

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

RAFAEL ZAKI,	)	<u>Garifalia (Lia) Milousis</u>
	)	<u>Geoffrey Trotter</u>
applicant,	)	for the applicant
- and -	)	
	)	
UNIVERSITY OF MANITOBA,	)	<u>Jeff Hirsch, K.C.</u>
respondent.	)	<u>Miranda Grayson</u>
	)	for the respondent
	)	
	)	<u>Judgment Delivered:</u>
	)	August 26, 2026

GRAMMOND J.

INTRODUCTION

[1] The applicant Rafael Zaki seeks the judicial review of a decision of the University Discipline Committee (the "UDC") of the respondent University of Manitoba (the "University"). Pursuant to the UDC's decision issued on May 12, 2022 (the "2022 Decision"), Mr. Zaki was expelled from the Undergraduate Medical Education ("UGME") program at the Max Rady College of Medicine at the University (the "College of Medicine" or the "College") because of three Facebook postings (the "Postings") that he made in February 2019. Two of the Postings pertained to Mr. Zaki's support of the right to carry firearms, and the third posting included an essay that he wrote about

abortion (the "Essay"). Mr. Zaki removed the firearms related postings from Facebook after a few days and removed the Essay after approximately 18 hours.

BACKGROUND

[2] The 2022 Decision is the second UDC decision to impact Mr. Zaki's academic career with the University. A previous UDC decision issued on July 24, 2020 (the "2020 Decision") to expel Mr. Zaki from the College of Medicine was quashed by Champagne J. of this court on a judicial review application, with reasons found at ***Zaki v. University of Manitoba***, 2021 MBQB 178 (the "Champagne Decision").

[3] Pursuant to the Champagne Decision, this matter was remitted back to the UDC for reconsideration, as a result of which a second disciplinary hearing was held before the UDC on April 8, 2022 (the "Hearing"). The Hearing proceeded as a trial *de novo*, and at which both Mr. Zaki and the University were represented by counsel, resulting in the 2022 Decision now under review. The application before me is limited, therefore, to a review of the 2022 Decision, and not a review of any of the earlier steps in the long procedural history of this matter.

[4] Nevertheless, a voluminous record, of over 4,800 pages, was filed in support of the application, in addition to written briefs, books of authorities, and multiple affidavits. In addition, almost two days of oral submissions were presented. Although I have considered all of these materials very carefully, I have referenced in this decision only those particulars that I determined were germane to the issues before me.

[5] The general position taken by Mr. Zaki on this application is that the Postings reflected an expression of his religious beliefs as a Coptic Orthodox Christian, and that

the University expelled him because he refused to change his core religious beliefs about abortion, in particular. The University submitted that the Postings, and specifically the Essay, constituted a breach of Mr. Zaki's professional obligations as a medical student, such that his expulsion was justified.

[6] For greater context, the UDC found that the Postings were "disturbing, with extreme and violent content relating to women, rape, slavery, and the Holocaust" (Affidavit of Applicant, vol 1 at 68). In particular, the Essay, which is titled "Refuting the 'Final Solution' for Undocumented Infants: A Reconciliatory Formula", included the following statements and references:

- a) "Pre-born human children, today, are held as disposable and executable slaves to their mother's whims and subjective desires";
- b) "abortion is reliant solely on the perceived value of the individual being murdered";
- c) a woman's right to choose as a private right is flawed — for the same reasons that a slave owner or sex trafficker's right to privacy is flawed;
- d) "it does not make sense to make murder legal . . . No mother has the right to kill her own, or someone else's, offspring";
- e) Superman and alien life forms are relevant to the definition of "personhood";
- f) the bodily autonomy argument would be more accurately portrayed as a hypothetical situation involving conjoined twins and a physician removing one twin who cannot consent due to "severe mental retardation";
- g) a lack of consciousness does not justify cutting up a person into little pieces and sucking them into a vacuum;
- h) the bodily autonomy argument can also be illustrated as a story of a woman who states, "MY BODY, MY CHOICE" and throws her breastfeeding baby off of her, killing the child in self-defence;

- i) “[e]verything that the baby receives from their mother is through the mother’s blood, which makes the mother a blood donor, at best”;
- j) a mother does not own the nutrients or oxygen of her child, similar to how she does not own the dust from her skin or her fecal material. This is not the issue, nor is it the mother's cells or enzymes given her loss of blood due to menstruation;
- k) “the physician, or abortionist . . . should be charged for first-degree murder, and be banned from medical practice”;
- l) abortion violates three of the rights and freedoms under the ***Canadian Charter of Rights and Freedoms*** (the “***Charter*”**) and 10 of the 30 articles in the ***Universal Declaration of Human Rights***;
- m) “[m]andatory referrals [for abortion] constitute forced labor, which is a human rights violation”;
- n) abortion is equated to eugenics; and
- o) abortion is immoral and unethical.

[Affidavit of Applicant, vol 1 at 214-241]

[7] Mr. Zaki argued that the foregoing list represents the most awful and offensive contents of the Essay, “cherry-picked” and taken out of context, initially by the College’s counsel in a written submission, and later in the Champagne Decision and the 2022 Decision, to portray the Essay in the worst possible light. With respect, that assessment strains credulity beyond reason, because:

- a) many of these statements and references are quoted directly from the Essay;
- b) the statements and references that are not direct quotes represent fairly what is written in the Essay; and

- c) none of the statements or references were taken out of context such that the meaning of the original content was lost.

PRELIMINARY ISSUE

[8] At the outset of the hearing before me, counsel for the University raised as a preliminary issue the fact that Mr. Zaki's application brief contained references to two alleged breaches of procedural fairness that were not particularized in the notice of application for judicial review.¹

[9] After hearing submissions, I gave an oral decision reflecting that I would not hear the parties on issues that are not properly before the court. Having said that, I extended to Mr. Zaki the opportunity to seek to amend the application and adjourn the substantive hearing. He declined that offer and elected to proceed with the hearing of the application as written.

ISSUES

[10] On the basis of the materials before me, the issues to be decided on this application are:

- a) is any aspect of the Champagne Decision binding upon this court?;
- b) did the UDC have jurisdiction to make the 2022 Decision?;
- c) was the 2022 Decision made with a reasonable apprehension of bias?;
- d) was the 2022 Decision unreasonable because:

¹ The alleged breaches of procedural fairness related to whether Mr. Zaki should have been given copies of the complaints filed with respect to the Postings, and whether he was given adequate notice of the allegations against him and the remediation and/or disciplinary process that would be followed.

- a. the UDC ignored the factual and legal factors that constrained its authority;
 - b. the UDC erred by finding that Mr. Zaki was guilty of professional misconduct; or
 - c. the UDC failed to appropriately apply and interpret the ***Charter?***; and
- e) if the 2022 Decision should be quashed for any reason, what remedy should be afforded to Mr. Zaki?

IS ANY ASPECT OF THE CHAMPAGNE DECISION BINDING UPON THIS COURT?

[11] Pursuant to the Champagne Decision, the 2020 Decision to expel Mr. Zaki from the College of Medicine was quashed for two reasons:

- a) the 2020 Decision was unreasonable because the UDC failed to consider the reasonable apprehension of bias on the part of Dr. Ripstein, the Associate Dean of the UGME Program, who participated in the initial decision to expel Mr. Zaki; and
- b) the UDC failed to consider the ***Charter***, which was both incorrect and unreasonable.

[12] The parties raised as a preliminary issue the question of whether any other aspect of the Champagne Decision is binding upon this court. More specifically, counsel noted the following additional conclusions referenced in the Champagne Decision:

- a) the tone and content of the Postings were such that a finding of unprofessional conduct was reasonable;

- b) the receipt of 18 complaints gave rise to the reasonable conclusion that the Postings had an adverse effect on the proper functioning of the rights of members of the University community; and
- c) it was both reasonable and correct for the UDC to conclude that it had jurisdiction over this matter.

[13] Mr. Zaki argued that the conclusions listed in paragraph 12 above were *obiter dictum* and are irrelevant to my analysis on this application. He also submitted that the Champagne Decision related to the 2020 Decision, which was fundamentally different than the 2022 Decision that I must review.

[14] The University argued that Mr. Zaki has advanced on this application many of the same arguments that were considered and rejected in the Champagne Decision, and that as a matter of judicial comity, predictability, and finality, I should not depart from the findings set out in the Champagne Decision, and in particular the findings of correctness, which were not *obiter*.

Analysis

[15] I note, as the 2022 Decision states, that the parties argued before the UDC the question of whether the Hearing could be used to re-litigate matters determined in the Champagne Decision. Mr. Zaki requested that the UDC allow and consider all of the evidence submitted by the parties, and the UDC agreed to do so. In other words, the UDC agreed to conduct a hearing *de novo*, to reconsider all of the conclusions referenced in the Champagne Decision, and to make its own decisions on those issues. The UDC's decision to do so does not form part of the judicial review application before me. In addition, I note that in ***Canada (Minister of Citizenship and Immigration)***

v. Vavilov, 2019 SCC 65, the court stated that the focus of a reasonableness review on a judicial review application must be on the decision made by the decision maker (see paragraph 83).

[16] It is clear, therefore, that my role is to review the 2022 Decision within the scope of Mr. Zaki's application as filed, including the conclusions that the UDC reached on any issues also considered in the Champagne Decision. In that context, the conclusions reached in the Champagne Decision cannot be binding upon me, irrespective of the importance of judicial comity, predictability, and finality.

[17] I will add that the conclusions referenced at paragraphs 12(b) and 12(c) above were included in the portion of the Champagne Decision that related to the question of the UDC's jurisdiction, which was one of the issues squarely before Champagne J. for adjudication. As such, those conclusions were not *obiter*. Nevertheless, for the reasons set out above, the conclusions reflected in the Champagne Decision are not binding upon me.

Conclusion

[18] The Champagne Decision is not binding upon me.

STANDARD OF REVIEW

[19] Before considering the next substantive issue, I will comment upon the applicable standard of review on this application. The leading case is **Vavilov**, where the court "reinforced that reasonableness is the presumptive standard to be applied by a court reviewing the merits of an administrative law decision" (**Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board) et al**, 2020 MBCA 60 at

paragraph 24). The parties agree, as do I, that there is no reason to derogate from that presumption in this case, except as noted specifically below.

[20] I note the following additional principles as set out in ***Vavilov***:

- a) a reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It remains, however, a robust form of review;
- b) the reviewing court must consider an award in light of its underlying rationale. The focus is on the award and the justification for it, not on the conclusion that the court would have reached;
- c) jurisdictional questions are not a distinct category attracting a correctness review, and a reasonableness review is sufficiently robust and responsive to enable a reviewing court to ensure that an administrative body acted within the scope of its lawful authority;
- d) the focus of a reasonableness review must be on the decision actually made by a decision maker, including their reasoning process and the outcome, to determine whether the rationale for the decision and the decision itself were unreasonable. Generally, a court should not decide the issue or ascertain the range of possible conclusions open to the decision maker;
- e) once the decision maker's reasoning is understood, the court can assess whether the decision as a whole is reasonable and based upon an

internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. If it is, the reviewing court must defer to the decision;

- f) it is not enough for the outcome of a decision to be justifiable. The decision must also be justified by the administrative decision maker's reasons and process. An otherwise reasonable outcome cannot stand if it was reached on an improper basis;
- g) the reasons of the administrative decision maker must not be assessed against a standard of perfection, and cannot be divorced from the institutional context or the history of the proceedings;
- h) to determine whether the decision is reasonable, the reviewing court must ask whether it bears the hallmarks of reasonableness: justification, transparency and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear upon the decision;
- i) the burden is on the party challenging the decision, in this case Mr. Zaki, to show that it is unreasonable; and
- j) absent exceptional circumstances, a reviewing court will not interfere with the factual findings of an administrative decision maker. In other words, a reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (at paragraph 125, quoting ***Canada (Canadian Human Rights Commission) v. Canada (Attorney General)***, 2018 SCC 31 at paragraph 55).

[21] In summary, I must consider, therefore, whether the 2022 Decision bears the hallmarks of reasonableness and whether it is justified in relation to the constraints that bear upon it.

DID THE UDC HAVE JURISDICTION TO MAKE THE 2022 DECISION?

[22] The first issue that I will consider is whether the UDC had jurisdiction to make the 2022 Decision.

[23] Mr. Zaki argued that the University acted outside of its jurisdiction in taking disciplinary action against him because the Postings were made on his personal profile on a public social media platform. As such, the UDC's finding of unprofessional conduct and the decision to expel him fell outside of the applicable Student Discipline Bylaw (the "Bylaw") and the Student Non-Academic Misconduct and Concerning Behaviour Procedure (the "NAM Procedure").

[24] The University argued that the UDC had jurisdiction over this matter because, as it concluded, the Postings constituted a "University Matter", as defined in the NAM Procedure.

Analysis

[25] The NAM Procedure provides that it applies to a student's non-academic conduct in relation to any "University Matter", which is defined as:

[2.3] . . . any activity, . . . or undertaking in which a member of the University Community participates which has a substantial connection to the University, such as:

. . .

(b) Activities . . . involving members of the University Community, where the actions of those members of the University Community may reasonably reflect upon or affect the University, including but not limited to:

. . .

(iii) Writings . . . and/or electronic communications, including communications through social media, where matters regarding the University or members of the University Community are a significant focus of the communication; [or]

. . .

(v) Matters of off-campus conduct that have, or might be reasonably be seen to have an adverse effect on the proper functioning of the University or the rights of a member of the University Community to use and enjoy the University's learning and working environments.

[26] The 2022 Decision reflects that the UDC considered Mr. Zaki's submission that the Postings were directed to those in his Sunday school class rather than his UGME Program. The UDC noted that the Postings included the following comments made by Mr. Zaki relative to the Essay:

- a) "Have I just become a PR nightmare?";
- b) "This is just one small piece of that which cannot be better described using any description other than: 'Rafael contra mundum'²"; and
- c) "Enjoy!" (Affidavit of Applicant, vol 9 at 3486).

[27] The UDC concluded that Mr. Zaki's reference to a "PR nightmare" included the College of Medicine and the University, and that the Essay was directed to other members of the UGME Program. The UDC rejected Mr. Zaki's submission that the Postings were directed to individuals in his Sunday school and determined that the Postings were a "University Matter".

[28] I will comment first upon Mr. Zaki's submission that the UDC did not articulate either the details of the "substantial connection" between the Postings and the University, or the "significant focus" of the Postings being the University or the

² In English, this phrase means Rafael "against the world" or "in defiance of all general opinion" (Affidavit of Applicant, vol 8 at 2849).

University Community, as referenced in the NAM Procedure. As set out in **Vavilov**, the UDC was not required to produce perfect reasons for decision, and I accept that its reasons on this point were imperfect, in part because the UDC's analysis and conclusions are contained within one paragraph of the 2022 Decision. In other words, the explanation of the UDC's analysis is lean.

[29] Having said that, the law is also clear that the UDC's reasons cannot be divorced from the institutional context or the history of the proceedings, and the obvious reality in this case is that the Essay sets out Mr. Zaki's views on a medical procedure (abortion), and that he was at the material time a medical student, enrolled in the College of Medicine at the University. Those facts constitute both a simple and a substantial connection between the Postings and the University. Similarly, abortion was the sole and significant focus of the Essay and given Mr. Zaki's status as a medical student, its publication on a public social media platform that garnered multiple complaints was clearly a matter "regarding the University" that could have had "an adverse effect" on the functioning of the University or the rights of its members.

[30] The fact that the UDC did not make these obvious statements in the 2022 Decision does not detract from either the accuracy of the statements or the reasonableness of its decision that this was a University matter. Had the subject matter of the Essay related to something other than Mr. Zaki's views on a medical procedure, or had Mr. Zaki been enrolled in a different discipline, the conclusions may have been different. In that vein, Mr. Zaki's firearms-related posts did not attract much discussion in the 2022 Decision, or on this application, because the Essay is clearly the root of the

issue in this case, and in my view that is so given the nature of its contents and the clear connection to Mr. Zaki's education.

[31] I have also considered Mr. Zaki's query whether he had become a "PR nightmare", and the UDC's conclusion that this comment included the College of Medicine and the University. As Mr. Zaki noted in argument, he included a follow-up question in his comments that read "Ha! Who ever said I wasn't already a PR nightmare?" (Affidavit of Applicant, vol 9 at 3486). In my view, whether these comments are taken together or considered separately, the UDC's conclusion that the College of Medicine and the University were included in the comments was reasonable. Mr. Zaki was a medical student commenting publicly on a medical procedure, in a manner that he knew was controversial, as evidenced by his comments regarding a "PR nightmare" and his description of the Essay: "Rafael contra mundum".

[32] The UDC's conclusion that the Postings were a University matter as defined in the NAM Procedure was reasonable, transparent, intelligible, and justified in relation to the constraints that bore upon it.

Conclusion

[33] The UDC had the jurisdiction to make the 2022 Decision, and it was not *ultra vires*.

WAS THE 2022 DECISION MADE WITH A REASONABLE APPREHENSION OF BIAS?

[34] Mr. Zaki submitted that a reasonable apprehension of bias arose at the Hearing on three bases.

[35] First, Mr. Zaki argued that the UDC was influenced by past proceedings, including the 2020 Decision and the Champagne Decision.

[36] Second, Mr. Zaki noted that the Chair of the UDC panel (the “Chair”) was at the material time a professor in the College of Pharmacy, who reported to the Dean of the Faculty of Health Sciences (the “Dean”) through another individual. The Dean was one of the decision-makers in Mr. Zaki’s expulsion from the College of Medicine and testified at the Hearing, such that the Chair should have recused herself.

[37] Third, Mr. Zaki submitted that the involvement of the University’s counsel at the Hearing, Thompson Dorftman Sweatman LLP (“TDS”), gave rise to a reasonable apprehension of bias.

The Law

[38] It is important to note that administrative tribunals are presumed to be impartial, and that the burden of proof is on Mr. Zaki, as the party alleging an apprehended breach of the duty of impartiality, to establish it on a balance of probabilities. Having said that, the threshold for a finding of apprehended bias is high.³

[39] The leading case on the applicable test relative to allegations of bias is

Committee for Justice and Liberty v. Canada (National Energy Board), [1978]

1 S.C.R. 369 at 394, where the court stated:

[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.”

³ These principles are found in, *inter alia*, ***Metis Child, Family & Community Services v. A.J.M. et al.***, 2008 MBCA 30 at paragraph 57; ***Ritchot v. The Law Society of Manitoba***, 2010 MBCA 13 at paragraphs 37 and 38; and ***Oleynik v. Canada (Attorney General)***, 2020 FCA 5 at paragraph 57.

[40] This test has been restated in many subsequent authorities, including ***Ritchot*** at paragraph 35, and ***Oleynik*** at paragraphs 46 and 56.⁴

[41] In ***R. v. R.D.S.***, [1997] 3 S.C.R. 484, the court noted that the reasonable and informed person referenced in the test must have knowledge of all of the relevant circumstances, including the social reality that forms the background to a particular case. Having said that, in ***Oleynik*** the court stated that the test cannot be related to the “very sensitive or scrupulous conscience”, such that the threshold is high (at paragraph 57, citing ***Committee for Justice and Liberty*** at 395).

[42] In ***Braemar Bakery Ltd. v. Manitoba (Liquor Control Commission)***, [1999] M.J. No. 523 (MBCA), the court stated that evidence of a lack of actual bias is irrelevant to whether there is a reasonable apprehension of bias (see paragraph 13).

[43] In ***Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)***, 2015 SCC 25, the court stated that the “objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process” (at paragraph 22, emphasis in original).

Analysis

Influence of Past Proceedings

[44] Mr. Zaki noted that pursuant to the Champagne Decision, the 2020 Decision was quashed in part because the UDC did not consider the reasonable apprehension of bias of Dr. Ripstein. In other words, the 2020 Decision was tainted and the UDC was precluded from deferring to any of the conclusions reached in that decision or in the

⁴ I will add that although Mr. Zaki made reference to institutional bias in this matter, he presented no evidence relative to the “substantial number of cases” as required in ***Douglas v. Canada (Attorney General)***, 2014 FC 299 at paragraph 153. As such, I have not considered those submissions further.

Champagne Decision (except those listed in paragraph 12 above). Rather, the UDC was required to act as a first-instance tribunal and draw its own conclusions based upon only the evidence before it, after conducting the **Charter** review as required by the Champagne Decision.

[45] Mr. Zaki noted that in the 2022 Decision the UDC referenced and agreed with the following conclusions set out in the Champagne Decision:

- a) that in the 2020 Decision the UDC reasonably concluded that there was sufficient evidence to support a finding of unprofessional conduct, because the Postings were misogynistic and had a negative impact on the learning and work environment; and
- b) that in the 2020 Decision the UDC reasonably concluded that the Postings had an adverse effect on the proper functioning of the rights of members of the University community to use and enjoy the University's learning and working environment, because 18 complaints were filed.

[46] The University submitted that these arguments are without merit, because the UDC acknowledged that the Hearing was to proceed on a *de novo* basis, and it in fact proceeded in that manner.

[47] I note, as referenced above, that the UDC decided to admit new evidence at the Hearing, and that it refused to limit the scope of the Hearing to the two errors identified in the Champagne Decision. More specifically, at paragraph 121 of the 2022 Decision, the UDC acknowledged that the Hearing was a *de novo* appeal, and that its responsibility was to consider the evidence afresh and conduct an independent

assessment of the issues. The UDC also stated that it was not bound by the decisions of the lower bodies and that it could hear additional evidence.

[48] I have reviewed the analysis and conclusions reflected in the 2022 Decision, and I have determined that the UDC addressed the issues, explored the evidence presented, and came to its own conclusions on the issues. Examples of this approach are found, *inter alia*, at paragraphs 157, 158, 159, 160, 161, and 164 of the 2022 Decision.

[49] The UDC's references to conclusions reflected in the Champagne Decision about which Mr. Zaki complained are found in paragraphs 165 and 166 of the 2022 Decision, and in my view the UDC stated its agreement with those conclusions, as opposed to its own determinations having been influenced by those conclusions. In other words, the UDC conducted its own analysis first, and then noted its agreement with the Champagne Decision, but it did not point to the conclusions reached in the Champagne Decision and adopt them as its own.

[50] I have concluded, therefore, that the references to the Champagne Decision in the 2022 Decision do not support the presence of a reasonable apprehension of bias.

The Chair

[51] The parties agree that at the material time, the Chair was a member of the College of Pharmacy and was not a part of the College of Medicine. Having said that, both Colleges formed part of the Faculty of Health Sciences, of which the Dean had oversight, and the Chair reported to another individual who, in turn, reported to the Dean.

[52] Mr. Zaki argued that accordingly, the Dean was the Chair's "boss's boss", and that this relationship gave rise to a reasonable apprehension of bias by the Chair,

particularly given that the Dean testified at the Hearing (Argument Brief of the Applicant at paragraph 162). Mr. Zaki filed affidavit evidence setting out the reporting structure and working relationship of the Chair and the Dean. In addition, Mr. Zaki submitted that little weight should be afforded to the affidavit of University Secretary Jeff Leclerc (the "Leclerc Affidavit"), filed by the University, wherein the relationship between the Chair and the Dean is described.

[53] Mr. Zaki pointed to ***Ringrose v. College of Physicians & Surgeons (Alberta)***, [1977] 1 S.C.R. 814, where the court stated that:

[25] . . . In some fact situations one might reasonably apprehend bias when a member considers an issue previously considered by another body with which he was associated, whether through participation in the earlier decision or through involvement with colleagues who actually made the first decision. What may be termed institutional bias or participation by association should not, in my opinion, be rejected out of hand as a possible ground for apprehension of bias.

[26] All of the surrounding circumstances must be investigated.

[54] Mr. Zaki submitted that there is no evidence of any investigation in this case, and although there were 19 members of the UDC at the material time, there is no evidence of whether it was possible to avoid the inclusion of the Chair on the panel at the Hearing, given the involvement of the Dean as a witness.

[55] In addition, Mr. Zaki noted that at the Hearing, although he was unaware of the working relationship between the Chair and the Dean, he advanced a challenge for cause of the UDC on the basis of bias. After the UDC had retired to consider the challenge, the Chair stated at the Hearing: "I am of the College of Pharmacy. However, it was decided that there is no conflict of interest as I do report through the College of

Pharmacy, have my own dean, and is [*sic*] separate from the . . . College of Medicine” (Affidavit #2 of the Applicant at paragraph 7).

[56] Mr. Zaki argued that the UDC failed to follow the process at s. 2.67 of the Student Discipline Appeal Procedure (the “Appeal Procedure”), which provides that the validity of a challenge is to be judged by the remainder of the UDC hearing panel. Here, the Chair appeared to take part in judging the challenge.

[57] The University submitted that the UDC considered Mr. Zaki’s challenge, with each member of the UDC confirming that they had no reason to recuse themselves from the Hearing. The University also submitted that the existence of a working relationship between a supervisor and a subordinate is insufficient, without further evidence, to ground a finding of reasonable apprehension of bias, and in this case no further evidence has been presented. Rather, the Leclerc Affidavit reflects how the structural relationships of the University operate in practice, of which the reasonable and informed person would be aware.

[58] I will comment first upon the challenge for cause advanced by Mr. Zaki at the outset of the Hearing. As I stated in a previous decision in this matter, ***Zaki v. University of Manitoba***, 2024 MBKB 81, I accept that at the Hearing, neither Mr. Zaki nor his counsel were aware of the reporting relationship between the Chair and the Dean. Having said that, the necessary information was available publicly and Mr. Zaki could have found it had the appropriate steps been taken, because he was provided with the name of the Chair on August 27, 2021, well before the Hearing.

[59] I note, with respect to the process at s. 2.67 of the Appeal Procedure, that Mr. Zaki advanced an omnibus challenge for cause and did not articulate any specifics with respect to the working relationship between the Chair and the Dean specifically. In the absence of those particulars, the Chair had no reason to recuse herself from judging the challenge. I note also that in response to the challenge, the Chair stated that she reported through the College of Pharmacy, as set out at paragraph 55 above, which was an accurate statement.

[60] I will comment next upon the working relationship between the Chair and the Dean. The Leclerc Affidavit sets out that at the material time, the Chair's direct supervisor was the Dean of the College of Pharmacy, who exercised general supervision and direction over that College, including powers relating to appointment, promotion, tenure, and discipline. The affiant opined that there is no realistic risk that a faculty dean in an appeal could exert influence over the career of a college faculty member who reports to their own college dean. The affiant stated that in this case there was no direct reporting relationship between the Chair and the Dean, and that the Dean would not have had any meaningful influence over the Chair or her career, particularly given that she was granted tenure in 1997 and promoted to the position of Professor, which is the highest-ranking classification, in 2004, long before the Hearing. I note that Mr. Zaki did not cross-examine on the Leclerc Affidavit and did not file any responding evidence.

[61] It is clear that the UDC was presumed to be impartial and had to decide this matter fairly, and despite Mr. Zaki's submissions that the presumption of impartiality is lower for administrative decision-makers than it is for judges, there is no authority

before me that stands for that proposition. In addition, the parties agreed, and I accept, that Mr. Zaki was owed a relatively high degree of procedural fairness at the Hearing, particularly given the potentially significant impact of the 2022 Decision upon him.

[62] I accept that the bar to overcoming the presumption of impartiality is high and must be based upon evidence assessed through the reasonable and informed person test. Mr. Zaki, who bore the onus, led evidence of the working relationship between the Chair and the Dean, but in my view there is no evidence before me that would cause a reasonable person to think that the Chair or the UDC could not decide the issues before them fairly.

[63] In each of the following cases, there was insufficient evidence of a reasonable apprehension of bias, and no such apprehension was found:

- a) ***Moharib v. Misericordia General Hospital***, [1996] M.J. No. 47 (MBCA), where the court noted that evidence was required to support the allegation that a panel member who was professionally trained by one of the witnesses could not act independently of his former teacher;
- b) ***Oleynik***;
- c) ***Shaw Estate v. Canada (Attorney General)***, 2021 FC 576; and
- d) ***Burlacu v. Canada (Attorney General)***, 2021 FC 339 (upheld on appeal in ***Burlacu v. Canada (Attorney General)***, 2022 FCA 197), where the court stated:

[69] . . . Without more, the mere fact that all employees in the Labour Relations and Compensation Branch, which includes the

National Integrity Centre of Expertise, are subordinates of the Director is incapable of reasonably supporting any concern about a lack of impartiality (whether actual or apprehended) on the part of those employees: see **Oleynik** at paras 67-68.

[64] In other words, something more than a working relationship, even between a supervisor and subordinate, must be established to ground a reasonable apprehension of bias. In this case, the UDC was presumed to be impartial as a quasi-judicial tribunal, and that presumption has not been rebutted. I have concluded that the existence of a reporting relationship between the Chair and the Dean is not enough to establish the high bar for a finding of a reasonable apprehension of bias. Moreover, the evidence before me reflects that the Dean did not have any meaningful influence over the Chair or her career.

[65] I will add that the UDC was not required to be constituted of individuals who were strangers to every witness. In **Fong v. Winnipeg Regional Health Authority**, 2006 MBQB 8, Greenberg J. stated at paragraph 35 that:

The impact of the relationship of the decision-maker to others involved in the proceedings before him or her, as with all issues affecting natural justice, must be considered in light of the context of the proceedings and the institutional constraints of the tribunal. In the context of the hospital community in Winnipeg, it would be difficult, if not impossible, for the WRHA to establish a hearing and appeal process regarding complaints against physicians where the various players, whether they are the investigators, prosecutors or decision-makers, do not know each other.

[66] In this case, the Leclerc Affidavit provides, and I accept, that it is not uncommon for members of a particular college to be appointed to hear a student discipline appeal arising from a different college within the same faculty.

[67] On the basis of the foregoing, I have concluded that the relationship between the Chair and the Dean would not give rise to an apprehension of bias by a reasonable person.

TDS

[68] Mr. Zaki argued that a reasonable apprehension of bias arose because of the following involvement of TDS, which may have influenced the UDC to find in favour of the University and against Mr. Zaki:

- a) TDS acted as counsel for the University on the earlier judicial review application that gave rise to the Champagne Decision;
- b) TDS subsequently acted as counsel to the College of Medicine until a few days before the Hearing, at which time the University's in-house counsel took over and appeared as the College's counsel at the Hearing; and
- c) TDS (specifically Mr. Hirsch K.C. and Ms. Grayson) sought and was granted permission by the UDC to attend the Hearing (which was conducted virtually), although the Hearing was a closed proceeding.

[69] The University submitted that at the material time the UDC had its own, independent counsel from another firm, and that at the Hearing the College of Medicine was represented by in-house counsel because that is the approach contemplated by s. 2.75 of the Appeal Procedure, to which Mr. Zaki raised no objection at the time. The University also submitted that there is no evidence or legal authority that TDS's involvement gave rise to a reasonable apprehension of bias.

[70] Having considered the evidence carefully, I have concluded that there is no basis before me upon which a finding of a reasonable apprehension of bias could arise relative to the three issues raised by Mr. Zaki involving TDS, and that the issues raised at paragraphs 68(a) and (b) above require no further comment.

[71] With respect to the issue referenced at paragraph 68(c) above, I note that the UDC stated in the 2022 Decision that counsel requested permission to attend the Hearing, that the Chair approved the request, noting that although they could be observers, neither would have standing to speak, and that they made no representations.

[72] I appreciate that pursuant to s. 2.71 of the Appeal Procedure, the Hearing must be closed unless the student requests otherwise, which did not occur in this case, and that the UDC granted permission for TDS to attend. Having said that, in my view, the attendance of the two TDS lawyers at the Hearing did not change its status from a closed hearing to an open hearing. It is reasonable, in the context of TDS's work on this file both before and after the Hearing, that counsel would want to attend the Hearing for observation purposes only, which is what occurred.

[73] In conclusion, the involvement of TDS in this matter does not give rise to a reasonable apprehension of bias.

Conclusion

[74] Having considered all of the allegations of a reasonable apprehension of bias both individually and collectively, I have concluded that the evidence does not support a finding of a reasonable apprehension of bias by the UDC.

WAS THE 2022 DECISION UNREASONABLE?

[75] As referenced above, I must consider whether the 2022 Decision was reasonable, including whether it was transparent, intelligible, and justified.

[76] Mr. Zaki argued that the Decision was unreasonable because the UDC:

- a) ignored the factual and legal factors that constrained its authority;
- b) found that Mr. Zaki was guilty of unprofessional conduct; and
- c) failed to appropriately apply and interpret the ***Charter***.

[77] I have considered each of those issues below, in the context of the applicable standard of review.

Factual and Legal Factors that Constrained the UDC's Authority

[78] Mr. Zaki submitted that the UDC made the following errors in the 2022 Decision, which were further evidence of its bias against him:

- a) it excluded as evidence:
 - (1) the social media posts of other University students; and
 - (2) a letter from Ms. Andrea Kim to the University; and
- b) it disregarded:
 - (1) the only evidence before it about Mr. Zaki's continued behaviour during the 2021-22 academic year; and
 - (2) Mr. Zaki's re-registration with The College of Physicians & Surgeons of Manitoba (the "CPSM").

[79] I will comment first upon the two pieces of evidence that Mr. Zaki argued were excluded by the UDC. The 2022 Decision reflects that the UDC "decided to allow all

evidence submitted and not restrict the scope, both of which would be considered during final deliberations” (Affidavit of Applicant, vol 1 at 61, paragraph 124). The UDC did not, therefore, exclude from the evidentiary record the pieces of evidence referenced at paragraph 78(a) above.

[80] Having said that, the 2022 Decision states that the UDC reviewed the social media posts referenced at paragraph 78(a)(1) above, concluded that the reliability and relevance of the posts were not established, that the evidentiary value of the posts was low, and that the posts would not be considered in its decision regarding liability or penalty.

[81] Similarly, the UDC reviewed the letter referenced at paragraph 78(a)(2) above, and determined that since the author did not make a submission to the UDC, the true nature of the letter was not established, such that no weight would be attributed to it.

[82] As referenced above, the law is clear that absent exceptional circumstances, I must not interfere with the factual findings of the UDC, and reweigh or reassess the evidence myself, because the UDC was in the best position to assess the evidence. No exceptional circumstances exist in this case, and I will not interfere with the UDC’s findings on these evidentiary issues for that reason alone. Certainly, the UDC was entitled to decide the weight and reliability of the evidence before it. I will add, however, that in my view the evidence appears to have had no probative value at the liability stage of the Hearing, and that the UDC’s decision not to attach weight to the evidence was justified, and does not establish a reasonable apprehension of bias.

[83] Mr. Zaki also submitted that the evidence referenced at paragraph 78(b) above, relative to his behaviour during the 2021-22 academic year and his re-registration with the CPSM were disregarded by the UDC, such that the 2022 Decision was unreasonable and reflected a reasonable apprehension of bias.

[84] I note that the UDC's comments on these factors were included in its analysis at the penalty stage of the 2022 Decision, and not at the liability stage. In my view, that approach was reasonable, because the UDC was tasked with determining whether the Postings constituted unprofessional conduct. As such, Mr. Zaki's conduct after the Postings was not relevant to the liability question before the UDC.

[85] In conclusion, the 2022 Decision was reasonable relative to the above-referenced factual and legal factors.

Finding of Unprofessional Conduct

[86] The reference to "unprofessional conduct" in the context of this case is found in the NAM Procedure, which defines "Non-Academic Misconduct" as:

[2.5] . . . any conduct that has, or might reasonably be seen to have, an adverse effect on the integrity or proper functioning of the University or the health, safety, rights or property of the University or members of the University Community, such as:

. . .

(c) Inappropriate or disruptive behavior, including but not limited to:

. . .

(v) Unprofessional conduct.

[87] Mr. Zaki argued that the UDC's finding that he engaged in unprofessional conduct was unreasonable because:

- a) the definition and finding of “unprofessional conduct” was subject to the ***Charter***,
- b) the UDC relied upon an unreasonable interpretation of his apologies; and
- c) the 2022 Decision contravened ***The Apology Act***, C.C.S.M. c. A98 (***“The Apology Act”***).

[88] The University argued that Mr. Zaki has not identified any errors that would render the UDC’s finding of unprofessional conduct unreasonable.

Charter Analysis

[89] I will consider Mr. Zaki’s submissions relative to the definition of “unprofessional conduct” below, in the context of the other submissions on the application of the ***Charter*** in this matter.

Mr. Zaki’s Apologies

[90] I will address first the issues regarding the apologies.

[91] Mr. Zaki presented detailed written and oral submissions in this proceeding with respect to the history of the facts in this matter, and in particular the manner in which the College conducted itself after it became aware of the Postings. More specifically, Mr. Zaki alleged that throughout the process, the “goalposts were moving”, such that it was impossible for him to satisfy the College and rectify the concerns that arose from the Postings.

[92] The record reflects that in 2019, prior to his expulsion, the College “assigned [Mr. Zaki] to write two letters”: an apology to his classmates and a letter to two members of the faculty of the College of Medicine, to be vetted by the College prior to release. He was advised that “this was a warning but continued behaviours of this kind”

may go on his record (Affidavit of Applicant, vol 1 at 308). Thereafter, Mr. Zaki wrote multiple drafts of the letters as discussions with the College continued.

[93] Mr. Zaki submitted that the College's approach with respect to the Postings escalated over time, such that he was expelled despite its ongoing claims that it sought to work with him to remediate this matter. Mr. Zaki argued that it was incumbent upon the College to detail what it believed was missing from the apology letters, which it failed to do. Mr. Zaki also contended that if his last apology letter was appropriate, as the UDC found it was, no further disciplinary action should have been taken against him.

[94] Mr. Zaki argued that although the UDC acknowledged that his apologies could not be relied upon as a legal admission, it relied upon the apologies and his refusal to admit to unprofessionalism as dispositive evidence that his apologies were not sincere and that he did not learn his lesson, leading to a finding that he engaged in unprofessional conduct.

[95] Mr. Zaki also argued that ultimately, the University wanted him to recant his core beliefs on abortion and guns, which cannot be justified in constitutional law. I will consider this argument below, in the context of the other issues that relate to the ***Charter***.

[96] The University argued that the UDC was not required to consider Mr. Zaki's apologies when assessing whether he engaged in unprofessional conduct, and that the UDC did not use Mr. Zaki's refusal to admit to unprofessional conduct as a basis for the finding that he engaged in unprofessional conduct. Rather, the UDC took into account

Mr. Zaki's refusal to admit wrongdoing as a factor at the penalty stage, and it did so in a reasonable manner.

[97] I have considered these submissions, and I note that at paragraph 149 of the 2022 Decision, the UDC accepted Mr. Zaki's position that his apologies, whether written or oral, would not be considered as voluntary admissions of unprofessional conduct. Thereafter, the only references to Mr. Zaki's apologies are found in the UDC's analysis of the penalty to be imposed upon him. In other words, the UDC made no reference to the apologies in its analysis of whether Mr. Zaki engaged in unprofessional conduct. I do not accept, therefore, that the UDC relied upon an unreasonable interpretation of the apologies relative to its findings at the liability stage of its analysis.

[98] I have also considered Mr. Zaki's refusal to admit to unprofessionalism at the Hearing, and I note that the UDC did not refer to that fact in its analysis of whether he engaged in unprofessional conduct. Rather, the main factors underlying its finding were the content and impact of the Postings.

The Apology Act

[99] ***The Apology Act*** provides:

Effect of apology on liability

2(1) An apology made by or on behalf of a person in connection with a matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with the matter; [and]

. . .

(c) must not be taken into account in determining fault or liability in connection with the matter.

[100] Mr. Zaki submitted that the 2022 Decision is contrary to ***The Apology Act*** because although the UDC found that his fifth apology was appropriate, it used his

ongoing failure to admit to unprofessional conduct as a basis for finding that he was insincere and had not gained the necessary ethical insight. In other words, the 2022 Decision is premised upon a “catch-22”, because Mr. Zaki should have been permitted to apologize for the Postings without admitting that his wrongdoing rose to the level of unprofessional conduct (Argument Brief of the Applicant at paragraphs 289-90).

[101] The University submitted that ***The Apology Act*** prohibits the use of apologies in some, but not all contexts, and that the UDC used Mr. Zaki’s apologies in a reasonable and available manner at the penalty stage of its analysis.

[102] As referenced above, ***The Apology Act*** provides clearly that an apology cannot be used as evidence of a person’s fault or liability in a given matter. As is also referenced above, the UDC did not use Mr. Zaki’s apologies as evidence to support its finding that he engaged in unprofessional conduct, and as such the 2022 Decision did not contravene ***The Apology Act***.

[103] I will add that ***The Apology Act*** does not prohibit the use of an apology in determining an appropriate penalty once liability has been established.

Failure to Apply and Appropriately Interpret the Charter

[104] The application of the ***Charter*** to the decision of the UDC is not at issue in this proceeding. Rather, Mr. Zaki argued that:

- a) the 2022 Decision was incorrect in the conclusion that s. 2(a) of the ***Charter*** (the right to freedom of religion) was not engaged in this matter;
- b) the 2022 Decision was unreasonable because the UDC applied ***Charter*** values rather than ***Charter*** rights; and

c) the 2022 Decision was unreasonable because it disproportionately limited Mr. Zaki's ***Charter*** rights more than necessary, to meet the University's statutory objectives, by:

- (1) finding him guilty of professional misconduct; and
- (2) expelling him, which was disproportionate and was not minimally impairing.

Freedom of Religion – s. 2(a) of the Charter

[105] The parties agree that the UDC's conclusion that Mr. Zaki's right to freedom of religion was not engaged is reviewable on a standard of correctness.⁵

[106] The UDC stated in the 2022 Decision that:

- a) the Postings were grounded in Mr. Zaki's religious beliefs;
- b) Mr. Zaki was not prevented from holding religious beliefs;
- c) Mr. Zaki's religious beliefs are not a barrier to practising medicine in accordance with the requirements for ethics and professionalism;
- d) accommodations are available pursuant to the University's Conscience-Based Exemptions Policy (the "Exemptions Policy");
- e) its finding of unprofessional conduct was not the result of Mr. Zaki's religious beliefs;

⁵ See ***York Region District School Board v. Elementary Teachers' Federation of Ontario***, 2024 SCC 22 at paragraphs 63 and 69.

- f) there was insufficient evidence to support the claim that Mr. Zaki's right to freedom of religion was engaged in the finding of unprofessional conduct; and
- g) since the manner in which Mr. Zaki expressed his beliefs, values, and views was under review, Mr. Zaki's **Charter** rights or values of freedom of expression were engaged at the Hearing.

[107] Mr. Zaki submitted that the UDC erred because:

- a) it failed to consider his right to publicly manifest, express, and live in accordance with his religious beliefs;
- b) his expressions in the Postings were grounded in his religious beliefs, such that engagement of s. 2(a) of the **Charter** follows logically from the engagement of s. 2(b); and
- c) the Champagne Decision provides that s. 2(a) is engaged in this matter.

[108] The University submitted that Mr. Zaki's right to freedom of expression was engaged, because the Postings represented the manner in which he chose to communicate his religious beliefs. The University noted that at the Hearing, the College conceded that freedom of religion may be engaged in this case, but the UDC rejected that position.

[109] I will comment first upon the Champagne Decision, and more specifically my conclusion that it does not reflect that s. 2(a) of the **Charter** is necessarily engaged in this matter. First, the court made the general statement that "[t]he importance of the **Charter** rights in this matter cannot be overstated and require a few words", followed

by commentary from *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, regarding the right to freedom of religion; and from *R. v. Kopyto*, [1987] O.J. No. 1052 (ONCA), regarding the right to freedom of expression. In other words, the Champagne Decision referred to case authority on the importance of freedom of religion in a matter where Mr. Zaki's religious beliefs are involved, and where Mr. Zaki's s. 2(a) rights could be engaged, but the court did not state that s. 2(a) was engaged.

[110] Second, the Champagne Decision does not reflect an analysis on the engagement of s. 2(a). Rather, it provides at paragraph 178 that the UDC will have "the difficult task of balancing any limitation on Mr. Zaki's *Charter* rights" in the context of an analysis pursuant to *Doré v. Barreau du Québec*, 2012 SCC 12, which is discussed further below. In other words, while Champagne J. found that the UDC must consider Mr. Zaki's *Charter* rights, he made no findings as to which specific rights were engaged or breached.

[111] I will comment next upon the UDC's conclusions on s. 2(a) of the *Charter*, together with Mr. Zaki's submissions regarding the scope of his s. 2(a) rights and the notion that the engagement of s. 2(a) of the *Charter* follows logically from the engagement of s. 2(b) of the *Charter*.

[112] In *Syndicat Northcrest v. Amselem*, 2004 SCC 47, the court stated:

[46] . . . our Court's past decisions and the basic principles underlying freedom of religion support the view that freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith . . .
...

[56] . . . at the first stage of a religious freedom analysis, an individual advancing an issue premised upon a freedom of religion claim must show the court that (1) he or she has a practice or belief, having a nexus with religion, which calls for a particular

line of conduct, either by being objectively or subjectively obligatory or customary, or by, in general, subjectively engendering a personal connection with the divine or with the subject or object of an individual's spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials; and (2) he or she is sincere in his or her belief. Only then will freedom of religion be triggered.

[57] Once an individual has shown that his or her religious freedom is triggered, as outlined above, a court must then ascertain whether there has been enough of an interference with the exercise of the [page584] implicated right so as to constitute an infringement of freedom of religion under the Quebec (or the Canadian) Charter.

[58] More particularly, as Wilson J. stated in *Jones, supra*, writing in dissent, at pp. 313-14:

Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion. [Emphasis added.]

Section 2(a) of the Canadian *Charter* prohibits only burdens or impositions on religious practice that are non-trivial.

[113] In addition, as noted in *Big M Drug Mart* at paragraph 94, the right to freedom of religion includes the ability to declare one's religious beliefs openly, without fear of reprisal, and the right to manifest one's religious beliefs by dissemination.

[114] In other words, the right to freedom of religion includes a right to express one's religious beliefs. In this case, it is clear that the Essay was a form of expression based upon Mr. Zaki's religious beliefs. Moreover, with respect to the two requirements referenced above in paragraph 56 of *Amselem*, there is no question that Mr. Zaki's pro-life beliefs are connected to his religious beliefs and that he is sincere in those beliefs. I am satisfied, therefore, that the *Amselem* requirements are met and that freedom of religion is triggered in this case, such that Mr. Zaki's s. 2(a) rights are engaged. As such, the UDC's finding that s. 2(a) was not engaged is incorrect, and the 2022 Decision must be quashed.

[115] That is not to say, however, that the disciplinary action undertaken as against Mr. Zaki arose because of his religious beliefs *per se*. Rather, the complaints were filed and the ensuing process was triggered because of the Postings, and the contents of the Essay in particular. In 2019 the College stated in written submissions that “pro-life opinion is legitimate” and that “misogynistic hate-based opinion” is not legitimate (Affidavit of Applicant, vol 9 at 3480). In other words, the College took issue with the Postings, not with Mr. Zaki’s underlying pro-life or other religious beliefs, and I reject Mr. Zaki’s argument that the University wanted him to recant his core beliefs or disciplined him for failing to do so.

The Doré Analysis and Charter Rights versus Charter Values

[116] If, however, I am wrong with respect to the engagement of s. 2(a) of the **Charter**, I have considered the reasonableness of the 2022 Decision relative to the **Doré** analysis and the UDC’s application of **Charter** rights or **Charter** values.

[117] As referenced above, pursuant to the Champagne Decision, the UDC was directed to conduct an analysis in accordance with the framework established in **Doré**, that balances **Charter** values and statutory objectives. More specifically, the court in **Doré** directed that an administrative decision-maker consider the statutory objectives that apply in a given situation and ask how the **Charter** value at issue will be best protected in view of the statutory objectives. This question is at the core of the proportionality exercise and requires the decision-maker to balance the severity of the interference of the **Charter** protection with the statutory objectives.

[118] In **Loyola High School v. Quebec (Attorney General)**, 2015 SCC 12, the court commented upon the **Doré** analysis as follows:

[37] On judicial review, the task of the reviewing court applying the **Doré** framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the **Charter** [page639] protections at stake and the relevant statutory mandate: **Doré**, at para. 57. Reasonableness review is a contextual inquiry: **Catalyst Paper Corp. v. North Cowichan (District)**, [2012] 1 S.C.R. 5, at para. 18. In the context of decisions that implicate the **Charter**, to be defensible, a decision must accord with the fundamental values protected by the **Charter**.

[38] The **Charter** enumerates a series of guarantees that can only be limited if the government can justify those limitations as proportionate. As a result, in order to ensure that decisions accord with the fundamental values of the **Charter** in contexts where **Charter** rights are engaged, reasonableness requires proportionality: **Doré**, at para. 57. As Aharon Barak noted, "Reasonableness in [a strong] sense strikes a proper balance among the relevant considerations, and it does not differ substantively from proportionality": "Proportionality (2)", in **The Oxford Handbook of Comparative Constitutional Law** (2012), Michel Rosenfeld and András Sajó, eds., 738, at p. 743.

[39] The preliminary issue is whether the decision engages the **Charter** by limiting its protections. If such a limitation has occurred, then "the question becomes whether, in assessing the impact of the relevant **Charter** protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the **Charter** protections at play": **Doré**, at para. 57. A proportionate balancing is one that gives effect, as fully as possible to the **Charter** protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review: **Doré**, at paras. 43-45.

[40] A **Doré** proportionality analysis finds analytical harmony with the final stages of the **Oakes** framework used to assess the reasonableness of a [page640] limit on a **Charter** right under s. 1: minimal impairment and balancing. Both **R. v. Oakes**, [1986] 1 S.C.R. 103, and **Doré** require that **Charter** protections are affected as little as reasonably possible in light of the state's particular objectives: see **RJR-MacDonald Inc. v. Canada (Attorney General)**, [1995] 3 S.C.R. 199, at para. 160. . .

[41] The **Doré** analysis is also a highly contextual exercise. As under the minimal impairment stage of the **Oakes** analysis, under **Doré** there may be more than one proportionate outcome that protects **Charter** values as fully as possible in light of the applicable statutory objectives and mandate: **RJR-MacDonald**, at para. 160.

[42] **Doré's** approach to reviewing administrative decisions that implicate the **Charter**, including those of adjudicative tribunals, responds to the diverse set of statutory and procedural contexts in which administrative decision-makers operate, and respects the expertise that these decision-makers typically bring to the process of balancing the values and objectives at stake on the particular facts in their statutory decisions [citations omitted].

[119] More recently, in *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*,

2023 SCC 31, the court stated:

[68] . . . As is the case for any other decision, the context constrains "what will be reasonable for an administrative decision maker to decide" when it exercises its discretion in a manner that limits **Charter** protections (para. 89; *Loyola*, at para. 41; *Trinity Western University*, at para. 81). To be reasonable, a decision must reflect the fact that the decision maker considered the **Charter** values that were relevant to the exercise of its discretion (E. Fox-Decent and A. Pless, "The Charter and Administrative Law: Substantive Review", in C. M. Flood and P. Daly, eds., *Administrative Law in Context* (4th ed. 2022), 399, at p. 410). The decision must also show that the decision maker "meaningfully" (*Vavilov*, at para. 128) addressed the **Charter** protections to "reflect" the impact that its decision may have on the concerned group or individual (para. 133).

[69] This means that when the decision maker gives precedence to the legislature's intention over **Charter** protections in order to achieve the statutory objectives, it must do so in a manner that is "proportionate to the resulting limitation on the **Charter** right" (*Trinity Western University*, at para. 82). A decision that has a "disproportionate impact" on **Charter** protections can in no way show that the decision maker meaningfully considered these protections or that its reasoning reflects the significant impact that the decision may have (para. 80). Such a decision is therefore unreasonable.

[70] In the context of discretionary decisions that engage **Charter** protections, the standard of reasonableness must allow for a "*robust* ... analysis" (*Loyola*, at para. 3 (emphasis in original)) that works the same "justificatory muscles" as the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (*Doré*, at para. 5; *Loyola*, at para. 40; *Trinity Western University*, at paras. 79-82). The approach must take into account the role of the courts as guardians of the Constitution and must reflect the particular importance of justification in decisions that engage **Charter** protections (*Vavilov*, at para. 133). When a decision engages **Charter** values, "reasonableness and proportionality become synonymous" (*Trinity Western University*, at para. 80).

[71] As a general rule, a reviewing court must not, in assessing the reasonableness of a decision, reweigh the factors underlying the decision or conduct a *de novo* analysis of the issues raised. If the decision maker took into account all the considerations that were relevant in the context, the reviewing court must uphold its decision [citations omitted].

. . .

[75] **Charter** values are those that "underpin each right and give it meaning" (*Loyola*, at para. 36). **Charter** values are inseparable from **Charter** rights, which "reflect" them (para. 4). The choice made by the framers to entrench certain rights in the text of the supreme law of Canada means that the purpose of these rights is important for Canadian society as a whole and must be reflected in the decision-making process of the various branches of government.

[120] In this case, the University's educational powers are set out in ***The University of Manitoba Act***, C.C.S.M. c. U60, (the "***Act***"), and in particular s. 3 which provides a general authority to, *inter alia*, promote and carry on the work of a university in all its branches. Section 16(1)(d) of the ***Act*** empowers the University's board to exercise disciplinary jurisdiction over the students of the University, with the power to fine, suspend, or expel. In other words, the Legislature has granted jurisdiction to the University to handle student discipline matters and the power to expel students, and the University has established various policies that govern those proceedings, including the Bylaw; the NAM Procedure; and the Essential Skills and Abilities (Technical Standards) for Admission, Promotion and Graduation in Medicine (the "Technical Standards").

[121] The parties agree, and I accept, that in this case there are two applicable statutory objectives: the provision of a safe and respectful learning environment; and ensuring that program graduates satisfy the *bona fide* academic requirements of a program.

[122] Mr. Zaki contended that, pursuant to the Champagne Decision, the UDC was required to conduct a full ***Doré*** analysis in the context of its determination of whether he engaged in unprofessional conduct, and that the 2022 Decision contains no such analysis.

[123] The University submitted that the UDC followed the instructions set out in the Champagne Decision in terms of what it was directed to consider. More specifically, the Champagne Decision reflected that the previous finding of unprofessional conduct was

a reasonable conclusion given the tone and content of the Postings, such that the UDC was directed to conduct the ***Doré*** analysis at only the penalty stage of the Hearing.

[124] I note that both parties filed written submissions with the UDC after the Champagne Decision was released and before the Hearing. Mr. Zaki submitted that the UDC should conduct in the ***Doré*** analysis relative to whether Mr. Zaki engaged in unprofessional conduct, and if so, what penalty should be imposed upon him. The College submitted that there should be little dispute about whether the Postings constituted unprofessional conduct given the “conclusion” in the Champagne Decision that this finding was reasonable, the content of the Postings, and the definition of “unprofessional conduct”. The College contended that the ***Doré*** analysis was relevant to the issue of what penalty should be imposed upon Mr. Zaki.

[125] I have reviewed the Champagne Decision, and I note that the decision of the previous UDC panel was quashed for the two reasons set out at paragraph 11 above, both of which appear to have applied to the 2020 Decision as a whole. In other words, the Champagne Decision does not contain language that restricts the scope of the ***Doré*** analysis such that the UDC was required to conduct that analysis at only the penalty stage of its analysis.

[126] I appreciate that the Champagne Decision states that, given the tone and content of the Postings, the UDC’s finding of unprofessional conduct was reasonable, as referenced at paragraph 12(a) above. Having said that, the Champagne Decision contains no analysis with respect to that statement, and it reflects specifically that the new UDC must conduct the ***Doré*** analysis and “examine the Postings” through a ***Charter*** lens (emphasis added). It is clear to me, therefore, that pursuant to the

Champagne Decision, the UDC was directed to include in its **Doré** analysis the question of whether Mr. Zaki engaged in unprofessional conduct and, if so, what penalty should be imposed upon him.

[127] Nevertheless, in the 2022 Decision, the UDC conducted the **Doré** analysis in the context of whether Mr. Zaki's s. 2(a) and/or s. 2(b) rights were engaged on the appeal, and with respect to the penalty to be imposed upon him. The UDC did not, however, comment upon the **Doré** analysis in the context of its analysis of whether Mr. Zaki engaged in unprofessional conduct, and the 2022 Decision does not reflect the reasons why it did not do so.

[128] As I have stated, the UDC must not be held to a standard of perfection, but I have concluded that it was directed to consider the **Doré** analysis in the context of whether Mr. Zaki engaged in unprofessional conduct, and that it did not conduct that analysis. In other words, the UDC's analysis was constrained by the direction to conduct a **Doré** analysis, and without doing so the UDC's finding that Mr. Zaki engaged in unprofessional conduct cannot be justified in relation to that constraint. In other words, the process undertaken by the UDC was not justified and its finding that Mr. Zaki engaged in unprofessional conduct was reached on an improper basis. As a result, that finding is unreasonable and the 2022 Decision must be quashed.

[129] I have also considered Mr. Zaki's extensive submissions on the reasonableness of the 2022 Decision in the context of the UDC's consideration of **Charter** rights versus **Charter** values. Given that the UDC did not conduct the **Doré** analysis in the context of whether Mr. Zaki engaged in unprofessional conduct, that question is moot. Having said that, the law is clear that the **Doré** analysis should involve a consideration of

Charter values, and that **Charter** values are inseparable from **Charter** rights as referenced above.⁶

[130] I will add that on January 1, 2022 (approximately five months after the Champagne Decision was issued), the Manitoba Legislature enacted **The Administrative Tribunal Jurisdiction Act**, C.C.S.M. c. A1.9 (the "**ATJA**"), which provides that an administrative tribunal does not have jurisdiction to determine any right under the Constitution of Canada unless a regulation provides otherwise (and there was no such regulation in this case).

[131] In that context, the UDC received supplemental submissions from the parties before the Hearing. In the 2022 Decision, the UDC noted that "both parties agreed that whether considering **Charter** rights or **Charter** values, the **Doré** framework would apply" (at paragraph 147). The UDC also agreed with Mr. Zaki that potential violations of his **Charter** rights, and thus the underlying **Charter** values, needed to be considered and balanced against the policy objectives of the University. In my view, given the clear link between **Charter** rights and **Charter** values referenced above, this stated approach was reasonable, irrespective of the **ATJA** or the fact that the UDC did not conduct the proper **Doré** analysis.

WHAT REMEDY SHOULD BE AFFORDED TO MR. ZAKI?

[132] As referenced above, on an application for judicial review, speaking generally, a court should not decide the issue before it. Having said that, as Mr. Zaki submitted, in

⁶ **Commission scolaire francophone des Territoires du Nord-Ouest** at paragraph 75.

special circumstances, the court can refuse to remit a matter back to the decision-maker and impose its own decision.⁷

[133] Mr. Zaki contended that remitting this matter back to the UDC would prolong the academic “limbo” that he has endured for years, and that he would be subjected to a further administrative proceeding which could be followed by additional litigation. He argued, therefore, that I should grant an order of *mandamus* re-enrolling him in the UGME program, removing all disciplinary entries from his student record, and prohibiting the University from re-constituting the UDC to re-try his appeal.

[134] The University submitted that, if the 2022 Decision was set aside, this matter should remain within its jurisdiction pursuant to the **Act**, as the UDC is best positioned to reach a reasonable and proportionate conclusion, subject to the provision of clear instructions from this court as to the scope of a re-hearing.

[135] I have considered these submissions carefully, and my view, echoing the comments of the court in ***Lauson***, I have concluded that it is “time for this odyssey to end” (at paragraph 152). I agree with Mr. Zaki that remitting the matter back to the UDC is neither fair nor just and would serve no useful purpose. It has been many years since Mr. Zaki made the Postings, and in my view no one’s interests are served by this ongoing dispute. I am loathe, therefore, to remit this matter back to the UDC for a determination, regardless of the extent of any accompanying instructions that I might provide.

⁷ See ***Canada (Attorney General) v. PHS Community Services Society***, 2011 SCC 44; ***Healey v. Memorial University of Newfoundland***, [1993] N.J. No. 61 (NLSC); ***Lauson v. Ontario (Justices of the Peace Review Council)***, 2023 ONCA 425 at paragraph 152.

[136] Having said that, given the content of the Postings, I am not prepared to simply re-enrol Mr. Zaki in the UGME program. Rather, I have determined that I will conduct the ***Doré*** analysis and determine whether he engaged in unprofessional conduct deserving of sanction.

The Doré Analysis

[137] I will consider first the meaning of “unprofessional conduct”, which is not defined in the NAM Procedure. Having said that, there are several documents in the record that are relevant. First, the College’s Academic Calendar for 2019-20 provides:

4.3.1 Professionalism

Professionalism, that is the behaviour and attitudes befitting medical professionals, is an important component of the Undergraduate Medical Education curriculum. Our goal is to instill the attributes of professionalism and to emphasize to medical learners that professional characteristics and attributes are necessary during the practice of medicine and for the development of their identity as physicians.

The Max Rady College of Medicine has developed a professionalism charter that serves as a framework for defining and demonstrating medical professionalism.

[Affidavit of Applicant, vol 9 at 3526]

[138] Second, the College’s professionalism charter provides:

PROFESSIONALISM:

To fully describe professionalism, an understanding of the idea of ‘professional practice’ is necessary. Four anchoring components exist for professional practice and provide a foundation on which professionalism can be based.

- The professional works within a social context and has social responsibilities;
- The professional must have knowledge and skill in medical/professional competence (e.g. a unique body of knowledge);
- The professional respects the primacy of the professional/practitioner – patient (or student) relationship; and
- Professionalism is part of all aspects of work and personal life.

. . .

Responsibility to profession:

. . .

Physicians must support profession-led regulation and act in ways that demonstrate that they are worthy of the trust that society has bestowed upon them. They must interact with others in ways that are respectful, collegial, and enhance patient care. This includes the following concepts:

- Collaboration and collegiality
- Profession-led regulation (self-governance)
- Maintaining professional standards
- Internal and external assessment

[Affidavit of Applicant, vol 9 at 3539 and 3542]

[139] Third, the Technical Standards provide:

Behavioural Attributes, Social Skills and Professional Expectations: A student must consistently display integrity, honesty, empathy, compassion, fairness, respect for others, professionalism, and dedication. Students must take responsibility for themselves and their behaviours. . . It is essential that a student progressively develop mature, sensitive and effective relationships with . . . all members of the medical school community . . .

[Affidavit of Applicant, vol 9 at 3546]

[140] Fourth, the Respectful Work and Learning Environment Policy (the "RWLEP") provides that every member of the University Community is entitled to a respectful learning environment that is free from harassment, defined as various forms of conduct including, *inter alia*, objectionable and unwelcome conduct or comments that objectively "would have the effect of creating an intimidating, humiliating, hostile or offensive work or learning environment" or impacts the mental health of another person (Affidavit of Applicant, vol 9 at 3582 and 3600).

[141] In my view, "unprofessional conduct" is a broad term that could include any conduct or comments that offend any aspect of the foregoing framework. Having said that, of particular import in this case are the following aspects of the framework:

- a) professionalism includes a social context and includes a student's personal life;
- b) a student must display empathy, compassion, and respect for others;
- c) a student must take responsibility for themselves and their behaviours;
- d) physicians must interact with others in ways that are respectful, including internal and external assessment; and
- e) comments that would create an intimidating, humiliating, hostile, or offensive learning environment are a form of harassment.

[142] In the context of the ***Doré*** analysis, I must consider whether the Postings constituted "unprofessional conduct" that was disciplinable in the context of Mr. Zaki's ***Charter*** rights, and whether the expulsion imposed upon him impaired his s. 2(a) and/or s. 2(b) rights minimally, with regard to what is necessary to meet the University's statutory objectives.

[143] With respect to Mr. Zaki's right to freedom of religion, I recognize, as the court stated in ***Big M Drug Mart***, that:

[94] . . . The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

[95] Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the ***Charter*** is to protect, within reason, from compulsion or restraint. . . Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

[144] Having said that, as the court stated in ***R. v. Kisilowsky***, 2018 MBCA 10:

[86] Where an infringement that is not trivial or insubstantial has been demonstrated, consideration must be given to whether the exercise of the right "impacts upon the rights of others in the context of the competing rights of private individuals" (***Amselem*** at para 62). Conduct which impacts the rights of others is not automatically protected. Despite the broad and expansive approach to be taken in the consideration of the definition of section 2(a), no ***Charter*** right is absolute.

[145] I note also that in ***Trinity Western University v. Law Society of Upper Canada***, 2018 SCC 33, the court stated:

[40] Limits on religious freedom are often an unavoidable reality of a decision-maker's pursuit of its statutory mandate in a multicultural and democratic society. Religious freedom can be limited where an individual's beliefs or practices harm or interfere with the rights of others (***R. v. Big M Drug Mart Ltd.***, [1985] 1 S.C.R. 295, at pp. 346-47; ***Multani v. Commission scolaire Marguerite-Bourgeoys***, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 26).

[146] With respect to Mr. Zaki's right to freedom of expression, as the court stated in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, the principles and values underlying that right are:

- a) seeking and attaining the truth is an inherently good activity;
- b) participation in social and political decision-making is to be fostered and encouraged; and
- c) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant and welcoming environment, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

[147] I pause to note that in ***Saskatchewan (Human Rights Commission) v. Whatcott***, 2013 SCC 11, the court considered infringements of both ss. 2(a) and 2(b)

rights, and commented that the applicable s. 1 analysis⁸ raised similar considerations with respect to each of those rights. In my view, the same logic applies in the context of the ***Doré*** analysis in this case, and I will consider both subsections of the ***Charter*** together.

[148] It is clear that Mr. Zaki has a constitutional right to hold religious beliefs including the views on abortion set out in the Essay, and to express those views publicly, regardless of whether his speech could be seen as unpleasant, unpopular, or offensive.

[149] On the other hand, the University is obligated to provide a safe and respectful learning environment and to ensure that program graduates satisfy the *bona fide* academic requirements of their program. Certainly, to achieve either of those objectives, the University must be able take steps to correct students' behaviour where appropriate. Having said that, the University as an educational institution must be inclusive, pluralistic, and secular, with a duty to accommodate the religious beliefs and expressions of its students.

[150] I have considered carefully the content of the Postings, and in particular, the Essay. Paragraph 6 above contains a list of some of the statements and references included in the Essay. Nevertheless, Mr. Zaki submitted that a holistic reading of the Essay demonstrates that it includes a concern for women, including a call for research and funding for women's health issues. He also contended that it does not reflect only the pro-life view, and I agree that the Essay includes his opinion that abortion should

⁸ As referenced above, in ***Loyola*** the court stated that a ***Doré*** proportionality analysis finds analytical harmony with the final stages of the ***Oakes*** framework under s. 1 of the ***Charter***, namely minimal impairment and balancing.

be “provided as an option” where the mother’s life is “sufficiently” endangered (Affidavit of Applicant, vol 1 at 222).

[151] In addition, in the Essay, Mr. Zaki recognized and commented upon the pro-choice viewpoint, and what he believes are the underlying reasons for that view. I note, however, that in most, if not all, of the instances in which he did so, he refuted those arguments immediately thereafter. In other words, the Essay does not contain commentary on both sides of the discussion in the context of a true debate. It is a pro-life Essay, despite Mr. Zaki’s efforts to cherry-pick its contents and suggest otherwise, and the reality is that some of the language used in the Essay is both extreme and disturbing.

[152] I have also considered Mr. Zaki’s intentions at the time of the Postings, and I note that the first page of the Essay states: “I wrote most of this piece a while ago” and “I wrote it over a couple years time” (Affidavit of Applicant, vol 1 at 214). In other words, the Essay was not a whim written shortly before the Postings, and although it also reflects that Mr. Zaki did not have time to re-organize it and that it may contain redundancy, it is 27 pages in length. In other words, it was prepared purposefully, and with significant effort.

[153] In addition, and as I have already found, it is clear that Mr. Zaki knew the Essay would be controversial, as evidenced by the following statements in the Postings that accompanied the Essay:

- a) he was not bystander;
- b) “Have I just become a PR nightmare? Ha! Who ever said I wasn’t already a PR nightmare?”;

- c) "This document . . . is my gift to you";
- d) "This is just one small piece of that which cannot be better described using any description other than: 'Rafael contra mundum'"; and
- e) "Enjoy!" (Affidavit of Applicant, vol 9 at 3486).

[154] The root of the problem in this case, put simply, is the content of the Postings, particularly when considered in the context of Mr. Zaki's intentions at the material time. To state it plainly, he was a medical student bound by the professionalism framework set out above, to which he agreed when he entered the College. He made a commitment to conduct himself within certain parameters, which is not uncommon in some professions. I appreciate that professionals, including physicians, are not required to "fall silent"⁹, but in this case the Essay pertains to a medical procedure and contains extreme and disturbing language about that procedure and the people who may be involved in it, including patients and physicians.

[155] Although Mr. Zaki appears to have utilized the Postings to disseminate his religious beliefs and to convey his truth and diversity, which should generally be encouraged in the context of his rights to freedom of religion and expression, as a medical student he was also required to consistently display empathy, compassion, and respect for others pursuant to the Technical Standards. In addition, pursuant to the professionalism charter, he had social responsibilities and was required to interact with others in ways that are respectful and maintain professional standards. Under the RWLEP, he was required to refrain from conduct that would have the effect of creating an intimidating, humiliating, hostile or offensive learning environment or would impact

⁹ *Strom v. Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at paragraph 166.

the mental health of another person. In my view, the content of the Essay clearly ran afoul of the Technical Standards, the professionalism charter, and the RWLEP, each of which embody the University's statutory objectives in some way.

[156] I have also considered the comments of the court in ***Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)***, 2018 ABCA 154, relative to a ***Doré*** analysis in the context of advertisements placed by a pro-life organization:

[71] . . . The advertisement clearly portrays women who terminate pregnancies, and medical professionals and facilities that assist, as "killers of children". On any reasonable view, the advertisement is likely to promote hatred against the identifiable groups of "women" and their doctors. In the ***Doré*** analysis, this is a strong factor in demonstrating that the transit manager's decision was a reasonable and proportionate limitation on free expression.

. . .

[84] The appellant points out that there was no medical or other specific evidence to support the reviewing judge's inference that the advertisement was likely to cause psychological harm to women who had terminated a pregnancy, or considered doing so. That is true, but the inference drawn by the reviewing judge is nevertheless reasonable. The appellant, after all, admits that the ad is intended to be disturbing; its website discloses that hard-hitting messages are a deliberate tactic. Its objective is to portray abortion as "the decapitation, dismemberment, and disembowelment of an innocent pre-born child". It is well within the scope of judicial notice for a reviewing judge to conclude that such advertising would be likely to cause harm to some women. As ***Keegstra*** noted at p. 746: "It is indisputable that the emotional damage caused by words may be of grave psychological and social consequence." In a ***Charter*** analysis of this type, concrete scientific proof is not required, and a "reasoned apprehension of harm" suffices [citations omitted].

[157] In other words, the potential harm done to others by antagonistic, anti-abortion, misogynistic speech is relevant to the ***Doré*** balancing and direct evidence of that harm is not required to make a finding. Rather, a reasonable apprehension of harm is sufficient. In this case, the complainants did not attend the Hearing and there was no evidence presented as to any harm done to them personally. Having said that, the record reflects that the University received 18 complaints about the Postings, and I

have inferred that the Postings had an adverse effect upon those complainants, and perhaps also other individuals in the University community who did not file complaints.

[158] In the foregoing context, I have considered how Mr. Zaki's ss. 2(a) and 2(b) **Charter** rights can best be protected in view of the University's statutory objectives. I have concluded that the Postings are not consistent with the University's statutory objectives, and that a finding that Mr. Zaki engaged in unprofessional conduct constitutes a proportionate limit upon his rights to freedom of religion and expression, given the impact of the Postings upon the University community, and the public interest in the competence of UGME graduates, including compliance with professionalism requirements.

[159] I will add that Mr. Zaki's apologies for the Postings are not relevant to the **Doré** analysis in terms of whether he engaged in unprofessional conduct, and I have not considered the apologies at this stage of the analysis.

[160] I have also considered the penalty that ought to be imposed upon Mr. Zaki.

[161] I note that in **Hancock v. College of Registered Nurses of Manitoba**, 2021 MBCA 20, the court commented upon the various factors that ought to be considered in professional misconduct cases, including the presence or absence of mitigating circumstances, the individual's background, and the circumstances of their misconduct. In **Lauson**, the court stated that possible aggravating or mitigating factors can include the presence or absence of insight, admitting or declining to admit misconduct, and the presence or absence of an apology (see paragraph 134). I have considered all of these factors in this case.

[162] I have already commented upon the circumstances of Mr. Zaki's unprofessional conduct, including the purposeful nature and extreme content of the Postings.

[163] With respect to Mr. Zaki's background, I have commented upon his religious beliefs, and I am mindful of the fact that when he made the Postings, he was a first-year medical student.

[164] In terms of aggravating and mitigating factors, I recognize that during the various appeal processes, Mr. Zaki was permitted to remain enrolled in the College of Medicine and was re-registered with the CPSM. Having said that, and as the UDC noted at paragraph 178 of the 2022 Decision, although Mr. Zaki testified that two issues occurred during his clinical rotations after his re-enrolment, neither of which related to professionalism, no documentary evidence was advanced, and the UDC was uncertain of the relevance of the incidents. In my view, and in the absence of detailed evidence being put before the UDC, Mr. Zaki's behaviour after the Postings and before the Hearing is a neutral factor. Certainly, evidence of any problems that had arisen relative to his conduct may have served as an aggravating factor, but a lack of any new issues does not constitute a mitigating factor.

[165] I have also considered Mr. Zaki's apologies, which he submitted were adequate and sincere, such that they serve as a significant mitigating factor. Although an apology can be treated as a mitigating factor, I have concluded that in this case, the weight to be attributed to the fifth apology letter is impacted by the context in which it was prepared. More specifically, Mr. Zaki was required to apologize by the College to continue in the UGME program, and as he submitted to the UDC, he did so because he thought that the matter would be dropped. It is clear that the contents of Mr. Zaki's

first apology differed significantly from the fifth version, and that the contents of his apologies evolved over time, under the significant influence of the College, and in the context of a reasonable apprehension of bias as found by Champagne J. Having said that, the UDC accepted Mr. Zaki's fifth apology, and although I agree that its contents are appropriate, I have concluded that little weight can be attributed to it because of the circumstances in which it was prepared.

[166] I have also considered the fact that during his testimony at the Hearing, Mr. Zaki denied that he engaged in unprofessional conduct in the legal sense, and in my view, he had every right to give that evidence and to take that position. For the purposes of assessing the penalty to be imposed upon him, however, while his failure to admit liability does not represent an aggravating factor, it does constitute the absence of a mitigating factor.

[167] I will add that the dichotomy between the provision of Mr. Zaki's apologies and his reluctance to admit to engaging in unprofessional conduct has given rise to some confusion in this case. In my view, this is so because it is unusual for a series of apologies to have been elicited from Mr. Zaki during an internal remediation process, prior to an admission or determination of liability and the commencement of formal proceedings. In the result, at the Hearing Mr. Zaki sought to defend his position on liability but at the same time rely upon his apologies at the penalty stage, which was a fair approach for him to have taken.

[168] Nevertheless, and as referenced below, after hearing his oral evidence, the UDC questioned the sincerity of the apologies in connection with its findings on what insight, if any, Mr. Zaki had into his unprofessional conduct. In my view, Mr. Zaki's insight, or

lack thereof, represents the crux of the analysis relative to the penalty to be imposed upon him. As referenced above, Mr. Zaki testified at the Hearing, and, particularly given that there is no official record of that testimony, it is clear that the UDC was in the best position to assess his evidence, including his sincerity, to determine what weight to give his evidence, and to understand why he led certain evidence. For those reasons, I have considered carefully the UDC's findings relative to Mr. Zaki's evidence, including the following excerpts from the 2022 Decision:

[173] . . . The UDC Panel concluded that the Appellant still didn't seem to grasp that apologizing to have the matter dropped is not the same as acknowledging his wrongdoing, offering a sincere apology for the harm done, and understanding how his unprofessional conduct impacts others.

. . .

[182] . . . The UDC Panel was not convinced that the Appellant understands the importance of professionalism and how unprofessional conduct on his part can affect his colleagues, patients, and community. The UDC Panel did not see evidence of professional growth or maturity. Even disregarding the College's process of remediation that was tainted by a reasonable apprehension of bias, the UDC Panel noted the lack of progress to date considering that during this appeal process, the Appellant has been re-enrolled in the UGME Program and is undergoing mandatory remediation through the CPSM.

[183] The UDC Panel determined that more time for remediation was not the issue and would not result in the understanding and professional growth required to address the concerns moving forward. Similarly, the UDC concluded that the lesser penalty of suspension, with or without remediation, would not be successful.

[Affidavit of Applicant, vol 1 at 71-73]

[169] In other words, the UDC was not convinced that Mr. Zaki truly understood the impact of the Essay upon others in the University community. Although I did not hear Mr. Zaki's evidence, I can see why the UDC concluded that he did not demonstrate sufficient insight into why he, a medical student, should not have published the Essay as written. As referenced above, even on this application Mr. Zaki has continued to downplay and sugarcoat the contents of the Essay, which does not constitute

compliance with various aspects of the Technical Standards, including taking responsibility for himself and his behaviour, or progressively developing mature, sensitive and effective relationships with other members of the medical school community.

[170] In the context of the ***Doré*** analysis, I have considered Mr. Zaki's submissions that the penalty to be imposed upon him could have been a suspension, or a variety of other options less severe than expulsion. Certainly, and as referenced in ***Loyola***, the ***Doré*** analysis is a highly contextual exercise, and I recognize that Mr. Zaki's ***Charter*** protections must be affected as little as reasonably possible in light of the University's statutory objectives.

[171] Having said that, in my view the threshold question that must be answered, before determining the penalty to be imposed, is whether Mr. Zaki can continue in the UGME program, such that the impact upon his ss. 2(a) and 2(b) ***Charter*** protections would be reduced while enabling the University to meet its statutory objectives.

[172] In this context, I have considered the fact that at the Hearing, the UDC heard evidence from two physicians called as witnesses by Mr. Zaki, who confirmed that religious beliefs are not a barrier to practising medicine in accordance with the requirements for ethics and professionalism. Rather, and as the UDC recognized in the 2022 Decision, pro-life views "are accommodated by the [Exemptions Policy] and by ensuring that patients have access to nonjudgmental and continuous medical care through referral" (Affidavit of Applicant, vol 1 at 69).

[173] Having said that, I have also considered Mr. Zaki's assurances that as a physician he would address the needs of a female patient seeking an abortion in accordance with the Exemptions Policy. In response to those assurances, the College noted the statements in the Essay that the same patient and the assisting physicians should be charged with murder and the physicians banned from medical practice, and characterized this dichotomy in Mr. Zaki's position as "an impossible scenario" (Affidavit of Applicant, vol 8 at 2855). I agree with that assessment. Although it is unknown whether Mr. Zaki could obtain an exemption under the Exemptions Policy, the content of the Essay undermines his assurances.

[174] Since Mr. Zaki continues to lack the necessary insight into his actions many years after the Postings, it is clear to me that his continuation in the UGME program would prohibit the University from fulfilling its statutory objectives, and in particular the need to ensure that program graduates satisfy the *bona fide* academic requirements of program, including professionalism. As such, Mr. Zaki cannot be permitted to continue in the UGME program, and I have concluded that expulsion is appropriate and strikes a proportionate balance in this case as between the limits upon Mr. Zaki's rights to freedom of religion and expression and related ***Charter*** values, and the University's fulfillment of its statutory objectives.

[175] I will add that, unlike the UDC, I have not considered Mr. Zaki's submission of the social media posts referenced at paragraph 78(a)(1) above in determining the penalty to be imposed.

Conclusion

[176] Mr. Zaki is expelled from the UGME program.

CONCLUSION

[177] The 2022 Decision is quashed.

[178] Having conducted my own analysis, I have concluded that Mr. Zaki engaged in unprofessional conduct and that expulsion from the UGME program is the appropriate penalty.

[179] If costs cannot be agreed upon, counsel may seek an appearance to make submissions.

Grammond J.