JUSTICE IN THE UNIVERSITY: LEGAL AVENUES FOR STUDENTS

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Universities have developed elaborate administrative procedures relating to academic appeals and the discipline of students. When making decisions that affect individual students, universities are accountable to the courts through judicial review, actions in contract or tort, and under human rights legislation. Inadequate attention to the procedural requirements of natural justice by universities and undue deference by the courts to university autonomy have rendered judicial review a poor and ineffective guarantor of natural justice. An aggrieved student is advised to seek redress in the law of contract or through human rights legislation. Procedural reform by universities and less deference to these institutions on the part of the courts would better reflect the important interest a student has in the completion of his or her education.

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Canadian universities have set up elaborate administrative schemes in order to respect the rules of natural justice when making decisions that affect individual students. Universities are held accountable for these decisions in a number of ways, including judicial review, suits in contract and tort, and through human rights legislation. To date in Canada, little scholarly attention has been given to examining the impact that the administrative decision-making structure of universities has on students. Even less attention has been given to the manner in which the courts have enforced the procedural guarantees necessary to ensure that university decisions are made in accordance with the principles of natural justice. This paper provides an overview, a starting point for debate, as to whether, and how effectively, universities and the courts are giving effect to the requirements of procedural justice in relation to students.

Any assessment of the current system is directly dependent on how one characterizes the interest a student has in his or her education. The universities and the courts tend to view post-secondary education as a privilege and grant a level of natural justice commensurate with the removal of a privilege. This view undervalues the student's interest in completing an education. An appropriate level of procedural justice must recognize the serious and permanent consequences of expulsion and the great interest a student has in completing his or her education. If one accepts this estimation of a student's interest then there is every reason to be concerned with the status quo.

This paper will contend that inadequate protections at the university level and undue deference by the courts to university autonomy have created a system in which students can have little confidence. In Part I, the external and internal structure of universities is examined, and an outline of the general regulatory powers vested in universities is provided. Part II examines natural justice in the university context. It surveys both caselaw and the procedural guaran-

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1 For an interesting, if dated, look at the legal nature of the university–student relationship, see C. B. Lewis, “The Legal Nature of a University and the Student–University Relationship” (1983) 15 Ottawa L.R. 249.

2 Quite a large body of caselaw and some literature exist on the requirements of natural justice in a university’s relations with its teaching staff. Because of the specialized relationship of professors with universities, this body of law stands apart from the law and procedures applicable to students; no attempt has been made to compare the two here.
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This section concludes with an evaluation of the procedural fairness offered by judicial review in the university context. The paper then turns, in Parts III and IV, to other avenues of legal protection available to students in either contracts and torts, or under human rights legislation. The final section contains recommendations for improving the present situation.

I. THE EXTERNAL AND INTERNAL STRUCTURE OF UNIVERSITIES

G. H. L. Fridman mused that universities are "curious bodies." On the one hand, they are legal, self-governing corporations that enter into contractual relations with faculty, staff, and students. Disputes arising from these relations can be resolved in the courts in the same way as any other contractual matter.

On the other hand, significant differences exist between the university and its corporate cousins. Universities are created through legislative acts, are funded almost completely by the state, and serve a public purpose: the education of the state's citizens. They are also professional bodies, and their decisions to admit or to expel students give them a unique monopoly over the entrance to all professions. Universities are public, statutory institutions subject to judicial review by the courts on an administrative law basis, and like many administrative bodies, universities are perceived by the

3 The 1993–94 Undergraduate Calendars of the following nine universities were selected: University of Alberta, University of British Columbia, Brock University, McMaster University, Memorial University, Queen's University, Saint Mary's University, University of Western Ontario, and York University. The universities were selected at random, with the exception that an effort was made to include the regulations of universities in several provinces and to include regulations of larger and smaller institutions. For Dalhousie University, the 1993–94 Dentistry, Law and Medicine Calendar was used. Because the university has standardized procedures at Senate level, this would not affect the results of the sample.

4 G. H. L. Fridman, "Judicial Intervention into University Affairs" (1973) 21 Chitty's L.J. 181 at 181.

5 For a thorough history and analysis of the role of the university in Canadian society, see the dissent of Wilson, J. in McKinney v. Board of Governors of the University of Guelph et al., [1990] 3 S.C.R. 229 at 320–417 [hereinafter McKinney].

6 Fridman, supra note 4 at 181–182.
courts as having considerable expertise. Courts have been especially
deferential when reviewing university decisions on matters concern-
ing education and the granting of degrees.

A university is created by a public or private act of the legisla-
ture,\footnote{7} with varying degrees of detail as to how it is to be governed.\footnote{8} An examination of the statutes that create Dalhousie University serves to illustrate the governing structure of Canadian universities in general. Dalhousie’s statutes are a collection of private Acts dating back to 1820.\footnote{9} Currently, those Acts create a body corporate to be known as Dalhousie College and University, at Halifax.

General regulation and control of the University is vested in a Board of Governors having “all usual powers and authorities as such.”\footnote{10} The members of the Board are either appointed by the government of Nova Scotia, or elected from constituencies of alumni, students, and others.\footnote{11} As head of a body corporate, the Board is the body that is capable of suing and being sued, of contracting with various parties, and of managing the finances of the University.

\footnote{7} Some universities are incorporated by Royal Charter, \textit{e.g.} McGill University in 1821.

\footnote{8} Some statutes create only a broad general framework; others are “more or less comprehensive attempts to regulate all aspects of university life.” See for example the Acts creating Dalhousie University S.N.S. 1863, c. 23 as amended; and Saint Mary’s University S.N.S. 1970, c. 147 as amended. Other provinces have one statute which governs the incorporation of all universities within the province. See \textit{e.g.} the Universities Acts of British Columbia and Alberta. See Lewis, \textit{supra} note 1 at 249–251.


\footnote{10} \textit{An Act for the Regulation and Support of Dalhousie College}, S.N.S. 1863, c. 24, s. 1, as amended.

\footnote{11} Dalhousie University, Dalhousie University 1993–94 Dentistry, Law, and Medicine Calendar at 5. See also \textit{An Act for the Regulation and Support of Dalhousie College}, S.N.S. 1863, c. 24, s. 1.
Internal regulation of the University is vested in the Senate, subject to approval by the Board.\textsuperscript{12} The Act specifically gives the Senate authority to exercise disciplinary jurisdiction over students and includes the power to fine, suspend, and expel. In addition, the Senate is given authority to delegate these responsibilities to any "person or body of persons," subject to those conditions it considers proper.\textsuperscript{13} The Senate determines its own composition under s. 1A of the Act, and currently consists of the President, Vice-Presidents, Registrar, Deans of faculties, academic department heads, full professors, and elected members representing other faculty members and students respectively.\textsuperscript{14} The Senate (or committees thereof) hears and decides cases at first instance as well as appeals from lower levels. Avenues of appeal are deemed exhausted after the adoption of a committee's decision by the Senate as a whole. Therefore, it appears that the Board of Governors exercises its supervisory jurisdiction over the Senate only with regard to policy, and not individual cases.\textsuperscript{15}

The President of the University is the Chief Executive Officer. He or she derives authority from, and is responsible to, the Board of Governors and the Senate for supervision of the university's administrative and academic work. In practice, the President of Dalhousie University also assumes an \textit{ad hoc} jurisdiction over non-academic discipline at the university, a jurisdiction further delegated to the Deans of the various faculties, who exercise it with the knowledge and consent of the President on a case-by-case basis.\textsuperscript{16}


\textsuperscript{13} An Act to Amend Chapter 24 of the Acts of 1863, An Act for the Regulation and Support of Dalhousie College, S.N.S. 1969, c. 127, s. 1(2); amending s. 7 of the Act of 1863 by adding to it s. 7(2).


\textsuperscript{16} This delegation is not reflected in any formal policy of Dalhousie University; an \textit{ad hoc} Senate Committee has been struck to create a policy regarding non-academic discipline, but has not yet reported to the Senate with conclusions.
Some universities' statutes also provide for a visitor. This is an ancient institution in which an important figure, such as the Lieutenant-Governor of the Province or the Bishop, is appointed to oversee the internal matters of ecclesiastical, civil, or eleemosynary corporations. Where the office of the visitor exists, appeals by any member of the university may be taken to him or her as a last resort.

The office of the visitor originated as an ecclesiastical institution for the purpose of supervising the government of the church, but its connection to universities is equally venerable. The visitor’s role in relation to a university is:

(a) to hear and adjudicate upon all claims and complaints concerning the internal affairs of the corporation made by the corporators, and (b) to appoint and remove the members and officers of the corporation.

Given “the antiquity of the office and the rarity of its exercise,” the powers of a visitor and the procedures under which he or she operates are unclear. Some aspects of the visitor’s role have been spelled out. The visitor may exercise jurisdiction either as the result of an appeal or on his or her own initiative. The visitor must observe the basic tenets of natural justice, and absent a breach of those rules, the visitor’s authority is exhaustive, final, and unreviewable by the courts.

In theory, the visitor seems to be a detached figure charged with the neutral oversight of university decisions and policies. In recent times, the role of the visitor has been largely irrelevant because the appointed person cannot practically carry out the functions of the office. The only significance of the visitor today is that, where the office exists, the courts have declined jurisdiction to hear student

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19 Bridge, ibid. at 532.
20 Ibid. at 538.
21 Ricquier, supra note 17 at 677.
22 Bridge, supra note 18 at 536.
23 Ibid. at 544.
24 Until the eighteenth century, the powers of the visitor were personally exercised by the office-holder, but at least from the mid-nineteenth century it appeared that the powers of the visitor could be delegated. Ricquier, supra note 17 at 678–679.
appeals. Some courts have expressed appreciation for the office, commenting that recourse to internal appeals, including to the visitor, are more appropriate forums for students than the courts because of economy, convenience, and speed of resolution. At least two scholars have looked at the office in a similar but cautiously optimistic manner, concluding that if the office can be brought into the twentieth century intact, it may still be useful.

The office of the visitor has long been abolished in all but a few Canadian universities. Those that retain the office would do well to either follow suit and abolish it, or update the office so that it becomes meaningful. One possible way to revive the role would be to retain the office, but ensure that legally trained arbitrators, and not ceremonial figures, are appointed to the office. There is some precedent for this. Where no express nomination as to who would assume the visitorial office was made, it has been held that visitorial powers are to be exercised in the Court of Chancery. Unfortunately, neither abolition nor revival of the office of the visitor is likely in the foreseeable future; the office is statutorily created and any change must come from the provincial legislature.

II. NATURAL JUSTICE IN THE UNIVERSITY CONTEXT

Students can become engaged in the appeals processes of a university through academic appeals, academic discipline and non-aca-


26 Blasser, ibid. at 310.

27 Bridge, supra note 18; Ricquier, supra note 17.

28 Dalhousie abolished the office in 1863 by repealing the statute that created the office and substituting another which made no mention of a visitor. However, at the University of Toronto, all powers not expressly delegated were vested in the Board of Trustees, and this was held to include visitorial powers. See Wong (1989), supra note 25. Three other universities that have retained the office into the 1990's are Laval University, McGill University, and the University of Saskatchewan.

29 Ricquier, supra note 17 at 651, commenting on the decision in The King v. The Bishop of Ely (1788), 100 E.R. 157 (K.B.).
ademic discipline. Academic appeals concern, \textit{inter alia}, course requirements, regulations, fitness requirements, and the reassessment of grades. They are normally initiated by the student in response to a grievance that has not been worked out (either formally or informally) at the departmental level. Appeals of these decisions normally go to faculty-level committees, and then on to a Senate Committee, the decisions of which are voted on by the Senate as a whole.\textsuperscript{30} Further recourse is had either to the visitor or to the courts.

As a university is also charged with maintaining internal academic and non-academic discipline, it will have jurisdiction to prosecute allegations of academic and non-academic offences. Non-academic offences are often handled through the office of the President, regardless of whether this power is explicitly delegated or not. Academic offences, such as cheating and plagiarism, remain within the jurisdiction of the Senate. Some universities provide for several levels of appeal up to the Senate; others direct all such allegations to the Senate at first instance.\textsuperscript{31}

As public bodies susceptible to judicial review, universities must observe the requirements of natural justice when exercising their regulatory powers.

\textbf{The Availability of Prerogative Writs}

The question of whether the writs of \textit{certiorari}, \textit{mandamus}, or \textit{prohibition} are available to students seeking judicial review of a university's decision(s) was answered in the affirmative by the Supreme Court of Canada in \textit{King} v. \textit{University of Saskatchewan}.\textsuperscript{32} The Court held that the three requirements for prerogative writs were met: namely, that the body was statutorily created and authorized to act; that its duties were in the nature of public duties; and, that the duties were judicial or quasi-judicial in nature.\textsuperscript{33}

Since then, it has never been doubted that judicial review of university decisions is available and the cases have turned on whether the writs should in fact issue under the circumstances.

\textsuperscript{30} Dalhousie University (1988), “Senate Academic Appeals Committee Procedures for the Conduct of Appeals” [unpublished].

\textsuperscript{31} Dalhousie’s Senate is an example of a body that has not delegated such disciplinary powers.

\textsuperscript{32} (1969), 6 D.L.R. (3d) 120 (S.C.C.) [hereinafter \textit{King}].

\textsuperscript{33} \textit{Ibid.} at 125.
Requirements of Natural Justice and the Standard of Review

The general rule as to whether, and to what extent, the rules of natural justice apply in any given case depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter which is being dealt with, and so forth." This idea has been restated as importing on tribunals a general duty to act fairly depending on (a) the nature of the decision, (b) the relationship between the administrative body and the individual and (c) the effect of the decision on the individual's rights. All statutory bodies have a duty to act fairly. An implied condition of the legislature's delegation of power is that the power will be exercised in a fair manner.

One would think that a high degree of natural justice or procedural fairness would apply to university academic and disciplinary tribunals. The decisions of these tribunals are directed against students individually, unlike university regulations which have general application. Tribunal decisions involve issues of competence, fitness, and punishment. The effect on the student of an adverse decision may be the deprivation of the career for which the student was in training, and render useless any previous academic success in that program. It may foreclose further university education entirely.

Yet the courts have shown extreme deference to universities in their academic and disciplinary capacity. In Re Harelkin and University of Regina, Beetz, J. held that the legislature, by empowering the university Senate to hear appeals, indicated that "the courts should be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors." Somehow, Beetz, J.'s qualified statement has been translated into something quite different. It would not be incorrect to say that exhaustion of university level appeals is almost a precondition of judicial review. The courts have also consistently

34 Dickson, J. (as he then was) dissenting in Kane v. Board of Governors of the University of British Columbia (1980), 110 D.L.R. (3d) 311 at 322 (S.C.C.) [hereinafter Kane], quoting Tucker, L.J. in Russell v. Duke of Norfolk et. al., [1949] 1 All E.R. 109 at 118.


36 Re Polten and Governing Council of the University of Toronto et al. (1975), 8 O.R. (2d) 749 at 759 [hereinafter Re Polten].

37 (1979), 96 D.L.R. (3d) 14 at 57 (S.C.C.) [hereinafter Re Harelkin].
applied a very low standard of natural justice in their efforts to defer to university decisions.

The Ontario District Court based the rationale for deference on entirely different reasons in *Wong (1989)*, ten years after *Re Harelein*. There it was held that the court's reluctance to interfere is based on the special relationship of members of a university, the importance of academic independence, and the special expertise of university tribunals.38

Nevertheless, the courts have been willing to apply a high standard of justice to professors and officials of the university because that "is required when the right to continue in one's profession or employment is at stake."39 So far, *Healey v. Memorial University of Newfoundland* is the only decision to apply this standard to a student.

Judicial review for violations of natural justice is normally confined to a review of procedure. It is clear that the courts will not conduct a substantive review of the merits of a student's case:40

> [T]he standards for a degree, and the assessment of a student's work, are so clearly vested in a university that the Courts have no power to intervene merely because it is thought that the standards are too high, or that the student's work was inaccurately assessed.41

The court will only review the record when it finds there have been "flagrant violations"42 or "obvious denials"43 of natural justice, or where the procedures involved were "manifestly unfair"44 or

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38 *Wong (1989)*, *supra* note 25 at 129.
39 *Kane*, *supra* note 34; *Healey v. Memorial University of Newfoundland* (1992), St. J. No.4305 (QL) (Nfld. S.C.T.D.) [hereinafter *Healey*].
41 *Re Polten*, *supra* note 36 at 758, Weatherston, J. for the Court.
44 *Bennett v. Wilfred Laurier University et al.* (1983), 15 Admin. L.R. 42 at 48 (Ont. Sup. Ct. (Div. Ct.)).
"manifestly and flagrantly contrary"\(^{45}\) to the principles of natural justice.

\textit{Re Polten}\(^{46}\) is authority for the proposition that a failure of natural justice in a lower tribunal cannot be cured on appeal unless the appeal is actually a trial \textit{de novo}. In a \textit{de novo} hearing the reviewing body does not exercise purely appellate functions but decides the matter afresh. Unless no procedures for a \textit{de novo} hearing exist,\(^{47}\) the court will allow the university an opportunity to "correct it's errors"\(^{48}\) before undertaking any judicial review.

In one exceptional case, the court ruled that even a \textit{de novo} hearing would not be sufficient because of bias.\(^{49}\) This is a logical extension of the rule regarding failures of natural justice being "cured" on appeal; if the appellate body is not capable of granting a \textit{de novo} hearing in accordance with natural justice, it is no appeal at all.

Only one case reviewed the merits of a tribunal's decision based on the "patently unreasonable" standard and the decision in question was a procedural one: to maintain disciplinary jurisdiction over a student after the professor who lodged a complaint had withdrawn it.\(^{50}\) In that case a writ of prohibition issued to prevent the discipline committee from considering the matter further.

In sum, the courts will only exercise judicial review over university tribunals and bodies where:

- (a) all internal levels of appeal are exhausted, or the university is unable to conduct a \textit{de novo} hearing in accordance with natural justice, and
- (b) any decisions already made were undertaken after a clear or flagrant violation of natural justice, or
- (c) the decision reached by the tribunal, while within its jurisdiction, was patently unreasonable.

This paper will now turn to an examination of the substantive aspects of natural justice.

\(^{45}\) Archer v. Université de Moncton (1992), 9 Admin. L.R. (2d) 200 at 201 (N.B.S.C.).

\(^{46}\) Supra note 36 at 767–768. See also Re Harelkin, supra note 37 at 27–29.

\(^{47}\) Re Polten, supra note 36; Re Harelkin, supra note 37; Paine, supra note 42.

\(^{48}\) Re Harelkin, supra note 37 at 57.

\(^{49}\) Healey, supra note 39; see also Sharma v. University of Calgary (1990), 71 D.L.R. (4th) 344 (Alta. Q.B.).

Audi Alteram Partem: The Opportunity to be Heard

The *audi alteram partem* rule is often cited as shorthand for the requirement that a person be heard, but inherent in this are several other rights attendant on a hearing. These other rights may or may not be required in any given case. Loosely, they are the rights to notice, disclosure, a hearing, counsel, cross-examination, and reasons for the decision. The requirements that natural justice imposes on university tribunals and decision-makers regarding each of these areas will be examined in turn.

i. Notice

Notice is one of the preconditions to the *audi alteram partem* rule in the sense that without notice, a party is unable to exercise any other procedural guarantees. While notice has never been the main issue in a student's appeal to the courts, the courts have consistently determined that university appeals and disciplinary decisions affect the rights of students in such a manner that notice is required.51

Despite this, few universities even state how notice is to be effected. Some dispense with notice entirely by permitting a Dean to exercise discretion to ban a "dangerous" student from the campus.52 Many universities specify that notice of proceedings against a student will be mailed to the student's last known address, but that the university will maintain jurisdiction and deal with a student *in absentia* if no reply is made within a given time.53 The most comprehensive provisions regarding notice are found in the University of Alberta Calendar, which requires that notices be sent by double-registered mail or hand-delivered.54 Unfortunately, this rule only applies to communication of a penalty, and not to the initiation of proceedings.

51 See e.g. Re Harelkin, supra note 37; Hill v. University College of Cape Breton et al., supra note 35.
53 See e.g. Memorial University, "General Academic Regulations (Undergraduates)," *Memorial University 1993–94 Undergraduate Calendar*, Reg. W, at 65.
ii. Disclosure

Disclosure of a university’s case against a student is necessary in order for the student to be able to reply to it effectively, yet the requirement of disclosure has been somewhat watered down by the courts in university situations. Bennett v. Wilfred Laurier University et al.55 set the minimum threshold at disclosure of “the substance of the allegations in sufficient detail to enable [a person] to respond.” The court went on to note that this did not necessarily involve a right to hear the actual evidence, cross-examine the witnesses, or even have the names of the witnesses.

Courts have held that a committee may not act on an _ex parte_ basis by holding private interviews with witnesses, or hear evidence in the absence of a party.56 It is not clear whether later disclosure of this evidence by the committee will cure a violation. In Kane, Dickson, J. (as he then was) seemed to think that there would be no violation of natural justice where the committee allowed the parties to respond to the new evidence.57

_Archer v. Université de Moncton_58 dealt with the timing of disclosure. In that case the student was given an unfavourable report for the first time at the hearing. The court held that, as long as the student was given time to read the report and did not request an adjournment, natural justice had been observed.

At minimum then, a university must disclose the substance of any allegation against a student which a person or committee plans to use in coming to a decision, although the disclosure need not take place until the hearing itself.

The universities have taken several different positions on disclosure. At Memorial University, a student charged with an academic offence is informed in writing of the “nature of the case,” but an opportunity to respond directly to his or her accusers is not guaranteed.59 In contrast, at Dalhousie University, provision exists for the Senate Academic Appeals Committee to require the disclosure of

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55 Supra note 44 at 47.
56 Ibid. supra note 34 at 322.
58 Supra note 45.
59 Memorial University, “General Academic Regulations (Undergraduates),” Memorial University 1993–94 Undergraduate Calendar, Reg. 4 at 67.
documents necessary for an appeal. The University of British Columbia places an onus to disclose on the student; all medical or emotional problems must be reported to the Dean of the relevant Faculty. Untimely notification will be taken into account when deciding a student's appeal. This regulation seems particularly and needlessly intrusive into the private aspects of a student's life.

iii. Right to a Hearing

In Re Polten it was decided that natural justice in universities does "not always require a formal hearing, or the presence of the appellant, provided his [sic] case is presented . . . by way of correspondence, briefs, memoranda or otherwise." Other aspects of natural justice may presuppose that the student is present at the hearing; if his or her presence is required to make a proper response, if it is a situation in which counsel is permitted, or if a credibility issue requires that a right of cross-examination be given. Certainly, by the time an appeal reaches Senate level, the presence of the appellant is a requirement of natural justice.

In terms of the right to a hearing, most universities permit the parties to be heard in writing at lower levels and in person at a Senate hearing. Variations do, however, exist. The University of Alberta and University of British Columbia permit a student to be present at all levels in discipline cases.

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62 Re Polten, supra note 36 at 768.

63 Healey, supra note 39. The trial judge held that Healey should have had the right to be present and commented: “I have not been shown another case where the allegations have been as serious, and the protections afforded as few, as in the present case.” See also the various university Calendars, many of which set out a right to be present at hearings.

64 See e.g. Saint Mary’s University, “Academic Regulations,” Saint Mary’s University 1993–94 Undergraduate Calendar, Reg. 11 at 23; University of Western Ontario, “Academic Policies and Regulations,” University of Western Ontario 1993–94 Undergraduate Calendar at 30.

Memorial University specifically provides that in the most serious discipline cases, an accused will have no opportunity to confront his or her accusers. The student is not permitted to be present at his or her own hearing, and the case for both sides is presented by the Chair of the Senate Undergraduate Committee. A student at Saint Mary's University is permitted to be present at his or her discipline hearing, but is presumed guilty until proven innocent where the alleged offence pertains to an examination. At York University, just the opposite occurs: a student charged with an academic offence “shall be presumed innocent until guilt, based upon clear and compelling evidence, has been determined by the committee.”

iv. Right to Counsel

In determining whether a student has a right to appear before a tribunal with counsel, the courts have distinguished between Senate and lower level hearings. At lower level hearings, it is not uncommon for a student to be permitted a non-lawyer advocate, however, there is no indication that this is a right. At Senate (or highest-level) hearings, students are generally permitted legal counsel. In rare instances, counsel is permitted at all levels.

v. Right to Cross-Examine Witnesses

It is generally accepted that there is no right to cross-examine witnesses unless the credibility of the witness is an issue at the hearing.

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66 Memorial University, “General Academic Regulations (Undergraduates),” Memorial University 1993–94 Undergraduate Calendar, Reg. 4 at 67.
67 Saint Mary’s University, “Academic Regulations,” Saint Mary’s University 1993–94 Undergraduate Calendar, Reg. 19(c) at 24.
69 Healey, supra note 39; Miraliakbari v. Dalhousie College and University, supra note 15. See also University of Western Ontario, “Academic Policies and Regulations,” University of Western Ontario 1993–94 Undergraduate Calendar at 30; University of British Columbia, “General Academic Regulations,” University of British Columbia 1993–94 Undergraduate Calendar, at 29.
This cross-examination must be direct (i.e. not through the committee) if the witness appears in person. Any right of cross-examination appears to be negatived if the witness does not appear personally. The committee is still entitled to consider the evidence without cross-examination as there is no power of subpoena in university tribunals, and such tribunals are not required to adhere to strict rules of evidence.

Cross-examination is seldom mentioned in university Calendars; when it is mentioned, it is usually to qualify it as a limited right. York University permits cross-examination where a factual dispute exists; Dalhousie University Senate hearings allow cross-examination, but give the Committee the option to require that it be undertaken indirectly, that is, through the Committee.

vi. The Right to Reasons

There is no mention in the caselaw of a right to reasons for a university tribunal's decision. A comment by Dickson, J. (as he then was) dissenting in Re Harelkin could be inferred as connecting a right to reasons with a right to appeal. Dickson, J. asked: "Should Mr. Harelkin be expected to [appeal] to the Senate not knowing . . . the real reason for his expulsion?" This statement was given in the context of a student who did not receive a hearing, but it is arguably just as valid where an appealable decision was given without reasons.

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72 Hajee v. York University, ibid.; Healey, supra note 39.
75 Dalhousie University, (1988) "Senate Academic Appeals Committee Procedures for the Conduct of Appeals," Reg. 9(a) at iv [unpublished].
76 Supra note 37 at 31.
Nemo Judex in Causa Sua: Bias

The nemo judex rule is the second major requirement of natural justice, but the courts have put a very high threshold on it in the university cases. The case of Re Schabas et al. and Caput of the University of Toronto et al.\(^7\) held that where the composition of a body is statutorily determined, only a showing of actual bias (as opposed to a reasonable apprehension of bias) will suffice. The court found that proof that the committee members had heard of the incident in question at an earlier meeting did not amount to bias. Bilson et al. v. University of Saskatchewan\(^8\) confirmed that a lesser standard of fairness is to be placed on domestic tribunals, and held that a committee’s consultation (during the hearing) with the lawyer for the university did not produce bias. In order to avoid bias or the appearance thereof, several universities have conflict of interest regulations pertaining to who may sit on a committee considering an academic appeal or a discipline case.\(^7\) Dalhousie University has adopted a general rule that no person from the same faculty as the appellant may sit on a Senate committee.\(^9\) The University of British Columbia goes a step further and prohibits any ex parte communication between committee members and parties to the dispute.\(^8\) The University of Alberta forbids disclosure of a student’s prior discipline record until the guilt or innocence of the student has been determined. Such a record is only relevant with regard to penalty.\(^8\)

This high threshold regarding bias seems to have arisen out of a recognition of the “community” nature of a university; universities are close communities with a limited number of officials and fac-

\(^7\) (1974), 52 D.L.R. (3d) 495 (Ont. H.C.).
\(^8\) Supra note 42.
\(^8\) Dalhousie University, (1988) “Senate Academic Appeals Committee Procedures for the Conduct of Appeals,” at ii [unpublished].
\(^8\) University of British Columbia, “General Academic Regulations,” University of British Columbia 1993–94 Undergraduate Calendar Reg. 2.06 at 29.
\(^8\) University of Alberta, “University Regulations and Information for Students,” University of Alberta 1993–94 Undergraduate Calendar at 57.
ulty who are qualified to hear appeals. In *King*, the Supreme Court of Canada held that university tribunals may permissibly have an overlap or duplication of membership at various levels of appeal. *Paine* held that a tenure committee (but not a tribunal) may act based on personal knowledge of the appellant, as well as the material actually placed before it.

The *Paine* case illustrates that the high threshold of bias in university cases is problematic. In some of the smaller departments and Faculties of a university, it would be difficult to find a faculty member who did not know the student appellant personally and did not have prior knowledge of the facts surrounding the appeal. A recognition of this, while pragmatic, seems to sacrifice procedural fairness on the altar of efficacy. How can a student know whether the members of a tribunal are acting solely on the material before them? How can a student know the case he or she has to meet if some of the material the committee members use in their decision-making is only in their minds and never disclosed to the student? This strikes at the heart of both fundamental principles of natural justice; *audi alteram partem* and *nemo judex in causa sua*. As such, the high threshold imposed since *King* ought to be reconsidered by the courts.

*Healey* gives some indication that the high threshold of proving bias is in fact under reconsideration. It is the only case in which bias was inferred from other evidence. In *Healey*, the court held that since the entire Senate had received transcripts of a previous tainted proceeding, a fair rehearing was impossible at that level, even if conducted as a *de novo* trial. As a result, the court intervened and ordered that Healey be reinstated as a student.

**Remedies**

If *certiorari* is granted by the court, it may quash the decision of the inferior tribunal. Normally the case will then be sent back to a differently constituted tribunal for a re-hearing in accordance with the principles of natural justice. If such a hearing is pending or is no longer possible, an interim or perpetual injunction may require the

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83 *Supra* note 32.
84 *Supra* note 42.
85 *Supra* note 39.
86 *Hajee v. York University*, *supra* note 71; *Hill v. University College of Cape Breton et al.*, *supra* note 35.
university to re-admit a student.\textsuperscript{87} A writ of \textit{mandamus} may issue to compel a university to grant a degree, or a writ of prohibition to prevent it from acting.\textsuperscript{88} Other remedies, such as specific performance and damages, are available if the action is framed in contract or tort. They are discussed in a later section.

\textbf{Conclusion: Judicial Deference to Universities}

Although Healey provides some hope that the courts may begin to require a higher level of natural justice in universities, caselaw suggests a general reluctance on the part of the courts to intervene in the academic affairs of universities, particularly with respect to alleged failures of natural justice.

Universities have implemented many procedural guarantees that could arguably justify the deference of the courts, but a review of the regulations of ten sample universities indicates several areas where universities have not adequately protected the interests of their students.\textsuperscript{89} Among them:

\begin{itemize}
  \item widespread variance among written policies;
  \item guidelines that are extremely vague on procedural rights;
  \item an unparalleled amount of unreviewable discretion at departmental and faculty levels;
  \item little or no attention to the requirements of natural justice set out by caselaw;
  \item reservation of enormous discretion to dismiss students for academic or non-academic reasons.
\end{itemize}

The majority of the aforementioned regulations pertain to Senate level appeals: the tip of the administrative iceberg. Most faculties and departments are free to determine their own procedures. This has resulted in a daunting maze of internal regulations with even more variety than is present among the universities.\textsuperscript{90} Of the universities surveyed, not one had developed uniform procedures for lower-level appeals.

The lack of uniform procedures becomes important when tied to the fact that not a single university surveyed offers a true \textit{de novo}

\textsuperscript{87} Boon v. Newbound and Governors of the University of Alberta (1983), 29 Alta. L.R. (2d) 131 (Q.B.); Healey, supra note 39.
\textsuperscript{88} King, supra note 32; Aylward, supra note 50.
\textsuperscript{89} Supra note 3.
\textsuperscript{90} Dalhousie University provides an example.
hearing at Senate level, unless it is the hearing at first instance.91 Each set of university regulations contains a privative clause of varying scope. For example:

- Queen's University permits appeals on "other than academic grounds";92
- The University of British Columbia regulations state that the Senate Committee "has no jurisdiction where the sole question raised in the appeal turns on the exercise of academic judgment by a Faculty";93
- Dalhousie University's Senate committee may not hear appeals involving "a requested exemption from the application of faculty or university regulations or procedures, except when irregularities or unfairness in the application thereof is alleged."94 The procedures also specifically state that the Senate committee may not second-guess a Faculty with regard to either grade assessments or fitness for a profession; the remedy for an appeal of this sort is, at most, a reassessment or reconsideration by the Faculty respectively;
- The University of Alberta permits academic appeals to the Senate only where there has been a "miscarriage of justice," but the committee is not authorized to hear any appeal respecting a grade in an individual course, an admissions decision, or a decision relating to transfer credits. Discipline appeals are conducted as de novo hearings, but are only permitted where they pertain to a denial of the offence, or to the penalty. Procedural irregularities will not be sufficient to quash a decision unless it deprives either party of a fair hearing.95

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91 For example, Dalhousie University has vested all jurisdiction over academic discipline in the Senate. See Dalhousie University, "University Regulations," Dalhousie University 1993–94 Dentistry, Law, and Medicine Calendar at 33.
92 Queen's University, "Code of Conduct and Academic Regulations," Queen's University 1993–94 Undergraduate Calendar at 361.
94 Dalhousie University, (1988) "Senate Academic Appeals Committee Procedures for the Conduct of Appeals," at i [unpublished].
95 University of Alberta, "University Regulations and Information for Students," University of Alberta 1993–94 Undergraduate Calendar at 49, 57–58.
Most exclude all appeals except those based on a denial of procedural fairness at lower levels. An appeal on the merits of the case is impossible, particularly with regard to academic judgments.

The deference that has been accorded university decision-makers by the courts is based in part on the university being able to “correct its own errors” through *de novo* hearings. As Dickson, J. pointed out in his dissent in *Re Harelkin,* “the normal sort of purely appellate function will rarely be seen as capable of curing a breach of natural justice.”96 Instead, a student appears before the Senate of his or her respective institution with the onus of showing that natural justice has been denied at the Faculty level. The substantive merits of that decision are unquestionable, and an adverse decision at the lower level weighs on the student like a stone. Many years of education and a potential lifetime in a career often hang in the balance. If the student is successful, the most he or she can normally hope for is that the Senate will direct an already certain Faculty to reconsider the case.

In defence of universities, it might be said that they have shied away from undue formalism, preferring instead to resolve disputes quickly, flexibly, inexpensively, and informally. One must recognize, however, that excessive informalism might not be appropriate where important interests are at stake. Universities have a virtual monopoly over entrance to all of Canada’s professions and most of the higher education in Canada; an adverse decision at one university can virtually preclude further education there or elsewhere. Given that the courts defer almost completely to university autonomy, the procedural guarantees offered by the universities surveyed do not go far enough; in some cases, they directly contradict what minimal guarantees the courts have required.

96 Supra note 37 at 29.
III. LIABILITY OF UNIVERSITIES IN CONTRACT AND TORT

When G. H. L. Fridman made his innocuous remark about universities and students entering into contractual relationships, he may well have set off a spate of cases in which students sued a university for breach of contract. Although it was not a contracts case, the first Canadian case characterizing the student–university relationship as a contractual one was *Re Polten*. The court cited the Fridman article and stated that although the procedural rules of a faculty or school have no statutory basis, the student must be taken to have agreed to be bound by them upon entering the faculty or school.

In construing the terms of the contract between the student and the university, the Ontario Court of Appeal refused to imply a term that a specific thesis supervisor would be provided. It found that such a term was not required to give the contract efficacy. The Ontario Divisional Court in *Ryan v. University of Ottawa* ruled that the university did not breach its contract by failing to permit a student who was facing disciplinary charges to withdraw from the university as allowed by the regulations.

In *Doane v. Mount St. Vincent University et al.* the court accepted that an action in specific performance could lie against a university in order to compel it to award a diploma or degree, but held that the plaintiff had not shown her compliance with the terms of the contract by passing the course in question. Similarly, in *Chicoine v. Ryerson Polytechnical Institute* the court accepted that

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97 Fridman, *supra* note 4 at 181. It is probably best to view the publication of a Calendar as an invitation to treat and the application of a student as an offer which the university may accept. This was the construction taken by the court in *Pecover v. Bowker* (1957), 8 D.L.R. (2d) 20 (Alta. S.C.) in which a student sought mandamus to enforce his "right" to be admitted to law school, having satisfied the minimum requirements for admission.

98 *Supra* note 36.

99 Ibid. at 754.

100 *Wong v. Governing Council of the University of Toronto et al.* (1992), 4 Admin. L.R. (2d) 95 (Ont. C.A.).


103 The *Doane* case turned on the construction of the course syllabus and whether both terms of work had to be passed individually, or whether an overall passing grade was acceptable. Ibid. at 302–303.

it had jurisdiction to hear a case framed as breach of contract because of the Institute's failure to teach a course as set out in the Calendar. The Court specifically rejected an analogy to labour relations cases which curb the jurisdiction of the courts where a statutory framework provides for the final settlement of all differences between the parties. No such framework exists in university statutes, and furthermore, it was the Academic Council under the university appeals process that did not have jurisdiction to adjudicate or grant damages for such a claim.\textsuperscript{105}

The first successful breach of contract action by a student against a Canadian university came in \textit{McBeth v. Governors of Dalhousie College and University}.\textsuperscript{106} McBeth, a law student, sought damages from the university because it did not allow her to write a supplemental exam until two years after the academic year in question had ended. A civil jury awarded her $4647.75 for student loan interest, legal fees and loss of business (non-legal), as well as $1688 in general damages. While the Appeal Division of the Nova Scotia Supreme Court did not consider this a proper contracts case in which to award damages for mental distress and overturned the award of general damages, the Court did accept that the terms of the University Calendar formed the basis of the contract between the parties.

The most recent breach of contract case between a student and a university was the 1992 case of \textit{Bell v. St. Thomas University}.\textsuperscript{107} In \textit{Bell}, a social work student was given permission to repeat a failed field instruction course upon fulfilling certain conditions, despite the fact that the Calendar provided students with the opportunity to repeat courses "without special permission." When he was later deemed to have failed again for not meeting the conditions imposed, he brought an action for damages in both tort and contract.

The Court held that the university had breached its contract with Bell, as set out in the University Calendar. However, the plaintiff failed in his action because he had not shown any damages and had not asked for an order compelling the defendant to readmit him to the course without conditions. While this case confirms that an order for specific performance is available to compel a univer-

\textsuperscript{105} \textit{Ibid.} at 263–264. There is no indication in the reports as to whether the plaintiff was successful at trial.


sity to adhere to the Calendar or to re-enrol a student, it is more important for its statement on the availability of damages in such situations.

Here, Bell had claimed tuition expenses for the social work courses already undertaken, as well as loss of income calculated over twenty years. The court rejected both heads of damage. It did not allow the tuition expenses for three years of the social work program because the plaintiff had returned to the university and used the credits earned toward a Bachelor of Arts degree and therefore had not suffered any loss. An important issue with regard to damages remains open—whether the "value" of a university credit is obtained upon successful completion of the course, or whether the value depends on putting the credit to some other use, such as transfer credits or the acquisition of a degree. It is certainly arguable that the whole of a university degree is of greater value than the sum of its parts.

The court also refused to allow damages for Bell's lost wages. First, the amount had not been proven. From the decision it seems as if the amount claimed was rather arbitrary, so this ruling is not surprising. Second, the court held that since the plaintiff may have failed the course again, the damages for lost income were too remote. This analysis leaves another question open in that it may be possible for a student to claim lost wages where the amount is carefully documented (perhaps as before and after degree figures) and the plaintiff can show every likelihood of successfully completing the degree (such as where the student is expelled for a reason not pertaining to low grades).

In the educational context, very few tort actions have been commenced against universities by students. The Wong (1989)\textsuperscript{108} case concluded without analysis that there was no tort of educational malpractice.\textsuperscript{109} The action in \textit{Bell v. St. Thomas University}\textsuperscript{110} was framed in negligent misrepresentation as well as breach of contract. With regard to the tort claim, the court applied \textit{Hedley Byrne}\textsuperscript{111} but

\textsuperscript{108} Supra note 25.
\textsuperscript{110} Supra note 107.
found that the defendant’s mid-term statement that they would “consider” allowing the plaintiff to retake the course was neither negligent nor relied on by the plaintiff.

From these few cases it is possible to conclude that a university is liable to its students for breach of contract where it fails to abide by the regulations set out in the Calendar and other official documents. While problems exist with regard to the proof of damages, the courts do seem willing to enforce the contract through equitable remedies such as an injunction or specific performance. Given that the deference accorded universities in judicial review does not exist in contracts cases, an action for breach of contract would seem to be a promising area for students aggrieved by a university’s failure to abide by its own regulations.

IV. THE APPLICATION OF THE CHARTER AND HUMAN RIGHTS LEGISLATION TO UNIVERSITIES

The curious public/private duality in the status of universities poses such a unique problem that the Supreme Court of Canada finally had to rule on whether the Canadian Charter of Rights and Freedoms and the various provincial human rights legislation even applied to them. In McKinney v. University of Guelph, a mandatory retirement case, Justices LaForest, Dickson and Gonthier held that the Charter applies only to “government action.” Despite

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112 Such a contract would be more akin to an contract d’adhésion or a standard form contract than one freely negotiated between the parties. As such, any clause purporting to limit a university’s liability to students would be interpreted strictly.

113 Lewis made the point that a court might be more reluctant to grant this type of remedy despite the inadequacy of damages where to do so would “force the parties to maintain a personal relationship,” supra note 1 at 259. However, in the few cases that do consider equitable relief for students, the courts do not seem concerned with any similarities a university–student contract might have with contracts for personal services.


116 Supra note 5.
close ties with government in terms of creation, regulation and funding, the long history of autonomy within universities meant that they were not "government actors" for purposes of the *Charter*.\textsuperscript{117}

Cases involving human rights legislation have focussed on the question of whether universities are in the business of providing services "customarily available to the public."\textsuperscript{118} In *Beattie et al. v. Governors of Acadia University et al.*,\textsuperscript{119} American students protested their exclusion from a varsity team because of a rule imposing quotas on foreign-trained basketball players. MacKeigan, C.J.N.S. declined to expand the application of the *Nova Scotia Human Rights Act*\textsuperscript{20} on the grounds that university services were available to only a subset of the public (in this case, those who had satisfied the admission requirements), and not to the public generally.

[The *Nova Scotia Human Rights Act*] does not...cover all types of discrimination or cover all places in which banned types of discrimination might occur...It would be the unthinkable that any university...would knowingly discriminate...The fact remains, however, that such laudable conduct by the university is voluntary.\textsuperscript{121}

\textsuperscript{117} *McKinney, supra* note 5 at 320–443. Justices Wilson and L'Hereux–Dube dissented. Both would have found that universities are government actors and that the *Charter* applies in the same way that it applies to community colleges. The majority did not entirely close this door, leaving the possibility that some aspects a university's work may meet the "control test," thus subjecting that aspect of the university's operation to *Charter* scrutiny. While it seems that an argument could be made that the "university as employer" is different from the "university as educator," Lamer, C.J.C. did not mention this distinction in *Berg, supra* note 115 at 685, and merely concluded on the basis of *McKinney* that the *Charter* did not apply to universities.

\textsuperscript{118} *Berg, supra* note 115 at 678–679. The current *Nova Scotia Human Rights Act*, R.S.N.S. 1989, c. 214, s. 4, uses the phrase "available to other individuals or classes of individuals in society." The *Federal Act*, and the Acts of seven provinces contain some reference to public availability of, or access to, services. The Acts of Manitoba and Nova Scotia refer to subsets of the public, and the *Ontario Act* contains no limiting phrase at all.


\textsuperscript{120} *Nova Scotia Human Rights Act*, S.N.S. 1969, c. 11.

\textsuperscript{121} *Beattie et al. v. Governors of Acadia University et al.*, *supra* note 119 at 723–724.
The Supreme Court of Canada addressed this matter in May of 1993, in *University of British Columbia v. Berg.* Berg, a graduate student with a history of depression, was denied two services customarily available to graduate students in her department: a key to the building for after-hours access, and a rating sheet (like a reference) to enable her to obtain a field placement. The Supreme Court held that the British Columbia *Human Rights Act* did apply to the University of British Columbia.

The reasoning of the Court seems to be based on three grounds. First, Lamer, C.J.C. (for the majority) commented that since the *Charter* does not apply to universities and a common law right of action for discrimination has been foreclosed by human rights legislation, students would be left with no remedy for discrimination if human rights acts did not apply.

Second, all parties agreed that admissions applications were available to the general public, and thus the Act applied to those initial procedures; it was the application of the Act to the internal workings of the university that was in question. Lamer, C.J.C. rejected this distinction entirely, arguing that the legislature could not have intended it:

> I would reject any definition of “public” which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public. . . . Students admitted to a university . . . become the “public” for that service. Every service has its own public, and once that “public” has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public . . . .

> [To maintain such a distinction] would allow such institutions to frustrate the purpose of the legislation by admitting students without discrimination and then denying them access to the accommodations, services and facilities they require to make their admission meaningful.

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122 *Supra* note 115.
124 *McKimney*, *supra* note 5.
126 *Berg*, *supra* note 115 at 686.
“Public” was defined by the Court as “all persons legally or properly qualified.”

Third, the words “customarily available” were examined as the university maintained that it had a discretion as to whether to issue items such as keys and rating sheets to students. The Court accepted the university’s discretion but stated that where the discretion is habitually exercised in a certain way, it will not avail the university to argue that it may deny a service simply because the discretion exists, particularly where that denial is based on a prohibited ground of discrimination.

The scope of this ruling was qualified somewhat by the *obiter* statement that just because *some* activities of a service or facility provider are subject to scrutiny does not mean that *all* are. The Court recommended a “relational” approach to determining whether the particular services of a provider are subject to the human rights legislation. The relational approach looks to the relationship between the service or facilities provider and the user of those services or facilities; the “public” is that group with which the offeror has a public relationship.

What the Court was probably making room for in its assertion that the Act did not apply to all university activities was program “fitness” requirements; that is, the regulatory power of a faculty or department to expel an otherwise acceptable student on the grounds that the student is unfit for the profession for which he or she is training. It was important to preserve this route at the time of the case because the British Columbia Human Rights Act did not then contain a defence to an allegation of discrimination in the form of a “bona fide or reasonable justification” clause.

It is precisely in this area that the human rights acts of the provinces ought to have full application. The similar wording of other human rights legislation and similar structure of universities across Canada leads one to believe that this case will have general application to universities. The impact of excluding the protection of human rights legislation from this area of university decision-making could be considerable.

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128 Ibid. at 687.
129 Ibid. at 690–691.
130 Ibid. at 687–688.
The power of a department or faculty to expel an otherwise academically and clinically competent student based on a lack of "fitness" for the profession for which she or he is training is a very powerful discretion. Given past stereotypes of disadvantaged persons, particularly persons with disabilities, this power could be exercised based on professional stereotypes or through ignorance of the true capabilities of such persons. This would deny disadvantaged persons the opportunity to even attempt to become a member of a profession. It is accepted that the discretion to declare a person unfit for a profession must exist somewhere, but given the enormous deference courts have granted to universities in their assessment of the merit of students, the discretion ought to be exercised after graduation by the relevant licensing body for the profession which the student seeks to enter.

V. CONCLUSION: SOME RECOMMENDATIONS FOR CHANGE

In *Kane*, Dickson, J. pointed out that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake."  This rule is often cited in cases between a professor and a university; *Healey* is the only case to apply the rule to a student. One of the reasons that neither the universities nor the courts have been protective of the interests of students is that, unlike professors, students are not perceived as having any vested right to continue or to complete their educations. As such, the requirements of natural justice are seen to be closer to those which pertain to the deprivation of as yet unvested rights, or mere privileges, as opposed to the deprivation of employment or a profession.

Perhaps this view of students' interests is correct where their continued presence in a program is not at stake, such as with a grade appeal or a minor disciplinary matter. Where the expulsion of a

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132 Another reason that estimations of "fitness" are better vested with licensing bodies than universities is that degrees are providing increasing professional flexibility. It is no longer unusual for a student to obtain a degree or enter a profession with no intent of ever practicing. One example is a person who seeks an LL.B. for use in business as opposed to the practice of law.

133 *Supra* note 34. Dickson, J., as he then was, was quoting the rule in *Abbott v. Sullivan and others*, [1952] 1 K.B. 189 at 198.

134 *Supra* note 39.
student is a possible outcome, this view of the worth of an education is now outdated and patently incorrect. An undergraduate degree is now almost a precondition to many forms of employment. Given the highly competitive nature of university programs, a student who has once been removed from a program will be unlikely to get another chance elsewhere. In some cases, as where a permanent notation appears on a student’s transcript indicating that he or she has been found guilty of academic dishonesty, the student’s transcript becomes less than worthless. It brands the student with a mark of dishonesty for which there is no pardon. The consequences to a student who has been expelled from a university can be severe, particularly where the student was studying for a professional designation. To treat that student as having an interest which vests upon graduation from a program rather than admission is to lower the standard of procedural fairness in a situation where the stakes are obviously high. This is not to say that students should never be expelled, just that a high degree of procedural justice should be required where foreclosure of an education is a possibility.

The court is the proper forum to monitor and ultimately decide what natural justice requires of universities in their dealings with students. It must be possible for the courts to defer to the unique expertise of universities in the evaluation of students, to respect the precious autonomy of these institutions, and at the same time insist that universities accord a level of natural justice commensurate with what is actually at stake for the student. Universities have great expertise with regard to education, but very little in the area of natural justice. No deference should be shown to a university’s interpretation of what natural justice requires.

Change should begin with the universities. Regulations and procedures should be revamped to grant students the same level of natural justice accorded to a person who may be deprived of his or her employment or profession. At the very least, current procedures must be brought into line with what the courts have hitherto required. However, this alone is not sufficient. Change in university procedures should include:
• the redrafting of regulations to approximate a "complete code" of academic and non-academic offences.135

• provision for true de novo hearings at the Senate level. It is not enough for the Senate to send a student's case back to a faculty that has already denied the student a hearing in accordance with natural justice. If such a denial is found, the Senate should be vested with jurisdiction to strike a committee at that level, which will hear the matter afresh, on its merits.

• closer monitoring of individual faculties and departments within a university under newly drafted uniform codes of procedure. Natural justice requirements should differentiate between actions which may foreclose a student's education, and those that would not do so. The latter may be left with individual faculties; the former should be the subject of uniform regulations to ensure consistency.

• procedures for obtaining an independent assessment of a student's academic or clinical merit. While a faculty member or members who work with a student on a daily basis may be most qualified to judge that student's competence, personal relationships also develop over time. These relationships could allow otherwise irrelevant considerations to taint a faculty member's ability to judge a student.

• strict conflict of interest guidelines and a bar on ex parte communication at all levels. The current system is open to the perception of a monolithic university against a single student. Assurances are required that the persons appointed to hear internal university appeals have no interest in the outcome of the case, risk no professional consequences for deciding in a student's favour, and are completely indifferent as between the student and her faculty.

• estimations of professional "fitness" independent of academic and clinical competence should be removed from the purview of universities and vested with the relevant licensing body for the profession. Fitness requirements are unusual in unlicensed disci-

135 The University of Alberta has come quite close to producing such a code. See the University of Alberta, "University Regulations and Information for Students" University of Alberta 1993–94 Undergraduate Calendar.
plines. Where no licensing body exists, regulation should be left to either the general laws of the land through the legislative and law enforcement branches of government, or to market forces.

- **Discretion to pardon or reinstate a student should be vested in the Senate of each University.** Particularly with regard to “convictions” for academic and non-academic offences, procedures should always include some measure of reversibility.

To revamp the current system of university tribunals and procedures will require a delicate balancing act on the part of the universities, the courts and possibly the legislatures. Direction can be taken from employment law and from the careful balance already achieved between the government, the courts, and the self-regulating professions. As judges so often remind us, where justice requires it, we should not avoid an action just because it is difficult or complicated to carry out.\(^{136}\) In relation to Canada’s universities, some reconsideration is long overdue.

For now, a student aggrieved by a university’s decision is best advised to seek redress in either the law of contract or through human rights legislation. Judicial review by the courts is a poor and ineffective guarantor of procedural justice in the university context.

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\(^{136}\) This statement is normally made in the context of assessing damages in personal injury cases and determining custody matters in family law.