CITATION: Morgenthau v. Toronto Metropolitan University, 2025 ONSC 4870
DIVISIONAL COURT FILE NO.: 601/24-JR
DATE: 20250904

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Lococo and Jensen JJ.

BETWEEN:	)	
SARAH MORGENTHAU	)	*Erin Pleet* and *Jacob Klugsberg*, for the Applicant
Applicant	)	
– and –	)	
TORONTO METROPOLITAN UNIVERSITY	)	*Adam Goldenberg* and *Javid Dharas*, for the Respondent
Respondent	)	
	)	**HEARD at Toronto:** June 26, 2025

JENSEN J.

Introduction

[1] The applicant, Sarah Morgenthau, was an adjunct professor at the Lincoln Alexander School of Law (LASL) at Toronto Metropolitan University (TMU).

[2] On October 20, 2023, 72 students at LASL signed an open letter (the Open Letter) concerning the conflict between Israel and Hamas. The Open Letter was circulated publicly and within the TMU community.

[3] Following the circulation of the Open Letter, the applicant submitted a formal complaint (the Complaint) under TMU's Student Code of Non-Academic Conduct (the Student Code of Conduct) and the Discrimination and Harassment Prevention Policy.

[4] In her complaint, the applicant alleged that by authoring and signing the Open Letter, the students had engaged in conduct "condoning, if not outrightly encouraging the Hamas terror

attacks on October 7 and denying Israel's right to exist". The applicant, who is Jewish, saw the Open Letter as antisemitic and condoning violence against Jews and Israelis.

[5] On October 27, 2023, TMU announced that it would appoint an independent external expert to conduct a review of the Open Letter and related events, petitions, and concerns, and to determine whether any of the actions and incidents related to the Open Letter were in breach of TMU's policies and procedures (the External Review). TMU subsequently appointed the Honourable Michael MacDonald, the former Chief Justice of Nova Scotia, as the independent external expert who would undertake the External Review and determine whether the students had breached the Student Code of Conduct. For the purposes of the External Review, TMU was the complainant.

[6] Following the announcement, TMU told the applicant that they would forward her complaint to the External Review Team for consideration. Mr. MacDonald agreed to meet with the applicant as a stakeholder, but he stated that his mandate did not include a determination of her complaint.

[7] On May 31, 2024, Mr. MacDonald released the results of the External Review (the MacDonald Report). He concluded that none of the participants in the Open Letter had breached the Student Code of Conduct. Therefore, the students were not disciplined.

[8] On July 5, 2024, TMU informed the applicant that it would not be proceeding with the investigation of her complaint because it had determined that the MacDonald Report and the External Review had fully and appropriately addressed the substantive issue raised in the complaint.

[9] The applicant was further advised by TMU that the decision of July 5, 2025, could not be appealed because it was a preliminary assessment that was not subject to appeal under either the Student Code of Conduct or the Discrimination and Harassment Prevention Policy.

[10] The applicant applied for judicial review of TMU’s decision not to proceed with her complaint. TMU brought a motion to dismiss the application for judicial review on the basis that the impugned decision was not an exercise of state authority nor was it of sufficiently public character to ground this court’s jurisdiction.

[11] At the outset of the hearing, the Panel asked the parties to provide their submissions on whether we should exercise our discretion to decline to undertake judicial review. At the conclusion of the parties’ submissions, the Panel announced that it was exercising its discretion not to hear the application for judicial review with reasons to follow. These are the Panel’s reasons.

Factual Background

Toronto Metropolitan University and its Policies

[12] TMU is a research university located in Toronto. It is a not-for-profit corporation established pursuant to the *Toronto Metropolitan University Act, 1977 (Amended)*.[1]

[13] TMU has adopted several internal institutional policies. These include the Student Code of Conduct and the Discrimination and Harassment Prevention Policy.

[14] The Student Code of Conduct establishes community standards of non-academic conduct for students at TMU. TMU's Student Conduct Office (the SCO) is responsible for administering and applying the Student Code of Conduct. The SCO has the discretion to decide whether and how to proceed with complaints under the Student Code of Conduct and to impose certain limited sanctions (for example, issuing a written reprimand or directing a respondent to take part in a facilitated learning activity).

[15] The goal of TMU's Discrimination and Harassment Prevention Policy is to foster a collegial environment for study and work that is free from discrimination and harassment. The Discrimination and Harassment Prevention Policy is enforced through the Discrimination and Harassment Complaint Process, and both are administered and overseen by TMU's Human Rights Services.

[16] Under the Discrimination and Harassment Prevention Policy and the Discrimination and Harassment Complaint Process, the Human Rights Services may accept a complaint for consideration or, alternatively, may determine that the concerns raised by a complaint fall outside of the scope of the Discrimination and Harassment Prevention Policy or would more appropriately be dealt with under another TMU policy or agreement.

[17] TMU's Human Rights Services office does not have the authority to impose sanctions under the Discrimination and Harassment Complaint Process. Rather, it is required to identify a decision maker to assess a complaint once the complaint has been accepted after a preliminary assessment.

The Open Letter

[18] On October 20, 2023, less than two weeks after Hamas' October 7 attacks in Israel, a group calling itself the Abolitionist Organizing Collective (the AOC) released an Open Letter that caused deep hurt and real pain for Jewish students and faculty at LASL. The Open Letter referred to Hamas's "recent war crimes" but asserted that Israel had also been committing war crimes. The

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[1] TMU, formerly known as Ryerson University, was originally established by *The Ryerson Polytechnical Institute Act, 1962-63*, S.O. 1962, c. 128, which was repealed and replaced by *The Ryerson Polytechnical Institute Act, 1977*, S.O. 1977, c. 47. The 1977 Act was amended five times, most recently in 2022 by substituting the title of the 1977 Act with the *Toronto Metropolitan University Act, 1977*. An official consolidated version of the Act is not available; an unofficial consolidated version was included in TMU's motion materials.

letter characterized "so-called Israel" as an "apartheid state" and "a product of settler colonialism". It claimed that Israel was "responsible for all loss of life in Palestine" and called on the LASL administration to issue a statement demanding that the Canadian government take certain actions, including demanding an immediate ceasefire. The authors also asked that the administration recognize "Palestinian resistance as fundamentally just and as a means of survival for Palestinians."[2]

[19] The Open Letter was circulated within the LASL community. The letter obtained 74 signatures: 72 signatures from LASL students, 36 of whom signed anonymously or by initial; one signature was from the AOC; and one signature from someone identified as "student, alumni".

[20] The Open Letter became public by October 22, 2023, sparking widespread attention on social media and in traditional media. It led to a backlash against the students who participated in it. The Open Letter was interpreted by many as endorsing the October 7 attacks and minimizing the pain of the Jewish community, many of whom were still coming to terms with their grief, fear and trauma following October 7, 2023.

[21] On October 23, 2023, the LASL administration posted a statement in response to the letter which read, in part: "The Lincoln Alexander School of Law did not issue, endorse or condone this letter. We unequivocally condemn the sentiments of Antisemitism and intolerance expressed in this message."[3]

[22] The message from the LASL administration did not quell the controversy, and TMU announced that an independent external review would be investigating the recent events, including the Open Letter.

The External Review

[23] On November 6, 2023, Mr. MacDonald was appointed as the designate of the Student Conduct Office, the Executive Director, Student Affairs, and the Vice-Provost, Students, to undertake the applicable resolution process under the Student Code of Conduct, make decisions, and if appropriate, assign outcomes in respect of the Open Letter.

[24] The appointment letter was framed as a complaint by the University against the participant students, with Mr. MacDonald being designated as the decision-maker. Mr. MacDonald is Counsel to Stewart McKelvey, an Atlantic Canadian law firm.

[25] Two lawyers from Stewart McKelvey joined Mr. MacDonald to make up the External Review Team, although all decision-making was done by Mr. MacDonald as the sole External Reviewer.

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[2] *Strengthening the Pillars: Report of the TMU External Review* (2024), at p. 9 (The MacDonald Report).
[3] The MacDonald Report, at p. 10.

[26] The External Review Team used a restorative justice approach to the extent possible while working within the complaint-oriented infrastructure of the Student Code of Conduct. Section 4.26 of the Student Code of Conduct defines restorative justice as:

> An alternative approach to resolving Complaints that focuses on addressing the harm caused by the breach and holds the respondent accountable for their actions. It involves engaging the complainant, respondent, and community in the resolution of the Complaint. Restorative justice processes take various forms and are always voluntary.

[27] Restorative justice is part of the alternative dispute resolution process that is used at TMU, when appropriate, in the resolution of complaints. The alternate dispute resolution process may also include conciliation, mediation and restitution.

[28] As described by the authors of the MacDonald Report, the External Review process, which had two main phases, was designed for the following purposes:

> … to encourage people to participate, while supporting them in efforts to establish what happened and why, and to help chart a path forward, based on individual and shared responsibility. This is consistent with Section 2 of the [Student Code of Conduct], which frames the Code as being educational and supportive, while ensuring accountability and fairness.[4]

[29] Phase One of the External Review process involved confidential meetings with the students. The External Review Team met with 34 of the 38 students who participated in the Open Letter by name. Some provided submissions through counsel. Only three students who participated by name declined to engage with the External Review Team.

[30] Phase Two of the External Review process involved meetings with stakeholders. The applicant was an internal stakeholder. She was not a complainant in the External Review. The applicant consented to being named in the MacDonald Report so that her views would be included in the Report. The applicant expressed her views in writing and was reported as saying that she considered the Open Letter to have instigated violent rhetoric against the Jewish community, which crossed the line into unacceptable conduct, particularly since the signatories were law students – and therefore future lawyers. She was reported as saying that she hoped the LASL administration would make clear that racist or discriminatory language would not be tolerated and ensure consistency in the application of its policies to all groups.

[31] To ensure procedural fairness, Mr. MacDonald did not accept stakeholder submissions on potential outcomes for students who participated in the Open Letter.

[32] At the conclusion of External Review, Mr. MacDonald concluded that while the Open Letter was troubling and offensive to many, the students' participation in it, when placed in

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[4] The MacDonald Report, at p. 11.

context, was nonetheless a valid exercise of student expression. It was therefore protected under the University's Statement on Freedom of Speech. In the words of Mr. MacDonald:

> The principles of freedom of expression, including those set out in the Statement on Freedom of Speech, give wide latitude for students to apply their experience and learning, and to experiment with written advocacy. The standard is not perfection. Students are entitled to make mistakes, and even cause harm, without necessarily facing sanctions.[5]

[33] Mr. MacDonald concluded that the students had not violated the Student Code of Conduct. He also determined that the students had not created a "poisoned environment" within the meaning of the Discrimination and Harassment Prevention Policy. He found that the Open Letter was a greatly flawed letter that caused significant unnecessary harm. However, the harm was unintentional. The External Reviewer stated that "[i]n the face of the appropriately robust free speech rights we have articulated, there is no other avenue to raise participation in this letter to the level of sanctionable conduct".[6]

[34] Finally, Mr. MacDonald found that the Open Letter was not antisemitic because it did not refer to Jewish people or Judaism, nor did it explicitly or implicitly equate Israel's actions with those of Jewish people, whose views do not necessarily align with those of the state of Israel. Furthermore, the Open Letter did not expressly refer to Zionism.

[35] As a result of his conclusions that the students did not breach the Student Code of Conduct, the External Reviewer did not assign any sanctions. He further added that even if sanctions might otherwise have been appropriate, the students had suffered enough. In Mr. MacDonald's words:

> They have been under the jeopardy of this review, subjected to a barrage of threatening hate mail, their personal information has been doxed, and they have likely lost existing and future professional opportunities.
>
> It's time for them to move forward in their legal education and their professional careers.[7]

[36] Mr. MacDonald issued a confidential and individualized written decision to each student who participated by name. In addition, a section of the MacDonald Report constructively critiqued the Open Letter as a piece of written advocacy in an effort to explain why, as drafted, the letter was unlikely to have the intended effect of convincing LASL administration to take certain actions in solidarity with Palestinians.

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[5] The MacDonald Report, at p. 12.
[6] The MacDonald Report, at p. 140.
[7] The MacDonald Report, at p. 140.

The Impugned Decision

[37] The SCO and Human Rights Services reviewed the MacDonald Report after it was released. On July 5, 2024, Human Rights Services advised the applicant that both the SCO and Human Rights Services had concluded that the MacDonald Report and the External Review process had fully and appropriately addressed the substantive issues raised in her complaint. At the same time, Human Rights Services advised the applicant that both offices at TMU had decided not to proceed with the complaint under the Discrimination and Harassment Prevention Policy and the Student Code of Conduct.

[38] The applicant attempted to appeal the decision not to proceed with her complaint. However, on September 5, 2024, Human Rights Services advised the applicant that the July 5th correspondence represented a preliminary assessment made with respect to whether her complaint would proceed through an internal complaint resolution process, and that such preliminary assessments are not subject to appeals under either policy.

[39] The parties agree that the decision for which the applicant wishes to seek judicial review is the decision communicated to her by Human Rights Services on July 5, 2024, and affirmed on September 5, 2024 (collectively the Decision).

The Application for Judicial Review

[40] On October 7, 2024, the applicant filed a Notice of Application for Judicial Review. The relief she requested included:

(i) An order quashing the Decision, wherein TMU purported to apply the External Review to the applicant's complaint;

(ii) An order setting aside the Decision and referring it back to TMU, requiring TMU to adjudicate the applicant's complaint under Policy 61: Student Code of Non-Academic Conduct and the Discrimination and Harassment Prevention Policy in accordance with their terms;

(iii) A declaration that TMU failed to apply its applicable codes and procedures to the complaint and to the External Review; and,

(iv) An interim order compelling disclosure of: (i) all written submissions; and (ii) all written records of oral statements made to the External Review Team during the External Review process (subject to redactions under applicable personal privacy obligations).

[41] Among the grounds for judicial review listed in her application, the applicant states that Mr. MacDonald’s findings were based on errors of law and on unreasonable and improper considerations. She also alleges that one of the lawyers on the External Review Team was biased against the right of Jewish people to an independent state.

The Issue

[42] The only issue in this case is whether the Panel should exercise its discretion not to hear the judicial review application.

The Law

[43] Judicial review "is the means by which courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority"; it aims to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes".[8] The traditional means by which the Crown historically controlled the actions of its servants, taken in its name were the "prerogative" remedies of *certiorari,* prohibition and *mandamus*. Though this jurisdiction was later conferred on the superior courts, the prerogative remedies retained their discretionary or "extraordinary" nature.[9]

[44] In *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, 489 D.L.R. (4th) 191, at para. 54, the Supreme Court of Canada emphasized that reviewing courts are required to begin their inquiry by determining whether to exercise their discretion to judicially review a decision. The court held that "[i]f, in considering the application, the judge determines that one of the discretionary bases for refusing a remedy is present, they may decline to consider the merits of the judicial review application."[10]

[45] As stated by the Supreme Court of Canada in *Strickland*: "[t]his means that that even if the applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief".[11] In *Strickland,* an application for judicial review had been brought in Federal Court challenging the *Federal Child Support Guidelines*, SOR/97-175. The Federal Court exercised its discretion to decline to undertake judicial review primarily based on the fact that there was an alternative to judicial review, which was to challenge the Guidelines in the provincial superior courts. The Supreme Court agreed, stating that the greater expertise of provincial superior courts in family law made it a better choice than judicial review for challenging the legality of the *Guidelines*.

[46] In *Strickland*, the Supreme Court based its decision for refusing to undertake judicial review on the fact that there was an adequate alternative to judicial review.[12] The courts have

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[8] *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 28; *Canada (Minister of Citizenship) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 12.
[9] *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 575; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713, at paras. 37-38.
[10] *Yatar*, at para. 54, citing *Strickland*, at paras. 1, 38 and 40, and *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 31.
[11] *Strickland*, at para. 37.
[12] *Strickland*, at para. 40.

identified other grounds for declining to undertake judicial review including prematurity, mootness and delay in commencing judicial review.[13]

[47] In the present case, the Panel declined to undertake judicial review because it is not appropriate for this court to second guess TMU's decision not to discipline the students who participated in the Open Letter. There are alternative forums for the applicant to pursue her complaints of harassment and discrimination which are preferable to judicial review when considered in the context of the particular circumstances of this case, and the policy considerations behind the legislative scheme. The following analysis explains why judicial review is not appropriate in the present case.

[48] In *Strickland*, the Supreme Court provided a list of factors to consider in deciding whether an alternative remedy or forum is adequate so as to justify a discretionary refusal to hear a judicial review application:

(i) The convenience of the alternative remedy;

(ii) the nature of the error alleged;

(iii) the nature of the other forum which could deal with the issue, including its remedial capacity;

(iv) the existence of adequate and effective recourse in the forum in which litigation is already taking place;

(v) expeditiousness;

(vi) the relative expertise of the alternative decision-maker;

(vii) economical use of judicial resources; and

(viii) cost.[14]

[49] The Supreme Court emphasized that the above-noted factors are not to be treated as a checklist. The inquiry is broader than a summary of differences and similarities. The appropriateness of both the available alternatives and the application for judicial review should be considered, which calls for a balance of convenience analysis. This balancing exercise should take account of the purposes and policy considerations underpinning the legislative scheme in issue.[15]

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[13] See for example: *Alexander v. Renfrew County Catholic District School Board*, 2024 ONSC 6444 (Div. Ct.), at para. 9; *Reynolds v. Ontario (Alcohol and Gaming Commission, Registrar)*, 2019 ONSC 5571 (Div. Ct.) , at para. 85.
[14] *Strickland*, at para. 42.
[15] *Strickland*, at para. 43.

It should also include a consideration of any disproportionate impact on the parties or the interests of third parties.[16]

[50] However, the Supreme Court's instructions in *Yatar* and *Vavilov* also make it clear that although the court retains the discretion to refuse to grant a remedy when there are suitable alternate forums including a statutory forum, it cannot do so merely because a limited right of appeal evinces an intention to restrict recourse to the courts on other questions arising from an administrative decision.[17]

[51] As the Supreme Court stated in *Yatar*, those whose interests have been decided by a statutory delegate must have a meaningful and adequate means to challenge decisions that they consider to be unreasonable having regard to their substance and justification or considerations of procedural fairness.[18]

[52] Nevertheless, it is important to bear in mind that "the discretionary nature of [judicial review] reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals".[19] Rather, judicial review is a public law remedy, directed at ensuring the lawful exercise of administrative decision-making power.

Analysis

Judicial review of TMU's decision not to discipline the students who participated in the Open Letter is not appropriate

[53] The applicant's complaint, filed on October 20, 2023, was against the AOC, LASL and the individual students who signed the Open Letter (collectively the "complaint respondents"). The applicant alleged that the students violated the Student Code of Conduct and the Discrimination and Harassment Prevention Policy in signing the Open Letter. She alleged that in signing the Open Letter, AOC and the students engaged in conduct that was abusive, threatening, intimidating and antisemitic. The applicant stated that this conduct undoubtedly amounted to "Harassment" as defined by the Student Code of Conduct.

[54] In her complaint, the applicant also alleged that LASL failed to ensure the safety of Jewish students and faculty on campus. With respect to workplace safety, the applicant stated:

> Faculty, both full and adjunct, and staff, also have a right to a safe workplace under the Ontario Labour Code first and foremost, as well as the Code and the collective agreements. This right has been compromised, to the extent that faculty and staff are concerned about their ability to continue to work and teach in safety.

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[16] *MiningWatch Canada v. Canada (Fisheries and Oceans),* 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52.
[17] *Vavilov,* at para. 52; *Yatar,* at para. 58.
[18] *Yatar,* at para. 65.
[19] *Strickland,* at para. 48

[55] During oral submissions, TMU argued that the applicant has several alternate forums in which she could seek redress for her complaint that are more appropriate than judicial review: (1) she could file a grievance under the collective agreement alleging that the employer, TMU, failed to protect her and other Jewish faculty from harassment and discrimination; (2) the applicant could file a human rights application under the *Human Rights Code,* R.S.O. 1990, c. H.19 against TMU; and (3) the applicant could pursue private law remedies against the complaint respondents in tort or contract law.

[56] The applicant's response to TMU's arguments was that the alternate redress mechanisms proposed by TMU would not provide her with the most important remedy that she is seeking: the discipline of the students who participated in the Open Letter. The applicant stated that she is not seeking a monetary remedy against the students or LASL. In essence, she is seeking a declaration that the External Reviewer erred in finding that the students' conduct did not warrant disciplinary action and an order that another investigation must be conducted into her complaint. The applicant argued that this remedy cannot be obtained in any other forum and therefore, the application for judicial review must proceed.

[57] The applicant further argued per *Vavilov*, that judicial review is protected by s. 96 of the *Constitution Act, 1867*.[20] As such, the refusal to grant relief should be exercised with care since "such discretionary power may make inroads upon the rule of law".[21] The applicant stated that this is one such case where the refusal to permit the judicial review application to proceed would violate the rule of law.

[58] The Supreme Court made in clear in *Strickland* that there is no right to judicial review.[22] The court's exercise of its discretion not to hear the judicial review application in this case does not violate the rule of law. This matter is a very complicated one which has dominated many institutions. TMU adopted a reasonable process, put resources into the review of the Open Letter and related events, and did not shirk its responsibility. In a university setting there are undoubtedly hundreds of people with concerns and perspectives about this matter. They cannot all be included as parties in the process. In these circumstances, it is not appropriate for this court, through the judicial review process, to second guess TMU's decision not to discipline the students.

[59] The Supreme Court in *Strickland* also stated that the remedy available in an alternative forum need not be the claimant's preferred remedy or identical to that which the claimant seeks by way of judicial review.[23] The remedial capacity of the alternative decision-maker is only one factor to consider in assessing adequacy. Furthermore, where there is an appropriate alternative forum that provides the litigant with an opportunity to have questions of fact, law, or mixed fact and law

[20] *Vavilov*, at para. 24. See also *Yatar*, at para. 61.
[21] *MiningWatch,* at para. 52.
[22] *Strickland*, at para. 59.
[23] *Strickland,* at para. 59.

heard, the court may decline to hear the application for judicial review provided the other *Strickland* factors are met.[24]

[60] What follows is an analysis of the *Strickland* factors, including the remedial capacity of the alternative decision makers, demonstrating that both a human rights application and a grievance under the collective agreement are suitable alternative forums. Finally, the balance of convenience analysis reveals that both alternate forums are preferable to judicial review.

The Strickland Factors

(i) *The convenience of the alternate forums*

[61] In her complaint, the applicant alludes to the application of the collective agreement to her circumstances. She correctly states that the collective agreement protects the safety of all TMU employees.[25] The Memorandum of Understanding 6 in the collective agreement stipulates that TMU agrees "[i]n accordance with the *Occupational Health and Safety Act* and its regulations to take all reasonable steps to protect the health and safety of members".

[62] When TMU refused to proceed with her complaint, the applicant's Faculty Association (her union) could have filed a grievance on her behalf under Article 9 of the collective agreement. While it is true that the applicant would not have carriage of the grievance since it must be brought by the Faculty Association, the grievance process itself is relatively straightforward. The Association files a grievance that is then the subject of a meeting with the appropriate Dean, the employee and the Faculty Association. If the grievance is not resolved at that stage, it is then referred to the Vice-Provost, Faculty Affairs. If the grievance is not resolved after a meeting with the Vice-Provost, the grievance is referred to an arbitrator for final and binding arbitration.

[63] Article 9.2C of the collective agreement allows the parties to the collective agreement to extend any of the time limits in the grievance procedure by written mutual agreement.

[64] The applicant states in her affidavit of February 21, 2025, that after the Open Letter was circulated, she left TMU and now works for another university teaching the same course she taught at TMU. Had the applicant remained employed by TMU, filing a grievance would likely have been the most expeditious means of addressing her concerns. The issues the applicant raised in her complaint relate to human rights, freedom of speech and workplace safety. In her grievance, she could have alleged both human rights violations as well as the violation of her right to a safe

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[24] *Yatar*, at para. 63.

[25] The collective agreement between the Board of Governors of TMU and the Faculty Association that was in place at the time of the incidents and the applicant's complaint can be found at: https://www.torontomu.ca/faculty-affairs/resources/documents/collective-agreements/tfa-collective-agreement/. Article 1.12 of the collective agreement stipulates that the term member or Faculty member includes "all Limited Term Faculty, all Tenured and pre-tenured Faculty (including those on a re-employment program, reduced workload and/or lay-off status". Therefore, at the time the applicant was employed by TMU, she would have been covered by this collective agreement.

workplace under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 and the collective agreement.

[65] Labour arbitrators have significant expertise in workplace safety. They also have the power and the responsibility to implement and enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement.[26] Arbitrators who are selected to arbitrate university grievances are required to strike the delicate balance between freedom of speech, academic freedom and general workplace issues like discrimination and harassment.

[66] In the grievance process, the Faculty Association could have argued that in failing to discipline the students, TMU violated its obligation to provide a safe workplace that is free from harassment and discrimination. It could have been argued that the focus of the External Review was on the TMU community as a whole and not the particular circumstances of TMU Faculty. While the applicant would likely not be permitted to launch a collateral attack on the MacDonald Report through the grievance process, the Association could advance the position that TMU did not do enough to protect her safety and human rights in the workplace.

[67] While the applicant could have filed a grievance before she left her employment with TMU, she chose not to so. Given that she is no longer a TMU employee, that avenue of redress is no longer open to her.

[68] However, the applicant could still file an application with the Human Rights Tribunal of Ontario (HRTO) against TMU even after she left her employment.[27] Although, pursuant to s. 45 of the *Human Rights Code*, the HRTO might have deferred the application to the grievance procedure under the TMU collective agreement while she was still employed by TMU, the HRTO does have concurrent jurisdiction with labour arbitrators under the grievance process and therefore could exercise its discretion to hear the application.[28] If the applicant is no longer employed by TMU, the HRTO would not defer to the grievance process.

[69] Section 34(2) of the *Human Rights Code* gives the HRTO the authority to extend the time limits for filing a human rights application if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

[70] In her human rights application, the applicant could allege that TMU's failure to discipline the students resulted in a violation of her right to a discrimination and harassment-free workplace.

[71] The procedures under the *Human Rights Code* are convenient and accessible: the applicant submits an application directly to the HRTO. The applicant is then offered mediation services and

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[26] *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 342*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 52.
[27] *Lazo v. Dufferin-Peel Catholic District School Board*, 2019 HRTO 100, at para. 6.
[28] *London District Catholic School Board v. Weilgosh*, 2024 ONSC 3857, at para. 66.

finally a hearing before the HRTO where she is permitted to call evidence, cross-examine witnesses and make submissions.[29] Members of the HRTO are experts in human rights law.

[72] Although in theory, the applicant could bring an action in tort against the students, it is unlikely that such an action would succeed on a Rule 20 motion for summary dismissal. It is probable that the students' conduct would be viewed as essentially a complaint about the applicant's work conditions, which must be resolved through binding arbitration or, where human rights are in issue, through the HRTO.[30]

[73] Thus, in my view, both the grievance and the human rights application processes provide a convenient forum. The applicant had access to the grievance process before she left TMU and chose not to avail herself of that option. Therefore, the only options now would be the human rights application process or an action in tort against the students (subject to the limitations noted above).

(ii) *The nature of the errors alleged*

[74] In her Notice of Application for judicial review, the applicant alleges that it was procedurally unfair and unreasonable for TMU to apply the MacDonald Report to her complaint because she was not able to participate in the External Review as a party and she was not given an opportunity to make submissions before the MacDonald Report was applied to her complaint. She also alleges that the MacDonald Report was unreasonable and contained errors of law. The applicant states that the External Reviewer erroneously relied on the signatories' intentions in determining whether there was a breach of the Student Code of Conduct, relied on events and responses that post-date the Open Letter, and misinterpreted TMU's Statement on Freedom of Speech. Finally, the applicant alleges bias on the part of one of the External Review Team.

[75] Would these alleged errors be addressed in the alternate forums? In my view, the answer is yes. In the HRTO process, the applicant could argue that the MacDonald Report did not specifically address the issue of discrimination, and that the External Reviewer's interpretation of "harassment" did not accord with that of the HRTO. As a party to the human rights application, she would have the right to make submissions and to argue her case as she saw fit. The allegation of bias would be dealt with through the adjudication of her application by another decision-maker.

[76] Therefore, I find this factor militates in favour of the alternate forum.

(iii) *The nature of the other forums, including their remedial capacity*

[77] The applicant argues that the other forums do not have the capacity to provide the remedy she is seeking, which is to have the students disciplined. She states that she is not interested in a

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[29] Applicant's Guide to filing an Application with the Human Rights Tribunal of Ontario. Found at: https://tribunalsontario.ca/documents/hrto/Guides/Applicants%20Guide.html

[30] *National Organized Workers Union v. Sinai Health System*, 2022 ONCA 802, 345 L.A.C. (4th) 424, at para. 21; *Weilgosh*, at para. 66.

monetary remedy or a finding that she has been a victim of discrimination and/or harassment. Rather, she wants the students to be held accountable for what they did. In that regard, she is essentially challenging Mr. MacDonald's findings and conclusions with regard to the students' conduct.

[78] While neither a grievance nor an HRTO application could lead to student discipline, the question is not whether the alternate forums will provide the applicant with her preferred outcome but whether the remedies that can be provided in the alternate forums will address the concerns she has raised in her application.

[79] As I see it, the applicant's concern with the External Review process was that she did not have sufficient standing to influence the outcome of the process. She was not permitted to have input on the appropriate sanctions against the students and was not permitted to comment on the Report before it was produced. As a result, she thinks it is flawed and does not reflect her perspective on the Open Letter.

[80] However, I find that the alternate forums of arbitration and the HRTO would provide the applicant with the opportunity to argue that her concerns and legal arguments were not sufficiently addressed in the External Review. They will permit her to argue that TMU's response to the MacDonald Report did not protect her right to workplace safety and to a workplace free from harassment and discrimination. As such, this factor militates in favour of the alternative forums.

(iv) *Existence of adequate and effective recourse in the forum in which litigation is already taking place*

[81] The applicant currently has no recourse in the forum in which the litigation is taking place. She cannot appeal the Decision. Therefore, her only means to directly challenge the Decision is through judicial review. However, in my view, that option is much less appropriate than the alternate forums.

(v) *Expeditiousness*

[82] Administrative tribunals, like the HRTO are designed in part, to provide for the efficient and expeditious resolution of disputes. However, that worthy goal is not always achievable, given the volume of disputes with which many tribunals are faced. Nevertheless, it cannot be assumed that the HRTO process would be any less expeditious than judicial review. Indeed, the possibility of arriving at a mediated resolution with the assistance of an HRTO member is an advantage that is not provided in the context of judicial review applications. This factor also militates in favour of the alternate forums.

(vi) *The relative expertise of the alternative decision-makers*

[83] The alternate forums would provide the applicant with access to the specialized knowledge and expertise needed to resolve the issues raised in her application.

(vii) *Economical Use of Judicial Resources and Costs*

[84] As the court noted in *Jirousek v. Yukon (Government of),* 2021 YKSC 19, at para. 27, generally speaking, court applications are more costly than administrative proceedings because of filing fees, more formal process requirements and stricter evidentiary requirements. In this case, recourse to the alternate forums would be a more economical use of judicial resources as well as reducing the costs for the parties.

[85] My analysis of the *Strickland* factors leads me to conclude that the alternate forums are preferable to judicial review to address the issues raised in the application. My conclusion in that regard is supported by cases like *Gupta v. Canada (Attorney General),* 2021 FCA 202. In that case, the Federal Court of Appeal dismissed an appeal from the Federal Court's decision to decline to hear the appellant's application for judicial review. Mr. Gupta sought judicial review of the employer's decision to adopt an administrative investigation report, with the result that his request for a retroactive promotion was denied. The Federal Court premised its decision to decline judicial review on the fact that the appellant had not exhausted the alternate remedies, namely the grievance procedure available under the applicable legislation.

[86] On appeal, the appellant argued that the Federal Court failed to consider the inadequacy of the grievance procedure in light of the particular circumstances of that case, and that the Court was required to consider whether the grievance procedure provided a suitable and appropriate remedy in accordance with the principles set out in *Strickland*. The Federal Court of Appeal concluded that the lower court had indeed considered the suitability of the grievance procedure. At para. 7, the Federal Court of Appeal held that:

> … the principles governing whether the Federal Court ought to have deferred to the grievance procedure are set out in *Canada (Border Services Agency) v. C.B. Powell Ltd*, 2010 FCA 61, [2010] F.C.J. No. 274 [*C.B. Powell*]. It holds that a party may not commence an application for judicial review prior to exhausting alternate administrative remedies – like the grievance procedure – unless exceptional circumstances exist. In addition, as noted by this Court in paragraph 33 of *C.B. Powell*, the threshold for exceptionality is high and typically does not include denials of procedural fairness committed prior to the final administrative decision. (See also, to similar effect, *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, (1979), 96 D.L.R. (3d) 14, at pp. 584-585, and *Nosistel v. Canada (Attorney General),* 2018 FC 618, 2018 CarswellNat 10225 [*Nosistel*], at para. 41, upon which the Federal Court relied in the instant case).

[87] A review of the *Strickland* factors does not end the analysis. Consideration must also be given to the balance of convenience. As noted, the question is not simply whether the other forum is adequate, but also whether judicial review is appropriate.[31]

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[31] *Strickland*, at para. 43.

Balance of Convenience Analysis

[88] The application for judicial review in this case seeks to quash TMU's decision to apply the findings in the External Review to her complaint and to refer it back to TMU with the requirement that they adjudicate the complaint in accordance with the Student Code of Conduct and the Discrimination and Harassment Prevention Policy.

[89] The Applicant intended to argue in her judicial review application that because she was not given an opportunity to participate as a party in the External Review and to make submissions, she was deprived of the opportunity to assert her individual complaint against the students. However, as Cromwell J. held in *Strickland*, unlike private law, the orientation of judicial review is not and has never been exclusively to vindicate the rights of individuals over those of another.[32]

[90] Moreover, in her application for judicial review, the applicant essentially launches a collateral attack or indirect challenge to the MacDonald Report. However, she has no standing to challenge the MacDonald Report because it was not a decision about her complaint. The only narrow issue on judicial review is TMU's decision not to proceed with her complaint given that its substance was already dealt with under the complaint process that led to the External Review process. The applicant cannot use the judicial review process to do indirectly what she is not permitted to do directly.

[91] Another problem with proceeding with a judicial review that indirectly challenges the MacDonald Report is that it would be done without the benefit of having the record of those proceedings or the participation of the parties involved in those proceedings, including the External Review Team and the students themselves. As noted in the MacDonald Report, many of the students have graduated from the Law School and gone on to their careers. They believed that the process had been completed with the release of the Report and TMU's decision not to proceed with the applicant's complaint.

[92] In addition, one of the members of the External Review Team has had her impartiality called into question in the application for judicial review. Yet she has no standing to participate in the application. Thus, the impact of the application for judicial review on third parties, which is a factor to consider in the balance of convenience analysis, is potentially quite detrimental. As Cromwell J. noted in *Strickland*, "…judicial review proceedings exclude direct adversarial participation by other directly affected parties".[33] The participation of the directly affected parties may be needed to fully canvass the issues. Those affected by the present application for judicial review would not be heard.

[93] Finally, I am required to consider the appropriateness of judicial review in the context of the statutory framework in this particular case. The question is whether judicial review is

[32] *Strickland*, at para. 48.
[33] *Strickland*, at para. 56.

"appropriately respectful" of the statutory framework and of the "normal processes" for which it provides.[34]

[94] Like other university legislation, the *Toronto Metropolitan University Act, 1977* establishes a self-governing, independent and autonomous learning institution: see *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553, 157 O.R. (3d) 753, at para. 51. The legislative regime which provides for university self-governance reflects the legislature's understanding that universities must be given a measure of autonomy to balance considerations like academic freedom, freedom of speech, the creation of a collegial learning environment and the protection of human rights in their own particular communities. Commenting on the self-governing nature of universities in general, the Court of Appeal of Ontario made the following statement at paras. 48-49 of *Canadian Federation of Students*:

> In contrast with colleges, Ontario universities are not Crown agents and are not highly regulated by the government. In general, they provide broader education as opposed to vocational training. This is made clear in the purpose statements of the various University Acts, which speak of "the advancement of learning and the dissemination of knowledge"; "the intellectual, social, moral and physical development of [the university's] members and the betterment of society;" and "pursui[ng] … learning through scholarship, teaching and research within a spirit of free enquiry and expression".
>
> The achievement of these goals requires that universities be self-governing, and so they are: although there are minor differences across the University Acts, in general they establish boards of governors and senates to run the universities and empower them to do so.
>
> [Footnotes omitted.]

[95] In accordance with its power to self-govern, TMU adopted a number of internal institutional policies. These include the Student Code of Conduct and the Discrimination and Harassment Prevention Policy.

[96] The Student Code of Conduct governs student behaviour and conduct at TMU. Its purpose is to educate students by providing a non-exhaustive list of the rights, expectations, and responsibilities related to non-academic student conduct.[35] Section 2 describes the Student Code of Conduct as educational and supportive, and designed to ensure accountability and fairness. Section 6 of the Student Code of Conduct stipulates that it works in accordance with other TMU policies such as the Sexual Violence, Residence Community Standards, and the Discrimination and Harassment Prevention Policies to combat sexual violence, harassment, and discrimination of all forms.

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[34] *Strickland*, at para. 49.
[35] Section 3.4 of the Student Code of Conduct.

[97] Section 6 of the Student Code of Conduct expresses the intention of TMU to foster diversity and inclusion where all community members feel welcomed, valued, seen and heard.

[98] The Student Code of Conduct takes an incremental approach by having complaints referred to one of three offices, depending upon the severity of the allegation. The gravity of the authorized sanction is also commensurate with the seriousness of the allegation. The most serious sanctions can be imposed only by the Vice-Provost, Students.

[99] The Student Code of Conduct expressly endorses alternative dispute resolution processes such as restorative justice. As noted above, this approach focuses on addressing the harms caused by the breach, as opposed to vindicating rights and punishing people.

[100] The Discrimination and Harassment Prevention Policy seeks to foster a collegial environment for study and work that is free from discrimination and harassment. TMU's Human Rights Services administers this Policy and is empowered to screen out complaints that fall outside of the scope of the Discrimination and Harassment Prevention Policy. The Human Rights Services office does not have the authority to impose sanctions under the Policy. Rather, it is required to identify a decision-maker to assess a complaint once that complaint has been screened in.

[101] The External Review process was designed to be consistent with the goals of the Student Code of Conduct which encourages an educational and supportive approach to conflict resolution while also ensuring accountability and fairness. It was intentionally a non-adversarial approach to conflict resolution, consonant with LASL's goal of teaching law students to do law differently.[36]

[102] The applicant does not believe that the External Review process satisfactorily resolved her concerns about the Open Letter and therefore, she has challenged the Decision to apply the findings of the MacDonald Report to her complaint. In her application for judicial review, the applicant is essentially asking the court to order the same internal complaint resolution process to be followed in dealing with her complaint. However, she goes further. She says the External Reviewer got it wrong: the process was procedurally unfair, errors in law were made and one of the External Review Team may have been biased against Israel. Therefore, the internal complaint process needs to be redone, this time with her as the complainant.

[103] In my view, it is not appropriate for this court to permit an indirect attack on the External Review process in the guise of protecting the applicant's right to pursue her complaint against the students and TMU. Given the particular circumstances of this case, I do not believe it is appropriate for the Divisional Court to intervene in the process undertaken by TMU to resolve an issue that affected the entire university community. The External Review process was designed to reflect TMU's values and its approach to conflict resolution in a collegial learning environment. The applicant should not be permitted to use the judicial review process to indirectly challenge the External Review process and to require TMU to repeat the investigation with her as the complainant.

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[36] The MacDonald Report, at pp. 55 and 100.

[104] The applicant may have been dissatisfied with the External Review process, but she had alternative means of obtaining personal redress for her complaint. She could have pursued a grievance alleging that TMU's failure to discipline the students created a psychologically unsafe workplace for her and her colleagues. She chose not to do so. The applicant could still pursue a human rights application alleging that the External Reviewers did not address her rights under the *Human Rights Code* to work in a workplace free from harassment and discrimination. She might still have recourse against the individual students in private tort law. Those avenues of personal redress more appropriately address the applicant's concerns than judicial review. The alternate forums strike a better balance between the applicant's interest in being a party to the litigation and TMU's interest in resolving a conflict that affected the whole community in a way that reflected its values.

Exceptional Circumstances

[105] The final factor to consider is whether there are "exceptional circumstances" that would justify granting judicial review notwithstanding the conclusions reached above. In *Border Services Agency v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332, at para. 31, the Federal Court of Appeal stated: "… absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted." The Federal Court of Appeal in *C.B. Powell*, at para. 33, also confirmed that the threshold for exceptionality is high and typically denials of procedural fairness do not qualify as exceptional circumstances allowing a party to be exempted from the requirement to pursue suitable alternate redress mechanisms.[37]

[106] In the present case, the applicant has not provided any indication of "exceptional circumstances" that would justify an exemption from the requirement to pursue suitable alternate redress mechanisms.

[107] For all of these reasons, the Panel declined to exercise its discretion to hear the application for judicial review.

Costs

[108] The parties agreed that costs in the amount of $30,000 would be paid by the applicant. However, the panel is of the view that this may not be an appropriate case in which to award costs. The panel invites submissions from the parties on whether costs should be awarded, and if so, whether this is an appropriate case in which to order a more modest quantum of costs in the range of $5,000 to $10,000, which is the normal range for human rights cases.

[37] See also *Gupta*, at para. 7.

Jensen J.

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Backhouse J.

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Lococo J.

Date: September 4, 2025

CITATION: Morgenthau v. Toronto Metropolitan University, 2025 ONSC 4870
DIVISIONAL COURT FILE NO.: 601/24-JR
DATE: 20250904

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Backhouse, Lococo and Jensen JJ.

BETWEEN:

SARAH MORGENTHAU

Applicant

– and –

TORONTO METROPOLITAN UNIVERSITY

Respondent

REASONS FOR JUDGMENT

Jensen J.

Date: September 4, 2025