

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thompson Rivers University Faculty
Association v. Thompson Rivers
University*,
2025 BCSC 2114

Date: 20251028
Docket: S243668
Registry: Vancouver

**In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241,
the *University Act*, R.S.B.C. 1996, c. 486 and
the *Thompson Rivers University Act*, S.B.C. 2005, c. 17**

Between:

Thompson Rivers University Faculty Association

Petitioner

And

Thompson Rivers University

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Petitioner:

S. Rogers
L.C. Boag

Counsel for the Respondent:

P. Gilligan-Hackett

Place and Dates of Hearing:

Vancouver, B.C.
April 22-23, 2025

Place and Date of Judgment:

Vancouver, B.C.
October 28, 2025

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I. INTRODUCTION

[1] The petitioner, Thompson River University Faculty Association (“Faculty Association”), seeks to set aside two decisions of the respondent, Thompson River University (“TRU” or “University”). The first decision concerns TRU’s decision to suspend enrollment in its Visual Arts programs. The second is the decision of TRU’s Board of Governors (“Board”) to discontinue four Visual Arts programs within the Faculty of Arts at TRU. The four specific programs that have been discontinued are: 1) the Bachelor of Fine Arts (Visual Arts, Major); 2) the BA (Visual Arts, Minor); 3) the Diploma in Visual Arts; and 4) the Visual Arts Studio Certificate (“Visual Arts Programs”).

[2] More specifically, the Faculty Association seeks the following orders and declarations in its Petition:

1. A declaration that the respondent Board breached s. 10(b) of the *Thompson Rivers University Act* and/or acted *ultra vires* by suspending student enrollment in Visual Arts programs in March 2023.
2. A declaration that the respondent Board breached s. 10(b) of the *Thompson Rivers University Act* when the Board resolved on January 29, 2024 to discontinue four Visual Arts programs without seeking the advice of the Senate and without the Senate advising the Board on educational policy with respect to the discontinuance of these programs.
3. An order setting aside:
 - (a) the March 2023 decision of the respondent to suspend student enrollment in Visual Arts programs at Thompson Rivers University;
 - and
 - (b) the Board’s January 29, 2024 decision to discontinue the four Visual Arts programs at Thompson Rivers University.

[3] TRU asserts that it complied with its statutory duties and did not act *ultra vires* its statutory powers. Further, TRU submits that it met the standard of review of reasonableness and acted in accordance with its duty of procedural fairness.

II. FACTUAL BACKGROUND AND STATUTORY CONTEXT

[4] The Faculty Association is a trade union within the meaning of s. 1 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. It is certified by the British Columbia

Labour Relations Board as the exclusive bargaining agent for faculty employees of the University.

[5] TRU is a university as defined in s. 1 of the *Thompson Rivers University Act*, S.B.C. 2005, c. 17 [*TRU Act*]. It is a statutory corporation with campuses in Kamloops and Williams Lake, British Columbia. It also has an Open Learning Division, providing online courses for students.

[6] The Faculty Association and TRU are parties to a collective agreement with a term from April 1, 2022 to March 31, 2025.

[7] Under s. 3 of the *TRU Act*, the University's purposes are to:

- a) offer baccalaureate and master's degree programs,
- b) offer post-secondary and adult basic education and training,
- c) undertake and maintain research and scholarly activities for the purposes of the above, and
- d) provide an open learning educational credit bank for students.

[8] TRU offers various courses and programs to students through a number of faculties and schools, including the Faculty of Arts.

[9] The Faculty of Arts at TRU is a large faculty which offers a broad range of courses, diplomas, and degree programs. This Faculty is divided into several departments, including the Department of Communication and Visual Arts.

[10] The University has traditionally offered various courses through the Department of Communication and Visual Arts, including a Bachelor of Fine Arts in Visual Arts, a Visual Arts Diploma, a Visual Arts Studio Certificate, a drawing and painting certificate, and a certificate in literary and art history.

[11] The Faculty Association's members include all faculty who instruct courses and develop curriculum for delivery in the Department of Communication and Visual

Arts Department of the Faculty of Arts, as well as all members of the Faculty of Arts Council.

A. Governance of TRU

[12] The executive of TRU is led by the President and Vice-Chancellor. The President is both a member of the Board *ex officio*, a Senator, and the Chair of the Senate *ex officio*.

[13] Five Vice-Presidents, including TRU's Provost (who also holds the position of Vice-President Academic), advise and report to the President. All five Vice-Presidents are members of TRU's executive.

[14] The Provost provides strategic direction for: TRU's budget, leadership over TRU's overall academic operations (including quality assurance), TRU's library, strategic enrollment management, registrar's services, teaching and learning, and student services.

[15] Section 4(1) of the *TRU Act* incorporates certain provisions of the *University Act*, R.S.B.C. 1996, c. 468 [*University Act*]. The *TRU Act*, including the incorporated provisions of the *University Act*, establishes a governance model for TRU which includes both the Board and the Senate. I refer to the *TRU Act* and the *University Act*, together, as the "Enabling Legislation".

[16] The roles of the Board and Senate may be summarized as follows.

[17] Section 7 of the *TRU Act* provides that Board governs the "management, administration and control of the property and revenue" of TRU as well as its "business and affairs". The Senate is charged with oversight over the delivery of TRU's academic programs. Section 9(2) of the *TRU Act* sets out various powers and duties of the Senate regarding the academic affairs of the University.

[18] Section 10 of the *TRU Act* identifies some matters which require collaborative interaction between the Board and the Senate. One such matter is the development of educational policy for the establishment, revision, or discontinuance of programs

and courses at TRU. More particularly, s. 10 requires the Senate to advise the Board on the development of such educational policy, and it also requires the Board to seek advice from the Senate on the same subject. Specifically, s. 10 provides:

10. The senate must advise the board, and the board must seek advice from the senate, on the development of educational policy for the following matters:

- (a) the mission statement and the educational goals, objectives, strategies and priorities of the university;
- (b) the establishment, revision or discontinuance of courses and programs at the university;
- (c) the preparation and presentation of reports after implementation by the university without prior review by the senate of
 - (i) new non-credit programs, or
 - (ii) programs offered under service contract;
- (d) the priorities for implementation of new programs and courses leading to certificates, diplomas or degrees;
- (e) the establishment or discontinuance of faculties at the university;
- (f) the evaluation of programs and educational services;
- ...
- (l) the consultation with community and program advisory groups concerning the university's educational programs;
- (m) other matters specified by the board.

[Emphasis added.]

[19] TRU's educational composition includes eight faculties, each chaired by a dean. The role of a dean is to advocate for the dean's faculty but also to ensure responsible resource allocation that is aligned with the strategic priorities of both the faculty in question and TRU, and which also responds to student demands in areas of growth. Each dean is a member of the Senate *ex officio*.

[20] The Board is comprised of 15 members, including the TRU Chancellor, the TRU President (who also holds the office of vice chancellor), members appointed by the Lieutenant Governor in Council, two members elected by faculty, two members elected by students, and one member elected by non-faculty employees.

[21] The Senate is comprised of the following members, in accordance with s. 8 of the *TRU Act*: the President, who acts as the Chair of the Senate ("Senate Chair"); the Academic Vice-President or equivalent; the Chancellor; the deans of the faculties (including the Faculty of Arts); the Chief Librarian; the Registrar; two faculty members for each faculty, elected by faculty members of the faculty; four students elected by the students; one alumni member who is not a faculty member; one administrator of the Open Learning Division; four members of the teaching staff in the Open Learning Division; two support staff; and non-voting members. The majority of senators are faculty members.

[22] The Board is responsible for the overall governance of the University. There are some matters that cannot be addressed by either the University executive or the Board without appropriate Senate involvement.

[23] The Board has created written policies intended to comply with the University's statutory obligations. These policies include Policy Number BRD 08-04 – Program Reductions and Eliminations ("BD Policy 8-4"), which was approved by the Board on January 15, 2000, and was last revised in 2005.

[24] BD Policy 8-4 sets out a detailed consultation process that includes, but is not limited to, the Senate's involvement when the Board proposes to terminate or reduce a University program.

[25] The Faculty Association underscores the following steps in BD Policy 8-4 that are to be taken when TRU intends to reduce or terminate a program:

- a) a written notice by the senior executive of TRU to the faculty of the affected department, copied to the Senate Chair, which must include a rationale for the proposed program reduction or elimination and an invitation to the department or school and division to comment;
- b) a written response from the Dean within 15 days, copied to the Senate Chair;
- c) a request by the Board for advice from the Senate on a proposed termination or reduction;

- d) a Senate process for deliberating and deciding upon advice to provide to the Board, including at least two special meetings of the Senate, comprising:
 - (1) a briefing on process; and
 - (2) one or more meetings for the purpose of hearing presentations by stakeholders including students, faculty, administration and external groups; and
- e) the Senate must provide advice to the Board with respect to “each proposed reduction or elimination” by identifying “educational losses” and “financial and other resource savings”.

[26] BD Policy 8-4 was never utilized between its adoption by the Board in 2000 and when the issues between the parties arose in 2023.

[27] I have set out, in considerable detail, the factual matrix underlying this judicial review to give shape, clarity and perspective to the nature and extent of the decision-making processes and the scope of the considerations undertaken by TRU in making the impugned decisions. While I have not documented or summarized all aspects of the process followed by TRU, the submissions given, or the steps taken in these Reasons, I have reviewed and considered the entirety of the evidentiary record placed before me.

B. Suspension of Enrollment in the Visual Arts Programs

[28] The Provost of TRU is Professor Gillian Balfour (“Provost Balfour”). She deposes that “[f]or some period of time before 2023, the viability of certain academic programs offered by TRU through the Visual Arts had been in question”. She states that these programs were the:

- a) Bachelor of Fine Arts (Visual Arts);
- b) Bachelor of Arts, Minor in Visual Arts;
- c) Visual Arts Diploma; and
- d) Visual Arts Studio Certificate.

[29] Provost Balfour deposes that, in April 2023, she and the Dean of Arts, Dr. McCutcheon, concluded that the viability of the Visual Arts Programs was sufficiently in doubt that the possibility of their elimination should be referred to and considered by the Board. The possibility of elimination, she asserts, was based on “very low completion rates in and the exceptional operational costs of the Visual Arts Programs”.

[30] Provost Balfour deposes that, on April 13, 2023, Dean McCutcheon invited her to a meeting of the Visual Arts faculty members to be held on April 20, 2023. She deposes that the Dean had arranged the meeting to inform the Visual Arts faculty members of “our conclusion that the possibility of eliminating the Visual Arts Programs would be initiated through the Senate’s Academic Planning and Priorities Committee (‘APPC’), Budget Committee (“BCOS”), and the Senate”.

[31] On April 19, 2023, TRU’s Registrar, Mr. Bluhm, sent an email to Provost Balfour and Dean McCutcheon drawing their attention to BD Policy 8-4 regarding program reductions and eliminations. In this email, Mr. Bluhm writes:

Low and behold there is a TRU Board policy that contemplates the Advisory council of senate’s role in program discontinuance, and rightfully emphasizes the business/resourced decision that need to ultimately inform such action.

BRD 08-4- Program Reductions and Eliminations

Apologies, I didn’t catch this earlier. I was focused on the legislation. Looks like this policy spells out a fairly detailed policy. This would likely be a lengthy process so still likely best to proceed with suspending intake beyond this fall and then pursuing the process in the coming months.

This may inform the discussion you are having tomorrow with faculty, though. Might want to stick to language like, “we are pursuing a path to discontinuing...” rather than “we are/will be discontinuing...”.

...

[32] Ms. Twyla Exner, a faculty member, union member, and full-time assistant teaching professor at TRU, who has taught various Visual Arts courses, deposes that she was at the April 20, 2023 faculty meeting scheduled by Dean McCutcheon. She received a calendar invite on April 19, 2023 for a meeting with Dean McCutcheon and Provost Balfour for the following day at 10:15 a.m. for 30 minutes.

[33] Ms. Exner attended the meeting with other faculty members of the Department of Communication and Visual Arts. She deposes that at this faculty meeting:

... Dr. McCutcheon told us that the decision had been made to discontinue the Visual Arts BFA program. Dr. McCutcheon told us there would be a three year “teach out”, which he explained as meaning current Visual Arts students would be given three years to complete their BFA.

At that meeting, Dr. McCutcheon also told us that none of us would be losing our jobs, but it was unclear what, specifically, we would be expected to teach after the Visual Arts programs had been discontinued. Dr. McCutcheon also told us at that meeting that registration for Visual Arts programs had already been suspended. I asked what courses would continue to be offered in Visual Arts and was told words to the effect that we would “cross that bridge when we get to it”.

[34] Provost Balfour deposes that, at the April 20, 2023 meeting, Dean McCutcheon “indicated to the Visual Arts faculty members that no new students would be admitted to and no new faculty members would be hired for the Visual Arts Programs”. She added that “Dean McCutcheon explained the Visual Arts Programs were not viable at the current level of enrollments and noted that for many years the Visual Arts faculty members had been resistant to any changes in the Visual Arts Programs”.

[35] Provost Balfour also spoke at the April 20, 2023 meeting and deposes she “indicated that if the Visual Arts Programs were eliminated no one would be laid off because... key courses within the Visual Arts Programs would continue to be offered as part of new programs”. The Provost further deposes that she also indicated at that meeting that “enrollments in the Visual Arts Programs would be suspended and that all currently enrolled students, including students then admitted for enrollment in September 2023, would be able to complete their respective programs”, noting that “[t]his process [of program completion] would require approximately three years to complete”.

[36] On April 20, 2023, the Dean sent an email to the Registrar. In that email, the Dean asked the Registrar, with the Provost’s permission, “to close all applications to the Visual Arts Programs”. This was in fact done. Provost Balfour deposes that

“April 20, 2023 was late in the application cycle for new students wishing to enroll in the Visual Arts Programs starting in September 2023”, although “[a]ll students who had applied successfully to the Visual Arts Programs before the application process was closed in late April 2023 had the opportunity to enroll in the September 2023 offering of the Visual Arts Programs” to complete their visual arts programs and related degrees.

[37] The Faculty Association asserts that when TRU suspended enrollment in all Visual Arts programs and courses at TRU, it took this step without any formal Board consideration or resolution, and without the Board seeking advice from the Senate or the Senate advising the Board. The facts before me support this assertion.

C. Decision to Discontinue the Visual Arts Programs

[38] On May 29, 2023, the Senate held its regular meeting. This was the first meeting of the Senate after Provost Balfour and Dean McCutcheon met with faculty members of the Visual Arts programs on April 20, 2023. Provost Balfour deposes that at this Senate meeting, the Dean gave a detailed PowerPoint presentation and “addressed the rationale for the decision to propose the elimination of the Visual Arts Programs” including the “decade long decline in both the enrollment and graduation rates in the Visual Arts Programs, the costs of delivering the Visual Arts Programs based on faculty members’ salaries, and the strategic plan for Faculty of Arts”.

[39] Provost Balfour spoke at the Senate’s May 29, 2023 meeting. She deposes that she addressed the process that was being followed under BD Policy 8-4, including the dates of future meetings of the Senate at which Senators would be informed about the financial and educational implications of eliminating the Visual Arts programs.

[40] Provost Balfour deposes that by June 1, 2023, she knew the Board would consider whether to reduce or eliminate the Visual Arts programs. Accordingly, she emailed Dean McCutcheon on June 1, 2023, asking him to forward her email “to all faculty members of the Visual Arts program in the Faculty of Arts”. Her email stated:

This email is to advise that in accordance with BD Policy 8-4, a proposed reduction or elimination of the Bachelor of Visual Arts, Minor, Diploma and Certificate will be considered. I have reviewed the information provided by the Registrar's Office, Finance, and the Faculty of Arts Strategic Academic Plan, and have requested a Special Meeting of the Senate be held on June 12, 2023, to allow for Chair of Senate and Senators to receive a full report by the Dean of Arts, under the terms of BD Policy 8-4.

Please note, that a second Special Meeting of Senate will be held in September 2023 for external members of the community to provide submissions with regards to this matter. Information regarding that event will be shared by June 30th 2023.

[41] On June 12, 2023, the Senate held a Special Meeting. At that meeting, Provost Balfour and Dean McCutcheon gave a presentation to the Senate about the proposed elimination of the Visual Arts programs. Provost Balfour deposes that this presentation addressed content "similar" to that presented at the May 29, 2023 Senate meeting, and also included additional information regarding: a) space utilization as a true cost of the Visual Arts programs; and b) specific enrollment trends.

[42] On June 16, 2023, the Board held a public meeting. Professor Balfour deposes she attended meeting in her capacity as Provost. She deposes that she "presented information about the governance processes being followed in relation to the proposed elimination of the Visual Arts Programs" and also "distinguished between the respective roles of the Senate and the Board in those processes". She deposes that she also stated what she "thought would be the case at the time"; that is, that the Senate's advice to the Board would be provided in a report from the Senate at the Board's September 2023 meeting.

[43] On July 7, 2023, the Senate issued an invitation for presenters at the Senate's Special Meeting scheduled for September 18, 2023. The invitation was posted on TRU Connect, an in-house platform for communicating news about events at TRU to faculty and staff. That invitation stated, in part:

Under the terms of BD Policy 8-4, the Steering Committee of Senate is seeking input from key stakeholders who may be affected by a decision to wind down the Bachelor of Fine Arts (BFA), the Certificate and Diploma (Fine Arts) program by 2026.

In keeping with the policy, one representative from each of the following stakeholder groups will be invited to speak at a special meeting of Senate for up to 20 minutes: 1 current faculty member in the program; 1 current student in the program; 1 recent program alumni; 1 current program administrator; one member of Kamloops community; and 1 member of Tk'emlups te Secwepemc.

...

[44] On August 1, 2023, Professor T. Exner, a faculty member in Visual Arts Department, wrote to the Senate, the Board, and Provost Balfour about the proposed elimination of the Visual Arts programs. Her submissions in her letter were detailed, explained the importance of the Bachelor of Fine Arts Program, suggested potential changes and improvements to increase its financial viability and “ensure its vibrant role”. She deposes that her submissions set out a “detailed proposal for a means to continue the Visual Arts Programming at TRU”.

[45] On September 17, 2023, Professor Craig Jones, K.C., a faculty member in the Faculty of Law and also (at that time) a senator of TRU, wrote to the Board Chair. Professor Jones noted that he was gratified that his procedural advice concerning the reduction or elimination of the Fine Art Program had been taken into account; however, he also asserted his view that “at least one significant procedural issue” remained at that time. Specifically, he noted that s. 10 of the *TRU Act* “requires that the Board request the advice of Senate before making a decision to discontinue a program, and that Senate provide that advice”. Professor Jones also expressed concern that the proper process under BD Policy 8-4 had not yet been followed. Professor Jones also stated his view that the Board could only act through resolution, and no resolution had yet been passed by the Board to seek the advice of Senate.

[46] The next day, on September 18, 2023, the Chair of the Board, Ms. Marilyn McLean, replied to Professor Jones’ September 17, 2023 letter, in part, as follows:

On June 16, 2023, at the public meeting of the Board of Governors in Williams Lake, the provost provided a presentation to governors in attendance, based on the work of the Dean of Arts, Finance and Enrollment Services, to recommend the discontinuance of the Visual Arts Program, in accordance with the Program Reductions and Eliminations Policy, BRD 8-4.

The Board heard of concerning and consistent rates of poor enrolment, financial implications of workload inequities with thing program, inefficiencies in the use of instructional space, as well as the new strategic direction of the Faculty of Arts. The Provost explained the following:

- a) No program changes had been initiated by the Department of Visual Arts in over 10 years despite enrolment challenges and program review recommendations.
- b) New student intake in to the Visual Arts programs had been suspended in march 2023, however all students currently registered would be able to complete their program over the next 3 years; TRUFA [Thompson River University Faculty Association] has been apprised that no layoffs would result; faculty and Arts Faculty Council were apprised of the need to consider the viability of the program.
- c) A Special Meeting of Senate would take place September 18 in accordance with BRD 8-4 to receive community stakeholder feedback on the proposed program elimination.
- d) Following that meeting on September 18th, Senators would provide the Senate Chair with advice on the matter, to inform his report to the Board on September 29, 2023.

[47] In addition, in her September 18, 2023 letter to Professor Jones, Ms. McLean, writes:

As Board Chair, I indicated at that time [at the June 16, 2023 meeting] that the Board looked forward to receiving the advice of Senate under BRD 8-4, before making a final decision regarding the discontinuance of the Visual Arts Program. The Board did not vote on a motion to receive the recommendation or to request advice from Senate at this meeting. To do so would be atypical, as not action by the Board was yet required and the Board normally only makes motions on the final determination of matters.

[48] Shortly before the Senate's September 18, 2023 meeting, the Chair of the Arts Faculty Council ("AFC"), Mr. David Hill, wrote a letter to the Senate, the Board, and Provost Balfour on behalf of the member of the AFC. This letter "asks that Senate recommend to the Board of Governors to not eliminate TRU's Bachelor of Fine Arts, diploma certificate and minor programs and for the Board of Governors to concur with this recommendation". In this letter, the members of the AFC state that they believe it is premature to eliminate the Visual Arts programs. Further, the letter states that while a justification for eliminating the Visual Arts programs was presented at the Special Meeting of Senate on June 12, 2023, the AFC disagrees

with the data and analysis presented, and believes the programs could be revised to make them more financially viable.

[49] Provost Balfour deposes that a Faculty Council does not have any authority over the decision to reduce or eliminate an established program such as the Visual Arts programs.

[50] On September 18, 2023, the Senate held another Special Meeting. Provost Balfour deposes she attended that meeting in her capacities as both Provost and Senator. She explains that the purpose of the Senate's September 18, 2023 Special Meeting was for Senators to hear community input about the proposed elimination of the Visual Arts programs. The Senate heard six separate presentations made by eight presenters (two of the presentations were made jointly by two presenters).

[51] Professor Exner deposes that she delivered a speech before the Senate at this meeting setting out her experiences teaching Visual Arts courses, her concerns about the discontinuance of the Visual Arts programs, and advocating for a continuation of the Bachelor of Fine Arts program.

[52] The Faculty Association asserts that during the September 18, 2023 meeting, Senators raised concerns about whether the process in BD Policy 8-4 had been followed and the need to ensure decision-making processes were rigorous and transparent.

[53] On the evening of September 28, 2023, Provost Balfour sent an email to Dean McCutcheon, copied to President Fairbairn, which stated:

As a follow-up to my email dated June 1, 2023 please find my formal request for feedback and suggestions regarding the Visual Arts Programs. In my earlier email I notified yourself, the Department Chair, program coordinator, and faculty members of Visual Arts of the intention to consider the elimination of the following programs:

- Bachelor of Arts (Visual Arts)
- Bachelor of Arts Minor in Visual Arts
- Certificate in Literary and Art History
- Drawing and Painting Certificate

Visual Arts Diploma

Visual Arts Studio Certificate

The concerns with the programs are the declining student demand, no evidence of faculty engagement in program renewals since 2011 and concerning workload inequity within the Faculty of Arts.

Please provide input on these concerns and alternatives to elimination, or suggestions for reduction or elimination of only some of the identified programs. Please have the response to me by October 20, 2023, cc'd to the Chair of Senate

As per BD 8-4 (Regulation III), please advise the Department of Visual Arts of my request.

[54] The next day, on September 29, 2023, the Board held an *in camera* meeting. Provost Balfour deposes that she attended portions of this meeting in her capacity as Provost. At the meeting, both President Fairbairn and Provost Balfour provided the Board with an update on the status of the proposal to eliminate the Visual Arts programs. During this update, President Fairbairn informed the Board that the Senate was still considering the matter but expected the Board would be addressing the matter at its December 2023 Board Meeting.

[55] On September 29, 2023, as requested by Provost Balfour's September 28, 2023 email, Dean McCutcheon sent an email to the Chair of the Communications and Visual Arts Department copying Provost Balfour. That email stated:

As per BD 8-4 (Regulation III), I have been asked to advise you, as Chair of the Department of Communications and Visual Arts, of the following request from Dr. Gillian Balfour, Provost and VP Academic. Please share with the department as appropriate.

[56] On October 20, 2023, Dean McCutcheon responded to Provost Balfour's September 28, 2023 email, providing his "feedback and suggestions regarding Visual Arts programming in the Faculty of Arts". In a written memorandum to Provost Balfour and President Fairbairn, Dean McCutcheon attached the Faculty of Arts Academic Plan 2023-2028 and the final version of Provost Balfour's Visual Arts presentation to the Senate. Essentially, Dean McCutcheon suggested that:

- (1) three programs be retained, namely: the Visual Arts Diploma; the Certificate in Literary and Art History; and the Certificate in Drawing and Painting; and

(2) three programs be “phased out”, namely: the Bachelor of Fine Arts; the Bachelor of Arts Minor in Visual Arts; and the Visual Arts Studio Certificate.

[57] Dean McCutcheon asserted that there were “two programs that had a direct bearing on this discussion, and which are being prepared for consideration in the academic approval process”; namely, the Communication Design Major and the Communication Design Minor. Dean McCutcheon states in his submissions that he “strongly” supports these proposed new programs as “latter additions to our program offerings in the Faculty of Arts as our research show they would meet many needs and would be highly desirable to students in Kamloops and the region”. He adds that his “recommendation to the Board regarding Visual Arts have been reinforced by careful strategic thinking done in the Faculty of Arts by faculty members over the past several years”. Dean McCutcheon further submits:

Phasing out these three studio-based programs will allow the Faculty of Arts to redirect teaching resources to new program areas while strengthening the remaining visual arts programs. At the same time, this direction will also allow the university to reduce the current substantial footprint of Visual Arts, allowing TRU to develop the space more effectively to meet a wider range of student and program needs across the institution ...

[58] On October 23, 2023, the Senate held a meeting. Provost Balfour deposes that, as is usual at meetings of the Senate, she presented a report at the Senate’s October 23, 2023 meeting in her capacity as Provost (she is also a Senator). Provost Balfour addressed several matters and “also informed the Senate that the Chair of the Senate had asked [her], in [her] capacity as chair of the APPC, to make a presentation to the Senate about the proposed elimination of the Visual Arts Programs”.

[59] Provost Balfour noted in her affidavit “that the role of the APPC is to advise the Senate on educational goals, objectives strategies and priorities”.

[60] In response to the Chair of the Senate’s request at the October 23, 2023 Senate meeting, Provost Balfour spoke about the process that would be undertaken and also confirmed the presentation from the APPC about the discontinuance of the

Visual Arts programs would be brought to the Senate at its November 27, 2023 Meeting.

[61] On October 25, 2023, Professor Jones, also a Senator of TRU at that time, wrote another letter to the Board Chair. In that letter, he expressed his concern that there was a lack of clarity regarding what specific cancellations to the Visual Arts programs were being proposed by “TRU Executive”. Professor Jones deposes that in this letter he stated that:

... Senate had received an ever-evolving list of proposed Visual Arts cancellations, and that the Board have never made a request to Senate for its advice, which request would, [he] hoped, set out with particularity which programs were being proposed for termination ...

[62] Professor Jones further deposes that at the time he wrote this letter, “the program cancellations proposed by TRU Executive had gone from two, to four, to three, and most recently to six”.

[63] In anticipation of the next Senate meeting on November 27, 2023, Professor Jones prepared and circulated three motions to the Senate, each of which addressed the proposed elimination of the Visual Arts programs. In addition to his three motions, Professor Jones also circulated a memorandum to Senate that he authored, which he describes as a “background memorandum”. Professor Jones deposes that in this memorandum, he “explained the process of the Board requesting, and the Board providing, its advice under the Policy, and outlining the different combinations of programs that had been described as the programs to be cancelled”. In that memorandum, Professor Jones also expressed his view that “none of the steps required under the [BD Policy 8-4] were followed”.

[64] On November 20, 2023, APPC delivered a report to the Senate Secretariat entitled “Impact of the Elimination of Four Programs: Faculty of Arts” (“APPC Report”).

[65] On November 27, 2023, the Senate held a meeting and considered, among other matters, the proposed elimination of the Visual Arts programs. Provost Balfour

deposes that she also attended this meeting in her capacities as both Provost and Senator. Professor Jones deposes that, during that meeting, the Senate passed a motion declining to hear a presentation regarding the APPC Report. He deposes the Senate also declined to provide any advice to the Board on the elimination or revision of the Visual Arts programming at that meeting. In Professor Jones' view, the Senate declined to do so "because the Senate had, as yet, received no request for advice from the Board and so it was not even clear what specific programs were proposed for cancellation".

[66] Notably, the APPC Report, which was in fact available for consideration by the Senate on November 27, 2023 but which the Senate resolved not to address, actually identified the four specific Visual Arts programs that were being proposed for cancellation, including the underlying facts and rationale behind their cancellation.

[67] At the November 27, 2023 meeting, the Senate addressed the three motions proposed by Professor Jones. His first motion provided:

RESOLVED that the Chair of Senate shall write to the Chair of Board of Governors to say that Senate will not be in a position to provide any advice to the Board in accordance with its duty set out in Section 10 of the Thompson Rivers University Act related to any proposed closures of Visual Arts programs until it has received from the Board of Governors a written request for advice which sets out, at minimum, a concise list of the programs whose termination or reduction is sought and, in the case of a proposed program reduction, the nature and extent of the proposed reduction.

[68] This first motion was defeated.

[69] Professor Jones' second motion provided:

RESOLVED that, upon receiving a written request from the Board of Governors for its advice with respect to Visual Arts program closures, and not before, the Chair of Senate shall request a presentation, in accordance with BRD 8-4 Guideline VI.2, from the Academic Planning and Priorities Committee that will permit it "to obtain a more complete picture of impacts from the proposed reductions or eliminations" with respect to each of the programs identified by the Board as being programs whose termination or reduction is sought ("Identified Programs"). In accordance with Policy BRD 8-4, this request to the APPC will seek information and advice with respect to

each Identified Program on (a) educational losses; (b) expected financial and other resource savings; and (c) possible alternative actions for cost reduction.

[70] This second motion was adopted as proposed.

[71] Professor Jones' third motion provided:

RESOLVED that consideration or further consideration of Senate's advice to the Board of Governors regarding any proposed closures or reductions of Visual Arts programs is adjourned until:

1. Senate has received from the Board of Governors a written notice of intent to proceed pursuant to Guideline I of BRD 8-4, setting out a concise list of the programs whose termination or reduction is sought ("Identified Programs") and, in the case of a proposed program reduction, the nature and extent of the proposed reduction;
2. Senate has received a written request for advice from the Board of Governors with respect to each of the Identified Programs;
3. Senate has received from APPC information and advice with respect to each Identified Program on (a) educational losses; (b) expected financial and other resource savings; and (c) alternative actions for cost reduction; and
4. Senate is satisfied that, with respect to each of the Identified Programs,
 - A) An opportunity has been provided for "written input from any person or group" pursuant to BRD 8-4 Guideline V; and
 - B) A special meeting has been held in accordance with BRD 8-4 Guideline VI, and in particular that invitations to speak at that special meeting have been extended to stakeholders in each Identified Program including a. students taking the program, b. faculty delivering the program, c. administration responsible for the program, d. external groups such as alumni, the community, or First Nations.

[72] This third motion was amended and was adopted as amended. The amendment struck item 4 from the motion, since an opportunity had already been provided to stakeholders for written input and oral presentations to the Senate at its September 18, 2023 Special Meeting.

[73] Accordingly, Professor Jones' third motion, as amended, provided:

RESOLVED that consideration or further consideration of Senate's advice to the Board of Governors regarding any proposed closures or reductions of Visual Arts programs is adjourned until:

1. Senate has received from the Board of Governors a written notice of intent to proceed pursuant to Guideline I of BRD 8-4, setting out a concise list of the programs whose termination or reduction is sought ("Identified Programs") and, in the case of a proposed program reduction, the nature and extent of the proposed reduction;
2. Senate has received a written request for advice from the Board of Governors with respect to each of the Identified Programs;
3. Senate has received from APPC information and advice with respect to each Identified Program on (a) educational losses; (b) expected financial and other resource savings; and (c) alternative actions for cost reduction.

[74] This amended motion was adopted by Senate.

[75] On November 29, 2023, Provost Balfour wrote a memorandum to the Board wherein she addressed various subjects, including:

- (1) background facts surrounding the visual arts undergraduate program “comprised of 6 separate credentials that include: Bachelor of Fine Arts (Visual Arts Major), Minor of Visual Arts, Diploma of Visual Arts, Visual Arts Studio Certificate, Certificate in Literary and Art History; and Certificate of Drawing and Painting”;
- (2) brief history of visual art program changes and reviews;
- (3) faculty complement;
- (4) BD Policy 8-4; and
- (5) the application and analysis of BD Policy in relation to visual arts undergraduate program.

[76] On December 1, 2023, the Board held a meeting, a portion of which was *in camera*. Professor Balfour attended this meeting. She deposes that at this meeting, “the Board discussed the elimination of the Visual Arts Programs and the following related documents were circulated”:

- a) an October 20, 2023 memorandum of Dean McCutcheon;
- b) an email dated November 16, 2023 (expressed as 11/16/2023) to Senators from TRU's Secretariat, which provides administrative support to the Board

and the Senate, regarding a correction to a memorandum dated November 10, 2023 from President Fairbairn, in his capacity as Chair of the Senate, to the Senate; and

- c) a copy of the APPC Report addressing the Visual Arts Programs which had been provided to the Senate at its November 27, 2023 meeting.

[77] On December 3, 2023, Provost Balfour emailed President Fairbairn, in his capacity as Chair of the Senate, and addressed Dean McCutcheon's October 20, 2023 submissions. Her email observed, among other things, that the Certificate in Drawing and Painting and the Certificate in a Literary and Art History had only two students registered since 2014. Provost Balfour noted that "[g]iven the lack of student enrollment for almost a decade, it is important for the Dean to assess all credentials that comprise the Visual Arts Programs and to give a thorough assessment of possible alternatives". She concluded her email stating that "[t]he Dean's report is to be considered by the Board".

[78] On December 8, 2023, the Board Chair wrote to the Senate. That letter reads, in part:

The board recognizes that through the past few months, there has been significant discussion in the Senate and public venues about BRD Policy 8-4 and the implementation of its associated regulations and guidelines. The board is aware that questions have been raised by some about whether all steps have been properly taken. The board has been fully informed from the beginning and has carefully review the process that has been followed and is satisfied the process has fulfilled the requirements as well as the spirit of the policy and regulations. It has been through, inclusive of different perspective, and meaningful. The process has met the objective and consultative principles of the policy, offering ample information for the board to consider in relation to these proposed closures.

...

In relation to program terminations, the board's responsibility is directed by Section 10 of the TRU Act, which requires the board to seek the Senate's advice before deciding. Section 10 also state that the Senate must advised the board. This latter provision is an obligation of the Senate but not a limitation on the board, meaning that the board does to need to wait indefinitely for the Senate to fulfill its responsibilities. BRD Policy 8-4 provides at least 10 days and normally one month for the Senate to give its advice.

The board respects and acknowledges the Senate's recent decision not to provide substantive advice. The board will consider the proposed closures

and decides at a special meeting of the board in late January. This decision will be based on the criteria set out in BRD 8-4, Regulation I.

Should the Senate with, the board remains open to receiving advice at any point before its late January meeting. The Board intends to proceed with consideration of the proposed elimination of the four programs in Visual Arts, including BFA (Visual Arts Major), the BA (Visual Arts Minor), the Diploma of in Visual Arts, and the Visual Arts Studio Certificate.

To assist the Senate in this regard, the Board has requested Senate's advice with respect to:

- Each of the respective VA program eliminations and such advice should address educational losses, expected financial and other resource savings, and possible alternative actions for cost reduction.
- The Board expects the Senate's advice by January 24, 2024, shortly after which date the Board will proceed with its decision.

The board previously communicated its intent to consider the elimination of these programs and its request for the advice of the Senate in the normal manner through university leadership. The board is comfortable repeating its intent and request to the Senate in writing.

I want to reassure everyone that even without substantive advice from the Senate, the board is committed to ensuring that this decision, along with every decision we make, considers the diverse voices of our community. We will ensure that this decision aligns with the mission and values of TRU and serves the best interests of the entire university, including students, faculty, staff, and our broader community.

[Emphasis added.]

[79] On December 11, 2023, Provost Balfour attended the Senate's December 11, 2023 meeting in her capacities as both Provost and Senator. She deposes as follow regarding a presentation given to Senate about the APPC Report as well as the discussion at that Senate meeting of the Board Chair's December 8, 2023 email to the Senate:

At the Senate's December 11, 2023 Meeting, I addressed various outstanding items from the APPC's November, 2023 report to Senate. One of those outstanding items was the APPC Report entitled "Re: Impact of the Elimination of Four Programs Faculty of Arts".

On behalf of the APPC, Daleen Millard ("Dean Millard"), then and now a Senator, a faculty member in and the Dean of the Faculty of Law and a member of the APPC, presented the work of the APPC in relation to the impact of the elimination of the Visual Arts Programs. Dean Millard noted the Senate had received in its Agenda package, the APPC's entire written report, which was unchanged since the report had been circulated in the agenda package for the Senate's November 27, 2023 Meeting.

At the Senate's December 11, 2023 Meeting, there was also discussion of Exhibit 27, being the December 8, 2023 communication from the Board Chair to the Senate.

[80] On January 16, 2024, Professor Exner, along with four permanent faculty members in the Department of Communication and Visual Arts and one Visual Arts Studio Technician, jointly wrote to the Board to provide submissions in favour of the continuation and renewal of TRU's Bachelor of Fine Arts program. The submissions addressed a number of factors including: the nature and significance of the Bachelor of Fine Arts program, alumni success, research, Indigenous student engagement, planning, and community engagement.

[81] The Senate met on January 22, 2024. Three additional motions were considered.

[82] The Senate considered a motion by Professor Jones which provided:

RESOLVED that prior to Senate giving advice to the Board with respect to program eliminations or reductions in the Visual-Arts Programs, the ED 8-4 review of the Visual Arts programs that was due in 2018 must be completed.

[83] This motion was defeated.

[84] At that same meeting, the Senate also considered the following motion:

That Senate advise the Board that Senate does not wish to cancel the Fine Arts programs until there is a program review in full consultation with Indigenous students in the program.

[85] This motion was also defeated.

[86] At its January 22, 2024 meeting, the Senate also considered a third and final motion with respect to the elimination or reduction of the Visual Arts programs:

On a one time, non-precedent setting basis, Senate shall provide the following to the Board as advice from Senate:

- The APPC report
- Written submissions of 8 stakeholders
- Arts Faculty Council submission

[87] This motion was adopted by a large margin of the Senate.

[88] On or about January 26, 2024, Provost Balfour provided the Board with a memorandum she prepared about the elimination of the four named Visual Arts programs. She deposes that her purpose in preparing this memorandum is summarized in the first paragraph of her memorandum as follows:

This memo serves as a summation of the information gathered since March 2023 as required under BRD 8-4, to assist the Board in reaching its decision on the elimination of the specific Visual Arts programs. The Board's decision is to be based on the following criteria set out in the policy: financial effectiveness, student demand, graduate employment, and alternative program providers.

[89] On January 29, 2024, the Board held an Extraordinary Public Meeting. Provost Balfour attended this meeting, again in her capacity as Provost and Senator. She deposes that at this meeting, the Board received the following materials in relation to its consideration of the proposed elimination of the Visual Arts programs:

- a) a presentation from the Visual Arts Department;
- b) the Senate's advice, which was provided in conformity with the resolution passed by Senate at its January 22, 2024 Meeting; and
- c) the Provost's January 26, 2024 Memorandum.

[90] At its January 29, 2024 Extraordinary Public Meeting, the Board adopted the following motion:

On motion duly made and adopted, it was resolved that the Board of Governors directs the TRU administration to discontinue immediately the following four programs in Visual Arts: 1, The BFA (Visual Arts, major); 2. The BA (Visual Arts, minor); 3. The Diploma in Visual Arts; and 4. The Visual Arts Studio Certificate.

[91] This is the second decision under judicial review in these proceedings.

[92] Provost Balfour deposes that after the January 29, 2024 Board meeting, TRU's administration acted in conformity with the Board's decision, including making provision for each student who was enrolled in one of the Visual Arts programs as of January 29, 2024 to complete the students' education. She adds that "in practical terms, this meant there would not be any new enrollments in the Visual Arts

Programs in and after September 2024 but that current students who wished to continue in the Visual Arts Programs would be taught in conformity with the requirements of the Visual Arts Programs”.

III. LEGAL ANALYSIS AND DISCUSSION

A. Standard of Review

[93] The parties are agreed that the standard of review in this case is reasonableness, as affirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*].

[94] The Faculty Association relies on the reasoning at paras. 67-68 of *Vavilov*, underscoring that a reasonableness review “does not give administrative decision makers free rein in interpreting their enabling statutes” and “does not give them licence to enlarge their powers beyond what the legislature intended”. Specifically, the Faculty Association argues that by suspending enrollment and discontinuing the Visual Arts programs, TRU did precisely that. The Faculty Association asserts that TRU acted unreasonably by acting outside the scope of its statutory authority.

[95] Essentially, the Faculty Association argues that TRU breached its statutory duties under s. 10 of the *TRU Act* by not *properly requesting* the advice of Senate and, further, that it made its decisions to suspend enrollment and discontinue the Visual Arts Programs *without receiving advice* from the Senate. As such, it acted outside the scope of its statutory powers, and its decisions fail to meet the standard of reasonableness.

[96] TRU submits that the presumptive standard of review on the merits of a decision is reasonableness: *Vavilov* at paras. 10, 23–32; *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, at paras. 7–8, 39–44. Further, TRU submits that it met its statutory duties by seeking the advice of Senate, as required, and by both receiving and accepting the advice of Senate before deciding to discontinue the Visual Arts Programs.

[97] TRU submits that reasonableness will always depend on the legal and factual context of the particular decision under review, such that reasonableness “takes its colour from the context”. Accordingly, TRU argues that, in light of the context of this case, it acted reasonably: *Vavilov* at paras. 89–90.

[98] On the issue of procedural fairness, TRU asserts this issue turns on whether, in all the circumstances, the decision maker acted fairly: *Nova-BioRubber Green Technologies Inc. v. Investment Agriculture Foundation of British Columbia*, 2022 BCCA 247 [*Nova-BioRubber*] at para. 71.

[99] The standard of review is a question of law to be determined by the court: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45–46; *Maroofi v. Health Professions Review Board*, 2021 BCCA 111 at para. 34; *Nova-BioRubber* at para. 39.

[100] In the context of this case, I agree with the parties that the standard of review on the merits of TRU’s decisions to suspend enrollment and, later, its decision to discontinue the Visual Arts programs is one of reasonableness: *Vavilov* at paras. 80, 90, 73–109. Further, as affirmed in *Vavilov*, matters of statutory interpretation are not treated uniquely; as with other questions of law, such cases are also evaluated on a reasonableness standard: *Vavilov* at paras. 115–118. To the extent there is any breach of procedural fairness, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *Nova-BioRubber* at para. 71.

B. Decision to Suspend Visual Arts Enrollment

1. Positions of the Parties

[101] The Faculty Association submits that TRU’s decision to suspend enrollment in the Visual Arts programs and courses in April 2023 constituted a “revision or discontinuance” of these programs for the purposes of s. 10(b) of the *TRU Act*. This provision of the *TRU Act*, submits the Faculty Association, required the Board of TRU to “seek advice from the Senate” and required the Senate to “advise” the Board before suspending enrollment. Having done neither, the Faculty Association argues

that TRU breached their statutory obligation under s. 10(b) of the *TRU Act* and the decisions should be set aside. In this regard, the Faculty Association relies on the decision of this court in *Capilano University Faculty Association v. Capilano University*, 2014 BCSC 712 [*Capilano University*] at paras. 23, 27–28, 30.

[102] In the alternative, the Faculty Association argues that if the Board did not make the decision to suspend the Visual Arts programs in March 2023, the decision was made by the Provost and/or the Dean of Arts on behalf of the University without the proper authority to do so.

[103] I have determined on the facts before me that this decision to suspend student enrollment was made by the Provost and the Dean. Indeed, TRU refers to this decision as one that was made by them. In this context, the Faculty Association argues that it was incumbent on the Provost and/or the Dean to refer this matter to the Board for decision. As such, argues the Faculty Association, because the decision to suspend enrollment was made in this way and without resolution by the Board to seek advice from the Senate, TRU did not have the authority to make the decision to suspend the enrollment under the Enabling Legislation and the decision is *ultra vires*.

[104] In response, TRU advances four first principles of judicial review. First, TRU underscores that this case does not involve a judicial review of a decision made by an administrative tribunal in an adjudicative proceeding, akin to a judicial or quasi-judicial process. Rather, TRU argues, this case involved a process followed by TRU to gather information and advice for review and consideration by its Board to later enable the Board to make an informed decision about whether the Visual Arts Programs should be continued. Accordingly, TRU submits that the Court must be mindful that the discontinuation of the Visual Arts Programs was a discretionary decision that was within the Board’s statutory powers to make.

[105] Second, TRU submits a reasonableness review is meant to ensure that the reviewing court only intervenes in administrative matters “where it is truly necessary to do so in order to safeguard the legality, rationality and fairness” of the

administrative process in question. The approach in cases such as these, argues TRU, “finds its starting point in the principle of judicial restraint” with respect for the “distinct role of administrative decision makers”.

[106] Third, TRU submits that where, as is the case before the Court, no reasons for the administrative decision are required or provided, the reviewing court must look to the record before it as a whole to understand the decision, including the decision maker’s reasoning process. Further, the court is not to re-weigh the evidence or the decision maker’s rationale in its assessment of whether the decision was reasonable.

[107] Fourth, TRU submits that the task of the reviewing court is to ensure that the statutory provision in question is interpreted according to the modern approach of statutory interpretation. TRU asserts that the focus of such statutory interpretation must be on the overall context of the statute while following the ordinary and grammatical meaning of the words chosen by the legislature, harmonized with the spirit of the statute including its purpose and legislative intent.

[108] In this light, TRU submits that its April 2023 decision to suspend further applications for enrollment, pending the Board’s decision about whether to eliminate the Visual Arts programs, was operational in nature and not a matter of “educational policy for... the revision or discontinuation of courses and programs at the university” within the meaning of s. 10(b) of the *TRU Act*. TRU underscores that not all decisions made by an administrative body are amenable to judicial review; the decision to suspend further applications for enrollment in the Visual Arts programs is such a decision.

[109] In the alternative, TRU submits that, if TRU’s April 2023 decision to suspend applications to the Visual Arts programs is found to be amenable to judicial review, this decision was reasonable in light of the factual and legal context in which it was made, including the decision’s underlying rationale.

[110] TRU submits that, in April of 2023, Provost Balfour and Dean McCutcheon had concluded that the viability of the Visual Arts programs was in sufficient doubt that the possibility of eliminating the programs should be considered. TRU explains this conclusion was based on very low student completion rates in, and exceptional operational costs of, the Visual Arts program.

[111] TRU further submits that when TRU's Registrar brought Policy BD 8-4 to the attention of the Provost and Dean, upon their review of the policy, it was apparent that Policy BD 8-4 does not address the related student application and enrollment cycle. TRU adds that "had the Board decided, at the end of January 2024, to continue the Visual Arts programs, applications could have been immediately re-opened for enrollment in September of 2024 offering of the Visual Arts programs".

2. Discussion and Analysis

[112] TRU is a statutory decision maker and, as such, its administrative decision makers must derive their authority from the Enabling Legislation. I have reviewed both the *TRU Act* and the *University Act*, as well as the submissions of counsel, and I do not see the statutory authority upon which the Provost and/or Dean were granted the unilateral power to suspend enrollment in the Visual Arts program. This, therefore, begs the question: Did the legislature intend to leave the determination of who could suspend enrollment in an educational program solely to the Provost and the Dean? I am satisfied, upon reviewing the Enabling Legislation, that the Provost and the Dean did not have the statutory authority to suspend enrollment in April of 2023 and that they acted beyond their authority by not referring the matter to the Board for direction and decision. I am satisfied that had the legislature intended for them to have that administrative authority, it would have made provision for that authority in the Enabling Legislation. It did not do so.

[113] As such, the decision to suspend enrollment does not meet the standard of reasonableness on judicial review. As the Supreme Court of Canada reasoned in *Vavilov*, at para. 68, a reasonableness review does not give administrative decision makers the licence to enlarge their powers beyond what the legislature intended.

Rather, the governing statutory scheme will always operate as a constraint on administrative decision makers, as a limit on their authority.

[114] TRU submits that the decision to suspend enrollment was an operational decision made by the Provost and the Dean that is not subject to judicial review. For the following reasons, I do not agree.

[115] The decision to suspend enrollment was a matter of Board governance that affected the affairs of the University and impacted the provision of educational services that impacted both students and faculty. The decision was of sufficient importance to engage the Board's statutory duties and obligations.

[116] I am, in any event, also satisfied that the decision of the Provost and the Dean to suspend enrollment was of a sufficient public character to be subject to judicial review. In *Nova-BioRubber* at para. 53, our Court of Appeal reasoned that the question of whether an impugned decision is of a sufficient public character to warrant judicial review is to be determined in accordance with the principles set out by the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 [*Highwood*]. At para. 54 of *Nova-BioRubber*, our Court of Appeal summarized the law on this question as follows:

[54] As explained in *Highwood*, the process of judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them. Judicial review is only available where there is an exercise of state authority that is of sufficiently public character: *Highwood* at paras. 13–14. The concept of “public” in this context means in a public law sense. The decisions of a private body do not become subject to judicial review simply because they may impact a broad section of the public; rather, a decision has a public character where it “involves questions about the rule of law and the limits of an administrative decision maker’s exercise of power”: *Highwood* at para. 20.

[Emphasis added.]

[117] One of TRU's statutory purposes is to offer baccalaureate and master's programs to the public. This statutory purpose, coupled with the effect of its decision

to limit student enrollment, engages the interests of both students and faculty members. I find, therefore, that it is of a sufficiently public character to render the decision subject to judicial review.

[118] Decisions of a sufficiently public character that exceed the powers granted by the enabling legislation are subject to remedial relief under the *JRPA* and the common law. I am satisfied that, in light of the purpose and language of the Enabling Legislation, including s. 7 of the *TRU Act*, if the matter were to be remitted back for reconsideration that it must be remitted back to the Board. Again, it is the Board, not the Executive of the University that ultimately has the power and duty to manage, administer, and control the business and affairs of the University, albeit after seeking the advice of the Senate in the appropriate circumstances. The governance scheme under the *TRU Act* and the *University Act* grants the Board the power to make decisions regarding the affairs of the University, which include enrollment decisions. As such, under the statutory governance scheme, if the matter were to be remitted back, it must be remitted back to the Board for decision.

[119] However, remitting the matter to the Board, at this point in time, makes little sense because the issue of the Provost's and the Dean's authority to suspend enrollment in the Visual Arts Programs has now been rendered moot, and no useful purpose would be served in doing so: *Vavilov* at para. 142. The enrollment period for the 2023-2024 school year has long passed. Furthermore, the Board has now determined that the Visual Arts Programs should be discontinued. In addition, as I address in the next part of these Reasons, I have concluded that the Board's decision to discontinue the Visual Arts Programs met the requisite statutory requirements and was a reasonable one in light of the circumstances before me. Furthermore, a declaration is also a discretionary remedy that I find would serve no useful purpose in these circumstances. I am also mindful that no substantial miscarriage of justice has occurred.

C. Board's Decision to Discontinue Visual Arts Programs

1. Positions of the Parties

[120] The Faculty Association asserts that the Board's decision on January 29, 2024, to discontinue the Visual Arts programs failed to comply with s. 10(b) of the *TRU Act*. It makes several arguments in this regard.

[121] First, the Faculty Association argues that under the TRU Board of Governors Bylaws, the Board can only act by resolution. More specifically, the Faculty Association asserts that the Board must seek the advice of the Senate under s. 10 of the *TRU Act*, and must only do so after passing a resolution to seek such advice with respect to the discontinuance of the Visual Arts programs. However, asserts the Faculty Association, the Board did not pass a resolution to seek the advice of Senate regarding the discontinuance of these programs or consider the advice from the Senate regarding their discontinuance.

[122] Second, the Faculty Association submits that, under s. 10 of the *TRU Act*, when the Board seeks advice from the Senate regarding the discontinuance of educational programs, the Board must identify the particular programs in question; however, it failed to do so.

[123] Third, the Faculty Association argues that, although the Chair of the Board wrote to the Senate on December 8, 2023, stating it was seeking the advice of Senate, that letter also stated that the Board would make a decision without advice from the Senate.

[124] Fourth, despite purporting to discontinue the Visual Arts Programs by way of a motion passed on January 22, 2023, the Faculty Association argues that at no time did the Senate provide any advice to the Board in that motion. The only purported "advice" given by the Senate to the Board was to provide the Board with conflicting submissions from stakeholders and submissions from the APPC and the Faculty of Arts Council, regarding the proposed discontinuance of the Visual Arts programs, without providing any advice or recommendations.

[125] The Faculty Association adds that compliance with s.10(b) of the *TRU Act* cannot be achieved by way of a technical or superficial exercise. Substantive advice must be genuinely sought by the Board from the Senate for good faith consideration, and substantive advice must be provided by the Senate in accordance with its duties.

[126] The Faculty Association refers to *Lakeland College Faculty Association v. Lakeland College*, 1998 ABCA 221 [*Lakeland College*], at para. 82, where the Alberta Court of Appeal reasoned that a similarly mandatory obligation of consultation under the *Colleges Act*, R.S.A. 1980, c. C-18, was a substantive obligation that could not be satisfied where the consultation was “inadequate”. The Faculty Association also relied on *Capilano University* at paras. 19–21.

[127] The Faculty Association submits that the duty of the Board to genuinely seek the advice of the Senate and the duty of the Senate to provide substantive advice to the Board cannot be avoided by way of delegation, development of policy, or expediency concerns: *Vancouver Community College Faculty Association v. Vancouver Community College*, 2005 BCSC 119 [*VCC*], at paras. 39–41.

[128] The Faculty Association argues that the Board failed to genuinely seek advice from the Senate, and the Senate failed to provide any substantive advice to the Board with respect to the discontinuance of the Visual Arts Programs, as required by s. 10 of the *TRU Act*.

[129] In response, TRU relies on the four first principles of judicial review, which I summarized earlier in these Reasons. Furthermore, it makes the following additional submissions.

[130] TRU asserts that, under the *TRU Act* and the *University Act*, the ultimate decision-making power in relation to program and course elimination or reduction rests with the Board. It acknowledges that before exercising this power, the Board has a statutory duty to seek advice from the Senate on the development of

educational policy for the establishment, revision, or discontinuance of courses and programs. TRU submits that advice was sought from the Senate and given.

[131] As regards the proper interpretation of the language of s. 10, TRU relies on *Vavilov* at paras. 120–121 and emphasizes: 1) that the decision maker’s interpretation of the statutory provision must be consistent with the text, purpose, and context of the Enabling Legislation; and 2) where the words used are “precise and unequivocal”, their ordinary meaning will usually play a more significant role in the interpretive exercise.

[132] With respect to the text of s. 10, TRU underscores that its language is precise and unequivocal: there is a statutory obligation that the Senate “must advise” the Board and a statutory obligation that the Board “must seek advice” from the Senate. As such, TRU argues that applying the modern principles of statutory interpretation, the text of s. 10 requires only that the Board seek advice from the Senate and that the Senate advise the Board on the development of educational policy for, among other things, the “revision or discontinuance of courses and programs at the university.”

[133] With respect to its purpose, TRU submits that an important purpose of the structure of s. 10 is to ensure the Senate cannot defeat the Board’s power to decide a matter before the Board by failing or refusing to provide advice, once that advice has been sought by the Board.

[134] Regarding the interpretive context of s. 10, TRU submits that it engages the system of governance established by the Enabling Legislation wherein the Board has the power to make decisions about the revision or discontinuance of courses and programs. However, TRU also recognizes that within this statutory governance system, decisions such as the discontinuation of educational programs embody an academic component, which is a subject matter that is generally within the authority of the Senate. In this light, TRU submits that the purpose of s. 10(b) of the *TRU Act* is to ensure the Board is informed about the academic component by requiring the Board to seek, and the Senate to provide, certain academic advice.

[135] Nevertheless, the Board underscores that the power to decide is, and remains, within the Board's purview.

[136] TRU also argues that the Board exercised its power to discontinue the Visual Arts programs after it engaged in a lengthy and thorough process, guided by BR Policy 8-4, to share information with, and to hear from, various stakeholders. Ultimately, TRU argues, the Board sought the advice that the Senate provided about the discontinuation of the Visual Arts programs and considered that advice.

[137] TRU underscores that there is no statutory requirement that the Senate's advice to the Board take any particular form. Accordingly, on January 29, 2024, the Board received and considered the Senate's advice, provided in conformity with the Senate's January 22, 2024 resolution. The Board then made its decision.

[138] As such, TRU argues there was no breach of any statutory requirements associated with the exercise of its statutory power, no unfair process, and no unreasonable decision.

2. Discussion Regarding the Board's Decision to Immediately Discontinue the Visual Arts Programs

[139] I am largely in agreement with TRU's submissions regarding the reasonableness of the Board's January 29, 2024 decision to discontinue the Visual Arts Programs.

[140] Considering the text, context, and purpose of the *TRU Act*, I am satisfied that the Board acted within its jurisdiction in making its decision to discontinue the Four Visual Art Programs in question and that it both sought and received the advice of Senate in making this decision. The following synthesis of the factual context is particularly instructive.

[141] As early as the May 29, 2023 Senate meeting, Dean McCutcheon gave a detailed PowerPoint presentation to the Senate that addressed the rationale for the proposed elimination of the Visual Arts programs. As well, at that meeting, Provost Balfour addressed the process that would be followed under its BD Policy 8-4. A

Special Meeting of the Senate was then called on June 12, 2023, where Provost Balfour made a presentation outlining the terms of BD Policy 8-4. At that meeting, she addressed the requirement that the Board seek the advice of the Senate and that the Senate advise the Board on the discontinuation of Visual Arts programs. A copy of BD Policy 8-4 was made available to the Senate by way of a “Link to Policy” in the Agenda provided to the Senate at the June 12, 2023 meeting.

[142] At the June 16, 2023 public meeting of the Board, Provost Balfour presented information that included the governance processes being followed by the Board and also addressed the respective roles of the Senate and the Board regarding the proposed elimination of Visual Arts programs, including the Board’s obligation to seek the advice of the Senate. At this June 16, 2023 meeting, the Chair of the Board expressly noted that the Board looked forward to receiving the advice of the Senate before making a final decision.

[143] On July 7, 2023, the Senate set the wheels in motion for another Special Meeting on September 18, 2023 in which the Senate invited input from: “key stakeholders who may be affected by a decision to wind down the Bachelor of Fine Arts (BFA), the Certificate and the Diploma (Fine Arts) programs by 2026”. Several written and oral presentations from various community members and faculty representatives were subsequently received and considered by the Senate at its Special Meeting on September 18, 2023.

[144] The Senate met in October and November 2023 and, during that time, it also received the APPC Report on the “Elimination of the Four Programs: Faculty of Arts”. The Senate passed a resolution at its November meeting adjourning the advice it was to provide to the Board on the conditions set out earlier in these Reasons, which reflected the requirements of BD Policy 8-4.

[145] On December 8, 2023, the Board Chair wrote to the Senate affirming that “the board previously communicated its intent to consider the elimination of these programs and its request for the advice of the Senate in the normal manner through university leadership”. In this letter, the Board Chair repeated the Board’s intent and

request for the Senate's advice regarding the elimination of "four programs in Visual Arts, including BFA (Visual Arts Major), the BA (Visual Arts Minor), the Diploma in Visual Arts and the Visual Arts Studio Certificate".

[146] In this light, I am unable to accept the Faculty Association's assertion that the Board acted unreasonably and outside its statutory authority by not passing a specific resolution to seek the advice of Senate on the proposed discontinuation of the Visual Arts Programs. I find the Board made clear requests for the Senate's advice on the issue and did so expressly on the record.

[147] I do not accept the Faculty Association's argument that the Board did not "genuinely" seek the advice from Senate. Considering the entire record before me, I find the Board actively sought the advice of Senate, received it and considered it. To be clear, I find the Board did not, ultimately, proceed to make a decision without receiving the Senate's advice.

[148] I am also unable to accept the argument that advice was not properly sought from the Senate by the Board. Further, I also do not accept the argument that the Senate was not properly apprised of which Visual Art programs were being considered for elimination. When the Senate met on December 11, 2023, it considered the APPC Report, as well as the Board Chair's letter of December 8, 2023. The Board Chair's letter affirmed that the Board was seeking the advice of the Senate and the APPC Report clearly identified and addressed the four specific programs that were proposed to be discontinued, as well as various factors underlying the proposed discontinuation of the Visual Arts Programs.

[149] Regarding the Faculty Association's argument that the Senate did not provide advice to the Board, I am particularly mindful that the Senate passed a motion on January 22, 2024, adopted by a large margin of the Senate, which provided:

On a one time, non-precedent setting basis, Senate shall provide the following to the Board as advice from Senate:

- The APPC report
- Written submissions of 8 stakeholders

- Arts Faculty Council submission

[Emphasis added.]

[150] It is significant that the Senate itself characterized its own motion as “advice from Senate”.

[151] Given the highly controversial nature of the issue before it, it is perhaps not surprising that the advice received from the Senate was informational in nature rather than directive. In any event, I agree with TRU that there is no statutory requirement that the Senate’s advice to the Board must take a particular form.

[152] The Oxford Dictionary definition of the word “advice” supports my conclusion that the Board did receive advice from the Senate. The Oxford Dictionary defines advice as “guidance *or* recommendation offered with regard to prudent action”. Notably, “advice” need not be in the form of a recommendation. I find that in the circumstances of this case, the Senate provided the best guidance it was able to provide. The guidance that was provided by the Senate at the Board’s express request, consistent with the wording of s. 10 of the *TRU Act*, comprised compiling the significant amount of information the Senate gathered and then sharing it with the Board.

[153] In this light, the facts of this case are clearly distinguishable from those relied upon in *Capilano University* and *VCC* upon which the Faculty Association relies. In this case, I have concluded that TRU was in compliance with its statutory duties and obligations when it discontinued the Visual Arts Program. In the final analysis, the Board clearly sought the advice of the Senate, received such advice, and considered it in reaching its decision.

[154] In addition to the Senate’s advice provided by way of formal resolution on January 22, 2024, the Board also considered: 1) a presentation from the Visual Arts Department; 2) the recommendation of the University’s senior administration about the proposed elimination of the Visual Arts programs; and 3) information about the Visual Arts programs financial effectiveness, enrollment data, space utilization,

student demand, graduate employment, and alternative program providers. Having considered all this information and the advice provided by the Senate, the Board exercised its statutory discretion and adopted the motion it did on January 29, 2024 to discontinue the Visual Arts Programs.

[155] Further, I find TRU’s decision-making process in reaching the decision to discontinue the Visual Arts Programs was fulsome, conducted in good faith and essentially in conformity with BD Policy 8-4. In this sense, the decision in *Lakeland College*, on which the Faculty Association relies, is also distinguishable on its facts. The consultation process was both thorough and fair.

[156] In conclusion, I find the Board acted within its statutory powers, acted reasonably, and undertook a process that satisfied the requirements of procedural fairness when it decided on January 29, 2024 to direct TRU’s administration to immediately discontinue: 1) the Bachelor of Fine Arts (Visual Arts, Major); 2) the Bachelor of Arts (Visual Arts, Minor); 3) the Diploma in Visual Arts; and 4) the Visual Arts Studio Certificate.

IV. DISPOSITION

[157] For the reasons set out above, this petition is dismissed.

“Morellato J.”