

Discipline, Interpretation, and Enforcement (DIE) Board

Ruling of the Board

(1) HEARING DETAILS

Style of Cause:	<i>Reference re: Fiduciary Duties of Council</i>
Hearing Number:	Ruling #2, 2008/2009
Hearing Date:	Tuesday, November 25, 2008
DIE Board Tribunes:	Dane Bullerwell (Associate Chief Tribune), Lorne Phipps, Kurtis Streeper
Appearing for the Applicant:	Beverly Eastham, Vice President (External), Students' Union
Appearing for the Respondent:	n/a
Intervener(s):	n/a

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(2) INTERPRETATION QUESTIONS

The Vice President (External) of the Students’ Union requests the following:

An interpretation is requested from DIE board as to the meaning of and scope of “fiduciary responsibility to the Students’ Union” as stated in bylaw 2000 s. 13(4) which states:

“Students’ Council shall, at the meeting following the drafting of the petition question by the Bylaw Committee as set out in Section 13(3), approve a question which meets the criteria set out in Section 13(3) unless the question would cause Students’ Council to breach its fiduciary responsibility to the Students’ Union”

Also, an interpretation is requested as to the interaction and relation, if any, of the Students’ Union’s fiduciary responsibility and the Students’ Union’s mandate, be the mandate that of the specific institution (the Students’ Union mission statement (to serve students in ways which meet students needs) and/or the Students’ Council standing committee mandates as outlined in bylaw 100 s. 16) or that of the organization as outlined in the Post-Secondary Learning Act (s. 93 and s. 95).

(3) RELEVANT LEGISLATIVE PROVISIONS

A. Students’ Union Bylaw 100 (A Bylaw Respecting Students’ Council)

Section 17: Conflict-of-Interest

(1) No person shall use a Students’ Union position that he/she holds to further personal business interests.

...

Section 19: No Force or Effect

Any decision of Students’ Council that is in conflict with federal or provincial statute or with the Common Law is of no force or effect.

B. Students’ Union Bylaw 1500 (Judiciary of the Students’ Union)

Section 2: Mandate

The Board is the organ of the Students’ Union responsible for the interpretation and enforcement of Students’ Union legislation.

Section 3: Scope of Cases

The scope of the Board shall be limited to actions and appeals brought before it that:

- (a) initiate a complaint about a contravention of Students' Union legislation or;
- (b) request an interpretation of Students' Union legislation.

C. Students' Union Bylaw 2000 (Elections, Plebiscites, and Referenda)

Section 2: Definitions

In this bylaw,

- k. "referendum" shall be a vote, open to all members except the C.R.O, held on a given question and whose result is legally binding upon the Students' Union;

Section 13: Plebiscite and Referendum Initiation

(1) Where a member wishes to initiate a plebiscite or referendum via petition, that member shall submit to the C.R.O.:

- a. the intent of the question;
- b. whether the question is a plebiscite or a referendum;
- c. the name, faculty, and student identification of that member;
- d. a twenty-five dollar (\$25.00) deposit in the form of cash or a certified cheque or money order payable to the Students' Union.

(2) Upon receipt of a submission meeting the requirements set out in Section 13(1), the C.R.O. shall immediately forward the intent of the question to the Bylaw Committee.

(3) The Bylaw Committee shall approve within fourteen (14) days from receiving the intent of the question from the C.R.O., a petition question which:

- a. fully reflects the intent submitted by the member;
- b. if carried and acted upon, would not violate any Students' Union bylaws or any federal or provincial law;
- c. where the plebiscite or referendum is to approve the collection of a University non-academic fee, provides for the formation of a permanent committee to oversee and direct the expenditure of this fee, such committee to have Students' Union members in voting positions proportional to the contribution of Students' Union members;
- d. where the plebiscite or referendum is to approve the collection of a fee for a University facility or service, provides access by any Students' Union member to that facility or service.

(4) Students' Council shall, at the meeting following the drafting of the petition question by the Bylaw Committee as set out in Section 13(3), approve a question which meets the criteria set out in Section 13(3) unless the question would cause Students' Council to breach its fiduciary responsibility to the Students' Union.

(5) Sections 13(2) and 13(3) notwithstanding, where it is not possible for the Bylaw Committee or Students' Council to approve a petition question which meets the criteria set out in Section 13(4), neither the Bylaw Committee or Students' Council shall approve such a question.

(6) Students' Council shall have the authority to call a plebiscite or referendum without a petition.

(7) Prior to being approved by Council all plebiscite and referendum questions must be drafted by the Bylaw Committee.

D. Post-Secondary Learning Act, S.A. 2003, c. P-19.5

Section 93 – Student Association:

(1) The Lieutenant Governor in Council shall by order establish a students association for each public post-secondary institution other than Banff Centre and shall give the students association a name consisting of the words “The Students Association of” followed by the name of the public post-secondary institution.

...

(3) The students association of a public post-secondary institution shall provide for the administration of student affairs at the public post-secondary institution, including the development and management of student committees, the development and enforcement of rules relating to student affairs and the promotion of the general welfare of the students consistent with the purposes of the public post-secondary institution.

...

Section 98 – Student Petitions:

(1) Members of a student organization may, by a petition that is determined to be sufficient in accordance with a bylaw passed under section 95(2), require the council of the student organization to conduct a vote on and implement any resolution pertaining to the affairs of the student organization.

(2) If a council has not passed the bylaw referred to in subsection (1), the petition is sufficient if it is signed by at least 10% of the members of the student organization.

(4) MAJORITY OPINION (BULLERWELL AND STREEPER)

(4.1) Introduction

[1] This case is the latest instalment in a long line of DIE Board decisions that relate to referenda and plebiscite questions. Bylaw 2000, the Students’ Union election bylaw, allows a student to initiate a “legally binding” referendum by collecting student signatures on a petition. Bylaw 2000 requires Students’ Council to approve such a referendum question unless its enactment “would cause Students’ Council to breach its fiduciary responsibility to the Students’ Union.” The primary issue in this request for interpretation is the meaning of the phrase “fiduciary responsibility” in the context of Bylaw 2000.

[2] The Board must give meaning to the words “fiduciary responsibility” by applying one or more of the usual approaches to statutory interpretation. These can include considering the “plain meaning” of the provision, analyzing the text of the provision, examining the provision within the larger context of the bylaw as a whole, reviewing multiple sources of Students’ Union legislation to determine how the provision fits into an overall legislative scheme, and inquiring into the purpose or understanding of Students’ Council when it passed the provision.

[3] We begin by considering whether the phrase “fiduciary responsibility” refers to a legal concept or a non-legal concept, then go on to consider the source of any such fiduciary responsibility.

(4.2) Is the concept of a “fiduciary responsibility” included in s. 13(4) a legal concept or a non-legal concept?

A. Nature of the term “fiduciary”.

[4] The meaning of “fiduciary responsibility” is tied to the definition of the word “fiduciary.” The easiest place to start when attempting to define a word or phrase is a dictionary. The Concise Oxford English Dictionary (12th Edition, 2008) defines the word “fiduciary” as follows:

fiduciary:

adj. 1. (Law) involving trust, especially with regard to the relationship between a trustee and a beneficiary. ...

n. (pl. fiduciaries) a trustee.

[5] The Collins English Dictionary (2000) defines the term similarly:

Fiduciary (Law)

1. *noun* a person bound to act for another's benefit, as a trustee in relation to his beneficiary.

2. *adjective*

a) having the nature of a trust.

b) of or relating to a trust or trustee.

[6] Both of these dictionaries define the word “fiduciary” by invoking a legal concept, the trust. The definitions also specifically identify “fiduciary” as a legal term. The word “fiduciary,” and the phrase “fiduciary responsibility,” are not common terms used in everyday student life. We believe that most students would struggle to define these phrases, and would at best understand that a fiduciary is someone who owes some sort of a legal duty to another person. Simply put, we do not believe there is an ordinary or colloquial meaning of the word “fiduciary.” The phrase “fiduciary responsibility” is a legal term of art.

[7] When Council uses a term of art in a bylaw, we presume that Council intends that the phrase should be understood in its specialized sense and context. In other words, the use of uncommon, specialized terminology suggests that Council intended the phrase to be used in an uncommon, specialized way. The fact that section 13(4) was drafted by non-lawyers does not imply that the term “fiduciary” was intended to be understood in its non-legal or colloquial sense (if such a sense even exists). Instead, because the bylaw was drafted by non-lawyers, and because these non-lawyers chose to use a specialized legal term of art not in common use by laypeople, the use of this phrase suggests the lay drafters intended the phrase to be used in its specialized, legal sense. If Council simply intended to give itself the power to reject petition

questions that would, say, threaten the financial health of the organization, there were much simpler phrases it could have used to express itself than “fiduciary responsibility.”

[8] Of course, just because a word has a legal meaning does not mean the Board is bound to apply the word in its legal sense. The phrases “just cause” and “forthwith” might have specific legal meanings in some contexts, but the Board can still define these terms without referring to their legal meaning. On the other hand, the meaning of words like “bailment” and “tort” are probably inseparable from their legal meaning. We believe that the word “fiduciary” is one of these uniquely legal words, a legal term of art with little to no common use outside of the legal context, which cannot be given a meaningful definition without reference to legal ideas.

[9] There are many other words that are used in the law that also have a commonly understood, non-legal meaning, and the Board will usually have little trouble interpreting and applying those words. But the phrase “fiduciary responsibility” is not such a simple concept. It is, at its core, a legal phrase inseparable from a legal concept, and therefore must be taken to refer to that legal concept.

[10] In conclusion, we believe that the phrase “fiduciary responsibility” in section 13(4) does not refer to a non-legal concept. Instead, it gives Council the ability to reject a petition question when a specific legal test is satisfied, and in this way, it incorporates the law of Alberta into Council’s decision making process and Students’ Union legislation.

B. Use of legislative history to understand Council’s intent.

[11] Reviewing a bylaw’s legislative history may help determine how Council intended a phrase to be used or understood, but we believe it is often dangerous for the Board to refer to legislative history or attempt to determine “what councillors intended” when interpreting a bylaw. The Board should not become a forum for current and former councillors to debate what Council “really meant,” and the Board cannot be expected to listen to hours of Council debates on points of order in the hopes that we can discover how a majority of Council understood a phrase.

[12] The majority does believe that, in this case, the legislative history suggests that Council understood the phrase “fiduciary responsibility” to be a legal concept (see: *Students’ Council Votes and Proceedings*, SC-2005-16 at 13-18, *Langstone v. Students’ Council (Re Pint Petition)* (Ruling #9, 2005/2006), and *Students’ Council Votes and Proceedings*, SC-2005-18 at 5-6). Councillors themselves needed to have the concept of “fiduciary responsibilities” explained to them, and the explanations addressed legal issues (SC-2005-16). The Speaker of Council made reference to the need for a legal opinion on the nature of Council’s fiduciary responsibilities (SC-2005-16). The Speaker ruled a question out of order on the basis that a violation of Council’s fiduciary responsibility was a violation of the *law*, and this ruling was upheld by Council as a whole (SC-2005-18). These legislative facts are compelling evidence that the

councillors of the time did not have a non-legal, “colloquial” meaning of the phrase “fiduciary responsibility” in mind, and instead intended the phrase to be understood in its legal sense.

[13] Nonetheless, because of the practical problems involved in considering legislative history, and because we do not need to refer to the legislative history to conclude the phrase should be understood in its legal sense, we will not address this issue any further.

(4.3) Where does the “fiduciary responsibility” of Council originate?

[14] Responsibilities do not arise out of thin air, or simply because they are good policy. If Council owes a fiduciary responsibility to the Students’ Union, as section 13(4) suggests it does, we should be able to determine *where* the fiduciary responsibility owed by Council comes from.

[15] Council obviously believed such a responsibility existed. If Council did not believe it owed a fiduciary responsibility, it would have been irrational to refer to the idea of a fiduciary responsibility when it enacted section 13(4). We should assume that Council acts rationally and with a purpose when it enacts a bylaw, so we should attempt to find a reasonable source for the fiduciary responsibility Council believed existed.

[16] We see four possible sources for Council’s fiduciary responsibility. First, merely using the words “fiduciary responsibility” in section 13(4) might imply that such a responsibility is created by that section itself. Second, the responsibility might be created, explicitly or implicitly, elsewhere in Students’ Union legislation. Third, the Board might decide such a fiduciary responsibility exists after looking at the overall nature and function of Students’ Council, its bylaws, and the *Post Secondary Learning Act*. (In this sense, it could be said that the Board could “create” such a responsibility even if the responsibility was not explicitly set out in a bylaw). Finally, by using the phrase “fiduciary responsibility,” Council might be referring to the legal concept of fiduciary obligations that find their source in the law of Alberta. We believe that the law of Alberta is the only logical and reasonable source for the fiduciary responsibility that Council believed it owed to the Students’ Union.

A. Fiduciary responsibilities stemming from the text of s. 13(4)?

[17] The first possibility is that, simply by mentioning the concept of a fiduciary responsibility in section 13(4), Council imposed a fiduciary responsibility on itself. But section 13(4) never talks about *creating* a fiduciary responsibility. Instead, it assumes this responsibility exists. Given the assumed existence of such a responsibility, it empowers Council to reject a petition question if approving the question would cause Council to violate this responsibility.

[18] By merely using the phrase “fiduciary responsibility” in section 13(4), Council does not *create* a fiduciary responsibility. The text of section 13(4) tells Council: “This section lets you reject a petition question if it conflicts with your fiduciary responsibility to the organization.” It does not say: “This section creates a fiduciary responsibility that you owe to the organization (the precise meaning of which will ultimately be determined by the DIE Board) and you can

reject a petition question if it conflicts with this responsibility.” The text of section 13(4) suggests that Council presupposed the existence of such a responsibility. It would unacceptably stretch the words of the section to conclude it implicitly creates a fiduciary responsibility.

B. Fiduciary responsibilities stemming from Students’ Union legislation?

[19] The second possibility is that the phrase “fiduciary responsibility” simply recognizes a concept that exists elsewhere within Students’ Union legislation, either explicitly or implicitly.

[20] The phrase “fiduciary responsibility” is not defined elsewhere in Students’ Union legislation. The provisions of Bylaw 2000 related to section 13(4) also do not provide any guidance regarding the source of the fiduciary responsibility, or what this responsibility might involve. As a result, Students’ Union legislation does not explicitly create any fiduciary responsibility for Students’ Council.

[21] The concept is also not implicitly defined. There are no provisions in Students’ Union legislation that spell out the duties of Council to the organization. If such provisions existed, and if these duties bore a resemblance to the idea of fiduciary responsibilities, then we might conclude Council that was referring to these provisions when it used the phrase “fiduciary responsibility.” Section 17 of Bylaw 100 sets out some of the situations where a councillor may be in a conflict of interest with respect to a decision, but this section deals with the obligations of an individual councillor, not Council as a whole. There does not appear to be any legislative provision that suggests what obligations Council collectively owes to the organization, or at least none clear enough to equate to “fiduciary responsibility” referred to in s. 13(4).

[22] If section 13(4) were deleted from Bylaw 2000, the Board could not conclude, based solely on the remaining Students’ Union legislation, that Students’ Council owes a fiduciary responsibility to the organization as a whole. Simply put, Students’ Union legislation is silent to the existence or non-existence of a fiduciary responsibility, and the fiduciary responsibility presupposed by s. 13(4) must stem from another source.

[23] Our conclusion might be different if there were a Students’ Union bylaw that read: “Students’ Council owes a fiduciary responsibility to the Students’ Union.” Then we would be forced to decide whether that provision was intended to simply acknowledge the existence of such a responsibility outside of Students’ Union legislation, or to create new obligations within Students’ Union legislation, distinct from the legal concept of fiduciary obligations. But the point is moot, as there is no such section in our bylaws.

C. Fiduciary responsibility as informed by sources beyond Students’ Union legislation (i.e. the *Post Secondary Learning Act*)?

[24] The Vice President (External) suggested that the phrase “fiduciary responsibility” might be given meaning by looking beyond Students’ Union legislation, by considering the aspects of the *Post-Secondary Learning Act (PSLA)* that relate to the mandate of the Students’ Union. In

particular, she suggested that the phrase “fiduciary responsibility” might be informed by s. 93 of the *PSLA*, which spells out the objects of the Students’ Union.

[25] The Board is very sceptical of any approach that asks us to resort to the *PSLA* to interpret Students’ Union legislation. Despite some creative attempts to have the Board consider the constituting legislation of the Students’ Union, it has been the long-standing policy of the Board not to refer to this legislation (see: *Reference Re Universities Act* (Ruling #3, 2003/2004), *Reference Re Bylaw 2400* (Ruling #6, 2005/2006), *Hirji v. Students’ Council* (Ruling #1, 2006/2007); but see *contra: Harlow v. COFA* (Ruling #1, 2000/2001)).

[26] Any interpretation we might offer of the *PSLA* would not be legally binding. Only a court can authoritatively interpret the meaning of the provisions of the *PSLA*, and only a court can determine whether the actions of the Students’ Union are outside of the scope of its statutory purposes. Whether looking at *PSLA* is framed as “interpreting” the *PSLA* itself or merely using the legislation to “inform” our interpretation of Students’ Union bylaws, either approach asks the Board to give the provisions of the *PSLA* a legal meaning. We are not comfortable making reference to provincial legislation in this way.

D. Can the Board itself “create” fiduciary responsibilities?

[27] Even if the “fiduciary responsibility” of Council cannot be traced to Students’ Union legislation or the principles embodied in the *PSLA*, such a responsibility could simply be assumed, or could be inherent in the very nature of the relationship between Students’ Council and the Students’ Union. But were the Board to rely on such an extra-textual approach to create fiduciary obligations for Students’ Council, we would risk confusing good policy with the requirements of Students’ Union legislation. Binding obligations within the Students’ Union cannot arise merely because they are a good idea, or because these principles would lead to the best outcome.

[28] The Board is limited to interpreting, applying, and enforcing Students’ Union legislation. To give substantive effect to a fiduciary responsibility of Students’ Council that does not find its source in some authoritative body of legislation is to exceed the jurisdiction of the Board.

[29] If we deny that Council’s “fiduciary responsibility” stems from the law of Alberta and *also* deny that this responsibility is somehow based in Students’ Union legislation, then we are in effect suggesting that we can create a “fiduciary responsibility” for Students’ Council ourselves. This would expand the mandate of the Board far beyond its legitimate boundaries.

[30] When asked whether the phrase “fiduciary responsibility” refers to a legal responsibility or a non-legal responsibility, the Vice President (External) suggested that the phrase should be understood as having elements of both legal and non-legal duties. In effect, this asks us to create a hybrid concept of fiduciary responsibility. By asking the Board to combine different ideas into a unified concept of a fiduciary responsibility, the process of *defining* the term “fiduciary responsibility” in section 13(4) is turned into a process of *creating new substantive obligations*.

Council's use of the words "fiduciary responsibility" in section 13(4) cannot be stretched to give the Board the authority to create such a responsibility under the guise of interpretation.

[31] Such an approach also raises difficult practical questions. How would we give meaning to the phrase "fiduciary responsibility" *besides* looking to legal sources? We would be left to either give meaning to the non-legal concept of fiduciary duties by turning to the law itself, which we are not qualified to interpret, or we would be called upon to re-invent the concept of fiduciary responsibilities starting from broad concepts expressed in sources such as Black's Law Dictionary, which is also a kind of legal source based on legal principles.

E. Fiduciary responsibilities stemming from the legal concept of fiduciary responsibilities?

[32] The only remaining source of fiduciary responsibilities that Council could have been referring to is the law in force in Alberta. As noted earlier, this source accords with both the inherently legal nature of the phrase and the intent of Council as revealed by the legislative history. It is the only explanation for the source of the fiduciary responsibility that Council was referring to when it enacted the bylaw that does not require the Board to "create" the fiduciary responsibility.

(4.4) What is a fiduciary responsibility?

[33] Even if the phrase "fiduciary responsibility" is a legal phrase, the Board *might* be able to tell Council something about what this phrase means. As suggested earlier, it is difficult to explain the terms "fiduciary" or "fiduciary responsibility" without reference to other legal principles. (The term "fiduciary responsibility" seems equivalent to the more common term "fiduciary duty.") One possible starting point, Black's Law Dictionary (8th Edition, 2004), defines these concepts as follows:

fiduciary, n. 1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor <the corporate officer is a fiduciary to the corporation>. 2. One who must exercise a high standard of care in managing another's money or property <the beneficiary sued the fiduciary for investing in speculative securities>.

fiduciary duty. A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).

[34] The law concerning fiduciary duties, as we understand it, seems to suggest that individuals who owe fiduciary obligations to an organization must act honestly and in good faith, must respect the trust and confidence that has been placed in them by the organization, must avoid conflicts of interest, must avoid abusing their position for personal benefit, must respect the confidentiality of any information they acquire by virtue of their position, and must act selflessly, honestly, and loyally. But these concepts are usually expressed in terms of

individuals (for example, individual councillors) owing a duty, not a *body as a whole* (here, Students' Council) having such responsibilities.

[35] But before we go any further in our discussion regarding fiduciary responsibilities, we must decide whether it is the Board's place to offer an interpretation of the legal concept.

(4.5) Should the DIE Board interpret or summarize the law of fiduciary responsibilities, or is this beyond the scope of the Board's powers?

[36] The Board respectfully declines to provide the applicant with any explanation of the legal concept of a "fiduciary responsibility." There are three reasons we refuse to do so.

[37] First, doing so is beyond our mandate as set out in bylaw. Per Bylaw 1500, the Board has the power to interpret and enforce Students' Union legislation, not the law. Based on our interpretation of this bylaw, the phrase "fiduciary responsibility" refers to a legal concept. Our responsibility to give meaning to this phrase (at least in the abstract) ends there.

[38] Second, we are not qualified to offer an interpretation of the law of Alberta. The Board's powers of interpretation cannot be used to turn the Board into a legal advisor for Students' Council, especially when we have no concrete facts before us to consider, and when there is no guarantee that any particular Board panel will have any legal training. The concept of a "fiduciary duty" is subtle, context-dependent, and difficult for even a judge to explain or apply in the abstract (see e.g. the Supreme Court's comments in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 643-644). We cannot guarantee any summary of the law of fiduciary obligations that we might offer will be accurate or complete. Just as in *Re Pint Petition* the Board decided that they were unable to pass judgment on what did or did not violate federal or provincial law without being presented with evidence on the issue, the Board in this case believes that we are not competent to investigate, in the absence of any evidence or specific facts before us, what Council's legal fiduciary responsibility to the organization, if any, entails.

[39] Third, providing an interpretation of the law risks misleading Students' Council into believing it is acting in accordance with the law of Alberta simply because it is acting in accordance with our decision, when in reality our decision has no force outside of the Students' Union. A court has the authority to state what the law is. This Board does not.

[40] If members of Students' Council wish to know the precise content of the legal concept of fiduciary obligations, the more appropriate course of action is to have a lawyer provide a legal opinion. This opinion, although also not legally binding, would certainly be better informed than the opinions of three lay Board members.

[41] Another example of this problem might be helpful. Suppose a Students' Union bylaw provided that an audit of the Students' Union financial statements must be conducted in accordance with "generally accepted accounting principles". This term, like "fiduciary

responsibility,” is also a term of art. Surely the use of this accounting term of art could not require the Board to determine in the abstract which accounting principles are generally accepted, or what particular actions the auditors are required to perform to comply with the bylaw. The Board could not be expected to set out these principles in a request for interpretation, in the absence of any specific facts or evidence regarding the issue. The Board could, of course, find an accounting textbook and attempt to summarize the main principles. But to do so would be outside of the Board’s sphere of competence, and there would be no guarantee that our interpretation would be correct (in the sense that our interpretation would match that of the accounting profession).

[42] Our insistence on an explanation for the source of Council’s fiduciary responsibility is the crux of the disagreement between the majority and the dissenting tribune. The dissenting tribune acknowledges that the word “fiduciary” is a legal word, but suggests it can be given meaning independent from its legal meaning. He proposes referring to a legal dictionary to give the phrase meaning. He concludes that Council has a fiduciary responsibility not to act in such a way that imperils the financial health of the Students’ Union.

[43] But where does this responsibility come from, if not the law itself? We need not repeat the alternative sources for this responsibility that we have already discussed and dismissed. We merely reiterate that the inclusion of the words “fiduciary responsibility” in section 13(4) was not enough to impose some kind of quasi-legal fiduciary responsibility on Students’ Council. Section 13(4) simply acknowledges the prior existence of such a legal responsibility. It does not empower the Board to create such a responsibility under the veil of interpreting the meaning of the phrase. It does not empower the Board to create a responsibility that is based on legal principles, but not based on the law itself. And if the source of the responsibility is the law, the DIE Board cannot simply “summarize” this complicated area of law in a few sentences, based on definitions from a legal dictionary. Such an interpretation by the Board creates significant risk for the organization, is misleading, and is illegitimate in the sense it exceeds the Board’s mandate.

[44] We should emphasize that our decision does not impose any new obligations on Council. It only confirms that Council’s legal fiduciary obligation to the Students’ Union, which *may or may not exist* as a matter of law, can provide grounds for rejecting a petition question. Our conclusion that this section makes reference to a legal concept is not sufficient to imply that such a legal obligation exists.

(4.6) Proposed approach to the use of s. 13(4) and Board review of its use.

[45] This decision does not mean that Council or the Speaker of Council cannot reject a proposed referendum question if it believes that the question’s enactment would cause Students’ Council to violate its fiduciary responsibility to the organization. That power remains enshrined in Bylaw 2000.

[46] There is no obligation on Council or the Speaker to get a legal opinion before deciding whether a proposed referendum question violates section 13(4), but this is one option. For example, in *Kawanami and Kirkham v. Speaker* (Ruling #8, 2005/2006), the Board decided that the Speaker of Council has the implicit authority to consider legal issues when ruling upon points of order. The panel suggested that Council may be able to conditionally approve a proposed referendum question, and then reconsider the question after Council receives legal advice. We agree with the approach suggested by the earlier panel.

[47] The Board can still review Council's use of its power to reject a proposed question. In *Re Pint Petition*, the Board suggested that determining whether or not a proposed referendum question would violate a provincial law may be beyond the capabilities of the Board, since the Board is not a court of law. We have reached a similar conclusion regarding our ability to define Council's fiduciary responsibility. But that panel went on to suggest that Council's decision to approve or reject a question on the basis it violated a law could be reviewed to determine whether its decision was reasonable, and overturned if it was not reasonable. We agree that this is the appropriate approach for the review of Council's decisions under section 13(4), should the Board be called upon to do so.

[48] When reviewing Council's decisions under section 13(4), the question for the Board to ask is: "Was Council acting reasonably when it exercised its discretion to approve (or reject) this referendum question?" The question is *not*: "Would the DIE Board panel have come to the same conclusion?" An unreasonable decision is a decision that no reasonable person could reach, or that is based on unreasonable assumptions or considerations, or that is decided in a procedurally unreasonable manner. Only an unreasonable decision should be overturned, and a decision is not automatically unreasonable just because the Board panel members would have come to a different decision or used a different procedure.

[49] This "reasonableness" standard will not always be the correct standard to use when reviewing Council's decisions. Not all of Council's decisions about the meaning or application of Students' Union legislation will be owed this much deference. The Board retains the "final say" on what Students' Union bylaws mean. But this is the appropriate approach in this case, where Council is better positioned to decide the complicated legal issue of when it owes a fiduciary responsibility.

[50] The Board may have to consider whether Council was wrong about the legal aspects of its fiduciary responsibility when it decided to approve or reject a petition question. But the Board cannot be expected to answer this legal question itself. Since we cannot assume Board members will be legally trained, in order for the Board to properly evaluate whether Council acted reasonably, the Board would probably need to hear evidence on the issue of Council's legal fiduciary responsibilities, in the *specific context* of the question before the Board. Should there be two conflicting legal opinions on the issue, the Board may need to make a difficult

decision about which approach to adopt. But it would be doing so on the basis of its assessment of the evidence put before the Board, not the Board's own investigations into the law.

[51] Returning to the earlier accounting principles example, in such a case the Board might be called upon to decide whether an audit had been conducted in accordance with the appropriate principles. The Board could not decline to decide the case simply because it involves complicated questions about what constitutes a generally accepted accounting principle. But in order for the Board to make an informed decision about a particular audit, it would need to hear convincing, trustworthy evidence about which principles that audit was alleged to have violated. The Board could not be expected to decide the issue by teaching itself about accounting principles, or by hearing submissions from equally ill-informed members of Council.

(4.7) General comments regarding the use of the Board's powers of interpretation.

[52] The interpretation power of the Board does not exist to cure defects or ambiguity in Students' Union legislation. Students' Council always retains the power to amend its bylaws. Council has a much better idea of what it means, and wants to accomplish, than the Board does. If Council disagrees with our decision that the phrase "fiduciary responsibility" refers to a legal concept, it is free to amend its bylaws to make its intent more clear. Almost exactly three years ago, in *Re Pint Petition*, the Board provided Council with the following advice:

The panel was surprised that no provision exists in SU bylaws to clarify the "fiduciary obligations" of Council relating both to petition questions and other orders. If Council wishes to refer to such a principle in the future, it should be enunciated clearly in bylaw.

[53] This advice obviously still applies today. Although Council added this concept to its bylaws, its meaning remains somewhat unclear.

[54] It is also somewhat unclear *who* might owe a fiduciary responsibility to the Students' Union: Students' Council collectively, or individual councillors in their capacities as councillors. Although the current text of the bylaw refers to Council collectively, the law seems to suggest that fiduciary responsibilities are owed by individuals (although again, we caution that our understanding of the law of fiduciary obligations is untrustworthy). This is an issue that Bylaw Committee may want to consider in the future.

[55] Finally, during her submissions to the Board, the Vice President (Academic) inquired as to whether Students' Council would be able to reject a petition question that was at odds with the mandate of the Students' Union as set out in the *Post Secondary Learning Act*. We remind Council that Bylaw 2000 gives it the power to reject any petition question that would cause it to violate a provincial law. If Council believes that enacting a proposal in a petition question would cause the Students' Union to act outside its mandate as set out in the *PSLA*, and if Council concludes that acting outside of this mandate set out in the *PSLA* is against the law, Council has the option of rejecting the petition question on these grounds.

(4.8) Summary of majority decision.

[56] This lengthy and complicated decision can be distilled down to a few essential principles:

1. The Board believes that the phrase “fiduciary responsibility” in section 13(4) of Bylaw 2000 refers to the legal concept of a fiduciary duty. Consequently, the Board declines to offer any interpretation of the phrase “fiduciary responsibility” (or the relationship between this phrase and any Students’ Union bylaws or provincial legislation) on the basis that discussing such legal issues in the abstract is outside of the scope of DIE Board’s mandate to interpret Students’ Union bylaws.
2. Under Students’ Union legislative rules, Bylaw 2000 gives Council the power to reject a referendum question if enacting the proposal contained in the question would violate Council’s fiduciary responsibility to the Students’ Union. When deciding whether to exercise this power, it is up to Students’ Council to determine whether Council as a whole owes a fiduciary responsibility to the Students’ Union, and if so, whether the enactment of the policy contained in the referendum question would cause Council to violate this fiduciary duty.
3. The Board does have the power to review Council’s decisions regarding whether a proposed question would violate Council’s fiduciary responsibility. But the Board will not review Council’s decision to determine whether the decision was *prudent*, or whether it was *correct* about how the law of fiduciary obligations should be applied. It will only consider whether Council’s decision was *reasonable*, by asking: “Was Council acting reasonably when it exercised its discretion by approving (or rejecting) this proposed referendum question?”
4. An applicant who claims that Council did not act reasonably bears the onus of putting evidence before the Board to prove that Council acted unreasonably. If the applicant claims Council acted unreasonably because it misapplied the law, the applicant should keep in mind that Board members cannot be expected to understand the law of fiduciary obligations without being provided with evidence on the issue, and any such evidence (for example, a legal opinion on the matter) should relate to the *specific question* the Board is asked to consider.

[57] We thank the Vice President (External) for her helpful submissions and apologize for our delay in releasing this decision. We note that, despite our decision not to provide specific answers regarding the concept of a fiduciary responsibility, we do not fault the Vice President (External) for bringing this reference before the Board. It was prudent of her to raise this issue in advance of it arising in the context of a specific petition question. We also thank the dissenting tribune for allowing us to review a draft copy of his thoughtful decision.

(5) DISSENTING OPINION (PHIPPS)

(5.1) Introduction

[58] In the course of deliberations our panel has split on the question of the correct interpretation of the term “fiduciary responsibility” as it appears in the context of Students’ Union Bylaw 2000. I do not agree with the majority’s interpretation, and because this difference of interpretation may have a significant impact on the outcome of future referenda initiatives, I must reluctantly dissent from the reasons of my colleagues.

[59] I agree that the concept of a “fiduciary relationship” is legal in nature, but this does not mean it can only be interpreted in the context of Canadian law by a trained legal professional. It is possible to understand the term independently of legal meaning *given by the courts of our country*. My view is that the term is more appropriately interpreted as an ordinary provision of the Student Unions’ Bylaws, not as a legal term of art whose meaning can only be understood through Canadian judicial precedent.

[60] I concur with the reasons of the majority on the issue of standard of review and with its decision to provide only general guidelines based on the evidence available to our panel.

(5.2) The meaning of “fiduciary relationship”

[61] In the context of Bylaw 2000, ‘fiduciary obligation’ means the Student Council’s obligation to preserve the financial security and assets of the Student’s Union. It can be understood independently of Canadian judicial precedent. This interpretation can be discerned by applying common approaches to statutory interpretation as set out below.

A. Applying the ‘Plain-meaning’ Rule

[62] My colleagues begin their analysis of the meaning of “fiduciary responsibility” by applying the “plain meaning of the word”. After choosing to examine two definitions of ‘fiduciary’ that define the term in the context of a trust, they conclude that neither of these definitions is useful in guiding the interpretation of ‘fiduciary’ as it applies in the context of the Bylaw.

[63] Generally, I agree with the majority’s application of the ‘plain-meaning’ rule. Most definitions of “fiduciary” define the term in the context of a trust relationship. This definition does not assist in informing the meaning of the ‘fiduciary’ in the context of the Bylaw is therefore not a persuasive in informing the words meaning in this context. However, in contrast with my colleagues, I do not think that his analysis has exhausted the ‘plain-meaning’ approach.

[64] Words are often capable of more than one meaning. It is only a partial application of the ‘plain-meaning rule’ to point to one meaning of the word that clearly does not fit and to therefore conclude that this approach has been exhausted. There are other definitions of the “fiduciary” and “fiduciary relationship”, some of which may be appropriately used to inform the meaning these words as they appear in the context of the Bylaw.

[65] In their reasons the majority has placed great emphasis on the fact that ‘fiduciary’ is commonly understood as a legal term. In this context I do not think it would be improper or improbable for a student to attempt to define the term by reference to a legal dictionary. Legal dictionaries are a resource available to all students in University of Alberta law libraries and online. They require no specialized legal knowledge to use.

[66] Acting on his own initiative, Bullerwell A.C.T. introduced the following definition from Black’s Law Dictionary 8th Ed. as evidence at the hearing:

Fiduciary

1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candour.
2. One who must exercise a high standard of care in managing another’s money or property.

[67] The second definition is potentially very useful. When the word ‘fiduciary’ is understood in this context, paragraph 13(4) imposes an obligation to vote for referendum initiatives that would not seriously prejudice the financial position or property of the Students’ Union. This interpretation is plausible on its face and can be supported by additional factors described below.

[68] A unique consideration when interpreting the word ‘fiduciary’ is that the word is often used more often than it is understood. In my experience, most students outside of the law and business faculties do not define the term in respect to a trust. Rather, the colloquial understanding is usually more analogous to ‘financial’ or ‘financial responsibility’. I freely admit that this definition is of low persuasive value given that it is pulled from my anecdotal experience. Nevertheless, I have included it in my judgment because I think it is plausible that that this definition was likely in the minds of at least some members of the Bylaw Committee when drafting the amendments that inserted ‘fiduciary’ into the Bylaw.

[69] When interpreting Students’ Union bylaws, I believe that there are several policy considerations that should influence the application of ‘plain-meaning’ rule. First, given that members of the Bylaw Committee are not lawyers, it is highly unlikely that they are using words in any way other than their ordinary meaning. This also gives rise to a corresponding presumption that the words used in Students’ Union Bylaws are not used in their legal sense. Secondly, the Bylaws of the Students’ Union are most likely to be read and interpreted by the student body. By construing the words in the Bylaws with their ordinary meaning the DIE Board is more likely to interpret the Bylaws in the same way ordinary students do. Interpreting terms in Student Unions’ legislation in their most basic and commonly understood meanings will make the Bylaws more accessible and more easily understood.

[70] In summary, the Black’s Law definition provides us with a definition that could fit within the Bylaw. This definition would be similar in content to the common understanding of the

term and policy considerations described above. However, further interpretative aids will have to be applied to determine if this is the correct approach.

B. Evaluating the Section as a Whole

[71] The issue of ‘best fit’ emerges again when attempting to apply a judicially established definition of ‘fiduciary responsibility’ within the context of the Bylaw as a whole. When reading the Bylaw using the majority’s interpretation it is unclear what *specific* law or undertaking gives rise to the fiduciary obligation. Individuals and groups can declare themselves trustees and therefore impose upon themselves a fiduciary obligation, but such a reading in this context strains the grammatical structure of the text. If one were to adopt the view that “fiduciary relationship” refers to a pre-existing legal obligation, it would be necessary to identify the source of that obligation *within the law*. I would find the reasons of the majority more compelling if they were able to identify the source of the fiduciary obligation.

[72] In contrast, it should be noted that by adopting an alternative definition, such as the one in Black’s Law Dictionary, these difficult issues do not arise.

C. Arguments from Legislative History

[73] It is inappropriate to draw inferences from legislative history in the present case. None of the evidence heard by the Panel, including that which the majority has included in their reasons, provides a good basis for inferring legislative intent. There are no statements that directly address the reasons for the legislative change, nor are there any statements from any party made during the actual legislative process. In summary, the legislative history is incomplete with the greatest omissions found at the most significant stages of the process. I do not think that reliable inferences can be drawn from the legislative history that is available.

(5.3) Policy Arguments For Adopting the Non-Judicial Meaning of ‘Fiduciary’

[74] My most serious objection to construing ‘fiduciary responsibility’ in a strict legal sense is that doing so may in fact impose new obligations and consequently new liability on the Students’ Council. As mentioned above, if a strict legal interpretation is imposed it is not clear what the source of the fiduciary responsibility is and consequently it is not possible to determine what the scope of the obligation is. A fiduciary obligation is the highest obligation that can be imposed in law and the potential for liability is extensive. Generally speaking, public office holders are not fiduciaries because of the vast potential for personal liability such a regime would create. Because of the high degree of risk, coupled with the fact the Bylaw amendments were created without formal legal advice, I believe that a strong presumption against interpretations that may impose such obligations is justified. Students’ Council may impose such obligations on themselves, but they should do so explicitly. It would be unfair for the DIE Board to interpret the Bylaws as imposing heightened personal liability on members of Students’ Council unless that was Council’s explicit intention.

(5.4) Analysis: An Alternative Approach

[75] Having identified the beginnings of an alternative approach for interpreting 13(4) we can now answer the reference question put forward by the Vice President External. First, the intent of section 13 should be read as allowing members of the Students' Union to bring forward Referendum questions. Secondly, I note that there are other means of bringing about changes in Students' Union policy. Members may run for Council or make representations Councillors to implement the policy changes they desire. In the context of these other avenues for policy change, the referendum process is unique in that it does not require the support of Students' Council. This is very significant aspect of Bylaw 13 and its provisions should be understood in this context.

[76] Turning to the text of paragraph 13(4), one should note the use of the word 'shall' which connotes an obligation and 'unless' which connotes an exception. The provision could paraphrased as saying "Students' Council must approve a question, unless the question would cause Students' Council to breach its fiduciary responsibility to the Students' Union". This sentence structure implies that the default position is that Students' Council must approve questions, unless the objectionable nature of the question rises to such an extent that it overturns this presumption.

[77] One aspect of a fiduciary relationship is that the fiduciary must act in the best interests of the principal. However, based on the interpretative markers noted above, when members of the Students' Council exercise their votes, they would not be authorized by 13(4) to oppose questions simply because they do not feel they are not in the best interests of the Students' Union. Rather, referendum question, if passed, must be objectively and demonstrably detrimental to the Students' Union.

[78] With respect to the meaning of 'fiduciary responsibility' in the context of this provision, based on the definitions surveyed above, combined with the legislative history, the term is most likely meant to refer to 'fiduciary' in a financial context. On the evidence, I think the colloquial definition is probably closest to what was intended, but for the purposes of clarity I prefer the definition from Black's Law Dictionary, specifically a fiduciary is "One who must exercise a high standard of care in managing another's money or property".

[79] In summary, under s. 13(4) the Students' Council may refuse a referendum question that would objectively and demonstrably imperil the health of the Student Unions' financial situation or material assets. While this is a high threshold for Council to meet, I would agree with the majority that the correct standard of review for Council's decisions in the context of this Bylaw is reasonableness. I concur on all points with the majority's standard of review analysis.

(5.5) Disposition

[80] In summary, in the context of Bylaw 2000, ‘fiduciary responsibility’ refers to the Student Council’s obligation to preserve the financial security and assets of the Student’s Union. It does not give rise to a ‘fiduciary obligation’ in the context of Canadian law.

[81] I agree with my colleagues’ decision to decline to provide further guidance on the meaning of the Bylaw in the context of a reference question and in the absence of further evidence. While I would dispute that judicial precedent is the only means of resolving the issue, evidence in the form of legal advice may prove useful when this issue is explored further in future DIE Board decisions. I also concur in the reasons given by the majority in the determination of the applicable standard of review for Council’s decisions.

[82] I would like to thank my colleagues for their reasons which have assisted greatly in clarifying the issues before our panel. I would also like to join with my colleagues in thanking the Vice President (External) for her helpful submissions.

The Discipline, Interpretation, and Enforcement (DIE) Board functions as the judiciary of the University of Alberta Students’ Union, and is responsible for interpreting and enforcing all Students’ Union legislation. Please direct all inquiries regarding the DIE Board or this decision to the Chief Tribune at: <ea@su.ualberta.ca>.