CONFIDENTIAL REPORT

On Alleged Breaches of Academic Freedom and Other University Policies at the University of British Columbia

To the University of British Columbia and the Faculty Association of the University of British Columbia

By The Honourable Lynn Smith, Q.C.
October 7, 2015

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I. INTRODUCTION

A. Terms of Reference and Addendum

On August 25, 2015, UBC and the Faculty Association of the University of British Columbia (UBCFA) asked me to conduct, as an independent fact finder, an impartial, full, and complete investigation into the following matter:

> Whether Mr. John S. Montalbano, Chair of the Board of Governors, and/or individuals in the School of Business identified by the Faculty Association, conducted themselves in the events following Professor Jennifer Berdahl's publication of her blog on August 8, 2015 in a manner that violated any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any applicable University policies including whether her academic freedom is or was interfered with in any way.[1]

The Terms of Reference, including an Addendum to the Terms of Reference,[2] are set out in full at the end of this Report as Appendix "A".

B. Summary of Conclusions

My conclusions are:

(1) UBC failed in its obligation to protect and support Dr. Berdahl's academic freedom.

(2) Mr. Montalbano, on his own, did not infringe any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any of the applicable university policies.

(3) No individual in the Sauder School of Business identified by the Faculty Association, on his or her own, infringed any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any of the applicable university policies.

(4) The Collective Agreement Preamble creates a positive obligation to support and protect academic freedom. UBC as an institution, through the combined acts and omissions of Mr. Montalbano, the named individuals in the Sauder School, and others, failed to meet that obligation with respect to Dr. Berdahl's academic freedom.

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[1] The University of British Columbia and the Faculty Association of the University of British Columbia, "Terms of Reference: Fact-Finding Process" (25 August 2015) at 1 (the "Terms of Reference") (Attached as Appendix "A").
[2] The University of British Columbia and the Faculty Association of the University of British Columbia, "Amendment to Terms of Reference" (18 September 2015) ("Addendum") (Attached as Appendix "A").

C. The Process

The parties chose not to have hearings or an adversarial process. In their Terms of Reference they envisioned a summary process focused on fact-finding through interviews. The person being interviewed could bring a representative if they wished, but external legal counsel were not permitted. I interviewed everyone identified by either party, and four additional persons. The list of persons interviewed is attached as Appendix "B". Everyone was fully co-operative with the process.

Almost every interview was conducted with a representative present. Representation for John Montalbano, 22 was provided by Lisa Castle, VP Human Resources. Representation for the individuals from the Sauder School of Business was provided by Allison Matacheskie, Director of Faculty Relations at UBC. Representation for Jennifer Berdahl, 22 was provided by Deena Rubuliak, Executive Director of the Faculty Association.

The interviews all took place at Allard Hall at UBC, with the exception of two individuals who were not in Vancouver and were interviewed by telephone. All of the interviews were recorded, for the purpose of backing up my notes and on the understanding that the recordings would be destroyed at the conclusion of the process. Some of the interviews were fairly lengthy. Three individuals were interviewed on two separate occasions: Jennifer Berdahl, John Montalbano and 22

The parties, in advance of the interview stage, identified relevant documents, provided them to me and exchanged them. A few documents came to light late in the day, for reasons that were explained. In a few instances the parties requested further disclosure, and I either required it or declined to require it.

Despite the parties' desire to avoid an adversarial process, as my work evolved it seemed important for the University and the Sauder School to know what position the Faculty Association was taking about the events, and for the Faculty Association to know what positions the University and Sauder were taking. Accordingly, I asked the Faculty Association to specify the respects in which academic freedom was allegedly disrespected or university policies were allegedly infringed, and by whom. Near the end of the process I asked each of the representatives to sum up their understanding of the events and the issues, and gave the others the opportunity to know what was said and to respond to it.

Pursuant to the Terms of Reference, I relied on the evidence that was provided to me through interviews and through documents. In assessing and weighing the evidence, I took into account whether or not it was first-hand (i.e. whether it would have been objectionable as hearsay in court). I also took into account surrounding circumstances bearing on the weight and reliability of evidence. Pursuant to the Terms of Reference, I applied the balance of probabilities standard in finding facts and reaching conclusions.

This was a unique and somewhat unusual process. I checked with the parties as we proceeded, and again at the submissions stage, as to their satisfaction with the fairness of the process, and to see if there were further steps that could be taken to ensure fairness. I circulated for comments by the representatives a draft Brief Chronology.

My sincere thanks to Meredith Hagel for her very able research and drafting support, to Kate Bush (and Carolina Cerna) for seamless administrative support, and to Peter A. Allard School of Law and Dean Catherine Dauvergne for providing space and other assistance.

Finally, thanks to the three persons who represented individuals in the interviews (Lisa Castle, Allison Matacheskie and Deena Rubuliak) and to the two (Deena Rubuliak and Lisa Castle) who designed the Terms of Reference. They all worked with me with tremendous patience, thoughtfulness, civility and diligence throughout.

D. The Allegations

The Faculty Association alleged that the following persons breached Dr. Berdahl's academic freedom: Mr. John Montalbano, 22

The Faculty Association alleged that the following persons breached University Policy 97 (Conflict of Interest, Conflict of Commitment): 22

The Faculty Association alleged that the following persons breached Policy 114 (Fundraising and Acceptance of Donations) and related Policy 47 (Chair, Professorship and Distinguished Scholar Honorifics): Mr. John Montalbano, 22

Finally, the Faculty Association alleged that the following persons breached the UBC Statement on Respectful Environment for Students, Faculty and Staff, Policy 2 (Equity) and Policy 3 (Discrimination and Harassment): Mr. John Montalbano, 22

II. PRINCIPLES OF ACADEMIC FREEDOM AND DESCRIPTION OF THE UNIVERSITY POLICIES

A. The Principles of Academic Freedom

1. The Sources of Academic Freedom

Within universities, academic freedom is a cornerstone of the culture, an "indispensable [condition] for the performance of the purposes of higher education."[3] Controversies

[3] Vernon Fowke & Bora Laskin, "Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of Professor H.S. Crowe by United College, Winnipeg, Manitoba" (Winnipeg:

surrounding claims to academic freedom have largely been internal matters within college and university communities. As a result, there are few traditional legal sources addressing the nature, content, and contours of academic freedom.

No statutes in force in British Columbia, including the statutes empowering the creation of universities in British Columbia, include the phrase "academic freedom"[4] or explicitly define its content.[5] To the extent that issues relating to academic freedom have come before Canadian courts, this has largely been in the context of administrative law: that is, through judicial review of internal university dispute-resolution mechanisms, where the focus is more on decision-making procedures than on the substantive content of the rights claimed.

(a) A Brief History of Academic Freedom in Canada

It is important to situate the modern understanding of the concept of academic freedom at UBC in the historical context in which it developed. The one major text which details the history and development of academic freedom in Canada, referred to by most Canadian scholars, is Michiel Horn's *Academic Freedom in Canada: A History*.[6] The book covers the nature, development, and understanding of "academic freedom" through a period up to the early 1960s. It also includes a Postscript on "Academic Freedom since 1965" detailing some of the important developments in the period from 1965 until the mid-1990s. The following summary is drawn largely from Horn's text, unless otherwise indicated.

The concept of academic freedom in this country, though related to understandings of that concept in other parts of the world, has developed in a uniquely Canadian way. Horn notes that "[t]he modern Canadian concept of academic freedom has three main sources. One is German in origin though adapted by Americans; the second is essentially British, and the third is largely North American."[7] Thus, in Canada, "German and U.S. ideas upholding a research-based professionalism were combined with British traditions of academic free speech and with claims to faculty autonomy and self-government."[8]

October 6, 1958), available online at https://www.crowefoundation.ca/documents/CroweReport.pdf [the "Crowe Report"] at 40.

[4] A search of the complete collection of the statutes and regulations on the BC Laws website which are currently in force for the phrase "academic freedom" confirms this: <http://www.bclaws.ca/civix/content/complete/?xsl=/templates/browse.xsl#tabs1-html>. BC Laws is published by the Queen's Printer for British Columbia in partnership with the Ministry of Justice and the Legislative Assembly, and according to their FAQs, "[o]n BC Laws you will find every public Act, and every regulation of general public interest, currently in force in the province of British Columbia, including new and recently amended laws that have yet to be published in official print formats. This current consolidation is an unofficial version of B.C. Statutes and Regulations."

[5] This is not to say that the definition or content of "academic freedom" at UBC is unaffected by the general laws of the province of British Columbia: see the section "Within the Law" below, beginning at page 18.

[6] Michiel Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999).

[7] Horn, *ibid* at 7.

[8] Horn, *ibid* at 7.

The German universities, beginning in the nineteenth century, emphasized *Lehrfreiheit*[9]—the freedom to teach and publish—and the essential role of research in those activities. This view, brought to North America by faculty members who had studied in Germany, influenced the research-oriented universities that were forming in the U.S. in the later nineteenth century. Until that time, academic freedom had largely involved a basic claim that, for faculty, "their personal convictions should matter less than their intellectual achievements".[10] The German influence meant that this view expanded to an assertion that "professors should not be penalized if their research findings, honestly arrived at, challenged received wisdom and that the religious or philosophical views of professors were no concern of universities worthy of the name."[11] The latter aspect of academic freedom was a uniquely American articulation, as German professors "were under an implicit obligation to maintain political neutrality ... as 'it was not generally assumed that *Lehrfreiheit* condoned or protected such [political] activities'".[12] In contrast, the right to free speech was protected within the U.S. Constitution, and some professors took advantage of this to express political and even partisan opinions.

In Great Britain, there existed an even stronger tradition of academic free speech, which was in turn linked to traditions of professorial self-government, most clearly evident in the universities at Oxford and Cambridge. The British tradition of academic free speech had a significant influence in Canada.

The earliest Canadian universities were not research institutions like their American or German counterparts, having instead two main purposes: "the training of clergy and the general education of the future leaders of society".[13] Even in the non-denominational Canadian universities, the focus was not on research but on professional and practical training in fields such as medicine, law, engineering, agriculture, forestry, and home economics. By 1914, there were six provincial universities (New Brunswick, Toronto, Manitoba, Saskatchewan, Alberta, and British Columbia) and three private non-sectarian institutions (Dalhousie, McGill, and Queen's) in which *applied* research, particularly in agriculture and engineering, was part of the reason for their existence. However, heavy teaching loads and scarce resources kept most professors from engaging in significant research of any kind. The British influence, more than the German research-based model, was therefore particularly important at the beginning of the twentieth century in Canada, with its links of academic freedom to professorial self-government and free speech.

The third influence on academic freedom in Canada resulted from the employment structure in the universities themselves: unlike at German universities, where professors were

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[9] This relates to the academic freedom of faculty members; students enjoyed *Lernfreiheit*—the freedom to learn—"the essence of which was freedom from administrative control in the learning process, and which largely governs student life in Germany to this day": Horn, *ibid* at 7.

[10] Horn, *ibid* at 7.

[11] Horn, *ibid* at 7.

[12] Horn, *ibid* at 8.

[13] Horn, *ibid* at 9.

civil servants, North American universities employed professors through administrative hierarchies, headed by presidents, who themselves were appointed by lay boards composed of professional and business people. The lay boards took control of business matters, and were the final authority in the appointment and dismissal of faculty and staff. From early on, this created tensions about employment guidelines for faculty behavior and competence, and relatedly, the procedures that were to govern tenure and dismissal. Tenure was a familiar feature of Canadian universities even before the turn of the twentieth century, providing academics some measure of economic security. But because tenure was typically held at the "pleasure" of the governing boards and could be ended without cause, it was not a reliable safeguard of academic freedom.[14]

In this way, "[a]cademic freedom in Canada had to develop within a framework in which power was very unequally distributed. As employees dependent on lay boards, professors were ill-positioned to assert themselves, particularly when confronting their own universities."[15] This may not have been as troubling to academics at the time as it might seem now, according to Horn:

> Challenging authority did not come easily to people whose social origins were mostly in the professional, business, and well-to-do farming classes and who probably ranked loyalty higher than independence of mind. ....
>
> ... Loyalty was due to the Crown, the Empire, one's country, one's church. But it had other objects as well ... [the Canadian imagination] developed in 'isolated communities surrounded with a physical or psychological "frontier," separated from one another and from their American and British cultural sources ... In the earliest maps of the country the only inhabited centres are forts[.][16]

(i) The Establishment of the CAUT

The Canadian Association of University Teachers ("CAUT") was not founded until 1951, even though its American counterpart—the American Association of University Professors ("AAUP")—was founded thirty-six years earlier in 1915.[17] The CAUT, like the AAUP, is a national organization devoted to advancing the interests of university faculty members across the country, and is particularly active in both defending and protecting academic freedom.[18] A pivotal point in the history of the CAUT occurred in 1958, seven years after its foundation. Historian Harry S. Crowe's dismissal from United College (now the University of Winnipeg)—"a defining event not only in the history of the Canadian professoriate but also in the history of

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[14] Horn, *ibid* at 12.
[15] Horn, *ibid* at 38-39.
[16] Horn, *ibid* at 39, quoting Northrop Frye.
[17] It should be noted that faculty associations existed at individual Canadian universities long before 1951. For example, the UBC Faculty Association ("UBCFA"), the first faculty association in Canada, was formed at UBC in 1920, with the primary objective of securing higher salaries for faculty: Horn, *ibid* at 54. See also the website of the UBCFA at http://www.facultyassociation.ubc.ca/aboutus.php.
[18] More about the CAUT and its activities can be found online at http://www.caut.ca/.

tenure"[19]—led to the CAUT's first-ever committee of inquiry, and to the Crowe Report.[20] Most importantly, "the case significantly affected the self-image of the professoriate and the idea of academic freedom in Canada."[21]

The events of the Crowe case infamously revolved around a purloined letter. Crowe, a permanent faculty member who was on leave and teaching at Queen's University, wrote a personal letter to a colleague at United College, William Packer, on March 14, 1958, in which he criticized the College administration and environment, and raised concerns about a landslide Conservative victory in the upcoming federal election. Crowe's letter never reached Packer, however, and instead mysteriously ended up on the desk of the Principal of the College, Wilfred Lockhart, along with an anonymous typed note. Exactly who stole and redirected the letter remains unknown. The board of regents ultimately dismissed Crowe 'for cause', "on the grounds that his actions in recent months are incompatible with his continued employment on the teaching staff at United College",[22] though initially the dismissal was with one year's notice. Lockhart himself had written that the letter demonstrated Crowe's lack of "sympathy with the avowed purposes of the College" and "no respect for or loyalty to the administration."[23]

The CAUT launched an investigation into the matter, and the Crowe Report was issued in the fall of 1958, finding that Crowe had been dismissed "for a private expression of opinion which he was given no opportunity to explain and which should not have been before the Board of Regents at all, or certainly not without a previous conference between Dr. Lockhart and Professor Crowe."[24] With respect to academic freedom, the Report then stated that

> ... the following basic postulates are not open to serious question: that academic freedom and security of tenure are neither ends in themselves nor the exactions of special privilege but merely conditions indispensable for the performance of the purposes of higher education; that the search for truth which is the central purpose of institutions of higher learning cannot prosper without freedom of inquiry and expression; and finally, that security of tenure is prerequisite to academic freedom.[25]

The Report also noted that the administration's interpretation of the contents of the purloined letter was irrelevant to the protections afforded by academic freedom:

> Academic freedom would be vulnerable indeed if its limits depended on the interpretation placed by a college administration on the remarks of a member of the academic staff. Academic people may say things which are not understood by the administration. Indeed, it is no part of the function of a professor to speak only in

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[19] Horn, *supra* note 6 at 300.
[20] The Crowe Report, *supra* note 3.
[21] Horn, *supra* note 6 at 220.
[22] Horn, *ibid* at 232.
[23] Lockhart's own words, in a letter he wrote to Crowe in late April of 1958, a few weeks after having received the purloined letter on his desk: Horn, *ibid* at 225.
[24] The Crowe Report, *supra* note 3 at 38.
[25] The Crowe Report, *ibid* at 40.

> accents familiar to the administration. For a man to be discharged on the basis of an interpretation of his remarks made by the administration would create a situation fraught with peril for academic freedom. To find a discharge made in the face of a remonstrance by the teacher that he has been misunderstood, and without being afforded an opportunity of explanation, makes the offence against academic freedom grave indeed. This is what happened in the instant case.[26]

The Report concluded that Crowe's dismissal was "an unjust and unwarranted invasion of the security of academic tenure to which he was entitled"[27] and further determined that the board of regents had mishandled the complaint against Crowe, violating natural justice, due process, and academic freedom. It recommended Crowe be reinstated, "with an assurance of academic freedom and tenure as elaborated in this report".

The release of the Report did compel the board of regents to vote to reinstate Crowe. However, the board refused to reinstate three of his colleagues who had resigned in his support. Crowe, in protest of the way in which Principal Lockhart and the board of regents had handled the entire affair, declined to be reinstated, and in total sixteen people resigned from their positions in support of Crowe. Principal Lockhart tendered his resignation as well, but after the board of regents declined to accept it, he ultimately decided to stay.[28]

Around the same time the Crowe Report was released in the fall of 1958, discussions within the CAUT were underway towards drafting its first statement on academic freedom and tenure. At that time, the National Conference of Canadian Universities (NCCU) (which in 1965 became the AUCC and is now Universities Canada) was also interested in offering its services to help resolve future disputes like the Crowe case, although cooperation and discussions between the organizations towards a joint statement and joint procedures for investigation ultimately did not pan out.

In 2011, the CAUT and the AUCC (now Universities Canada) each issued statements on academic freedom (referred to later in this Report, and attached as Appendix "C" and "D" respectively). The AUCC statement was issued with the aspiration that subscription to it would be a condition of membership in the organization;[29] however, it does not appear that the aspiration has been achieved.[30]

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[26] The Crowe Report, *ibid* at 39.

[27] The Crowe Report, *ibid* at 46.

[28] Horn, *supra* note 6 at 242.

[29] Initially, the press release that accompanied the 2011 AUCC Statement stated that "[a]ffirmation of this statement by institutions is expected to become part of AUCC's criteria for membership": AUCC, "Media Release: Canada's universities adopt new Statement on Academic Freedom" (25 October 2011), available online at: http://www.univcan.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/ (attached as Appendix "D").

[30] The current criteria for membership now state that institutional members shall satisfy a number of conditions, including that "Its approach to the protection of academic freedom respects the spirit of the Universities Canada Statement on Academic Freedom which was approved by the membership on October 25, 2011 and as may be

(ii) Tenure and Academic Freedom

As the Crowe case illustrates, security of tenure for faculty members has become a pillar of academic freedom. By the mid-1940s, the UBC Faculty Association ("UBCFA")—an association formed in 1920 "for the purpose of facilitating members' social and employment relationship with the University"[31]—was showing interest in academic freedom and tenure as well as in salaries and benefits.

In 1948, the UBCFA suggested that the Senate and the Board at UBC endorse the 1940 AAUP "Statement of Principles on Academic Freedom and Tenure" (the "1940 Statement"),[32] towards having the phrase "appointment without term", which was used in employment contracts at the university, defined to mean "tenure" as outlined in the 1940 Statement (which allowed dismissal only "for cause").[33] In 1949, the Board approved the 1940 Statement in principle, though the broad and discretionary statutory powers of the Board and of the President were maintained in every way. Through a process of discussion and agreement, the definition of tenure at UBC gradually fell more in line with the 1940 Statement, and clearer procedures governing the granting of promotion and tenure, including the involvement of senior faculty in an advisory role, were put in place.

Ultimately, however, the statutory instruments governing universities in British Columbia continued to provide that faculty served "during the pleasure" of the Board,[34] and so "[t]he security enjoyed by tenured faculty in the three British Columbia universities ultimately depended on the extent to which their governing boards were willing to tie their own hands. In practice, though, tenured faculty members served during good behavior until the age of retirement."[35]

Since 2000, the UBCFA has been the sole bargaining agent for tenure, tenure-track, and sessional faculty at UBC under the terms of the BC *Labour Relations Code*,[36] and a Collective Agreement between the UBCFA and UBC governs the terms of employment of those faculty members.[37] In 2006, language was added to the Preamble of the Collective Agreement

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amended by the membership from time to time" (Universities Canada, "Criteria to Become a Member", available online: http://www.univcan.ca/about-us/member-universities/membership-eligibility/criteria-to-become-a-member/ (accessed 2 October 2015).

[31] UBCFA, "About Us", available online at http://www.facultyassociation.ubc.ca/aboutus.php. The website goes on to note that "[t]he Faculty Association is now a registered non-profit society incorporated under the *Society Act* in British Columbia. Since 2000, we have also been a voluntarily recognized union and the sole bargaining agent for our more than 3,200 members under the protection and rules of the *Labour Relations Code* of British Columbia."

[32] AAUP, "1940 Statement of Principles on Academic Freedom and Tenure", available online at: http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure ("the 1940 Statement").

[33] Horn, *supra* note 6 at 292.

[34] This is still the case: see s. 28 of the *University Act*, RSBC 1996, c 468.

[35] Horn, *supra* note 6 at 293.

[36] *Labour Relations Code*, RSBC 1996, c 244.

[37] UBC/UBCFA Collective Agreement 2012-2014, available online at: http://www.hr.ubc.ca/faculty-relations/collective-agreements/ (the "Collective Agreement").

regarding academic freedom; that language is still in place today.[38] The specific terms and conditions of tenure at UBC, including faculty appointment, promotion, and dismissal are also governed by the Collective Agreement.

(iii) Lessons from History

This brief history shows that, in Canada, the specific content and protections offered by academic freedom—though greatly influenced both by current and historical understandings from around the world—are largely a matter of collegial co-governance and agreement among faculty members, their faculty associations, and the specific university at which they are employed.

(b) Academic Freedom and the Canadian Constitution

Under the terms of the *Constitution Act, 1867*, the power to establish and regulate universities is given to the provincial legislatures.[39] For example, UBC was established by provincial statute, and is continued and governed by the terms of BC's *University Act*.[40]

The *Canadian Charter of Rights and Freedoms*, which largely came into force in 1982 as part of the *Constitution Act 1982*,[41] sets out fundamental rights and freedoms which cannot be unjustifiably infringed by the state, whether by law or government action.[42] Included in these are the "fundamental freedoms" set out in s. 2 of the *Charter*, which explicitly include the freedoms of thought, belief, opinion, expression, and association. The phrase "academic freedom" is not mentioned. None of the enumerated rights or freedoms is absolute: all rights and freedoms guaranteed by the *Charter* are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[43]

The courts have recognized that the *Charter* embodies a set of fundamental values. Further, there has been some recognition in the jurisprudence that academic freedom, as "the freedom to express and explore ideas to advance both knowledge and understanding"[44] is akin to a *Charter* value, in that it "is a critically important value in a free and democratic society."[45]

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[38] It is discussed below in "The Centrality of the Collective Agreement", beginning at page 14.

[39] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, s 93.

[40] *University Act*, RSBC 1996, c 468.

[41] Except for the equality provisions in s. 15, which came into force three years later in 1985.

[42] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter*").

[43] The *Charter*, *ibid*, s. 1.

[44] *Maughan v UBC*, 2008 BCSC 14 ["*Maughan* (BCSC)"] at para 2, affirmed 2009 BCCA 447 ("we are satisfied that the trial judge's interpretation of the *CRPA* was correct and that he did not err in failing to apply *Charter* values as an aid to interpretation [the statute was not ambiguous, so regard did not need to be made to *Charter* values as a principle of statutory interpretation]. We also note that we are not persuaded that the application of *Charter* values would have led to a different conclusion as to the interpretation of the *CRPA* in any event" (at paras 56-57), leave to appeal refused [2009] SCCA No. 526.

[45] *Maughan* (BCSC), *ibid* at para 2. See also *R v Parent* (2014), 308 CCC (3d) 493 (QC SC) at para 123 ("In other words, academic freedom and the importance of institutions of higher learning and academic research are key components of a democracy that values freedom of thought and expression."); and *Pridgen v University of Calgary*,

The possible application of the *Charter* or *Charter* values to activities in universities is an interesting question that has not been definitively resolved by the courts. Neither need it be discussed further here: its determination is not necessary to the analysis, and none of the parties involved relied on *Charter* arguments.

(c) The University's Governing Documents

The University's governing documents include (1) UBC's empowering statute, the *University Act*,[46] (2) the provisions of the Academic Calendar as issued by the Senate, (3) the various contracts and agreements entered into by the University, including the Collective Agreement, and (4) the official policies and regulations issued by the Board of Governors.

(1) The *University Act* – The *University Act* delineates the function and powers of all universities in British Columbia, including UBC, and their constituent elements.[47] Although the *University Act* delegates a significant amount of regulatory and decision-making power to UBC, it remains the ultimate legal authority in relation to all university matters and activities. Anything done contrary to its provisions is considered unlawful and without jurisdiction. Generally speaking, the *University Act* creates a bicameral governance structure at UBC, composed of a Vancouver and an Okanagan Senate, and a central Board of Governors. The Senate is the authoritative governance body on academic matters,[48] while the Board of Governors is the ultimate authority on matters related to the management, administration and control of the property, revenue, business and affairs of the University.[49] The President is the chief executive officer of UBC, and generally supervises and directs the academic work of the University.[50] The Collective Agreement which sets out the terms of employment for faculty members at UBC is the result of employment negotiations between the UBC Faculty Association (the faculty union) and UBC (as represented by the President and Board of Governors).

(2) The University Calendar – As part of the statutory powers of academic governance vested in the Senate,[51] the University is empowered to prepare and publish a university calendar. The current UBC Academic Calendar includes a policy on "Academic Freedom" consisting of two parts: (1) an introductory statement on academic freedom; and (2) a statement of freedom from harassment and discrimination.[52] The introductory statement provides as follows:

2012 ABCA 139 at para 113 ("Academic freedom, as that idea has come to be understood, is an important value in Canadian society. LaForest J. in *McKinney* described it as the 'free and fearless search for knowledge and the propagation of ideas' (para 62), that is 'essential to our continuance as a lively democracy' (para 69)").

[46] The *University Act*, RSBC 1996, c 468.

[47] *Ibid*.

[48] *Ibid*, s. 37(1).

[49] *Ibid*, s. 27(1).

[50] *Ibid*, s. 59.

[51] See s. 37(1)(n) of the *University Act*, *ibid*.

[52] The Policy on "Academic Freedom" in the Vancouver Academic Calendar 2015/16 can be found online at http://www.calendar.ubc.ca/vancouver/index.cfm?tree=3,33,0,0. As noted on the website, "The Academic

> The members of the University enjoy certain rights and privileges essential to the fulfilment of its primary functions: instruction and the pursuit of knowledge. Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, and to engage in full and unrestricted consideration of any opinion. This freedom extends not only to the regular members of the University, but to all who are invited to participate in its forum. Suppression of this freedom, whether by institutions of the state, the officers of the University, or the actions of private individuals, would prevent the University from carrying out its primary functions. All members of the University must recognize this fundamental principle and must share responsibility for supporting, safeguarding and preserving this central freedom. Behaviour that obstructs free and full discussion, not only of ideas that are safe and accepted, but of those which may be unpopular or even abhorrent, vitally threatens the integrity of the University's forum. Such behaviour cannot be tolerated.[53]

The policy on Academic Freedom then further emphasizes the "Freedom from Harassment and Discrimination":

> The University of British Columbia is committed to ensuring that all members of the University community - students, faculty, staff, and visitors - are able to study and work in an environment of tolerance and mutual respect that is free from harassment and discrimination.[54]

(3) The Collective Agreement – The parties agree that the governing definition of "academic freedom" is that set out in the Collective Agreement between UBC and the UBCFA which is currently in effect (the "Collective Agreement").[55] The full text of the Preamble in Part 1 ("Framework for Collective Bargaining") of the Collective Agreement provides as follows:

> THE UNIVERSITY OF BRITISH COLUMBIA and the FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA
>
> DESIRING to promote fair and proper economic conditions and terms of appointment for Faculty Members, Librarians, and Program Directors at The University of British Columbia;

Calendar is a comprehensive guide to all *programs, courses, services,* and *academic policies* at the University of British Columbia. The Calendar also serves as a record of many University academic policies and procedures. The online Calendar is the official Calendar. Changes are incorporated online at intervals throughout the year": http://www.calendar.ubc.ca/vancouver/.

[53] UBC Vancouver Academic Calendar 2015/16, Policies and Procedures, "Academic Freedom: Introduction", available online at http://www.calendar.ubc.ca/vancouver/index.cfm?tree=3,33,86,0.

[54] UBC Vancouver Academic Calendar 2015/16, Policies and Procedures, "Academic Freedom: Freedom from Harassment and Discrimination", available online at http://www.calendar.ubc.ca/vancouver/index.cfm?tree=3,33,87,0.

[55] UBC/UBCFA Collective Agreement 2012-2014, available online at: http://www.hr.ubc.ca/faculty-relations/collective-agreements/ (the "Collective Agreement").

> RECOGNIZING that the University is a community of scholars whose essential functions are the pursuit and dissemination of knowledge and understanding through research and teaching and that academic freedom is essential to carrying out these functions;
>
> BEING DETERMINED not to interfere with that academic freedom;
>
> CONFIRM THAT the members of the University enjoy certain rights and privileges essential to the fulfillment of its primary functions: instruction and the pursuit of knowledge. Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, to engage in full and unrestricted consideration of any opinion. This freedom extends not only to the regular members of the University but to all who are invited to participate in its forum. Suppression of this freedom, whether by institutions of the state, the officers of the University or the actions of private individuals, would prevent the University from carrying out its primary functions. All members of the University must recognize this fundamental principle and must share responsibility for supporting, safeguarding and preserving this central freedom. Behaviour which obstructs free and full discussion, not only of ideas which are safe and accepted but of those which may be unpopular or even abhorrent, vitally threatens the integrity of the University's forum. Such behaviour cannot be tolerated[.][56]

(4) Official UBC Policies and Regulations – UBC has a number of policies, regulations, guidelines, and rules which govern activities within the University community and of University members. They include the policies that will be discussed in this Report, below, in "Description of the University Policies".

(d) Other Sources

The understanding of academic freedom in Canada is informed by statements promulgated by two national organizations: the AUCC (Association of Universities and Colleges of Canada, now known as Universities Canada/Universités Canada)[57] and the CAUT.[58] They are attached to this Report as Appendices "C" and "D".

Finally, the United Nations Educational Scientific and Cultural Organization (UNESCO) has issued a statement on academic freedom adopted out of "concern regarding the vulnerability of the academic community to untoward political pressures which could undermine academic freedom," and "[c]onsidering that the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education and that the open communication of findings, hypotheses and

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[56] Collective Agreement, *ibid* at 5.
[57] AUCC "Statement on Academic Freedom", *supra* note 29 (attached as Appendix "D").
[58] Canadian Association of University Teachers ("CAUT"), CAUT Policies: Academic Freedom, online: http://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom (attached as Appendix "C").

opinions lies at the very heart of higher education and provides the strongest guarantee of the accuracy and objectivity of scholarship and research".[59]

None of these statements is binding on UBC but they are informative about the sometimes competing understandings of academic freedom in Canadian universities and show the focus of some key debates.

2. The Centrality of the Collective Agreement in Defining the Academic Freedom of Faculty at UBC

The parties agree that the governing definition of "academic freedom" is that set out in the Collective Agreement between UBC and the University of British Columbia Faculty Association ("UBCFA") which is currently in effect (the "Collective Agreement").[60]

Thus, according to the Preamble to the Collective Agreement, quoted in full above, "academic freedom" is defined as follows:

(a) Vested in "members of the University", recognizing that "the University is a community of scholars";

(b) Essential to the integrity of the University's forum and to the fulfillment of the two primary functions of the University, those being (1) instruction: the pursuit and dissemination of knowledge and understanding through teaching, and (2) the pursuit and dissemination of knowledge and understanding through research;

(c) Consisting of "the freedom, within the law, to pursue what seems to [members of the University] as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, [and] to engage in full and unrestricted consideration of any opinion";

(d) As placing positive obligations on "[a]ll members of the University" to "recognize this fundamental principle" and to "share responsibility for supporting, safeguarding and preserving this central freedom";

(e) As being protected from "suppressing behavior" by certain individuals or institutions, namely (1) institutions of the State; (2) officers of the University; or (3) the actions of private individuals;

(f) Where "suppressing behavior" includes (but is not necessarily limited to) "[b]ehaviour which obstructs free and full discussion, not only of ideas which are safe and accepted but of those which may be unpopular or even abhorrent"; and

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[59] *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO, 29th Sess (11 November 1997), Records of the General Conference, Volume 1: Resolutions, available online at http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[60] UBC/UBCFA Collective Agreement 2012-2014, available online at: http://www.hr.ubc.ca/faculty-relations/collective-agreements/ (the "Collective Agreement").

(g) Is a freedom which is not "interfere[d] with" by the provisions of the Collective Agreement.

The core of this statement on academic freedom can be located within the single sentence which defines its substantive content:

> Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, to engage in full and unrestricted consideration of any opinion.[61]

3. Academic Rights and Obligations: The Elements of Academic Freedom as They Relate to Faculty at UBC

Some elements of academic freedom pertinent to UBC faculty members are as follows.

(a) Terminology in the Collective Agreement

As noted above, the parties (UBC and the Faculty Association) agree that the Preamble to the Collective Agreement is the main source of the definition and content of academic freedom at UBC, as it applies to the rights and responsibilities of faculty members.

(i) "Members" of the University

To whom does academic freedom apply? The Collective Agreement explicitly recognizes that the protections of academic freedom extend to all "members" of the university, including visitors: "This freedom extends not only to the regular members of the University but to all who are invited to participate in its forum."

The term "member" or "member of the University", as it appears in the Preamble, remains undefined in the Collective Agreement.[62] That said, given that the Collective Agreement also specifically recognizes that "the University is a community of scholars", and given that the UBCFA, as bargaining agent for all faculty at UBC, negotiated and signed the Collective Agreement, there can be no question that individual "faculty" are included within the definition.[63] Although they are not specifically referenced, and nor are they bound by the terms of the Collective Agreement, students and staff of UBC also seem to fall within this definition, as "members" who participate in the university forum on a regular basis. This is affirmed, in part,

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[61] Collective Agreement, *ibid* at 5 [emphasis added].

[62] However, the capitalized term "Member" *is* defined within the Collective Agreement, and "means member of the Faculty Association bargaining unit": Article 1.01, *ibid*.

[63] The more specific term "Faculty Member" is also defined within the Collective Agreement in Article 1.01, and "means any person having an appointment from the Board of Governors of The University of British Columbia as Sessional Lecturer, Lecturer, Instructor, Instructor I, Instructor II, Senior Instructor, Professor of Teaching, Assistant Professor, Associate Professor, or Professor".

by the fact that this part of Preamble is also replicated word-for-word in UBC's Academic Calendar, which sets out UBC's more general academic governance regulations and policies.[64]

(ii) "Dissemination" of Knowledge

The Collective Agreement identifies two "essential functions" of the University to which academic freedom is essential: the *pursuit* of knowledge and understanding, and the *dissemination* of knowledge and understanding.

Scholarly knowledge and understanding have generally been disseminated at Canadian universities through (ideally, peer-reviewed) publication in books, articles, journals, and treatises, as well as in lectures and speeches. With the internet and other technological advances, the university forum now extends well beyond the borders of the campus and the print on a page. New electronic media such as email, websites, blogs, and online learning management systems, as well as social media such as Facebook, Twitter, and LinkedIn, have emerged as important vehicles for communication in the academy, at vastly greater speeds, and reaching far wider audiences than were previously possible. These new media serve to advance the dissemination of scholarly research and opinion. It cannot seriously be argued that the means of publication (for example, electronic rather than in print) affects the extent to which a scholar is free to advance ideas or opinions.

UBC has embraced this reality, and the University has published online guidelines for the use of social media by all members of the UBC community. Those guidelines specifically recognize that social media can be used to advance the dissemination of knowledge through the exercise of academic freedom:

> The use of social media is increasingly common for faculties, departments, and employees at UBC. These guidelines have been created to provide general guidance on the use of social media at UBC for faculty and staff.
>
> Blogs, forums, and social networking sites are exciting channels where you can share ideas and connect with others who have the same interests. They provide an opportunity to advance UBC's mandate to disseminate knowledge and build effective relations with the community through dialogue and academic freedom. However, they also have the potential to affect professional and organizational reputations.[65]

The guidelines for "faculty use" of social media technologies acknowledge the ways that the use of social media can enhance the dissemination of knowledge by faculty members at UBC:

> Just as speaking at conferences and to journalists can enhance your academic reputation, effective use of social media can help your influence and connect you with

[64] See the section, above, on "The University's Governing Documents".
[65] The University of British Columbia, "Social Media Guidelines" (Vancouver: UBC, 2015), online at http://brand.ubc.ca/working-with-our-brand/social-media/before-you-start/ (accessed 20 September 2015) [emphasis added].

> others working within your discipline. Social media can be a powerful way to share ideas, foster discussion, and enhance your teaching. These guidelines were created to assist you in creating an effective social media presence related to your area of expertise.[66]

The Faculty Use Guidelines further acknowledge that the guidelines are in no way intended to interfere with the exercise of faculty members' academic freedom:

> These guidelines are intended to encourage faculty to engage in social media, not to interfere with or restrict academic freedom in any way. As with all communications at UBC, your right to academic freedom is limited only by the university's respectful environment and harassment and discrimination policies.[67]

(b) The Responsibilities of Academic Freedom at UBC

The protections and rights associated with academic freedom at UBC exist alongside concurrent duties and responsibilities. As at other Canadian universities, legitimate restrictions and limitations apply to the academic freedoms of individual members of the UBC community.[68] As Horn puts it:

> Legitimate restrictions on academic freedom do exist. Academic freedom does not imply that the campus must be host to any and all behaviour short of the actually illegal. It does not justify defamation or the counselling of insurrection, or doing as little work as possible. Nor does it confer the liberty to teach whatever catches ones fancy. Course content may depend on the choices made by individual professors, but the subjects to be taught must be authorised by academic bodies.[69]

Academic freedom confers not only rights but also responsibilities. Included in these responsibilities are the obligations to obey the law, to create and maintain a respectful environment at UBC, to act in good faith, and to actively support and protect the exercise of academic freedom.

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[66] The University of British Columbia, "Social Media Guidelines: Faculty Use" (Vancouver: UBC, 2015), online at http://brand.ubc.ca/working-with-our-brand/social-media/before-you-start/faculty-use/ (accessed 20 September 2015) ["Faculty Use Guidelines"].

[67] "Social Media Guidelines: Faculty Use", *ibid*.

[68] One of the longest standing debates around academic freedom includes how ideals of social equity and equal opportunity can appropriately be balanced with ideals of free expression and free inquiry. UBC has been at the forefront of the Canadian movement towards theorizing, discussing, and applying this kind of balanced approach to academic freedom at Canadian universities. For further reading, see the text *Academic Freedom and the Inclusive University*, ed by Sharon E. Kahn & Dennis Pavlich (Vancouver: UBC Press, 2000), which arose out of a conference of the same name hosted at UBC by the President and various UBC academic associations on 10-12 April 1997.

[69] Horn, *supra* note 6 at 6.

(i) "Within the Law"

The definition of academic freedom found in the Collective Agreement explicitly describes it as "the freedom, within the law, to..." do a number of things.[70] While it likely goes without saying, speech or behavior which might otherwise be protected under the category of "academic freedom" is not protected to the extent that it is unlawful.

However, this limitation on academic freedom is not simply a matter of contract, and thus cannot be waived: even where it is not explicitly acknowledged, there is an implied duty on all members of the University to act lawfully in the exercise of their academic freedom. Simply put, if an act or omission would be unlawful outside the University community, it is similarly unlawful within the University. Academic freedom does not provide any special immunity from the general laws of the province or the country.

That said, courts have been cognizant of the existence, particular circumstances, and context of academic communities, including the essential roles that universities play in contributing to the larger Canadian society through the pursuit and dissemination of knowledge and ideas:

> Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy.[71]

Generally applicable laws, such as the law of negligence, take into account fundamental values such as academic freedom and freedom of expression:

> The law must be restrained in intervening in the conduct of affairs in any circumstances where what are at issue are expressions and communications made in the context of an exploration of ideas, no matter how controversial or provocative those ideas may be. It is for that reason that the *CRPA* [*Civil Rights Protection Act*, RSBC 1996, c 49] requires evidence that an alleged tortfeasor not only engaged in communications which had the effect of an interference with a person's civil rights by inciting religious based hatred or contempt of her or by inciting a sense of her inferiority, but also that the tortfeasor intended that result. It is also for that reason that, in the specific context of the academic exploration of ideas, the *University Act* prevents actions against the defendant UBC or its representatives unless there is evidence of bad faith.
>
> Those evidentiary thresholds, while not depriving those subjected to harm of the right to a remedy for malicious or morally oblique behaviour, are nevertheless necessary to further academic freedom, which is vital to the function of a university and the

[70] Collective Agreement, *supra* note 37 at 5 [emphasis added].
[71] *McKinney v University of Guelph*, [1990] 3 SCR 229 at para 69 (per LaForest J) ("*McKinney*").

community it serves, and freedom of expression, which is crucial to the operation of a free and democratic society.[72]

This is also true of other areas of law, such as the common law of privilege.[73]

(ii) Acting in Good Faith

In exercising their academic freedoms, faculty members must be given wide latitude "to pursue what seems to them as fruitful avenues of inquiry".[74] However, this free pursuit of knowledge is not completely unfettered. I believe that it remains subject to an overarching duty to act honestly and in good faith, in both the pursuit and dissemination of knowledge. Academic freedom is not an end in itself, but a means to the end of enabling the purposes of higher education to be fulfilled. Faculty members do not, within the protections of academic freedom, have the right to do or say anything they please, whenever or wherever they want, particularly when their motives for doing so serve to undermine, rather than advance, the pursuit and dissemination of knowledge and understanding. For example, it seems to me that the intentional fabrication of data would not be a protected exercise of academic freedom.

Broadly speaking, this overarching duty of honesty and good faith means that all university faculty members remain subject to a duty "inherent in their academic freedom ... to base their research and scholarship on an honest search for knowledge with due respect for evidence, impartial reasoning and honesty in reporting".[75] Impartiality in this context should not be confused with neutrality: faculty members remain free to adopt and proffer their own opinions and perspectives on all matters, including those relating to the standards governing their particular discipline. Indeed, it is essential to the "full and unrestricted consideration of any opinion"[76] that faculty at UBC are active participants in the "full and free discussion, not only of ideas which are safe and accepted but of those which may be unpopular or even abhorrent".[77]

The duties of honesty and good faith must be understood in the context of the professional standards within which a faculty (or other University) member operates, and the pursuit of excellence to which the University is committed. The Collective Agreement itself recognizes that in, for example, promotion and tenure reviews, "consideration of appropriate standards of excellence across and within faculties and discipline" is to be one of the key

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[72] *Maughan* (BCSC), *supra* note 44 at paras 493-94 [emphasis added].
[73] See, for example, *R v Parent* (2014), 308 CCC (3d) 493 (QC SC), finding a researcher-participant confidentiality privilege rooted in the common law, including the importance of academic freedom, which protects confidential, academic research work product from disclosure in criminal investigations; and *Ogden v Simon Fraser University*, 1998 CarswellBC 3260, [1998] BCJ No. 2288 (Prov Ct), upholding a researcher's claim to payment of legal fees from the university in successfully defending a claim of researcher-participant privilege.
[74] Collective Agreement, *supra* note 37 at 5.
[75] *Recommendation Concerning the Status of Higher-Education Teaching Personnel*, UNESCO, 29th Sess (11 November 1997), Records of the General Conference, Volume 1: Resolutions, s 34(c).
[76] Collective Agreement, *supra* note 37 at 5.
[77] Collective Agreement, *ibid*.

factors.[78] To the extent that such professional standards facilitate and advance the "pursuit and dissemination of knowledge and understanding", whether within a relevant academic discipline or to the University community and the public more broadly, these standards do not "limit" but instead are constitutive of academic freedom at UBC.[79] The same is true of the overarching duty of honesty and good faith.

(iii) Respectful Environment

A key aspect of academic freedom is that it is intended to protect the "free and full discussion, not only of ideas which are safe and accepted but for those which may be unpopular or even abhorrent".[80] The censorship or silencing of ideas or voices is the antithesis of such "free and full discussion". However, discussions and discourses are not one-way streets: they are only "free" and "full" to the extent that *every* person who wishes to participate in them is not threatened or silenced by other louder or more strident voices. The protections of academic freedom do not include an unlimited "right to offend", nor do they include disrespectful actions or behaviours which have the effect of quieting or silencing—and thus limiting the participation of—some members of the University in the free and full discussion of all ideas.

Therefore, another part of what generally frames the understanding of "academic freedom" at UBC is the "Statement on Respectful Environment for Students, Faculty and Staff". In the balancing of academic freedoms, rights, and obligations, its effect is to affirm that speech or behavior will only be protected as an exercise of academic freedom so long as it "respect[s] the dignity of individuals and make[s] it possible for everyone to live, work, and study in a positive and supportive environment, free from harmful behaviours such as bullying and harassment."[81] This implies that members of the University, while having certain freedoms and rights, also have certain obligations which accompany those freedoms and rights—most particularly, the duty to exercise those freedoms and rights "responsibly":

> Therefore, freedom of expression and freedom of inquiry must be exercised responsibly, in ways that recognize and respect the dignity of others, having careful regard to the dynamics of different relationships within the university environment, such as between professor and student, or supervisor and employee. A respectful environment is a

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[78] Article 5.14(e)(iii) of the Collective Agreement, *supra* note 37 at 79.

[79] See, for example, *University of Alberta v Alberta (Human Rights Commission)*, [1992] 2 SCR 1103 at para 139: "Peer evaluation ... is a fair and equitable way of assessing professors in good faith, on the basis of their teaching, research and publication records, rather than on their age. Unless abused, it poses no threat to academic freedom, and in fact enhances the value of tenure by ensuring that incompetent professors, young or old, are dismissed. These evaluations are difficult, as they should be, but no more difficult than the assessments that are made before an academic is first hired for a term, offered tenure, promoted, and awarded merit increases. In effect, evaluations of a professor's competence, as opposed to the popularity of their specific views, are made throughout his or her career."

[80] Collective Agreement, *supra* note 37 at 5.

[81] "UBC Statement on Respectful Environment for Students, Faculty and Staff", Approved by UBC Executive, Revised May 2014 ["Statement on Respectful Environment"].

climate in which the human dignity of each individual is valued, and the diverse perspectives, ideas and experiences of all members of the community are able to flourish.[82]

(c) Positive Obligations to Protect Academic Freedom

As recognized in the Academic Calendar and the Collective Agreement, all members of UBC, including senior administrators, have positive obligations with respect to the academic freedoms of others: "All members of the University must recognize this fundamental principle [of academic freedom] and must share responsibility for supporting, safeguarding and preserving this central freedom."

In particular, all members of the University, including faculty members, are subject to an underlying positive obligation to support and protect academic freedom at UBC. This means both supporting individual members in the exercise of their academic freedoms and rights, and ensuring those protections are embedded in the larger governing structure. In this sense, "academic freedom is tied to professional responsibilities within the university and the academic community."[83]

(d) Commenting on University Governance

The definition of academic freedom found in the Collective Agreement is silent as to whether it includes the "right to criticize" either UBC or other societal or governmental institutions. Other articulations of academic freedom do explicitly address the issue. For example, the collective agreement currently in place at the University of Toronto provides that "academic freedom is the freedom to examine, question, teach, and learn, and it involves the right to investigate, speculate, and comment without reference to prescribed doctrine, as well as the right to criticize the University and society at large."[84] That collective agreement goes on to note that academic freedom entitles faculty to "freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual nor does it preclude commitment on the part of the individual. Rather academic freedom makes such commitment possible."[85]

Similarly, the CAUT Policy on Academic Freedom states that "[a]cademic freedom includes ... [the] freedom to express one's opinion about the institution, its administration, and

[82] Statement on Respectful Environment at 2 [emphasis added].
[83] Barry E Hogan & Lane D Trotter, "Academic Freedom in Canadian Higher Education: Universities, Colleges, and Institutes Were Not Created Equal" (2013) 43:2 CJHE 68 at 71 ["Hogan & Trotter"]
[84] Article 5 of the consolidated "Memorandum of Agreement" between The Governing Council of the University of Toronto and The University of Toronto Faculty Association, initially ratified on the 28th of June, 1977 and including subsequent ratified amendments ["U of T Collective Agreement"] [emphasis added].
[85] U of T Collective Agreement, *ibid*, Article 5(1)(c).

the system in which one works ... Academic freedom always entails freedom from institutional censorship."[86]

By contrast, the "Statement on Academic Freedom" adopted by Universities Canada (formerly the Association of Universities and Colleges of Canada, or "AUCC") makes no mention of an individual right or freedom to criticize either one's university or any other institution.[87] Instead, the Statement on Academic Freedom focuses more specifically on the individual freedoms to teach and conduct research, the principles of institutional autonomy and integrity, and the responsibilities attached to such freedoms, particularly on the part of the university leadership. Universities Canada states that "[i]t is a major responsibility of university governing bodies and senior officers to protect and promote academic freedom. This includes ensuring that funding and other partnerships do not interfere with the autonomy in deciding what is studied and how. .... Faculty also share with university leadership the responsibility of ensuring that pressures from funding and other types of partnerships do not unduly influence the intellectual work of the university."[88]

Although the UBC Collective Agreement definition of academic freedom does not refer to commentary on university governance, in my opinion the positive obligation to support and protect academic freedom at UBC means that such commentary falls within its ambit.

The fact that UBC, like many other universities across Canada, is largely a self-governing institution, supports this view. As stated by the Supreme Court of Canada in *McKinney*, this implies a significant measure of institutional autonomy—the institutional form of academic freedom—from the government:

> The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.[89]

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[86] Canadian Association of University Teachers ("CAUT"), CAUT Policies: Academic Freedom, online: http://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom [emphasis added]. See also Appendix "C".

[87] "Statement on Academic Freedom", Press Release, Universities Canada/Universités Canada (October 25, 2011), available online at: http://www.univcan.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/. See also Appendix "D".

[88] Universities Canada, "Statement on Academic Freedom", *ibid*. See also Appendix "D".

[89] *McKinney*, *supra* note 71. Note that UBC, unlike the Ontario universities to which the Court was referring in *McKinney*, does not have a majority of its Board of Governors elected or appointed independent of government. On the contrary, under the terms of s. 19(2) of the *University Act*, RSBC 1996, c 468, of the 21 members of the Board of Governors, a majority of 11 are appointed by the Lieutenant Governor in Council. It is still true, however, that the members of the Board of Governors are to act, not as directed by the government, but "in the best interests of the university" as set out in s. 19.1. The Supreme Court of Canada, in the companion case to *McKinney* which explicitly considered BC's *University Act* found that this difference in governmental control did not affect the

Institutional autonomy (self-governance), in conjunction with the recognition that "the University is a community of scholars",[90] means that, broadly speaking, "[a]cademic freedom is premised on the expectation that the professoriate will self-regulate and participate in institutional governance."[91] Members from all parts of the University community, including faculty, students, alumni, and employees, have a voice in the formal governance structures at UBC.[92] At the same time, faculty members' significant involvement in almost all aspects of UBC governance implicitly involves "the balance between faculty decision-making rights and faculty responsibilities."[93]

Participation in UBC governance on the part of faculty members is not limited to those individual members who actually sit in a representative capacity on the governance bodies or their committees. Other faculty members similarly participate in the governance of UBC when they engage in "free and full discussion" of university affairs. In my opinion, the freedom "to engage in full and unrestricted consideration of any opinion"[94] extends to commentary on the extent to which the central functions of the University are being advanced or hindered by decisions or initiatives affecting the University. I note that this does not mean that faculty members who participate in governance, either in representative capacities or as a part of the senior administration, might not have additional responsibilities and obligations *as a result of those other roles*. Those role-specific responsibilities and obligations might serve to limit their freedom to comment on university affairs.[95]

(e) Reporting Potential Violations

Academic freedom would be a hollow freedom indeed if it did not include the freedom to raise, report, or protest a perceived interference with its protections. The parameters of academic freedom do not normally occupy the day-to-day thinking of most faculty members. Very few claim particular "expertise" in relation to academic freedom. Yet all members of the UBC community enjoy academic freedom, and rely on its implicit protections in carrying out

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ultimate conclusion that UBC is not a government actor with respect to its retirement policies: *Harrison v University of British Columbia*, [1990] 3 SCR 451 at para 56 (per LaForest J).

[90] Collective Agreement, *supra* note 37 at 5.

[91] Hogan & Trotter, *supra* note 83 at 71.

[92] See particularly the statutorily mandated composition of the UBC Board of Governors in s. 19(2) of the *University Act*, RSBC 1996, c 468; and of the Okanagan and Vancouver Senates of UBC in s. 35.1, the majority of which are made up of faculty members: ss. 35.1(2)(g) and 35.1(3)(g).

[93] Hogan & Trotter, *supra* note 83 at 71.

[94] Collective Agreement, *supra* note 37 at 5.

[95] The case of Robert Buckingham at the University of Saskatchewan is a telling example: Professor Buckingham was a tenured professor as well as the head of the School of Public Health who was fired and escorted off-campus for negative remarks he made about cuts and restructuring plans at the university. The university later apologized for firing a tenured professor and reinstated him in his faculty position, but maintained that the firing from the senior administrative position was justified, stating that "Dr. Buckingham was removed from his executive director position for acting contrary to the expectations of his leadership role." See, for example, CBC News, "Robert Buckingham offered tenured role at Saskatchewan university after firing" (May 15, 2014), available online at http://www.cbc.ca/news/canada/saskatoon/robert-buckingham-offered-tenured-role-at-saskatchewan-university-after-firing-1.2644085 .

their daily academic activities. In this way, academic freedom's content is formed not only through "top-down" policies, agreements, and regulations, but also through attention to the daily realities of those who work in universities and thus occasionally bump up against its application and potential limits. In these moments, university members must be free to raise, discuss, and report on the nature and effect of activities they see as potential infringements of their own, or others', academic freedom, regardless of the specific nature of their academic area of expertise. In my view, this follows from the existence of a positive obligation to protect and support academic freedom.

4. The Test for Determining Interference With or a Failure to Protect Academic Freedom

(a) Interference With Academic Freedom

In my opinion, the test for determining whether there has been an unjustified interference with a faculty member's academic freedom at UBC should be both purposive and contextual. It should take into account the purposes advanced by the activities in question, the extent to which they relate to the essential functions of the University, the context in which the alleged infringement occurred, and the individual roles and circumstances of the parties involved, including the relationship dynamics among them. An intention to suppress academic freedom may be relevant, but suppression of or interference with academic freedom can also occur through unintended effects.

This means that a determination that there has been an interference with an individual's academic freedom is based not only on what the parties involved actually experienced, knew, or understood about each other and the situation, but on what a reasonable person in each of their circumstances would have experienced, known or understood, taking into account the full context of the situation.

(b) Failure to Protect Academic Freedom

Because of the positive obligation to support and protect academic freedom, not only acts, but also failures to act, may be problematic. Such failures can occur both on the part of individuals and on the part of the institution, at a systemic level. As with the analysis of an alleged interference, the context and the purposes for which academic freedom is protected are relevant. Similarly, a failure to protect academic freedom can occur intentionally or unintentionally.

B. Description of the University Policies

UBC has a number of policies, regulations, guidelines, and rules which govern activities within the University community and of University members. They include:

1. UBC Statement on Respectful Environment for Students, Faculty and Staff

Generally speaking, the "Statement on Respectful Environment" prohibits "activities harmful to a respectful environment" because they are "not only a direct attack on the dignity and worth of the individual or group" at whom they are directed, but they also undermine "the freedoms of the whole community".[96] As such, "disrespectful behavior, including bullying and harassment, is not acceptable and will not be tolerated at UBC."[97] What constitutes "bullying or harassment" is then further defined:

> "Bullying or harassment" is "objectionable and unwanted behavior" that:
> (a) Usually consists "of repeated acts", but may also consist of "a single serious incident that has a lasting harmful effect";
> (b) is "verbally or physically abusive, vexatious or hostile";
> (c) is "without reasonable justification"; and
> (d) that "creates a hostile or intimidating environment for working, learning or living."[98]

2. Policy 3, "Discrimination and Harassment"

As noted in the Policy, its "fundamental objectives ... are to prevent Discrimination and Harassment on grounds protected by the B.C. *Human Rights Code*, and to provide procedures for handling complaints, remedying situations, and imposing discipline when such Discrimination or Harassment does occur."[99] Like the Statement on Respectful Environment, the Policy affirms that UBC is "committed to providing its students, staff and faculty with an environment dedicated to excellence, equity and mutual respect; one that is free of Discrimination and Harassment; and one in which the ability to freely work, live, examine, question, teach, learn, comment and criticize is protected."[100] The relationship between academic freedom and discrimination and harassment is discussed in Article 1.5:

> Academic Freedom is a fundamental tenet of the University. Academic Freedom ensures the right of all Members of the University Community to engage in frank discussion of potentially controversial matters and to make statements, assign readings or use instructional techniques that challenge and may even offend the sensibilities, ideas and beliefs of others, provided that they conduct themselves in a manner that is consistent with the *B.C. Human Rights Code*. All Members of the University Community, in exercising their Academic Freedom, shall respect the human rights of others and not

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[96] UBC, "UBC Statement on Respectful Environment for Students, Faculty and Staff", available online at http://www.hr.ubc.ca/respectful-environment/files/UBC-Statement-on-Respectful-Environment-2014.pdf ("Statement on Respectful Environment") at 2.
[97] Statement on Respectful Environment, *ibid.*
[98] *Ibid.* Further examples of what "bullying or harassment" includes or does not include are then set out in the Statement.
[99] UBC Board of Governors, "Policy 3: Discrimination and Harassment", available online at: http://universitycounsel.ubc.ca/files/2013/08/policy3.pdf.
[100] See "Background & Purposes", "Policy 3: Discrimination and Harassment", *ibid.*

> engage in actions that would deny equality to, or harass, individuals or groups on grounds protected by the *B.C. Human Rights Code*.[101]

The grounds currently protected are "(actual or perceived) age, ancestry, colour, family status, marital status, physical or mental disability, place of origin, political belief, race, religion, sex, sexual orientation and criminal conviction unrelated to employment."[102] The terms "Discrimination" and "Harassment" are defined in Articles 3.3 and 3.2 respectively.

3. Policy 47, "Chair, Professorship and Distinguished Scholar Honorifics"

The purpose of this Policy is encourage the creation of Honorifics, which "are conferred by UBC to reward excellence in research and teaching", and "to establish the academic, financial and accountability criteria for these Honorifics."[103] A Holder of an Honorific is directly accountable to UBC through the establishment of objectives and the preparation of reports;[104] in turn, "UBC is accountable to the community and to its donors whose gifts enable the establishment and continuation of Honorifics."[105]

4. Policy 97, "Conflict of Interest and Conflict of Commitment"

This Policy recognizes that "[o]ccasionally and as a result of normal and productive engagements inside and outside the University, Faculty Members, staff and students may find themselves in a conflict of commitment, an actual or potential conflict of interest, or in a situation where there is a perception of a conflict of interest."[106] The Policy applies to all UBC Persons, defined as "full-time and part-time Faculty Members and staff members of the University, and any other person who teaches, conducts research, or works at or under the auspices of the University".[107] In general, it places positive obligations on UBC Persons, who are

> expected to vigilantly guard against conflicts of commitment, actual and potential conflicts of interest, and perceived conflicts of interest. It is important to note that the mere existence of a conflict of commitment, a conflict of interest or a perceived conflict of interest does not necessarily imply wrongdoing on anyone's part. Rather, conflicts exist regardless of a person's character, intentions and motivations. In situations where a conflict exists or there is a perception of a conflict, it is not sufficient to merely live up

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[101] Article 1.5 of "Policy 3: Discrimination and Harassment", *ibid*. The Policy also notes in Article 3.1 that "Academic Freedom" for the purposes of the Policy is as defined in the Academic Calendar.

[102] Article 2.1 of "Policy 3: Discrimination and Harassment", *ibid*.

[103] See "Background & Purposes", UBC Board of Governors, "Policy 47: Chair, Professorship and Distinguished Scholar Honorifics", available online at: http://universitycounsel.ubc.ca/files/2014/04/policy47.pdf ("Policy 47: Honorifics").

[104] Within UBC, the persons to whom a Holder of an Honorific are directly accountable are his or her Department Head and the Dean: see Article 4, "Assessment and Accountability", *ibid*.

[105] Policy 47: Honorifics, *ibid* at 6.1-6.2.

[106] See "Background & Purposes", UBC Board of Governors, "Policy 97: Conflict of Interest and Conflict of Commitment", available online at http://universitycounsel.ubc.ca/files/2012/02/policy97.pdf ("Policy 97: Conflicts").

[107] Article 1.1 of Policy 97: Conflicts, *ibid*.

> to one's obligations; it is necessary to do so in a timely, open, forthright, constructive and accountable manner.[108]

Actual and perceived Conflicts are placed into one of two categories: "those that are permissible if appropriately managed; and those that are prohibited because they cannot be appropriately managed."[109] Disclosure of a Conflict of Interest must be made "to all parties affected".[110] The discretion to assess and manage actual and perceived Conflicts of Interest is given to an Initial Reviewer,[111] who, "[e]xcept as otherwise designated by the University Counsel ... is the Administrative Head of Unit in which that UBC person holds his or her primary appointment."[112]

5. Policy 114, "Fundraising and Acceptance of Donations"

The purpose of this Policy is "to guide all UBC's fundraising activities and the acceptance of donations on behalf of UBC and the UBC Foundation."[113] It applies to all persons "soliciting gifts on behalf of UBC" and "to all donations to UBC from donors."[114] One of the general principles articulated by the Policy is that "UBC values and will protect its integrity, autonomy and academic freedom, and will not accept donations when a condition of such acceptance would compromise these fundamental principles."[115] UBC will support donor involvement with UBC, beyond a mere financial contribution, to the extent such involvement is consistent with that general principle of integrity, autonomy and academic freedom.[116]

III. THE FACTS

I begin with a list of the people involved and their roles at the time of the events. Much of the detail about the timing of what occurred is set out in the Chronology section, where I summarize events and place them in sequence. As well, certain documents are quoted in full in the Chronology. In the Narrative, I describe key events and explain why I have reached the conclusions I have about the facts.

A. Persons Involved

Dr. Jennifer Berdahl, Montalbano Professor of Leadership Studies: Gender and Diversity | Sauder School of Business

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[108] "Background & Purposes", Policy 97: Conflicts, *ibid*.
[109] Article 2.4 of Policy 97: Conflicts, *ibid*.
[110] Article 4.1 of Policy 97: Conflicts, *ibid*.
[111] Article 6 of Policy 97: Conflicts, *ibid*.
[112] Article 8.9 of Policy 97: Conflicts, *ibid*.
[113] See "Background & Purposes", UBC Board of Governors, "Policy 114: Fundraising and Acceptance of Donations", available online at http://universitycounsel.ubc.ca/files/2015/07/policy114.pdf ("Policy 114: Fundraising and Donations").
[114] Articles 1.1 and 1.2 of Policy 114: Fundraising and Donations, *ibid*.
[115] Article 2.2 of Policy 114: Fundraising and Donations, *ibid*.
[116] Article 6.1 of Policy 114: Fundraising and Donations, *ibid*.

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Mr. John Montalbano, Chair | UBC Board of Governors

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B. Chronology

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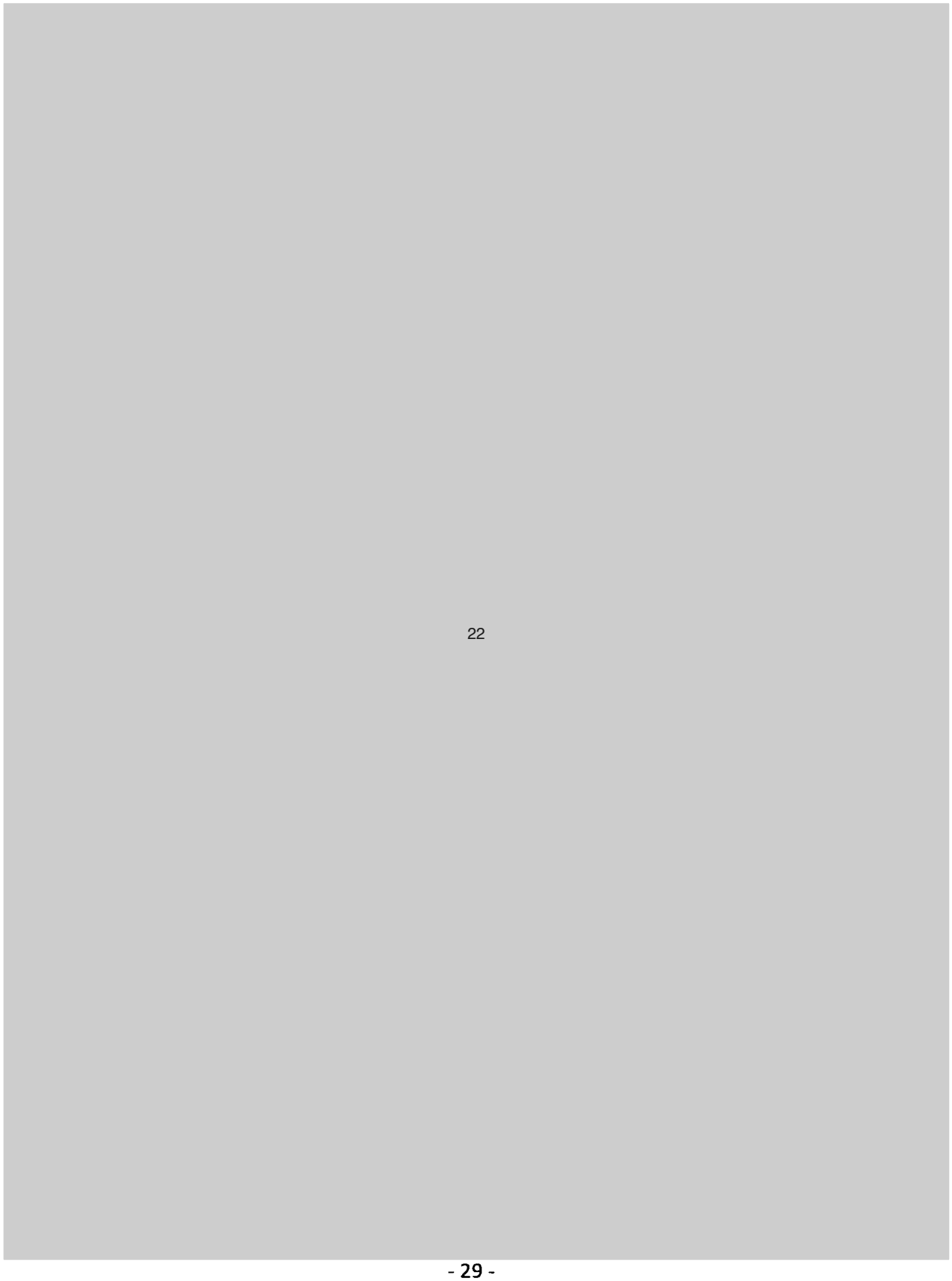

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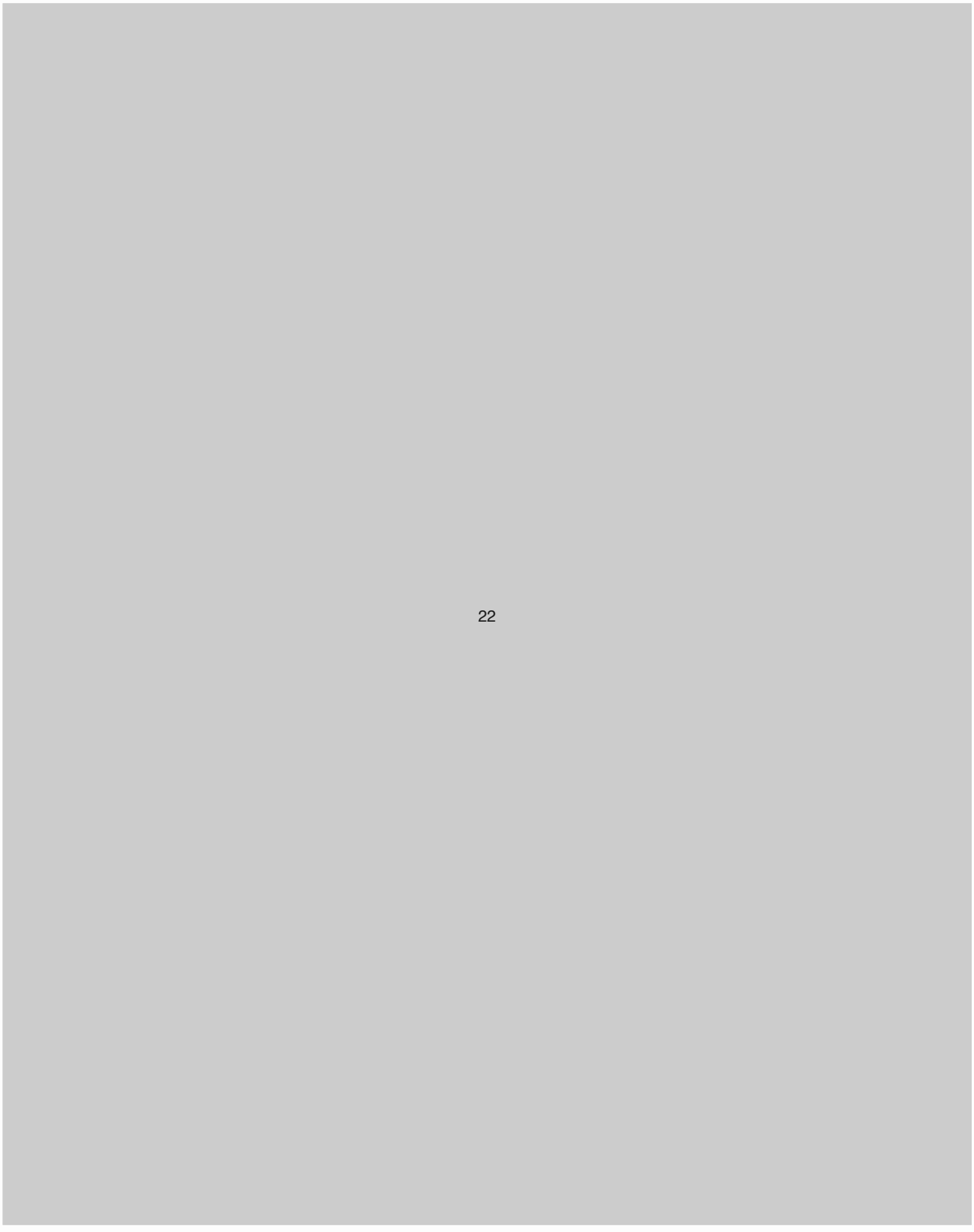
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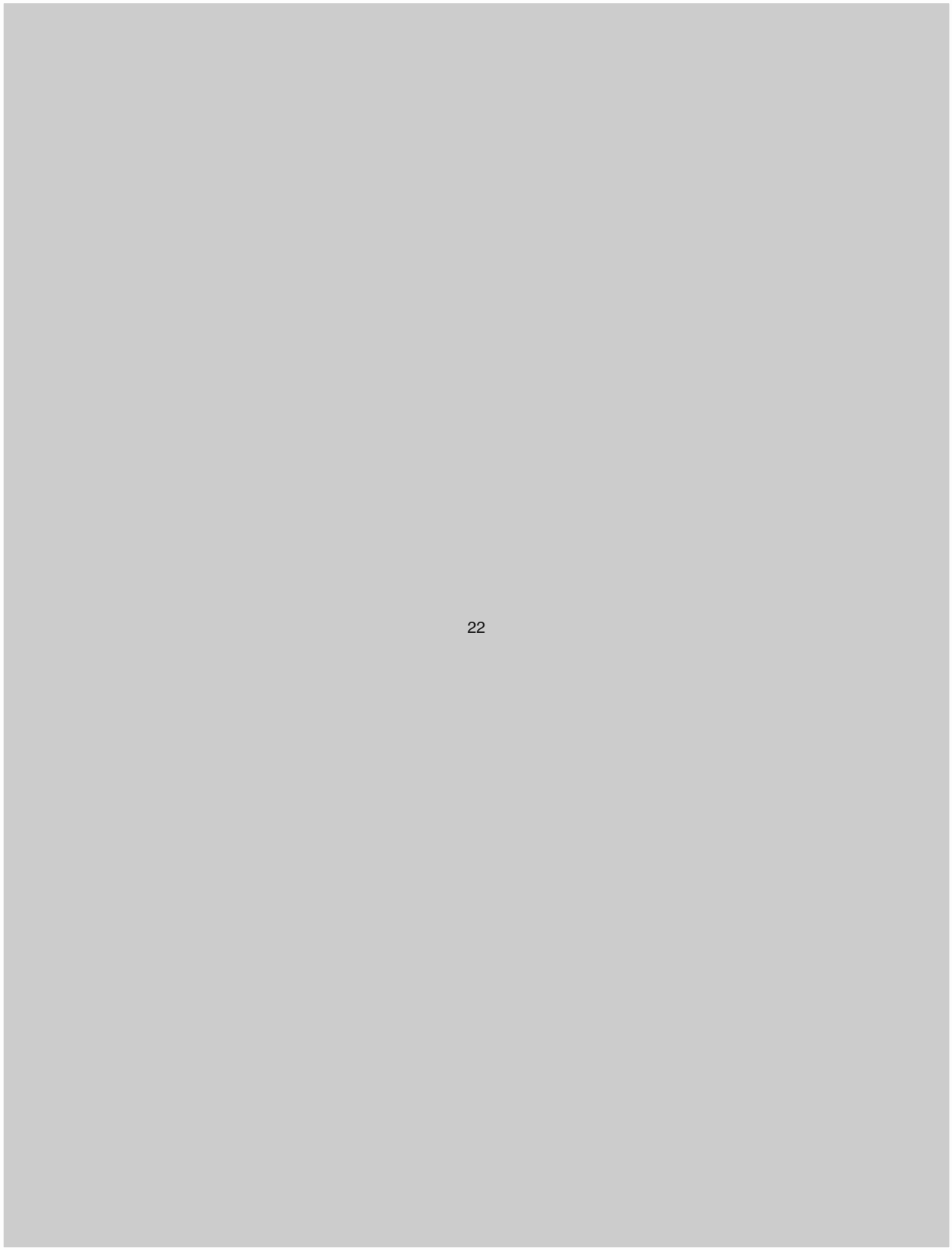
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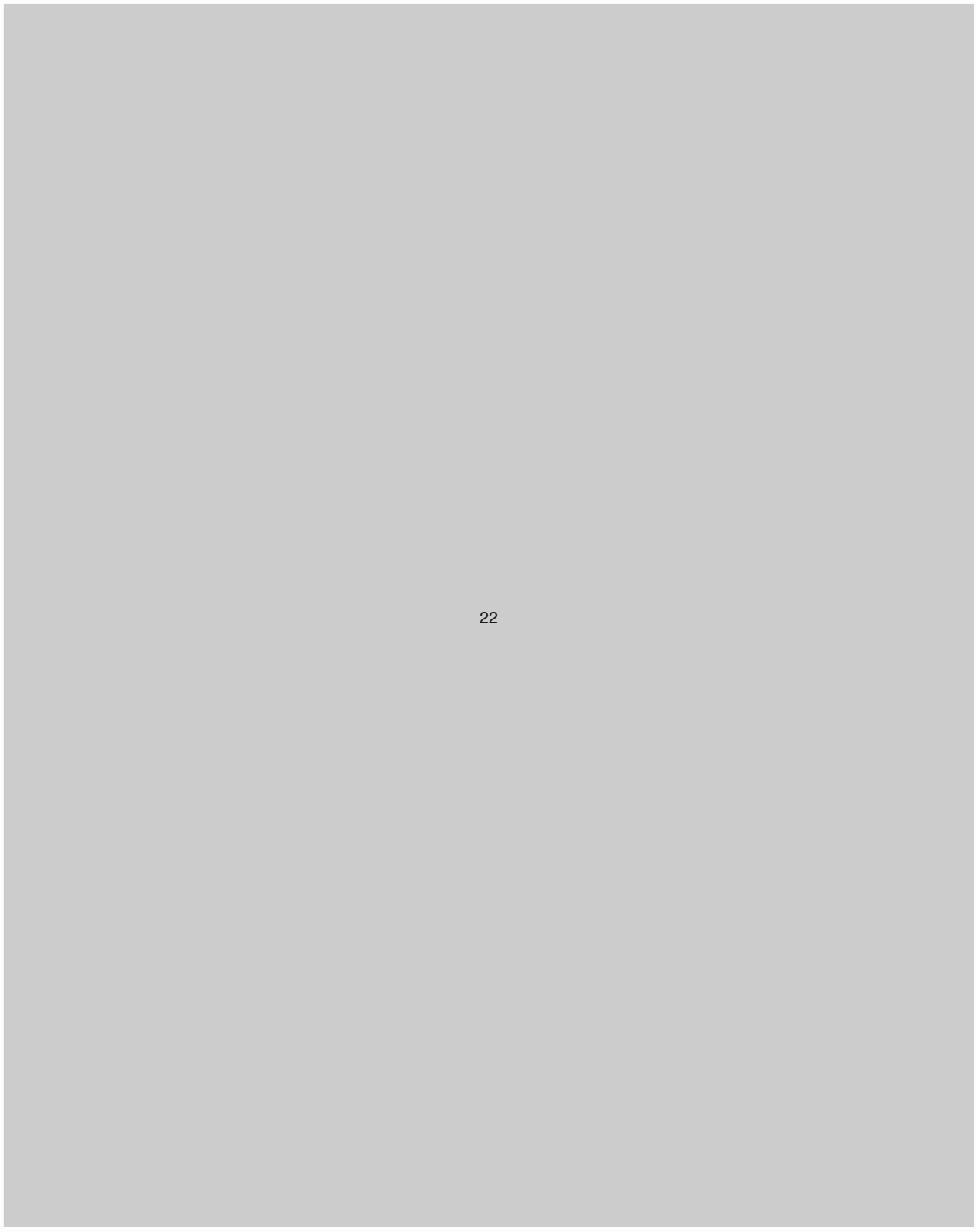

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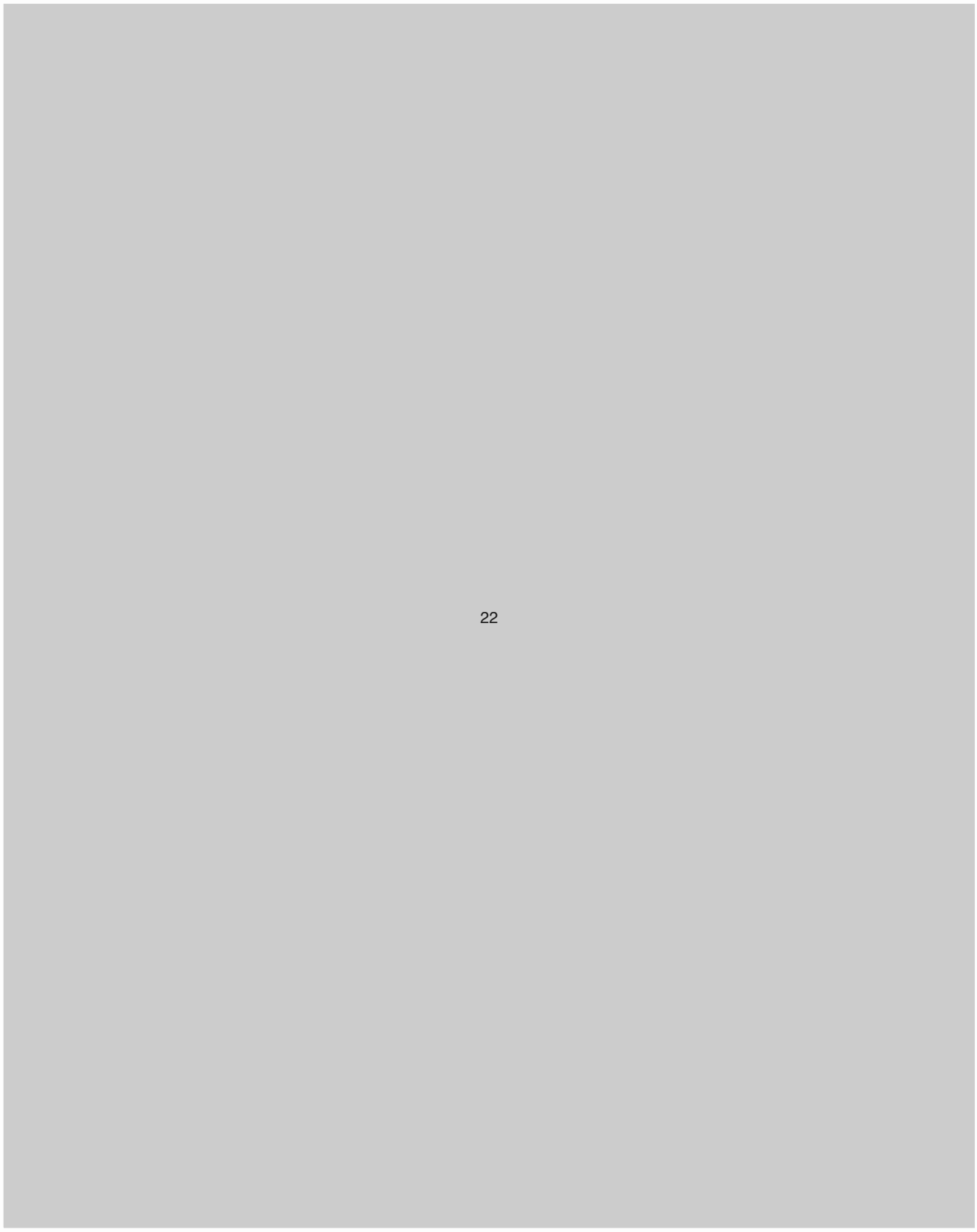

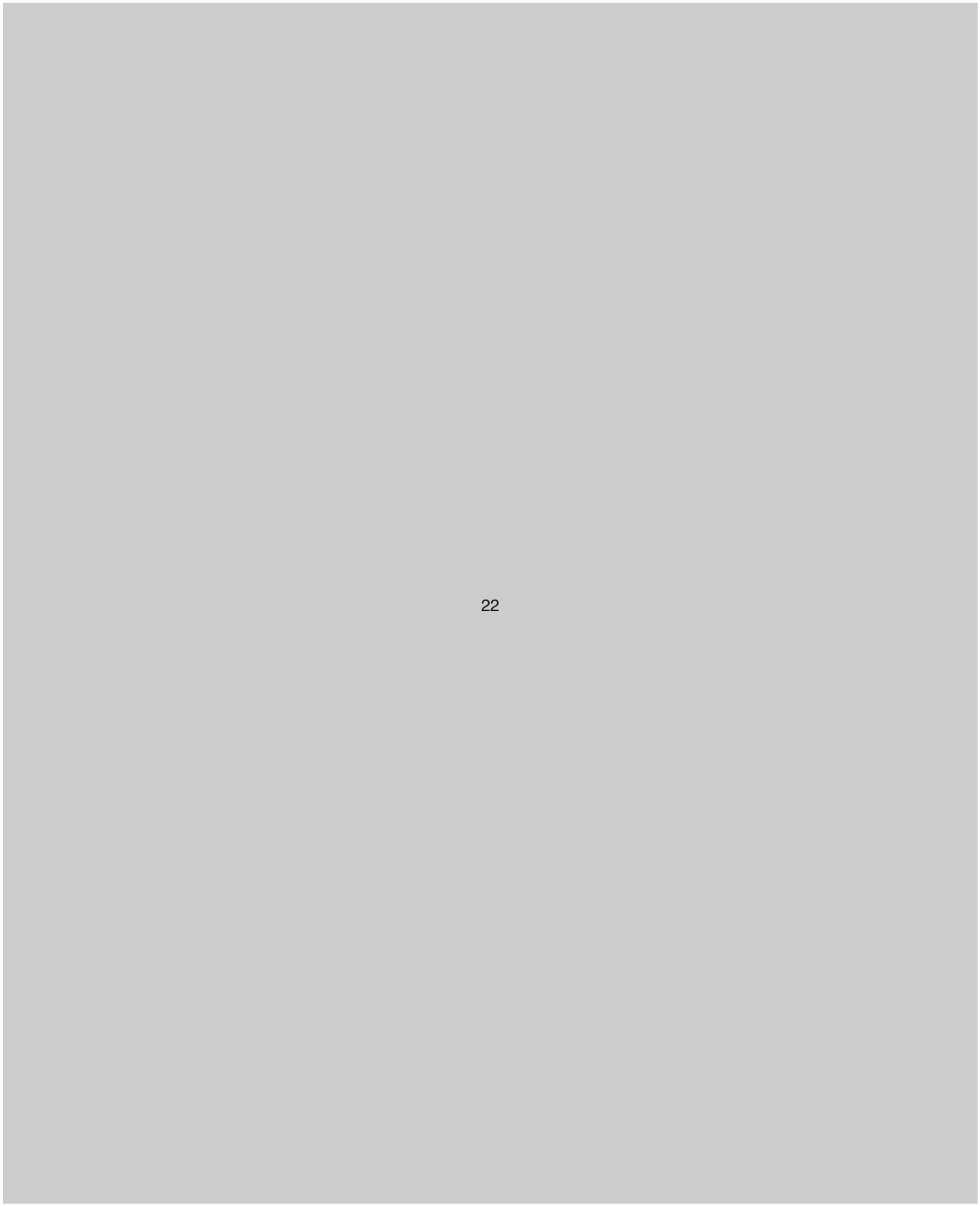

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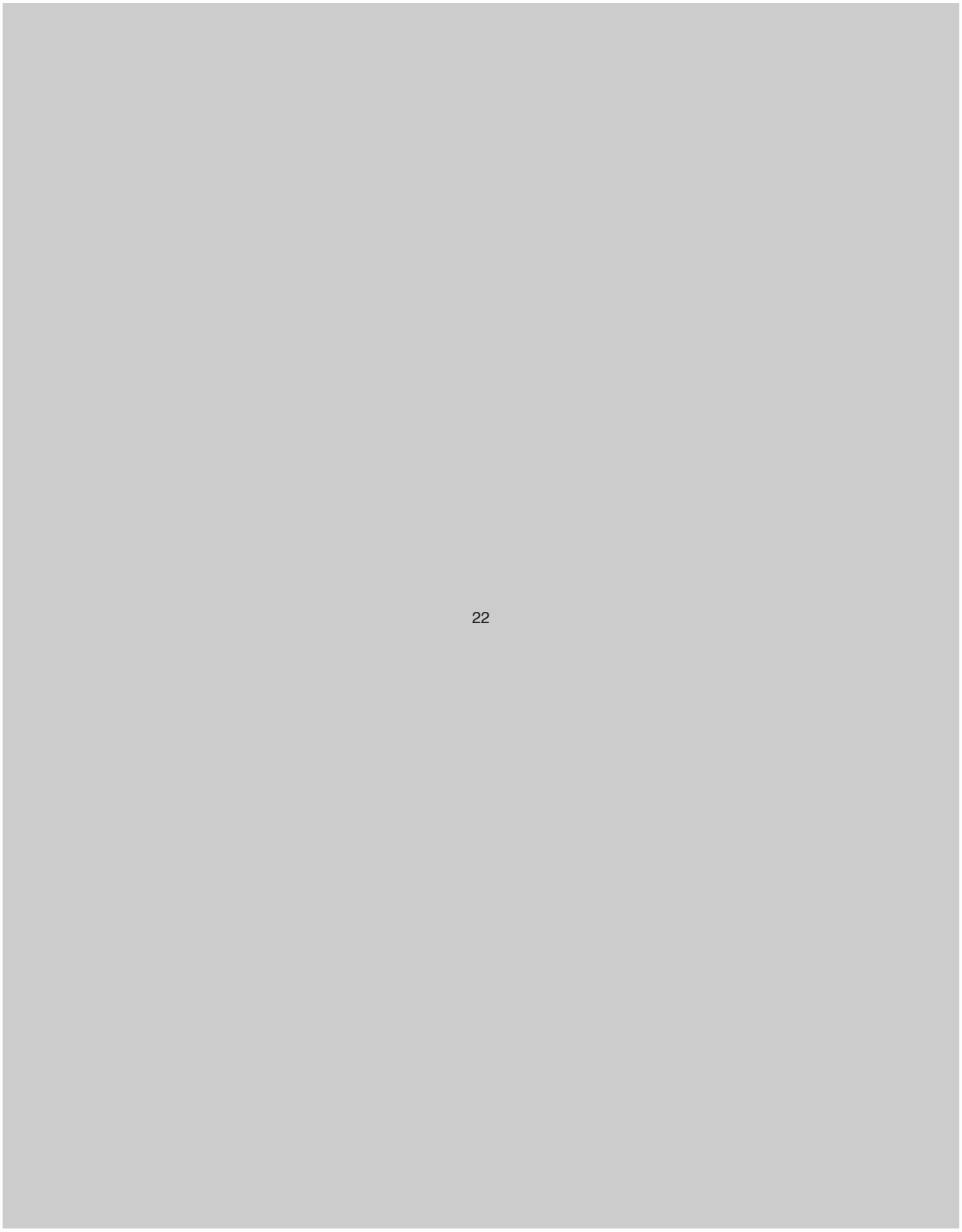

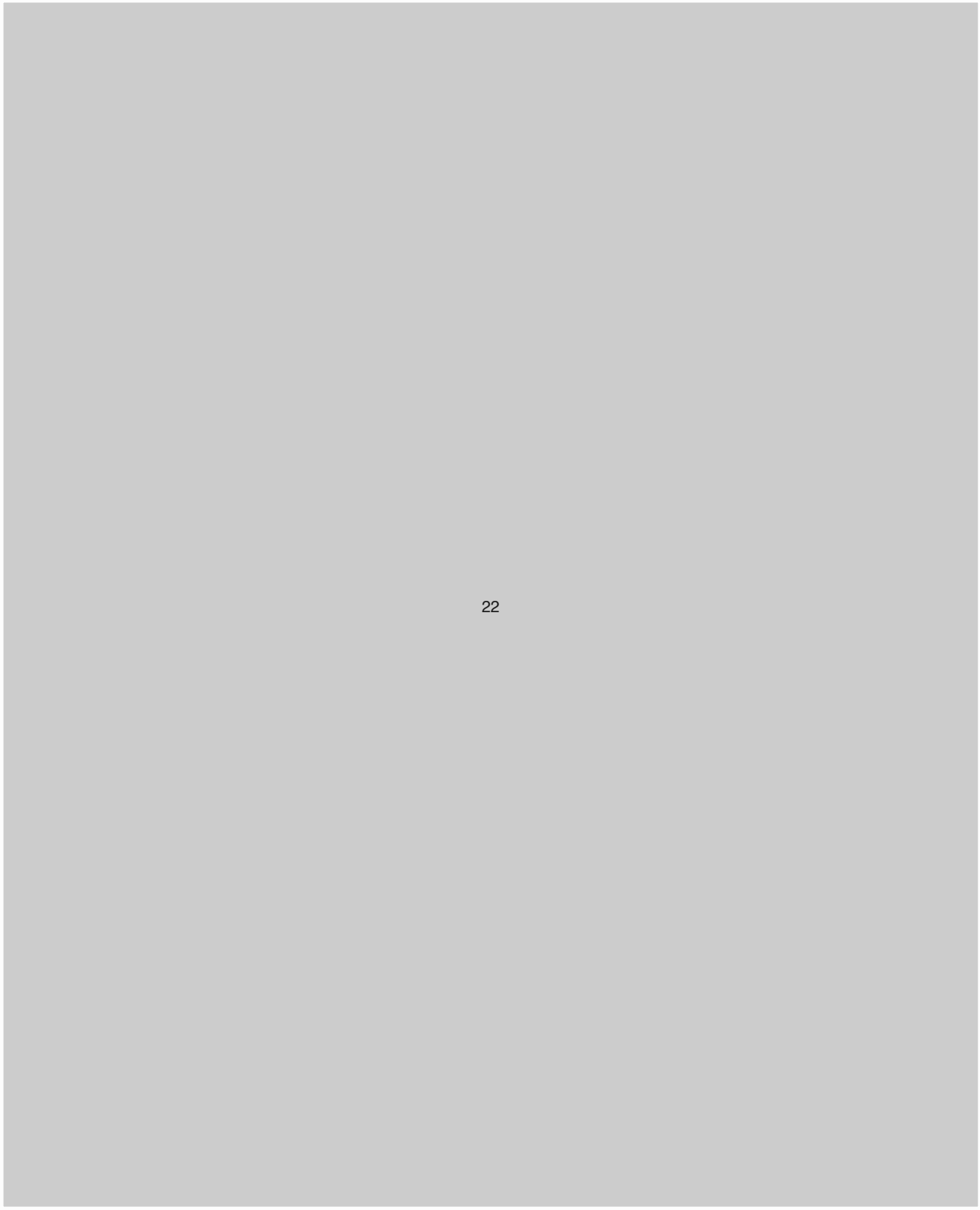

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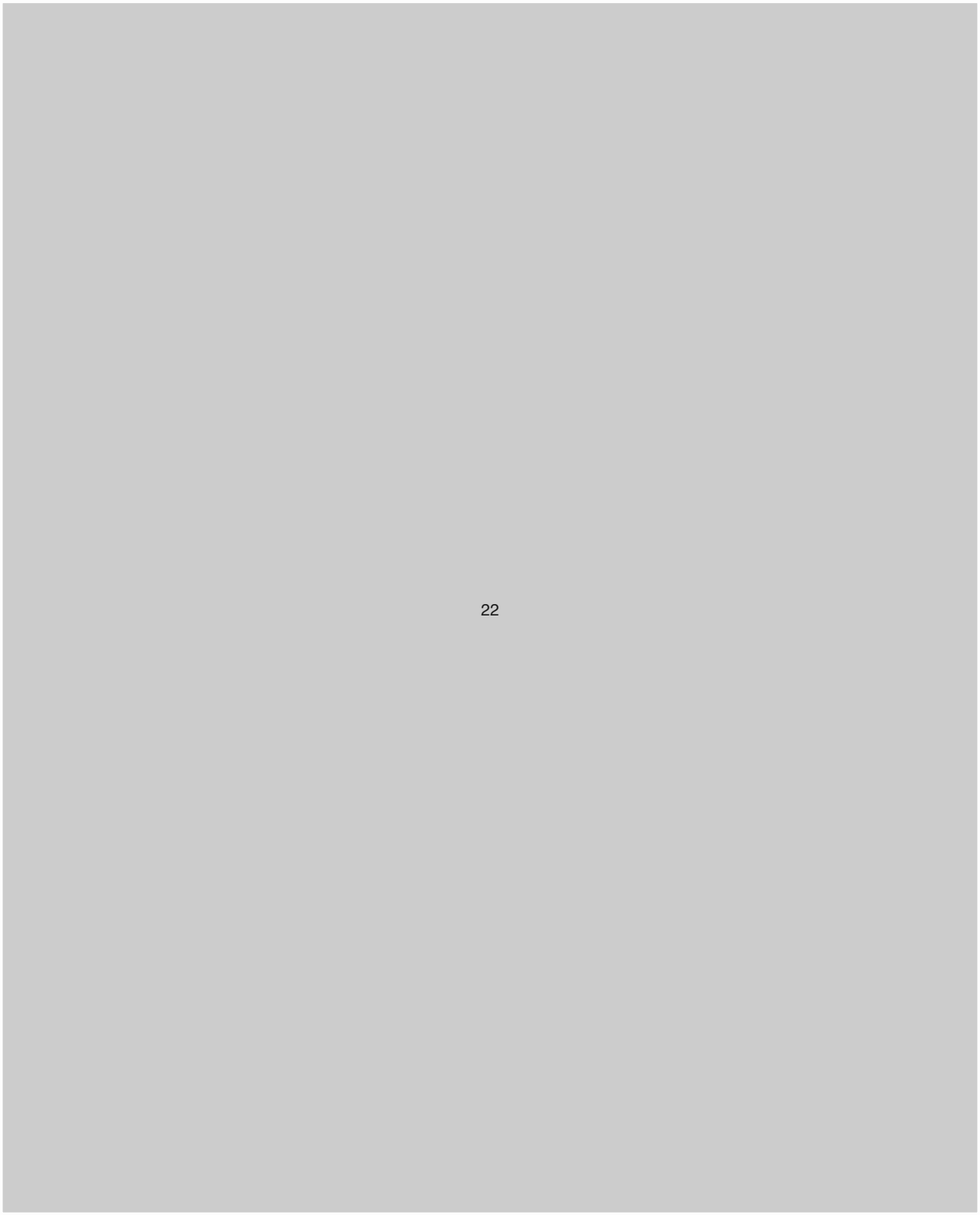

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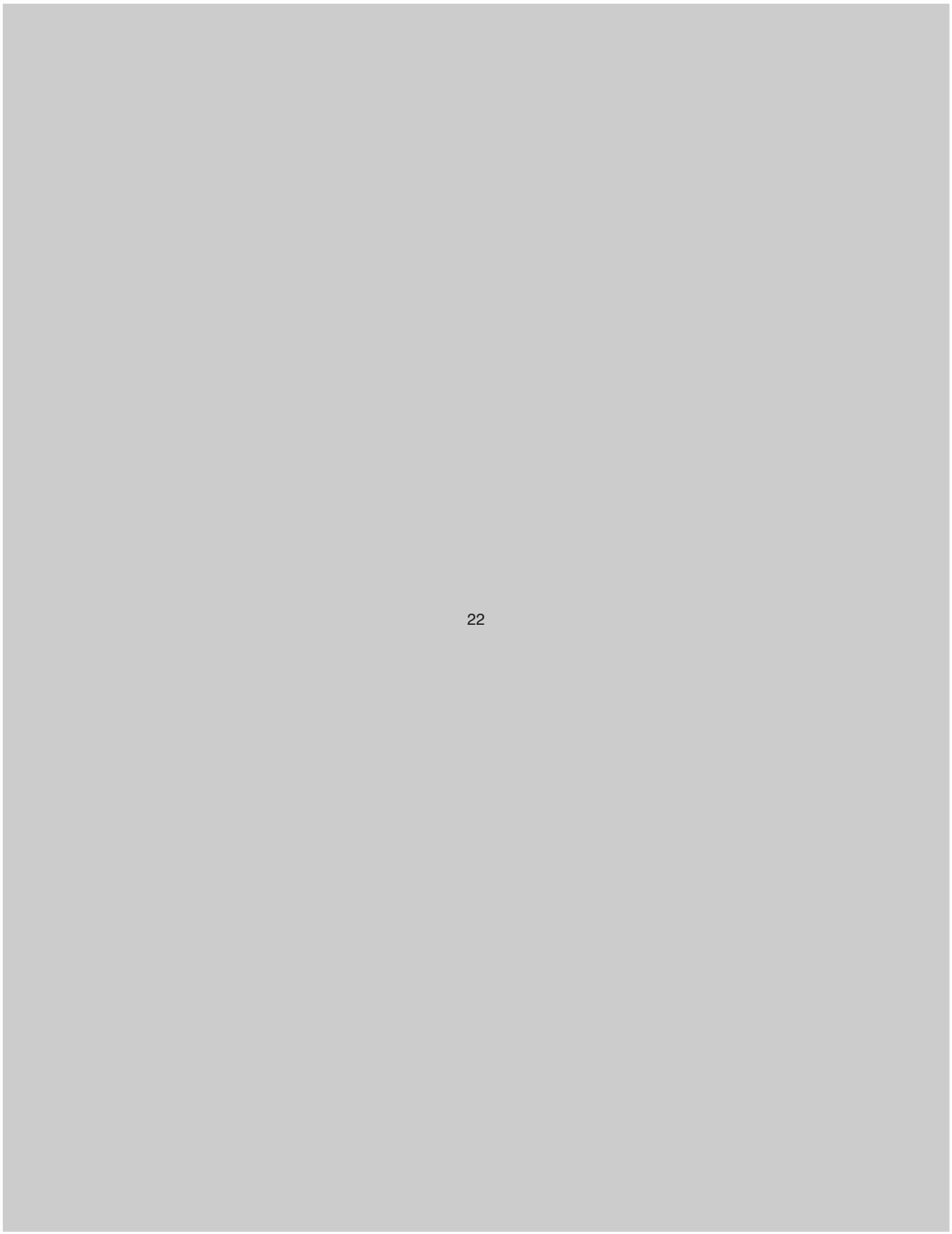
C. Narrative

On Friday, August 7, 2015, the Board of Governors of UBC released an announcement. Its President, Arvind Gupta, who had been in the position for just over a year, had resigned. Board representatives stated that they could not provide information about the reasons for Dr. Gupta's departure because of non-disclosure agreements. Speculation began to roil and intense media interest became focused on the story.

The Chair of UBC's Board of Governors was John Montalbano. 22

Dr. Jennifer Berdahl is a member of faculty at UBC. 22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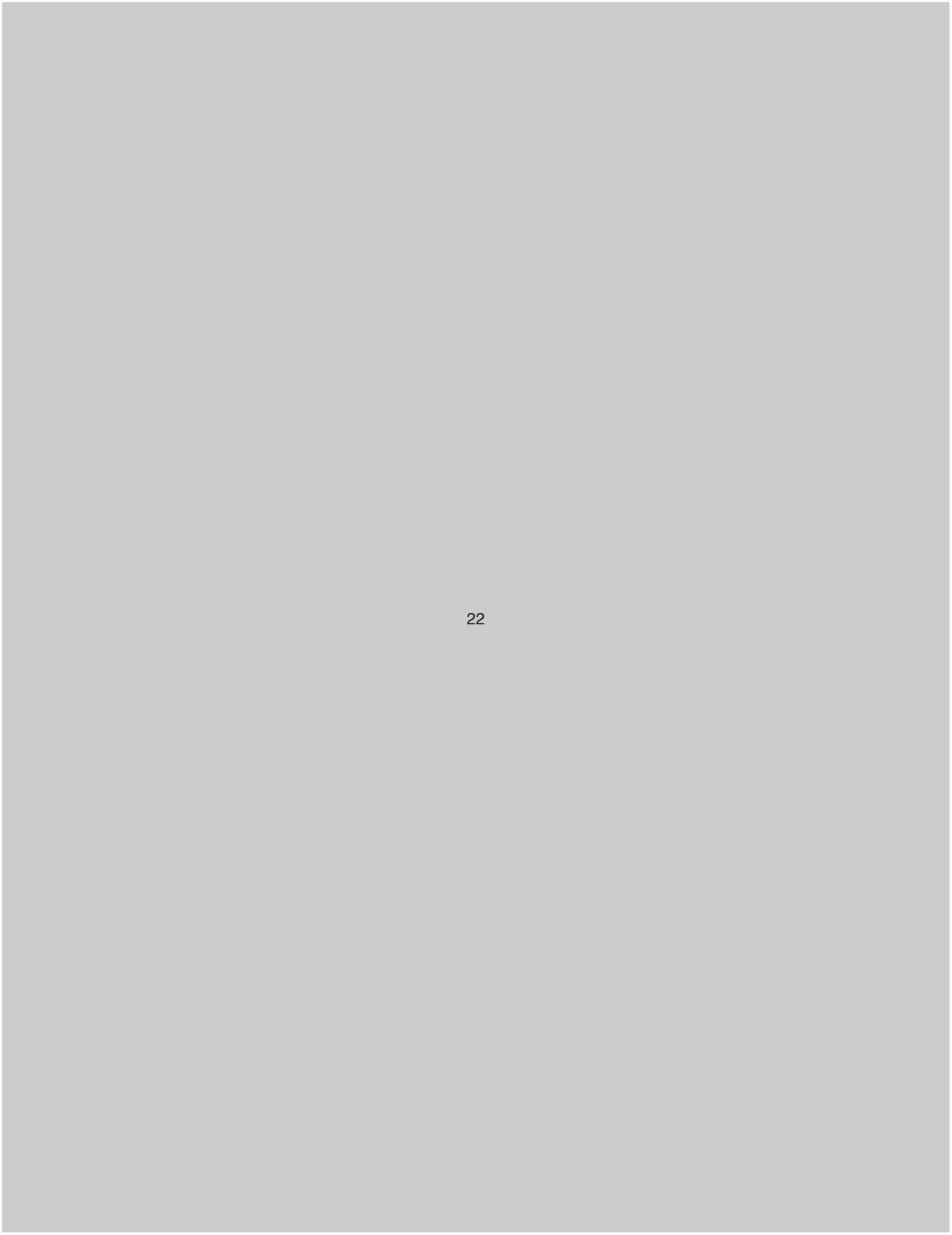

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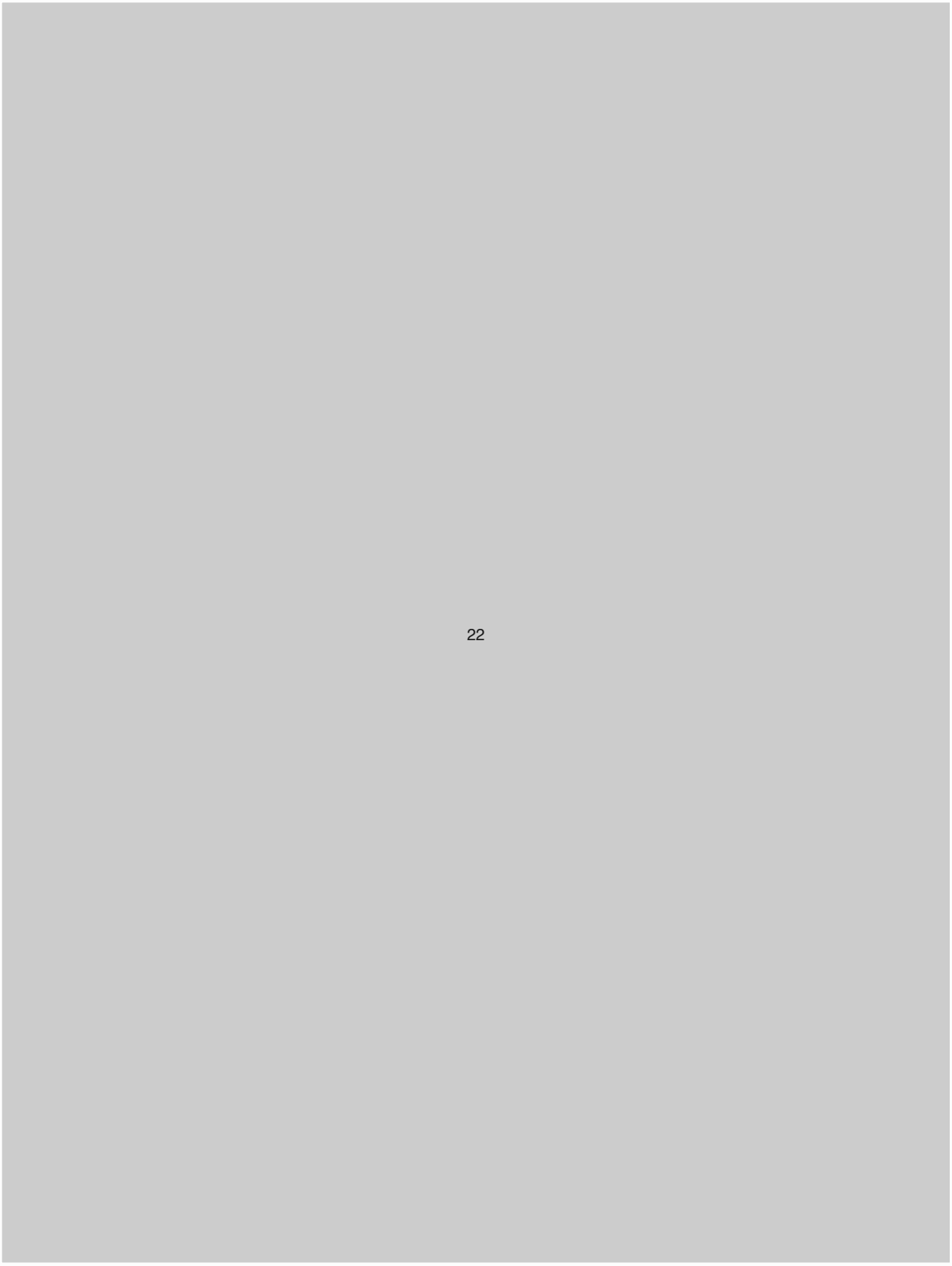

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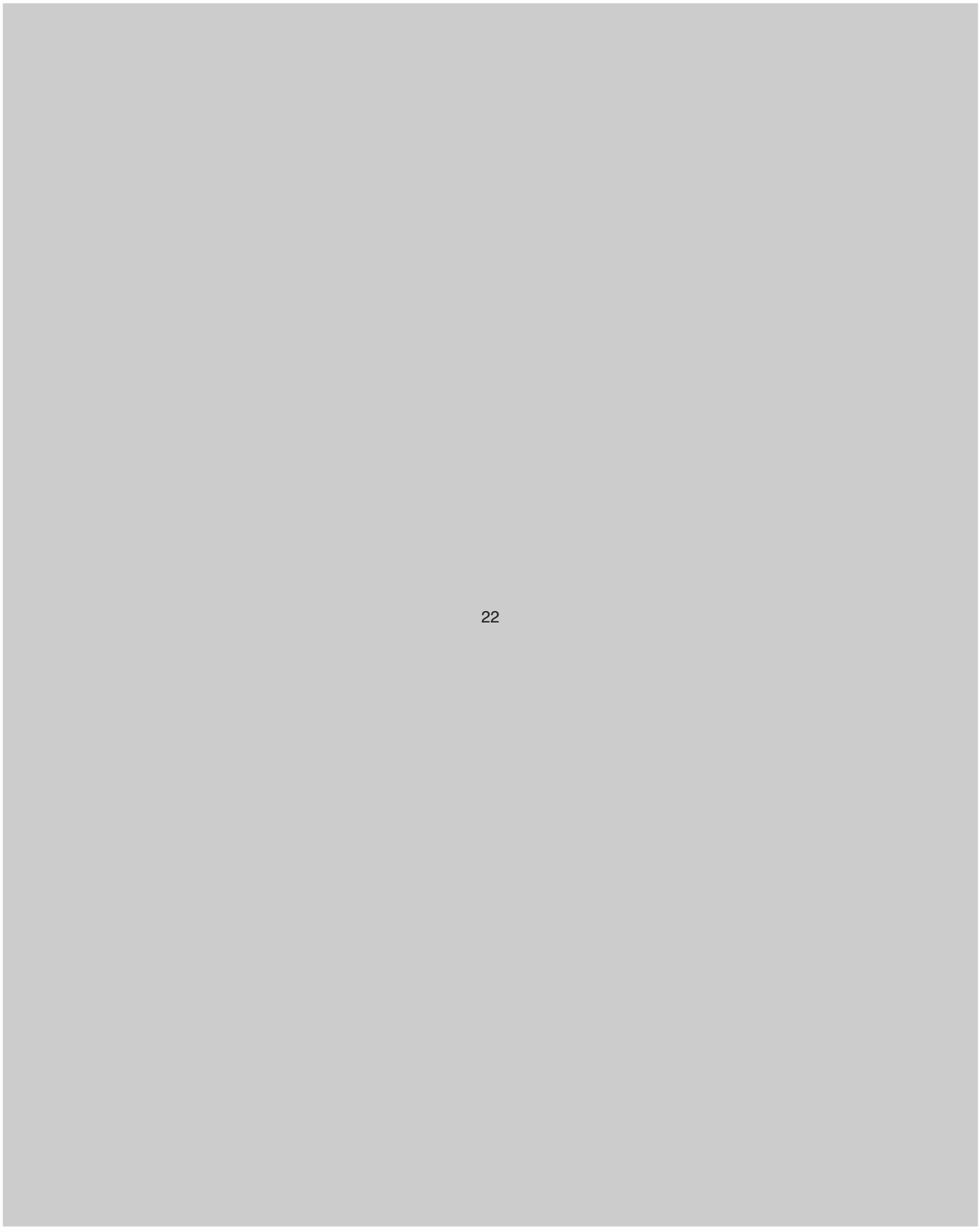

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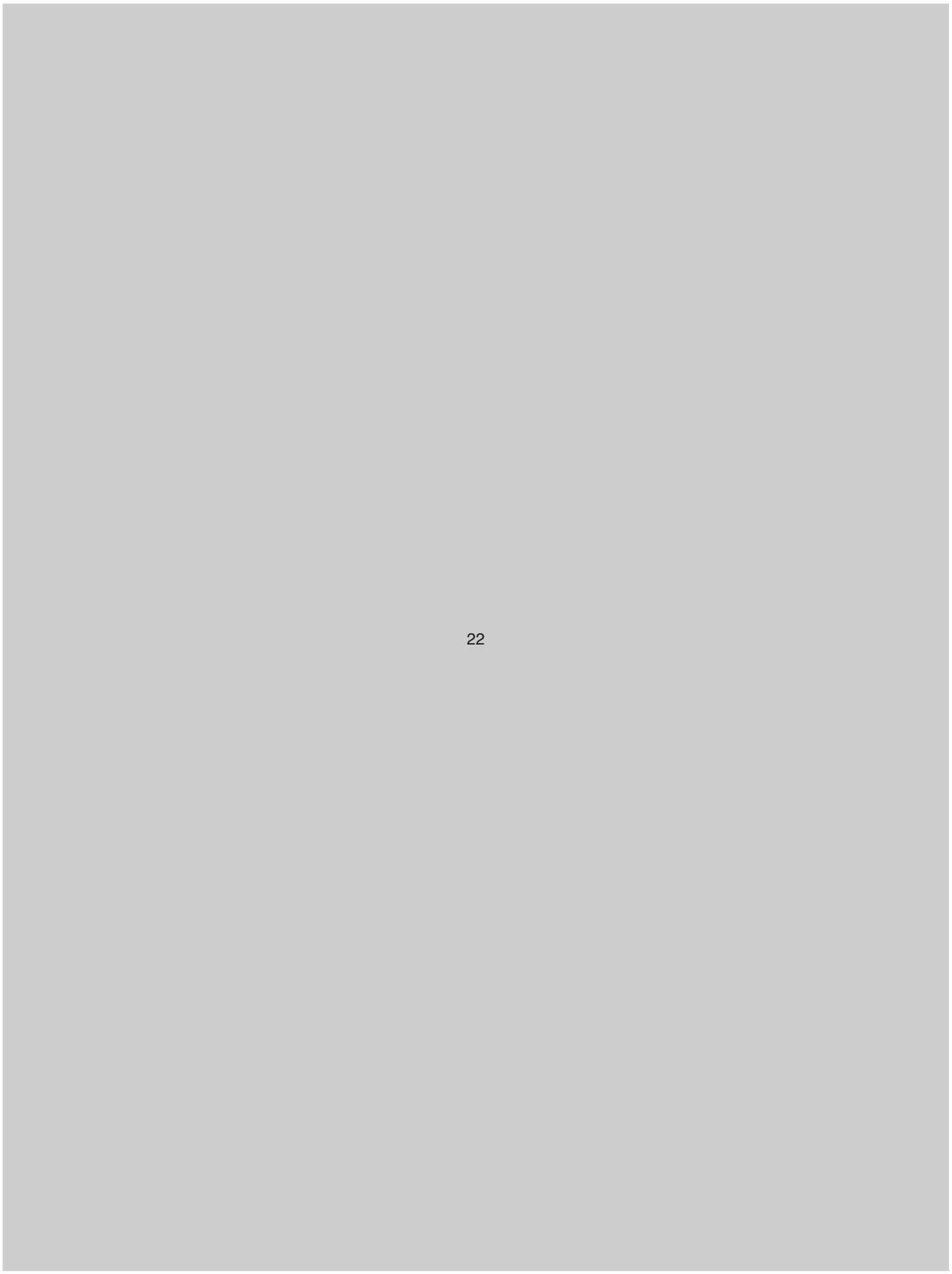

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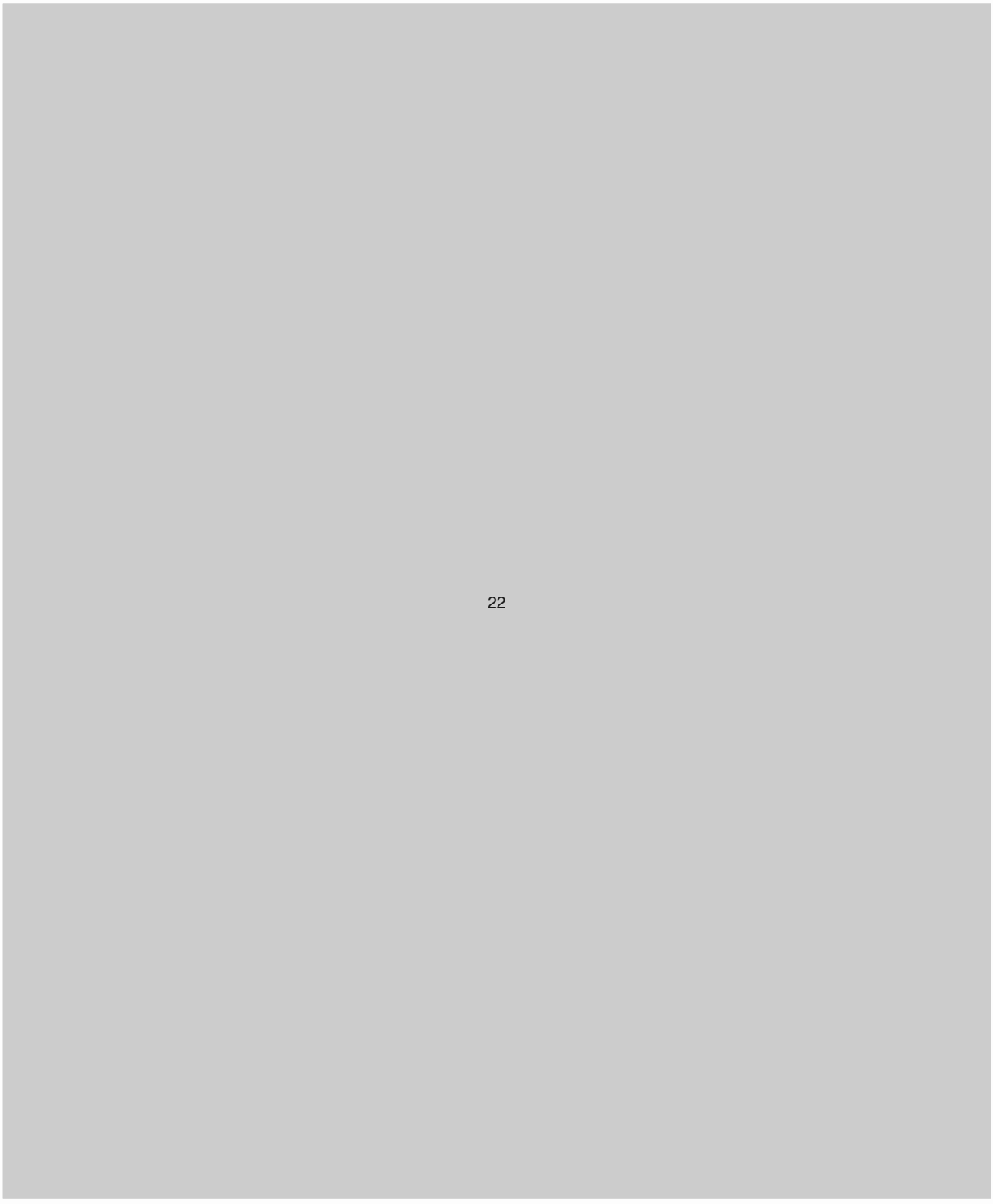

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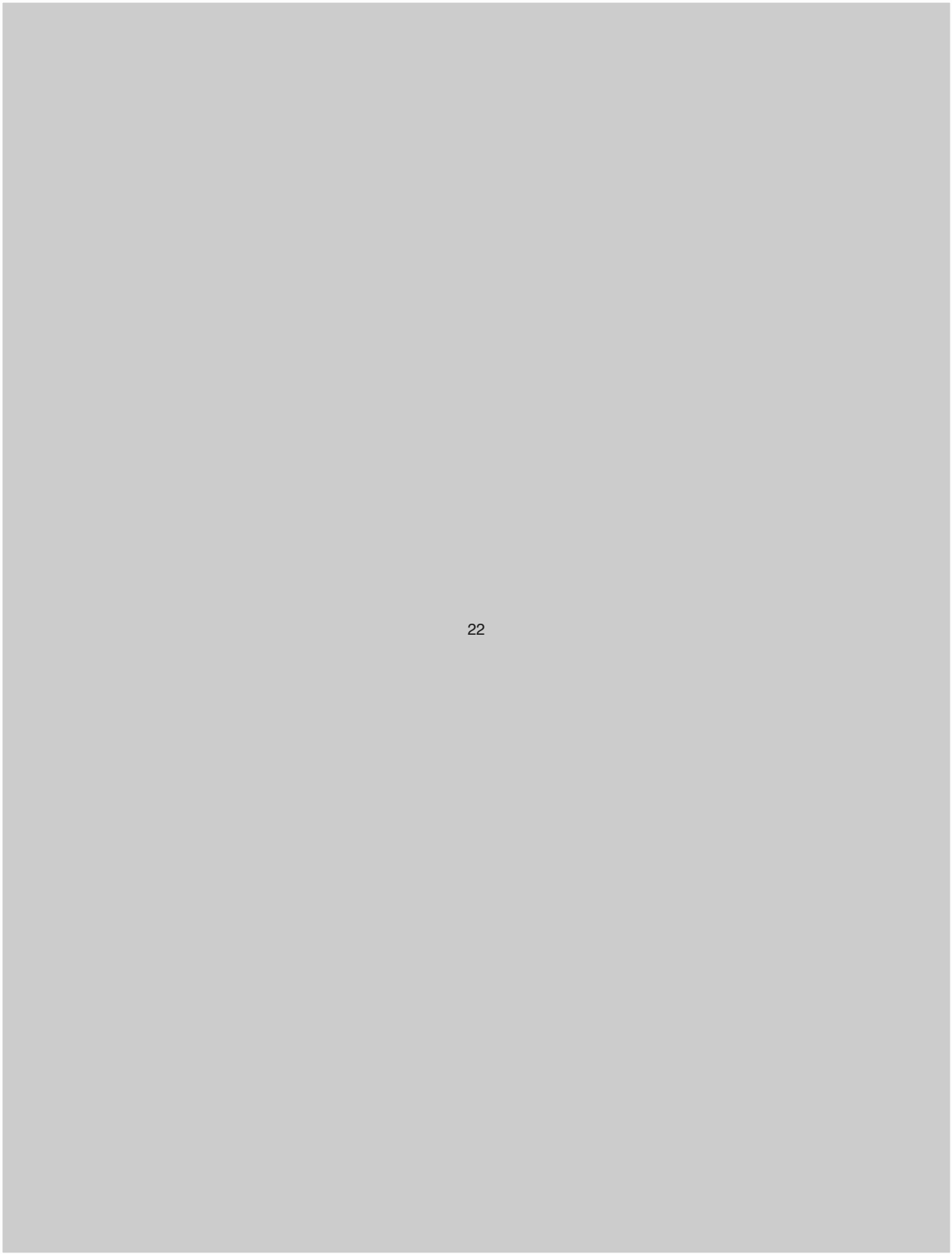

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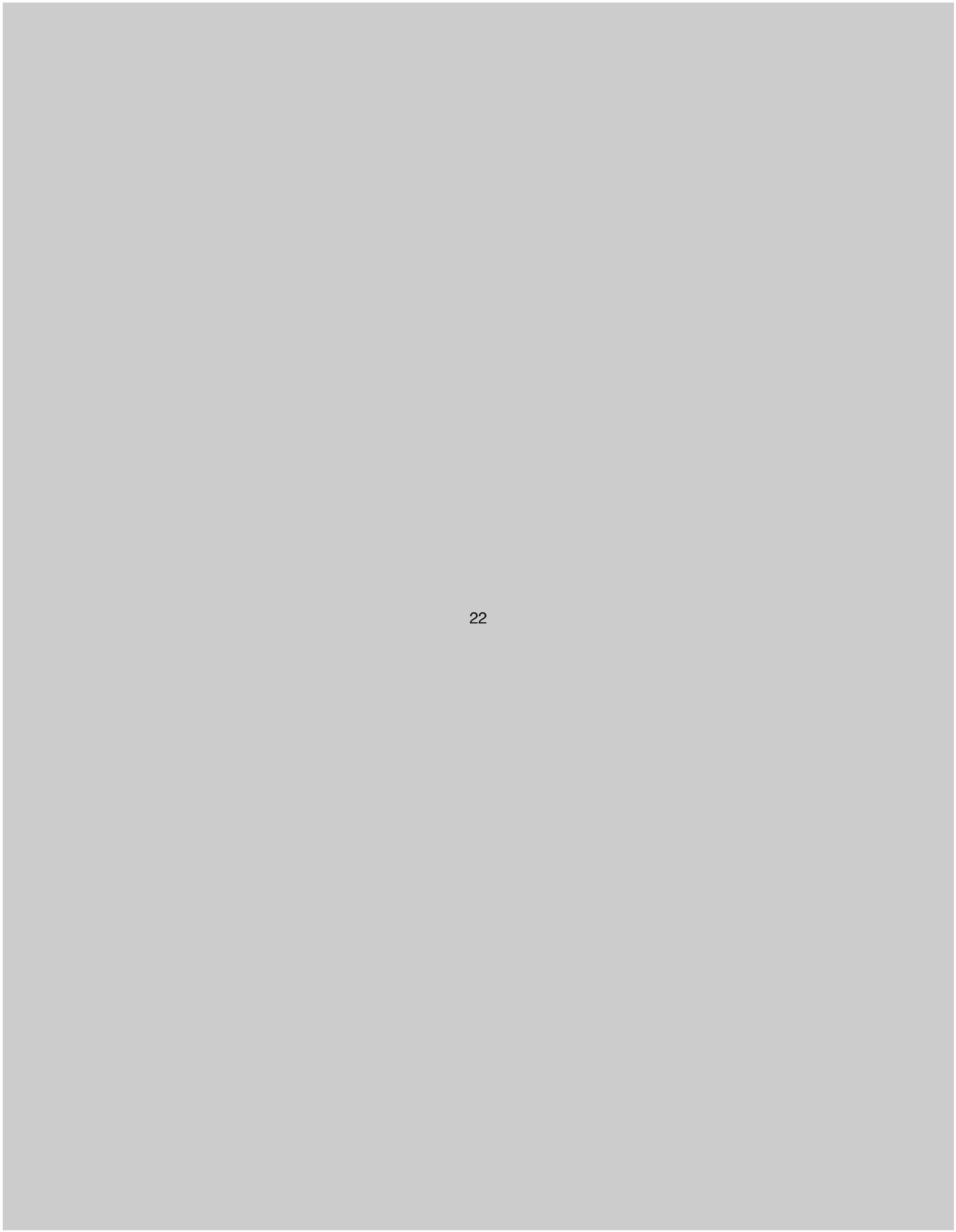

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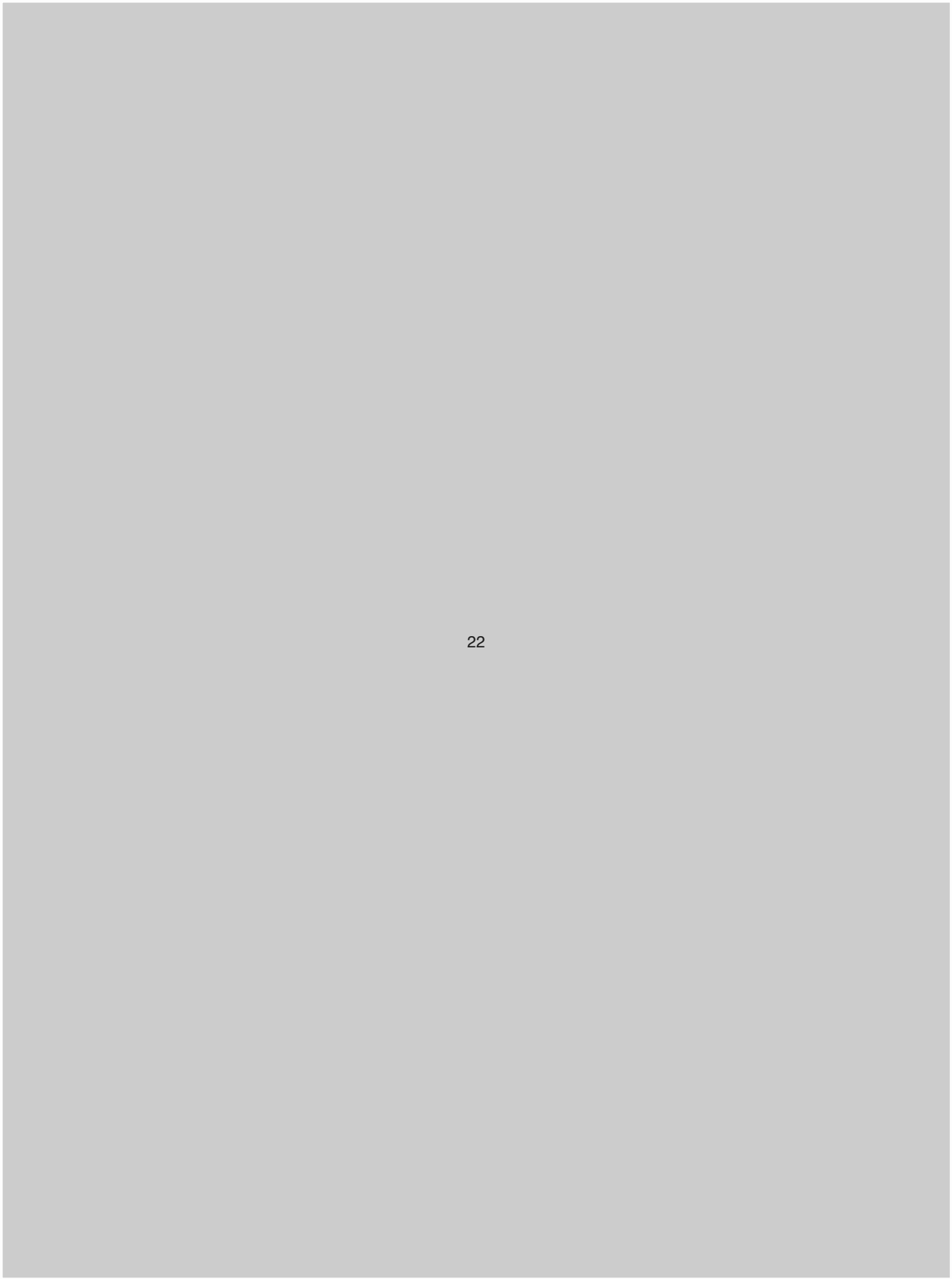

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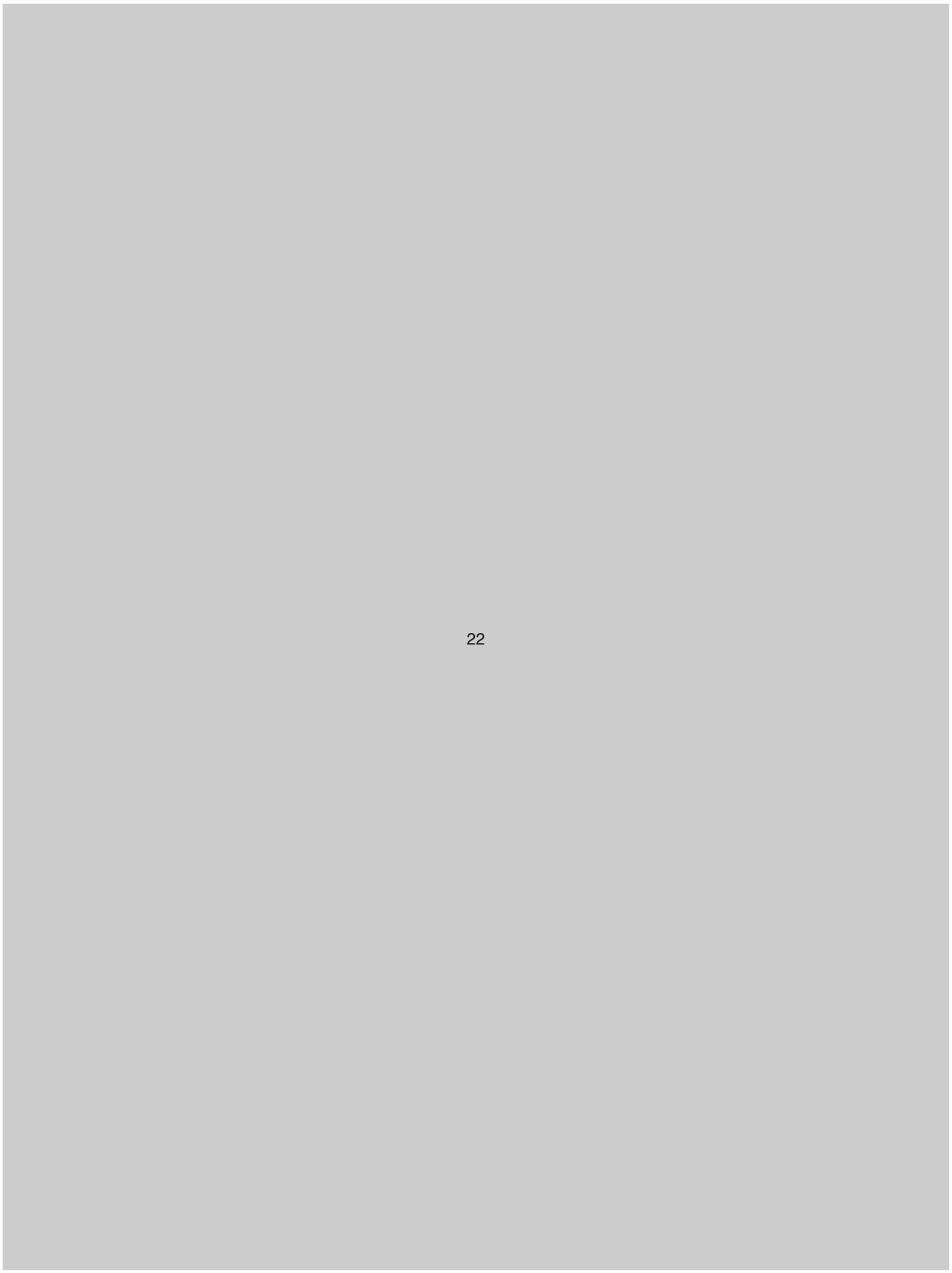

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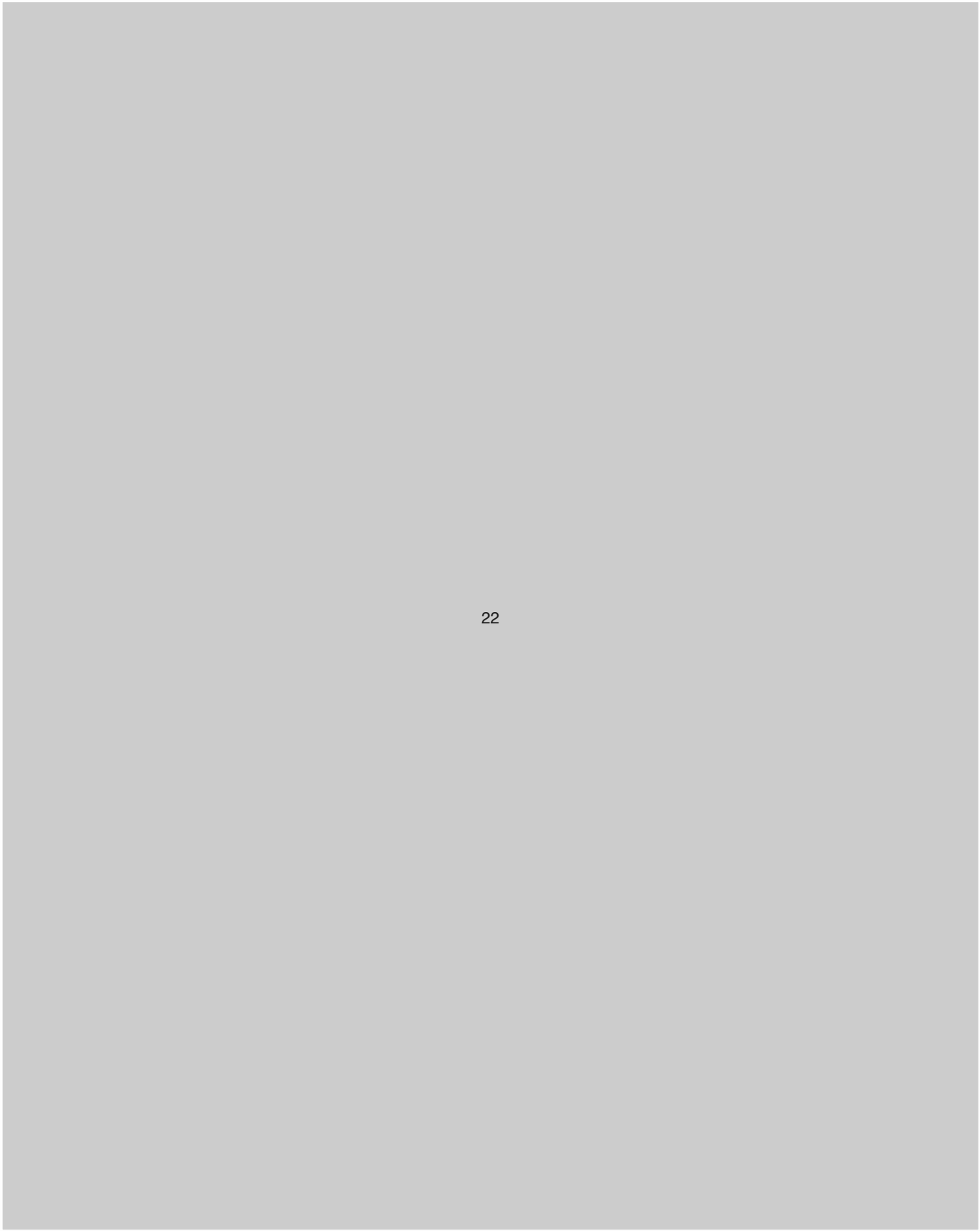

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IV. ANALYSIS

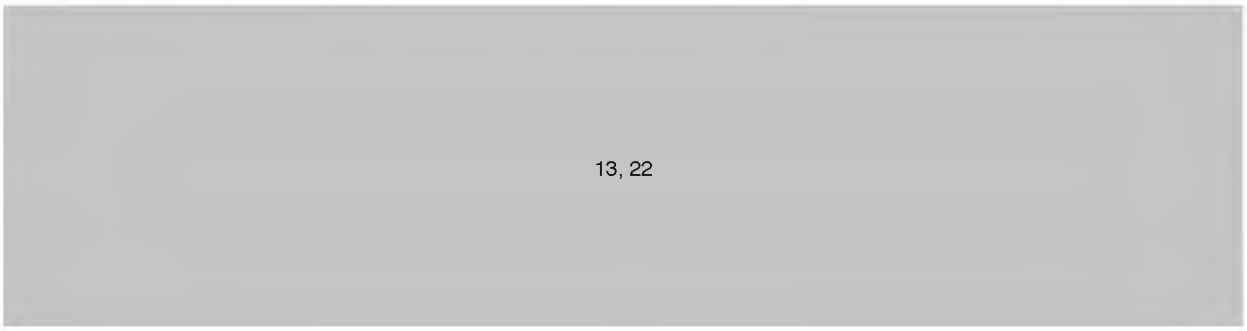
A. Academic Freedom

With the benefit of my interviews of the key participants and my review of the relevant documents, I have considered this sequence of events in the light of UBC's commitment to protect and support academic freedom. In the section of this Report on Principles of Academic Freedom (above) I have set out how those principles are stated and some of their implications. I have concluded that UBC did not live up to its responsibility to protect and support the academic freedom of one of its faculty members, Dr. Berdahl.

Sometimes, several relatively small mistakes can lead to a failure of the larger system. The failure in this case resulted from a cascading series of events in which there were some errors of judgment and some unlucky circumstances. In my view, no single individual bears responsibility, but rather the institution as a whole failed Dr. Berdahl and missed an important opportunity to vindicate the principle of academic freedom.

Dr. Berdahl wrote and published her Blog Post relating to a crucial event in the life of the university, about which speculation was swirling. She did so as a UBC faculty member and the Montalbano Professor in Leadership Studies in Gender and Diversity. I have said above, in the Narrative portion of this Report, why it seemed foreseeable that Mr. Montalbano and others would feel targeted by the Blog Post, even though that was not Dr. Berdahl's intention. Having said that, I am conscious of the risk of seeming to "blame the victim". Therefore, I state the obvious: Dr. Berdahl had the freedom and was absolutely within her rights to publish her reflections on Dr. Gupta's departure. Members of UBC faculty must be able to comment on topical matters, especially when they are drawing directly on their research (as she was), and even where the topic is university governance. The Blog Post was clearly an exercise of her right as a faculty member to disseminate her knowledge and research, including through commentary on current events in a blog.

In the chain of events that followed, there were several moments where individuals could have acted differently and in a manner more consistent with the university's obligation to protect academic freedom, or where circumstances contributed to its failure to uphold academic freedom.



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B. University Policies

With respect to the alleged infringements of several UBC policies, I do not find that they are made out on the facts of this case, for the reasons set out below. (A description of each of these policies is found in this Report, above, in Section II B.)

1. Policy 114: Fundraising and Acceptance of Donations (and related Policy 47: Chair, Professorship and Distinguished Scholar Honorifics)

Mr. Montalbano donated $2,000,000 to UBC to establish an endowment fund, now called the "Montalbano Professorship in Leadership Studies: Gender and Diversity" (the "Montalbano Gift"). Policy 114 "is intended to guide all UBC's fundraising activities and the acceptance of donations on behalf of UBC".[117] With respect to donor involvement, Policy 114 states that "UBC recognizes that donors may wish to be actively engaged with UBC beyond making a financial contribution. UBC supports donor engagement that is consistent with section 2.2 of this Policy."[118]

Section 2.2 of the Policy, in turn, states that "UBC values and will protect its integrity, autonomy and academic freedom, and will not accept donations when a condition of such acceptance would compromise these fundamental principles."[119]

The UBC policy related to honorifics is intended "to establish the academic, financial and accountability criteria" for those honorifics.[120] Accountability is achieved in part through regular reports which the holder makes to UBC, which then shares those reports to the donor. For example, in the case of the Montalbano Gift, the Gift Agreement states that UBC "will provide the Donor with confirmation regarding the impact and performance of the Gift."

The UBCFA alleges that Mr. Montalbano breached Policy 114 by failing to abide by terms or conditions regarding donor involvement. Further, the UBCFA alleges that s. 22 failed in their duties under Policy 114 to manage appropriately Mr. Montalbano's involvement in the Sauder School of Business and with respect to the Montalbano Professorship and related initiatives. In short, the UBCFA alleges that Mr. Montalbano's involvement "in the events following Professor Jennifer Berdahl's publication of her blog on August 8, 2015"[121] violated the terms or conditions of the Gift, and that [redacted] had a duty under Policy 114 to manage Mr. Montalbano's involvement as donor, which they failed to satisfy.

The provisions and procedures set out in Policy 114 clearly apply to the period of time when terms and conditions in the gift agreement are negotiated and agreed, up to UBC's acceptance of the donation.[122] Thus, if a donor insisted on conditions for a gift that would constitute a breach to or threat to academic freedom, Policy 114 requires the gift to be

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[117] "Background & Purposes", Policy 114, *supra* note 113.
[118] Article 6.1 of "Procedures", Policy 114, *ibid*.
[119] Policy 114, *ibid*.
[120] "Background & Purposes", Policy 47, *supra* note 103.
[121] The University of British Columbia and the Faculty Association of the University of British Columbia, "Terms of Reference: Fact-Finding Process" (25 August 2015) at 1 (attached as Appendix "A").
[122] See Article 1 of Policy 114 ("Scope"), which states that the Policy applies to "all persons ... soliciting gifts on behalf of UBC" as well as "to all donations to UBC from donors": *supra* note 113 [emphasis added].

declined. Policy 114 does not on its face apply to the ongoing management of the relationship between the donor and UBC after the gift is in place.

However, Article 6.1 of the policy may contemplate an ongoing role. It states:

> UBC recognizes that donors may wish to be actively engaged with UBC beyond making a financial contribution. UBC supports donor engagement that is consistent with section 2.2 of this Policy.[123]

It is possible to read Article 6.1 as aimed only at describing permissible donor engagement parameters incorporated into the terms and conditions of the gift before its acceptance. If so, then Policy 114 has no application in this case.

If it is meant to have broader application, extending to a donor's activities after the gift has been made, the question is the same as that raised in the allegations regarding infringement or failure to protect academic freedom. I have already dealt with those contentions and have concluded that the Sauder School failed to protect or uphold Dr. Berdahl's academic freedom. In my view, Policy 114 does not add anything further to that analysis.

2. UBC Statement on Respectful Environment for Students, Faculty and Staff, Policy 2 (Employment Equity) and Policy 3 (Discrimination and Harassment) (together, the "Respectful Environment Policies")

The Respectful Environment Policies, taken together, are intended to promote at UBC a positive and supportive environment dedicated to excellence, equity, and mutual respect and in which the ability to freely work, live, examine, question, teach, learn, comment, and criticize is protected; to curb and prevent discrimination and to remove discriminatory barriers; to curb and prevent harassment, bullying, and other disrespectful behaviours, both at UBC and with respect to members of the UBC community; and to set out formal procedures for reporting and investigating concerns, incidents, and complaints.

The UBCFA alleges that Mr. Montalbano, [redacted] violated these policies through their involvement in the events following the publication of Dr. Berdahl's August 8th Blog Post.

(a) Policy 2: Employment Equity

I do not find that any of the named individuals violated Policy 2, which is directed towards equal opportunity in employment matters, ensuring that "[b]oth current and prospective faculty and staff will receive equitable treatment in hiring, training, and promotion

[123] Article 6.1 of Policy 114, *ibid*.

procedures."[124] There is no evidence establishing that Dr. Berdahl's employment or promotion prospects at the Sauder School of Business, or at UBC generally, have been affected. She remains a tenured Full Professor and the Montalbano Professor. 13, 22

(b) Policy 3: Discrimination and Harassment

Similarly, I do not find that any of the named individuals violated Policy 3, which addresses discrimination and harassment based on grounds protected by the *B.C. Human Rights Code*, namely (actual or perceived) age, ancestry, colour, family status, marital status, physical or mental disability, place of origin, political belief, race, religion, sex, sexual orientation and criminal conviction unrelated to employment.[125] The actions and reactions of the named individuals towards Dr. Berdahl following the publication of her August 8th Blog Post were not based on any of these individual characteristics, but rather on her role as a faculty member at Sauder, her role as the holder of the Montalbano Professorship, and the actual or perceived content of her Blog Post.

The UBCFA further alleges that Dr. Berdahl was unfairly targeted by the named individuals, because she was making equity and human rights based arguments, even though a number of other UBC faculty voiced critical public opinions following the resignation of Dr. Gupta. With respect to this allegation, I did not see any evidence that Dr. Berdahl was being singled out in comparison with other persons: no information was provided as to what other UBC faculty members were saying or what the reaction in other cases had been.

Finally, I note with respect to Mr. Montalbano that Policy 3 would only apply if he were a "Member of the University Community", defined as a "student, a member of faculty, or a member of staff".[126] He falls into none of those categories and accordingly the Policy does not apply to him.

(c) Statement on Respectful Environment

The Statement on Respectful Environment helpfully provides language describing the parameters of what is and is not meant to be permissible under it. Having stated that "disrespectful behavior, including bullying or harassment, is not acceptable and will not be tolerated at UBC",[127] it sets out that bullying and harassing behaviour includes: "cumulative demeaning or intimidating comments, gestures or conduct; verbal aggression or yelling; threats

[124] Article 1.2 of UBC Board of Governors, "Policy 2: Employment Equity", available online at http://universitycounsel.ubc.ca/files/2010/09/policy2.pdf.
[125] Article 2.1 of Policy 3, *supra* note 99.
[126] Articles 1.1 and 3.5 of Policy 3, *ibid*.
[127] UBC Executive, "UBC Statement on respectful Environment for Students, Faculty and Staff" (last revised May 2014), available online at: http://www.hr.ubc.ca/respectful-environment/files/UBC-Statement-on-Respectful-Environment-2014.pdf ("Statement on Respectful Environment") at 2.

to employment, educational status, person or property; persistent comments or conduct, including ostracism or exclusion of a person, that undermines an individual's self-esteem so as to compromise their ability to achieve work or study goals; abuse of power, authority or position; sabotage of a person's work; humiliating initiation practices; hazing; calling someone derogatory names; spreading of malicious rumours or lies; or making malicious or vexatious complaints about a person."[128] It does not include: "the exercise of appropriate managerial or supervisory direction, including performance management and the imposition of discipline; constructive criticism; respectful expression of differences of opinions; reasonable changes to assignments or duties; correction of inappropriate student behaviour; instructional techniques such as irony, conjecture, and refutation, or assigning readings or other instructional materials that advocate controversial positions; and single incidents of thoughtless, petty or foolish words or acts that cause fleeting harm."[129]

This policy does apply to Mr. Montalbano.[130] but I do not find that he infringed it. 13, 22

[redacted]

[128] Statement on Respectful Environment, *ibid* at 2.
[129] Statement on Respectful Environment, *ibid* at 2.
[130] Statement on Respectful Environment, *ibid* at 1: "Everyone at the University of British Columbia is expected to conduct themselves in a manner that upholds these principles in all communications and interactions with fellow UBC community members and the public in all University-related settings. In the context of an academic community, responsibility for maintaining a respectful environment falls on all community members, including students, faculty, staff, and members of the public who participate in University-related activities."

13, 22

I do not find that an infringement of the Statement on Respectful Environment occurred on the part of any of the named individuals.

13, 22

3. Policy 97: Conflict of Interest, Conflict of Commitment

My Terms of Reference do not require me to determine whether Mr. Montalbano was in breach of Policy 97.

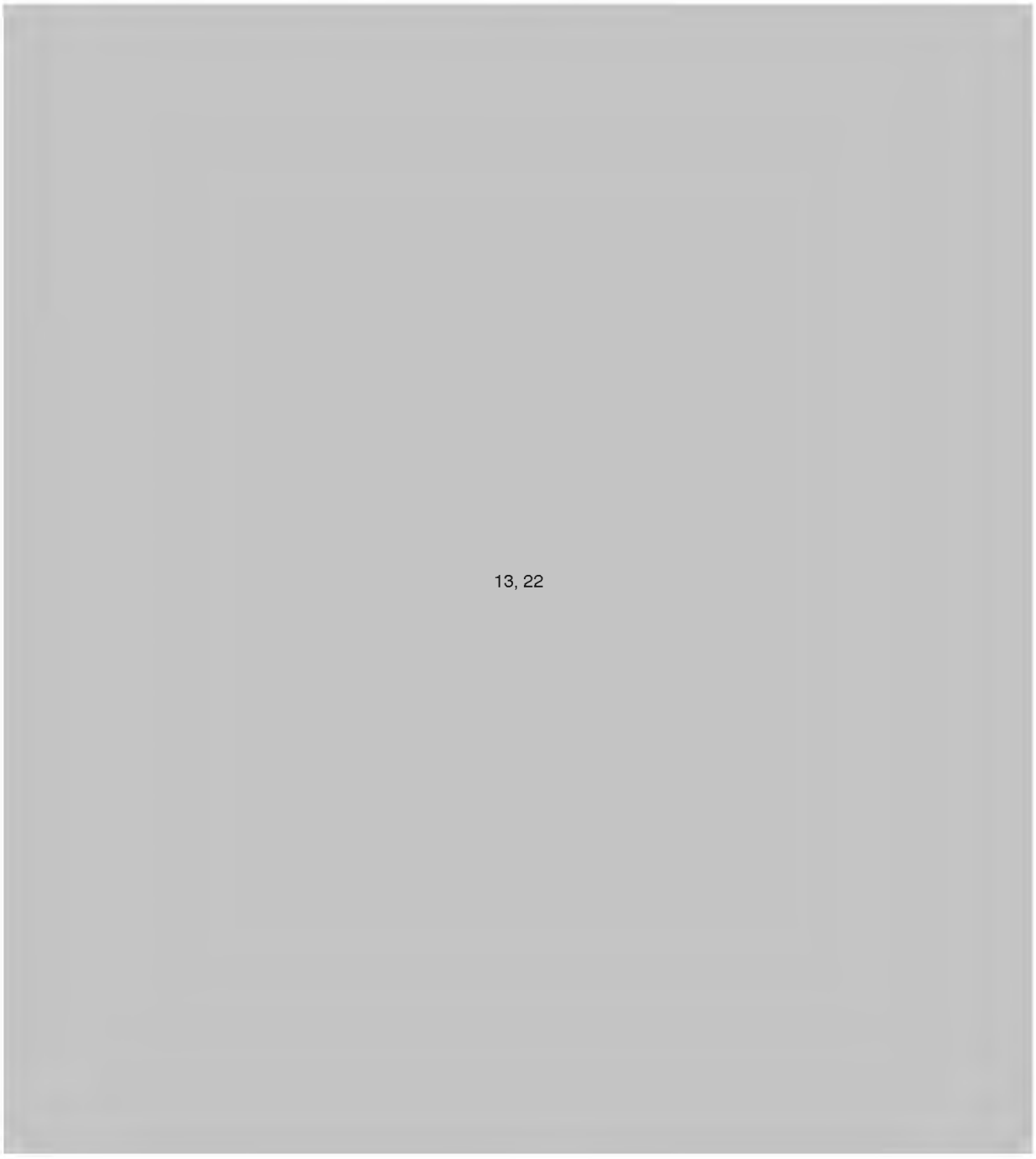
The UBCFA alleges that 22 failed to appropriately manage the real and perceived conflicts of interest inherent in Mr. Montalbano's various roles at the University and within the Sauder School. Specifically, the UBCFA says that 22 did not advise Mr. Montalbano that it would be inappropriate to call Dr. Berdahl to discuss her Blog Post once they became aware of his intention to do so, which also permitted a breach of her academic freedom.

In my view, it is not clear that a Dean or Associate Dean can be in breach of the conflict of interest policy through failing to manage the conflicts of an individual who does not report to that Dean or Faculty. In any event, I think that this allegation is subsumed in the allegation that there was a failure to protect academic freedom, which I have discussed above.

V. CONCLUSION

The Terms of Reference under which I write this Report explicitly state that I will not make any recommendations for any actions to be taken by the parties relating to my findings or conclusions. Accordingly, I do not.

However, I wish to record a few observations.



13

The Honourable Lynn Smith, Q.C.
October 7, 2015

APPENDIX "A"

Terms of Reference:
Fact-Finding Process
The University of British Columbia and the Faculty Association
of the University of British Columbia

The University of British Columbia ("University" or "UBC") and the Faculty Association of the University of British Columbia ("Faculty Association"), (hereinafter sometimes referred to as "the Parties"), have agreed to engage an independent Fact Finder to conduct an impartial investigation of the following matter:

Whether Mr. John S. Montalbano, Chair of the Board of Governors, and/or individuals in the Sauder School of Business identified by the Faculty Association, conducted themselves in the events following Professor Jennifer Berdahl's publication of her blog on August 8, 2015 in a manner that violated any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any applicable University policies including whether her academic freedom is or was interfered with in any way.

UBC and the Faculty Association agree that the process will meet following requirements:

1. The Fact Finder will be an independent, respected, and legally trained individual with experience in fact-finding processes and knowledge of university and academic culture, particularly faculty culture. The Parties have mutually agreed upon the Honourable Lynn Smith, Q.C., (hereinafter referred to as the "Fact Finder"), and the Honourable Lynn Smith, Q.C., has agreed to undertake this fact-finding process.

2. The Fact Finder will undertake a full and complete investigation of the matter referred to above and will be required to make findings of fact and reach conclusions on this matter. The Fact Finder will attempt to reach conclusions on the matters referred to above on the basis of supporting facts and evidence.

3. The Fact Finder will not make any recommendations pertaining to any actions to be taken by the Parties related to her findings or conclusions.

4. The Fact Finder may determine her own processes and procedures provided that:
    a. the process is impartial and fully considers the matter described above;
    b. the fact finding process shall be confidential and each participant in the process shall be advised by the Fact Finder of this requirement during the process;
    c. in reaching her findings and conclusions, the Fact Finder shall consider the definition of academic freedom provided in Part 1 of the *Collective Agreement* between the Faculty Association and the University, the UBC *Statement on Respectful Environment*, *Policy 97* (*Conflict of Interest and Conflict of Commitment*), and any other applicable University policy;

d. findings of fact and conclusions shall be determined on the balance of probabilities standard of proof;
e. the Fact Finder will conduct separate interviews with Professor Jennifer Berdahl, Mr. John S. Montalbano, Chair of the Board of Governors, and the individuals from the Sauder School of Business who have been identified by the Faculty Association;
f. the Parties will have an opportunity to submit a list of witnesses who may be asked to participate in the fact-finding process. The Fact Finder will be entitled to speak with any witnesses that the Fact Finder determines to be relevant to reaching a conclusion on the matter;
g. those persons being interviewed may be accompanied by a either a representative of the Faculty Association or the University and not by external legal counsel;
h. each party will produce all documents relevant to this process that are in its possession or control. The documents will be provided to the other party and to the Fact FInder on or before September 7, 2015. Those individuals involved in the fact-finding process will be given an appropriate opportunity to review and comment on the documentation; and
i. the Fact FInder will be entitled to request any documents from the Parties or any other documents the Fact Finder deems relevant to the process.

5. The Fact Finder may record the Interviews solely for her own purposes. Any recordings shall be destroyed following issuance of the Fact Finder's report.

6. The Fact Finder will prepare and submit her report to UBC and the UBC Faculty Association no later than October 7, 2015. Each of the Parties may circulate the report on a "need to know" basis only. The Fact Finder will also prepare an Executive Summary by October 15 that may be circulated publicly.

7. Nothing contained herein shall prevent the Faculty Association from initiating a grievance pursuant to Article 20 of the Collective Agreement following the completion of the process or its termination by the Fact Finder.

Signed this 25th day of August, 2015

[redacted]

Mark Mac Lean
President
UBC Faculty Association

[redacted]

Angela Redish
Acting President
University of British Columbia

Amendment to Terms of Reference:

Fact-Finding Process

The University of British Columbia
and
the Faculty Association
of the University of British Columbia

The University of British Columbia and the Faculty Association of the University of British Columbia have agreed upon the following amendment to the Terms of Reference dated August 25, 2015 for an impartial investigation:

The Fact Finder, and anyone acting for or under her direction, will not:

(a) be subpoenaed or otherwise compelled to give evidence in any proceedings in respect of the performance of their duties or the exercise of their powers and functions pursuant to the Terms of Reference; or
(b) be required to produce documents or other information, whether through legal process or otherwise, that they obtained in the performance of their duties or the exercise of their powers and functions pursuant to the Terms of Reference.

Signed this 8th day of September, 2015.

[redacted]

Mark Mac Lean
President
UBC Faculty Association

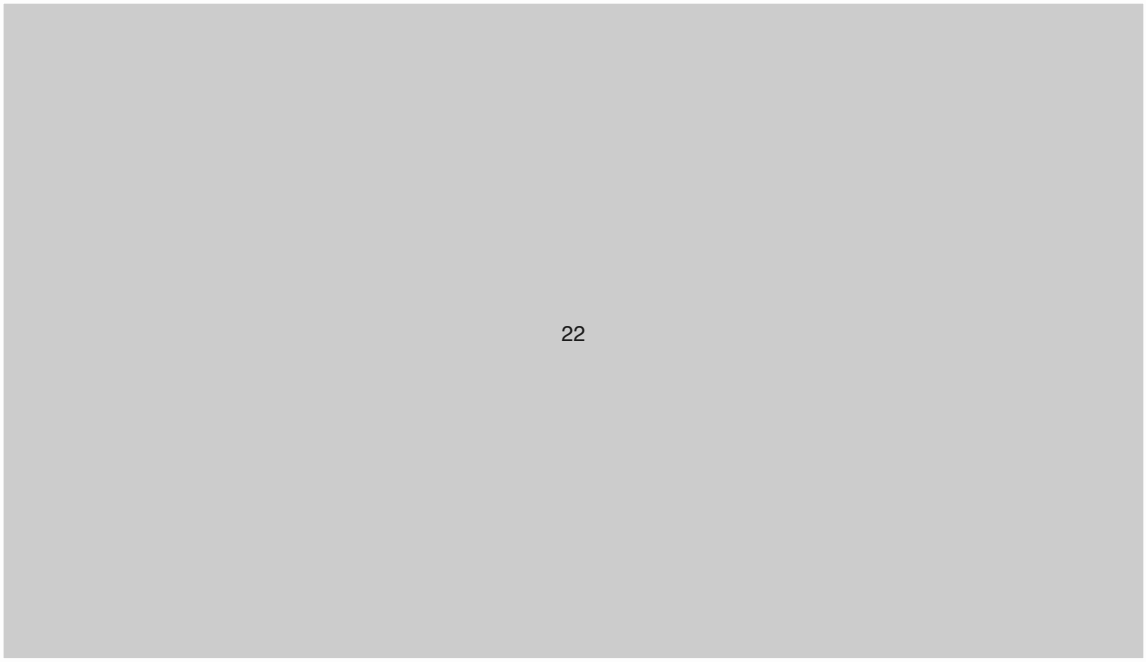
[redacted]

Angela Redish
Provost and Vice-President Academic *pro tem*
University of British Columbia

APPENDIX "B"

List of Persons Interviewed:

Dr. Jennifer Berdahl, Montalbano Professor of Leadership Studies: Gender and Diversity | UBC Sauder School of Business



Mr. John Montalbano, Chair | UBC Board of Governors

APPENDIX "C"

CAUT Policy Statement on Academic Freedom – available at http://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom

Academic Freedom

1 Post-secondary educational institutions serve the common good of society through searching for, and disseminating, knowledge and understanding and through fostering independent thinking and expression in academic staff and students. Robust democracies require no less. These ends cannot be achieved without academic freedom.

2 Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service to the institution and the community; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

3 Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible. All academic staff must have the right to fulfil their functions without reprisal or repression by the institution, the state, or any other source. Contracts which are silent on the matter of academic freedom do not entitle the employer to breach or threaten in any way the academic freedom of academic staff employed under such collective agreements or other employment contracts.

4 All academic staff have the right to freedom of thought, conscience, religion, expression, assembly, and association and the right to liberty and security of the person and freedom of movement. Academic staff must not be hindered or impeded in exercising their civil rights as individuals including the right to contribute to social change through free expression of opinion on matters of public interest. Academic staff must not suffer any institutional penalties because of the exercise of such rights.

5 Academic freedom requires that academic staff play a major role in the governance of the institution. Academic staff members shall constitute at least a majority on committees or collegial governing bodies responsible for academic matters including but not limited to curriculum, assessment procedures and standards, appointment, tenure and promotion.

6 Academic freedom must not be confused with institutional autonomy. Post-secondary institutions are autonomous to the extent that they can set policies independent of outside influence. That very autonomy can protect academic freedom from a hostile external environment, but it can also facilitate an internal assault on academic freedom. Academic freedom is a right of members of the academic staff, not of the institution. The employer shall not abridge academic freedom on any grounds, including claims of institutional autonomy.

Approved by the CAUT Council, November 2011.

APPENDIX "D"

Media release

Canada's universities adopt new Statement on Academic Freedom

October 25, 2011

MONTREAL – Canada's universities have adopted a new Statement on Academic Freedom that clarifies the importance and definition of academic freedom on campuses across Canada. The new Statement on Academic Freedom was accepted unanimously by university presidents at the centennial meetings of the Association of Universities and Colleges of Canada today in Montreal. It replaces the statement members had agreed to in 1988.

Affirmation of this statement by institutions is expected to become part of AUCC's criteria for membership.

The new statement is as follows:

Statement on Academic Freedom

What is academic freedom?

Academic freedom is the freedom to teach and conduct research in an academic environment. Academic freedom is fundamental to the mandate of universities to pursue truth, educate students and disseminate knowledge and understanding.

In teaching, academic freedom is fundamental to the protection of the rights of the teacher to teach and of the student to learn. In research and scholarship, it is critical to advancing knowledge. Academic freedom includes the right to freely communicate knowledge and the results of research and scholarship.

Unlike the broader concept of freedom of speech, academic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities.

Why is academic freedom important to Canada?

Academic freedom does not exist for its own sake, but rather for important social purposes. Academic freedom is essential to the role of universities in a democratic society. Universities are committed to the pursuit of truth and its communication to others, including students and the broader community. To do this, faculty must be free to take intellectual risks and tackle controversial subjects in their teaching, research and scholarship.

For Canadians, it is important to know that views expressed by faculty are based on solid research, data and evidence, and that universities are autonomous and responsible institutions committed to the principles of integrity.

The responsibilities of academic freedom

Evidence and truth are the guiding principles for universities and the community of scholars that make up their faculty and students. Thus, academic freedom must be based on reasoned discourse, rigorous extensive research and scholarship, and peer review.

Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission. The insistence on professional standards speaks to the rigor of the enquiry and not to its outcome.

The constraint of institutional requirements recognizes simply that the academic mission, like other work, has to be organized according to institutional needs. This includes the institution's responsibility to select and appoint faculty and staff, to admit and discipline students, to establish and control curriculum, to make organizational arrangements for the conduct of academic work, to certify completion of a program and to grant degrees.

Roles and responsibilities

University leadership: It is a major responsibility of university governing bodies and senior officers to protect and promote academic freedom. This includes ensuring that funding and other partnerships do not interfere with autonomy in deciding what is studied and how. Canada's university presidents must play a leadership role in communicating the values around academic freedom to internal and external stakeholders. The university must also defend academic freedom against interpretations that are excessive or too loose, and the claims that may spring from such definitions.

To ensure and protect academic freedom, universities must be autonomous, with their governing bodies committed to integrity and free to act in the institution's best interests.

Universities must also ensure that the rights and freedoms of others are respected, and that academic freedom is exercised in a reasonable

and responsible manner.

Faculty: Faculty must be committed to the highest ethical standards in their teaching and research. They must be free to examine data, question assumptions and be guided by evidence.

Faculty have an equal responsibility to submit their knowledge and claims to rigorous and public review by peers who are experts in the subject matter under consideration and to ground their arguments in the best available evidence.

Faculty members and university leaders have an obligation to ensure that students' human rights are respected and that they are encouraged to pursue their education according to the principles of academic freedom.

Faculty also share with university leadership the responsibility of ensuring that pressures from funding and other types of partnerships do not unduly influence the intellectual work of the university.

-30-

Media Contact:

Helen Murphy
Communications Manager
Association of Universities and Colleges of Canada
hmurphy@aucc.ca
Cell: 613-608-8749

Topics: Universities Canada News

APPENDIX "E"

8th August

Did President Arvind Gupta Lose the Masculinity Contest?

[http://2.bp.blogspot.com/-ucaCz4VV-X0/VcWDjuOrHKI/AAAAAAAAKb0/soAdLGzjM3I/s1600/Screen%2BShot%2B2015-08-07%2Bat%2B9.20.03%2BPM.png]

As a conference of interdisciplinary scholars studying Work as a Masculinity Contest [http://www.sauder.ubc.ca/Faculty/Research_Centres/Gender_and_Diversity_in_Leadership_Initiative/Research/Working_Groups/Work_as_a_Masculinity_Contest] came to an end today, the resignation of Arvind Gupta as UBC's president after a year in office was announced [http://news.ubc.ca/2015/08/07/ubc-announces-leadership-transition/] . I do not claim to know the ins and outs of this unfortunate outcome. UBC either failed in selecting, or in supporting, him as president. But what I do have are my personal observations and experiences after my first year here as the inaugural Montalbano Professor of Leadership Studies: Gender and Diversity. I believe that part of this outcome is that Arvind Gupta lost the masculinity contest among the leadership at UBC, as most women and minorities do at institutions dominated by white men.

President Gupta was the first brown man to be UBC president. He isn't tall or physically imposing. He advocates for women and visible minorities in leadership – a stance that has been empirically demonstrated [http://www.theatlantic.com/business/archive/2014/04/why-men-dont-stand-up-for-women-to-lead/361231/] to hurt men at work. I had the pleasure of speaking with him on this topic to UBC alumni in Calgary [https://www.alumni.ubc.ca/2014/events/ubc-president-arvind-gupta-in-calgary/] and Toronto [https://startanevolution.ubc.ca/events/toronto-campaign-celebration-2014-diversity-leadership/] , and it was clear that he is convinced of the need to bring and keep all forms of talent into the Canadian workplace, no matter its size, style, or packaging.

I also had the pleasure of serving on an executive search committee he chaired. In leading that committee he sought and listened to everyone's opinions, from students through deans. He expressed uncertainty when he was uncertain and he sought expertise from experts. He encouraged the less powerful to speak first and the more powerful to speak last. He did not share his own leanings and thoughts until it was time to make a decision, so as not to encourage others to "fall in line." In other words, he exhibited all the traits of a humble leader: one who listens to arguments and weighs their logic and information, instead of displaying and rewarding bravado as a proxy for competence.

When work is a masculinity contest, leadership does not earnestly seek expert input, express self-doubt, or empower low-status voices. Instead, those who rise to positions of leadership have won the contest of who can seem most certain and overrule or ignore divergent opinions. Risk-taking, harassment, and bullying are common. Against men this usually takes the form of "not man enough [http://www.theglobeandmail.com/report-on-business/careers/business-education/paternity-leave-dads-seen-as-not-man-enough/article13821961/] " harassment, with accusations of being a wimp [http://foreignpolicy.com/2014/09/10/barack-obama-and-the-wimp-factor/] , lacking a spine [http://www.sodahead.com/united-states/what-is-more-elusive-barack-obamas-spine-or-barack-obamas-birth-certificate/question-1465561/] , and other attacks on their fortitude as "real men" (or leaders, which occurs for

women as well). "Frat-boy" behavior sets the tone, like encouraging heavy drinking, bragging about financial, athletic, or other forms of prowess, and telling sexual jokes.

Like a lot of bias in organizations, much of this behavior is conducted without ill intention. Not all men engage in it, and some women do in order to fit in. But as research in social psychology and organizational behavior reveals, it does not lead to excellence in decision-making or performance. President Arvind Gupta was about excellence. I wish him the best in finding it in his next endeavors.

Posted 8th August by Jennifer Berdahl

39 View comments

APPENDIX "F"

straight.com

Scholar suggests Arvind Gupta lost masculinity contest at UBC

Sauder School of Business scholar Jennifer Berdahl has presented a provocative hypothesis to explain why Arvind Gupta is no longer president of UBC.

"I believe that part of this outcome is that Arvind Gupta lost the masculinity contest among the leadership at UBC, as most women and minorities do at institutions dominated by white men," Berdahl wrote on her blog.

Berhdal is UBC's Montalbano professor of leadership studies: gender and diversity.

She pointed out that Gupta, a computer scientist, was "the first brown man" to become president of UBC.

Based on her conversations with him, she's concluded that Gupta is "convinced of the need to bring and keep all forms of talent into the Canadian workplace, no matter its size, style, or packaging".

"He isn't tall or physically imposing," she noted. "He advocates for women and visible minorities in leadership—a stance that has been empirically demonstrated to hurt men at work."

She recalled that when she was on an executive search committee with Gupta, he "expressed uncertainty when he was uncertain and he sought expertise from experts".

"He encouraged the less powerful to speak first and the more powerful to speak last," Berdahl added. "He did not share his own leanings and thoughts until it was time to make a decision, so as not to encourage others to 'fall in line'."

She pointed out that when work is a "masculinity contest", the leadership "does not earnestly seek expert input, self-doubt, or empower low-status voices".

"Instead, those who rise to positions of leadership have won the contest of who can seem most certain and overrule or ignore divergent opinions," Berdahl wrote. "Risk-taking, harassment, and bullying are common."

It can lead those who govern in a less hierarchical manner to be derided as wimps or "not man enough".

On her blog, she stated that "UBC either failed in selecting, or in supporting, him as president".

"President Arvind Gupta was about excellence," Berdahl concluded. "I wish him the best in finding it in his next endeavours."

University from carrying out its primary function.

All members of the UBC community recognize and value this fundamental principle, and must share responsibility for supporting, safeguarding and preserving it. Academic freedom is balanced by the scholar's commitment to academic integrity that requires intellectual honesty and objectivity, unfettered by personal gain or financial or political considerations.

The principles of fairness and due process are also fundamental to the UBC community, and we must respect the law to ensure all members of the university community are enabled to contribute fully to their endeavours. As such, UBC has rigorous processes in place – established with the agreement of the Faculty Association – to investigate any allegation of breach of academic freedom. It is imperative that we follow this impartial process embedded within and protected by the collective agreement before pre-judging unproven and untested allegations at this time.

The facts will be gathered and all parties will be heard before reaching any conclusion. We welcome this process and it would be entirely inappropriate to comment further on the allegations until this process has been concluded.

Angela Redish – Provost *Pro Tem* and Martha Piper – Interim President

***Media can learn more about UBC's rigorous approach to academic freedom** here **and its grievance and arbitration procedures** here.*

UBC News

APPENDIX "I"

Media Statement: Chair of the University of British Columbia, John Montalbano

Email

Tweet 0

August 18, 2015

(http://news.ubc.ca/wp-content/uploads/2015/04/ubc770.jpg)

First and foremost, I want to reinforce the University of British Columbia's commitment to academic freedom and my commitment as Chair of the Board of Governors to academic freedom. At its August 17, 2015 Board meeting, the Board of Governors reaffirmed their confidence in me as Chair, which I respect and appreciate. It is an honour to volunteer my time as Chair and I will continue to serve.

It is important now that I briefly address some allegations that I interfered in a professor's academic freedom. Let me first say, that I'm deeply concerned with the way in which my interaction with Professor Jennifer Berdahl about her recent blog post (August 8, 2015) has been portrayed.

(http://news.ubc.ca/wp-content/uploads/2013/11/
John Montalbano

My intention in contacting Professor Berdahl, who has been a trusted colleague for two years and with whom I have regular contact, was to discuss her blog post and to further understand the professor's concerns. I asked the professor if she would be comfortable with discussing the blog and, in particular, I asked if she thought the discussion would in any way compromise her academic freedom. I asked her to stop me at any time if she felt uncomfortable. She agreed to the call and said that she welcomed the discussion and would not see it as affecting her academic freedom. At no time did I ask the professor to retract any of her blog and at no time did I threaten her funding. In fact, I reinforced that her funding would continue. At no time did I intend to impinge her academic freedom. At the end of our telephone call, Professor Berdahl agreed that we had a productive conversation and though we didn't agree on all points, she confirmed that I did not ask for any retraction, that I affirmed her funding and did not interfere in her academic freedom. Given this, I'm sure most people can understand that I'm upset and hurt by the allegations that our call was an impingement on the professor's academic freedom. I have immense

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- UBC Facts and Figures (http://news.ubc.ca/media-resources/ubc-facts-and-figures/)
- TV and Radio Studios (http://news.ubc.ca/media-resources/tv-and-radio-studios/)
- UBC's Okanagan Campus Newsroom (http://news.ubc.ca/ubc-okanagan-news-room/)

Tweets Follow

UBC Public Affairs

People want to walk and live in a landscape not a road, says 's landscape architect

respect for Professor Berdahl and I am saddened that our interaction has caused her such concern.

As the acting President and Provost said in her recent statement, it is important that an objective, independent and thorough process be followed to determine whether there is any validity to the allegations made against me. The Faculty Association collective agreement includes a thoughtful, thorough grievance process and I welcome – in fact, I ask – the professor to engage in this process. I commit to fully engaging in the grievance process if and when the professor lodges a formal grievance request.

I want to thank my family, board colleagues and the campus and broader community for their support. Being subject to these allegations is difficult for me, and this support is much appreciated.

In closing, I would like to say that I look forward to working with Dr. Martha Piper, who will be interim President on September 1, to provide strong leadership as we continue our efforts to be one of the world's leading universities through our core mission of teaching and research. We look forward to celebrating the many successes of the university and its people in our upcoming 100th anniversary.

Find other stories about: Board of Governors (http://news.ubc.ca/tag/board-of-governors/), John Montalbano (http://news.ubc.ca/tag/john-montalbano/)

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