

# Universities and Freedom of Expression: When Should the *Charter* Apply?

Linda McKay-Panos<sup>†</sup>

*There is confusion about whether “public” activities at universities should invoke application of the Canadian Charter of Rights and Freedoms (Charter). Two recent lines of authority have reached different conclusions. The 2016 decision of the British Columbia Court of Appeal in British Columbia Civil Liberties Association v University of Victoria, and the recent emergence of decisions from Alberta and Saskatchewan, which conflict with those from Ontario and BC, support the position that the Supreme Court of Canada (SCC) needs to address the question. In this article, I respectfully argue that the University of Victoria case was incorrectly decided. I also part ways with those who agree that the Charter should apply to universities but only if the activity involves students. Given the importance of freedom of expression in a learning environment, the Charter should apply to activities of non-invited individuals (even non-students). After presenting an overview of section 32(1) of the Charter and its application to universities, I summarize the two conflicting lines of cases. Next, the University of Victoria decision and its outcome are discussed in detail. I examine whether there are any logical, principled bases for the conflicting decisions of Canada’s provincial courts on the issue of the Charter’s application to universities. Finally, after concluding that the differences cannot be supported, I provide reasons why the SCC must address the issue.*

---

<sup>†</sup> With thanks to articling student Nitin K Srivastava B.A., LL.B., LL.M. for his research assistance, and Geneviève Tremblay-McCaig, (LL.M) and Dr. Maureen Duffy, B.S. (Journalism), J.D. cum laude, LL.M. Dean’s Honours, D.C.L (McGill University) for their helpful discussion and feedback.

*Il existe une certaine confusion quant à savoir si les activités « publiques » tenues dans les universités sont assujetties à l'application de la Charte canadienne des droits et libertés (la Charte). Deux tendances jurisprudentielles récentes sont parvenues à des conclusions différentes à cet égard. La décision rendue en 2016 par la Cour d'appel de la Colombie-Britannique dans l'affaire British Columbia Civil Liberties Association c University of Victoria et l'émergence, en Alberta et en Saskatchewan, de décisions qui entrent en conflit avec celles de l'Ontario et de la Colombie-Britannique étayent le point de vue selon lequel il est nécessaire que la Cour suprême du Canada traite la question. Dans cet article, je soutiens en toute déférence que la décision rendue dans l'affaire University of Victoria était incorrecte. Je me dissocie également de ceux qui soutiennent que la Charte devrait s'appliquer aux universités, mais seulement si l'activité implique la participation d'étudiants. Étant donné l'importance de la liberté d'expression dans un milieu éducatif, la Charte devrait s'appliquer aux activités de personnes non invitées (même à celles de personnes ne faisant pas partie du corps étudiant). Après avoir présenté un survol du paragraphe 32(1) de la Charte et de la façon dont il s'applique aux universités, je présenterai brièvement les deux tendances jurisprudentielles en opposition. J'analyserai ensuite en détail la décision relative à l'affaire University of Victoria et son résultat. Enfin, j'examinerai s'il n'y a pas quelques fondements logiques fondés sur des principes qui expliqueraient les décisions contradictoires des cours provinciales canadiennes sur la question de l'application de la Charte aux universités. Enfin, après avoir conclu que les différences ne se justifient pas, je donnerai les raisons pour lesquelles la Cour suprême du Canada devrait trancher la question.*

## I. Introduction

In the past few years there have been several cases in which the courts were asked to determine whether the *Canadian Charter of Rights and Freedoms*<sup>1</sup> applies to public universities. Often this issue arises in the context of a freedom of expression matter, such as a protest group on campus with a controversial display. It is perhaps ironic that universities are said to be places where academic freedom and a free exchange of ideas are encouraged. Yet it has never been a given that the *Charter* applies to public universities. Two lines of cases have reached conflicting conclusions on the issue of whether “public” activities at universities should invoke the application of the *Charter*. The British Columbia Court of Appeal (BCCA) decision in *British Columbia Civil Liberties Association v University of Victoria*,<sup>2</sup> and the recent emergence of decisions from Alberta and Saskatchewan, which conflict with other decisions from Ontario and British Columbia, support the position that the Supreme Court of Canada (SCC) needs to address this issue. I respectfully argue that *UVic CA* was incorrectly decided. I also part ways with those who agree that the *Charter* should apply to universities but only if the activity involves students. I believe the *Charter* should apply to activities of non-invited individuals (even non-students), as I take a perhaps broader view on the value of expression. This does not mean that public safety and other legitimate concerns should not be addressed – that is the role of section 1 of the *Charter*.

Cases in which there is contention over the application of the *Charter* often involve privately owned spaces to which members of the public are invited. In addition to university campuses, some of these “public” locations include shopping malls, airports, bars, sports stadiums and nursing homes.<sup>3</sup> Because members of the public are invited to these spaces, attendees assume that they are protected by the *Charter*, when, in fact, the *Charter* may not apply. Even though it may seem that the *Charter* should apply, these spaces are privately owned and legislation dealing with private property, such as trespass legislation, is applicable.

Even if the *Charter* does not apply, individuals who encounter rights violations in these settings are not without legal recourse. If representatives of these places discriminate against individuals on the basis of a protected ground the applicable human rights legislation may apply.<sup>4</sup> The limitation

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

<sup>2</sup> *British Columbia Civil Liberties Association v University of Victoria*, 2016 BCCA 162, [2016] 8 WWR 678 [UVic CA].

<sup>3</sup> See e.g. Linda McKay-Panos & Brian Seaman, “Do You Have A Right To Be At The Mall?” (2007) 31:6 *LawNow* 50.

<sup>4</sup> See e.g. *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302, [2005] BCHRTD No 302 where a disabled Aboriginal woman was denied entry to a Vancouver mall as the security guard deemed her “suspicious”. The British Columbia Human Rights Tribunal found that the security guard had violated

is that human rights law generally applies only to discrimination on the basis of a listed ground in specific contexts (e.g. employment, tenancy or services customarily available to the public). If the situation does not involve discrimination on an enumerated ground, or if it is not in a context covered by human rights legislation, then the complainant would need to look to the *Charter* or to other civil remedies. Nevertheless, in some cases involving non-government contexts, courts have determined that there is enough of a connection to a government or a government's objectives that the *Charter* applies, at least to some of the activities occurring in these places.

Universities are in many ways like small cities and it is important to note that the *Charter* applies to municipal governments. In 2016, the student population of the University of Calgary was over 30,000 and there were approximately 1,800 faculty and 3,100 staff.<sup>5</sup> Similarly, the University of Victoria has over 20,000 students.<sup>6</sup> Post-secondary education is clearly a significant activity for many Canadians. Does its significance and prevalence support the application of the *Charter*? The jurisprudence is clear that the *Charter* does not apply to universities the same way it does to municipalities (as government entities). However, there are activities occurring at universities (and the other locations listed above) that support the conclusion that the *Charter* should apply in some circumstances. The disagreement revolves around what activities should attract the *Charter* and the rationale supporting the *Charter's* application versus the reasons for finding that the activities occurring in the location are happening in a "Charter-free zone".<sup>7</sup>

Early cases holding that the *Charter* did not apply to universities occurred in the context of staff employment or other internal issues. This is a logical distinction as it recognizes the autonomy of the university (a non-government organization) when making day-to-day decisions. Further, when a situation involves the university as employer or service-provider, provincial human rights legislation may apply instead of the *Charter*.<sup>8</sup> For example, if the university as an employer is accused of discriminating against professors and/or staff on the basis of age, race, religious belief, etc., the employee(s) could approach the provincial human rights commission and launch a complaint for a remedy.

After presenting an overview of section 32(1) of the *Charter* and its application to universities, I summarize the two conflicting lines of cases

---

the *Human Rights Code*, RSBC 1996, c 210 and ordered the mall owner to institute policies, training and support to help security staff perform their duties in a non-discriminatory manner.

<sup>5</sup> University of Calgary, "About the University of Calgary", online: <[www.ucalgary.ca/about](http://www.ucalgary.ca/about)>.

<sup>6</sup> University of Victoria, "About UVic", online: <[www.uvic.ca/home/about/about](http://www.uvic.ca/home/about/about)>.

<sup>7</sup> *Pridgen v University of Calgary*, 2010 ABQB 644 at para 69, [2011] 1 WWR 660, Stekaf J [*Pridgen, QB*].

<sup>8</sup> See *University of British Columbia v Berg*, [1993] 2 SCR 353, 309 DLR (4th) 1 [*Berg*] (where the educational services and facilities of the university were considered "services customarily available to the public" for the purpose of the application of human rights law).

mentioned previously. Next, the BCCA decision (*UVic CA*) and its outcome are discussed in detail. I then examine whether there are any logical, principled bases for the conflicting decisions of Canada's provincial courts on the issue of the *Charter's* application to universities. Finally, after concluding that the differences cannot be supported, I provide reasons why the SCC must address the issue.

## II. Universities and Section 32(1) of the *Charter*

At issue is whether universities fit within “legislature and government” under section 32(1) of the *Charter*. To address this question some discussion of past decisions is instructive.

Section 32(1) provides:

This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.<sup>9</sup>

### A. The SCC Grapples With Whether the *Charter* Applies to Universities

*McKinney v University of Guelph*<sup>10</sup> was the first major case to address whether the *Charter* applied to universities. This case involved mandatory retirement for academic staff, which was indeed a matter that could have been argued before the human rights commission, except that the (then) *Ontario Human Rights Code*<sup>11</sup> protected only those between the ages of 18 and 65 from age discrimination. The SCC was reluctant to interfere with personnel and other decisions relating to the autonomous operation of the University.<sup>12</sup>

In *McKinney*, the majority decision of the SCC seemed to close the door

<sup>9</sup> *Charter*, *supra* note 1, s 32(1).

<sup>10</sup> [1990] 3 SCR 229, 76 DLR (4th) 545 [*McKinney* cited to SCR].

<sup>11</sup> *Ontario Human Rights Code*, SO 1981, c 53.

<sup>12</sup> Two years later, in *Dickason v University of Alberta*, [1990] 2 SCR 1103, 95 DLR (4th) 439, the SCC dealt with a similar situation arising in Alberta, but this case was argued under human rights law rather than the *Charter*. There, the SCC felt that a mandatory retirement policy was *prima facie* discriminatory, but the discrimination was reasonable and justifiable. As with *McKinney*, the SCC noted that there was a collective bargaining agreement in place that authorized compulsory retirement, and which applied to all faculty members. Thus, at that time, challenges to mandatory retirement policies were unsuccessful under both the *Charter* and human rights law. The courts and tribunals have recently changed their position on the issue of mandatory retirement, rejecting blanket policies in favour of individual or subjective assessment of abilities. See e.g. *Greater Vancouver Regional District Employees' Union v Greater Vancouver Regional District*, 2001 BCCA 435, 206 DLR (4th) 220.

on the possibility of the *Charter's* application to universities. Speaking for the Majority, Justice La Forest (writing for Chief Justice Dickson and Justice Gonthier) stated:

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the *Charter*.<sup>13</sup>

Justice La Forest was prepared to suggest there *might* be exceptions to this general rule:

There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government[.]<sup>14</sup>

Justice Sopinka agreed that universities are not government entities for the purpose of attracting the *Charter*. On the other hand, he also stated that he “would not go so far as to say that none of the activities of a university are governmental in nature.”<sup>15</sup> Justice Sopinka was however ultimately prepared to hold that the “core functions of a university are non-governmental and therefore not directly subject to the *Charter*.”<sup>16</sup>

Justice Wilson, dissenting in *McKinney*, analyzed several scholarly opinions and attempted to provide indicators of factors that could point to a government nexus sufficient to demonstrate that the *Charter* applied, such as exercising control by the government, performing a government function and being a government entity that is performing a task under statutory authority. In applying these factors to universities, she concluded:

[T]he fact that the universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of ‘government’ for purposes of s. 32. Their policies of mandatory retirement are therefore subject to scrutiny under s. 15 of the *Charter*.<sup>17</sup>

When the issue of the applicability of the *Charter* to universities was raised recently in *Pridgen v University of Calgary*,<sup>18</sup> Justice Paperny referred to Justice Wilson’s dissent in *McKinney* to assist in attempting to make sense of this complex issue.

<sup>13</sup> *McKinney*, *supra* note 10 at 268.

<sup>14</sup> *Ibid* at 274.

<sup>15</sup> *Ibid* at 444.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at 379.

<sup>18</sup> *Pridgen v University of Calgary*, 2012 ABCA 139, 350 DLR (4th) 1 [*Pridgen*].

In *McKinney*, Justice Cory agreed with the tests suggested by Justice Wilson with respect to determining whether entities were part of the government such that the *Charter* applied. He agreed that mandatory retirement policies were subject to *Charter* scrutiny under section 15(1), but he also agreed with the majority that mandatory retirement policies were within the scope of section 1 and thus survived *Charter* scrutiny.<sup>19</sup>

Over the next few years Canadian legal decisions proceeded on the assumption that the *Charter* did not apply to universities, in particular with respect to their internal activities.<sup>20</sup> Courts seemed concerned that subjecting universities to *Charter* review in any circumstances would undermine their independence. More recent decisions have also emphasized the reluctance of the SCC to interfere with private actions and the independence of public authorities, by deferring to them on most questions of law and fact, and by excluding their private actions from judicial review.<sup>21</sup>

In the years since *McKinney* was decided, there have been developments in case law expanding the circumstances in which the *Charter* applies. This has reopened the issue of *Charter* application to universities. However, the concern about maintaining and respecting the autonomy and internal integrity of universities has perhaps continued to support the reluctance of courts in some Canadian jurisdictions to extend the application of the *Charter* to university activities.

## B. The SCC Expands the Application of the *Charter* to Non-Government Entities

In *Eldridge v British Columbia*<sup>22</sup> the SCC dealt with the issue of whether the *Charter* would apply to the delivery of medical care by a non-government entity—a hospital. *Eldridge* marks an extension of the circumstances in which the *Charter* can apply. In British Columbia, hospital services are funded by the government which reimburses them for medically required services provided to the public. The Medical Services Plan provides funding for required medical services delivered by doctors and other health care practitioners.<sup>23</sup> The appellants were born deaf and used sign language.<sup>24</sup> They were not provided sign language interpreters for visits to their doctors and other health care providers, and argued that this violated their rights under

<sup>19</sup> *McKinney*, *supra* note 10 at 446–47.

<sup>20</sup> See Michael Marin, “Should the Charter Apply to Universities?” (2015) 35:1 NJCL 29 at 34.

<sup>21</sup> See e.g. *Berg*, *supra* note 8; *Harrison v University of British Columbia*, [1990] 3 SCR 451, 77 DLR (4th) 55 [*Harrison*]; *Maughan v University of British Columbia*, 2009 BCCA 447, 181 ACWS (3d) 932, leave to appeal to SCC refused, 33495 (29 April 2010).

<sup>22</sup> [1997] 3 SCR 624, 151 DLR (4th) 572 [*Eldridge* cited to SCR]. See also *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700 [*Stoffman* cited to SCR].

<sup>23</sup> *Eldridge*, *supra* note 22 at para 2.

<sup>24</sup> *Ibid* at para 5.

section 15(1). The SCC agreed and held that the violation was not saved by section 1 of the *Charter*.<sup>25</sup>

A preliminary issue of this case was whether the *Charter* applied to the implementation of government policy by a non-government entity. The SCC was concerned that if the *Charter* were not to apply under these circumstances, legislatures could escape their constitutional responsibilities under the *Charter* by delegating the implementation of their policies to private entities.<sup>26</sup> The SCC provided guidance for determining whether the *Charter* might apply to a private entity when it is performing “inherently governmental actions”.<sup>27</sup>

The SCC outlined two circumstances when the *Charter* would apply:

1. The private entity in its entirety must be considered to be government; that is, based on the degree of control exercised over it by the government, it is clearly an organ of the government; or
2. The particular activity must be considered to be “governmental”, i.e. through the implementation of a certain government program.<sup>28</sup>

In *Eldridge*, the *Charter* was held to apply to a hospital that was carrying out a specific governmental objective.<sup>29</sup> There, the SCC further noted that the legislature could not avoid its *Charter* obligations by appointing hospitals to carry out its objectives.<sup>30</sup>

### C. The SCC Builds upon and Explains *Eldridge*

The next relevant decision was *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*.<sup>31</sup> In that case, two transit authorities (BC Transit and Translink) refused to post the Student Federation’s political advertising because their advertising policies permitted commercial (but not political) advertising. The Student Federation argued that this refusal violated its rights under sections 2, 7 and 9 of the *Charter*.

A preliminary issue was whether the *Charter* applied. The SCC held that the transit authorities are “government” within the meaning of section 32. The SCC held that the *Charter* applied to all matters within the authority of Parliament, the legislatures and the government. BC Transit was held to be a statutory body designated by legislation to be an “agent of the government”,

<sup>25</sup> *Ibid* at para 95.

<sup>26</sup> *Ibid* at para 35.

<sup>27</sup> *Ibid* at para 42.

<sup>28</sup> *Ibid* at paras 41–44.

<sup>29</sup> *Ibid* at para 50.

<sup>30</sup> *Ibid* at para 51.

<sup>31</sup> 2009 SCC 31, [2009] 2 SCR 295 [*Greater Vancouver*].

which could not operate autonomously from the provincial government because the government has power to exercise substantial control over its day-to-day activities.<sup>32</sup> Translink was not an agent of the government, but it was substantially controlled by a local government entity, the Greater Vancouver Regional District.

In setting out the proper approach to determining whether the *Charter* applied, the SCC noted that

there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.<sup>33</sup>

In *Eldridge*, the SCC provided two examples of a "governmental act": the implementation of a specific statutory scheme or a government program.<sup>34</sup> The SCC also noted that an entity performing a governmental act will be subject to *Charter* review only in respect of that act, and not its other private activities.<sup>35</sup> In *Greater Vancouver*, because both BC Transit and TransLink were considered to be government entities, *all* of their activities were held to be subject to the *Charter*.<sup>36</sup>

#### **D. One Alberta Court of Appeal Justice Attempts to Consolidate Jurisprudence on *Charter* Application**

The final pertinent development occurred in *Pridgen*<sup>37</sup> where the Alberta Court of Appeal (Justice Paperny) attempted to categorize the entities and activities to which the *Charter* might apply. The University of Calgary disciplined two students for posting comments on Facebook about their instructor. The University decided the comments were non-academic misconduct and imposed discipline on both students, including several months of academic probation. The students were successful on judicial review by Justice Strekaf of the Alberta Court of Queen's Bench, who ruled that the University decision was unreasonable in law and also infringed section 2(b) and could not be saved by section 1 of the *Charter*. Justice Strekaf also held that the University was "not a *Charter*-free zone."<sup>38</sup> Justice Strekaf

<sup>32</sup> *Ibid* at para 17.

<sup>33</sup> *Ibid* at para 16.

<sup>34</sup> *Eldridge*, *supra* note 22 at para 44.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Greater Vancouver*, *supra* note 31 at para 24.

<sup>37</sup> *Pridgen*, *supra* note 18.

<sup>38</sup> *Pridgen QB*, *supra* note 7 at para 69.

noted that because it is a specific government policy of the Alberta legislature to provide post-secondary education to the public in Alberta,<sup>39</sup> universities are acting as government agents to deliver post-secondary education under the *Post-Secondary Learning Act*.<sup>40</sup>

The Alberta Court of Appeal unanimously upheld Justice Strekaf's finding that the disciplinary decision of the University was unreasonable under administrative law principles. At the same time, two of the three Appeal Justices held that it was unnecessary to consider the issue of the application of the *Charter* to universities. The University did not challenge Justice Strekaf's findings that the University had infringed the Pridgens' freedom of expression under section 2(b), or that the violation could not be justified under section 1.<sup>41</sup> The University argued that Justice Strekaf should not have considered the issue of whether the *Charter* applied because there was an "evidentiary vacuum", and that the case should be decided on administrative law principles.<sup>42</sup> The University further submitted that if the issue of the application of the *Charter* were going to be addressed, it would argue that the *Charter* did not apply.

Justice Paperny of the Court of Appeal gave several reasons for her consideration of the application of the *Charter* to universities. First, Justice Strekaf had addressed the matter at length. Second, three of the interveners in the Appeal case (the Association of Universities and Colleges of Canada, the Governors of the University of Alberta and the Canadian Civil Liberties Association) had all been granted leave to intervene exclusively on the issue of *Charter* application and had made extensive arguments on the issue at the Court of Appeal. Third, the issue of whether the *Charter* applied to the University was not a matter of evidence, but a matter of statutory interpretation and legal argument.<sup>43</sup> Finally, because this constitutional issue was likely to recur, Peter Hogg, in *Constitutional Law of Canada*, had indicated that it was best to address the issue, even if it could be decided on a different basis (i.e. administrative law).<sup>44</sup> In view of these reasons and other recent cases that involved whether the *Charter* applied to universities, it is unfortunate that the other two justices declined to directly consider the issue.

Justice Paperny examined the cases that had interpreted section 32, and listed five categories of situations in which the *Charter* could apply:

1. The *Charter* applies to legislation that is enacted by federal, provincial and territorial governments, when that legislation is the source of the *Charter*

---

<sup>39</sup> *Ibid* at para 63.

<sup>40</sup> *Post-Secondary Learning Act*, SA 2003, c P-19.5 [PSLA].

<sup>41</sup> *Pridgen*, *supra* note 18 at paras 36, 44.

<sup>42</sup> *Ibid* at para 62.

<sup>43</sup> *Ibid* at para 63.

<sup>44</sup> *Ibid* at para 64, citing Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Scarborough, ON: Thomson Carswell, 2007) at 59-22.

violation that is alleged.<sup>45</sup>

2. The *Charter* applies to *government actors by nature* (e.g. municipalities).<sup>46</sup>
3. The *Charter* applies to *government actors by virtue of the regular and routine control that government has over them* (e.g. colleges but not universities because they have more autonomy).<sup>47</sup>
4. The *Charter* applies to *bodies that exercise delegated statutory authority, especially those with coercive powers* (e.g. the power to compel the release of documents). Examples include human rights tribunals,<sup>48</sup> universities that are enforcing parking by-laws,<sup>49</sup> and professional bodies that are disciplining their members.<sup>50</sup> The reason for this category is to avoid the government delegating responsibility to others in order to avoid their constitutional duties.<sup>51</sup>
5. The *Charter* applies to *non-governmental bodies when they are implementing governmental objectives* (e.g. in *Eldridge*, the hospital was coordinating the provision of medically necessary services).<sup>52</sup>

Justice Paperny noted that with the fourth and fifth categories, the *Charter* will apply only to activities when the entity is implementing a particular government policy, power or program and not to internal matters of the body, such as employment issues.<sup>53</sup> Justice Paperny also stated that the five categories may overlap in some cases.<sup>54</sup>

In *Pridgen*, Justice Paperny held that Justice Strekaf had relied on the fifth category when she found that the University was implementing government policy on post-secondary education when dealing with students. Justice Strekaf had relied on the *PSLA*, which authorizes the Lieutenant Governor in Council to establish universities in the province and which requires each university to establish a board of governors and a general faculties council (which both have jurisdiction over student discipline for academic and non-academic misconduct). While Justice Paperny found that this was a logical

<sup>45</sup> *Ibid* at para 79.

<sup>46</sup> *Ibid* at paras 80–81.

<sup>47</sup> *Ibid* at paras 81–82. See also *Greater Vancouver and Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570, 77 DLR (4th) 94.

<sup>48</sup> See *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307.

<sup>49</sup> See *R v Whatcott*, 2002 SKQB 399, [2003] 4 WWR 149 [*Whatcott* 2002].

<sup>50</sup> See *Rocket v Royal College of Dental Surgeons of (Ontario)*, [1990] 2 SCR 232, 71 DLR (4th) 68.

<sup>51</sup> *Pridgen*, *supra* note 18 at para 85.

<sup>52</sup> *Ibid* at paras 94–98.

<sup>53</sup> *Ibid* at paras 93, 98.

<sup>54</sup> *Ibid* at para 99.

application of *Eldridge*, she thought that the Pridgens' situation fell more within the fourth category (statutory compulsion). In Justice Paperny's mind, the University, in exercising its disciplinary powers, was acting under delegated powers that were beyond the authority held by private individuals or organizations.<sup>55</sup>

In *Pridgen*, the University argued that discipline was an internal matter that was not governmental in nature. Justice Paperny rejected this argument, noting that regulating student expression as a matter of non-academic misconduct was more than an internal issue.<sup>56</sup> Justice Paperny also held that there was a public aspect to student opinions about the quality of their education, holding that the regulation of non-academic misconduct had a public benefit.<sup>57</sup> Thus, Justice Paperny opined that universities are no longer mere "communit[ies] of scholars" but also play a gatekeeping role for professional faculties, such as law and medicine.<sup>58</sup>

Justice Paperny concluded that the *Charter* applied to the university in *Pridgen*, which involved university discipline for non-academic misconduct. The University and the interveners sought to rely on academic freedom and institutional autonomy to rebut her conclusion. However, Justice Paperny saw freedom of expression and academic freedom as complementary values. Further, Justice Paperny held that if there is a situation where these principles conflict, then section 1 of the *Charter* could be used to balance any competing values.<sup>59</sup>

Justice Paperny's final two categories seem to be the most applicable to universities and yet the most controversial in recent jurisprudence. In particular, Noura Karazivan urges that *Eldridge* should be interpreted and applied carefully.<sup>60</sup> In *Eldridge*, the hospital (a private entity) was enlisted to implement a *determined* government policy or program (medically necessary health care). On the other hand, does offering a post-secondary education to a great number of people constitute a determined government policy? Karazivan notes that universities are certainly not obligated by government to confer upon students a right of access to an education, while the hospital in *Eldridge* was required by the government to provide free access to health care.<sup>61</sup> Karazivan notes that the case law is divided on whether universities are subject to the *Charter* based on differing interpretations of their enabling legislation as to whether they are actually delivering a specific government

<sup>55</sup> *Pridgen*, *supra* note 18 at para 105.

<sup>56</sup> *Ibid* at paras 106-7.

<sup>57</sup> *Ibid* at para 108.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid* at paras 113-17.

<sup>60</sup> Noura Karazivan, "L'application de la Charte canadienne des droits et libertés par les valeurs: l'article 32" (2013) 61:2 SCLR 241.

<sup>61</sup> *Ibid* at 266.

program.<sup>62</sup> Karazivan also argues that the right (to health care) and the identified obligations of the private entity that existed in *Eldridge* are absent in *Pridgen*.<sup>63</sup> Karazivan questions the inference in *Pridgen* that the interpretation of the specific wording of the statute that constitutes a university is not necessarily determinative of the issue whether the *Charter* applies to the university's actions. Additionally, Karazivan cautions against relying on the assertion that provisions in the various provincial statutes pertaining to universities are not substantially different from each other.<sup>64</sup>

Karazivan concludes by arguing in the alternative that when a non-government entity such as a university takes action, the action is not in furtherance of a specific governmental objective (as was the case in *Eldridge*) and where the university's applicable legislation delegates decision-making discretion, then the values of the *Charter* may still be applicable. To support this conclusion Karazivan cites administrative cases where there is delegated discretion, such as *Doré v Barreau du Québec*,<sup>65</sup> where *Charter* values played a role. Indeed, in some of the recent jurisprudence (discussed below), judges fell short of finding whether the *Charter* directly applied but were willing to conclude that *Charter* values are applicable.

Karazivan's discussion certainly draws attention to the significance of the characterization of the action in question and the statutory authority upon which the action is based. The conflicting results often turn on whether courts interpreted the impugned action as one based on statutory compulsion or statutory authority or neither. On the one hand, in *Pridgen*, Justice Paperny was prepared to accept either statutory compulsion or statutory authority as the basis for finding the *Charter* applied. Furthermore, Justice Strekaf was convinced the *Charter's* application was based on statutory authority. At the same time, while Karazivan and Justice Paperny suggest that *Eldridge* involved statutory authority, each interpretation of the level of specificity of the governmental objective required differs. Presumably, in *Pridgen*, Karazivan would prefer to rely on the application of *Charter* values to the interpretation of the university's decision.

The current issue of the application of the *Charter* to universities must be examined in the context of this summary of the development of section 32 cases.

### III. Brief Synopsis of University Cases Before UVic CA

Recent cases involving the issue of whether the *Charter* applies to

<sup>62</sup> *Ibid* at 266–67.

<sup>63</sup> *Ibid* at 270.

<sup>64</sup> *Ibid* at 271.

<sup>65</sup> *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].

universities have generated quite a few commentaries that for the most part express a sincere hope that the SCC will address this issue.<sup>66</sup> There is clear division between Alberta and Saskatchewan cases on the one hand, and those from Ontario and British Columbia, on the other, when the courts deal with students' or former students' expression.

There are, however, a few circumstances where the courts across these jurisdictions agree that the *Charter* does apply to universities. For example, when security staff members act as agents for the police, or the police are involved in enforcing university by-laws, the *Charter* applies on campus.

In one case, when the University of Western Ontario security staff members were asked to remove a student for security reasons, the court held that the *Charter* could be relied upon to challenge the constitutionality of the *Trespass to Property Act*.<sup>67</sup> Nevertheless, the University security staff's actions, performed under the authority of the trespass legislation, were saved by section 1 of the *Charter*.<sup>68</sup>

A second case involved two individuals convicted of littering under the University of Regina's *Traffic and Parking Bylaws*. The individuals placed anti-abortion literature on a number of vehicles parked at the university.<sup>69</sup> On appeal to the Saskatchewan Court of Queen's Bench, the appellants successfully argued that the by-law infringed their freedom of expression under section 2(b). Justice Ball held that "[t]he enactment of the By-law was a quintessentially governmental function" that "resulted in the appellant being charged, prosecuted, tried, convicted and penalized by the Provincial Court for distributing his pamphlets."<sup>70</sup> The University was exercising authority given to it under the *University of Regina Act*,<sup>71</sup> and was acting much like a municipality that was enforcing its by-laws. The *Charter* applied to the university by-law, the actions infringed upon the accused's freedom of

<sup>66</sup> See e.g. Marin, *supra* note 20; Karazivan, *supra* note 60; Dwight Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45:1 RDUS 133; Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20:1 Appeal 79; Jennifer Koshan, "Face-ing the *Charter's* Application to University Campuses" (13 June 2012), *Ablawg*, online: <ablawg.ca/2012/06/13/face-ing-the-charters-application-on-university-campuses-5>; Sally A Comery & Anthony Morris, "Application of Canadian *Charter* to universities remains unclear" (June 2012), Norton Rose Fulbright (blog), online: <www.nortonrosefulbright.com/knowledge/publications/67808/application-of-canadian-charter-to-universities-remains-unclear>; Sara Hanson, "Delineating the *Charter's* Scope in *Pridgen v University of Calgary*" (23 April 2012), *The Court* (blog), online: <www.thecourt.ca/2012/04/delineating-the-charters-scope-in-pridgen-v-university-of-calgary>; Meredith Bacal, "Post, Like, and Share Away: *Pridgen v University of Calgary*" (24 May 2012), *The Court* (blog), online: <www.thecourt.ca/2012/05/post-like-and-share-away-pridgen-v-university-of-calgary>; Linda McKay-Panos, "Does the *Charter* Apply to Universities? *Pridgen* Distinguished in U Vic Case" (6 February 2015), *Ablawg*, online: < ablawg.ca/2015/02/06/5332>.

<sup>67</sup> *Trespass to Property Act*, RSO 1990, c T 21.

<sup>68</sup> See *Jackson v University of Western Ontario*, [2003] OTC 901, 125 ACWS (3d) 828 (Sup Ct J).

<sup>69</sup> *Whatcott* 2002, *supra* note 49.

<sup>70</sup> *Ibid* at para 43.

<sup>71</sup> *The University of Regina Act*, RSS 1978, c U-5.

expression<sup>72</sup> and the infringement of the *Charter* was not saved by section 1. The Court of Queen's Bench held that the University's objectives of controlling littering and preserving aesthetics on campus could have been accomplished in a manner that minimally impaired freedom of expression. For example, the University could have set aside areas where posters or pamphlets could be placed or distributed.<sup>73</sup> Thus, the appeal was granted and the conviction was set aside.

Another case involving freedom of expression on campus considered section 2(b) in a criminal context.<sup>74</sup> Whatcott and LaBarbera were charged under the *Criminal Code*<sup>75</sup> with mischief for wilfully interfering with the lawful use, enjoyment or operation of the University of Regina. The University was aware that there was going to be an anti-abortion and anti-LGBTQ protest on campus and university officials were concerned that materials distributed at the protest would violate the University of Regina's *Respectful Workplace Policy* ("Policy").<sup>76</sup> Whatcott and LaBarbera met three to six other protestors at the University of Regina, where they spoke to the media and distributed t-shirts, signs and literature.<sup>77</sup> The Director of Security believed the material was contrary to the Policy and twice asked Whatcott and LaBarbera to leave campus. When the protestors refused, the police were contacted.<sup>78</sup> After arriving on campus, two police officers were informed that the *University of Regina Act* stated that the University was private property.<sup>79</sup> Whatcott and LaBarbera again refused to leave and were arrested by the police for assault by trespass.<sup>80</sup> Once at the police station, the officers discovered that assault by trespass was no longer an offence as it had been repealed on March 11, 2013.<sup>81</sup> Whatcott and LaBarbera were immediately informed that their charges had been changed to mischief under section 430 under the *Criminal Code*.<sup>82</sup> Whatcott and LaBarbera defended the mischief charge by relying on subsection 492(2), which states that "[n]o person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right."<sup>83</sup>

The accused argued that the "legal justification" for their actions was their freedom of expression was protected under section 2(b).<sup>84</sup> Thus, the issue

<sup>72</sup> Whatcott 2002, *supra* note 49 at paras 46–47.

<sup>73</sup> *Ibid* at para 48.

<sup>74</sup> *R v Whatcott*, 2014 SKPC 215, 464 Sask R 105 [*Whatcott* 2014].

<sup>75</sup> *Criminal Code*, RSC 1985, c C-46.

<sup>76</sup> Whatcott 2014, *supra* note 74 at para 6.

<sup>77</sup> *Ibid* at para 9.

<sup>78</sup> *Ibid* at paras 9–11.

<sup>79</sup> *Ibid* at para 11.

<sup>80</sup> *Ibid* at paras 12–13.

<sup>81</sup> Repealed by the *Citizen's Arrest and Self-defence Act*, SC 2012, c 9.

<sup>82</sup> Whatcott 2014, *supra* note 74 at para 14.

<sup>83</sup> *Criminal Code*, *supra* note 75, s 492(2).

<sup>84</sup> Whatcott 2014, *supra* note 74 at para 56.

before the Provincial Court was whether or not the actions of the University administrators, in deciding that the accused's actions were contrary to policy, could be characterized as governmental action and thus subject to *Charter* scrutiny.<sup>85</sup> The Saskatchewan Provincial Court relied upon the reasons provided in *Whatcott* 2012 (mentioned below) to find that the University's actions were subject to the *Charter*.<sup>86</sup> As the means used to protect students from the accused's message did not represent a minimal impairment of freedom of expression, the Provincial Court found that the infringement on the section 2(b) right could not be justified under section 1.<sup>87</sup> The Provincial Court concluded that both *Whatcott* and *LaBarbera* were acting with legal justification pursuant to subsection 492(2) of the *Criminal Code*.<sup>88</sup> In the result, both accused were found not guilty.

A fourth case involving Alberta's *Trespass to Premises Act*<sup>89</sup> seems to fit in this category of cases and includes some discussion about students' right to freedom of expression. An anti-abortion and anti-LGBTQ activist, *Whatcott*,<sup>90</sup> was prohibited from being on the University of Calgary's campus under the *TPA*.<sup>91</sup> Campus security arrested *Whatcott* for trespassing when he was posting anti-LGBTQ literature on campus, and Calgary Police later charged him with an offence under the *TPA*.<sup>92</sup> The Provincial Court of Alberta decided that the activist's *Charter* right to freedom of expression had been violated but stayed the proceedings.<sup>93</sup> The Crown appealed that decision to the Alberta Court of Queen's Bench where Justice Jeffrey dismissed the Crown's appeal. The trial judge found that using the *TPA* to respond to an individual's complaint about the flyers was subject to *Charter* scrutiny. Justice Jeffrey held that the trial judge was correct in concluding that the effect of the enforcement of the provincial trespass legislation was to restrict *Whatcott*'s freedom of expression under the *Charter*.<sup>94</sup> The challenge was not to the legislation itself, but to the actions of the University in applying the legislation.<sup>95</sup>

In addition, the trial judge found because that the university's prevention of the distribution of flyers was not related to an objective that was pressing and substantial, the University's use of the trespass legislation could not be justified under section 1. The trial judge concluded that the indefinite ban of *Whatcott* was excessive and Justice Jeffrey agreed, adding that the University's

---

<sup>85</sup> *Ibid* at para 64.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* at para 68.

<sup>88</sup> *Ibid* at para 69.

<sup>89</sup> *Trespass to Premises Act*, RSA 2000, c T-7 [*TPA*]

<sup>90</sup> *Whatcott* is the same person in all cases.

<sup>91</sup> *R v Whatcott*, 2012 ABQB 231, [2012] 10 WWR 385 [*Whatcott* 2012].

<sup>92</sup> *Ibid* at paras 4-5.

<sup>93</sup> See *R v Whatcott*, 2011 ABPC 336, 514 AR 154.

<sup>94</sup> *Whatcott* 2012, *supra* note 91 at para 42.

<sup>95</sup> *Ibid* at para 31.

use of handcuffs, its pat-down search and its imprisonment of Whatcott were all disproportionate responses to the peaceful distribution of flyers.<sup>96</sup>

The trial judge also found that the University's actions had eliminated a chance (for the students) to participate in a learning opportunity, which created a direct connection between the University's governmental mandate and the impugned activity. Thus, this connection was another reason that the *Charter* applied and Justice Jeffrey held that the trial judge's finding was correct.<sup>97</sup> The protection of freedom of expression also applied to the students rather than merely to the individual who posted the flyers.

Some of these cases pertain to freedom of expression of persons who are not students nor are they former students. To support the conclusion that the *Charter* applied, the decisions rely on the statutory authority of the security and police officials to support the conclusion that the *Charter* applies. The *Whatcott* 2012 case added a discussion on the implications of limiting non-student expression on student learning. This is perhaps the most controversial case and it could be argued that the discussion of student expression was *obiter*. Yet, the underlying value seems to be that university students should be exposed to all forms of expression in the name of learning.

## A. Freedom of Expression Cases Involving University Students or Former Students

The university cases diverge when considering the freedom of expression of students or former students – whether in disciplinary or other contexts. In *Pridgen*, a case involving student discipline for non-academic misconduct, the Alberta Court of Queen's Bench found (and the Alberta Court of Appeal in *obiter* would have found) that the actions of the university staff were subject to the *Charter*. Likewise, a similar Alberta case involving discipline of extra-curricular behaviour of students at the University of Calgary (anti-abortion display) found that individuals in the university internal appeal process were willing to consider *Charter* values such as freedom of expression and protection from discrimination.<sup>98</sup> Alberta Court of Queen's Bench Justice Horner was certainly prepared to import a discussion of *Charter* values into the administrative context. This decision suggests that extra-curricular use of university property could trigger the application of the *Charter*.<sup>99</sup>

On the other hand, in a case involving extra-curricular use of space for

<sup>96</sup> *Ibid* at para 48.

<sup>97</sup> *Ibid* at para 29.

<sup>98</sup> *Wilson v University of Calgary*, 2014 ABQB 190, [2014] 7 WWR 322 [*Wilson*].

<sup>99</sup> Marin, *supra* note 20 at 37.

an anti-abortion display at Carleton University,<sup>100</sup> the Ontario Court of Appeal (ONCA) held that when a university books space for non-academic extracurricular use, the university is not implementing a specific government policy or program as contemplated by *Eldridge*.<sup>101</sup> The ONCA agreed with the Ontario Superior Court, distinguishing *Pridgen* and holding that the *Carleton University Act* created an autonomous entity whose structure and governance are not prescribed by the government.<sup>102</sup> In this case, whether the *Charter* applied to university activities depended on the content and interpretation of the legislation that enacted that university.

In another case, a University of Ottawa medical student unsuccessfully argued that the *Charter* applied to university disciplinary proceedings that resulted in his expulsion for misconduct.<sup>103</sup> The student argued that his expulsion violated his *Charter* right to freedom of expression.<sup>104</sup> The Ontario Divisional Court held that the *Charter* did not apply because the University's disciplinary decision was not made as part of the implementation of a statutory scheme. In addition, the University's enabling statute said that the University's disciplinary decisions should be made "free from restrictions and control from any outside body."<sup>105</sup> *Pridgen* was distinguished based on the fact that Alberta's *PSLA*<sup>106</sup> requires universities to carry out the government objective of facilitating access to post-secondary education, whereas Ontario has no equivalent legislation.<sup>107</sup>

Another Ontario case involved a graduate student, Telfer, at the University of Western Ontario.<sup>108</sup> Telfer was disciplined by the Vice-Provost for harassing another student. The Vice-Provost found that the harassment was misconduct under the *Code of Student Conduct*. Telfer sought judicial review at the Ontario Superior Court of Justice, arguing, among other grounds, that the decision of the Vice-Provost violated his *Charter* right to freedom of expression.<sup>109</sup> Justice Swinton, writing the majority decision, held that *Eldridge*, *Pridgen* QB and *Whatcott* 2002 were distinguishable.<sup>110</sup> The University of Western Ontario was not implementing a government policy nor acting as an agent of the government when developing and applying the Policy for students or carrying out its educational functions. Thus, the *Charter* did not apply.<sup>111</sup>

---

<sup>100</sup> *Lobo v Carleton University*, 2012 ONCA 498, 220 ACWS (3d) 46 [*Lobo*].

<sup>101</sup> *Ibid* at para 4.

<sup>102</sup> See *Lobo v Carleton University*, 2012 ONSC 254, 211 ACWS (3d) 48.

<sup>103</sup> *Alghaithy v University of Ottawa*, 2012 ONSC 142, 215 ACWS (3d) 377 [*Alghaithy*].

<sup>104</sup> *Ibid* at para 29.

<sup>105</sup> *Ibid* at para 76.

<sup>106</sup> *PSLA*, *supra* note 40.

<sup>107</sup> *Alghaithy*, *supra* note 103 at para 78.

<sup>108</sup> *Telfer v University of Western Ontario*, 2012 ONSC 1287, 349 DLR (4th) 235.

<sup>109</sup> *Ibid* at para 19.

<sup>110</sup> *Ibid* at paras 58–60.

<sup>111</sup> *Ibid* at para 61.

Finally, in the *UVic CA* case, the refusal to allow the extra-curricular use of university space by a former student was held to not be subject to the *Charter*.<sup>112</sup> It is quite evident that in the cases leading up to and including the *UVic CA* case there is a division. While Alberta and Saskatchewan cases tend to find that some University activities are subject to *Charter* scrutiny, British Columbia and Ontario cases tend to find that the *Charter* does not apply, even where the activities at issue are the same or quite similar to those in Alberta and Saskatchewan. In cases from British Columbia and Ontario, the activities undertaken under the authority of by-laws and policies passed under the applicable legislation are usually considered insufficient to fall under “government”, such that the *Charter* does not apply.

#### **IV. *BC Civil Liberties Association v University of Victoria***

In *British Columbia Civil Liberties Association v University of Victoria* (BCSC),<sup>113</sup> Cameron Côté, a former student at the University of Victoria, was a member of the executive of a student club called Youth Protecting Youth (YPY). Côté was informed by the President of the Students’ Society that the University had prohibited YPY from using campus space because of its prior activities (i.e. anti-abortion activities). Similar activities continued and YPY and Côté were admonished for defying the direction of the president of the Students’ Society. Côté and the British Columbia Civil Liberties Association (BCCLA) asked the British Columbia Supreme Court for a declaration that any restrictions or regulations placed by the University of Victoria on students who wished to use the school for “expressive purposes” conform with the *Charter*.

In addressing the issue of whether the University policies were subject to the *Charter*, the BCCLA and Côté relied on Justice Paperny’s judgment in *Pridgen* to support their position that any regulation of speech on University property was subject to *Charter* scrutiny.<sup>114</sup> Recall that Justice Paperny’s reasoning was based on the determination that the university was exercising statutory authority or acting under statutory compulsion and thus was subject to the *Charter*.

Chief Justice Hinkson of the BCSC distinguished *Pridgen* for a number of reasons. First, he noted that neither of the other two justices agreed with Justice Paperny in *Pridgen* in terms of the *Charter* issue. In particular, Justice O’Ferrall had held that a ruling on the application of the *Charter* was unnecessary to the lower court’s disposition of the case and to the disposition of the University’s appeal. Justice O’Ferrall was further influenced in his conclusion because the

<sup>112</sup> *UVic CA*, *supra* note 2.

<sup>113</sup> *British Columbia Civil Liberties Association v University of Victoria*, 2015 BCSC 39, [2015] 9 WWR 549 [UVic BCSC].

<sup>114</sup> *Ibid* at para 137.

issue of *Charter* infringement had not been explored in the original hearing.<sup>115</sup> Justice McDonald had held that it was neither appropriate nor necessary for the lower court to have embarked on a *Charter* analysis in *Pridgen*.<sup>116</sup> Second, Chief Justice Hinkson noted that Côté, unlike the Pridgens, was not subject to any actual discipline by the University.<sup>117</sup>

Third, Alberta's applicable legislation differs from that of British Columbia, because the BC *University Act*<sup>118</sup> specifically prohibits the Minister from interfering with certain powers granted to the University, and also gives the president and senate authority over student discipline.<sup>119</sup> Fourth, Justice Hinkson accepted the University's submission that in booking space for student club activities the University is neither controlled by government, nor performing a specific government policy or program. Fifth, the *Charter* did not apply to the impugned decisions, as they were undertaken "by the University with respect to the management of its privately owned land, and not to the exercise of governmental policy or the implementation of a specific government program regulating the use of University land."<sup>120</sup> Thus, the decisions made by the University were within their "sphere of autonomous operational decision-making" and not subject to the application of the *Charter*.<sup>121</sup>

Chief Justice Hinkson concluded that the *Charter* did not apply to the activity of booking space by students and declined to grant the declarations sought by Côté and the BCCLA.<sup>122</sup> The BCCA upheld this decision in *British Columbia Civil Liberties Association v University of Victoria*.<sup>123</sup> On appeal, Côté and BCCLA sought a declaration under the *Constitution Act, 1982*, section 52 that section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires*, void and of no force or effect, as it violated sections 2(b), (c) and (d) of the *Charter*.<sup>124</sup>

Côté and BCCLA acknowledged that the University was not an organ of the state, but relied on *Eldridge* to argue that certain decisions made by the University could be subject to *Charter* challenges.<sup>125</sup> Further, they argued that the University's regulation of its property under the authority of the *University*

<sup>115</sup> *Ibid* at para 138.

<sup>116</sup> *Ibid* at para 132.

<sup>117</sup> *Ibid* at para 141.

<sup>118</sup> *University Act*, RSBC 1996, c 468.

<sup>119</sup> *UVic BCSC*, *supra* note 113 at para 141.

<sup>120</sup> *Ibid* at para 147.

<sup>121</sup> *Ibid* at para 148.

<sup>122</sup> *Ibid* at para 152.

<sup>123</sup> *UVic CA*, *supra* note 2.

<sup>124</sup> Linda McKay-Panos, "BCCA Unfortunately Chooses Not to Follow Alberta's Lead on the Issue of Whether the Charter Applies to Universities" (25 May 2016), *Ablawg*, online: <[ablawg.ca/2016/05/25/bcca-unfortunately-chooses-not-to-follow-albertas-lead-on-the-issue-of-whether-the-charter-applies-to-universities](http://ablawg.ca/2016/05/25/bcca-unfortunately-chooses-not-to-follow-albertas-lead-on-the-issue-of-whether-the-charter-applies-to-universities)>.

<sup>125</sup> *UVic CA*, *supra* note 2 at para 6.

*Act* amounts to “government activity” and thus attracts *Charter* scrutiny.<sup>126</sup> The University’s Policy involved the exercise of regulatory power conferred by the Act that could not be separated from the University’s core role of delivering publicly-funded post-secondary education.<sup>127</sup>

Côté and BCCLA argued that the lower Court had relied unduly and incorrectly on some older cases involving mandatory retirement, such as *McKinney*, and some more recent cases from other jurisdictions involving similar situations, such as *Lobo*.<sup>128</sup> Côté and BCCLA submitted that the *UVic CA* case was more closely analogous to a line of cases (from Alberta and Saskatchewan) in which university students were held to be entitled to assert *Charter* rights in disputes with governing bodies of universities (e.g. *Pridgen*).<sup>129</sup>

Côté and BCCLA also argued that because the ability to express political ideas on campus was not separable from other aspects of university education, there is a public interest in extending the scope of *Charter* protection.<sup>130</sup> Further, the University plays a central role in the democratic, economic and social life of the province; thus, the University must use its statutory powers in the public interest.<sup>131</sup> As a separate ground, Côté and BCCLA argued that even if the BCCA did not find an infringement of *Charter* rights, the University must take into account *Charter* values when applying the Policy, and had failed to do so. Côté and BCCLA had unsuccessfully made a similar argument before the BCSC.<sup>132</sup>

BCCA Justice Willcock, with Justices Saunders and Dickson concurring, upheld the lower court decision, agreeing that the actions of the University in creating the Policy did not violate Côté’s *Charter* rights. Further, the question of whether *Charter* values applied was moot and should not be considered.<sup>133</sup> The BCCA Justice embarked on a lengthy discussion of the issue of *Charter* application to universities. Justice Willcock discussed the scope of section 32(1). He first cited *Dolphin Delivery v RWDSC, Local 580*<sup>134</sup> for the proposition that section 32 does not refer to the government in its generic sense, but rather to a branch of the government, narrowly defined.<sup>135</sup> Justice Willcock also cited *Stoffman*, where Justice La Forest said that references to government in section 32 “could not be interpreted as bringing within the ambit of the *Charter* the whole of that amorphous entity which in contemporary political theory might

---

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid* at para 7.

<sup>130</sup> *Ibid* at para 9.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid* at para 11.

<sup>133</sup> *Ibid* at para 16.

<sup>134</sup> *Dolphin Delivery v RWDSC, Local 580*, [1986] 2 SCR 573, 33 DLR (4th) 174 [*Dolphin Delivery* cited to SCR].

<sup>135</sup> *UVic CA*, *supra* note 2 at para 19.

be thought of as ‘the state.’”<sup>136</sup>

Justice Willcock also noted that, at the same time, the jurisprudence provided that section 32 should not be so narrowly defined as to permit the government to act with impunity by using subordinate bodies.<sup>137</sup> Justice Willcock noted that while the *Charter* likely applied to “delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures,”<sup>138</sup> cases have excluded from “government” such entities as universities in Ontario and British Columbia and the Vancouver General Hospital, yet have included community colleges and the transportation authority of the Greater Vancouver Regional District.<sup>139</sup>

Justice Willcock relied on *McKinney*, *Stoffman* and *Harrison* to hold that the fact that a university is fiscally accountable under the *University Act* does not establish government control or influence on the core functions of the university, including policies and contracts.<sup>140</sup> He was not persuaded that *UVic CA* was distinguishable from the *Harrison* case in any material way on the issue of the application of the *Charter* to universities.<sup>141</sup> All three of these cases relied upon by Justice Willcock concerned mandatory retirement of faculty/staff.

Côté and BCCLA argued that the present case fits into an exception that is carved out from the general rule cited in *Harrison* and that because the University is given statutory authority under the *University Act* to regulate its property, the *Charter* can be used to challenge measures undertaken under these statutory provisions.<sup>142</sup> Justice Willcock noted that this argument had been rejected in *McKinney*.<sup>143</sup>

To respond to the argument that the University was established to encourage public expression—the specific activity that was affected by the University’s decisions—Justice Willcock relied on *McKinney*, which said that the delivery of a public service by an agency did not automatically incorporate the agency into government.<sup>144</sup> *Eldridge* outlined the circumstances in which an activity could bring an entity under *Charter* scrutiny. Because the Vancouver General Hospital in *Eldridge* was putting into place a government program or acting in a governmental capacity by adopting policies regarding the delivery of medical care mandated by statute, these were “inherently governmental

<sup>136</sup> *Ibid*, citing *Stoffman*, *supra* note 22 at 90.

<sup>137</sup> *UVic CA*, *supra* note 2 at para 20.

<sup>138</sup> *Ibid*, citing *Dolphin Delivery*, *supra* note 134 at 602.

<sup>139</sup> *UVic CA*, *supra* note 2 at para 20.

<sup>140</sup> *Ibid* at paras 21, 26.

<sup>141</sup> *Ibid* at para 21.

<sup>142</sup> *Ibid* at paras 22–23.

<sup>143</sup> *Ibid* at para 24.

<sup>144</sup> *Ibid* at para 28.

actions” and the court could consider whether the hospital was subject to the *Charter*. In particular, the court could examine: whether the government maintained responsibility for the program, despite the use of a private agency to deliver it; whether there was a specific government program or policy directing the hospital to act; and whether the government had delegated the implementation of its policies and programs to the private entity.<sup>145</sup>

Justice Willcock drew two important points from *Eldridge* about the scope of the applicability of the *Charter* to private entities. First, the mere fact that an entity performs a public function, or the fact that a particular activity may be described as public in nature, will not be enough to bring the entity into “government” for the purposes of section 32.<sup>146</sup> Second, determining whether an entity attracts *Charter* scrutiny with respect to a particular activity requires an investigation, *not* into the nature of the entity, but into the nature of the activity itself.<sup>147</sup>

When Justice Willcock applied these two criteria from *Eldridge*, he concluded that the specific acts in question of the University were not governmental in nature. The government had neither assumed nor retained any express responsibility to provide a public forum for free expression at universities.<sup>148</sup> Justice Willcock went on to distinguish *Pridgen*, noting that the case was decided on administrative grounds and that any discussion by Justice Paperny about the *Charter*’s application was *obiter dicta*.<sup>149</sup> Further, Alberta’s statutory framework with respect to universities did not apply in British Columbia. Finally, in *Pridgen*, Justice Paperny found that disciplinary sanctions fell into the category of statutory compulsions (one of five possible categories of entities, laws and activities that could attract *Charter* scrutiny as set out by Justice Paperny in *Pridgen*). Justice Willcock held that the decisions at issue involved no exercise of statutory authority beyond the authority held by private individuals or organizations.<sup>150</sup>

Justice Willcock did not note that Justice Strekaf in *Pridgen* QB would have categorized the university as a non-governmental entity implementing a government objective, similar to that in *Eldridge*, and thus the policy would have fit under statutory authority, a different category than statutory compulsion. Côté and BCCLA had in fact relied on the “implementing a government objective” in *Eldridge* to make their arguments.

Justice Willcock held that the lower court had correctly relied upon *Lobo*. In *Lobo* the lower court had held that the appellants had failed to plead the material facts necessary to establish that the university was implementing

<sup>145</sup> *Ibid* at para 30.

<sup>146</sup> *Ibid* at para 31, citing *Eldridge*, *supra* note 22 at para 43.

<sup>147</sup> *UVic CA*, *supra* note 2 at para 31, citing *Eldridge*, *supra* note 22 at para 44.

<sup>148</sup> *UVic CA*, *supra* note 2 at para 32.

<sup>149</sup> *Ibid* at para 37.

<sup>150</sup> *Ibid* at paras 37–39.

a specific government program or policy when it failed to allocate space to the appellants to advance their extra-curricular objectives.<sup>151</sup> In addition, the ONCA had held that when the university books space for non-academic extra-curricular use, the university was not implementing a particular government policy or program as considered in *Eldridge*.<sup>152</sup>

Even if the *Charter* had applied in the circumstances of this case, the University would have the opportunity to rely on section 1 of the *Charter* to demonstrate that the limits on the *Charter* right were reasonable and demonstrably justified in a free and democratic society. Thus, the university would not be without an opportunity to justify its actions or policies, even if its policies were subject to *Charter* scrutiny.

## V. Logical Threads that Emerge: Any Substantive Bases for the Divergent Conclusions?

While there are some reasons argued to account for the differences between jurisdictions, the reasons do not substantively account for the divergent conclusions set out above. There have been three possible bases argued to account for the distinction between the findings on the applicability of the *Charter* to universities:

1. variation between the legislation governing universities and their purposes and roles in implementing government objectives;
2. differences in the interpretation of the significance and effect of the activities at issue; and
3. different emphasis upon the role of deference to a university's autonomous decision-making.

However, as I analyze each of these, I conclude that none of them are persuasive reasons for the different outcomes. To summarize, the main reasons relied upon by the BCCA in *UVic CA* to find that the *Charter* did not apply to the actions of the university are:

- The university was not implementing a specific government program or policy (as provided in the governing legislation, the *University Act*), as was the case in *Eldridge*;
- The university's statutory authority to regulate the use of its property

---

<sup>151</sup> *Ibid* at para 40.

<sup>152</sup> *Ibid*, citing *Lobo*, *supra* note 100 at para 4.

was not sufficient to invoke the application of the *Charter*; and

- The action of the university involved a decision about its day-to-day operations, and this type of decision should not be subject to the *Charter* – the autonomy of the university is paramount.

Also, *Pridgen* was distinguished because in *UVic CA*, the former student was not subject to any disciplinary process.

As discussed, the judges making contradictory decisions were prepared to find that the universities in question were acting under statutory compulsion or statutory authority. The courts in these decisions interpreted the governing legislation as setting sufficiently clear government objectives through policies or programs, such that the universities' actions thereunder could be subject to the *Charter*. The three possible reasons for divergence in the decisions are each dismissed as non-persuasive in the material that follows.

## A. Variation between the Legislation Governing Universities and Their Purposes and Roles in Implementing Government Objectives

In the cases from Ontario and British Columbia, the courts place significant emphasis on the different wording in the respective statutes of each province's universities' governing statutes. The legislation is interpreted to find that the universities do not implement a particular government objective or policy. However, I have not been able to find support in *Eldridge* that limits identifying government objectives from the specific wording of statutes. Perhaps an analysis and comparison of the governing legislation applicable to the universities could suggest a logical basis for the divergent conclusions on the *Charter's* application.

Michael Marin makes a persuasive argument about the danger of relying too closely on the statutory provisions that establish universities based on their history in Ontario and British Columbia.<sup>153</sup> Marin notes that for the most part, Ontario universities were formed under a series of private acts which were passed between 25 and 50 years ago, and therefore are not modern enabling statutes like Alberta's *PSLA*. Despite their age, some (but not all) of these private acts contain clauses that discuss the purpose of the university to disseminate knowledge and advance learning.<sup>154</sup> In addition, Marin emphasizes that the private acts were passed in an age when universities played a much different role in our society, were open mainly to elites and attendance by the general public was not considered absolutely necessary.<sup>155</sup>

Today, post-secondary education has evolved to a much more significant

<sup>153</sup> Marin, *supra* note 20 at 41–47.

<sup>154</sup> *Ibid* at 42.

<sup>155</sup> *Ibid*.

role in supporting government policy objectives.<sup>156</sup> Further, the original acts have been augmented by Ontario's more recent *Post-secondary Education Choice and Excellence Act*,<sup>157</sup> which provides that a university can provide programs and grant degrees under the authority of the Legislative Assembly or of the Minister of Training, Colleges and Universities. Specifically, that Act provides:

**Authority to grant a degree, etc.**

2. (1) No person shall directly or indirectly do any of the following things unless the person is authorized to do it by an Act of the Assembly or by the Minister under this Act:

1. Grant a degree.

2. Provide a program or part of a program of post-secondary study leading to a degree to be conferred by a person inside or outside Ontario.

...

**Authority to establish a university, etc.**

3. No person shall directly or indirectly do any of the following things unless the person is authorized to do it by an Act of the Assembly or by the Minister under this Act:

1. Operate or maintain a university.<sup>158</sup>

Marin also lists several current practices and policies beyond the statutory provisions in Ontario that indicate courts may be required to look outside of the precise words of the statutes for a complete picture of the nature and role of universities. Currently, Ontario universities are overseen by the Ministry of Training Colleges and Universities, which has the power to make regulations that set criteria for legislative grants to post-secondary institutions.<sup>159</sup> Marin notes that in 2014, six percent of Ontario's \$7.8 billion budget was earmarked for the post-secondary and training sector, and this included funding for universities.<sup>160</sup> While universities in Ontario likely fulfil important public policy objectives (much like municipalities, school boards and hospitals), and the body of documents and policy papers probably indicate that universities are of public importance, each fails to identify a specific policy or program that universities implement.<sup>161</sup> Marin believes, however, that taken as a group, documents like provincial budgets, throne speeches, commission reports and

<sup>156</sup> *Ibid.*

<sup>157</sup> *Post-secondary Education Choice and Excellence Act*, SO 2000, c 36.

<sup>158</sup> *Ibid.*, ss 2(1), 3.

<sup>159</sup> Marin, *supra* note 20 at 42.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid* at 43.

agreements with universities suggest that having an accessible and quality post-secondary education system is a “key government policy”.<sup>162</sup> Further, the Ontario Government recently implemented the *Differentiation Framework for Postsecondary Education*, which includes “high quality educational experience” as one of its priorities.<sup>163</sup> Marin concludes that these non-statutory factors taken together indicate that the Ontario Government expects universities to implement specific policies and programs, sufficient to bring them within section 32(1).<sup>164</sup>

For British Columbia, Marin notes that the relationship between the government of British Columbia policies and its universities is basically the same as that in Ontario, except that British Columbia has only one enabling statute for universities.<sup>165</sup> British Columbia’s *University Act* provides:

**Power to grant degrees**

2 Each university has in its own right and name the power to grant degrees established in accordance with this Act.

**Power and capacity of a natural person**

46.1 A university has the power and capacity of a natural person of full capacity.

**Functions and duties of university named in section 3 [e.g. *University of Victoria*]**

47 (1) In this section, “university” means a university named in section 3 (1).

(2) A university must, so far as and to the full extent that its resources from time to time permit, do all of the following:

(a) establish and maintain colleges, schools, institutes, faculties, departments, chairs and courses of instruction;

(b) provide instruction in all branches of knowledge;

(c) establish facilities for the pursuit of original research in all branches of knowledge;

(d) establish fellowships, scholarships, exhibitions, bursaries, prizes, rewards and pecuniary and other aids to facilitate or encourage proficiency in the subjects taught in the university and original research in all branches of knowledge;

(e) provide a program of continuing education in all academic and cultural fields throughout British Columbia;

(f) generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid* at 44.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

### Minister not to interfere

48 (1) The minister must not interfere in the exercise of powers conferred on a university, its board, senate and other constituent bodies by this Act respecting any of the following:

- (a) the formulation and adoption of academic policies and standards;
- (b) the establishment of standards for admission and graduation;
- (c) the selection and appointment of staff.

(2) Despite subsection (1), a university must not establish a new degree program without the approval of the minister.

### Reports to minister

49 (1) At the request of the minister, a university must provide the minister with reports and any other information that the minister considers necessary to carry out the minister's responsibilities in relation to universities.<sup>166</sup>

Marin suggests that the BC legislation is ambiguous about the government mandate for universities and that the legislation focuses instead on aspects of internal management and governance.<sup>167</sup> Again, Marin argues for the necessity to look beyond the enabling statute to understand the relationship between British Columbia universities and government policies and programs.<sup>168</sup> In British Columbia, the Minister of Advanced Education is required to establish policy and directives for post secondary training.<sup>169</sup> Other British Columbia legislation that applies to universities, such as the *Public Sector Employers Act*,<sup>170</sup> *Budget Transparency and Accountability Act*<sup>171</sup> and the *Financial Administration Act*,<sup>172</sup> suggest that universities are very closely related to government.<sup>173</sup>

Silletta points out that the funding patterns of universities by government (including that of British Columbia) indicate that education is a governmental objective, and that government certainly exercises control because of them.<sup>174</sup> Silletta notes that in the fiscal year 2012–13, the government grants to the University of Victoria totalled \$264 million, roughly 52 percent of the University's revenue.<sup>175</sup> The logical conclusion is that this level of funding must be in furtherance of a specific government objective. Universities' reliance on government funding at this level certainly gives rise to universities

<sup>166</sup> *University Act*, *supra* note 118, ss 2, 46.1, 47(1), 48, 49(1) [emphasis added].

<sup>167</sup> Marin, *supra* note 20 at 43.

<sup>168</sup> *Ibid* at 45.

<sup>169</sup> *Ibid*.

<sup>170</sup> *Public Sector Employers Act*, RSBC 1996, c 384.

<sup>171</sup> *Budget Transparency and Accountability Act*, SBC 2000, c 23.

<sup>172</sup> *Financial Administration Act*, RSBC 1996, c 138.

<sup>173</sup> Marin, *supra* note 20 at 45.

<sup>174</sup> Silletta, *supra* note 66 at 95.

<sup>175</sup> *Ibid*.

considering government interests when making decisions.<sup>176</sup>

The judges in the Ontario and British Columbia cases seemed to rely on the difference in wording between Alberta's university legislation and that of Ontario and British Columbia. The judges relied mostly on Alberta's recent legislation, appearing to ignore its historical background. (The judges also ignored the *University of Regina Act*.) Alberta's *PSLA*, which replaced the *Universities Act* and the *Colleges Act*, among others, has an educational purpose clause that is laid out below, and this difference seems to have been very persuasive in the Ontario and British Columbia cases. The preamble of the *PSLA* provides:

WHEREAS the Government of Alberta recognizes that the creation and transfer of knowledge contributes to Alberta's competitive advantage in a global economy; and

WHEREAS the Government of Alberta is committed to ensuring that Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system; and

WHEREAS the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities through a co-ordinated and integrated system approach, known as Campus Alberta, wherein postsecondary institutions collaborate to develop and deliver high quality learning opportunities;  
...<sup>177</sup>

Despite the differences between the provinces, it would seem that the administrative authorities within the universities have similar autonomous decision-making authority. For example, university faculty councils are empowered under Alberta's *PSLA* as follows:

29 (1) A faculty council may

- (a) determine the programs of study for which the faculty is established,
- (b) appoint the examiners for examinations in the faculty, conduct the examinations and determine the results of them,
- (c) provide for the admission of students to the faculty,
- (d) determine the conditions under which a student must withdraw from or may continue the student's program of studies in the faculty, and
- (e) authorize the granting of degrees,

subject to any conditions or restrictions that are imposed by the general faculties council.<sup>178</sup>

<sup>176</sup> *Ibid* at 95–96.

<sup>177</sup> *PSLA*, *supra* note 40.

<sup>178</sup> *Ibid*, s 29(1).

In Regina, the applicable legislation is the *University of Regina Act*.<sup>179</sup> As with Ontario and British Columbia university legislation, this Act does not have an “educational purpose” clause. The Act sets out the powers and responsibilities of the University of Regina, which was once a part of the University of Saskatchewan. The applicable sections read:

**Instruction, examination and granting degrees**

4 The university may:

- (a) give such instruction and teaching in the several faculties and different branches of knowledge as may from time to time be recommended by the senate;
- (b) examine candidates for degrees in the several faculties and for certificates of honour in the different branches of knowledge;
- (c) grant such degrees and certificates after examination in the manner herein provided.

**Academic freedom**

4.1 The university shall exclusively exercise the powers conferred on it in relation to:

- (a) the formulation and adoption of its academic policies and standards;
- (b) the establishment of its standards for admission and graduation; and
- (c) the selection, appointment, suspension and removal of its staff.<sup>180</sup>

The Act also provides powers to acquire and deal with real and personal property.<sup>181</sup>

Despite this Act’s similarity with Ontario and British Columbia legislation (the *University of Regina Act* does not explicitly state that its objective is education), Saskatchewan courts had no difficulty applying the *Charter* to some of the university’s activities, especially those that are implemented under statutory authority (e.g. trespass laws) and affect the freedom of expression of non-students and students alike.

Marin argues persuasively that focusing narrowly on a particular university’s enabling statute does not assist in understanding the relationship between universities and government.<sup>182</sup> He argues that universities are important for implementing government policy and are given substantial powers and are held accountable in a manner that is quite different from

<sup>179</sup> *Supra* note 71.

<sup>180</sup> *Ibid*, ss 4, 4.1.

<sup>181</sup> *Ibid*, s 5.

<sup>182</sup> Marin, *supra* note 20 at 31.

private entities.<sup>183</sup> Thus, courts must take a holistic approach to the issue of the extent to which the *Charter* should apply to universities.<sup>184</sup> A holistic approach would take into account the way that universities fulfil government objectives.

Of the legislation discussed here, Alberta's *PSLA* is the only one that specifically states that education is a governmental objective. However, as indicated by Silletta, the fact that an enabling statute does not specifically state that education is a government objective cannot reasonably mean that the other provinces do not consider education to be a governmental objective. Silletta argues that governments have long provided and funded education in order to enable citizens to participate in society and the workforce.<sup>185</sup> The absence of specific language in the enabling statute does not mean that education is not a valid governmental objective, such that the *Charter* could not apply to universities. Significantly, several of the cases discuss the role of free exchange of ideas, academic freedom and other similar principles as essential to the educational function of universities.

On the other hand, as discussed earlier, Karazivan cautions against an overbroad interpretation of *Eldridge* that would accept that education is a specific enough governmental objective to be inferred from the *PSLA* or other university statute.<sup>186</sup> She notes that universities are certainly not obligated by government to confer upon students a right of access to an education, while the hospital in *Eldridge* was required by the government to provide free access to health care.<sup>187</sup> Karazivan argues that broad interpretations of universities' enabling legislation—that they are actually delivering a specific government program—incorrectly affects the ultimate conclusion that the *Charter* applies.<sup>188</sup> Karazivan also argues that the right (to health care) and the identified obligations of the private entity that existed in *Eldridge* were absent in *Pridgen*.<sup>189</sup> One might take issue with the impact of the characterization of the governmental objective in *Eldridge*, as did Justice Paperny in *Pridgen*. She argued that the objectives set out in the *PSLA* were tangible and clear enough to meet “governmental objectives” as required by *Eldridge*.<sup>190</sup>

Nevertheless, I am not convinced that the differences between wording of legislation dealing with the powers and duties of universities in various provinces can support different conclusions about *Charter* application. While I agree it is necessary to look at university legislation, it may also be necessary

---

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Silletta, *supra* note 66 at 95.

<sup>186</sup> Karazivan, *supra* note 60.

<sup>187</sup> *Ibid.* at 266.

<sup>188</sup> *Ibid.* at 266–67.

<sup>189</sup> *Ibid.* at 270.

<sup>190</sup> *Pridgen*, *supra* note 18 at para 104.

to look at the broader context to determine whether universities fulfil government objectives. Further, I cannot find any requirement in *Eldridge* that limits the determination of government objectives to statutory provisions.

## B. Differences in the Interpretation of the Significance and Effect of the Activities at Issue

Since considering the different wording of the applicable statutes provides insufficient convincing evidence to support differing case results, perhaps the nature of and authority for the actions taken by the authorities at the individual universities can account for the different outcomes. However, the only supportable distinction is that found between internal operations, such as employment issues, where the *Charter* clearly does not apply, and other “public” activities, many of which appear to be directly related to freedom of expression and education.

*McKinney* and its contemporaneous decisions, *Harrison* and *Stoffman*, dealt with mandatory retirement for faculty and staff, where the parties are in a contractual relationship. Justice LaForest could have held that essentially private aspects of the universities activities do not attract *Charter* scrutiny, without basically closing the door on *all* university activities. This was the position of the dissenting Justices L’Heureux-Dubé and Wilson.<sup>191</sup>

Recall that the absolute bar of *Charter* application to universities (and similar non-government entities) that was found in *McKinney* was modified in *Eldridge*. *Eldridge* indicated that for the *Charter* to apply:

- The private entity in its entirety must be considered to be government; that is, based on the degree of control exercised over it by the government, it is clearly an organ of the government; or
- The particular activity must be considered to be “governmental”, i.e. through the implementation of a certain government program.<sup>192</sup>

It is clear that under *Eldridge* not every decision made due to statutory authority will be subject to scrutiny under the *Charter*. Similarly, not every decision made by a private entity that is implementing a government policy or program will require *Charter* analysis.<sup>193</sup> In addition to having statutory authority, cases require that the decision made must have a public aspect.<sup>194</sup> Thus, matters that would be considered public include matters that are not private or commercial; that are closely related to public responsibilities of

<sup>191</sup> *McKinney*, *supra* note 10 at 444.

<sup>192</sup> *Eldridge*, *supra* note 22 at paras 41–44.

<sup>193</sup> *Marin*, *supra* note 20 at 50.

<sup>194</sup> See e.g. *Pridgen*, *supra* note 18 at para 93, citing *Tomen v FWTOA* (1989), 70 OR (2d) 48, 61 DLR (4th) 565 (CA), leave to appeal to SCC refused, [1991] 1 SCR xv.

the body in question; where public law remedies are relevant; or where the decision is the result of a compulsory process.<sup>195</sup>

Considering these factors, student expression seems to be a public matter which would subject the university to both administrative and constitutional scrutiny.<sup>196</sup> While the relationship between individual students and universities may be a private contractual one, there is a public interest in censoring expression in the context of many university activities.<sup>197</sup> When a student is disciplined or otherwise removed from campus, his or her education could be in jeopardy. Wanting to preserve his or her rights at the university, the student is unlikely not make a claim for damages for breach of contract.<sup>198</sup> Thus, a university's decision to restrict a student's expression has a public dimension that would warrant *Charter* scrutiny. Likewise, a university relying on its statutory powers to discipline or remove a student from campus involves the university using its legislative authority while tasked with the government policy of providing access to higher education.<sup>199</sup>

All of the cases discussed are consistent in concluding that universities are not "government" in and of themselves even as they differ sharply on whether the various activities are "governmental", thereby engaging the *Charter*. The activities at issue are often public in nature as they do not involve the private aspects of the operation of universities, such as employment. Many of the cases engage issues of freedom of expression of students or members of the public who are not students. Some decisions involve disciplinary decisions (many of these are for non-academic misconduct).

The cases in which the *Charter* is held to apply tend to cast the nature of the universities' activities in a broad, holistic, educational light. These decisions are supported in this outcome by characterizing universities as implementing government policies or programs, such as education. The exposure to different points of view, even if many people disagree with the expressed opinions or find them offensive, is seen as necessary in the context of academic freedom and the free exchange of ideas in a learning environment. If the *Charter* applies to some university activities, universities are not without methods of ensuring safety or balancing competing interests. Section 1 of the *Charter* is available to defend limits imposed by universities to ensure safety and protect others from harm, provided the limits minimally impair the *Charter* rights in question.

The cases that find the *Charter* is inapplicable defer almost absolutely to the decisions made by universities. The cases also tend to cast the activities

<sup>195</sup> See *Air Canada v Toronto Port Authority*, 2011 FCA 347, 211 ACWS (3d) 254.

<sup>196</sup> Marin, *supra* note 20 at 51.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid* at 51–52.

<sup>199</sup> *Ibid* at 52.

at issue in a very narrow light which avoids or minimizes the role of free expression in contexts related to learning. For example, in *UVic CA* the BCCA held that “[t]he government had neither assumed nor retained any express responsibility to provide a public forum for free expression at universities.”<sup>200</sup> As noted above, the decisions also rely on a strict interpretation of university legislation. The universities’ autonomy and independence from government in all activities are emphasized.

Marin argues that cases involving non-students, such as the *Whatcott* decisions, extend the nexus between expressive activities and the government’s mandate too far.<sup>201</sup> I respectfully disagree. The legal basis for most of the non-student cases is actually that campus security or police are acting under statutory authority (e.g. trespass legislation) and the legislation and actions thereunder are being challenged for violating the non-student’s *Charter* rights. Also, exposing students in a university environment to all opinions, even those extra-curricular statements made by uninvited non-students, is an important learning activity even if the statements are repulsive to some.

In the alternative, even if the *Charter* does not apply to an activity of the university, a belief that administrative decisions should be made with *Charter* values in mind is supported by the *Wilson* case, the submissions by the British Columbia Civil Liberties Association and Côté in *UVic CA* and by Karazivan.

Since there is little significant difference between the activities at issue that account for different case outcomes, it may be that the difference is actually based on the fear of interfering unduly with the autonomy of universities.

### C. Different Emphasis Upon the Role of Deference to a University’s Autonomous Decision-Making

University autonomy is not sacrificed by allowing and protecting freedom of expression on campuses in the current context. It is possible under current administrative law principles to defer to decisions of university officials and respect academic freedom while also protecting freedom of expression.

In the beginning, *McKinney* emphasized the importance of institutional autonomy when finding the *Charter* did not apply to universities. Justice LaForest stressed that the purpose of the *Charter* was to control oppressive acts of government, not to deal with private entities such as universities.<sup>202</sup> He reasoned that university self-governance and autonomy were incompatible with considering a university “government” for the purposes of section

<sup>200</sup> *UVic CA*, *supra* note 2 at para 32.

<sup>201</sup> Marin, *supra* note 20 at 53.

<sup>202</sup> *McKinney*, *supra* note 10 at 262.

32.<sup>203</sup> Justice LaForest also stated that the fact that universities were heavily regulated by government, were reliant on public funding and provided an important public service do not make them government entities.<sup>204</sup> Interestingly, all of the subsequent cases agreed that universities are not government entities *per se*.

Justice La Forest was primarily concerned that if the *Charter* were to apply to universities their independence would be undermined. He also preferred to leave a university's decisions to administrative law's judicial review principles, which generally defer to decisions of specialized entities (e.g. human rights commissions).<sup>205</sup> The reasoning for Justice La Forest's reluctance to interfere with the universities' governance was legitimate at the time *McKinney* was decided. However, recent significant developments in administrative law that affect the role of the *Charter*, coupled with the evolution of the law about section 32, suggest that the current courts should exercise caution when relying too closely on *McKinney*.

The SCC has recently provided guidance on the standard of review applicable to the decisions of public bodies that raise a constitutional question. In *Doré*, the SCC held that the existence of a *Charter* issue in an administrative board case does not affect the standard of review that should apply.<sup>206</sup> On matters of discretion (most university decisions), courts apply a reasonableness standard and the outcome of any case must reflect proportionate balancing between the decision-maker's statutory mandate and the *Charter* values that are in issue.<sup>207</sup> The SCC maintained that administrative bodies are entitled to some deference when they determine that a decision does protect *Charter* rights.<sup>208</sup> Thus, Justice La Forest's concern in *McKinney*, that universities should be free from meddling in their autonomous decision-making, has been addressed by *Doré*.

The cases from Ontario and British Columbia sometimes acknowledge *Doré*, but they continue to prefer to err on the side of deference. In *UVic CA* for example, Côté and BCCLA relied on *Doré* when they argued that the lower court and the University failed to take *Charter* values into account in arriving at their decisions. The University argued, and the BCCA agreed, that the issue was moot; therefore it was not fully discussed.<sup>209</sup>

Since many of the decisions concern freedom of expression, if the reasonableness standard in *Doré* were applied to decisions of a university that limit freedom of expression (as in many of these cases), courts would look

<sup>203</sup> *Ibid* at 273–74.

<sup>204</sup> *Ibid* at 269, 272.

<sup>205</sup> *Ibid* at 263.

<sup>206</sup> *Doré*, *supra* note 65 at para 45.

<sup>207</sup> *Ibid* at para 57.

<sup>208</sup> *Ibid* at para 56.

<sup>209</sup> *UVic CA*, *supra* note 2 at para 59.

at whether the university considered *Charter* values in making a decision, and could provide a reasonable explanation for why it was necessary to limit freedom of expression. Courts would only interfere if a university were to avoid considering *Charter* values at all, if a university did not adequately consider *Charter* values, or took action that was disproportionate or illegitimate.<sup>210</sup> This seems to be the approach followed in Alberta and Saskatchewan.

Early on, a concern was raised that applying the *Charter* to universities would interfere with academic freedom.<sup>211</sup> However, Justice Paperny in Pridgen held that both academic freedom and freedom of expression serve the same goal: the meaningful exchange of ideas.<sup>212</sup> Marin also cautions against conflating institutional autonomy and academic freedom, which some universities have done in recent cases.<sup>213</sup> He notes that history shows that universities have used their autonomy both to defend and violate academic freedom.<sup>214</sup> Marin concludes that an independent and impartial judiciary that applies the *Charter* in a balanced fashion is probably the best forum to resolve disputes relating to academic freedom in any event.<sup>215</sup>

## VI. Conclusion

The courts' interpretation of student rights and responsibilities will have a considerable impact. One practical impact of these conflicting decisions is that only those students at the Universities of Calgary and Regina (and those other universities that follow recent Alberta and Saskatchewan cases) will have exposure to the full marketplace of ideas. If important aspects of learning include exposure to divergent opinions and arriving at one's own conclusions about controversial topics, students may need to be exposed to sometimes unpopular, even offensive, ideas. Universities are clearly important for the implementation of government policy, and thus the *Charter* should apply to some university activities.

Even the SCC in their majority judgments in *McKinney* and *Stoffman* recognized that there may be circumstances where a university is implementing a government policy such that the *Charter* should apply.<sup>216</sup> These circumstances were contrasted with the situation where a university is acting as an employer and the *Charter* clearly would not apply. Continued respect for this distinction

<sup>210</sup> See Pridgen, *supra* note 18 at para 55.

<sup>211</sup> See McKinney, *supra* note 10 at 273.

<sup>212</sup> Pridgen, *supra* note 18 at para 117.

<sup>213</sup> Marin, *supra* note 20 at 56, citing James L Turk, *Academic Freedom of Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Larimer & Company, 2014) at 14.

<sup>214</sup> Marin, *supra* note 20 at 56, citing Turk, *supra* note 213 at 12–14.

<sup>215</sup> Marin, *supra* note 20 at 56.

<sup>216</sup> McKinney, *supra* note 10 at 42, 371, 436; Stoffman, *supra* note 22 at 507.

would support the long-stated notion that universities should be autonomous with respect to internal operations. Further, the decisions in *Eldridge* and *Doré* provide guidance as to what activities should be subject to *Charter* scrutiny and how *Charter* analysis can be achieved while respecting both institutional autonomy and academic freedom.

If the situations described in the British Columbia and Ontario cases do not meet with those circumstances outlined in *McKinney*, in which a university is implementing a government policy, I am at a loss to conjure up situations where *McKinney*'s "exceptional" circumstances would apply to universities. I sincerely hope that the appellants in *UVic CA* seek leave to appeal to the SCC, and that the SCC takes the opportunity to reconcile these conflicting decisions in favour of the application of the *Charter*.