Free expression: Do Canadian universities make the grade?

Universities in Canada are currently grappling with balancing respect for free expression and the call for less offensive speech on campus, especially when it targets and harms marginalized groups. But, what *is* the law of free expression in Canada? Is it no-holds-barred – you can say what you want, when you want? Or does offensive or hateful speech cross the line? If so, how offensive or hateful does speech have to be to cross that line?

Limitations on expression at universities

The vision of universities as free spaces to express and to learn has been compromised by conflicting opinions about what free expression means.[1] Some students allege that universities are silencing unpopular or controversial ideas because of political correctness, while others say that free expression is being relied on to justify the presentation of offensive views.[2]

A few recent examples of conflicts over free expression include protestors pulling the fire alarm during a controversial talk by Rebel Media's Ezra Levant at the University of Toronto in 2016, and the cancellation of an event at Wilfrid Laurier University with Danielle Robitaille, one of the lawyers who acted for Jian Ghomeshi, because of "safety concerns" that were brought to her attention ahead of the event.[3]

In 2016, a comprehensive study of 60 universities measured the level of free speech on campuses across Canada.[4] The results of the study show that over 25 of the universities received "failing grades" on their policies and practices addressing free expression.[5] The grades, ranging from A to F, show a wide variance between universities in their approach to regulating expression.[6] There is no consistency between how decisions are made. At present, each university makes its own decisions as to what expression it will allow.

Free expression as protected by the *Charter*

The *Charter*, section 2(b), protects: "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."[7] This broad section has been found to protect many types of expression including speech. Any activity which conveys or attempts to convey meaning is generally considered to be expression within the meaning of section 2(b).[8]

Like any other *Charter* right, the right to free expression is not without its limits. There is a higher degree of protection for speech that is closely connected to the core values of expression: the search for political, artistic and scientific truth; the protection of individual autonomy and self-development; and, the promotion of participation in the democratic process.[9] Limitations on freedom of expression are more common when they are far from these core values on a spectrum – therefore, for example, there are restrictions on obscenity

and child pornography[10], hate speech[11], and defamation.[12] The Supreme Court of Canada has upheld these types of expression as “reasonable limits” on free expression.

The *Charter* protects Canadians against violations of rights and freedoms by the state. All *Charter* protections apply between the government (or a government body) and an individual (or group). Therefore, in the case of universities, it must first be established whether the purpose or effect of a law or government policy restricts an individual’s expression. If so, the limitation could be challenged by the individual who feels their rights in section 2(b) are infringed. For example, pro-life groups having their posters taken down could be considered a restriction on their freedom of expression.

What are other limitations on free expression?

Not all expression is protected by the *Charter* guarantee of freedom of expression. Some expression such as hate speech has been deemed criminal. Human rights acts across the country prohibit expression that discriminates against marginalized groups. For example, the Supreme Court found in *Saskatchewan (Human Rights Commission) v Whatcott* that distributing anti-gay flyers violated the Saskatchewan *Human Rights Act*, and that the Act was constitutional.[13] In this regard, sections of the *Criminal Code* and *Human Rights Acts* have been deemed reasonable limits on the freedom of expression that are guaranteed in our *Charter.*

But other than speech that is clearly illegal, universities must make decisions as to what expression it will allow. Universities can do this either on the basis of clear policies or on a case-by-case basis, armed with the knowledge that our *Charter* has constitutionally entrenched freedom of expression and that universities must encourage deep conversations and reflection about issues, some of which will be offensive.

Why is free expression an issue on college campuses?

Universities are environments which foster deep thinking, creativity, and research – that is, the freedom to safely study and research a wide range of subject matter.[14] Universities are also a traditional forum for discussion and debate on pressing and controversial social and political issues.[15] In *McKinney*, Justice La Forest described academic freedom, as serving "a vital role in the life of the university", and protecting "against the censorship of ideas."[16]

Universities have opted to address the issue of conflicting opinions on campus in vastly different ways. Some universities, such as the University of Ottawa, have enforced ‘speech codes’—rules, regulations and policies which prohibit speech that could be considered controversial or offensive.[17] “Offensive remarks” and “displays of discriminatory material” are examples of discriminatory acts based on prohibited grounds, but are not further defined in the code.[18] On the other end of the spectrum, some universities have staunchly advocated for free speech by preemptively crafting policies that “[uphold] the supremacy of free expression and academic freedom”, preventing the administration from silencing controversial views on campus.[19]

Multiple schools with pro-free speech policies, such as Ryerson University and the University of Alberta, have had lawsuits launched against them for failing to support free speech on campus in practice.[20]

In the courts: universities versus free expression

Ryerson Men's Issues Awareness Society v Ryerson Students' Union

Ryerson Students' Union (RSU) denied student club status to a student group seeking to form a Men's' Issues Awareness Group (MIAS) to discuss issues and views that disproportionately affect men (such as homelessness, workplace injuries, and higher rates of suicide).[21]In rejecting their application, RSU claimed that men have "systemic privilege," and that a group focused on men's issues would "harass" women and make them feel "unsafe".[22]

In response, the MIAS group students claimed that their freedom of expression was being harshly restricted (along with their freedom of association).[23]Without group accreditation, they claim that their ability to spread their message on campus is unfairly and extremely hindered, therefore infringing their freedom of expression.[24]As of August 2017, this case is currently in progress and will be heard together with two other freedom of expression challenges against the Student Association at Durham College and University of Ontario Institute of Technology, and the University of Toronto Mississauga Students' Union.[25]

UAlberta Pro-Life v University of Alberta

The UAlberta Pro-Life club hosted a demonstration on campus in 2015.[26] Opposing students staged a counter-protest that violated the University's Code of Student Behaviour, and caused damage and disruption to the Pro-Life demonstration.[27] The protestors' violations of the student code were never addressed or acted upon by the University.[28] A year later, in 2016, the Pro-Life club wanted to hold a similar demonstration. Two weeks before the scheduled event, the University asked the student group to pay a $17,500 "security deposit", which would cover the costs for additional security, and costs of barricading the venue to address potential misconduct of students protesting the demonstration.[29]

The UAlberta Pro-Life club challenged both the University's security fee and decision to condone violations of the *Code of Student Behaviour* directed against the club at the first demonstration in 2015.[30] They allege that by imposing the security deposit, the University put a cost on expression – a cost that most, if not all, student groups would be unable to pay.[31] The application was heard in the Alberta Court of Queen's Bench in June 2017. The decision was released in October with the Court finding that the University did consider freedom of expression on making its decision. Ultimately, the Court concluded that the decision of the University to impose costs on the student group was within a range of possible acceptable outcomes.

How and when should universities draw a line, if at all?

Assuming the *Charter* is found to apply to universities, academics suggest that any restrictions on freedom of expression in the university context should be set out clearly in advance, and ideally, be neutral regarding censorship of the content being expressed.[32] For example, ideally, there should be the same restrictions on speech for a pro-life group as for a pro-choice group.

There are also suggestions to require universities to take reasonable steps to allow a forum for unpopular opinions or ideas. For example, some campuses have allowed "free speech walls" where students can write whatever they like on a designated wall or board.[33]

Another approach for a university is to consider the impact of a possible rights infringement in exercising its disciplinary authority on free expression issues on a case by case assessment. This would provide more legitimacy for the administrative decisions of the university.[34] For example, students might not be keen to challenge decisions on the basis of *Charter* rights being infringed if the *Charter* right is used to develop policy or guiding decisions by the university in the first place. Society has a keen interest in maintaining the academic freedom of universities – it nurtures the development of knowledge, information and ideas.[35]

As Justice Paperny writes in *Pridgen*, "academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge."[36] Because of this, universities and student governing associations independently and possibly, arbitrarily, drawing the line on what types of expression can or cannot occur in the university environment on a case by case basis, without reference to a policy is problematic.

As universities grapple with what expression to allow, they would be wise to examine and apply the values enshrined in our *Charter of Rights and Freedoms* in crafting transparent policies. Creating or adjusting policies to be more informed by *Charter* values would allow for more uniformity across university campuses, instilling the same or similar levels of academic freedom and freedom of expression across the country's university communities. It would also help guide universities with what expression should be allowed and which should be banned or restricted. Given the important role of universities in our democracy, the curtailing of freedom of expression there must be done carefully. It is a context in which losing one's free expression holds a great deal of weight.

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[1] Kristy Hutter, "Campus clash: Students battle over what constitutes free speech", *CBC News* (18 April 2017), online: <www.cbc.ca/news/canada/free-speech-versus-hate-speech-1.4058994>.

[2] *Ibid.*

[3] *Ibid.*

[4]"Summary of Findings", 2016 Campus Freedom Index, *Justice Centre for Constitutional Freedoms*, online: <campusfreedomindex.ca/summary/>.

[5]*Ibid.*

[6]*Ibid.*

[7]*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, s 2(b).

[8]*Irwin Toy Ltd v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 at 968.

[9]*RJR-Macdonald Inc v Canada (Attorney General),* [1995] 3 SCR 199*at 211.*

[10]*R v Butler,* [1992] 1 SCR 452.

[11]*R v Keegstra,* [1990] 3 SCR 697.

[12]*Hill v Church of Scientology of Toronto,*[1995] 2 SCR 1130.

[13] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.

[14]Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal 79 at 80.

[15]Craig Jones, "Immunizing Universities from Charter Review: Are We 'Contracting' Out Censorship?" (2003) 52 UNBLJ 261 at 270.

[16]*McKinney v University of Guelph*, [1990] 3 SCR 229 at 376.

[17]"Summary of Findings", *supra* note 4.

[18] "University of Ottawa", 2016 Campus Freedom Index, *Justice Centre for Constitutional Freedoms*, online: <campusfreedomindex.ca/campus/university-of-ottawa/>.

[19]"Summary of Findings", *supra* note 4.

[20]*Ibid.*

[21] Ashley Csanady, "Men's issues group taking Ryerson University's student union to court over club status", *The National Post* (12 April 2016), online: <nationalpost.com/g00/news/canada/mens-issues-group-taking-ryerson-universitys-student-union-to-court-over-club-status/wcm/6af96018-c7b4-4da9-a80e-2481a5a7bd38?i10c.>; *Kevin Arriola and Alexandra Godlewski v Ryerson Students' Union* (8 April 2016), Toronto, ON SC CV-16-550599 (notice of application) .

[22]Csanady, *ibid*; *MIAS Application*, *ibid* at 4-5.

[23]Csanady, *ibid*; *MIAS Application*, *ibid*.

[24]Csanady, *ibid*; *MIAS Application*, *ibid* at 6.

[25]"Our Cases", Justice Centre for Constitutional Freedoms, online: <www.jccf.ca/our-cases/#ryerson>.

[26]*U-Alberta Pro-life, Amberlee Nicol & Cameron Wilson v University of* Alberta (26 April 2016), Edmonton, AB QB 160307352 (originating application) at 3-4 .

[27]*Ibid*.

[28]*Ibid* at 4-7.

[29]*Ibid* at 7-9; Zoë Todd, "University of Alberta anti-abortion group faces $17,500 security tab", *CBC News* (23 February 2016), online: <www.cbc.ca/news/canada/edmonton/university-of-alberta-anti-abortion-group-faces-17-500-security-tab-1.3459413>.

[30]*UAlberta Pro-life* application*, supra* note 26.

[31]*Ibid* at 12; Todd, *supra* note 29.

[32]John Carpay, "These Two-Faced Universities Threaten Free Expression on Campus" (8 November 2016), *The Huffington Post* (blog), online: <www.huffingtonpost.ca/john-carpay/university-free-expression_b_12800814.html>.

[33]*Ibid;* Tristin Hopper, "'Not every opinion is valid:' Carleton University free speech wall torn down within hours", *The National Post* (22 January 2013), online: <nationalpost.com/news/canada/not-every-opinion-is-valid-activist-censors-peers-by-tearing-down-universitys-free-speech-wall/wcm/e41ecfc2-b9c7-4f2f-95d4-5a449d04a7bd>.

[34]Silletta, *supra* note 14 at 90.

[35]Jones, *supra* note 15 at 276

[36]*Pridgen v University of Calgary*, 2012 ABCA 139 at para 117.