A penny for your thoughts, if we like them: Freedom of Expression on Campus Part 1

The Progressive Conservative Government of Ontario has altered their provincial funding scheme for post-secondary institutions: 60% of funding is now tied to measurements that include the employment and pay rates of graduates.[1] It appears the United Conservative Government of Alberta ("UCP") wants to implement a similar system to ensure that taxpayers are getting the optimal return on their investment. The UCP has promised to measure the tie between provincial subsidies and the "labour market outcomes" of post-secondary education programs.[2]

There is growing concern that funding schools based on the job outcomes of its graduates will limit post-secondary institutions', and professors' freedom of expression. As Dax D'Orazio, a PhD candidate in political science at the University of Alberta, observed, the "pursuit of truth and knowledge" are compromised when scholars focus on the economic value of their work because "they self-censor, take fewer risks, and imbibe conventions uncritically."[3]

Others fear that policies like this seep in at the student level as well: "students often avoid engagement in extra-curricular activities that appear to be at odds with the system and instead lean towards resume-enhancing, non-contentious forms of expression."[4] This is because government funding following this policy "encourages students to think of higher education merely as a means to an end (employment), rather than an innate good that provides society with thoughtful and informed citizens."[5]

Does tying government funding to graduates' job outcomes create an 'invisible hand' limiting freedom of expression on post-secondary campuses? Is the *Charter* guaranteed right to freedom of expression under threat?

Freedom of Expression

The *Charter* guarantee of freedom of expression protects "freedom of thought, belief, opinion and expression." The Supreme Court of Canada ruled that there are three underlying values guiding its purpose:

1. promotion of the "free flow of ideas essential" to democracy;

2. promotion of the "marketplace of ideas" where truth can be found through the competition of ideas; and

3. the "intrinsic value to the self-realization of both speaker and listener."[6]

To decide if a government action violates freedom of expression courts first decide if the restricted activity is expression. An "activity is expressive if it attempts to convey meaning."[7]

Next, a court decides if the purpose or the effect of the government action was to limit freedom of expression.[8] If it was the government's purpose, there is a violation. If not, a claimant can still prove that an effect of a government action is the restriction of expression.[9] The claimant must prove the effect occurred and show that the restricted activity contributes to one of the underlying values of freedom of expression.[10]

If a court finds there has been a restriction on freedom of expression, the final step is to decide if the restriction is justifiable as a reasonable limit in a free and democratic society, a qualifier found in section 1 of the *Charter*.[11] In order for a restriction to be a reasonable limit there must be:

1. a pressing and substantial reason for the action;

2. a rational connection between the action and the reason for taking it;

3. minimal impairment of the *Charter* guarantee; and

4. proportional effects – the underlying objective and the benefits of the action must outweigh the harmful effects.[12]

If the government can prove these, a limitation of a *Charter* right is constitutional.

Challenging the Effects

Could a post-secondary institution challenge this government policy as an unconstitutional violation of their freedom of expression?

There is very little activity on post-secondary campuses that is not expressive. A post-secondary institution's real first step of the legal test would be showing that either the purpose or the effect of the government action is a violation of freedom of expression.

The purpose of tying funds to job prospects appears to be increasing return on taxpayer investment. But is one of the *effects* a limitation of freedom of expression? If an institution can prove that their expression was limited in some way as a result of the government action, the institution would next need to show that said expression contributes to the underlying values of freedom of expression. One example might be if the university was forced to make cut backs in the Arts department, reducing classes offered and research funding, in order to direct the funds to an Engineering department with more favourable graduate employment rates.

If a violation of freedom of expression is established, it falls to the government to show that the limitation on expression is justifiable.

First, the government would need to show a pressing and substantial reason to base post-

secondary funding on job prospects. The rational connection between auditing funding and ensuring return on investment is fairly straightforward.

Next, they would need to show that the impairment on freedom of expression is minimal. This would likely depend on how strict funding allocation is. Does the university still get to choose which classes it provides? Does the government decide which programs it wants to fund, or can universities do what they want with the money as long as graduates get jobs? Has there been a real reduction in funding, or are increases in funding only going to the 'employable' programs?

The final step is a proportionality test. The objective is maximizing return on tax money. Benefits would include an increased likelihood of employment after graduating. Do these outweigh the limitation of freedom of expression on post-secondary campuses?

Is Money Power?

There is debate surrounding just how influential government funding is for post-secondary institutions. There are those who argue that "provincial governments' funding patterns not only reveal that education is a governmental objective, but also that the government exercises immense control over universities."[13] Provinces often limit both tuition rates and allowable annual increases.[14]

Alternatively, some believe that government funding for universities is actually dwindling. Post-secondary institutions are operating more like businesses, focusing more on brand management, and becoming increasingly corporatized.[15] The worry is that "those who control the university's purse strings are the ones with access to speech, determining policies, marketing campaigns and strategic plans, while those who do not are structurally encouraged to remain silent."[16]

In the past, the Supreme Court of Canada ("SCC") has decided that post-secondary institutions are largely autonomous of government: private actors. Even when a province required government approval of a university program in order for it to receive public funds, and designated funds to meet specific policies, the SCC still decided that the *Charter* did not apply to university activities.[17] This suggests that a Court might determine that post-secondary institutions are not at the mercy of government. If universities are autonomous, and not reliant on government funding, it will be more difficult for the university to prove that their expression is being limited by the withholding of funds.

Conclusion

The concern is that with this new funding model, professors with non-conventional, controversial ideas will receive less funding, and maybe even be pushed out from post-secondary institutions. Professors are already struggling with institutional blowback when accused of propounding controversial ideas. University of New Brunswick professor Ricardo Duchesne has retired in the middle of a university investigation into claims that he is a white supremacist.[18] Cambridge rescinded their offer for a visiting fellowship to

controversial University of Toronto psychology professor Jordan Peterson in a move Peterson described as "bowing to pressure from students."[19]

When the Supreme Court of Canada decided that universities are generally autonomous from government control, they suggested: "Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom."[20] Although the provinces have not taken such direct action yet, it appears that some provinces might be letting the invisible hand of the market do the work for them. Only time will tell if post-secondary institutions will decide to draw a line in the sand and if the *Charter* will aid in any resistance they mount.

To learn more about how funding policies are already changing the freedom of expression landscape on post-secondary campuses, read Part 2 in our series on freedom of expression on campus: with the threat of reduced funding, the Alberta and Ontario governments want campuses to implement freedom of expression policies in line with the Chicago Principles.[21]

[1]Emma Graney, "UCP prepares to roll out Ford-flavoured post-secondary changes in Alberta", *Edmonton Journal* (6 May 2019), online: <edmontonjournal.com>.

[2]*Ibid*.

[3]Dax D'Orazio, "Opinion: UCP promises would imperil free speech", *Edmonton Journal* (14 May 2019), online: <edmontonjournal.com>.

[4]Sandra Smeltzer & Alison Hearn, "Student Rights in an Age of Austerity? 'Security', Freedom of Expression and the Neoliberal University." (2015) 14:3 Social Movement Studies 352 at 354.

[5]D'Orazio, *supra* note 3.

[6]*R v Keegstra*, [1990] 3 SCR 697 at 802 – 804, 117 NR 1.

[7]*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968, 58 DLR (4th) 577 .

[8]*Ibid* at 971.

[9]*Ibid* at 976.

[10]*Ibid*.

[11]*Ibid* at 979.

[12]*R v Oakes*, [1986] 1 SCR 103 at 138 – 140, 26 DLR (4th) 200; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 887, 120 DLR (4th) 12.

[13]Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal 79 at 95.

[14]*Ibid* at 97.

[15]Smeltzer, *supra* note 4 at 353.

[16]*Ibid* at 356.

[17]*Mckinney v University of Guelph*, [1990] 3 SCR 229 at 272, 76 DLR (4th) 545 .

[18]Joe Friesen, "Controversial University of New Brunswick professor to retire amid probe" , *The Globe and Mail* (4 June 2019), online: <theglobeandmail.com>.

[19]"Cambridge rescinds offer of visiting fellowship for professor Jordan Peterson", *The Globe and Mail* (21 March 2019), online: <theglobeandmail.com>.

[20]*Mckinney*, *supra* note 17 at 273.