Charter Rights on Campus? It Depends Where You Live

The *Canadian Charter of Rights and Freedoms* protects several foundational rights, but only from violations by the Canadian government, not by private individuals or bodies.[1] As a result, it is important to know just who, and what, qualifies as "government." Nearly three decades ago the Supreme Court of Canada ruled that universities are not "government."[2] However, the Supreme Court left open the possibility that the *Charter* may apply to some university actions.[3] In a recent decision, the Alberta Court of Appeal decided that when universities restrict student's expression on campus they are subject to the *Charter*.

The Debate Between Pro-Life and the University of Alberta

UAlberta Pro-Life ["Pro-Life"] is an anti-abortion student organisation at the University of Alberta ["the University"]. They aim to "raise awareness that abortion is a human rights violation" and to "start a conversation with peers about abortion on campus."[4] In March 2015, they held an event on the Quad, a central, high-traffic area on the University Campus.[5] The event was met by protesters, some of whom held "signs and banners blocking the displays."[6] University Protective Services became involved, separating protesters from Pro-Life.[7] Pro-Life later filed complaints with University Protective Services against several protesters.[8]

In early 2016, Pro-Life sought to hold a second event, also in the Quad.[9] Because the first event required additional security, the University imposed a security cost of $17,500 on Pro-Life to hold the event.[10] Pro-Life challenged the high cost, alleging it violated their *Charter* right to freedom of expression.[11] Since they could not afford to pay the security costs, they could not hold the event. They took the University to court. In response, the University argued that the *Charter* does not apply to them.[12]

Charter* Application: Only the Government is Subject to the *Charter

Section 32 of the *Charter* defines the scope of the *Charter's* application, who and what is bound to respect the rights and freedoms it describes. It makes clear that the *Charter* only applies to the federal and provincial governments.[13] The Supreme Court of Canada has also reinforced that the *Charter* only constrains governments and their actions, not private citizens or companies.[14] Section 32 makes clear that the *Constitution* acts as a regulator of the government.[15] The Supreme Court of Canada has said that section 32 expresses that the *Charter* is "an instrument for checking the powers of government over the individual."[16]

There are two ways the *Charter* can apply to an entity (i.e. a person or organization whose actions are in question).[17] First, the *Charter* applies if the entity is by nature a governmental entity. In other words, if the entity *is* government. This includes the federal

and provincial governments, municipal governments, and government officials acting in the scope of their duties.[18] If an entity is government by nature, all its actions are subject to the *Charter*.[19]

Second, the *Charter* applies if a non-government entity engages in governmental action. Typically, government actions are acts which implement a specific government policy or program.[20] For example, in the case *Eldridge v British Columbia (Attorney General)*, the Supreme Court of Canada held that in delivering healthcare, hospitals were engaged in governmental action.[21]

This second pathway to *Charter* application exists to prevent government from avoiding *Charter* scrutiny by granting powers to implement their policies to otherwise private entities.[22] If an entity is acting 'governmentally,' then that action alone, and not the rest of their actions, is subject to the *Charter*.[23]

Regulating Speech on Campus is a Governmental Action (In Alberta)

A trial court first heard, and dismissed, Pro-Life's case.[24] The trial judge did not decide whether the *Charter* applied to the University's decision to impose the security cost on Pro-Life. The judge instead found that the University "voluntarily assumed responsibility for considering freedom of expression."[25] Pro-Life appealed the trial judge's decision to the Alberta Court of Appeal.

The Court of Appeal decided it had to rule on whether the *Charter* applied to the University's action. It ruled that a university action is governmental if the university acts "for the state more broadly and not just for internal University objectives."[26] Internal university objectives likely include the aims any private organization would hold, like the hiring and firing of staff or entering business deals. Acts "for the state more broadly" are acts done for the goals of the government. The question then is whether the way the University regulated students' expression was for the state more broadly or just for internal objectives.[27]

The Court found that when the University regulates student expression on campus they are engaged in governmental action.[28] They gave five reasons why the University was acting for state purposes when they regulated speech on campus[29]:

1. The "core purpose" of the University is the "education of students largely by means of free expression."[30] Government gave the University this purpose "under both statute and the *Constitution Act, 1867*."[31]
2. The University and others recognize that the University's core purpose is the education of students.[32]
3. The "grounds of the University are physically designed to ensure" all students can "learn, debate and share ideas."[33]
4. Finding that the *Charter* applies to universities' regulation of speech on

campus "is a visible reinforcement of the great honour system which is the Rule of Law."[34] Also, ensuring the *Charter* applies anywhere the government is present reinforces Canada's "core values of human rights and freedoms."[35]

5. Recognizing that the *Charter* applies to universities' regulation of speech on campus "does not threaten the ability of the University to maintain its independence or to uphold its academic standards or to manage its facilities and resources."[36]

The Court highlighted that the provincial government founded the University through legislation in 1906.[37] It is clear, the Court said, that "the University and its purposes were a subject of great significance to *the Crown* when it enacted the University into existence."[38]

In short, the provincial government gave the University the mission of educating students "by means of free expression."[39] Because the government gave the University this mission, the University's actions in implementing that goal are governmental action. Since the regulation of speech on campus is a governmental action, the *Charter* applies to how the University regulates speech on campus.

The Court gave "no opinion regarding the University's ability to justify" their imposition of the security costs on Pro-Life.[40] In future cases, universities could attempt to justify their restriction of student expression. The Court noted that the University is "specially experienced and equipped to accommodate hubbub" that may come with controversial speech.[41] In doing so, the University will have to balance competing values. Sometimes, it will be justified in limiting expression; for example, if the expression is "violent, obscene, freedom suppressing or intimidating in its nature."[42]

Finding the University was subject to the *Charter* in this case is consistent with prior Alberta cases. In a 2012 Alberta Court of Appeal case, one judge held that the *Charter* applied to how the University of Calgary disciplined students for Facebook posts criticizing a professor.[43] Some students posted comments on Facebook criticizing how a professor taught a University course.[44] The University found the students (some of whom only joined the Facebook page, but did not post comments) guilty of non-academic misconduct and punished them with, among other things, a 24-month probation.[45] The students challenged the decision in court, and eventually Justice Paperny of the Alberta Court of Appeal found that the university was both subject to the *Charter* and had violated the student's freedom of expression.[46] In disciplining the students, the University of Calgary was using power given to it by the government and was therefore acting governmentally. As such, its decisions had to comply with the *Charter*.[47]

The Alberta Court of Appeal's Decision is Inconsistent with Other Jurisdictions

The Alberta Court of Appeal's decision is inconsistent with decisions in similar cases in in

Ontario and British Columbia. In those cases, courts found that the *Charter* does not apply to university actions regulating expression on campus.

In Ontario, the leading case on the application of the *Charter* to university action is *Lobo v Carleton University*.[48] In *Lobo*, students of Carleton University sought to set-up anti-abortion demonstrations in a busy location on campus. The University requested the students organise elsewhere, a request the students appear to have ignored. In turn, the University charged the students with trespassing and prevented them from demonstrating on campus. The students in turn sued the University for "failing to allocate the desired space" for their demonstrations.[49] The Ontario Court of Appeal dismissed the student's case, noting that booking space for "non-academic extra-curricular" is not a "specific government policy or program."[50] The Alberta Court of Appeal in *UAlberta* discussed *Lobo*, but found it was "not of penetrating effect" to their decision.[51]

In British Columbia, the case *BC Civil Liberties Association v University of Victoria* dealt with *Charter* application to universities.[52] There, a University of Victoria anti-abortion student group received approval from the Vice-President of the University to hold a demonstration on campus. Shortly thereafter, following the advice of the Student Society, the Vice-President revoked the approval and informed the group as such.[53] Despite this, they proceeded with their event. The University responded by suspending their outdoor booking privileges for one year.[54] The student group appealed this decision to the courts.

The British Columbia Court of Appeal concluded that the University of Victoria's actions were not governmental. The Court found that in deciding how to use campus space it was not implementing a government policy or program.[55] The Alberta Court of Appeal did not explicitly state why they disagreed with the British Columbia Court of Appeal's finding. They did, however, mention that the University, who relied on the *BC Civil Liberties* case in their argument, may be giving section 32 of the *Charter* "a pinched and technical reading."[56]

Conclusion

Until the Supreme Court of Canada rules on a case like this one and sets a Canada-wide standard on the *Charter's* application to university actions limiting expression, the *Charter's* applicability to universities seems to depend on where you live. Regardless, university administrators deciding how to handle the expression of student groups like Pro-Life must act carefully.[57] In Alberta, their decisions must be *Charter* compliant.

Further Reading

Katherine Creelman, "Free expression: Do Canadian universities make the grade?" *Centre for Constitutional Studies* (23 October 2017), online.

Dwight Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45 R Dr U Sherbrooke 133.

[1] *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 .

[2] *McKinney v University of Guelph*, 1990 CanLII 60 (SCC) .

[3] *Ibid*. See also Atrisha S. Lewis, Adam Goldenberg & Marco Fimiani, "Free speech on campus is subject to the Charter – but only in Alberta" *McCarthy Tetrault* (15 January 2020), online: <www.mccarthy.ca/en/insights/blogs/canadian-appeals-monitor/free-speech-campus-subject-charter-only-alberta>.

[4] "UAlberta Pro-Life" *University of Alberta Bears Den: Student Organizations* (last visited 21 July 2020), online: <www.alberta.campuslabs.ca/engage/organization/ualbertaprolife>.

[5] See *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at para 8 .

[6] *Ibid* at para 10.

[7] *Ibid* at paras 11-12.

[8] *Ibid* at para 13. These complaints resulted in a second issue discussed by the Alberta Court of Appeal: whether the University's decision to not punish the protesters was reasonable. See *Ibid* at paras 37-101.

[9] *Ibid* at para 16.

[10] *Ibid* at para 18.

[11] *Ibid* at para 20.

[12] *Ibid* at para 146.

[13] *Charter*, *supra* note 1, s 32.

[14] See *RWDSU v Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC) at para 34 .

[15] See Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2019, release 1), at 37.2(h).

[16] *McKinney*, *supra* note 2.

[17] *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at paras 15-16.

[18] *Dolphin Delivery*, *supra* note 14 at para 33.

[19] See *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) at para 40 . See also *Lavigne v Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC).

[20] *Eldridge*, *supra* note 19 at paras 41-42.

[21] *Ibid* at para 50.

[22] *Eldridge*, *supra* note 19 at para 42. See also *McKinney*, *supra* note 2.

[23] *Eldridge*, *supra* note 19 at para 44.

[24] *UAlberta*, *supra* note 5 at 23.

[25] *UAlberta Pro-Life v Governors of the University of Alberta*, 2017 ABQB 610 at para 46.

[26] *UAlberta*, *supra* note 5 at 139.

[27] *Ibid*.

[28] *Ibid* at para 148.

[29] See also Linda McKay-Panos, "Alberta Court of Appeal Concludes that University of Alberta is Subject to the *Charter*," *ABLawg* (25 February 2020), online: <www.ablawg.ca/2020/02/25/alberta-court-of-appeal-concludes-that-university-of-alberta-is-subject-to-the-charter/>.

[30] *UAlberta*, *supra* note 5 at para 148.

[31] *Ibid*. See also paras 105-109.

[32] *Ibid* at para 148.

[33] *Ibid*.

[34] *Ibid*.

[35] *Ibid*.

[36] *Ibid*.

[37] *Ibid* at para 105.

[38] *Ibid* at para 106 [emphasis in original].

[39] *Ibid* at para 148.

[40] *Ibid* at para 230.

[41] *Ibid* at para 205.

[42] *Ibid*.

[43] *Pridgen v University of Calgary*, 2012 ABCA 139.

[44] *Ibid* at para 5.

[45] *Ibid* at paras 17-22.

[46] *Ibid* at para 128.

[47] *Ibid* at para 105.

[48] *Lobo v Carleton University*, 2012 ONCA 498 .

[49] *UAlberta*, *supra* note 5 at para 141.

[50] *Lobo*, *supra* note 48 at para 4.

[51] *UAlberta*, *supra* note 5 at para 141.

[52] *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162.

[53] *Ibid* at para 1.

[54] *Ibid*.

[55] *Ibid* at para 33.

[56] *UAlberta*, *supra* note 5 at para 144.

[57] Michael Larsen, "University Spaces and the Freedom of Expression" *Mondaq* (17 February 2020), online: <www.mondaq.com/canada/trials-appeals-compensation/894154/university-spaces-and-the-freedom-of-expression>.