

## APPLICATION OF THE *CHARTER* TO UNIVERSITIES' LIMITATION OF EXPRESSION

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Résumé de l'article

La Charte canadienne des droits et libertés s'applique uniquement à l'action gouvernementale. En conséquence de ce champ d'application limité, plusieurs questions fondamentales se sont posées au regard de son application aux contextes d'enseignement postsecondaire. Bien que la jurisprudence semblait envisagée de prime abord les universités comme des zones libres de l'application de la Charte, elle semble plus récemment affirmer que ce n'est pas le cas. Cet article exploite la règle sur l'application de la Charte, réarticulée par la juge Deschamps, afin de clarifier cette situation. Il tente de résoudre l'opposition apparente entre liberté académique et application de la Charte dans un contexte universitaire. Il démontre que dans le contexte actuel, l'application de la Charte semble au contraire susceptible de promouvoir les valeurs de la liberté académique.

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by Dwight NEWMAN\*

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*The Canadian Charter of Rights and Freedoms applies only to governmental action. As a result of this limited scope of application, there have been significant questions concerning its application to post-secondary education contexts. Although early case law appeared to establish universities as a Charter-free zone, later cases have made clear that this is not the case. This paper uses Justice Deschamps's rearticulated rule on Charter application to make this point clear, shows that this revised approach is showing itself in case law, and challenges claims that academic freedom gives reasons not to see Charter application in a university context. Indeed, the paper argues that in the present context, Charter application actually seems likely to further the values of academic freedom.*

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## I. Introduction

Questions about the application of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> have been heavily contested in the context of post-secondary education.<sup>2</sup> The challenging aspect of these questions arises because the *Canadian Charter*, unlike the *Quebec Charter of Human Rights and Freedoms*,<sup>3</sup> applies only to governments.<sup>4</sup> The Quebec framework works quite differently and has, for instance, enabled the application of the *Quebec Charter* even as between students in the context of competing views and actions related to a student strike.<sup>5</sup>

Leading case law that first distinguished governmentally-controlled actors to which the *Canadian Charter* would apply from non-governmental actors to which it would not apply involved postsecondary education. The famous *McKinney* and *Douglas/Kwantlen* cases drew distinctions between different kinds

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1. *Canadian Charter of Rights and Freedoms*, being Schedule B to the *Constitution Act, 1982*, 1982, c. 11 (U.K.).
  2. The other prevalent context involves health care issues. See e.g. *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 and *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 [*Eldridge*] (latter extending former's focus on government control to also look at governmental activities, in context of hospital delivering government health care programmes in a discriminatory manner).
  3. *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.
  4. On *Charter* application generally, see chapter 18 of Guy RÉGIMBALD & Dwight NEWMAN, *The Law of the Canadian Constitution*, Toronto, LexisNexis, 2013. *Charter* application questions of course are primarily determined by interpretation and application of s. 32(1) of the *Charter*: "32. (1) 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." That the *Charter* applies only to governments is actually an important way of ensuring that it properly achieves the values it sets out to achieve. If the *Charter* applied to private actors, the constraints imposed upon individuals' liberty through such application would actually defeat rather than serve the cause of protecting individuals' fundamental freedoms.
  5. See *Beausoleil v. Cégep régional de Lanaudière*, 2012 QCCS 1673.

of postsecondary educational institutions based on the degree of government control to which they were subjected.<sup>6</sup> This early case law based on traditional governance structures, while subjecting many post-secondary institutions other than universities to the *Charter*, seemed to many to put universities generally into a *Charter*-free zone. While other educational contexts have seen a deep engagement with the implications of the *Charter* for expansions of student rights,<sup>7</sup> university administrators have revelled in the sanctity of an elite position above *Charter* challenges.<sup>8</sup> But, as this paper will argue, newer case law makes it clear that this position has effectively been overturned in so far as universities are actually carrying out governmental activity.

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6. Cf. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (government control of university not sufficient for *Charter* application in context of challenge to mandatory retirement policy); *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (same conclusion with another university); and *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 (government control of a college sufficient for *Charter* to apply, with the same true in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 where the board of a college was called an “emanation of government”). The sort of university mandatory retirement policies at issue were pursued further in human rights litigation in *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103 and later cases, with the eventual effect that many universities’ mandatory retirement policies have now been removed, despite the lack of success of the *Charter* argument on the issue in *McKinney*. Sometimes, individuals have still been forced to retire during the transitional period prior to the removal of mandatory retirement and been unable to have this overturned: see e.g. *French v. Nova Scotia (Attorney General)*, 2012 NSSC 394, 323 N.S.R. (2d) 150.
  7. For an earlier discussion, see Ailsa M. WATKINSON, *Education, Student Rights, and the Charter*, Saskatoon, Purich Publishing, 1999. For a more recent and extraordinarily deep analysis of key evolving issues, see Paul CLARKE, *Understanding Curricular Control: Rights Conflicts, Public Education, and the Charter*, London, Althouse, 2013.
  8. University administrators writing about the area have been pleased to find that courts are ready to leave decision-making in the hands of universities themselves. See e.g. David A. HANNAH, *Student-Institution Legal Relationships in Colleges and Universities in the Common Law Provinces of Canada: An Analysis of the Case Law from 1982 to 1994*, PhD Dissertation, Bowling Green, Bowling Green State University, 1996 (unpublished); Robyn JACOBSON, *Managing Conflict and Resolving Disputes Involving Students on University Campuses*, PhD Dissertation, Toronto, York University, 2012 (unpublished).

The university context has remained subject to contestation over recent years. The *Greater Vancouver* case, in which Justice Deschamps applied and succinctly restated *Eldridge's*<sup>9</sup> expanded framework for *Charter* application,<sup>10</sup> was on one factual level about advertising on buses but interestingly involved advertisements sought to be purchased by the Canadian Federation of Students.<sup>11</sup> And, in recent years, the Alberta courts' consideration of *Charter* application in the context of the *Pridgen*<sup>12</sup> case on a university's attempt to censor students' Facebook postings marks a significant new discussion of the implications of the changes made in *Eldridge*<sup>13</sup> and *Greater Vancouver*.<sup>14</sup> The *Pridgen* case evoked a whole new wave of comments on the possibility of *Charter*

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9. *Eldridge*, prec., note 2.

10. *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 S.C.R. 295, par. 16 (*Greater Vancouver*) (Deschamps J. summarizing effect of *Eldridge*, prec., note 2 as leading to the following rule: “Thus, 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*.”)

11. *Id.*, par. 3-4.

12. *Pridgen v. University of Calgary*, 2012 ABCA 139, 350 D.L.R. (4<sup>th</sup>) 1 [*Pridgen CA*], affg *Pridgen v. University of Calgary*, 2010 ABQB 644, 325 D.L.R. (4<sup>th</sup>) 441 [*Pridgen Trial*].

13. *Eldridge*, prec., note 2.

14. *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, prec., note 10.

application to universities in the media,<sup>15</sup> on blogs,<sup>16</sup> and from law firms.<sup>17</sup>

There are, of course, ordinary *Charter* application cases that merely happen to arise in a university context but that do not engage any special considerations because of the university context.<sup>18</sup> For example, searches of a dorm room by a university's security personnel are subject to normal *Charter* application analysis in terms of whether the security personnel were functioning at the time as state agents.<sup>19</sup> Or, a student uttering threats will not find *Charter* freedom of expression values applied against university discipline proceedings, but this will be because of standard rules on lack of freedom of expression protection for threats rather than out of any distinctive feature of the university context.<sup>20</sup> A student putting unclear *Charter* arguments in a

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15. See e.g. John CARPAY, "A Victory for Free Speech at the University of Calgary", *National Post*, May 11, 2012.
  16. See e.g. Jennifer KOSHAN, "Face-ing the Charter's Application on University Campuses", posting of June 13, 2012 on [ablawg.ca](http://ablawg.ca), online: <<http://ablawg.ca/2012/06/13/face-ing-the-charters-application-on-university-campuses-5/>> (accessed October 28, 2014). See also "Does the Charter Apply to Universities", posting of October 17, 2010 on Education Law Blog, online: <<http://educationlawblog.ca/does-the-charter-apply-to-universities/>> (accessed October 28, 2014).
  17. See e.g. Sally GOMERY & Anthony MORRIS, "Application of Canadian Charter to Universities Remains Unclear", June 2012 posting, online: <<http://www.nortonrosefulbright.com/knowledge/publications/67808/application-of-canadian-charter-to-universities-remains-unclear>> (accessed October 28, 2014).
  18. The Supreme Court of Canada decision in *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, could also properly be considered an example of a case raising *Charter* application, but with the issue answered in ways not hinging on the university context. As stated by Iacobucci and Bastarache JJ.'s judgment at par. 25, the *Charter* does not apply to a privately funded university as a private institution, in the same way that it does not apply to any private actor.
  19. See e.g. *R. v. Fitch*, [1994] B.C.J. No. 2027, 93 C.C.C. (3d) 185 (C.A.) (check of room when rent overdue to see if had been abandoned leading to discovery of stolen property).
  20. See *Zhang v. University of Western Ontario*, 2010 ONSC 6489, 328 D.L.R. (4<sup>th</sup>) 289 (S.C.J.). The case resembles a *Charter* application case, though it should technically be distinguished as a case about the scope of internal

procedurally inadequate way will similarly find the *Charter* not to be considered to apply.<sup>21</sup>

The more interesting set of issues on *Charter* application to universities are those arising in ways that engage the distinctive values and character of universities, notably those such as universities' limitation of expression for various reasons, with these situations also often implicitly interacting with at least some issues of academic freedom. This paper seeks to explore these issues, to present a larger theoretical framework on the interaction of academic freedom with questions of *Charter* application than is typically contemplated, and to argue ultimately that there is room for *Charter* application to universities without any threat to their distinctive values and, indeed, with the possibility that *Charter* application may actually enhance the fulfillment of those values in contexts where universities have strayed from them.

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limits on freedom of expression, with an application of the general rule that constitutionally protected expression does not include threats. Indeed, one could even read the judgment as actually presuming or even advocating for *Charter* application against university disciplinary proceedings aimed at student expression. The Court states at par. 35: "With respect to the first issue, namely Mr. Zhang's constitutional right to free speech, as afforded him by s. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms* and Part I, s. 6 of the University of Western Ontario's Code of Student Conduct, we have no doubt whatever about the correctness of the decision of the appeal committee. This court is mindful of the historical importance of encouraging free speech on university campuses, and rigorously defending the right of students to debate difficult and often highly unpopular issues with passion. However, free speech has its limits, including the making of threats and defamation of character. Uttering threats is proscribed by the *Canadian Criminal Code*. Defamatory libel is a serious tort. In the instant case, the panel found after hearing *viva voce* testimony from Mr. R. that he felt personally threatened by the Facebook posting of Mr. Zhang. In so finding, the panel was right to conclude that the applicant was not protected by his professed right to free speech." [underlining added].

21. See e.g. *Maughan v. University of British Columbia*, 2009 BCCA 447, leave to appeal to S.C.C. refused: [2009] S.C.C.A. no. 526.



To do so, Part II briefly reviews the rule offered on *Charter* application by Justice Deschamps in *Greater Vancouver*,<sup>22</sup> the significance of the change reflected in it as compared to early 1990s jurisprudence, and how it properly leads to the *Pridgen* position in favour of universities not being “*Charter-free zones*”.<sup>23</sup> The recognition of the expanded rule on *Charter* application crystallized effectively in Justice Deschamps’s statement is of course not novel, but the resulting application to the university context has been less discussed. Part III categorizes several specific contexts in which the regulation of speech at universities has become a hotly contested area that has led to new advocacy for *Charter* application. Part IV examines the main worries of universities about *Charter* application in this context, showing that the properly considered worries relate to certain dimensions of academic freedom, which the paper seeks to situate within something of a theoretical framework on academic freedom that partly draws upon American jurisprudence in this area. Part V briefly argues that application of the *Charter* in the ways implied by Justice Deschamps’s rule as interpreted in recent case law does not pose a threat to values of academic freedom, properly understood, and may actually enhance the fulfillment of these values. In doing so, Part V also identifies a variety of possible emerging areas of contestation in the area of universities and expression, trying to show in these specific contexts that *Charter* application may actually help guide universities back to a mission of being places of debate.

## **II. Justice Deschamps’s Rule in *Greater Vancouver***

The actual issue of *Charter* application in *Greater Vancouver* was not especially difficult on the facts of the case.<sup>24</sup> Both transit authorities in the case were easily found to be controlled by government and thus not even to need *Charter* application by a different route. However, Deschamps J. nonetheless helpfully

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22. *Greater Vancouver*, prec., note 10.

23. *Pridgen Trial*, prec., note 12, par. 69 (“I am satisfied that the University is not a *Charter-free zone*”).

24. In *Greater Vancouver*, prec., note 10, the transit authorities that declined political advertising were fairly easily recognized as being government.

restated the legal framework within which this conclusion was now situated. She explained the basic framework as follows:

Thus, 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>25</sup>

The second branch, focused on governmental activities, is a branch that has grown since *Eldridge*.<sup>26</sup> There, the conclusion in *Stoffman*<sup>27</sup> that hospitals are not themselves government if they are not under sufficient government control was adjusted to recognize that certain activities of hospitals, in so far as they were delivering government programs and carrying out government policy objectives, could be governmental activities.<sup>28</sup> Governmental activities need not be required in statutory form but can encompass a broader range of policy and program delivery.<sup>29</sup> Where an action is a delivery of a government policy or program, that governmental activity is subject to the *Charter's* application, even if other activities of the same entity are not—this is the rule that Deschamps J. crystallizes so succinctly in *Greater Vancouver*.<sup>30</sup>

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25. *Id.*, par. 16.

26. *Eldridge*, prec., note 2.

27. *Stoffman v. Vancouver General Hospital*, prec., note 2.

28. *Eldridge*, prec., note 2. But see *Rasouli (Litigation Guardian of) v. Sunnybrook Health Sciences Centre*, 2011 ONSC 1500, 105 O.R. (3d) 761, par. 84-93, affd on other grounds 2011 ONCA 482, 107 O.R. (3d) 9, leave to appeal granted [2011] S.C.C.A. No. 329 (trial court going through some reasoning suggesting *Charter* does not apply to doctors, albeit based on older case law).

29. *Eldridge*, prec., note 2, par. 44.

30. *Greater Vancouver*, prec., note 10, par. 16.

This rule marks a meaningful change from the set of cases enunciated alongside *McKinney*.<sup>31</sup> To say as much should not be surprising in so far as *Eldridge*<sup>32</sup> marked a departure from *Stoffman*<sup>33</sup> and a subsequent recognition that hospitals are not “Charter-free zones”. The same principle naturally applies against *McKinney* itself—where *McKinney* could have been read as precluding the application of the *Charter* to universities in general terms, the rule that developed in *Eldridge* and was given clear voice by Deschamps J. in *Greater Vancouver* says that if some activities of universities amount to delivery of government policies and programs, then those activities will be subject to the *Charter*. Universities are not “Charter-free zones”.<sup>34</sup> Although that point was not widely noticed immediately after *Eldridge*, logical and legal consistency can lead to no other conclusion.

This application of the *Charter* to specific activities of universities has now received recognition through to the Court of Appeal level in Alberta. The case of *Pridgen v. University of Calgary*<sup>35</sup> involved the university imposing disciplinary proceedings against two young students for posting comments on their Facebook walls in which they criticized a sessional lecturer as having been an ineffective teacher. The students objected to the restriction of their expression and ultimately pursued litigation.

At trial, the judge highlighted a passage in *McKinney* that could lead to a reading of it that is consistent with the later case

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31. *McKinney v. University of Guelph*, prec., note 6.  
32. *Eldridge*, prec., note 2.  
33. *Stoffman v. Vancouver General Hospital*, prec., note 2.  
34. *Pridgen Trial*, prec., note 12, par. 69.  
35. *Id.*, note 12, affd *Pridgen CA*, prec., note 12.

law<sup>36</sup> and referenced the developments in *Eldridge*.<sup>37</sup> Based on an analogy to *Eldridge*, the *Charter* could apply:

In my view, the circumstances in this case are analogous to those in *Eldridge* as the University is acting as the agent of the provincial government in providing accessible post-secondary education services to students in Alberta pursuant to the provisions of the *PSL Act*... In this context, I find that the University is tasked with implementing a specific government policy for the provision of accessible post-secondary education to the public in Alberta, thus bringing the facts of this case into line with *Eldridge*.<sup>38</sup>

This trial decision was upheld by the Alberta Court of Appeal, albeit in a somewhat more confusing manner than needed to be the case. The lead judgment of Paperny J.A. carries out a masterful overview of different categories of *Charter* application, each of which she goes on to detail, but which she could summarize as follows:

A review of the authorities yields five broad categories of government or government activities to which the *Charter* applies.

1. Legislative enactments;
2. Government actors by nature;
3. Government actors by virtue of legislative control;
4. Bodies exercising statutory authority; and

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36. *Id.*, note 12, par. 38, quoting *McKinney*, prec., note 6 at par. 42 (“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 and, as noted, there is no statutory requirement imposing mandatory retirement on the universities”).

37. *Pridgen Trial*, prec., note 12, par. 42-48, culminating in par. 48 (“As the Supreme Court recognized in *Eldridge*, the *Charter* may apply in one of two ways; it may apply to a government actor or it may apply to non-government actors responsible for the implementation of a specific government policy or activity”).

38. *Id.*, par. 59 and 63.

5. Non-governmental bodies implementing government objectives.<sup>39</sup>

Justice Paperny would have held the *Charter* to apply on the same basis as the trial judge had held, in the form of the university's implementation of governmental policy in the area of post-secondary education, but she suggested there was another alternative route to application on the facts of the case in terms of the statutory compulsion the university exercised against the students.<sup>40</sup>

Justice McDonald wrote a separate concurring judgment based solely on administrative law grounds, preferring not to decide the *Charter* application issue.<sup>41</sup> Justice O'Ferrall rounded things out with a third concurring judgment in which he held that the university bodies ought to have considered civil rights values like freedom of expression in their decision-making, although not necessarily because of *Charter* application but also because of long-standing traditions of freedom of expression within the common law.<sup>42</sup> One could almost characterize the situation as one of three judges with four opinions. But it nonetheless seems right to take the opinion of Paperny J.A. as the lead judgment, which answered the questions put before the Court, and which can derive further support from dimensions of O'Ferrall J.A.'s slightly more equivocal analysis.

The rule developed in part in *Eldridge* and put powerfully by Deschamps J. in *Greater Vancouver* leads to a conclusion, as recognized by Paperny J.A. in the Alberta Court of Appeal in *Pridgen*, that the *Charter* can apply to some activities of universities, particularly when the activities in question are implementing governmental policies.

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39. *Pridgen CA*, prec., note 12, par. 78.

40. *Id.*, par. 104-106.

41. *Id.*, par. 130.

42. *Id.*, par. 178.

### III. Contested Instances of Charter Application to Universities

This reality that universities are not immune to the *Charter* raises, however, the question of in what activities universities are subject to the *Charter*. A full-fledged answer could well examine many different areas of university policy. However, the particular area that has been contentious in recent case law concerns several spheres in which universities have acted in ways limiting expression. It is however possible to identify several categories within these expression-limiting actions, so as to consider the possibility that there are pertinent distinctions between some of them. For the moment, for purposes of this part, it is worth simply categorizing applications that have already received attention in the limited case law to date, with Part V later turning to more prospective possibilities.

One category has consisted of limitation of expression by students concerning the university itself. The *Pridgen* case fits this category in so far as it concerned student comment on the teaching a university provided.<sup>43</sup> A second category has consisted of limitation of expression by individuals (including non-students) on matters that could be under discussion within a university, encompassing within broad academic terms potentially all matters of human existence. Freedom of expression challenges have succeeded, for example, in some instances against universities that sought to preclude individuals from placing flyers on vehicles that presented individuals' (controversial and quite possibly emotionally distressing to some readers) perspectives on issues of morality and public policy that might reasonably be thought to be under discussion within a university.<sup>44</sup> Similarly, *Charter* freedom of

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43. *Id.*

44. See *R. v. Whatcott*, 2012 ABQB 231 (Alberta Court of Queen's Bench holding on an appeal that *Charter* applied to university using trespass statutes to prevent Whatcott from putting flyers on cars, with judge elaborating several different bases for *Charter* application and going on to hold that Whatcott's freedom of expression violated by university). See also *R. v. Whatcott*, 2002 SKQB 399 (Saskatchewan Court of Queen's

expression rights were an important dimension in a recent determination against the University of Calgary in constraints it had put on students' political and moral expression (requiring them to display placards in a certain manner to limit their visibility) on a controversial public policy issue.<sup>45</sup> A third category could consist of challenges to academic judgment on expression, with there having been instances where students challenged academic judgments that their work did not meet particular standards (of excellence or of success).<sup>46</sup>

Already, it might be apparent that the first two categories are different from the third. As will be elaborated in the next Part, the first two relate to expression that has actually traditionally been at the core of what academic freedom protects, and a limitation on this expression purportedly based on academic freedom thus comes across immediately as tension-laden. The third category, however, consists of what is actually a challenge to the exercise of a dimension of academic freedom; part of academic freedom is the exercise of proper academic judgment on things expressed.<sup>47</sup> The third category of limitation thus might be much more readily

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Bench holding that *Charter* applied in context of university having adopted bylaws that were used to prevent Whatcott from putting flyers on cars).

45. See *Wilson v. University of Calgary*, 2014 ABQB 190 (Horner J. ultimately concluding, based on a mixture of reasons including the severity of threat to *Charter* expression rights in the university's conduct, that the university had not provided sufficient appeal mechanisms for the students, with the university's later determinations resulting from the judgment in more recent months ultimately finding in favour of the students).
46. For examples along these lines, see e.g. *Alghathiy v. University of Ottawa*, 2012 ONSC 142 (concerning student attempting to challenge neurosurgery program deeming some of his emails unprofessional and thus affecting his place in the residency program); *Maughan*, prec., note 21.
47. See Eric BARENDT, *Academic Freedom and the Law: A Comparative Study*, Oxford, Hart Publishing, 2010, p. 110 (describing the English legal principle that "universities and other bodies such as funding councils enjoy unfettered discretion to make purely academic judgments", something also found in German and American case law). The same principle runs through case law in Canada on the role of the university "visitor". See e.g. *King v. University of Saskatchewan*, [1969] S.C.R. 678; *University of Saskatchewan v. Pearlman*, 2006 SKCA 105.

justified as against application of the *Charter* (even though one could obviously imagine instances in which it would be abused).

However, there are further categories of cases that have also arisen that may initially seem of a significantly different category but are actually arguably closer to the educational context than may be first apparent. These concern regulation by a university of dimensions of student government<sup>48</sup> or of extracurricular activities, including through allocation of space for extracurricular activities.<sup>49</sup> Courts have rejected *Charter* application in some such cases, notably in *Lobo v. Carleton University*.<sup>50</sup> The case concerned a claim by students to use space for their extracurricular activities that involved the expression of particular moral, religious, and political views, and the trial court held that the university decision was not subject to the *Charter* because it was not implementing any specific governmental program or policy,<sup>51</sup> something the Court of Appeal upheld in an oral judgment of a scant few paragraphs.<sup>52</sup>

One question that arises is whether the informal curriculum of an educational institution can be so easily distinguished from the formal curriculum, so as to say that student extracurricular activities have no place within their educational experience and academic activity.<sup>53</sup> If this distinction cannot be so fiercely drawn, then it may be that this category is no different than others in which student expression of views is limited.

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48. For an example, see *Telfer v. University of Western Ontario*, 2012 ONSC 1287 (Court not applying *Charter* to disciplinary proceeding arising from conduct in student election context, although with Court splitting on administrative law dimensions in the case).

49. See e.g. *Lobo v. Carleton University*, 2012 ONSC 254, affd 2012 ONCA 498.

50. *Id.*

51. *Id.*

52. *Lobo v. Carleton University*, 2012 ONCA 498.

53. Drawing on other literature, Paul Clarke suggests that the informal curriculum—what an educational institution teaches about behaviours and values through aspects of the institution outside the formal curriculum—may be just as important to the educational experience. See Paul T. CLARKE, *Understanding Curricular Control: Rights Conflicts, Public Education, and the Charter*, London, Althouse Press, 2013, p. 161.



#### **IV. Academic Freedom and *Charter* Application**

Universities themselves have not been enthusiastic to see the *Charter* apply to their activities. At one level, this reticence reflects a simple desire to avoid the legal complexity that may ensue, as they then have to distinguish between university activities to which the *Charter* does and does not apply and test their activities for *Charter* compliance, no doubt at meaningful financial cost. Any business owner could likely empathize with the challenges awaiting university administrators subjected to a new layer of legal complexity. However, in many contexts, there have been holdings that mere administrative inconvenience is no reason to reject *Charter* claims,<sup>54</sup> and the same principle surely applies here to *Charter* application.

A separate argument raises academic freedom, whether in more general terms or in terms of institutional independence of academic institutions. Both arguments were put at the Alberta Court of Appeal in *Pridgen*.<sup>55</sup> This argument certainly seems more important than the question of administrative inconvenience for academic institutions. If academic institutions are a sphere unto themselves, deserving of institutional independence and academic freedom, the claim that they are properly outside the scope of the *Charter* has more plausibility.

Canada does not have a specific doctrine of academic freedom, unlike other democratic states of interest.<sup>56</sup> In Canada, there are some brief references to academic freedom in *McKinney*, where LaForest J. refers to the value of academic freedom as the “free and fearless search for knowledge and the propagation of

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54. See e.g. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

55. *Pridgen CA*, prec., note 12, par. 3.

56. For a comparative analysis of Germany, the United States, and the United Kingdom, see BARENDT, prec., note 47.

ideas”<sup>57</sup> and suggests that it is “essential to our continuance as a lively democracy”.<sup>58</sup> But he gives it no specific legal force.

Germany, by contrast to Canada, has an actual textual provision in its constitution to guarantee scientific and teaching freedom (*Wissenschaftsfreiheit* and *Lehrfreiheit*).<sup>59</sup> The United States, by contrast to Canada, has actually developed a constitutional academic freedom doctrine, with prominent United States Supreme Court statements in favor of both academic freedom generally<sup>60</sup> and institutional academic freedom.<sup>61</sup> Indeed, the US cases appear to enunciate a constitutional weight to academic freedom—as an expression of First Amendment values—that could weigh off against other constitutional values in certain circumstances.<sup>62</sup> This is a concept that Canada could reasonably

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57. *McKinney*, prec., note 6, par. 62.

58. *Id.*, par. 69.

59. Article 5(3) of the German Basic Law states: “Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.” This is the translation in BARENDT, prec., note 47, p. 117.

60. See e.g. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 & 263 (1957) (both Warren CJ and Frankfurter J offering statements supportive of academic freedom, with Frankfurter J’s being particularly quoted elsewhere); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (Brennan J offering a robust defence of academic freedom amid case where majority upholds faculty members’ challenge to a New York statute requiring dismissal on several political grounds).

61. See e.g. *Regents for the University of California v. Bakke*, 438 U.S. 265 (1978) (universities entitled to pursue diversity policies partly because of their institutional independence being a counterweight to constitutional discrimination claims); *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985) (Court to respect faculty professional judgments except in extreme cases); *Board of Regents of University of Wisconsin v. Southworth*, 529 U.S. 217 (2000) (university’s institutional independence entitling it to require students to pay fees to support student organizations even where disagreement with particular organizations, with organizational dimension to university’s rights); *Grutter v. Bollinger*, 539 U.S. 306, 329 (2000) (O’Connor J. referring to how “universities occupy a special niche in our constitutional tradition”).

62. This effectively remains the present position on affirmative action implemented for purposes of diversity within the academic institution. See

draw upon. Although s. 2(b) extends freedom of expression to various textually determined contexts that do not specifically include academic freedom, academic freedom would appear to be a reasonable analogous extension.

The implications of this extension, however, do not weigh easily in favor of any academic institutional immunity from *Charter* scrutiny, at least in the particular context of freedom of expression. The very purposes of such a freedom make freely exchanged ideas quite central to its fulfillment. So, if the main contexts giving rise to issues, as suggested in the last Part, concern university limitations on expression, then there is little reason to identify academic freedom giving rise to a reason for constraint on *Charter* application. In this context, *Charter* application actually furthers the values of academia.

That said, some could object that the *Charter* was not necessarily designed for purposes of regulating universities and that application via s. 32 is thus something of a blunt instrument for oversight of universities and one that threatens institutional independence. On such an argument, academic freedom would then be constrained by *Charter* application, and there would be preferable means of oversight, such as the institution of the university "visitor".<sup>63</sup> And, indeed, there might well be some core academic activities—such as the critical assessment of ideas through exercise of academic judgment—that merit profound deference.<sup>64</sup> There will even be needs for academic organization that may give rise to reason to defer to certain institutional decisions.<sup>65</sup>

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generally *Fisher v. University of Texas at Austin*, 570 U.S. \_\_\_\_ (2013) (slip op.).

63. For an overview of this institution, see generally *Pearlman*, prec., note 47. See also J.L. CALDWELL, "Judicial Review of Universities—The Visitor and the Visited" (1982) 1 *Canterbury L. Rev.* 307.

64. *Regents of University of Michigan v. Ewing*, prec., note 61 (Court to respect faculty professional judgments except in extreme cases).

65. *Board of Regents of University of Wisconsin v. Southworth*, prec., note 61 (university's institutional independence entitling it to require students to pay fees to support student organizations even where disagreement with

However, it is frankly not clear that there is anything in the idea of academic freedom that obviously, inherently calls for *Charter* immunity. Universities as *Charter*-free zones have shown themselves, as institutions, to be subject to forces that lead them away from their own values. As the last Part will show, in the kinds of situations where *Charter* claims are arising, application of the *Charter* actually has the potential to preserve academic values.

## **V. *Charter* Application as Furthering Academic Values**

Given the kind of situations in which *Charter* application to universities has been argued, there is reason to say that *Charter* application could actually further academic values. Justice Paperny in *Pridgen* engages in some analysis of the academic freedom arguments, and she concludes as follows:

In my view, there is no legitimate conceptual conflict between academic freedom and freedom of expression. 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. There is no apparent reason why they cannot comfortably co-exist. That said, if circumstances arise where these values actually collide, a section 1 analysis would be required to properly balance them. That circumstance does not arise in this case.<sup>66</sup>

Two key points are present in this passage. First, there is no conflict between academic freedom and freedom of expression. Second, there is a way to take into account the considerations of academic freedom elsewhere in the *Charter* analysis rather than as giving rise to an argument against *Charter* application. Quite simply, the availability of a limitations analysis means that there always remains a mechanism by which academic freedom considerations can be part of the analysis. Where universities limit

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particular organizations, with organizational dimension to university's rights).

66. *Pridgen CA*, prec., note 12, par. 117.

*Charter* rights, they may have a justification for doing so in considerations of academic freedom, but they should need to prove this justification rather than simply to wave around generalized academic freedom considerations before claiming *Charter* immunity.

Within a short article focused specifically on identifying the application of the *Charter* to university freedom of expression issues, it would of course be out of place to attempt a complete typology of possible freedom of expression issues that may arise on campus. Such a typology would relate more to a substantive *Charter* analysis of campus expression. However, it is nonetheless worth identifying the sorts of issues that *Charter* application in this context may open to constitutional scrutiny, so as to reinforce the point that *Charter* application actually has prospects of furthering academic freedom.

University campuses have actually become places where freedom of expression comes under many different sorts of threats, a phenomenon not unique to Canada. Indeed, the United States has seen some of the issues much more exposed and scrutinized.<sup>67</sup> However, many of the sorts of restraints on expression on university campuses have overlapped those in Canada. As catalogued by those examining restraints on campus expression, they have included such matters as: constraints on student groups expressing views on controversial issues; viewpoint constraints, such as in the cancellation of speakers promulgating views on controversial issues; campus speech codes of various sorts that often have chilling effects beyond those intended; and removals of individuals from academic posts based on expression of particular viewpoints.<sup>68</sup>

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67. See e.g. Donald Alexander DOWNS, *Restoring Free Speech and Liberty on Campus*, Cambridge, Cambridge University Press, 2006.

68. See *id.* For further cataloguing of issues, particularly helpful are the ongoing reports in the United States by the Foundation for Individual Rights in Education (FIRE) and in Canada by the Justice Centre for Constitutional Freedoms (JCCF), with its annual Campus Freedom Index. Such matters as the removal of individuals from academic posts is not a mere bogeyman of the imagination, as seen with the widespread public attention to the termination from both an administrative position and his

Another category, of course, whose status as “on-campus” or “off-campus” is sometimes part of the issue at stake pertains to university disciplining of students for cyberspeech that may or may not have any physical link to campus, with such discipline arising overwhelmingly from negative comments about school officials.<sup>69</sup> Notably, many of these constraints on expression actually limit or chill academic speech or speech on the sort of policy issues in which one would hope students and faculty would engage.

To the extent they are focused on facilitating matters like equal participation in the educational environment, some of these restraints on expression will of course gain greater sympathy within the Canadian context, where less absolutist versions of freedom of expression prevail than in the United States. Thus, whereas the regulation by universities of actual expressions of hatred in the United States needs to focus on forms of expression actually promoting intimidation,<sup>70</sup> there will be more possible arguments to raise within a Canadian proportionality analysis for rights limitation. With that reality, there is very little prospect that *Charter*

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tenure (later reversed) by the University of Saskatchewan of Robert Buckingham in mid-2014 or the less widespread public attention to the University of Calgary's attempts to present Tom Flanagan as having been moved into retirement in 2013 after a controversial video of public statements during a presentation. The latter is detailed in Tom FLANAGAN, *Persona Non Grata*, Toronto, McLelland & Stewart, 2014. On campus speech codes, there is an extensive American case law on their often overbroad construction – see e.g. *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008) – and growing scholarship on their chilling effects – see e.g. Azhar MAJEED, “Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes”, (2009) 7 *Georgetown J. L. & Public Pol’y* 481; and Steven R. GLASER, “Sticks and Stones May Break My Bones But Words Can Never Hurt Me: Regulating Speech on University Campuses”, (1992) 76 *Marquette L. Rev.* 265 (the latter showing instances of campus speech codes that chilled discussion of cases in a law school environment).

69. For a discussion in the American context of the extensive case law on the issue, see Emily GOLD WALDRAM, “Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions”, (2011) 19 *Wm. & Mary Bill of Rights J.* 591.

70. For discussion, see Alexander TESIS, “Burning Crosses on Campus: University Hate Speech Codes”, (2010) 43 *Connecticut L. Rev.* 617.

application in respect of campus freedom of expression issues will harm universities' pursuit of their mission.

Indeed, on the contrary, *Charter* freedom of expression arguments on campus are likely to further universities' academic mission. The types of expression at issue bear centrally on the academic mission of universities. Thus, the American Association of University Professors has issued a strong statement in defence of free speech on campuses, putting the point baldly: "On a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed".<sup>71</sup> Or, in a Canadian context, as stated by Jeffrey J.,

[The university mission] is consistent with a University campus that is censorship-free not *Charter*-free. This is consistent with divergent viewpoints on campus being encouraged, not curtailed by wielding the powers of the state merely to save an attendee from having to contend with, or even just encounter, an alternate perspective. Does anyone actually expect to attend a university campus and encounter only the ideas they already embrace? Are only select viewpoints now permissible on our university campuses? John Stuart Mill in his essay "On Liberty" opined that "he who knows only his own side of the case, knows little of that".<sup>72</sup>

Returning to the application issue, the rule offered by Deschamps J. in *Greater Vancouver*,<sup>73</sup> which focuses on activities furthering governmental programs or policies, is fully coherent with applying the *Charter* to university educational and academic activities within the formal and informal curricula. This consequence might not have been contemplated by the Court at the time, but it is a valuable result. In the context of contemporary universities often restricting expression (or failing to protect

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71. Council of the American Association of University Professors, "On Freedom of Expression and Campus Speech Codes", (November 1994).

72. *R. v. Whatcott*, 2012 ABQB 231, par. 33.

73. *Greater Vancouver*, prec., note 10.

expression), the *Charter* may actually be a means of saving them and their own values from themselves.