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Citation: Hamill, S. (2017). Of Malls and Campuses: The Regulation of University Campuses and Section 2(b) of the Charter. Dalhousie Law Journal, 40(1),

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Forthcoming in the *Dalhousie Law Journal*.

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Of Malls and Campuses: The Regulation of University Campuses and Section 2(b) of the *Charter*

Abstract

There have been a number of recent cases from across Canada about whether the *Charter* applies to public universities. Courts in Alberta have suggested that the *Charter* will apply to public universities while courts in British Columbia and Ontario have refused to apply the *Charter* to such cases. In this article I focus on the cases that also involve a claim to use university space, that is, those cases where there is an argument that by failing to allow an event on campus the university has violated the free expression guarantee in the *Charter*. If the *Charter* does apply, and I argue that it does, this matters for how we conceive of university property. It is too simplistic to hold that university property is private and, as such, section 2(b) should grant a right of access to some instances of university property under certain circumstances.

Introduction

"No support is needed for the proposition that universities are established in the public interest to serve a public purpose, or the importance, in some cases, of the physical facilities used to that end."[1] Here, Willcock J.A., writing for a unanimous British Columbia Court of Appeal in *British Columbia Civil Liberties Association v. University of Victoria,* linked the physical space of universities with their role and purpose. It was, for him, so obvious as to hardly need saying. However, just because the two are linked does not mean that students (or anyone else for that matter) have the right to access university property for the purposes of free expression.

The expression at issue in *BCCL CA* involved attempts of anti-abortion activists to hold graphic protests on campus, and *BCCL CA* is but one of a growing number of similar cases.[2]

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[1] *British Columbia Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at para 10 [*BCCL CA*] aff'g *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39 [*BCCL*].

[2] *Lobo v Carleton University*, 2012 ONCA 498, [2012] OJ No 3161 [*Lobo*]; *Wilson v University of Calgary*, 2014 ABQB 190 [*Wilson*].

When these anti-abortion protests do go ahead, whether or not they have been officially sanctioned, the response is often vehement opposition which sometimes results in the protesters facing verbal and even physical attacks.[3] Consequently, a number of Canada's public universities have become reluctant or have refused to allow anti-abortion protests to go ahead on campus, whether they take the form of a demonstration or a poster display. Additionally, several anti-abortion groups have been denied or have lost official club status which affects their ability to access and use campus spaces.[4] Are universities entitled to prevent such protests from taking place and, if so, is that not a violation of the right to free expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*?[5] It is here courts have split, with those in Alberta and Saskatchewan finding that the *Charter* does apply to public universities and those in British Columbia and Ontario holding that it does not.[6]

In claiming that they have the right to protest on university campuses, anti-abortion activists typically argue that the *Charter* applies to public universities and, moreover, that in denying access to campus space these universities are unduly infringing section 2(b) of the *Charter*.[7] In so arguing, the anti-abortion groups face an uphill struggle, as it is far from clear that the *Charter* applies to public universities and, even if it does apply, it is equally uncertain whether it would grant them access to university property for the purposes of free expression.

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[3] *BCCL, supra* note 1 at para 58.
[4] See, e.g., Michelle Da Silva, "Campus Crusade: Pro-Lifers Fight for Club Status at Ryerson" *Now Toronto* (18 November 2015) online: www.nowtoronto.com/news/campus-crusade-pro-life-club-at-ryerson.
[5] *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act, 1982* (UK), 1982, c11, s 2(b) [*Charter*]. *Lobo, supra* note 2; *BCCL, supra* note 1; *Wilson, supra* note 2. The cases are discussed below.
[6] *R v Whatcott*, 2002 SKQB 399, [2003] 4 WWR 149 [*Whatcott (Regina)*]; *Wilson, supra* note 2.
[7] The one exception is *Gray v Alma Mater Society of the University of British Columbia*, 2003 BCSC 864, 15 BCLR (4th) 358 [*Gray*] as there the anti-abortion activists conceded the point about *Charter* applicability.

Both these issues raise questions about where to draw the line between what is public and what is private.

For the *Charter* to apply to the acts of a public university, these acts must somehow fall under the ambit of "government action."[8] Clearly, the *Charter* will not apply to a private university such as British Columbia's Trinity Western University, but simply being a public institution does not result in a duty of *Charter* compliance in all spheres of institutional action. A number of lower courts have asserted that the question of the *Charter*'s applicability to public universities has been answered in the negative: the *Charter* does not apply.[9] The authority they cite for such a claim is, however, over a quarter-century old and dealt with university policies about mandatory retirement.[10] The hiring and retiring of university staff is hardly central to the specifically public functions of a university. A close reading of *McKinney v. University of Guelph* strongly suggests that the Supreme Court of Canada left room for the *Charter* to apply in other contexts; it is this reading that courts in Alberta and Saskatchewan have followed, even if their counterparts in Ontario and British Columbia disagree.[11]

What the Ontario and British Columbia courts overlook is that since *McKinney* a substantial amount of jurisprudence has flowed from the Supreme Court about "government action"[12] and about the role of the *Charter* more broadly. The more recent jurisprudence may not

[8] *Charter*, *supra* note 5, s 32. For earlier discussions of the *Charter* and public universities see, Christopher Henderson, "Searching for "Government Action": Post-Secondary Education as a Case Study in the Conceptual Weaknesses of the *Charter*'s Government Action Doctrine" (2005) 15 Educ &LJ 233; Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal Current L & L Reform 79; Craig Jones, "Immunizing Universities from *Charter* Review: Are We Contracting Out Censorship?" (2003) 52 UNBLJ 261.
[9] *Lobo*, *supra* note 2; *BCCL*, *supra* note 2; *Telfer v University of Western Ontario*, 2012 ONSC 1287 [*Telfer*]
[10] *McKinney v University of Guelph*¸ [1990] 3 SCR 229, 2 OR (3d) 319 [*McKinney* cited to SCR].
[11] *Pridgen v University of Calgary*, 2012 ABCA 139, 350 DLR (4th) 1 [*Pridgen*]; *Wilson*, *supra* note 2; *Whatcott (Regina)*, *supra* note 6 at paras 40-45.
[12] *Charter*, *supra* note 5, s 32.

be specifically about universities but is about which actions must comply with the *Charter*,[13] the role of *Charter* values when *Charter* rights do not apply,[14] and where and under what circumstances *Charter* rights can be exercised.[15] Public universities are caught in an intersection of these ideas, which results in a more complicated picture than the simple claim that the *Charter* does not apply. While the periodic discussions of *Charter* applicability to universities have focused on the question of government action they have tended to overlook the physical space of universities themselves. Are the campuses of public universities private property? Are all parts of the campus private property? Is it not possible that if some of a university's acts fall under government action this could matter for how we conceive of the physical space of the university itself?

In this article I examine recent case law which involves not just a claim that the *Charter* applies to universities but also a claim to use campus facilities for the exercise of a *Charter* right, namely free expression. I argue that the question of free expression cannot be so readily excised from the question of space and that without paying attention to the tacit property law arguments, any victories with respect to the application of the *Charter* will be hollow. The reason the victories would be hollow is that the public-private distinction of section 32 is echoed in the question of what spaces are available for section 2(b) rights. In short, even if universities are

[13] For a discussion of this jurisprudence see, *Pridgen, supra* note 11 at paras 78-99.
[14] See, e.g., *Hill v Church of Scientology*, [1995] 2 SCR 1130, 24 OR (3d) 865; Mark D Walters, "Respecting Deference as Respect: Rights, Reasonableness and Proportionality in Canadian Administrative Law" in Hanna Wilberg & Mark Elliott, eds, *The Scope and Intensity of Judicial Review: Traversing Taggart's Rainbow* (Oxford: Hart Publishing, 2015) 395 at 412; Jamie Cameron, "Giving and Taking Offence: Civility, Respect, and Academic Freedom" in James L Turk, *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Toronto: James Lorimer & Co, 2014) 287 at 297-98.
[15] See, e.g., *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 77 DLR (4th) 385 [*Commonwealth of Canada*, cited to SCR]; *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084, 15 OR (3d) 548 [*Ramsden* cited to SCR]; *Montreal (city) v 2952 -1366 Quebec Inc*, 2005 SCC 62, [2005] 3 SCR 141 [*Montreal (City)*]. See also, *Vancouver (City) v Zhang*, 2010 BCCA 450, 325 DLR (4th) 313 [*Zhang*].

public enough for the *Charter*, their property might well be private and thus unavailable for section 2(b).

My argument is not that *all* of a public university's buildings should be open for free expression but that, under certain circumstances, there ought to be *some* space on campus which is open. I should also make it clear that I am not arguing for the appearance of the old public forum doctrine which was briefly seen in the United States.[16] For one thing, it is not clear that university campuses are exactly comparable to malls and other types of privately-owned, yet publicly accessible property. My point is that the nature of universities themselves and the close relationship between academic freedom and free expression ought to result in their physical spaces being more open to free expression than they currently are.[17] If certain aspects of a public university's functions can fall under government action – and I argue that they can and do – then the application of the historical function test should result in university property being open to free expression.[18]

I begin by briefly setting out the concepts of government action, public property, and free expression as they might apply to public universities in Canada. The first two concepts seem readily identifiable but both the practice and theory are more complex than they appear. Similarly, free expression has proven to be a concept in flux and there have been a number of controversies surrounding what constitutes free expression on campus, with a particular concern about safe spaces which are free from discriminatory, offensive or upsetting speech.[19] The

[16] See e.g. Timothy Zick, "Property, Place, and Public Discourse" (2006) 21 Wash U JL & Pol'y 173.
[17] For more on this relationship see, Cameron, *supra* note 14.
[18] The historical function test is taken from *Montreal (City)*, *supra* note 15 at para 74.
[19] This is an international concern; for some recent discussion in the American context as the result of a scandal on Yale University's Campus, see, e.g., Adrienne Green, "Do Historically Black Colleges Provide the Safe Spaces Students are After?" *The Atlantic* (19 November 2015) online: <www.theatlantic.com/education/archive/2015/11/are-hbcus-necessary-racial-sanctuaries/416694>; For a Canadian

second section examines the recent divergence between Alberta and two other provinces, namely British Columbia and Ontario. The third section examines what a finding of *Charter* applicability would mean for who gets to access university property to exercise section 2 (b) rights.

I. *Public or private: Universities and their campuses, government action, and free expression*

There are three questions central to the recent spate of cases about free expression on university campuses. These are if and when universities will be caught by the *Charter*'s reference to government action; how property is divided into public and private, particularly in the context of universities; and what are the values of and acceptable limits on free expression? The last question also calls to mind the additional one of how free expression relates to academic freedom. For ease of analysis, this section is sub-divided to deal with each question in turn. Running through each section is the difficulty of offering a clear dividing line between public and private.

1. *Public bodies but not government? Section 32 and public universities*

By virtue of section 32 of the *Charter*, the *Charter* only applies to "government action." It does not apply to private actors and will not apply in solely private disputes, though such disputes

discussion see, David Watson, "Delineating Safe Spaces Key to Protecting Free Speech on University Campuses" *The McGill Tribune* (24 November 2015), online: <mcgilltribune.com/opinion/lessons-from-yale-delineating-safe-spaces-key-to-protecting-free-speech-102937> ; See also, Cameron, *supra* note 14.

may well fall under provincial human rights legislation.[20] However, modern government is complex, consisting of the three traditional branches of government – the executive, the legislature, and the judiciary – as well as a vast administrative state whose constituent parts differ widely in their structure and powers, to say nothing of the various private entities and autonomous statutory bodies charged with implementing government policy. Consequently, the question of which bodies and which acts will be caught by section 32 is something of a Gordian knot as there is no longer (if there ever was) a clear-cut distinction between public action and private action.[21] As yet, Canadian courts have not found a test which can untangle the knot. Instead, since 1982, they have, to continue the metaphor, tied themselves in knots. In this sub-section, I offer a brief overview of section 32 jurisprudence. As will become clear, part of the problem lies in the fact that the test, as applied to public universities, seems subjective and has led to a range of different answers to the same or similar questions.

Despite an early flurry of academic interest in synthesizing and distilling the case law on section 32,[22] the most recent and comprehensive survey comes from Articleny J.A. of the Alberta Court of Appeal in *Pridgen v. University of Calgary*.[23] Her analysis is particularly relevant given that she applied it to the University of Calgary. Justice Articleny identified five categories of "government or government activities to which the *Charter* applies."[24] These categories were:

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[20] *Whatcott (Regina), supra* note 6 at para 11.
[21] For critique of the public-private divide, see: Patricia Hughes, "The Intersection of Public and Private Under the *Charter*" (2003) 52 UNBLJ 201 at 201; Allan C Hutchinson, *Waiting for Coraf: A Critique of Rights and Freedoms* (Toronto: University of Toronto Press, 1995) at 120-128.
[22] See, e.g., A Anne McLellan & Bruce P Elman, "To Whom Does the Charter Apply?—Some Recent Cases on Section 32" (1986) 24:2 Alta L Rev 361; Dale Gibson, "Distinguishing the Governors from the Governed: The Meaning of Government Under Section 32(1) of the *Charter*" (1983) 13 Man LJ 505; Gordon P Crann, "How Far Does the *Charter* Reach?—a Theoretical Review of the Section 32(1) Debate and Canada's Emerging Governmental Action Doctrine" (1989) 47:1 UT Fac L Rev 156.
[23] *Pridgen supra* note 11; Jennifer Koshan, "Face-ing the Charter's Application on University Campuses" ABlawg.ca (13 June 2012), online: <ablawg.ca/2012/06/13/face-ing-the-charters-application-on-university-campuses-5>.
[24] *Pridgen, supra* note 11 at para 78.

legislative enactments including regulations and by-laws;[25] bodies that are government actors by nature, such as provincial governments but also municipalities;[26] bodies that are government by virtue of the degree of legislative control over them, also known as the "government control test," such as community colleges and transit authorities;[27] bodies which exercise statutory authority and act in a "governmental capacity" particularly when such bodies have a statutorily-granted coercive power which is greater than that exercised by a private individual;[28] and "non-governmental bodies implementing government objectives" such as hospitals.[29] The last two categories are designed to prevent the government from "contracting out" of their constitutional obligations by delegating authority to non-governmental entities. These five categories are neither closed nor mutually exclusive.[30]

As useful as Articleny J.A.'s summary is, her application to the University of Calgary has two drawbacks: first, the other two decisions in *Pridgen* did not fully discuss the *Charter* issue and secondly, *McKinney* remains the last word from the Supreme Court of Canada about the *Charter*'s application to universities. *McKinney* was one of a quartet of cases about whether a hospital, a community college, and two public universities were caught by section 32.[31] These decisions were famously complex and show how confused and contradictory the Court's approach to section 32 was in the early years. A majority of the Court said that the test for determining if the *Charter* applied was the structural connection of these institutions to the

[25] *Ibid* at para 79.
[26] *Ibid* at paras 80-81.
[27] *Ibid* at paras 82-84; *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570, 77 DLR (4th) 94 [*Douglas/Kwantlen* cited to SCR]; *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 [*GVTA*].
[28] *Pridgen, supra* note 11 at paras 85-93, quote from para 86 citing *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 49, 152 DLR (4th) 577.
[29] *Pridgen, supra* note 11 at paras 94-98.
[30] *Ibid* at para 99.
[31] *McKinney, supra* note 10; *Harrison v University of British Columbia*, [1990] 3 SCR 451, 77 DLR (4th) 55; *Douglas/Kwantlen, supra* note 27; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700.

government; a test which centred on the degree of direct control of the government over the body. As such, community colleges were caught by section 32 but hospitals and universities were not, due the autonomy of their decision-making processes.

In dissent, Wilson J. suggested that the better questions might be whether the government had "general control," whether the body performed a government function, and whether it "acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?"[32] Confusingly, Cory and L'Heureux-Dubé JJ. agreed with Wilson J.'s test, though L'Heureux-Dubé J. found that it did not result in the *Charter* applying to universities. Here, L'Heureux-Dubé J. agreed with La Forest J.'s reasoning. In short, there was ample disagreement over which test to use and what resulted from the proposed tests.

Seven years after *McKinney*, a unanimous Court clarified the test in *Eldridge v. British Columbia (AG).*[33] *Eldridge* made it clear that hospitals, when they provide medically necessary services, namely those specified in the *Hospital Insurance Act*,[34] are delivering "a specific government program."[35] However, La Forest J. was careful to point out that his conclusion in *Eldridge* was in keeping with his decision in *Stoffman. Stoffman,* like *McKinney,* dealt with retirement policies and as such policies are purely a matter of internal regulation they did not invoke the *Charter*. The *Charter* only applies to non-governmental entities when they are engaging in the delivery of a governmental policy or program.

[32] *McKinney, supra* note 10 at 370.
[33] *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*].
[34] *Hospital Insurance Act*, RSBC, 1996, c 204.
[35] *Eldridge, supra* note 33 at paras 42-52.

In light of the jurisprudence since *McKinney*, Articleny J.A. found that there were two routes to the *Charter*'s applicability to the University of Calgary. The first was the *Eldridge* test which, given that post-secondary education is a "specific objective of the Alberta legislature," meant that the *Charter* applied to questions about student discipline.[36] The second was the statutory compulsion framework because the disciplinary sanctions of a university went beyond that of a private organization.[37] Notably, in Alberta, the punishments for students are set out in the *Post-Secondary Learning Act*,[38] which means that a student's relationship with the university is not one of contract and is akin to that of "professional regulatory bodies."[39] Nonetheless, as will become clear in part II, La Forest J.'s comment in *McKinney* that "the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision makers"[40] continues to be persuasive to courts outside of Alberta and Saskatchewan. Such a holding means that universities are subject to administrative law but not the *Charter*.

2. *University property: public, private or both?*

In terms of attempts to access property for the purposes of free expression, the section 32 inquiry is only the first step in the argument. Even assuming that a court will find the *Charter* to apply to a particular body and its challenged act, such a finding does not mean that an individual will automatically gain the right to use that body's property for free expression. Most free expression jurisprudence that also invokes the question of access to property involves municipal streets and

[36] *Pridgen*, *supra* note 11 at paras 101-104.
[37] *Ibid* at para 105.
[38] *Post-Secondary Learning Act*, SA 2003, c P-19.5, s 31
[39] *Pridgen*, *supra* note 11 at paras 105-107.
[40] *McKinney*, *supra* note 10 at 268.

parks. Before examining the jurisprudence, it is helpful to unsettle the meaning of public property and to highlight that the same public-private divide which bedevils section 32 also matters for how property is understood.

There are some forms of property which are obviously private: a person's house, for example, or the offices of a corporation. Yet the common law has long recognized that some forms of otherwise private property are rendered public by virtue of the services they provide. Innkeepers offer the classic and ancient example: inns must take all comers provided that the inn in question has room. Such a requirement was often sweetened by the granting of a liquor license to innkeepers. Similarly, some forms of public property are managed as though they are private property. For example, the public ownership of natural resources in Canada is managed by the government as though these resources were private property.[41]

In terms of the modern urban sphere, malls, subways, enclosed urban pathways, and airports are examples of property that have both public and private aspects. Sorting out which is which—and what that might mean for rights of access—is then further complicated by the absence of much theorizing about public property, or any property which is not owned by a private individual.[42] Nevertheless, there are two main ways to categorize property as public or private: the owner or how that property is used. Canada follows both approaches with the inquiry into ownership coming first and use coming second.

[41] Even though such property is owned by the Crown, the common law has long recognized that Crown ownership is not necessarily determinative of public rights to that property. See, e.g., *Reference re British Columbia Fisheries*, [1913] UKPC 63 at 16, 5 WWR 878 (suggesting the Crown had the same rights as a private owner with respect to inland fisheries).

[42] Though this trend is starting to reverse see e.g. Anna di Robilant, "Common Ownership and Equality of Autonomy" (2012) 58:2 McGill LJ 263; Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365; Michael Robertson, "Common Property *Redux*" (2016) 49:2 UBC L Rev 563.

If the property in question is privately owned, such as a mall, then even though there is an invitation for the public to enter the owner can revoke it at any time. While courts in the United States briefly flirted with the public forum doctrine which allowed free expression on properties like malls, they retreated from that position in the 1970s.[43] Courts in Canada were never quite so bold and have only allowed for a deviation from the private owner's right to exclude if it is mandated by legislation. Historically, labour legislation offered one exception to the whims of the owner,[44] and today human rights protections could offer another.[45] Similar anti-discrimination provisions exist to protect would-be tenants renting dwelling spaces. The landlord-tenant relationship may be one of private law but it is one in which the balance of power has been altered by statute. We would not think that anti-discrimination provisions in landlord and tenant law turn rental properties into public property; they merely ensure that they are equally accessible to all people able to pay the rent asked.

Although the regulation of private property necessarily affects how that property may be used, the question of use in a definitional sense only arises if the property is owned by government. Then the question becomes whether the property in question is open to the public or whether it is closed to the public and thus private. Examples of private government property are ministerial offices and army bases; such places are not ordinarily open to the public. Streets and parks are more obviously open to the public but even that is no guarantee that an individual may exercise *Charter* rights there. Put simply, the nature of the expressive activity must fit with the historical function of the property.[46] Under the historical-use test, it would be doubtful if an

[43] See Zick, *supra* note 16.
[44] This exemption was discussed in *Harrison v Carswell*, [1976] 2 SRC 200 at 219, [1975] 6 WWR 673.
[45] See *Whatcott (Regina), supra* note 16 at para 11.
[46] *Montreal (City), supra* note 11 at para 74.

individual would win the right to hold a protest march on a major highway, as the historical function of such highways is hardly well-suited to expressive activity.

The result of the owner-then-use inquiry into the nature of property is that the jurisprudence is deferential towards private property. Courts may well have recognized that their strictness here could work a disadvantage towards certain kinds of people when malls offer the only form of "public" space readily available to them,[47] a situation which becomes all the more pressing during cold winter days. Of course, no Canadian court would consider the provision of shelter to be a government activity sufficient to invoke the *Charter*. To an extent, a person's homelessness cannot force the government to act, but homeless people are allowed to build their own nighttime shelter in parks and governments cannot prevent them from so doing without providing alternative shelter.[48] Consequently, even if people do use malls and underground tunnels to shelter themselves from the weather they may only do so on sufferance from the owner. The same rule applies for expressive activity in malls and other forms of publicly accessible yet privately owned property: without the owner's permission there is no right and even with the owner's permission there is only a privilege. All of which leaves a relatively limited physical space for free expression.[49]

Assuming that the *Charter* will apply to public universities, the question then becomes whether university property is public or private? In 1994 the Ontario Court of Appeal had

[47] *R v Asante-Mensah*, 2003 SCC 38 at para 24, [2003] 2 SCR 3. Such rules do work a disadvantage; see Parkdale Community Legal Services, "Submissions to the Task Force on the Law Concerning Trespass to Publicly Used Property as it Affects Youth and Minorities" (1997) 35:3&4 Osgoode Hall LJ 819. This is also a problem elsewhere see e.g. *Appleby & others v United Kingdom*, No 44306/98, [2003] ECHR 222, 37 EHRR 38.
[48] *Abbotsford (City) v Shantz*, 2015 BCSC 1909, 392 DLR (4th) 106; *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29.
[49] See also: Sarah E Hamill, "Location Matters: How Nuisance Governs Access to Property for Free Expression" (2014) 47:1 UBC L Rev 129 [Hamill, "Location Matters"].

occasion to comment about the nature of Queen's University campus. The case arose out of a lawful strike by CUPE Local 229 and centred on the question of whether the employees could picket in certain buildings on campus.[50] Under Ontario's labour legislation at that time, employees were allowed to picket on premises "to which the public normally has access and from which a person occupying the premises would have a right to remove individuals."[51] Such a rule was designed to allow picketing in malls but would it apply to universities? The campus was described as "comprised of privately owned buildings and property as well as municipally owned public streets and sidewalks."[52] As to whether the public normally had access, the parties agreed that university residences ought to be excluded with no picketing allowed there,[53] but they disagreed about a particular academic building and another building which contained various shops and services.[54] The union tried to argue that these buildings should be considered those to which the public ordinarily had access but this argument was unsuccessful. Technically the issue on appeal was whether the lower court had jurisdiction to grant an injunction against the picketers. Nonetheless the Court of Appeal agreed with the lower court's determination on the question of property. None of the buildings at issue was open to the public in the way envisioned by the legislation.[55] Only those with some affiliation to Queen's, be it student, staff, faculty, alumni, or guest thereof, had "the right to remain and use the facilities" while others were "routinely" removed by security personnel.[56]

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[50] *Queen's University at Kingston v CUPE Local 229*, 120 DLR (4th) 717, 76 OAC 356 at paras 5-6 [*Queen's University*].
[51] *Ibid* at para 10.
[52] *Ibid* at para 6.
[53] *Ibid*.
[54] *Ibid* at paras 8-9.
[55] *Queen's University v CUPE Local 229*, 120 DLR (4th) 717, 1994 CarswellOnt 536 at para 19.
[56] *Ibid*. Here, it would seem as though the court erred in its use of "right" and the better term would be "privilege."

It is questionable how far *Queen's University* would apply to other universities. It is not uncommon for universities to open up their sports facilities and libraries to members of the public, even if they charge a small fee for access. Similarly, members of the public might not be able to readily distinguish between what is municipally-owned and what is university-owned. They might cut across the open spaces on campus, for example. Other university campuses also have large public transit centres on campus, which raises questions about the public's right to access campuses.[57] Even if campus security does regularly remove non-affiliated people, it should go without saying that some kinds of people are more likely to be targeted as being non-affiliated than others.[58] If it really were the case that only affiliated people are allowed in certain areas, universities could install card readers such as those which are common in some British university buildings and which are seen at the University of Toronto's Robarts Library.[59]

Barbour v. University of British Columbia also examined a university's property rights.[60] *Barbour* was a challenge to the University of British Columbia's (UBC) enforcement provisions of its parking regulations on the grounds that they were *ultra vires* the university's delegated legislation. UBC agreed that these provisions were *ultra vires* but argued that it could rely on its common law rights as a property owner.[61] There was no question as to whether UBC could regulate parking on campus only whether it could collect fines and tow offending vehicles. The British Columbia Supreme Court held that while UBC may have had the same rights as a private

[57] Such campuses include York University's Keele Campus in Toronto, ON, UBC's main campus in Vancouver, BC, the University of Victoria, the University of Alberta's North Campus in Edmonton, AB, and the University of Calgary's main campus.
[58] See, e.g., Parkdale Community Legal Services, *supra* note 47 at 820, 825-26.
[59] Individuals can only access Robarts' stacks if they have a pass; see: <onesearch.library.utoronto.ca/robarts-stack-access> .
[60] *Barbour v University of British Columbia*, 2009 BCSC 425, 310 DLR (4th) 130 [*Barbour*].
[61] *Ibid* at para 8.

owner,[62] these rights did not include the power to tow vehicles or to collect fines.[63] Following *Barbour*, the legislature of BC amended the *University Act* to give UBC the power to enforce its parking regulations and made this power retroactive.[64] In other words, UBC has a statutory power greater than that given to private individuals with respect to regulating parking on its property. Notably, the court held that the "doctrine of *ultra vires* continues to apply to corporations created by special act for *public* purposes."[65]

A close reading of the case law on universities, either in terms of government action or what rights they have with respect to their property, suggests the picture is more complicated than it first appears. Public universities are creatures of statute and these statutes tend to grant universities special powers and privileges both as universities and in terms of their property. University legislation, for example, often exempts the campus from municipal property taxes. In addition, the campuses of many public universities are often made up of an inter-locking system of public and university property, without which the university could not function. The vast majority of York University's students, staff, and faculty, for example, live beyond easy walking distance of campus and must drive or take transit to reach it. The same could be said for UBC, the University of Victoria, and the University of Manitoba, to name but a few. Public roads and public transit are an integral part of the York University campus and yet posted around campus are signs describing it as "private property." Such signs are also posted on certain concrete planters on St George Street as it passes through the University of Toronto's downtown campus.

[62] *Ibid* at para 49.
[63] *Ibid* at paras 54-57.
[64] *Barbour v University of British Columbia*, 2010 BCCA 63 at para 2, 282 BCAC 270 [*Barbour CA*].
[65] *Barbour*, *supra* note 60 at para 41 [emphasis added].

Thus even if section 32 does apply to public universities, that may not be enough to make their property public enough for section 2(b).

3. *Free expression and its limits*

There can be no doubt of free expression's importance to democracy. However, free expression encompasses more than just political speech; the freedom applies to just about every kind of speech or communication. In a theoretical sense, expressive activity is central to the development of "individual agency and identity"[66] and, as such, it is crucial for the ways in which we understand ourselves and relate to one another. That being said, free expression in Canada is not absolute and it is limited by prohibitions on hate speech as well as certain limits with respect to the location and form of the expression.[67] As the courts are fond of saying, the *content* of speech is protected but the *form* is not. The form-content divide is yet another example of the public-private distinction, given that questions of form are about how the content, which would otherwise be private, is publicized.

With respect to limits on form and location, Canadian courts have not adopted an identical version of the American time, manner, and place doctrine but there are echoes of it in Canadian jurisprudence. In the US, time, manner, and place restrictions are only constitutional if they are content-neutral, serve a significant governmental interest or objective, and leave open an alternative method of communication.[68] The problem with such limits is that there is nearly

[66] Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 4 [Moon, *Constitutional Protection*].
[67] Such limits are usually justified under section 1 of the *Charter*.
[68] See Zick, *supra* note 16 at 183.

always an alternative method of communication. Canadian courts rarely examine alternative methods of communication in the justification of *restrictions* on expression; there is some case law which references, briefly and in passing, the alternate methods that *could* have been used by a person challenging the infringement of their right.[69] As laudable as it might be for Canadian courts to have avoided the time, manner, and place doctrine, in that it does not second guess a person's choice of forum, the result is much the same as in the US but with less discussion of the values of free expression.

The Canadian jurisprudence on free expression has long been criticized for failing to grasp the social nature of the right.[70] The Supreme Court may have recognized that the values which underlie free expression are "individual self-fulfillment and human flourishing"[71] but such statements are rooted in a deeply individualistic understanding of the freedom entailed by section 2 (b). Like most *Charter* rights, section 2(b) is designed to protect against government interference with a right which already exists, rather than guaranteeing access to "effective communication."[72] The right is not facilitative; it is preventative. Hand in hand with this preventative reading of section 2(b), is a judicial reluctance to open up physical space for free expression.[73] The ideal type of expression is that which does not impinge on public space or impose costs on the public purse.

In a sense the section 2(b) jurisprudence has failed to grasp that it is but a single prong of section 2. Section 2's other freedoms – of conscience and religion, peaceful assembly, and

[69] *R v Guignard*, 2002 SCC 14 at para 25, [2002] 1 SCR 472[*Guignard*]
[70] Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40:3 Osgoode Hall LJ 337 at 340.
[71] *Montreal (City), supra* note 15 at para 84.
[72] Richard Moon, "Freedom of Expression and Property Rights" (1988) 52 Sask L Rev 243 at 243.
[73] I have explored this issue elsewhere: Hamill, "Location Matters" , *supra* note 49.

association – highlight the social aspects of the rights referenced. The narrow construction of section 2(b) and, arguably, section 2(a),[74] means that these rights are viewed in an individualistic manner. If section 2 is looked at as a whole, the rights guaranteed under section 2(a) and (b) could be linked with the other, more obviously social rights protected by section 2.[75] Section 2(c) also implicitly invokes the need for space as a "peaceful assembly" typically means (but would not be limited to) a group of people meeting in a particular location. Frustratingly, there is very little substantial jurisprudence about section 2(c) as most cases where it could be invoked also involve 2(b) and (d) rights. What a more holistic reading of section 2 would result in is a more nuanced approach to free expression, one which is perhaps more restrictive of harmful speech, more aware of the value of free expression, and more alert to the importance of space to expressive rights.[76]

The current definition of hate speech by the Supreme Court is that which "a reasonable person, aware of the context and circumstances, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination."[77] Sarah Sorial points out that such a definition focuses on the *how* of the expression rather than the content. She notes that such distinctions can miss forms of speech which are polite and civil yet harmful.[78] In particular she focuses on the idea of "manufactured authority" which is hate speech disguised as part of a historical debate, such as Holocaust

[74] Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall LJ 277 at 283.
[75] I do not have space to fully explore the implications of such a reading here.
[76] This is similar to the conclusion Moon reaches in his critique of the individualistic approach to free expression, Moon, *Constitutional Protection*, *supra* note 66 at 30.
[77] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 59, [2013] 1 SCR 467 [*Whatcott HRC*].
[78] Sarah Sorial, "Free Speech, Hate Speech, and the Problem of (Manufactured) Authority" (2014) 29:1 CJLS 59 at 60-66.

denial.[79] Holocaust denial is, of course, a slippery example of hate speech in that it is rooted in anti-Semitism but does not always make any overt references to its underlying motivations. Sorial also identifies the ways in which hate speech can be cloaked in authority either by using the spaces of intellectual debate, such as universities, or by adopting their tropes such as institutes and journals.[80]

The point of Sorial, Moon, and others is that expression, because of its social nature, can be harmful and that the courts' hands-off approach to content restrictions misses this particular harm. There is a sense in which Sorial's argument challenges the traditional view that the truth will out through democratic discourse,[81] yet at the same time an equally cogent argument in favour of Sorial's point is that not everyone has the same resources to advance their views.[82] If truth-seeking is truly a value of free expression then that right might need to impose more positive obligations than it currently does. As it is, section 2(b) appears cut-off from other section 2 rights and is conceptualized by the courts as an individual right which does not impose any positive obligations on government, only that they refrain from infringing it without justification. Section 2(b) is then further hindered by the courts' reluctance to allow it to grant strong rights of access to public places.[83]

It is telling that Sorial's reference to "manufactured authority" invokes universities. Such a linkage calls two things to mind: first, the links between academic freedom and free

[79] *Ibid* at 66.
[80] *Ibid* at 72-73.
[81] For an overview of this idea see, Moon, *Constitutional Protection, supra* note 66 at 9-14. Relatedly, there is also the argument that merely advancing alternative viewpoints does not go far enough in challenging the dominant paradigm; e.g., Richard Delgado & Jean Stefancic, "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills" (1992) 77 Cornell L Rev 1258.
[82] See, e.g., Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, (Toronto: University of Toronto Press, 1997) at 70-76.
[83] On this point, see: Hamill, "Location Matters," *supra* note 49..

expression, and, second, the sense in which universities are a privileged space. In recent years the question of academic freedom has appeared with some regularity in the popular media and typically involves a discussion of overly restrictive speech codes, the concept of safe spaces and trigger warnings. Bakan, writing in the late 1990s, pointed out that some restrictions on free expression can actually enhance the values that underlie free expression by silencing the silencers. He gives the example of restrictions on homophobic speech as allowing LGBTTQQIA+ people to express themselves "without fear of reprisal."[84] He also gives the example of political correctness codes as opening up spaces for expression. He notes that "[i]n universities, a predominantly white, middle-class, and male professoriate has established over the years what methods and subjects of inquiry are valid" as well as what counts as appropriate behavior.[85] Bakan's point is that if we do value a diversity of views, and the arguments in favour of free expression suggest we do, then we need to create an environment where people can share such views without fear.

In terms of academic freedom, however, Bakan points out that universities tend to be self-selecting, meaning that unpopular or minority views can be repressed or weeded out.[86] In addition, for at least some academic disciplines, a small number of schools produce the majority of professors and this too can have a chilling effect on the diversity of views expressed. Here Harvard Law School's record at producing law professors for the rest of the United States in the early part of the twentieth century offers a classic example.[87] The point being that even if

[84] Bakan, *supra* note 82 at 72-73
[85] *Ibid* at 73-74.
[86] *Ibid* at 74. See also: Cameron, *supra* note 14 at 288-289.
[87] William C Chase, *The American Law School and the Rise of Administrative Government* (Madison: University of Wisconsin Press, 1982) at 41-46, 58-59.

faculties have an ethnically and culturally diverse professoriate, they may well have one which is intellectually inbred.

Perhaps ironically, the policies about civility in universities make little mention of academic freedom.[88] Certainly the same criticisms of these policies which Bakan described in the late 1990s continue to exist today, the main difference being that such efforts at political correctness or civility seem more widespread at the moment than they were twenty years ago. More worryingly, there has been a rise in what the English novelist Howard Jacobson called the "battleground of stated positions" and the failure to recognize that "thought can be tentative and argument exploratory."[89] On university campuses the result has been a push for doctrinal orthodoxy with respect to certain issues,[90] and a kneejerk tendency to link offence with harm.[91] Jamie Cameron suggests that the better way to enforce civility might be one which is collaborative rather than coercive.[92] Such a suggestion seems rooted in the idea that free expression facilitates discussion which in turn leads to truth.[93] Yet it too could fall into the trap of forcing those who are offended, who are likely to be members of a minority, to do the work of explaining instead of putting the onus on the majority to understand minority viewpoints and take them into consideration.

Another way of phrasing the situation might be that academic freedom is not just the freedom to say controversial or offensive things but the freedom to explore a diversity of

[88] Cameron, *supra* note 14 at 289-96.
[89] Howard Jacobson, "It is hard being a columnist for eighteen years – here's how I got through it" *The Independent* (25 March 2015), online: <www.independent.co.uk/voices/it-is-hard-being-a-columnist-for-eighteen-years-heres-how-i-got-through-it-a6952481.html>.
[90] See, e.g., the policy of the University of Victoria's Students' Society with respect to abortion, *BCCL, supra* note 1 at para 29.
[91] On the difficult relationship between offence and harm, see: Cameron, *supra* note 14 at 289, 303.
[92] *Ibid* at 302-304.
[93] Moon, *Constitutional Protection, supra* note 66 at 9-14.

viewpoints before coming to a conclusion. Ironically, both the self-selecting nature of universities and their push for civility can undermine such a diversity of opinion. That is not to say that all opinions are equally valid, or indeed truthful, but, rather that if we do take seriously the idea that free expression is about truth-seeking in a social context we need to be exposed to views that differ from our own.

II. *Government action and university property*

The recent cases dealing with the question of free expression and access to university property are often not clear-cut examples of universities shutting down free speech. In fact, some involve affiliated student groups refusing to grant access to their space(s) on campus. Nor are these cases straightforward examples of rights' infringement; they are perhaps more accurately described as examples of conflicting rights. For example, the University of Victoria Students' Society refused to allow anti-abortion protests or signs in its building on the grounds that they violated the society's commitment to gender equality and a woman's right to choose.[94] Similar objections exist with respect to attempts to protest homosexuality on university campuses. In other words, there are equality and anti-discrimination issues in play as well.[95] It is not the case that *any* homophobic statements will fall under hate speech and thus that public bodies will be entitled to prevent or limit their expression; nor is it the case that anti-abortion protests are inherently a threat to gender equality. At the same time, it is also not the case that such anti-homosexuality and anti-abortion protesters will automatically have the right to express themselves wherever

[94] *BCCL*, *supra* note 1 at para 29.
[95] For an in-depth discussion of what to do when academic freedom and freedom from discrimination collide, see: Anver Saloojee, "Balancing Academic Freedom and Freedom from Discrimination in Contested Spaces" in Turk, *supra* note 14 at 205.

they choose. I should make it clear that my point is not to defend the opinions espoused in such protests. I, like many others, find their views offensive; in fact, their views are probably squarely in the minority on most university campuses, if not in society more broadly. The fact that such views are in the minority should not be taken as evidence that the battle for abortion rights, gender equality, and equal treatment regardless of sexuality have been won. Much work remains to be done in these areas. My concern is whether or not the *Charter* ought to apply to public universities as they make decisions about who can access their property for the purposes of free expression.

The recent spate of cases from British Columbia, Alberta, and Ontario is but the latest salvo in a lengthy battle over access to university property. Some ten years earlier, two cases from Saskatchewan and British Columbia dealt with similar issues. The first involved William Whatcott's distribution of anti-abortion pamphlets on the campus of the University of Regina.[96] Whatcott was charged and convicted of "the unlawful distribution of literature on University property" in violation of the University of Regina's bylaws about traffic and parking.[97] Although the Saskatchewan Court of Queen's Bench found the bylaws to be *ultra vires* the university on the grounds that littering had nothing to do with parking, Ball J. also held that the *Charter* would apply in this context because by enacting parking bylaws the university was acting in the same way as a municipality.[98] As such, the University of Regina's regulation of its parking and traffic on campus was in effect a government function caught by section 32. Not surprisingly the bylaw

[96] *Whatcott (Regina), supra* note 6.
[97] *Ibid* at paras 1-5.
[98] *Ibid* at paras 41-43.

was found to violate section 2(b) of the *Charter* and was not saved under section 1 because a total ban is not minimal impairment.[99]

In contrast to *Whatcott (Regina)*, the plaintiffs in *Gray v Alma Mater Society of the University of British Columbia* conceded that the *Charter* did not apply.[100] *Gray* emerged out of an attempt to hold a graphic anti-abortion display on campus, similar to the display that would cause controversy in the more recent cases. Although the main display fell through, related images were posted on campus and were then destroyed by other students. Attempts to display the images were opposed by the Alma Mater Society (AMS) and the plaintiffs alleged that AMS had acted in breach of contract and its fiduciary duties by not allowing them to display their images.[101] Absent the *Charter,* arguments about contractual rights and fiduciary duties were the only ones open to the plaintiffs. Unsurprisingly, the plaintiffs failed in their attempt to turn academic freedom into an enforceable, implied term of the contract between a university and its students,[102] and in their attempt to argue that they were owed fiduciary duties.[103] Justice Cohen observed that

> the democratic rights which the plaintiffs seek to have enforced as contractual terms are more appropriately dealt with in the context of constitutional law. I think it is a correct statement by the defence that the law of contract was never intended, nor is its use appropriate, to balance and determine the broad social rights sought to be enforced as contractual terms by the plaintiffs.[104]

[99] *Ibid* at paras 46-48.
[100] *Gray, supra* note 7 at para 2.
[101] *Ibid* at paras 5-6.
[102] *Ibid* at para 89.
[103] *Ibid* at para 129.
[104] *Ibid* at para 115.

Of course, the concession by the plaintiffs with respect to *Charter* applicability meant that the constitutional argument was not heard.

The question of *Charter* applicability has, however, been examined in more depth in four recent cases dealing with anti-abortion protests similar to those seen in *Gray* and *Whatcott (Regina)*. In *Whatcott (Calgary)* the Alberta Court of Queen's Bench found the *Charter* to apply to the actions of the University of Calgary as they sought to ban William Whatcott from its campus for distributing leaflets which were against homosexuality and abortion.[105] In *Whatcott (Calgary)*, the university attempted to use trespass legislation to prohibit Whatcott from its campus. The reason the university's actions were caught by the *Charter* was that they amounted to a "denial of a learning opportunity." As learning opportunities are an objective listed in Alberta's *Post-Secondary Learning Act* there was a "direct connection between the institution's governmental mandate and the impugned activity."[106]

Wilson, a case which has a similar fact pattern to *Gray* but was about the University of Calgary, also suggested that the *Charter* would apply to the university. The particular action at issue in *Wilson* was the university's non-academic misconduct proceedings brought against members of an anti-abortion student group for failing to follow the instructions of campus security about the manner of their protest.[107] The students in question raised the *Charter* at every level of the process, including the university appeals process and the Court of Queen's Bench.[108] The university tried to argue that the *Charter* did not apply but even, if it did, that it had acted reasonably.[109] Justice Horner disagreed with the university's claim to have acted reasonably

[105] *R v Whatcott*, 2012 ABQB 231 at paras 4-6, 538 AR 220 [*Whatcott (Calgary)*].
[106] *Ibid* at paras 29-30.
[107] *Wilson*, *supra* note 2 at paras 9-11.
[108] *Ibid* at paras 143-147.
[109] *Ibid* at paras 146-49.

because the university appeals board did not show that they had given "due regard" to the rights at stake.[110] However, as this was a judicial review, the appropriate remedy was for the Student Discipline Appeal Committee to be convened to hear the students' case.[111] Consequently, the question of *Charter* applicability was not squarely addressed, though it seems clear that Horner J. would have found it to apply.

Two cases from Ontario and British Columbia, despite having a similar fact pattern to *Wilson*, found that the *Charter* would not apply to the universities in question. In *Lobo*, the Ontario Court of Appeal upheld the decision of the lower court to strike the *Charter* claim from the plaintiff's case. A unanimous Court held that when Carleton University was booking space for "non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*."[112] At trial, Toscano Roccamo J. made much of the fact that the *Carleton University Act* created an autonomous body in a way that differed from the situation in *Pridgen*.[113]

Yet Toscano Roccamo J.'s decision was issued before the Alberta Court of Appeal's decision in *Pridgen*. At the Court of Appeal, Articleny J.A. emphasized both the public purpose of post-secondary education and the coercion the university was entitled to use by way of statutory authority. *Lobo*'s dismissal of *Charter* applicability is thus too superficial. The Alberta cases, particularly *Whatcott (Calgary)*, emphasize the link between accessing campus and the dissemination of knowledge and it was for this reason that the issue of access became linked to

[110] *Ibid* at para 163.
[111] *Ibid* at paras 180-81.
[112] *Lobo*, *supra* note 2 at para 4.
[113] *Lobo v Carleton Univresity*, 2012 ONSC 254 at para 14 [2012] OJ No 63. For the act, see: *Carleton University Act*, SO 1952, c 117 as amended by SO 1957, c 130 & SO 1968-69, c 145, online: <carleton.ca/secretariat/wp-content/uploads/University-Act1.pdf>.

the purpose of the university and thus to a governmental policy or program. As Wilson J. noted in her dissent in *McKinney*, education is a traditional function of governments in Canada and universities perform a public function, particularly the "free exchange of ideas."[114] One of the purposes of Carleton University, per its governing statute, is "the dissemination of knowledge."[115] *Lobo's* distinction between "extra-curricular" activities and education is too narrow a reading of *Eldridge*.

In *BCCL*, the British Columbia Supreme Court found that decisions about how a university regulates its property are a sphere of "autonomous operational decision-making reserved for the University."[116] Much as with *Wilson* and *Lobo*, *BCCL* was about an anti-abortion student group's attempt to book university space to hold a protest comparing abortion to genocide and to show related posters and movies.[117] As with *Lobo*, Hinkson C.J.'s analysis of the section 32 jurisprudence left much to be desired. Instead of tracing the evolution of the test for section 32 applicability, Hinkson C.J. started with *Eldridge* and then referred to *McKinney* and *Harrison.*[118] This pattern continued at the Court of Appeal, with Willcock J.A. observing that

> [t]he question whether the University of Victoria should be regarded as an agent of government or equivalent to government for all purposes, insofar as the application of the *Charter* is concerned, is settled by the decisions of the Supreme Court of Canada in *McKinney*, *Stoffman* and in particular *Harrison.*[119]

[114] *McKinney*, *supra* note 10 at 379.
[115] *Carleton University Act*, *supra* note 113, s 3(b).
[116] *BCCL*, *supra* note 1 at para 149.
[117] *Ibid* at para 46.
[118] *Ibid* at paras 117-124.
[119] *BCCL CA*, *supra* note 1 at para 21.

Justice Willcock dismissed any attempt to apply the *Eldridge* test on the grounds that "[t]he government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses."[120]

However, *McKinney* and *Harrison* were about retirement policies, while *Eldridge* was about access to medical services, and this distinction is crucial. A university's decisions over its staff members are not connected to a government policy or program in the same way as access to educational opportunities are. By holding that the decisions relating to the booking of space are simply about property and thus within the autonomous sphere of the university, Hinkson C.J. found them to be immune from *Charter* review. Such decisions can still be reviewed on administrative law grounds but the *Charter* will not apply.[121] Here Hinkson C.J. distinguished *Doré v. Barreau du Québec*,[122] because in that case the Barreau "was acting upon its express grant of statutory authority in the discipline of its professional member."[123] Technically, the Barreau conceded the point about *Charter* applicability and so a rigorous analysis of whether the *Charter* should apply to *all* administrative decision makers has not yet taken place.

It seems strange, however, that a decision could be reviewed on administrative law grounds but would not have to be *Charter* compliant.[124] Such a distinction was drawn in *McKinney* and cited with approval in *Eldridge* with the exact phrasing being that "the basis of the exercise of supervisory jurisdiction by the courts is not that universities are government, but

[120] *BCCL*, *supra* note 1 at para 32.
[121] *Ibid* at paras 151, 124 quoting *Eldridge*, *supra* note 33 at paras 42-43. See also, *BCCL CA*, *supra* note 1 at para 57.
[122] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*].
[123] *BCCL*, *supra* note 1 at para 133.
[124] On this point, Peter Hogg thought that the *Charter* would apply to *all* bodies created under statute. See: Peter W Hogg, *Constitutional Law of Canada* 2d ed (Toronto: Carswell, 1985) at 671. More recently he has refined his position to the claim that exercises of statutory authority ought to be *Charter* compliant: Peter W Hogg, *Constitutional Law of Canada*, 5th ed, looseleaf (consulted on 28 March 2016) (Toronto: Carswell, 2007) vol II at at 37.13

that they are *public* decision-makers."[125] Immediately after this quote from *McKinney* appeared in *Eldridge,* La Forest J. observed that "[i]n order for the *Charter* to apply to a private entity it must be found to be implementing a *specific* governmental policy or program."[126] In other words, universities are supervised by the courts because they are public but immune from *Charter* review because they are sufficiently autonomous from government to be considered private. Again this seems like further evidence of the courts' struggle to find a way to distinguish public and private and thus figure out which actions must be *Charter* compliant.

The University of Victoria may be autonomous but its authority flows from statute and so too does its authority to deal with matters of student discipline and to regulate its property.[127] As such, it and other public universities seem to fit within the fourth category of section 32 cases identified by Articleny J.A.: "[b]odies exercising statutory authority" particularly those which have an authority to regulate which is greater than that of a "private citizen or corporation."[128] In terms of regulating university property, *Whatcott (Regina)* found the University of Regina to be acting akin to a municipality and thus the *Charter* would apply. As the *University Act* gives universities in British Columbia greater powers to regulate their property than exist for a private landowner, it seems as though the *Charter* should apply in questions of who can hold what activities on campus. Often, the property of public universities is subject to special protections and exemptions that,[129] while not a coercive power per se, are a way to protect university property so that it might be used for university purposes. In other words, if a university's role is,

[125] *McKinney, supra* note10 at 268, quoted in *Eldridge, supra* note 33 at para 43 [emphasis added].
[126] *Eldridge, supra* note 33 at para 43 [emphasis in original].
[127] *University Act,* RSBC, c 468, ss 61, 37(1)(v), 27(2)(t).
[128] *Pridgen, supra* note 7 at paras 78, 90.
[129] *Carleton University Act, supra* note 113, ss 9-10; *York University Act,* SO 1965, c 143, ss 18-20.

as courts in Alberta have found, closely linked with its physical space then access to that space for the purposes of expression might well be protected by the *Charter*.

IV – The *Charter* and University Space

It is no surprise that public universities should seek to argue that the *Charter* does not apply to them under any circumstances. Yet it is also clear that *McKinney* is badly in need of an update. The divergence between provinces with respect to whether or not the *Charter* applies to public universities has led to calls for the Supreme Court to revisit the issue of universities and the *Charter*.[130] Such calls seem particularly urgent given that current split between provinces is the result of different facts than were at issue in *McKinney*. The recent cases are about student discipline and attempts to access university property for the purposes of free expression.[131] These situations are more obviously tied to the central role of universities than mandatory retirement policies. The need for the Supreme Court's guidance is all the more pressing given that students, particularly those in anti-abortion groups, are increasingly turning to the courts to guarantee their rights to use university property.[132] The refusal on the part of universities and university student societies to allow these protests or the universities' decisions to impose stricter restrictions on these protests invokes a range of questions both about the limits of free expression and of the right of students and others to use university space for these purposes. Attempts to read *Charter*

[130] Silletta, *supra* note 8 at 98.
[131] The discipline cases are *Pridgen*, *supra* note 11 and *Telfer*, *supra* note 9. *Wilson*, *supra* note 2 involved both a disciplinary action and a question of the use of space.
[132] Cameron Wilson, "UAlberta Pro-Life: Explanation for Suing University Administration" *The Gateway* (14 October 2015), online: <www.thegatewayonline.ca/2015/10/ualberta-pro-life-explanation-for-suing-university-administration>; Jamie Sarkonak, "U of A Sued by Pro-Life Student Group: Says the University Violated the Code of Student Conduct Behaviour" *The Gateway* (29 September 2015), online: <www.thegatewayonline.ca/2015/09/u-of-a-sued-by-pro-life-student-group-says-the-university-violated-the-code-of-student-conduct-behaviour>.

rights into the contractual relationship between students and universities have failed.[133] Yet it is likely that the *Charter* could or should apply to universities in some contexts. Justice Wilson's dissent in *McKinney* remains pertinent and is in keeping with later decisions such as *Eldridge*. In providing education with privileges and powers granted by statute—particularly with respect to their students and property—universities are not as obviously exempt from the *Charter* as they might think. Certainly, there will still be certain acts of the university which will not be caught by the *Charter*, such as mandatory retirement policies. The more interesting question is what a finding of *Charter* applicability would mean for university property and what criteria could be used to determine if and when such property is available for section 2 (b) rights?

In *Eldridge* the issue was about enabling the access of differently-abled patients to medical services. It was thus an equality argument rather than one about free expression. While *Eldridge*'s finding could have an impact on hospital property—it would, for example, seem to require that everyone be equally able to access hospital buildings and so on—it would not grant anyone the right to use hospital property for free expression. As far as I am aware no one has argued that they have a right to free expression on hospital property. The obvious answer to such a claim is that a person would not have the right to use hospital property for free expression because that is not the purpose of hospitals. The same cannot be said for universities.

When the Supreme Court of Canada has examined the question of access and use of property for free expression they have made some limits quite clear. For one thing, even when property is owned by government that will not automatically make it available for free expression. In order to determine whether government-owned property is available for free

[133] See *Gray*, *supra* note 7 at para 115.

expression the Court has devised a two part test, first used by the majority in *Montreal (City)*.[134] The first is the "historical or actual function of the place" and the second is "whether other aspects of the place suggest that expression within it would undermine the values underlying free expression."[135] In some ways this test is an extension of and an expansion on McLachlin J.'s discussion of public and private government property in *Commonwealth of Canada*.[136] Some places such as streets and parks are clearly readily available and, historically, have been used for free expression. Other spaces are less clear cut, and in such circumstances the question becomes "[w]ould an open right to intrude and present one's message by word or action be consistent with what is done in the space?"[137]

Certain kinds of university property would clearly fall into the private sphere: residences, offices, classrooms, libraries and so on. Even the open quads and connecting pathways of university campuses might be more private than an ordinary street. During exam time, for example, a university might seek to limit the kinds of activities held in these open spaces in order to promote an environment conducive to studying.[138] Yet this is suggestive of a stronger regulatory right on the part of the university, not an absolute right to ban whomever it pleases from campus. Here Whatcott's activities on the University of Regina and the University of Calgary's campuses provide good examples of the kind of activity that would be in keeping with the quiet use of a university's open spaces.

Thus the first question that must be asked about whether university property will be available for section 2(b) is does the nature of the protest fit with the normal use of the relevant

[134] *Montreal (City), supra* note 15 at para 74.
[135] *Ibid.*
[136] *Commonwealth of Canada, supra* note 15 at 228-37.
[137] *Montreal (City), supra* note 15 at para 76.
[138] As was the case in *Queen's University, supra* note 50, where the injunction was sought for the exam period.

property?[139] As such, certain kinds of posters might not be appropriate in residence buildings but would be more appropriate in classroom buildings, with marches and the like being similarly limited to non-residential buildings and areas on campus. A related second question would examine whether there is anything else, such as an ongoing examination period, that would justify placing limits on certain kinds of protests?

Of course, university campuses have also been a traditional – if sometimes contested – site of protest.[140] In this regard they are often more like streets, parks, and public squares than malls have ever been. University spaces are and have always been the site of debate and discussion; it seems clear that the historical function test would find free expression on university property to fit with the values underlying free expression. Here the nature of universities as institutions offers an additional justification for holding their spaces open for free expression. The very purpose of a university is to foster debate and discussion. It is this purpose that is often missed and which would perhaps continue to be missed in battles over access to university space. It is not just that university property is compatible with free expression but that free expression is central to the property in question.[141]

Free expression and academic freedom do not overlap perfectly, however. Academic freedom is more abstract and less reliant on physical space than free expression, and is generally understood as being limited to the university's researchers rather than extending to its students and staff. Academic freedom also speaks more to the relationships among university researchers, their colleagues, and superiors rather than the individual-state relationship invoked by a *Charter*

[139] This is a variation of the question asked in *Queen's University, supra* note 50.
[140] By contested, I mean that universities have been subjected to sit-ins and similar protests by students against actions of the administration.
[141] Cameron, *supra* note 14 at 302-303.

claim. Moreover, even if university campuses are suitable for free expression, as with all property open to free expression, the expressive right will not be absolute and can be quite effectively regulated, even to the point of *de facto* non-existence.

Supreme Court jurisprudence has made it clear that government entities can regulate who uses their property and can charge fees for it. Courts will not, for example, hold that anyone can demand to post an advert on public transit free of charge. Yet, if a transit authority does allow adverts to be posted, they cannot arbitrarily prohibit certain kinds of expression, such as political adverts, as *GVTA* made clear. The transit authority's attempt to regulate what might be controversial speech went too far because "[c]itizens…are expected to put up with some controversy in a free and democratic society."[142]

These comments lead to a third question that ought to be asked in deciding whether university property will be available for free expression: is the expression at issue hate speech? The problem with the third question is determining what constitutes hate speech. The current definition is that which "incite[s] the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects." In other words, the goal is to guard against discrimination. This goal stems from the fact that the most recent case about hate speech centred on the definition of hatred in the *Saskatchewan Human Rights Code*[143] and human rights codes are aimed at ending discrimination and promoting equality.

How the matter of controversial or offensive speech should play out on university campuses is a thorny issue. As Sorial's examination of manufactured authority and its relation to hate speech makes clear, universities can confer an air of legitimacy on otherwise unpalatable

[142] *GVTA*, *supra* note 27 at para 77.
[143] SS 1979, c S-24.1.

views. She gives the example of some French universities granting "postgraduate research degrees for Holocaust denial theses."[144] Sorial finds this troubling on the grounds that intellectuals play a key role in French public life, but a more damning critique might be that the Holocaust as historical fact is beyond all doubt. We would not treat a World War II historian who denied the fact of the D-Day landings as a serious scholar, so why would we do the same for someone who denied the Holocaust? Academic history tends to be about the interpretation of the facts rather than arguing over whether something did or did not happen.

Admittedly the distinction between facts and the interpretation of those facts can be a hard line to draw but it could be helpful in distinguishing hate speech from offensive speech. After all, hate speech typically relies on falsehoods to incite discrimination against the targeted group. Here *Whatcott (HRC)* offers a good example of the fineness of the line that is drawn between asserted facts and interpretations of facts. The Supreme Court upheld the Saskatchewan Human Rights Commission's finding that two of Whatcott's flyers constituted hate speech but overturned it with respect to two other flyers. The two which were not hate speech were reprints of a page of classified adverts with Whatcott's handwritten commentary, while the two which were hate speech were in the style of letters or articles.[145] The difference between these flyers is that the reprinted adverts were more obviously Whatcott's interpretation of what the classified adverts represented – in this case the allegation that homosexuals are pedophiles – than the two letters or articles which could be more readily mistaken as fact. Admittedly, the court did not distinguish the flyers on the basis of asserted facts versus interpretation of evidence, but it is clear that is what is going on and better accounts for the line the court ultimately drew. In a

[144] Sorial, *supra* note 78 at 72.
[145] *Whatcott (HRC), supra* note 77 at paras 182-196. The flyers were reprinted in the Appendix to the decision.

sense, it is also in keeping with the truth-seeking aspects of free expression, but the distinction between facts and interpretations of those facts often strikes a fine balance between speech we agree with and speech we do not.

Assuming that the anti-abortion protests on campus fall short of hate speech and are merely offensive does not necessarily mean a university *has* to let protesters use university space.[146] Even municipalities are entitled to regulate streets and parks out of concerns for public safety and free movement of people.[147] The concern about safety is one which has repeatedly reared its head in terms of the regulation of anti-abortion protests on campus, not necessarily because the protesters themselves are violent but because they can provoke violent reactions.[148] Accordingly, the fourth question that ought to be asked in decisions about granting protesters the use of university property is whether or not the protest raises any safety concerns.

It is, perhaps, unfair to the protesters to limit their right to free expression because of the reactions of others—something which is beyond their control and is effectively punishing them for another's wrongful act. However, the potential for violent responses can be planned for and several universities have proposed that anti-abortion groups pay extra or that they would be charged extra to cover enhanced security.[149] Such limits are precisely the kinds of limits that the

[146] Given that many of the anti-abortion protests compare abortion to genocide, there is an argument to be made that this constitutes hate speech given that it exposes abortion clinics, their staff, and patients to a level of abhorrence which could result in discrimination. At the same time, however, these people may not be a readily identifiable group and, as such, will not be covered by hate speech provisions. Certainly, it is clear that anti-abortion rhetoric can and has incited people to violence against abortion providers but whether this is justification for restricting anti-abortionists' expression is less clear. See also the debate around the holding of Israeli Apartheid Week on Canadian University Campuses: Richard Moon, "Demonstrations on Campus and the Case of Israeli Apartheid Week" in Turk, *supra* note 14 at 185.

[147] *Zhang*, *supra* note 15 paras 38-39. See also: Nicholas Blomley, "How to Turn a Beggar into a Bus Stop: Law, Traffic, and the 'Function of the Place'" (2007) 44:9 Urban Studies 1697.

[148] This has been named as an issue at the University of Victoria and the University of Calgary: *BCCL*, *supra* note 1 at paras 58, 75; *Wilson*, *supra* note 2 at paras 4, 7, 132.

[149] *Wilson*, *supra* note 2 at para 175 (the issue of whether the university could do this was not properly before the court).

Supreme Court has implied would be justified in the municipal regulation of streets. In *Ramsden v. Peterborough*, for example, an outright ban on postering on lampposts and so on was struck down because it was overbroad, yet the Court opined that the city would be entitled to charge for the use of its property.[150] Where such extra payments pose problems for universities is that they are often imposed asymmetrically and could be interpreted as a tax for holding an unpopular opinion. At the same time, however, the jurisprudence has made it clear that blanket bans on particular kinds of free expression are unacceptable. The problem with such a holding is that it is not a challenging bar to overcome; it is often a matter of having some kind of route to win an exemption, even if no such exemptions are ever granted.[151]

The other issue with the question of *Charter* applicability is whether it only applies in the context of the relationship between the university and its students or whether it applies between the university and anyone seeking an educational opportunity. The latter situation is the conclusion to be drawn from *Whatcott (Calgary)*, but it seems too broad a ruling. For one thing, Whatcott was unaffiliated with the university at the time of his arrest for trespass. Universities simply do not have the resources, or the space, to be required to let *anyone* access and use their campuses and buildings as they so choose. Understanding the *Charter* to govern the relationship between a university and its students is more in-keeping with the decision in *Pridgen* and continues to respect a university's autonomy over who its students are. Insofar as universities can be caught by section 32 their acts of government only affect the university community.

As such, the fifth question about accessing university property might be *who* is seeking to access it. Here, the line-drawing could be affected by the size and manner of the free expression.

[150] *Ramsden*, *supra* note 15 at 1107.
[151] In *Zhang* Vancouver's regulation against structures on city streets failed because there was no procedure to apply for an exemption, *Zhang*, *supra* note 15 at paras 39, 66-69.

Whatcott's protests have tended to be fairly solitary and, just as municipalities require permits for marches but not always for distributing leaflets, the bigger problem would be if a group otherwise unaffiliated with the university wished to hold a demonstration on campus. Just as university education, even in public universities, is not free and is only open to those capable of reaching defined academic standards, university property is primarily for those affiliated with the university, even if it is publicly accessible.

The five questions I have suggested—does the nature of the protest fit with the normal use of the relevant university property; is there anything else, such as an ongoing exam period, which would justify placing limits on certain kinds of protests; is the expression at issue hate speech; does the expression at issue raise any safety concerns; and who is trying to access university property—are not necessarily exhaustive. They are based on pre-existing case law about public property, university property, and free expression, but they are not a guarantee that university property *will* be available for free expression. Regardless of whether or not the *Charter* does apply to public universities, universities could use these questions to help justify their decision for or against granting permission for particular protests.

Of course, even if the *Charter* does apply to universities when they make decisions about who gets to use their space, the situation may not necessarily be that different than it is now. Anti-abortion protesters could still find themselves unable to access campus in the way that they might wish to. The only potential difference would be that they have a court decision saying that their section 2 (b) rights have been violated but that the violation was saved by section 1 of the *Charter*. A more important conclusion from the question of who can access university space might be how challenging it is to actually rely on section 2(b) rights in situations where a person is trying to gain access to a larger communicative forum than is otherwise available to them.

Consequently, university campuses are more like malls in that universities retain much stronger rights to revoke an invitation to access than municipalities do with parks and streets.

Conclusion

Canada's public universities might seem like the quintessential place for free expression and rigorous debate about controversial issues but, as this article has shown, that is not the case. Recent cases from across Canada have exposed both that universities and those affiliated with them have refused to allow certain groups to protest on campus, and that courts (with the exception of courts in Alberta and Saskatchewan) have upheld a university's right to do so. As much as these cases raise questions about whether and in what circumstances public universities ought to be *Charter* compliant, they also raise questions about public spaces and the regulation of property. Insofar as public universities make claims to have private property in their campuses, they do not rigidly enforce this claim and, in fact, at times seem to invite members of the public onto campus. Even if universities are correct in their claim that they have private property in their campus, if the *Charter* does apply to them—and it seems clear that it should in some contexts—then university property ought to be considered at least partially public space. Such a finding would not grant a blanket right of access to university campuses for free expression but would place some limits on how a university goes about deciding which groups can use its spaces and for what purposes.