University Campus is not *Charter*-Free

By Linda McKay-Panos

Case Considered:
   R v Whatcott, 2012 ABQB 231

Yet another case has arisen that raises the issues of whether and when the *Charter* might apply on a university campus. William Whatcott (Whatcott), an anti-abortion and anti-gay activist, is not merely before the Supreme Court of Canada for a human rights matter involving anti-gay leaflets (see: Appeal heard on October 12, 2011; he has also engaged the Alberta courts and the University of Calgary. In 2005, Whatcott was prohibited from campus under the Alberta *Trespass to Premises Act,* RSA 2000, c T-7 (*TPA*). On July 25, 2008, Whatcott was arrested by campus security for trespassing, when he was posting anti-gay literature on campus. Calgary Police then charged Whatcott with an offence under the *TPA*. After a trial, the Provincial Court of Alberta decided that Whatcott's *Charter* right to freedom of expression (under section 2(b)) had been violated. The Trial Judge (Judge Bascom) then stayed the proceedings (see 2011 ABPC 336). The Crown appealed that decision to the Alberta Court of Queen's Bench.

Justice P.R. Jeffrey dismissed the appeal.

The Crown put forward three grounds of appeal (para 7):

   i.   the Trial Judge erred at law in concluding that the *Charter* applied at all in the circumstances of this case;

   ii.   in the alternative, if the *Charter* did apply, the trial judge erred in finding Mr. Whatcott's *Charter* rights had been infringed; and

   iii.   in the further alternative, if the *Charter* did apply in these circumstances and if Whatcott's *Charter* rights had been infringed, then the trial judge erred in his application of section 1 of the *Charter*.

Justice Jeffrey held that the standard of review on all three grounds was correctness (paras 10 to 19). (Correctness means the reviewing court will make its own assessment of the issues at hand.)

In determining whether the activity of the University was subject to the *Charter* (under section 32), the Crown argued that the University of Calgary was establishing and enforcing a policy that prohibited the distribution on campus of all printed material without its permission. This was therefore non-governmental and the *Charter* did not apply (para 22). However, the activity that the Trial Judge found to be subject to the *Charter* was the University using the *TPA* to respond to a complaint about Whatcott's flyers. Mr. Whatcott's challenge was not to the legislation itself

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but to the actions of the University in applying the legislation. The Trial Judge found that the University's activity had prevented an opportunity to participate in a learning opportunity, which created a direct connection between the University's governmental mandate and the impugned activity. Thus, the *Charter* applied. Justice Jeffrey found that this finding was correct (para 29).

Justice Jeffrey also provided additional reasons for the conclusion that the *Charter* applied. First, by using the provincial trespass legislation to stop Whatcott from disseminating his views, the University could not act contrary to the *Charter* any more than Alberta's Legislature could when it created the trespass offence (para 31). Second, in addition to providing learning opportunities as a connection between the University and its governmental role, the University stated that its statutory mandate included providing a platform for the exchange of ideas and the advancement of knowledge, which is consistent with a University that is censorship free, not *Charter*-free (para 33). Thus, the distribution of flyers on campus had a direct connection to the additional governmental intentions for the University's existence (para 34). Third, the university was (is) publicly funded, which was a factor which could not easily be discounted in assessing the applicability of the *Charter* (para 35). Fourth, the University's use of the provincial trespass legislation engaged the powers of the state in issuing the ticket, prosecuting the charge and enforcing and receiving any fine. The University did not appear as a litigant to enforce its property rights, but rather the Crown appeared to enforce the laws and interests of the state. Therefore, these actions were subject to *Charter* scrutiny (para 37).

Once Justice Jeffrey determined that the *Charter* applied, he went on to examine whether the *Charter* was violated in this scenario. First, Justice Jeffrey agreed with the Trial Judge that Whatcott's distribution of flyers fell within freedom of expression as protected by *Charter* section 2(b) (para 40). Second, he noted that campus security had used the trespass legislation to respond to an individual's complaint about the content of the flyers. The Trial Judge was therefore correct in concluding that the effect of the enforcement of the provincial trespass legislation was to restrict Whatcott's freedom of expression under the *Charter* (para 42).

Next, Justice Jeffrey analyzed whether the *Charter* infringement was nevertheless saved by the *Charter* section 1 as being reasonable and demonstrably justified in a free and democratic society. The Trial Judge had found that the university's prevention of the distribution of flyers was not related to an objective that was pressing and substantial, and thus the University's use of the trespass legislation could not be justified under the *Charter* section 1. Further, the Trial Judge concluded that the indefinite ban of Whatcott was excessive. Justice Jeffrey agreed, and added that the University's use of handcuffs, its pat-down search and its imprisonment of Whatcott were all a disproportionate response to the peaceful distribution of flyers.

Thus, it would appear that activities related to learning, the exchange of ideas and the advancement of knowledge (or other legislated activities of the university), could provide the "governmental" nexus required to invoke the application of the *Charter* to the University. This could encompass expressive activities such as flyer distribution and other displays of material that some people may find offensive.