

Freedom of Expression, Universities and Anti-Choice Protests

By Jennifer Koshan

Anti-abortion protestors were back in force at the University of Calgary the last week of March following [news](#) that on March 16, they pleaded not guilty to trespassing charges laid against them in relation to a similar incident in November, 2008. One might reasonably think that the freedom to express anti-choice views deserves protection on a university campus, a center of academic debate on a range of controversial subjects. Or one might reasonably think that the University of Calgary was justified in advising the Campus Pro-Life group that they could mount their protest, provided they turned their signs - depicting graphic images of the Rwandan genocide, the Holocaust, the Ku Klux Klan and aborted fetuses - inward. But the University is making a different [argument](#), namely that the *Canadian Charter of Rights and Freedoms* does not apply to universities. I think that view is itself subject to debate.

Section 32 of the *Charter* provides that it applies to the Parliament and government of Canada and the legislature and government of each province. In *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, the Supreme Court of Canada interpreted section 32 to mean that the *Charter* only applies to government actors and government action, and not to private actors. A subsequent trilogy of cases examined whether universities and hospitals could be considered government actors to which the *Charter* applied. In one of these cases, *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, a majority of the Supreme Court held that government actors are those who are under the control of government. Even though universities are publicly funded, are creatures of statute performing public services and may be subject to judicial review of their decisions, the majority found they were legally autonomous bodies rather than part of the apparatus of government. Colleges, on the other hand, may be subject to the application of the *Charter* in circumstances where they are under the routine and regular control of the government (see e.g. *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211). The question of whether the *Charter* applies to a particular actor is very much a contextual, fact-based inquiry.

Interestingly, Alberta's *Post-secondary Learning Act*, S.A. 2003, c. P-19.5, covers universities, colleges, and technical institutes. Formerly, there was a separate statute governing universities in Alberta, but the *Universities Act*, R.S.A. 2000, c. U-3, was repealed when the *Post-secondary Learning Act* came into effect. Could it be said that the inclusion of all post-secondary institutions in one statute erases the differences amongst them, such that the *Charter* might now apply to universities as it does to colleges? It is likely not that simple, as the *Post-secondary*

Learning Act does continue to treat different post-secondary institutions differently in respect of some key issues, such as the appointment of members of the board of governors and the requirement of a senate and general faculties council for universities but not colleges. Universities therefore continue to be distinguished from colleges in having a greater degree of decision-making autonomy.

Even if a university is not a government actor, the *Charter* also applies to non-government actors in specific instances where they are implementing government policy. For example, a hospital is not a government actor (see *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483), but when it is carrying out government policy concerning the delivery of health care services, the *Charter* will apply to its actions as if they were those of a government actor (see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, where a hospital's refusal to provide funded sign language interpretation for deaf patients was subjected to *Charter* scrutiny). In *McKinney (supra)*, a majority of the Supreme Court held that in the circumstances of that case - a claim that the university's mandatory retirement policy was discriminatory - the university was not implementing government policy; rather it was acting as an employer. However, a majority of the Court also noted that in some circumstances, universities might perform public functions to which the *Charter* would apply (see the reasons of L'Heureux-Dubé J. at p. 418; Sopinka J. at p. 444; and Wilson and Cory JJ. at pp. 371-379, as cited in *R. v. Whatcott*, 2002 SKQB 399 at para. 41).

In *R. v. Whatcott*, a similar issue arose as to whether the *Charter* applied to a university in the context of anti-abortion expression. William Whatcott was convicted of littering under the University of Regina Traffic and Parking Bylaws when he placed anti-abortion pamphlets on a number of vehicles parked at the university. On appeal, he argued that the bylaw infringed his freedom of expression under section 2(b) of the *Charter*. The preliminary question of whether the *Charter* applied was answered in the affirmative by Justice Ball of the Saskatchewan Court of Queen's Bench. According to Justice Ball, "the enactment of the Bylaw was a quintessentially governmental function" that "resulted in the appellant being charged, prosecuted, tried, convicted and penalized by the Provincial Court for distributing his pamphlets" (at para. 43). The University was exercising authority given to it by the *University of Regina Act*, R.S.S. 1978, c.U-5, and was acting akin to a municipality enforcing its bylaws. The bylaw was found to violate section 2(b) of the *Charter*, and the fact that it was a total ban on pamphlet distribution anywhere on campus meant that it was not justifiable as a reasonable limit under section 1 of the *Charter*, as it did not minimally impair the expression.

Importantly, Justice Ball noted that a university campus is "a locale one would expect to facilitate and encourage free and open intellectual discussions" (at para. 47). This finding is supported by Alberta's *Post-secondary Learning Act*, the preamble of which provides as follows:

WHEREAS the Government of Alberta recognizes that the creation and transfer of knowledge contributes to Alberta's competitive advantage in a global economy; and
WHEREAS the Government of Alberta is committed to ensuring that Albertans

have the opportunity to enhance their social, cultural and economic well being through participation in an accessible, responsive and flexible post secondary system; and

WHEREAS the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities through a co ordinated and integrated system approach, known as Campus Alberta, wherein post secondary institutions collaborate to develop and deliver high quality learning opportunities;

...

In the circumstances at hand, members of Campus Pro-Life - some of whom are University of Calgary students - were charged with trespassing in relation to their protest. It would appear these actions are being taken in order to avoid violent confrontations on campus that the displays might provoke, a concern that Campus Pro-Life itself is said to have raised with the University. According to a media release issued by the University on November 21, 2008, "Campus Pro-Life's actions, and the organization's repeated refusal to respond to reasonable requests, have elevated the University's concern for the safety and security of students, faculty and staff." In these circumstances, is the University acting more like an employer, as in *McKinney*, or is the University engaged in a public function, more like the University of Regina in *Whatcott*?

The case arguably falls somewhere in the middle, but I suggest that it is closer to the public function end of the spectrum. To the extent that the University of Calgary is restricting expression on its campus to protect other students, staff and faculty, it is interfering with the very "creation and transfer of knowledge" entrusted to it by the *Post-secondary Learning Act*. As in *Whatcott*, the fact that this management of knowledge is taking place outside of the classroom does not diminish its close connection to the public functions of a university. It is not only in classrooms that learning, dialogue and debate occur on university campuses.

How significant is the fact that the University of Calgary is relying on the *Trespass to Premises Act*, R.S.A. 2000, c. T-7, rather than a university bylaw as in *Whatcott*? The University has said that the campus is "private property" and that "freedom of expression does not extend to trespassers" (see <http://www.cbc.ca/health/story/2008/11/24/abortion-protest-calgary.html>). This seems like a red herring, as the *Trespass to Premises Act* does not distinguish between public and private property. Freedom of expression is protected on both public and private property, although it is rare for the government to regulate expression on private property (but sometimes it does so, for example in prohibiting the possession of child pornography even in the privacy of one's home - see *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45). The key question for the application of the *Charter* is whether there is government action in relation to the property, regardless of whether it is public or private.

Another way of looking at the *Trespass to Premises Act* is that it actually provides rather than undermines the necessary government action for the *Charter* to apply to the University's actions. The Act empowers owners or their authorized representatives to give notice prohibiting trespass on property covered by the Act. Those who disobey a notice not to trespass are guilty of an offence and liable to a fine not exceeding \$2000 (for a first offence) or to a fine not exceeding

\$5000 (for a 2nd or subsequent offence in relation to the same premises - section 3). By empowering universities to constrain expressive activity on their property, the *Trespass to Premises Act* kick starts the process whereby protestors can be “charged, prosecuted, tried, convicted and penalized” at the behest of a university, as in *Whatcott*. This is not to say that the *Trespass to Premises Act* is itself the source of the section 2(b) violation. As in *Eldridge*, the source of the *Charter* violation is the conduct of the University rather than the legislation that confers discretion upon it. Further, this argument should not be taken to mean that the *Charter* is applicable to all owners covered by the *Trespass to Premises Act*. Rather, the Act supports the argument that the University is acting pursuant to its public function to deliver educational services in an atmosphere free of violence. Therefore, if the University of Calgary is restricting the anti-abortion protests and invoking its powers under the *Trespass to Premises Act* as part of its implementation of educational policy, including the creation of a safe environment for its students, staff and faculty, the *Charter* will be found to apply to it.

If the University loses its argument that it is not subject to the *Charter*, it would then be up to the anti-abortion protestors to prove that their freedom of expression under section 2(b) of the *Charter* had been infringed. All activities that convey meaning are protected under section 2(b), unless they take a form that is violent. Depictions of violence and hate speech are covered (see *R. v. Butler*, [1992] 1 S.C.R. 452 and *R. v. Keegstra*, [1990] 3 S.C.R. 697). Even though the images shown on the Campus Pro-Life posters were of violent historical events, and even if the display crossed the line into hate speech against women, the message was not delivered using actual violence, so the display would likely fall within the scope of section 2(b) of the *Charter*. While the University permitted the displays to be erected, the use of its powers under the *Trespass to Premises Act* requires protestors to choose between mounting their displays and facing sanctions, or avoiding those sanctions by curbing their expression. This would likely amount to a violation of section 2(b), and it would thus be necessary for the University to justify the restrictions on the anti-abortion protests under section 1 of the *Charter*.

To justify its conduct, the University would likely argue that the limits it placed on the expression were reasonable in the circumstances. It offered Campus Pro-Life the option of setting up its display so that it faced inwards, such that persons walking by could avoid seeing the images unless they chose to do so. As noted, the University’s objective was to prevent the protest from turning violent. When Campus Pro-Life refused to accept this limitation, the University permitted the group to erect its display facing outwards and posted warning signs around the perimeter of the display. It was only after the fact that the protestors were charged under the *Trespass to Premises Act*. For their part, Campus Pro-Life members may argue that the University’s limitations were not reasonable. The purpose of their display is to shock passersby with images associating abortion with genocide, and to turn their display inward would unduly restrict the reach of their message. To use the language of *R. v. Oakes*, [1986] 1 S.C.R. 103, Campus Pro-Life would contend that the University’s actions did not minimally impair its expression.

Whose arguments would be more likely to prevail? Similar restrictions on anti-choice expression are found in B.C.’s *Access to Abortion Services Act*, R.S.B.C. 1996, c.1, which creates protest-

free bubble-zones around abortion clinics, hospitals performing abortions, and the homes of abortion service providers. This legislation was upheld as a justifiable limit on expression in *R. v. Spratt*, 2008 BCCA 340. While the groups protected by that legislation - women seeking abortion services and abortion service providers - are more vulnerable than university students, faculty and staff, the case nevertheless shows that freedom of expression is not absolute and may be reasonably limited in terms of its time, place and manner of delivery.

At the end of the day, the result may be the same whether the *Charter* applies to universities or not. In other words, the University of Calgary's actions towards Campus Pro-Life may not constitute a defence to the trespassing charges either because the University is not subject to the *Charter*, or because the University acted reasonably in limiting the protestors' freedom of expression. However, the question of whether the *Charter* applies to universities has broader implications, and is not as clear-cut as the University of Calgary has made it out to be (at least as reported by the media). Universities in Canada are entrusted with the delivery of post-secondary educational services, a function that remains a public one in this country. As long as this is the case, universities may be required to respect *Charter* rights and freedoms in carrying out these services.

Finally, if the *Charter* does not apply to the University in these circumstances, can human rights legislation assist the members of Campus Pro-Life? Alberta's *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14 ("HRCMA"), does not protect freedom of expression per se, although the prohibition against publicly displaying a sign that is discriminatory or is likely to expose a protected class of persons to hatred or contempt is to be interpreted so as not to "interfere with the free expression of opinion on any subject" (section 3). This provision would only arise if a complaint was made under the *HRCMA* against Campus Pro Life or its members engaged in the anti-abortion display.

HRCMA also prohibits the denial of facilities customarily available to the public to persons because of their race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income or family status (section 4). A similar section was found to apply to a university in the provision of facilities to one of its students in *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353. In fact, one of the Supreme Court's reasons for reaching this conclusion was as follows (at para. 50):

Given that it appears that the *Canadian Charter of Rights and Freedoms* does not apply to universities in their relations with their members (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229), and that this Court has foreclosed a common law cause of action for discrimination operating in tandem with human rights legislation (*Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181), students enrolled in the university would be denied any protection from discrimination [if human rights legislation did not apply to universities].

This case was decided before *Eldridge*, and should not be taken to undermine the proposition that the *Charter* might still apply to universities where they are carrying out government functions.

Returning to the *HRCMA*, could the Campus Pro-Life protestors argue that the denial of university space for their anti-abortion displays violated section 4? The difficulty here would be fitting themselves within one of the protected grounds. Unlike some other human rights statutes (see e.g. Manitoba's *Human Rights Code*, C.C.S.M. c. H175, section 9(2)(k)), the *HRCMA* does not protect against discrimination on the ground of political beliefs. While anti-abortion beliefs may be based upon religion in some cases, a finding of discrimination on this ground would very much depend on the evidence put forward by the Campus Pro Life members in question.

ABlawg will continue to follow this case once the trespass charges come on for trial.