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Alberta Court of Appeal Concludes that University of Alberta is Subject to the *Charter*

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Decision Commented On: *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 (CanLII)

Once again, Alberta courts have been asked to address whether and when the *Charter* applies to activities at universities. There have been several ABlawg posts in the last few years that indicate there are two conflicting lines of cases across Canada. See: Context is Everything When it Comes to *Charter* Application to Universities, BCCA Unfortunately Chooses Not to Follow Alberta's Lead on the Issue of Whether the Charter Applies to Universities; Does the Charter Apply to Universities? Pridgen Distinguished in U Vic Case; Face-ing the Charter's Application on University Campuses; University Campus is not Charter-Free; and Freedom of Expression, Universities and Anti-Choice Protests.

The Alberta Court of Appeal (ABCA), in *UAlberta Pro-Life v Governors of the University of Alberta*, was again faced with similar issues as in previous cases involving freedom of expression on campus. Justices Jack Watson, Peter Martin and Michelle Crighton were asked to address appeals from two rulings made by Justice B.L. Bokenfohr in *UAlberta Pro-Life v Governors of the University of Alberta*, 2017 ABQB 610 (CanLII).

On March 3 and 4, 2015, the student group UAlberta Pro-Life held an anti-abortion event with large photo displays in what is called the Quad area of University of Alberta (at para 3). There was a counter demonstration on both days consisting of "many University students, faculty, staff, and the general public" who were "standing side by side holding signs and banners blocking the displays" (at para 3). Chanting and cheers of protest were also heard (at para 3).

The first case involved a complaint by Pro-Life that the University of Alberta did not take any disciplinary action against the counter protesters under the *University Code of Student Behaviour*. The Alberta Court of Queen's Bench (ABQB) denied judicial review of the University's decision not to discipline the counter demonstrating group (at para 4).

The second case addressed a situation when Pro-Life applied to hold a similar event in the Quad in early 2016. This time, the University required that Pro-Life deposit $9,000 in advance to defray the costs of security, with a balance of $8,500 to be paid afterward. Because this cost was prohibitive, the Pro-Life group argued that this denied "their exercise of freedom of expression" (at para 5). As with the first case, the ABQB denied judicial review of the University's decision to charge in advance for the costs of security (at para 5).

There were a number of preliminary issues and other issues before the ABCA. This post focuses on the discussion of whether the *Canadian Charter of Rights and Freedoms* applies to protect the rights of University students (see paras 102 to 149). As issues of freedom of expression will be discussed elsewhere, I will extract those portions of the judgment that pertain to the issue of whether and when the *Charter* applies to a university.

The ABCA (per Justice Watson), noted that the lower court had not found it necessary to address the question of whether the *Charter* applies to university students in the context of speech (at para 103). However, Justice Watson felt that he must answer this question (at para 104).

Noting that the University of Alberta was established by legislation in 1906 (at para 105), Justice Watson noted that "the University and its purposes were a subject of great significance to *the Crown* when it enacted the University into existence under s 93 of the *Constitution Act, 1867*" (at para 106). Justice Watson states:

> In other words, from its very inception, the University was committed by government policy with deep Constitutional roots to a broad scope of education with surveillance by the Crown (at an increasingly greater distance over the decades). In the modern era, by its own current website, the University is dedicated to higher education and to human innovation, which of course involves the broadest possible dissemination / expression of what the University discerns. (at para 109)

Justice Watson also noted that the context (the Quad), a place where "students, faculty, staff and visitors [meet and] move about" (at para 111) was "a classic forum for expression or for listening arguably comparable to the groves of the academe at the time of Plato" (at para 111). Thus, if the University is subject to the *Charter*, it could not be open to the university to argue that the *Charter* does not protect expression in the location of the Quad (citing *Montreal (Ville) v 2952-1366 Québec inc.*, 2005 SCC 62 at paras 64, 73-77).

Justice Watson emphasized, however, that it was still open to the University to argue that it was not *legally* obligated to protect *Charter* freedoms of students in all contexts. Thus, it would be possible that the University was merely morally obligated to reflect *Charter* values in its relations with students (at paras 119-120, 124).

Justice Watson canvassed some early decisions that established "it has been accepted that a *Charter* right or freedom may be involved in a factual situation without the party seeking to limit it being either an aspect of government or carrying out government action under s 32 of the *Charter*" (at para 124). However, it is not sufficient to demonstrate that an entity is acting under statutory authority (*Harrison v University of British Columbia*, [1990] 3 SCR 451). Pro-Life also had to show that the University was engaged in a form of governmental action when it set the security cost conditions in 2016 (at para 127).

For the present case, Justice Watson held that "it is sufficient to consider whether the specific activity of the University in relation to the specific *Charter* freedom of expression *exercised by students on University campus property* is 'governmental in nature' [not the University as a whole]" (at para 128).

Pro-Life argued that the University is bound by *Charter* s 32 to allow students to engage in freedom of expression on the Quad (at para 129). Pro-Life relied on the cases of *Pridgen v University of Calgary*, 2012 ABCA 139; *R. v Whatcott*, 2012 ABQB 231; and *Wilson v University of Calgary*, 2014 ABQB 190. All of these cases have been discussed in the previous posts above. The difficulty with *Pridgen* is that two of the three Appeal Justices relied on administrative law principles to deal with the issues. Only Justice Paperny thought it was necessary to delve into the issue of the application of the *Charter* to (in this case) disciplinary procedures against students by universities. Nevertheless, Justice Papery thoroughly canvassed the judicial history of determining whether a body is a government or government actor. Justice Watson (at para 131) quoted Justice Paperny's categories of government to which the *Charter* applies:

1. Legislative enactments;

2. Government actors by nature;

3. Government actors by virtue of legislative control;

4. Bodies exercising statutory authority; and

5. Non-governmental bodies implementing government objectives (*Pridgen*, para 78).

Justice Paperny held that the University of Calgary in *Pridgen* was exercising statutory authority and thus subject to the *Charter*.

The University of Alberta argued that the Ontario case of *Lobo v Carleton University*, 2012 ONCA 498 should be followed. This case held (at para 4): "when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*". The intervenor, British Columbia Civil Liberties Association (BCCLA), argued that *Lobo* should be distinguished because it turned on the legislative history of Carleton University, and because it was merely a motion to strike out a lawsuit (at para 141).

The ABCA summarized the University's arguments, some of which were based on conflicting case law from Ontario and British Columbia, as follows:

> [104] Nothing in the University's governing legislation requires it to provide a forum for extracurricular expression by students. There is no specific government direction that such a policy be carried out by post-secondaries institutions in Alberta. While the University may choose to provide supports for extra-curricular activities by its students, it does not attract Charter scrutiny merely in doing so. This does not mean, however, that students are without protection for fundamental human rights. The University is subject to the *Alberta Human Rights Act* like any other private or statutory body in Alberta.
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> . . .
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> [106] This case does not relate to the imposition of discipline against a student. It does not relate to the potential or actual exclusion of a student from an academic course or program, nor to a decision relating to research, teaching, or academics. As in *BCLA* and *Lobo*, the powers being exercised here go no further than those powers held by any owner of land:

> the ability to make rules about who can use the land and to place conditions on that use, including the requirement that the actual costs associated with ensuring safety and security are passed on to that user. Under a proper *Eldridge* analysis, the *Charter* should not apply to this Security Cost decision. (at para 146, quoting paras 104 and 106 from the respondent's factum).

In the end, Justice Watson sets out five reasons why the *Charter* should apply in the context of this case. (I have underlined the most important aspects):

> (1) The education of students largely by means of free expression is the core purpose of the University dating from its beginnings and into the future. It is a responsibility given to the university by government for over a century under both statute and the *Constitution Act, 1867*. It is largely funded by government and by private sector donors who likewise support and adhere to the core purpose of the University. Education of students is a goal for society as a whole and the University is a means to that end, not a goal in itself.
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> (2) The education of students is the acknowledged core purpose of the University even by the University's own view of its mandate and responsibility. The University recognizes that society of Alberta, Canada and the World benefits from higher education and its production of wisdom, innovation and associational harmony and peace. In a sense, education of a younger generation is the primary duty of the generations that came before. Again, the University is a method for the older generations to pass both knowledge and values down to the younger generations.
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> (3) The ability of students to learn and to debate and to share ideas is not only a central feature of the core purpose of the University, but also the grounds of the University are physically designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space. This involves infrastructure and land holdings granted to the University and / or sustained by money from many sources. These resources of infrastructure and land holdings are, above all, designed to permit interaction, assemblies, for a, and the ancient characteristics of educational exchange.
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> (4) Recognizing the *Charter* as applicable to the exercise of freedom of expression by students on the campuses of the University is a visible reinforcement of the great honour system which is the Rule of Law. The core values of human rights and freedoms, democracy, federalism, Constitutionalism, equality and respect for minority interests are continually reinforced and invigorated where it is apparent that there are no places where the government is present by proxy and yet the *Charter* writ does not run.
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> (5) The recognition of the University's being subject to s 32 of the *Charter* in relation to freedom of expression by students on University grounds does not threaten the ability of the University to maintain its independence or to uphold its academic standards or to manage its facilities and resources, notably in light of the degree of deference available to the University under the *Dore / Loyola / TWU1 / TWU2* analysis as discussed below. (at para 148)

Justices Crighton and Martin agreed that it was appropriate to decide whether the *Charter* applied to the University in the context of this case; they also agreed with Justice Watson's conclusion and

analysis on this issue (at para 222). Therefore, it was open to Pro-Life to argue that its freedom of expression was protected on campus and that the University of Alberta had violated this freedom in placing restrictions on the Pro-Life Events.

Commentary

We now have conflicting judgments from provincial courts of appeal on the issue of whether the *Charter* applies to universities in the context of on campus events, even in situations with very similar facts. It is therefore hoped that the Supreme Court of Canada can settle this matter or at least provide some principles that are universally applicable to universities and similar bodies in terms of whether they are or are not subject to the *Charter*.

This post may be cited as: Linda McKay-Panos, "Alberta Court of Appeal Concludes that University of Alberta is Subject to the *Charter*" (February 25, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/02/Blog_LMP_ProLife.pdf

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