

June 21, 2024

Encampments on Campus: Trespass, Universities, and the *Charter*

By: Jennifer Koshan and Jonnette Watson Hamilton

Matter Commented On: University of Calgary and Calgary Police Service Response to an On Campus Encampment on May 9, 2024

Campus encampments have proliferated this spring, demanding that universities divest from funds supporting Israel’s military operations in Gaza. In Alberta, the University of Calgary called in the police to dismantle a student encampment in the University quad on May 9, 2024 less than 24 hours after it went up, and similar action followed at the University of Alberta two days later. Concerns were raised about the use of force by the universities and police (see e.g., a letter from law professors [here](#) and from a former justice of the Alberta Court of Appeal [here](#)). The universities defended their actions on the basis that they had properly invoked their powers under trespass law and university policies. According to a [message to the campus community](#) from University of Calgary President Ed McCauley on May 10, 2024:

All members of the community have the right to free speech and the right to protest.

But because, for safety and operational reasons, temporary structures as part of protests and overnight protests are not permitted, the individuals who set up the encampment were provided a written summary of the university’s policies and procedures and asked to remove their camp. They were issued a trespass notice when they refused to take the structures down.

At 8 p.m. yesterday, Calgary Police Service began enforcing the university’s trespass order. Their decision to enforce a trespass order — and how — is based on assessment of the risk to public safety as determined through things such as protester actions, communications (including social media monitoring) and analysis.

I want to underline that as community members, you have the right to protest. Protests occur regularly and with the operational support of the university.

But as outlined in our campus statement on free expression, that right is subject to limitations imposed by law as well as policies and procedures related to the university’s functioning.

Trespass law and its protection of “private property” are often raised as a complete answer to any criticism of the universities’ actions – not just in Alberta but beyond (see e.g., the recent reliance

on trespass law to call in police to respond to the encampment at [York University](#)). However, the [Canadian Charter of Rights and Freedoms](#) is the supreme law of Canada, and any assessment of the legality of forcibly dismantling a student protest must be analyzed in this light. In this post, we unpack the “trespass” and “university policy” justifications by examining the legal frameworks relevant to the University of Calgary, as well as the application of the *Charter* to these frameworks, focusing on the actions of the University.

Trespass Law

At common law, real property (land and attached structures) is protected primarily by the tort of trespass. No one is allowed to intentionally enter on or touch the property of another without authorization of the property’s owner or lawful occupier. Anyone who does so is liable to the owner or lawful occupier. Trespass to land is also a strict liability tort. All that matters is that the act being called a trespass, such as the act of stepping on someone else’s lawn, was an intentional act that lacked authorization; it does not matter if the trespasser caused damage or not, or that it was necessary to take the step, or that the trespasser did not know they were doing wrong (*Costello v Calgary (City)*, [1997 ABCA 281 \(CanLII\)](#) at para 7). The typical remedies for trespass to land are court-ordered injunctions to prevent the trespass from continuing or reoccurring and monetary damages. Trespass is strong protection of property, tied to the idea that the essence of property is the right of the owner to exclude all others (see Thomas W. Merrill, “Property and the Right to Exclude” [\(1998\) 77 Nebraska Law Review 730](#)).

Even though Alberta has three different trespass statutes, it appears that the common law tort continues to exist in Alberta. In 2003, the Supreme Court of Canada, when considering arrest powers at an Ontario airport, held that Ontario’s *Trespass to Property Act*, [RSO 1990, c T.21](#) – the equivalent of Alberta’s *Trespass to Premises Act*, [RSA 2000, c T-7](#) – “did not replace the common law remedies, but gave occupiers additional rights” (*R v Asante-Mensah*, [2003 SCC 38 \(CanLII\)](#) at para 30). And in *The Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform*, [2014 ABQB 493 \(CanLII\)](#), when the Calgary International Airport applied to restrain pro-life, anti-abortion demonstrations, Chief Justice Neil Wittmann found that the protesters had trespassed, both under Alberta’s *Trespass to Premises Act* and the common law (at para 59).

Despite the ongoing relevance of the common law tort of trespass and the strength of its protection of property, as well as related but more limited provisions in the federal *Criminal Code*, [RSC, 1985, c C-46](#) (see s 72(1) (prohibiting forcible entry onto real property in the actual and peaceable possession of another) and s 430 (prohibiting mischief to property)), Alberta has three different trespass statutes. The earliest was the *Petty Trespass Act*, [RSA 2000, c P-11 \(PTA\)](#), followed by the *Trespass to Premises Act (TPA)*, and then, in 2020, the *Critical Infrastructure Defence Act*, [SA 2020, c C-32.7 \(CIDA\)](#). The first two statutes were amended substantially by the *Trespass Statutes (Protecting Law-Abiding Property Owners) Amendment Act, 2019*, [SA 2019, c 23](#), as a result of animal rights activists’ sit-in at a southern Alberta turkey farm: see Jodi Lazare, “Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?” (2020) 58:1 Alberta Law Review 83 at 88 ([SSRN](#)). For the motivation behind the newest statute, see Jennifer Koshan, Lisa Silver, and Jonnette Watson Hamilton, [“Protests Matter: A Charter Critique of Alberta’s Bill 1”](#) (June 9, 2020). Both the 2019 amendments and the 2020 statute target activism.

One way to see how the three Alberta statutes differ from the common law and from each other is to compare the statutes across various criteria. Like the description of trespass at common law, the features are simplified somewhat for ease of comparison.

	<i>Petty Trespass Act</i>	<i>Trespass to Premises Act</i>	<i>Critical Infrastructure Defence Act</i>
Property type	“Land”, excluding Crown land (s 1)	Building or structures in whole or in part, plus the land used with the building or structure for parking, storage, enhancing appearance or use, plus any land not included in the <i>Petty Trespass Act</i> (s 1(c))	“Essential infrastructure” as defined in the act or regulations, including pipelines, oil sands sites, storm drainage systems, highways and their ditches, railways, power plants, public utilities, dams, public hospitals, ambulances, continuing care homes, etc., plus land on which the essential infrastructure is located and land used in connection with the essential infrastructure (s 1(1), (2))
Entry prohibited by notice	Oral or written notice or posted signs saying “no trespassing” are each sufficient (s 2.1)	Oral or written notice or posted signs saying “no trespassing” are each sufficient (s 2(2))	N/A
Entry prohibited without notice	On any land that is a lawn or garden, or used for farming, ranching or beekeeping, or enclosed by a fence or natural boundary or anything else indicating people are to keep off (s 2.2)	N/A	Willful entry is prohibited (s 2(1))
Prohibitions	Entry on the land by individuals without the permission of the owner or occupier is prohibited, as is failing to leave after being told to do so (s 2)	Entry into the building or structure or land used with it when the individual has notice not to trespass is prohibited (s 2)	Willful entry, wilful damage or destruction, and wilful obstruction, interruption and interference with essential infrastructure are prohibited. Aiding or counselling prohibited actions is also prohibited (s 2)
Defences	Having a right or legal authority to be on the land (s 2(3))	Acting under a fair and reasonable belief that the trespasser had a right to act as they did (s 8)	A lawful right, justification or excuse to enter (s 2)
Police powers	Trespassers may be arrested without a warrant by any	Trespassers may be arrested without a warrant by any	Trespassers may be arrested without a warrant by a peace officer (s 4)

	<i>Petty Trespass Act</i>	<i>Trespass to Premises Act</i>	<i>Critical Infrastructure Defence Act</i>
	peace officer or by the owner or occupier (s 4)	peace officer or by the owner or their representative (s 5)	
Penalties for individuals	A fine not more than \$10,000 for the first offence and a fine not more than \$25,000 for subsequent offences on the same land; imprisonment for up to 6 months also available for prohibited entry with notice (ss 2(1.3), 2(2))	A fine not more than \$10,000 or imprisonment for up to 6 months or both for the first offence and a fine not more than \$25,000 or imprisonment for up to 6 months or both for subsequent offences on the same buildings and structures (s 3(1)(a))	A fine not less than \$1,000 and not more than \$10,000 or imprisonment for up to 6 months or both for the first offence and a fine not less than \$1,000 and not more than \$25,000 or imprisonment for up to 6 months or both for subsequent offences on the same premises; each day the offence continues is a separate offence (s 3)

One of the most interesting things about the one common law and three statutory descriptions of trespass is how insignificant the category of “private property” is to trespass. Arguments supporting university and police actions have often taken the form of “the campus is private property,” therefore “protesters were trespassing,” and therefore “police actions were justified.” Whether a campus is private property or public property or some mixture of the two is irrelevant for many purposes, including for the purposes of designating conduct as “trespass” and – as we will argue below – for the purposes of examining the university and police actions.

Although the University of Calgary did not specify which trespass law it relied on in giving notice to the protestors, one might assume it was the *PTA*, given that the encampment occurred on “land” and not “premises” or “essential infrastructure.” Regardless of which statute was applied in the case of the encampment, having a right to be on the land (s 2(3) *PTA*) or to engage in activities on the premises (s 8 *TPA*) is a defence for anyone charged under the Acts. Before turning to the *Charter* rights that may be relevant to this inquiry, we outline the applicable university policies in the next section.

University Policies

In the [June 2024 newsletter](#) of The University of Calgary Faculty Association (TUCFA), President Kent Donlevy indicated that in the weeks before May 9, “a committee was established on campus to plan for potential encampments.” TUCFA was not invited to participate on this Committee, nor was it advised of its membership, mandate, or plans for possible responses that might be taken by the University and/or police. Donlevy speculated that the policy relied on by the University on May 9 is likely the [Use of University Facilities for Non-Academic Purposes Policy](#) (Facilities Policy), although President McCauley’s message of May 10 did not mention this Policy specifically.

The purpose of the Facilities Policy is “to outline terms and conditions for the use of University Facilities for Non-Academic Purposes so that University space is used efficiently and responsibly,

in ways consistent with University values and priorities, and in a manner that does not interfere with normal academic activities” (s 1). “University Facilities” include “all buildings and grounds, including athletic and recreational fields, owned, leased or operated by the University” (s 3(f)). The Policy recognizes “demonstrations” and defines this term to mean “a public gathering of people to express some sentiment by explicit means such as picketing, parading, carrying signs or shouting, usually in favour of or opposed to some action or opinion” (s 3(a)). It also states that “freedom of expression and lawful assembly are permitted at the University, subject to the limits set out herein” (s 4.2). These limits include “Prohibited Conduct”, which is defined as:

(i) conduct prohibited by law; (ii) conduct that threatens or endangers the health or safety of any person or creates in such person a reasonable fear that such a result will occur; (iii) the use of force or violence, actual or threatened; (iv) conduct that threatens or interferes with the maintenance of appropriate order and discipline in the operation of the University, including its academic programs; (v) any conduct that results in damage or defacement of University facilities; (vi) inciting, aiding, or encouraging others to engage in prohibited conduct; and (vii) any conduct that is contrary to University policy or specific university direction. (s 3(c))

As noted by Donlevy, the Facilities Policy is “silent regarding temporary structures and overnight stays.” We would add that this Policy is also silent on the University’s use of trespass laws as a means of restricting access to its facilities.

The Facilities Policy purports to confer on the University “the right and responsibility to control and manage the use of and access to University Facilities in order to: a) ensure a safe, respectful, and civil environment; b) protect and maintain the physical assets of the University; and c) protect the reputation of the University” (s 4.1). We note, however, that a university does not have “rights” – it has “powers” that may be limited by the *Charter*, as we discuss below.

The Facilities Policy [cross-references](#) (at art 7) the University’s [Student Non-Academic Misconduct Policy](#) to establish the consequences for students of engaging in prohibited conduct (Misconduct Policy). [Appendix 2](#) of the Misconduct Policy sets out available sanctions for prohibited conduct, including probation, suspension, loss of privileges (e.g., access to certain university facilities), and expulsion.

The other policy that is relevant to our discussion is the University’s [Statement on Freedom of Expression](#), dated December 13, 2019. This Statement was mandated by a [ministerial directive from the province](#) in July 2019, consistent with the then-new UCP government’s commitment to the [Chicago Principles](#). The relevant part of the Statement says:

All members of the University have the right of free expression, which means the freedom to investigate, comment, listen, gather, challenge and critique subject to the law and, on our campuses, to University policies and procedures related to the functioning of the University. Thus, we may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the institution.

The *Post Secondary Learning Act*, [SA 2003, c P-19.5 \(PSLA\)](#) is also relevant to the discussion of university policies. Section 60(1) of the *PSLA* states that the board of governors of a public post-secondary institution “shall ... (b) develop, manage and operate, alone or in co-operation with any person or organization, programs, services and facilities for the economic prosperity of Alberta and for the educational or cultural advancement of the people of Alberta” (emphasis added). Section 31 of the *PSLA* empowers a university’s general faculties council to provide “general supervision of student affairs” at the university, including the power to discipline students.

That these powers and policies of the University are authorized by provincial statute and government mandate leads to our next topic – the application of the *Charter*.

The Charter

Application

The first step in any *Charter* analysis is to determine whether the *Charter* applies. Section 32(1) provides that the *Charter* applies:

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 32(1) has been judicially interpreted to include two main categories for the purposes of *Charter* application: government actors and government actions (see e.g., *Eldridge v British Columbia (Attorney General)*, [1997 CanLII 327 \(SCC\)](#), [1997] 3 SCR 624). In one of its most recent decisions, a majority of the Supreme Court of Canada held that s 32(1) “must be interpreted in a manner that is flexible, purposive, and generous, rather than technical, narrow, or legalistic” so as to “secure for individuals and relevant collective minorities the full benefit of the *Charter*’s protections and to constrain government action inconsistent with those protections” (*Dickson v Vuntut Gwitchin First Nation*, [2024 SCC 10 \(CanLII\)](#) at para 45 per Kasirer and Jamal JJ).

In the case of government actors, the *Charter* expressly applies to the federal, provincial, and territorial legislatures and governments (i.e., to executive and administrative actions – see *Dickson* at para 41). As a matter of judicial interpretation, it also applies to actors under the routine and regular control of government, such as colleges, and actors that are governmental by nature, such as municipalities. The Supreme Court has previously held that universities are not government actors because they are autonomous and not under the routine and regular control of government (see e.g., *McKinney v University of Guelph*, [1990 CanLII 60 \(SCC\)](#), [1990] 3 SCR 229). However, *McKinney* could be distinguished in Alberta given the level of control the government has claimed over universities in this province, as evidenced by the recent Bill 18, the *Provincial Priorities Act* (see e.g., [here](#) and [here](#)). That is an issue for another day.

Universities will however fall into the second category of *Charter* application when they are found to be carrying out government actions. This category ensures that governments do not avoid their *Charter* duties by delegating government actions to other bodies (see *Eldridge* at para 42). The question is whether the entity in question is exercising delegated governmental powers or is otherwise implementing government policy (*Eldridge* at para 36). If the entity was engaged in internal management (e.g., a mandatory retirement policy for staff in *McKinney*), the *Charter* will not apply, but if it was exercising statutory powers, particularly powers of compulsion, the *Charter* will apply (see *Dickson* at paras 66-68). Under this second category, the *Charter* will only apply to the specific activities of the entity that qualify as governmental (*Eldridge* at para 44). It is therefore crucial to identify the specific activity of the non-government entity that is being challenged.

Returning to the case at hand, the source of the potential violation of protestors' *Charter* rights is not particular provisions of trespass legislation or the *PSLA*, but the specific actions of the University pursuant to those laws – i.e., the University's issuance of a trespass notice to require protestors to decamp and its decision to call in the police to enforce the notice. Police are government actors and must respect *Charter* rights and freedoms in carrying out their powers, and their actions are not our focus here. The issue that concerns us is whether the University itself was engaged in government action in relation to the de-encampment such that the *Charter* applies.

There is previous case law from Alberta where the *Charter* has been applied to universities in circumstances where they were exercising powers of compulsion. In *Pridgen v University of Calgary*, [2012 ABCA 139 \(CanLII\)](#), Alberta Court of Appeal Justice Marina Paperny found that the University of Calgary was subject to the *Charter* in their administration of disciplinary measures for students who made derogatory comments about a professor on Facebook (at para 105). Rejecting the University's argument that student discipline "is an internal matter and a matter of contract" (at para 106), she noted that the *PSLA* expressly authorized student sanctions that affected their access to a university education (at paras 107, 109). She also characterized the relationship between a university and its students in the case of non-academic misconduct as having "a public dimension that is missing in purely private situations", stating that "[s]tudent opinions about the quality of education they are receiving ... are of obvious interest to current and future students of the institution and to the standing of that institution in the academic world" (at para 108). The "public dimension" noted by Justice Paperny applies with equal force to student expression about a university's investments, particularly where students face arrest and discipline as a result of collectively expressing their views while on campus property.

Pridgen was only a decision of one justice, however, with the other justices in that case resolving the issues on administrative law grounds. The Court of Appeal had another opportunity to rule on the application of the *Charter* to universities in *UAlberta Pro-Life v Governors of the University of Alberta*, [2020 ABCA 1 \(CanLII\)](#), also involving student expression on campus. Following a university-permitted anti-abortion event in the main quad of the University of Alberta that gave rise to a counter-demonstration, the University refused to allow a subsequent event by the same group unless they covered the costs of security. The group argued that the University's actions violated their freedom of expression. Writing for a majority of the Court of Appeal on the s 32 issue, Justice Jack Watson held that "the University's regulation of freedom of expression by

students on University grounds should be considered to be a form of governmental action” based on “five overlapping reasons” (at para 148):

- University education of students involves free expression and is the core purpose of the University, a responsibility given to it by government pursuant to powers under the *Constitution Act, 1867*
- The University’s education of students is for the benefit of society and the world
- The University’s grounds “are physically designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space”, involving “infrastructure and land holdings granted to the University and/or sustained by money from many sources”
- Application of the *Charter* to universities in their regulation of freedom of expression upholds the rule of law and the “core values of human rights and freedoms, democracy, federalism, Constitutionalism, equality and respect for minority interests”
- Application of the *Charter* “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.”

The application of the *Charter* in *UAlberta Pro-Life* was thus based on the more general idea of universities performing government action rather than exercising powers of compulsion. While this case provides a broader basis for *Charter* application than the decision in *Pridgen*, the latter case recognized that either the “power of compulsion” or “governmental action” categories could apply in the circumstances there (at paras 103-105). Both cases provide support for the application of the *Charter* to the University of Calgary in regulating the expression of students in an on-campus protest, as well as exercising statutory powers to compel them to decamp.

Finally, in *R v Whatcott*, [2012 ABQB 231 \(CanLII\)](#), Justice Paul Jeffrey affirmed a trial judge’s ruling that the *Charter* applied to the University in circumstances where a non-student was arrested by Campus Security under the *TPA* for distributing anti-abortion pamphlets on campus. Applying the non-delegation of government responsibility rationale from *Eldridge*, he found that “in utilizing provincial trespass legislation to curtail Mr. Whatcott from disseminating his viewpoint ..., the University cannot act contrary to the *Charter* any more than could the Alberta Legislature when it created by statute the trespass offence” (at para 31). This decision suggests that even if the University of Calgary encampment involved persons who were not students, the *Charter* would apply given the University’s reliance on trespass legislation.

We have relied on Alberta case law in this section. Courts in some other provinces have found that the *Charter* does not apply to universities in comparable circumstances, but the cases we cite here are most relevant to encampments on campus in this province. For a similar conclusion that the *Charter* applies to the responses of universities in other provinces to student encampments, see posts by [Jamie Cameron](#), [Irina Ceric](#), and [Richard Moon](#).

Rights, Freedoms, and Reasonableness

Assuming the *Charter* applies to the actions of the University of Calgary in its response to the encampment, there are several rights and freedoms engaged: the protestors' fundamental freedoms of expression, peaceful assembly, and association (ss 2(b), (c) and (d) respectively); their rights to liberty and security of the person (s 7) and their right to equality (s 15). For analysis of how these rights and freedoms are engaged in the context of protests, see our [earlier post on CIDA](#). What we will emphasize here is that for the purposes of freedom of expression, courts have found that the place of expression may internally limit the scope of the right. This idea is referenced in the University's Statement on Freedom of Expression, which states that "we may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the institution."

In *Montréal (City) v 2952-1366 Québec Inc.*, [2005 SCC 62 \(CanLII\)](#), the Supreme Court held that expression on public property is included within s 2(b) when the venue "is a public place where one would expect constitutional protection for free expression" in the sense that expression in that particular place does not conflict with the purposes of s 2(b), namely: "(1) democratic discourse, (2) truth finding and (3) self-fulfillment" (at para 74). As part of this analysis, courts must consider "the historical or actual function of the place" and "whether other aspects of the place suggest that expression within it would undermine the values underlying free expression" (at para 74). The Court also stated that private property "will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*" (at para 62).

We have such "state-imposed limits on expression" in this instance. As noted in the previous section of this post, the University's actions in relation to the encampment can be characterized as governmental, given the University's regulation of expression on campus and its reliance on powers of compulsion under trespass legislation and *PSLA*-authorized policies to call in police to dismantle the encampment. It follows that the *Charter* should apply to the expression in question, regardless of whether university property is characterized as public or private. *Montréal (City)* unnecessarily muddies the waters in this case where we have clear governmental action on university property, and it is notable that *Montréal (City)* was not applied in *Whatcott*. *Montréal (City)* was, however, applied in *UAlberta Pro-Life*. The distinction may be that in *Whatcott*, the *Charter* was raised as a defence to an arrest and charges laid under trespass legislation, whereas in *UAlberta Pro-Life*, the *Charter* was raised more proactively to challenge restrictions on expression on campus. *Whatcott* provides a clearer analogy to the University's actions in relation to the encampment, and we contend that the approach from *Montréal (City)* – namely, a consideration of whether the activity on the property in question was consistent with the values underlying expression and the functions of the place – is not necessary in this case.

Even if *Montréal (City)* applies, that test is likely met. As the University's Statement on Freedom of Expression recognizes, the University is a place where expression is generally encouraged and protected. More specifically, as Justice Watson stated in *UAlberta Pro-Life*, a university "[q]uad is "well suited" to the exercise of freedom of expression" (at para 112). More facts would be helpful to be able to fully analyze whether the encampment did interfere with the functions of the University. But we do know that the encampment occurred during spring term in an outdoor space that did not appear to block access to any University buildings, and it was present for less than 24 hours before the University issued the trespass notice and called in the police. TUCFA has filed a

freedom of information request that may contribute more to the factual context. As it stands, the actions of the protestors in the University quad appear to have promoted the purposes underlying s 2(b) – democratic discourse, truth finding, and self-fulfillment, so there is no clear basis to exclude the encampment from the protected scope of s 2(b) of the *Charter*.

Assuming that at least some of the relevant *Charter* rights and freedoms were engaged by the actions of the University, the next stage of analysis requires the University to defend its actions. This analysis will differ depending on the focus of the *Charter* challenge. TUCFA has advised that four protestors were charged on May 9, presumably under trespass legislation. If they defended those charges based on their *Charter* rights and freedoms, s 1 of the *Charter* would apply. Section 1 allows reasonable limits to be placed on *Charter* rights and freedoms where such limits are “demonstrably justified in a free and democratic society.” It would be up to the Crown to make the case that the trespass charges were a reasonable limit, which requires proof of a pressing and substantial objective for interfering with the rights as well as a reasonably proportionate response (see *R v Oakes*, [1986 CanLII 46 \(SCC\)](#), [1986] 1 SCR 103). It is noteworthy that in *Whatcott*, the University’s actions in preventing the distribution of leaflets were not seen as amounting to a pressing and substantial objective. Justice Jeffrey also noted that “the use of handcuffs, the pat-down search and the imprisonment of Mr. Whatcott [by Campus Security] were a disproportionate response to the peaceful distribution of flyers” (at para 48).

While *Whatcott* relied on *Oakes* in the context of trespass charges, there is another approach that applies in evaluating the reasonableness of exercises of discretion by administrative decision-makers such as universities. In *Doré v Barreau du Québec*, [2012 SCC 12 \(CanLII\)](#), the Supreme Court created the still-current framework for this analysis. The overarching question is “whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play” (*Doré* at para 57). If the actions of the University outside the context of trespass charges were reviewed, *Doré* would be the applicable framework rather than *Oakes*. However, there is “conceptual harmony” between the two approaches (*Doré* at para 57), and we need not say more about them here.

That is because regardless of whether *Oakes* or *Doré* applies, our key point in writing this post has been to show that the invocation of trespass law and university policies alone are not a sufficient basis for the University to justify its actions. To reiterate, those laws and policies are subject to the *Charter* and merely citing them does not establish the proportionate balance required by case law. Although the objectives of trespass laws, the *PSLA*, and University policy will inform the assessment of the reasonableness of the University’s actions, the mere existence or use of law/policy alone is not a justification. More facts are needed about the University’s reasons for issuing a trespass notice and calling in the police to dismantle the encampment as well as the extent to which it balanced the underlying *Charter* rights and freedoms in doing so.

If the University of Calgary had applied for an injunction as McGill, University of Toronto, and other universities across Canada have done in similar contexts, and a court was therefore called upon to assess the arguments for dismantling the encampment, the University would have been required to provide sufficient evidence to support its reliance on safety and operational concerns. Assuming the TUCFA President is correct that a committee was struck to deal with a potential

encampment, presumably University leadership turned their minds to this issue, but we still await details from the University that explain its response.

Conclusion

This post has focused on the application of the *Charter* to the University of Calgary in its handling of the on-campus encampment in May 2024, and is not intended to imply that the *Charter* would apply to the University in other circumstances. As noted in *Dickson*, application of the *Charter*, including s 32, is always highly contextual.

Let us return to President McCauley’s message to the campus community from May 10, which stated: “as outlined in our campus statement on free expression, that right [to protest] is subject to limitations imposed by law as well as policies and procedures related to the university’s functioning.” This statement makes the mistake of suggesting that the right to protest is subject to the law and university policies rather than the other way around. As we have argued here, the *Charter* has primacy over law and policy, so it is more accurate to say that trespass law and the University’s policies are subject to the right to protest.

The problem with invoking trespass law is that police powers are enabled without the independent review of a court that results when a university applies for an injunction. The court’s role is to make evidence-based decisions on matters such as constitutional rights and their reasonable limits. One would hope that as research institutions, universities would also base their actions on evidence, and that they would be transparent about what that evidence was. Trespass law is a blunt instrument and its use by universities will hopefully be subject to a *Charter* challenge in due course.

On the other hand, [as argued by Irina Ceric](#), when universities apply for injunctions, this provides “a veneer of legitimacy” to the policing of student protests, which overtakes student demands for negotiation with their institutions. And an alternative to using trespass law is criminal law, which typically has more serious consequences than being arrested and/or charged for a provincial trespass offence. Indeed, it appears that some protestors at the University of Alberta were criminally charged, but those charges [are reported](#) to have been dropped.

The University of Calgary Students’ Union and the TUCFA President have now called for an independent review (see Students’ Union [here](#) and TUCFA [here](#)) of the events of May 9, 2024, and we hope that such a review grapples with the issues that we and others have raised in relation to encampments on campus.

This post may be cited as: Jennifer Koshan & Jonnette Watson Hamilton, “Encampments on Campus: Trespass, Universities, and the *Charter*” (21 June 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/06/Blog_JKJWH_Campus_Encampments_Charter.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](#)

