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Let Them Eat Breakfast? Encampments on Campus Part 3

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Decision Commented On: *University of Toronto (Governing Council) v Doe et al.*, 2024 ONSC 3755 (CanLII)

Stampede Week in Calgary just ended. Pancake breakfasts and other festivities went ahead despite a recent water emergency. At times like this, folks often point to Calgary's can-do attitude. Indeed, some observers have suggested that this same can-do attitude prevailed, in a good way, when the University of Calgary (UCalgary) called in the Calgary Police Service (CPS) to enforce a trespass notice within less than 24 hours of an on-campus encampment being established on May 9, 2024 (see e.g., the comments of Councillor Terry Wong at the May Calgary Police Commission hearing at 46:13, 49:15). Who needs an expensive court-ordered injunction when the police are willing to heed the call of property owners? Well, the University of Toronto (U of T) decided that it did, seemingly because the Toronto police – unlike the CPS – refused to intervene without a court order in a 50+ day encampment on that campus (*University of Toronto v Doe et al.*, 2024 ONSC 3755 (CanLII) at para 212). U of T got its interlocutory injunction on July 2 and then others, such as Memorial University (here), suggested that the U of T injunction decision supported their actions in removing protesters. We expect UCalgary will also rely on the U of T decision to justify its actions after the fact.

In this post, we build on our analysis in previous posts (see here and here) and argue that the U of T decision does not provide a justification for the actions of UCalgary on May 9. There are too many differences in the factual context for UCalgary to feel complacent about its decision. We also provide some critical commentary on the U of T decision, which in many ways can be summed up as 'universities must be able to control their property so folks can eat breakfast where they want on campus.' This is not a riff on Marie Antoinette's treatment of French peasants; there are nine references to eating breakfast in the 96-page U of T decision.

Occupy U of T Facts

The University of Toronto applied for an interlocutory injunction to end an encampment on the Front Campus of their main campus in downtown Toronto. The protesters occupying the encampment who were named in the application were U of T students and employees. The protesters demanded that the U of T divulge and divest itself of investments and other measures that "sustain Israeli apartheid, occupation and illegal settlement of Palestine" (at para 25). They claimed the U of T's efforts to dismantle their encampment infringed their *Charter* freedoms of expression and assembly.

The Front Campus is a recreational green area in the U of T campus that is open to the members of the university community and to the public (at para 27). It had been closed for 3 years to allow a $100 million renovation, re-opening in October 2023 (at para 28).

Concern that the student-led pro-Palestinian encampment protest movement would be coming to Toronto led the U of T in late April 2024 to erect a fence around the Front Campus, put up "No Tents, No Camping" signs, and send a message to students saying overnight camping would be viewed as trespass (at paras 26-29). On May 2, the Occupy U of T protesters arrived, and set up an encampment on the Front Campus that grew to 177 tents by May 24 (para 30). The protesters said they would not leave until their demands were met (para 32). Nevertheless, several issues were negotiated between the U of T and the protesters during the course of the encampment (at paras 32, 86, 155). The U of T also informed the protesters that it would help them use the university's Divestment Policy and Divestment Procedure that had been established to deal with questions about their social responsibility as investors (at para 37).

The U of T issued a Notice of Trespass on May 24, giving protesters until May 27 to dismantle the encampment and telling them that no tents or other structures were allowed on U of T property and they could not occupy the U of T between 11 pm and 7 am (at para 36). On May 31, the Toronto Police Service refused to remove the encampment without a court order because the U of T initially allowed the protestors to stay and a Quebec court had refused to grant McGill University an injunction against a similar encampment ("Toronto police say trespassing law doesn't give power to clear UofT encampment"). The U of T then warned protesters that they would seek a court order if the encampment was not taken down.

When the protesters did not leave, the U of T's interlocutory injunction application was set down for hearing on June 19 and 20 before Justice Markus Koehnen. He allowed 20 parties to intervene and make written submissions about the perspectives of their respective organizations. His July 2 order granted U of T its interlocutory injunction and ordered the protesters to remove themselves and their property by 6 pm on July 3. The order also prohibited any further interference with access or establishment of encampments by those protesters and anyone with knowledge of the order, as well as any use of the Front Campus and King's College Circle between 11 pm and 7 am without U of T's consent. It also empowered the Toronto Police Service to arrest and remove protesters and the U of T to remove their property. The protesters cleared the Front Campus before that deadline.

Reasons for Decision in *University of Toronto v Doe*

(a) Interlocutory Injunction

Justice Koehnen concluded that the relevant facts and law were quite simple. He indicated that he could have set out his reasons for granting the interlocutory injunction "in only a few pages" but was expanding them so that all parties would know they had been heard (at para 4). There is a three-stage test for analyzing interlocutory injunction applications when a *Charter* violation is alleged, initially set out in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 at 334, and modified by *R v Canadian Broadcasting Corp*, 2018 SCC 5 (CanLII), [2018] 1 SCR 196 at paras 15-17. First, the applicant must prove it has a strong prima

facie case if a mandatory injunction is sought, as it was in this case. Second, the applicant must prove they would suffer irreparable harm if the injunction is not granted. And, third, the balance of convenience must be weighed to decide which party would suffer the greater harm from granting or refusing the injunction.

The U of T put forward three arguments to meet the "strong prima facie case" requirement. They argued that the encampment was violent or attracted violence. Justice Koehnen rejected violence as a reason to grant an injunction, primarily because the evidence of any violence was hearsay, did not involve the protesters named in the application, and was isolated (at paras 7, 50-70, 122). The U of T also argued that the expressive conduct within the encampment was antisemitic. This too was rejected as a basis for an injunction, primarily because the expressions complained of had multiple meanings and there was no evidence the protesters had used them in an antisemitic way (at paras 8, 71-109, 122).

The U of T's third argument relied upon trespass and a claim for ejectment (possession of real property), and Justice Koehnen held this argument did meet the strong prima facie case standard (at paras 10, 123, 136). The protesters had "appropriated" the front campus from its owner and deprived the owner of its ability to control what happened on its property (at para 10). Whether based on Ontario's *Trespass to Property Act*, RSO 1990, c T.21 or on the common law, the U of T complaint about trespass and ejectment raised a strong presumption that an injunction was warranted (at paras 124-130). Indeed, as Justice Koehnen noted, case law has found this presumptive protection of property rights to be so strong that it is not even necessary to consider the irreparable harm and balance of convenience stages of the test (at paras 130-131, 146).

Nevertheless, Justice Koehnen did consider the other two stages of the test for an interlocutory injunction. However, in his analysis of those two stages, it was the fact of trespass that proved both irreparable harm (at paras 10, 146-150, 160) and that the balance of convenience favoured granting the injunction (at paras 164,189. 203-206).

The protesters' *Charter* claims were only taken into account at the balance of convenience stage where the harm to the protesters of granting an interlocutory injunction to the U of T was identified as the infringement of the protesters' freedom of expression (at para 162). However, Justice Koehnen decided that the protesters still had freedom of expression under the terms of the injunction that the U of T requested (at para 171). The university only wanted to prevent the protesters from camping, erecting structures, blocking entrances to the campus and protesting on campus between 11 pm and 7 am and previous cases had held that protesters' freedom of expression did not protect those activities (at para 181). He determined that "the injunction does not limit the freedom of expression that the law provides" (at para 12). There was therefore little on the protesters' side of the scales to be balanced against the right of the property owner to decide what could be done on their property (at para 189). Freedom of expression – like the freedom to eat breakfast – was just one of many conflicting claims to the use of the Front Campus (at para 185). Justice Koehnen summed up the interlocutory injunction analysis by stating "exercising freedom of expression is not a defence to trespass" (at para 220).

Justice Koehnen's decision is quite typical of interlocutory injunction decisions involving protesters, as these time-sensitive decisions tend to focus on the balance of convenience stage of

the test, preserve the existing status quo, and prefer clear, concrete rights such as the right to exclude or the right to control the use of property. See e.g., Basil S. Alexander, "Peaceful Assembly's Surprising Underdevelopment: Contributing Factors and Resulting Issues, in Howard Kislowicz, Kerri A. Froc and Richard Moon, eds., *Canada's Surprising Constitution: Unexpected Interpretations of the Constitution Act, 1982* (Vancouver: UBC Press, 2024) 38 at 39. And Ontario courts are not the only ones to see cases involving trespass as being so clear and concrete that they feel free to short-circuit stages two and three of the *RJR-MacDonald* test. For more on the "trespass exception," see Stepan Wood, "Reconsidering the Test for Interlocutory Injunctions Affecting Homeless Encampments: A Critical Assessment of BC Case Law" (2022) Osgoode Legal Studies Research Paper No. 4297377 at 28-32.

(b) *Charter* Applicability

The applicability of the *Charter* to U of T was considered in two parts of the judgment, Part III and Appendix A, that Justice Koehnen separated from the Part IV interlocutory injunction analysis in order not to interrupt the narrative (at para 116). He did not decide if the *Charter* applied because a notice of constitutional question, which he found to be required in these circumstances, had not been given (at paras 113, 223). He did decide that whether the *Charter* applied or not made no difference to the outcome of the application because the parties agreed that the relevant law had to be applied "in a manner consistent with the fundamental values enshrined in the *Charter*," citing *RWDSU v Dolphin Delivery Ltd*, 1986 CanLII 5 (SCC), [1986] 2 SCR 573 at para 39 (at paras 114, 116).

In the alternative, Justice Koehnen concluded that the *Charter* did not apply to the U of T and, even if it did apply and the protesters' freedom of expression was breached, the breach was justified under s 1 of the *Charter* (at para 116). His conclusion that the *Charter* did not apply was based upon s 32 of the *Charter* and whether the U of T was "governmental by its very nature" due to the degree of government control over it, or whether its decisions about the use of its property were governmental because they implemented a government statutory scheme or program (at para 227). The Ontario Court of Appeal had decided in *Lobo v Carleton University*, 2012 ONCA 498 (CanLII), that the *Charter* did not apply because Ontario universities were autonomous and not government actors and Carleton University's decision to refuse space to anti-abortion demonstrators did not further a specific government policy. Justice Koehnen held he was bound to follow that decision (at para 231).

Justice Koehnen distinguished two Alberta Court of Appeal decisions holding that the *Charter* applied to Alberta universities: *Pridgen v University of Calgary*, 2012 ABCA 139 (CanLII), and *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 (CanLII) (both of which are discussed in our first ABlawg post on encampments). He held that a review of the legislation and regulatory scheme that applied to Alberta universities indicated they were under "much more immediate government control and direction" than were Ontario universities (at para 232). He also relied upon the Ontario Court of Appeal's reaffirmation of Ontario universities' autonomy in *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553 (CanLII) (at para 238).

The U of T argued that regardless of whether the *Charter* applies to Ontario universities, freedom of expression does not protect anyone from tortious actions such as trespass, relying on *RWDSU, Local 558 v Pepsi-Cola Canada Beverage (West) Ltd*, 2002 SCC 8 (Can LII) at para 77 (discussing tortious picketing "regardless of where it occurs") and *Batty v City of Toronto*, 2011 ONSC 6862 (CanLII) at para 15 (discussing protesters taking over "public space" in a city park) (at para 243). Justice Koehnen agreed that even if the *Charter* applied to the U of T, it would not apply in this case because "the *Charter* does not protect trespass" (at para 244).

Finally, Justice Koehnen stated that if the *Charter* did apply to the encampment, then the trespass notice would violate the protesters' freedom of expression but the violation would be justified under s 1. The pressing and substantial objective of enforcing the trespass notice would be the same as it was in *Batty*: "retaining public spaces for the use of the general public" (at para 248, citing *Batty* at para 91). Enforcing the trespass notice was rationally connected to this objective, minimally impaired freedom of expression, and was proportionate because it allowed protesting to continue in different forms, places, and times (at paras 249-254). While this reliance on *Batty* suggests that Justice Koehnen saw the Front Campus as public property, he indicated earlier that he categorized it as "quasi-public property" (at para 188).

Although we find his decision on the application of the *Charter* somewhat confusing in terms of the government actor/government action distinction, we do not disagree with Justice Koehnen's conclusion that whether or not the *Charter* directly applied to the U of T encampment made no difference to the outcome. As we argued in our first post, the use of *Charter* values to scrutinize the university's actions should achieve the same result as direct *Charter* application. Nor do we think that his granting an interlocutory injunction that banned camping, erecting structures, blocking entrances to the campus and protesting on campus between 11 pm and 7 am was obviously wrong, although we disagree with how he reached that conclusion. We won't say much about that here, but in brief, we take issue with the idea that the *Charter* does not protect trespass. If a *Charter* values approach is applied, the law of trespass should be interpreted subject to freedom of expression, association, and peaceful assembly – not the other way around. Our main concern in this post, however, is whether Justice Koehnen's decision is relevant to UCalgary's dismantling of its encampment on May 9.

Does the *University of Toronto v Doe* Decision Justify the University of Calgary's Actions?

Any claim that Justice Koehnen's decision justifies UCalgary's actions on May 9 after the fact is a claim that the U of T decision is persuasive. The decision is not, of course, binding in Alberta as it is from another jurisdiction with different laws. However, it might be persuasive on the basis of its reasoning if the laws are not too different and the facts are similar enough. We saw an example of the law being too different to be persuasive when Justice Koehnen distinguished the two Alberta Court of Appeal cases about the *Charter*'s application to universities. However, whether the *Charter* applies or *Charter* values apply makes that distinction of lesser importance for our analysis. The factual differences are more significant than the legal ones because whether and how the law of interlocutory injunctions applies depends on the facts about the encampment, its location, the protesters' actions, and more.

There are many facts about UCalgary's actions on May 9 that are still not known to the university community or the public. Most of what we know comes from an email sent to students by the UCalgary administration before May 9, President Ed McCauley's statement to the campus community on May 10, and the account of events presented by Calgary Police Service Chief Mark Neufeld at the May meeting of the Calgary Police Commission. There are also some student accounts of the events of May 9 (see e.g., here). The Alberta Serious Incident Response Team has been asked by the province's public safety minister to investigate the police actions, and The University of Calgary Faculty Association (TUCFA) and others have filed freedom of information requests, so more facts will presumably be available eventually.

With those limitations in mind, the facts at the U of T and at UCalgary appear to differ in the following ways:

- Advance notice: The U of T erected a fence around Front Campus and posted "No Tents, No Camping" signs on April 27, before any occupation, as well as sending notice about its policies and procedures on encampments to students, whereas UCalgary sent a notice to its students about a "Temporary structures and overnight protests" Direction on April 29 (May Calgary Police Commission hearing at 30:45).

- Timing before notice of trespass: The U of T encampment was set up May 2 and the U of T served a notice of trespass more than 3 weeks later on May 24, giving the protestors until May 27 to decamp before seeking a court order (at para 36), whereas the UCalgary encampment was set up at 5:30 am on May 9 and a verbal notice of trespass was given by Campus Security almost immediately (May Calgary Police Commission hearing at 31:45).

- Duration: The U of T encampment lasted from May 2 to July 3 (over 50 days), whereas the UCalgary encampment lasted less than 24 hours.

- Police action on notice of trespass: The Toronto Police Service exercised its discretion to refuse to enforce the U of T notice of trespass and require a court order, whereas UCalgary Campus Security called the Calgary Police Service within 67 minutes of the encampment being established and requested the police remove the protesters by 11 am the same day, and the Calgary Police service exercised its discretion by responding with patrol officers initially and then with the Public Safety Unit between 8 and 9 pm (May Calgary Police Commission hearing at 33:05).

- Denial of access: At the U of T, protesters occupied the entire Front Campus, controlled entry to the Front Campus, and blocked entry to a number of buildings, to traffic on a street, and to one examination (at paras 42, 48, 49) and their occupation meant June graduation ceremonies had to be moved (at paras 28, 165), whereas there is no indication that any access was impeded at UCalgary where the protesters occupied about one-quarter of the Taylor Family Digital Library quad (May Calgary Police Commission hearing at 31:40). Put differently, Justice Koehnen found that the U of T encampment took away "the University's ability to control what occurs on Front Campus" (at para 10) and there was no similar lack of control evident at UCalgary.

- Prominence and usage of encampment location: The U of T had spent about $100 million on a three-year refurbishment of the Front Campus, which was "in a particularly beautiful and historic part of the University campus" and a tourist and recreational destination in downtown Toronto (at paras 13, 27, 47), and the encampment there took up "almost all of the green space" (at para 30), whereas the UCalgary campus is outside the downtown area, the small quad is not known as a tourist destination, and there was no evidence of recreational activities being disturbed by the encampment there.

- Evidence of problems in the encampment: Because their encampment continued for many weeks, the U of T had a lot of evidence of what was said and done, such as graffiti in the washrooms (at para 56) and the reinforcement of fencing around the encampment (at para 31), whereas at UCalgary there were reports of water bottles being thrown by protestors but only in reaction to the actions of the police , as well as photos of some harmless encampment supplies and equipment taken after the police had removed all protesters.

- Noise issues: The U of T encampment that grew to 177 tents was close to university residence buildings, affecting the "residents' rights to sleep" (at para 12), whereas there is no indication the much smaller UCalgary encampment created noise that was disturbing to nearby residents.

- Counter-protesters: There were counter-protesters at the U of T encampment (at paras 85, 154, 197), whereas it seems that there was only the fear of counter-protesters and the possibility of what might happen at UCalgary.

- Negotiations: There were negotiations on a number of different matters over the course of weeks between the U of T administration and the protesters (at paras 32, 86, 155), and Justice Koehnen found that "[t]he protesters have had considerable success in shining a bright light on what universities should or should not invest in. They have succeeded in catching everyone's attention and in obtaining an expedited process" (at para 18). In contrast, there are no reports of negotiations between the UCalgary administration and protesters in the short duration of that encampment.

- Divestment: The U of T has a Divestment Policy and a Divestment Procedure which could be used to question its social responsibility as an investor, whereas to our knowledge UCalgary has neither.

Based on the facts as we know them, the *University of Toronto v Doe* decision does not provide an after-the-fact justification for the actions of the UCalgary administration on May 9, 2024. The two situations were factually so dissimilar that the law of interlocutory injunctions could not be applied in a similar way – unless the only fact that mattered was whether UCalgary was a property owner. Even Justice Koehnen did not go that far in his decision. Nor would the U of T decision provide a precedent if UCalgary protestors were to bring a *Charter* or administrative law challenge to the university's actions on May 9. This is not just because a *Charter* challenge is different from

an interlocutory injunction application; rather it is because the starkly different factual contexts call into question the reasonableness of UCalgary's actions.

The UCalgary administration appears to have acted without the evidence of harm, nuisance, or lack of access to university property that prompted the U of T to act. But, perhaps UCalgary has such evidence about the hours-old encampment and has simply not disclosed it. We are renewing our original request to the UCalgary administration for more facts about the university's actions and the reasons for those actions. While we understand that President McCauley told General Faculties Council at its June meeting that there would be a review of UCalgary's response to the encampment, the university community has pressing questions about the facts that should be answered in the meantime. As our attempt to account for the factual differences between the two encampments has shown, UCalgary cannot hide behind the Ontario decision in *University of Toronto v Doe* to justify its actions, at least based on what we know currently. The UCalgary administration needs to explain why, when it came to asking the CPS to enforce a hours-old notice of trespass, the attitude was "can-do!" rather than *Charter*-informed caution.

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