Constitutional forum constitutionnel

Universities, the Charter, *Doug Ford, and Campus Free Speech*

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On a warm summer day at the end of August 2018, Ontario Premier Doug Ford's office issued a press release announcing, "Ontario's Government for the People is delivering on its promise to uphold free speech on every Ontario publicly-funded university and college campus."[1] An accompanying "Backgrounder" spelled out the details.[2]

Although this policy seems progressive on its face, it is actually anything but. That said, it may have the unintended but beneficial effect of bringing Ontario universities under the *Canadian Charter of Rights and Freedoms*.[3] More about that later. First, the problems.

Overrides Institutional Autonomy

The Ford government's announcement overrides the institutional autonomy that historically has provided some protection for free speech and academic freedom on campus. For a very long time, it has been recognized that the freedom to ask difficult questions, explore unpopular viewpoints, question conventional wisdom — in short, to do what is essential to advance

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1 Office of the Premier, News Release: "Ontario Protects Free Speech on Campuses: Mandates Universities and Colleges to Introduce Free Speech Policy by January 1, 2019" (30 August 2018), online: *Government of Ontario* <news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html> [Office of the Premier, "Ontario Protects"].

2 See Office of the Premier, Backgrounder "Upholding Free Speech on Ontario's University and College Campuses" (30 August 2018), online: *Government of Ontario* <news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [Office of the Premier, "Upholding Free Speech"].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

knowledge and educate students — requires that universities have a significant measure of autonomy from the thin skins and political infatuations of politicians and governments.

A university properly fulfilling its role can challenge dominant forces in society. The 1991 (and still current) University of Toronto Statement of the "Purpose of the University" describes that role:

> Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.[4]

While generally accepted in principle, this vision of the university has been frequently contested when powerful interests — whether private or government — have been subjected to vigorous challenge. The American Association of University Professors was formed in 1915, largely in response to the firing of academics, like prominent economist E. A. Ross, for their critical perspectives on prevailing social and economic policies.[5] Similar pressures on universities continue to this day, as when wealthy benefactors threatened to withdraw their donations from the University of Alberta in 2018 after it announced it was awarding an honorary degree to David Suzuki.[6]

The threat to institutional autonomy by Ford's directive is that it puts Ontario universities' free speech policies and practices under the thumb of the provincial government. It sets up a government agency, the Higher Education Quality Council of Ontario (HEQCO),[7] to police university free speech behaviour and advise the government about what it finds. The policy

4 University of Toronto Governing Council, "Statement of Institutional Purpose" (15 October 1992) at 3, online (pdf): *University of Toronto* <governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/mission.pdf>.

5 See Richard Hofstadter and Walter P Metzger, *The Development of Academic Freedom in the United States*, (New York: Columbia University Press, 1955) at 468-477. For a general description of the pressure on universities one hundred years ago as well as a detailed account of Ross's firing at Stanford, see Thomas L Haskell, "Justifying the Rights of Academic Freedom in the Era of 'Power/Knowledge'" in Louis Menand, ed, *The Future of Academic Freedom* (Chicago: University of Chicago Press, 1996) 43.

6 See Kelly Cryderman, "Debate Sparked Over University of Alberta Tribute to David Suzuki", *The Globe and Mail* (24 April 2018), online: <theglobeandmail.com/canada/alberta/article-debate-sparked-over-university-of-alberta-tribute-to-david-suzuki/>. The pressure was not only from external special interest groups; they were joined by the University's deans of engineering and business. See Cryderman; Gordon Kent, "U of A Honorary Doctorate for David Suzuki Angers Dean of Engineering, Donors" *Edmonton Journal* (23 April 2018), online: <edmontonjournal.com/news/local-news/furor-erupts-over-honorary-university-of-alberta-degree-for-environmentalist-david-suzuki>. Unlike in the Ross case, the University of Alberta administration rejected the demands and awarded the degree to Suzuki. See David Turpin, "Consider This: Why Should the University Stand Up for a Controversial Honorary Degree?" (25 April 2018), online (blog): *The Quad* <blog.ualberta.ca/consider-this-why-should-the-university-stand-up-for-an-unpopular-honorary-degree-50171d9c67d6>.

7 Online: *Higher Education Quality Council of Ontario* <heqco.ca/en-ca/Pages/Home.aspx>.

then threatens funding reductions for individual universities that fail to comply with government requirements.[8] This threat to cut funding casts aside a longstanding Canadian tradition in which, unlike in many US states, university autonomy is protected because governments set system-wide formulae for funding and do not deal with the budgets of individual universities. In the United States, where many state legislatures directly approve the budgets of individual universities, legislatures not infrequently use the real threat of cutting individual university budgets to ensure universities bend to their political will.[9] Premier Ford is introducing that practice to Ontario.

Based on a False Premise

The Ford government policy is based on the false premise that freedom of expression is endangered at Ontario's universities. It is not. Despite occasional lapses, universities (along with journalist and media organizations and public libraries) are the principal advocates for, and defenders of, freedom of expression in our society. At universities, every day of the academic year, thousands of classes are held and innumerable guest speakers lecture without issue. The university's *raison d'être* is premised on free expression. Universities cannot fulfill their missions of creating knowledge and educating students without it.

General campus freedom of expression is bolstered almost universally at all Canadian universities through collective agreement guarantees for academic freedom. These agreements ensure academic staff have free expression rights in their teaching and research as well as the right to publicly criticize the university itself and its administration — an action that would lead to discipline, if not termination, in most other workplaces. There is more freedom of expression on university campuses than anywhere else in Canada.

Much of the public understands this. As a result, it is big news whenever the principle of free speech appears to have been compromised at a university; it is big news precisely because it is such an exception to the pervasive respect for free expression within the academy. When there is an exception that threatens universities' commitment to free expression, there is a vigorous response to correct the situation — often led by the Canadian Association of University Teachers — because of the recognition that, left unchecked, failure to protect free expression on campus destroys the foundation of the university and threatens academic freedom. One of the ironies is that, since there is often media coverage of the rare exceptions but not of the daily respect for free expression on campus, the public can get a distorted sense of campus reality. Premier Ford is taking advantage of this fact.

The health of free expression on campus is best measured not by the absence of any lapses or failures to protect campus free expression rights, but by the infrequency of failure and the response of the institution and community when there is a failure. The widely publicized Lindsay Shepherd case at Wilfrid Laurier University is a sign of a healthy system. Initially, the uni-

8 Office of the Premier, "Upholding Free Speech", *supra* note 2.

9 See Adrienne Lu, "Brandishing Budget Power, State Lawmakers Pressure Public Universities", *Stateline* (24 April 2014), online: <pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/04/24/brandishing-budget-power-state-lawmakers-pressure-public-universities>.

versity handled it badly[10], but following public outcry, there was community self-examination and discussion[11] that resulted in the university embracing one of the best campus free expression policies in the country.[12]

We can only understand the Ford government policy when we recognize that it is not about saving free expression on campus — which is alive and well. This is a deliberate political measure borrowed from the American right and alt-right, to play to what Premier Ford sees as his political base and to try to expand that base.

Creating a Wedge

The Ontario initiative channels Donald Trump who, in response to the controversy over alt-right provocateur Milo Yiannopoulos at the University of California at Berkeley in February 2017, famously tweeted, "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view — NO FEDERAL FUNDS?"[13] Trump's approach was elaborated shortly afterwards by the *National Review* in an article saying to Congress, "It's time to crush campus censorship."[14] and subsequently formalized by the Goldwater Institute into a model bill designed to impose free expression rules on US public universities.[15] Seeing

10 See Luisa D'Amato, "WLU Censures Grad Student for Lesson that Used TVO Clip", *Waterloo Region Record* (14 November 2017), online: <therecord.com/news-story/7923200-wlu-censures-grad-student-for-lesson-that-used-tvo-clip/>.

11 See "Apology from Laurier President and Vice-Chancellor Deborah MacLatchy." Wilfrid Laurier University (21 November 2017), online: *Wilfred Laurier University* <wlu.ca/news/spotlights/2017/nov/apology-from-laurier-president-and-vice-chancellor.html>.

12 Not only was the process for developing the Wilfrid Laurier Statement a broad and inclusive one, the content of the statement recognizes that freedom of thought, association, and expression are fundamental to the university; unequivocally embraces the principles of free expression; challenges the idea that free expression and the goals of diversity, equity, and inclusion must be at odds with one another, to embrace the concept of inclusive freedom; acknowledges that free expression can cause harm and that it is the responsibility of everyone in the university community and the university itself to provide support as well as ensure safety from physical harm; affirms that it is not the role of the university to censor speech, but that there are limits which are the same as in general society, as well as limits to ensure both that the ordinary activities of its community are not disrupted and that the physical safety of its members is not impinged upon — while also affirming that this administrative discretion should not be exercised in a manner inconsistent with Laurier's overarching commitment to free expression. Finally, the statement distinguishes between the context of classroom and that of the general campus outside the classroom. See also "Statement on Freedom of Expression" (29 May 2018), online: *Wilfred Laurier University* <wlu.ca/about/discover-laurier/freedom-of-expression/statement.html>.

13 Donald J Trump, "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view — NO FEDERAL FUNDS?" (2 February 2017 at 4:13), online: *Twitter* <twitter.com/realDonaldTrump/status/827112633224544256?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E827112633224544256&ref_url=https%3A%2F%2Fwww.nbcbayarea.com%2Fnews%2Flocal%2Fpresident-donald-trump-takes-on-uc-berkeley-on-twitter-threatens-federal-funds%2F35521%2F>.

14 See David French, "It's Time to Crush Campus Censorship", *National Review* (24 April 2017), online: <nationalreview.com/2017/04/free-speech-campus-censorship-congress-must-punish-universities-indulging-student-mob/>.

15 Goldwater Institute, "Restoring Free Speech on Campus" (last visited 22 July 2019), online: *Goldwater Institute* <goldwaterinstitute.org/campus-free-speech/>.

advantage in this use of campus free speech as a wedge issue, Andrew Scheer brought the idea to Canada during the federal Conservative Party leadership contest in May 2017. Following the American right's script, Scheer declared, "I will withhold federal funding from universities that shut down debate and can't stand different points of view."[16] The UK Conservative government's higher education minister, Jo Johnson (Boris Johnson's brother), picked up the refrain in December 2017, declaring that universities failing to protect free expression could be fined.[17]

Ahead of the start of the 2018 Ontario provincial election, Doug Ford joined the chorus, announcing he would tie university funding to free speech on campus.[18] As Premier, he has now put these words into action in Ontario. The United Conservative Party of Alberta followed Ford's example in 2019. After winning a majority government, Alberta Premier Jason Kenney announced that all Alberta universities and colleges will be required to "develop, post and comply with free speech policies that conform to the University of Chicago Statement on Principles of Free Expression."[19]

Ford's policy works as a wedge issue by bringing together two very different constituencies. On the one hand, there are those on the right who have chosen to weaponize free expression, pushing relentlessly and aggressively at the outer boundaries of speech and vilifying those who express concerns. Think of the denigration of students who are concerned about racist, Islamophobic, anti-Indigenous, or homophobic speech as "snowflakes."[20] In a recent *New Yorker* article, Harvard historian Jill Lepore suggested that the guide for those weaponizing free speech "isn't the First Amendment; it's the hunger of the troll, eager to feast on the remains of liberalism."[21] How better to do that than to use the rhetoric of liberalism to attack one of the principal repositories of liberal, Enlightenment values — the university?

The other constituency Ford is seeking to draw in are those who genuinely care about universities and have come to believe, from the high-profile media stories of campus free speech controversies, that campus free expression is endangered. This is a potentially larger constituency than his core right-wing base. Ford's campus free speech policy aims to unite these two

16 See Stephanie Levitz, "Andrew Scheer's Free Speech Pledge Wouldn't Apply in Toronto Case: Spokesman", *National Post* (16 August 2017), online: <nationalpost.com/news/news-pmn/canada-news-pmn/andrew-scheers-free-speech-pledge-wouldnt-apply-in-toronto-case-spokesman/wcm/1a8a0ef2-02a3-47b2-b371-10f58c51ab3f>.

17 See Rajeev Syal and Rowena Mason, "Jo Johnson to Tell Universities to Stop 'No-Platforming' Speakers", *The Guardian* (26 December 2017), online: <theguardian.com/education/2017/dec/26/jo-johnson-universities-no-platforming-freedom-of-speech>.

18 See Tamara Khandaker, "Doug Ford Wants to Tie Funds for Universities to Free Speech", *Vice News* (9 May 2018), online: <news.vice.com/en_ca/article/3k48w8/doug-ford-wants-to-tie-funds-for-universities-to-free-speech>.

19 See Madeline Smith, "Kenney Follows Ford's Push for Campus free speech. But Critics Say It's a Dog Whistle For Far-Right Voters", *The Star* (6 May 2019), online: <thestar.com/calgary/2019/05/06/alberta-and-ontario-premiers-campus-free-speech-policies-a-dog-whistle-blow-for-the-right-expert.html>.

20 See e.g. Chris Quintana, "Colleges Are Creating 'a Generation of Sanctimonious, Sensitive, Supercilious Snowflakes,' Sessions Says", *The Chronicle of Higher Education* (24 July 24 2018), online: <chronicle.com/article/Colleges-Are-Creating-a/243997>.

21 Jill Lepore, "Flip-Flopping on Free Speech: The Fight for the First Amendment, on Campuses and Football Fields, From the Sixties to Today", *The New Yorker* (9 October 2017), online: <newyorker.com/magazine/2017/10/09/flip-flopping-on-free-speech>.

very different groups against an unspecified university and university-educated "elite" that has betrayed its own liberal values.

Peculiar Champions of Free Speech

Ford and the Conservative Party are peculiar champions of free expression, as they have a long history of attacking the free speech rights of those with whom they disagree — particularly in relation to criticism of Israeli government policies. One of Ford's first post-2018 election statements was that he would seek to ban an annual Palestinian solidarity event, Al Quds (Jerusalem) Day.[22] While a Toronto municipal councillor, Ford sought to defund Toronto's Pride Parade because Queers Against Israeli Apartheid were allowed to march alongside hundreds of other groups.[23] This is consistent with denunciation by the Conservative Party (with support from their Liberal colleagues) of universities and groups that host Israeli Apartheid Week or permit advocacy of the Boycott, Divestment and Sanctions (BDS) movement.[24]

Policy Platitudes, Not Community Commitment

Free speech is a messy business. There is no such thing as absolute free speech; its legitimate limits are the issue here. Ford's policy does not answer questions concerning these limits, but it does undermine the autonomy of the university community and with it the possibility of vibrant campus free expression by turning over authority to decide acceptable limits to the third-party, government-appointed HEQCO and the Government of Ontario.

Meaningful campus free expression depends on community discussion, debate, and recognition of free expression's foundational importance to the university and democratic society, and what, therefore, should be acceptable limits within the university committed to free expression and academic freedom.

Campus free expression can only thrive where university communities seriously engage in the difficult consideration of how to protect free expression while recognizing other demands and values. These include the law, which raises as many questions as it provides answers;[25]

22 See David Reevely, "Reevely: Ford Promises to Ban Al-Quds Day Protests Somehow" *Ottawa Citizen* (11 June 2018), online: <ottawacitizen.com/news/local-news/reevely-ford-promises-to-ban-al-quds-day-protests-somehow>.

23 See Martin Regg Cohn, "Doug Ford's Conversion and Confusion on Free Speech Versus Hate Speech" *Toronto Star,* (7 September 2018), online: <thestar.com/opinion/star-columnists/2018/09/07/doug-fords-conversion-and-confusion-on-free-speech-versus-hate-speech.html>; Yves Engler, "Doug Ford's Election as Premier May Benefit Pro-Palestinian Movement", *rabble.ca* (18 June 2018), online: <rabble.ca/blogs/bloggers/yves-englers-blog/2018/06/doug-fords-election-premier-may-benefit-pro-palestinian>; Natalie Alcoba, "Queers Against Israeli Apartheid's Pride Participation Doesn't Violate Anti-Discrimination Policy: Report", *National Post* (13 April 2011), online: <nationalpost.com/posted-toronto/queers-against-israeli-apartheids-pride-participation-doesnt-violate-anti-discrimination-policy-report>.

24 See Evelyn Hamdon and Scott Harris, "Dangerous Dissent? Critical Pedagogy and the Case of Israeli Apartheid Week" (2010) 2:2 *Cultural and Pedagogical Inquiry* 62.

25 There is no clearer example of the difficulty setting boundaries of what is constitutionally protected expression in Canada than the decisions in relation to four homophobic pamphlets written by Saskatchewan fundamentalist pastor William Whatcott. The Saskatchewan Human Rights Tribunal found that all four violated the provincial human rights code: *Wallace v. Whatcott*, 2005 CanLII 80912 (SK HRT),

requirements of good pedagogy;[26] recognition that the university is also the living space for students in residence; university values of diversity and inclusivity; and the requirement of academic freedom[27] if the university is to fulfill its mission of advancing knowledge.

There are numerous examples where university communities have engaged the issue of campus free expression and its limits; they have developed and articulated their own understandings and policies where freedom of expression has a real meaning in the life of the community rather than being an abstract principle which is dutifully acknowledged but has little impact on the activities and behaviour of its members.

Typically, serious community engagement follows from a community-wide crisis — not, if ever, by a directive from on high. Arguably one of the best and most consequential university statements on free expression emerged 45 years ago at Yale University.[28] This was after the Yale community wrestled with free speech issues for more than a decade and after the faculty members had passed a resolution calling on the university to appoint a "commission to examine the condition of free expression, peaceful dissent, mutual respect and tolerance at Yale, to draft recommendations for any measures it may deem necessary for the maintenance of those principles, and to report to the faculties of the University early next term."[29] This resolution was precipitated by a controversial speaker being prevented from lecturing at Yale.[30]

2005 CarswellSask 725 (WL Can). The Saskatchewan Court of Queen's Bench upheld the decision of the Tribunal: *Whatcott v Saskatchewan Human Rights Tribunal*, 2007 SKQB 450. The Saskatchewan Court of Appeal, in granting Whatcott's appeal, found that none of the pamphlets violated the Code: *Whatcott v Saskatchewan Human Rights Tribunal*, 2010 SKCA 26. The Supreme Court of Canada then granted the Saskatchewan Human Rights Commission's appeal for two of the pamphlets and rejected it for the other two; *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11.

26 See Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017) at 85-102.

27 Academic freedom should not be confused with freedom of expression. Academic freedom is a special right necessary for all academic staff if they are to fulfill the university's societal mission of advancing knowledge and educating students. Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; to carry out research and disseminate and publish the results thereof; to produce and perform creative works; to engage in service to the university and the community; to express one's opinion about the institution, its administration, and the system in which one works; to acquire, preserve, and provide access to documentary material in all formats; and to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship. In short, it makes it possible for academic staff to use their best professional judgment in teaching and research, university governance, and community engagement. Freedom of expression, on the other hand, is a general human right of everyone to both express their own views *and* to hear the views of others. Academic freedom and freedom of expression are related as it is impossible to have vibrant academic freedom within the university in the absence of general freedom of expression in the society.

28 See Committee on Freedom of Expression at Yale, "Report of the Committee on Freedom of Expression at Yale" (23 December 1974), online: *Yale College* <yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>.

29 See C Vann Woodward, "Chairman's Letter to the Fellows of the Yale Corporation" in Committee on Freedom of Expression at Yale, *ibid*.

30 See "President Salovey's Freshman Address Professor Woodward's Legacy after 40 Years: Free Expression at Yale" (22 August 2014), online: *Yale News* <news.yale.edu/2014/08/22/professor-woodward-s-legacy-after-40-years-free-expression-yale>.

In response to the faculty resolution, Yale's president appointed a committee of thirteen, consisting of five faculty members, two members of the administration, three graduate students, two undergraduates, and one member of the Yale alumni. The committee reviewed Yale's record of the past decade, sought the views and opinions of all members of the university community, held advertised public and private hearings, and recorded hours of testimony and advice.[31] Subsequently the report was shared across the university and was adopted as policy, guiding its community since.

A similar sequence resulted in the recent Wilfrid Laurier University policy. In response to the Lindsay Shepherd case noted above that rocked the university,[32] the university community struggled with what to do. Out of that struggle emerged a process beginning with a broadly-based university committee, extensive consultation with the university community, development of a statement on free expression that was debated within the community, amended, and then brought to the university senate which adopted it.[33]

Short-circuiting that community process and engagement only results in empty policy statements to which the community has no ownership or commitment; such statements have minimal impact on the life of the university in practice. Sadly, that is what the Ford government's directive has invited, with its short timeline and directed conclusion, in almost every university in Ontario. A notable exception is Wilfrid Laurier, an institution that had already engaged the issue as a community for its own reasons.

The Charter

There is likely to be one positive outcome of the Ford initiative: judicial recognition that the *Charter* applies to universities in Ontario. Section 32 of the *Charter* specifies that it applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament" and to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province."[34]

Subsequent jurisprudence has given some clarification about the extent of the *Charter's* applicability to non-government entities — entities created by government for the purpose of legally enabling them to do things of their own choosing (such as establishing private corporations, hospitals, and universities). The fact that non-government entities like universities perform a public service and, as a result, may be subjected to the judicial review of certain decisions, does not *in itself* make them part of government within the meaning of section 32 of the *Charter*. The exercise of supervisory jurisdiction by the courts is not grounded in the fact that such non-government entities are government, but that they are "public decision-makers."[35]

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31 Vann Woodward, *supra* note 29.

32 See D'Amato, *supra* note 10.

33 See Robert Gordon, "Policy Development in the Aftermath of a Reputational Challenge: Managing Freedom of Expression on Campus" (delivered at the Summit and Annual Conference of Faculty Bargaining Services, Montréal, 31 October-2 November 2018).

34 *Charter*, *supra* note 3, s 32.

35 See *McKinney v University of Guelph*, [1990] 3 SCR 229 at 268, 76 DLR (4th) 545 [*McKinney*].

In 1986 in *RWDSU v Dolphin Delivery Ltd,* the Supreme Court of Canada suggested that the *Charter* seemed to apply to many forms of delegated legislation such as regulations, orders in council, and possibly municipal by-laws as well as the by-laws and regulations of other creatures of Parliament and the legislatures — and this is not an exhaustive list.[36] Writing for the majority, Justice McIntyre held, "where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable."[37] That said, he notes that "the element of governmental intervention necessary to make the *Charter* applicable in an otherwise private action is difficult to define."[38] *Dolphin Delivery* is important because the Court made clear that it contemplated the *Charter's* applicability to non-government entities even when they are not controlled by the government. Three years later, in *Slaight Communications Inc v Davidson*, the Court agreed that the *Charter* applies to administrative bodies, indicating that relation to government is based on the source of the non-government entity's authority, not just the government's control of its operation.[39]

Subsequently in 1997 in *Eldridge v British Columbia,* the plaintiffs alleged that the province discriminated against deaf patients by failing to provide sign language interpretation in its hospitals.[40] The province and the Medical Services Commission replied that decisions in relation to sign language interpreters were made by hospitals, rather than the province, and therefore were not subject to the *Charter.* The Supreme Court ruled unanimously that the hospital's failure to offer sign language interpretation was subject to *Charter* review. It reaffirmed that "the mere fact that an entity performs what may loosely be termed a 'public function,' or the fact that a particular activity may be described as 'public' in nature, will not be sufficient to bring it within the purview of 'government' for the purposes of … the *Charter*."[41] Justice La Forest, writing for the unanimous Court, however, did add another consideration with regard to indirect *Charter* application: whether the entity is "found to be implementing a *specific* governmental policy or program."[42]

The result is that successive court decisions have created the test for whether the activities of a non-government entity are subject to the *Charter.* Following *Eldridge,* this test now has three aspects:

1. Whether the non-government entity is controlled by government;

2. Whether it is exercising delegated statutory authority;

3. Whether it is implementing specific government policies, programs, or objectives.

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36 *RWDSU v Dolphin Delivery Ltd,* [1986] 2 SCR 573 at 602-603, 33 DLR (4th) 174 [*Dolphin Delivery*].
37 *Ibid.*
38 *Ibid* at 599.
39 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1078-1079, 59 DLR (4th) 416, Lamer J, dissenting in part.
40 *Eldridge v. British Columbia (AG),* [1997] 3 SCR 624, 59 DLR (4th) 416.
41 *Ibid* at para 43.
42 *Ibid* [emphasis in original].

The seminal case involving universities and the *Charter*, *McKinney v University of Guelph,*[43] was decided by the Supreme Court of Canada in 1968 — after *Dolphin Delivery* and *Slaight*, but before *Eldridge*. Eight university professors and one librarian argued that the retirement policies of four universities requiring retirement at age 65 were contrary to the academic staff's equality rights under Section 15 of the *Charter.* In a 5-2 decision with five different judgments, the Court ruled against the academic staff. The divided judgments arguably reflect the disputable issues in regard to the applicability of the *Charter* to universities.[44]

Justice La Forest wrote for the three judges who held that universities are generally not subject to the *Charter.* Basing his argument largely on the necessary autonomy of universities, he emphasized that the primary purpose of the *Charter* was as an instrument for checking the powers of government over the individual, and that the exclusion of private activity from *Charter* protection was deliberate.[45]

He outlined two circumstances in which the activities of a non-government entity should face constitutional review: (1) when such an entity is exercising delegated statutory authority,[46] and (2) when it is subject to government control.[47] After reviewing these two possibilities, he rejected the argument that the universities' mandatory retirement policies constituted state action — universities were not acting pursuant to statutory authority, nor are they under the government's control because they are carrying out a public purpose or a function of an important public nature.[48]

While Justice La Forest did not foreclose the possibility of the *Charter* applying to universities, his rationale made clear that it would be an exceptional situation in which the government directed or was part of their decisions.[49] Two of the judges who concurred in the majority's conclusion and the two dissenting judges took a less restrictive view that universities could be subject to the *Charter* under different circumstances.[50] That said, as Marin notes, "the principle that emerged from La Forest J.'s judgment in *McKinney* is that decisions regarding a university's internal affairs are immune from *Charter* review."[51]

With the additional consideration regarding the applicability of the *Charter* to non-government entities subsequently articulated in *Eldridge* seven years later, more recent cases regarding universities and the *Charter* have resulted in a divide between the courts in Alberta and those in British Columbia and Ontario. The former have shown a greater willingness to find certain decisions of universities as subject to the *Charter*, while those of Ontario and B.C.

43 *McKinney*, *supra* note 35.
44 For a thorough discussion of *McKinney* and *Charter* issues in relation to the university, see Michael Marin, "Should the *Charter* Apply to Universities?" (2015) 35:1 National J Constitutional L 29; Krupa M Kotecha, "*Charter* Application in the University Context: An Inquiry of Necessity" (2016) 26:1 Education & LJ 21; Franco Silletta, "Revisiting Charter Applicability to Universities" (2015) 20 Appeal 79.
45 *McKinney*, supra note 35 at 262.
46 *Ibid* at 264-265.
47 *Ibid* at 273.
48 *Ibid* at 275.
49 *Ibid* at 274.
50 See Kotecha, *supra* note 44 at 27-28.
51 Marin, *supra* note 44 at 34.

have not. They instead rely on a broad interpretation of *McKinney* and not arguments based on *Eldridge*.

The key Alberta decisions in which *university* actions were found subject to the *Charter* were *Pridgen v University of Calgary*,[52] *R v Whatcott*,[53] and *Wilson v University of Calgary.*[54] *Pridgen* involved two students challenging the University's discipline of them for non-academic misconduct as violating their free expression rights under Section 2(b) of the *Charter.* The Alberta Court of Appeal upheld the lower court decision that the University's actions warranted *Charter* scrutiny;[55] the Court deemed that the University's discipline of its students affected the extent to which they were able to participate in higher education learning activities that the province's *Post-Secondary Learning Act* specifically entrusted to the universities in the province.[56]

R v Whatcott involved the arrest of an individual under the province's *Trespass to Premises Act* after complaints that he was distributing anti-LGBTQ pamphlets on campus. Justice Jeffery held that the *Charter* applied both in respect to the arrest being an exercise of delegated statutory authority[57] and the arrest impinging on the University's fulfilment of a specific government policy objective specified in the *Post-Secondary Learning Act.*[58]

Wilson v University of Calgary dealt with the University directing a registered student organization (Campus Pro-Life) to turn its display of graphic images away from public walkways. The students refused and were disciplined under the University's student discipline policy. In the students' appeal, Justice Horner held that the University, as "an institution which facilitates scholarly inquiry," failed to take into account "the nature and purpose of a university as a forum for the expression of differing views"[59] thereby implicating its public mandate and triggering *Charter* scrutiny.

In a series of cases, courts in Ontario have taken a narrow view of university mandates and failed to find *Charter* applicability.[60] While ostensibly addressing the relevance of the *Charter* based on the furtherance of government objectives, they have been largely unwilling to look beyond universities' governing structures and statutory authority and have, as a consequence, failed to do the analysis that would meaningfully assess whether the institutions are implementing specific government policies, programs, or objectives and thus subject to *Charter* scrutiny.[61]

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52 *Pridgen v University of Calgary*, 2010 ABQB 644 [*Pridgen* QB], aff'd 2012 ABCA 139 [*Pridgen* CA].
53 *R v Whatcott*, 2012 ABQB 231 [*Whatcott* 2012].
54 *Wilson v University of Calgary*, 2014 ABQB 190 [*Wilson*].
55 *Pridgen* CA, *supra* note 52 at para 128.
56 *Pridgen* QB 644, *supra* note 52 at para 67.
57 *Whatcott* 2012*, supra* note 53 at para 31.
58 *Ibid* at para 34.
59 *Wilson*, *supra* note 54 at para 163.
60 See *Lobo v Carleton University,* 2012 ONSC 254; *Alghaithy v University of Ottawa*, 2012 ONSC 142; *Telfer v University of Western Ontario*, 2012 ONSC 1287.
61 For a closer examination of the Ontario cases, see Marin, *supra* note 44 at 38-40; Kotecha, *supra* note 44 at 37-39.

British Columbia courts have likewise refused to apply the *Charter* to free speech cases in relation to universities.[62] As Marin observes, "[Alberta courts] identify the university's policy mandate and then determine whether a particular decision bears upon it. Although the B.C. and Ontario courts have suggested that the role of universities is different in Alberta … there is no basis for such a distinction."[63]

The Unintended Effect of Ford's Directive

The Ford government's directive to universities will likely cause Ontario courts to reconsider their position on Charter applicability to universities. The government directive is unambiguous: Ontario universities must implement and comply with a free speech policy consistent with the "Chicago principles" by January 1, 2019; they must report annually on their progress to the Higher Education Quality Council of Ontario (HEQCO) starting in September 2019; HEQCO will monitor their compliance on behalf of the government and, should any university's compliance be found inadequate, that university may be subject to a reduction in operating grant funding.[64]

This clearly meets the requirement for *Charter* scrutiny spelled out by Justice La Forest in *Eldridge*: whether the non-government entity can be "found to be implementing a specific governmental policy or program."[65] It is hard to imagine that Ontario courts can any longer fail to apply this third consideration of the test for whether the activities of a non-government entity are subject to the *Charter*.

At the end of the day, it is interesting that the Ford government campus free speech directive would have this unintended result, given it arose as a way of dog-whistling the Premier's base and bringing in others who were worried about free speech on campus; it offers no solution whatsoever to free speech issues existing on campus, and it opens the door to American-style political intervention in universities.

The Charter, Universities, Autonomy, and Academic Freedom[66]

While there is no institution for which freedom of expression is more fundamental to its societal mission than the university, application of the *Charter* to universities has been strongly contested. The concern is that bringing universities under the *Charter* will threaten university

62 See *Maughan v University of British Columbia*, 2009 BCCA 447; *BC Civil Liberties Assn v University of Victoria*, 2016 BCCA 162.

63 Marin, *supra* note 44 at 41.

64 See Office of the Premier, "Ontario Protects", *supra* note 1.

65 *Eldridge, supra* note 40 at para 43 [emphasis in original].

66 Note that since writing this paper, the *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 decision has been issued. In that case, the Court 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" for the purposes of section 32 of the *Charter*: *ibid* at para 148. This decision may make it more difficult to avoid *Charter* scrutiny of decisions concerning the expressive activities of students. It has arguably made campus "free speech" a matter of provincial government policy, not merely of internal university administration. This decision is of course, only binding in Alberta. It is inconsistent with the jurisprudence in Ontario, Saskatchewan, and British Columbia and is merely persuasive there and in other jurisdictions.

autonomy and, with it, academic freedom. This was key for Justice La Forest in 1990 when he wrote the plurality *McKinney* decision:

> The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment.[67]

This is a misplaced fear. *Charter* scrutiny can only enhance free expression on campus. The fear that it will undermine academic freedom is misplaced for several reasons. The first is that the assumed link between institutional autonomy and academic freedom is only partially correct at best.[68] There certainly are threats to academic freedom from outside the university — from special interest groups, donors, politicians, and governments, among others. Sometimes institutional autonomy has helped ward off these attacks. But sometimes, it has not, especially when administrators or colleagues pick up the external demands and press them. The protective wall of "autonomy" has proven porous on too many occasions.

Further, many proponents of autonomy as the protection for academic freedom ignore the reality that threats to academic freedom originate just as frequently from inside the university as they do outside — from board members, administrators, colleagues, and students. Walling off the university may diminish outside threats but could grant free reign to internal threats. That recognition was a significant factor in Canadian university academic staff unionizing beginning in the early 1970s. It also explains why the rate of unionization has accelerated so significantly since La Forest wrote *McKinney* in 1990; today, more than 90 percent of Canadian academic staff are unionized. Every university collective agreement has as its centrepiece a clause protecting academic freedom and enforceable through the grievance/arbitration process. That collective agreement language is the only real protection for academic freedom. This will not change as a result of universities being brought under *Charter* scrutiny, as that scrutiny does not extend to contractual relations between the university and its employees.

In considering the implications of universities being subject to *Charter* scrutiny, it is important to remember that the application of the *Charter* to the university does not bring every university decision, policy, and action under *Charter* scrutiny. As noted above, the *Charter* will only be relevant in respect to matters when the university is acting under direct government control, when it is exercising delegated statutory authority, or when it is implementing a specific government policy, program, or objective.[69]

Further, even for those matters that are subject to *Charter* scrutiny, the standard is determined solely by administrative law principles. In matters of discretion, including most university decisions, that standard is reasonableness; it requires that the outcome must "reflec[t]

67 *McKinney, supra* note 35 at 273-274. See also *ibid* at 268, 273.

68 See Len Findlay, "Institutional Autonomy and Academic Freedom in the Managed University" pp. 49-64 in James L Turk, ed, *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Toronto: James Lorimer & Co, 2014) 49.

69 See Kotecha, *supra* note 44 at 46.

a proportionate balancing" between the decision-maker's statutory mandate and the relevant *Charter* values.[70] More generally, Marin notes:

> [T]he Supreme Court has encouraged greater independence of public authorities, specifically by excluding their private actions from judicial review and affording them deference on most questions of fact and law, including those involving the *Charter.* These developments have made it possible to envision a more liberal application of the *Charter* without unduly compromising institutional autonomy.[71]

As Justice Paperny correctly wrote in *Pridgen*:

> [T]here is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist.[72]

Free expression and academic freedom are the lifeblood of the university in fulfilling its twin missions of advancing knowledge and educating students. Campus free expression can only be enhanced by universities being subject to *Charter* scrutiny; conversely, academic freedom and the legitimate autonomy of the university to make decisions regarding curriculum, academic standards, and staffing will not be compromised.

70 See *Doré v Barreau du Québec*, 2012 SCC 12 at para 57. See also *ibid* at paras 45-58.
71 Marin, *supra* note 44 at 30.
72 *Pridgen* CA, *supra* note 52 at para 117.