Constitutional
forum
constitutionnel

Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy

Alison Braley-Rattai and Kate Bezanson*

Introduction

In August 2018, the Ford Government in Ontario introduced a 'Directive' entitled "Upholding Free Speech on Ontario's University and College Campuses" (the Directive).[1] The Directive required all publicly supported universities and colleges[2] in Ontario to create a free speech policy by January 1st 2019 that applies to "faculty, students, staff, management and guests," and includes a) a definition of free speech, and b) reference to various "principles" of free speech similar to those elucidated by the University of Chicago (Chicago Principles).[3] According to the Directive, speech that is otherwise illegal is not permitted. Illegal speech includes hate speech and uttering threats that are proscribed by Canada's *Criminal Code*,[4] defamatory

* Dr. Alison Braley-Rattai is Assistant Professor of Labour Studies at Brock University. Dr. Kate Bezanson is Associate Professor of Sociology and Associate Dean of the Faculty of Social Sciences at Brock University.

1 Ministry of Training, Colleges, and Universities, "Upholding Free Speech on Ontario's University and College Campuses" (30 August 2018) online: *Government of Ontario Newsroom* <https://news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html> [perma.cc/7VXR-K4RB] [Directive].

2 This piece is only concerned about the university sector. There are noteworthy differences between colleges and universities with regard to topics discussed in this piece that are unexplored here.

3 The Committee on Freedom of Expression, "Report of the Committee on Freedom of Expression" (2014) online (pdf): *University of Chicago* <provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [perma.cc/LAA4-RW43].

4 *Criminal Code*, RSC 1985, c C-46, s 319(1).

speech which can give rise to both criminal[5] and civil[6] actions, as well as workplace harassment.[7]

The Directive obliges universities to rely upon existing internal measures to deal with students who run afoul of the ensuing policy. It also obliges universities to take student groups' compliance with the policy into account to secure institutional funding or official recognition. It concludes that "unresolved complaints" against an institution "about free speech" may be referred to the Ontario Ombudsman after having exhausted the university's internal channels.[8] The Directive includes a reporting requirement to an Ontario government agency — the Higher Education Quality Council of Ontario (HEQCO) — and institutional compliance with the speech policy is conditioned by the prospect of provincial funding cuts.

Many Ontario universities previously had express or adjacent speech policies that reflected their central mission: to produce and share knowledge via research and teaching.[9] These policies included language analogous to the requirements of the Directive, in particular recognition that universities were places of "open discussion and free inquiry."[10] Constituent members of the University — students, faculty, staff, administrators, and, by extension, society at large — have long evinced principled disagreement among themselves about what open discussion and free inquiry require in different circumstances, including genuine disagreement about what kind of expression counts as hate speech, defamation, discrimination, and harassment, all of which remain, rightly, proscribed.[11] Speech, on campus as elsewhere, has never been limitless; its bounds, and the principled justification of those bounds, are negotiated and renegotiated.[12]

In traditional accounts of free speech, speech is instrumental because it aids truth-seeking and the exchange of ideas necessary for a democratic polity, and is also intrinsically good

---

5 *Ibid*, ss 297-304.

6 *Libel and Slander Act*, RSO 1990, c L.12.

7 *Occupational Health and Safety Act*, RSO 1990, c O.1; *Human Rights Code*, RSO 1990, c H.19.

8 Directive, *supra* note 1.

9 See e.g. McMaster University "Statement on Academic Freedom" (15 December, 2011) online (pdf): *McMaster University* <secretariat.mcmaster.ca/app/uploads/SPS-E1-Statement-on-Academic-Freedom.pdf> [perma.cc/2669-KP4N]; University of Toronto Governing Council, "Statement on Freedom of Speech" (18 May, 1992) online: *University of Toronto* <governingcouncil.utoronto.ca/secretariat/policies/freedom-speech-statement-protection-may-28-1992> [perma.cc/2YZG-PSPL].

10 Directive, *supra* note 1.

11 See e.g. Richard Moon, "Understanding the Right to Freedom of Expression and its Place on Campus" (Fall 2018) online: *Academic Matters* <academicmatters.ca/understanding-the-right-to-freedom-of-expression-and-its-place-on-campus/> [perma.cc/DPQ6-6N78].

12 The protection of free expression is not the preserve of either those whose perspective align with liberalism and progressivism or conservatism, as members of both sides have sought to limit the speech of those with whom they disagree. Both sometimes appeal to the same logic: that the speech in question disparages members of certain groups in a way that is harmful to them, constituting a prohibited act of harassment, hate, or discrimination; at other times, with an appeal to a basic right to speak or express freely. See generally Nat Hentoff, *Free Speech for Me — But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (New York: Harper Collins, 1992); Diane Ravitch, *The Language Police: How Pressure Group Restrict What Students Learn* (New York: Knopf, 2003).

because it enables the self-expression necessary for autonomy.[13] Universities are principally concerned with the *instrumental* function of free speech and expression. A core purpose of a university education is to learn to distinguish the credible or substantive — ideas that are supported by evidence, or from which one may draw reasoned inferences, where nuanced distinctions are necessary for comprehensive and accurate understanding — from that which ignores or cherry-picks evidence, draws inferences and conclusions that are easily rebutted, or forsakes nuance.

The fact that the University is in the business of distinguishing ideas and speech does not mean that it is justified in censoring what it may deem to be bad. However, the Directive does not illuminate how to address disagreement among constituent members of the University identified above. As such, it offers no 'solution' to the alleged campus speech 'problem.'

The purpose of this article is to consider the Directive through the prism of one its principal potential consequences: to make the *Charter* applicable to those aspects of Ontario's universities that are animated by free speech concerns. While some argue that this outcome may be overdue,[14] this paper reflects upon the application of the *Charter* to Ontario's universities regarding the intersection of expressive freedom, academic freedom, and institutional autonomy, which is presently undertheorized. It proceeds in two parts. Part I reviews the applicability of the *Charter* to the University sector. Part II reflects on what such applicability might imply for the intersection of expressive freedom, academic freedom, and institutional autonomy. We suggest that the expressive concerns animating the unique landscape of university campuses require a more nuanced understanding of the differences and tensions among expressive freedom, academic freedom, and institutional autonomy.

Part I: The *Charter* and its application to universities

It is perhaps axiomatic that the University's mission underwrites the quintessentially public good of an educated citizenry, whether understood in the classical Aristotelian sense of education leading to better democratic governance, or in a more contemporary sense of enabling the provision of high-quality goods and services via a skilled workforce. In Canada, universities provide education to nearly 1.5 million students per year.[15] They are partially publicly funded, and they operate pursuant to establishing legislation at the provincial level.[16]

13 See generally John Stuart Mill, "On Liberty" in John Gray, ed, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991). Mill's conception is adopted by the Supreme Court of Canada in its seminal freedom of expression case, *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

14 See e.g. Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal 79; Linda McKay-Panos, "Universities and Freedom of Expression: When Should the *Charter* Apply?" (2016) 5 Can J Human Rights 59; Sarah E Hamill, "Of Malls and Campuses: The Regulation of University Campuses and Section 2(b) of the *Charter*" (2017) 40:1 Dal LJ 157; Dwight G Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45 RDUS 133; Michael Marin, "Should the *Charter* Apply to Universities?" (2015) 35 NJCL 29.

15 "Enrollment by University" (2019) online: *Universities Canada* <www.univcan.ca/universities/facts-and-stats/enrolment-by-University> [perma.cc/RCX6-8JY9].

16 See e.g. *University of Ontario Institute of Technology Act, 2002*, SO 2002, c 8, Sch O; *Algoma University Act, 2008*, SO 2008, c 13.

Given their avowedly public character, it may seem illogical that *Charter* rights are generally neither operational nor guaranteed at a university. Courts in both Saskatchewan[17] and Alberta[18] have affirmed that the *Charter* applies to the University sector in view of its provision of an important government program — notably, publicly-available post-secondary education — which other jurisdictions, notably Ontario[19] and British Columbia,[20] have thus far declined to do. The *Charter*'s applicability — or lack thereof — to the University sector in Canada has thus resulted in contradictory and unsettled caselaw.

As Turk and Cameron also canvass in this volume, the *Charter* applies to government, but not private, action. This stems from the view that since private actors may be restrained by government action, it is only government that requires constitutional restraint. This distinction in applicability has drawn criticisms of arbitrariness.[21] Nonetheless, drawing the distinction between government action and private action is the purview of jurisprudence involving the *Charter*'s "application clause" (section 32).[22] The mere fact that an entity exists pursuant to legislation or is highly regulated, is in receipt of public funding, or that it serves a public purpose does not automatically make the difference. As Justice La Forest explained:

> Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse.[23]

The two earliest landmark cases involving section 32 are *McKinney v University of Guelph* (*McKinney*)[24] and *Eldridge v British Columbia (Attorney General)* (*Eldridge*).[25] *McKinney*

17 See *R v Whatcott*, 2002 SKQB 399.

18 *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 [*UAlberta Pro-Life*]. See also *R v Whatcott*, 2012 ABQB 231 [*Whatcott*]. There, the Alberta Court of Queen's Bench upheld a lower court's ruling that the *Charter* applied to the University of Calgary, in view of the language of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 [*PSLA*]. Mr. Whatcott, who was not affiliated with the University of Calgary, left anti-gay and anti-abortion pamphlets on vehicles parked at the University, and was arrested under the province's *Trespass to Premises' Act*, RSA 2000 c T-7, after refusing to leave the premises. The Court concurred with the lower court's conclusion that the "the University is the vehicle through which the government offers individuals the opportunity to participate in the post-secondary educational system," and that decisions which prevent participation in "learning opportunities […] directly impacts the stated policy […] under the [*PSLA*]" (at para 29). In this case, his arrest for trespassing violated his *Charter* rights to free expression (at para 49).

19 See e.g. the following trio of cases: *AlGhaithy v University of Ottawa*, 2012 ONSC 142 [*AlGhaithy*]; *Telfer v The University of Western Ontario*, 2012 ONSC 1287 [*Telfer*]; *Lobo v Carleton University*, 2012 ONCA 498.

20 *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162.

21 See e.g. Patricia Hughes, "The Intersection of Public and the Private under the *Charter*" (2003) 52 UNBLJ 201; Allan C Hutchison & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38:3 UTLJ 278.

22 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

23 *McKinney v University of Guelph*, [1990] 3 SCR 229 at 269, 76 DLR (4th) 171 [*McKinney*].

24 *Ibid.* See also *Harrison v University of British Columbia*, [1990] 3 SCR 451, 77 DLR (4th) 55; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700.

25 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.

invoked the *Charter*'s applicability to the University sector. On the facts of the case involving a question of mandatory retirement, the Court determined that the *Charter* did not apply; the autonomy in their day-to-day operations precluded universities from constituting a government entity. Nevertheless, the Court was alive to the possibility that even if the University was not a government *entity* (such that *all* of its activities may come under *Charter* scrutiny) some *particular activity* of non-government entities might constitute government action (such that only *that* activity could come under *Charter* scrutiny), but only if that activity was somehow mandated or directed by government. The purpose of such an analysis has been to preclude the government from establishing a non-government entity to deliver what is otherwise a government program, policy, or objective, and thus derogating from its *Charter* obligation.

Eldridge tested this 'non-derogation' principle. The case involved the denial of sign language interpretation as one of the services provided pursuant to the province of BC's comprehensive, public medical insurance plan. In *Eldridge,* the Court held that by "guaranteeing access to a range of medical services,"[26] the *Hospital Insurance Act*[27] constituted a "specific government policy,"[28] thus bringing the provision of those services under *Charter* scrutiny. The corollary *Medical and Health Services Act*[29] provided wide discretion to determine what services would be included within that plan. The discretionary determination to deny sign language interpretation as part of the public plan was held to violate the *Charter*'s equality rights provision, even while the *Medical and Health Services Act* itself remained constitutionally sound.

Universities' governance structures remain sufficiently independent of government that they are not considered government entities, but certain of their activities have attracted *Charter* scrutiny. One reason for this is when a university has been held to be implementing a specific governmental policy or program when engaged in those activities.[30] A second reason is when a university is found to be exercising statutory control over specific activities. The power of compulsion beyond that which a 'natural person' possesses is a key component of the criterion of finding the *Charter* to apply in view of a grant of statutory authority. Some commentators have argued that student discipline, with its power to carry long-term and serious consequences for students, particularly in the context of expulsion, *ipso facto* constitutes such a grant,[31] although courts have not always agreed.[32]

Finally, the *Charter* may be at play in virtue of administrative law principles, and not in virtue of section 32 at all, in which case the *Charter* is thought to be 'indirectly' — as opposed to 'directly' — applicable. Administrative law is a branch of law concerned with the quality of decision-making by public bodies; it concerns the circumstances under which administrative decisions may be judicially reviewed, and the circumstances under which the decisions of

26 *Ibid*, at 51.

27 *Hospital Insurance Act*, RSBC 1979, c. 180, as repealed by RSBC 1996, c 204.

28 *Eldridge*, *supra* note 25 at 51.

29 *Medical and Health Care Services Act*, SB.C 1992, c. 76, as repealed by *Medicare Protection Act*, RSBC 1996, c 286.

30 See e.g. *Pridgen v University of Calgary*, 2010 ABQB 644 [*Pridgen* (QB)]; *R v Whatcott*, *supra* note 18; *UAlberta Pro-Life*, *supra* note 18.

31 See Silletta, *supra* note 14; Marin, *supra* note 14.

32 See *Telfer*, *supra* note 19; *AlGhaithy*, *supra* note 19.

such bodies may be rejected. The failure of such bodies to pay adequate attention to 'balancing' the *Charter* interests of those involved with other considerations given by the relevant policies, that is to consider '*Charter* values,'[33] may result in a decision being rejected by a reviewing court.[34]

Alberta has taken the broadest approach to the application of the *Charter* to the University sector among the various jurisdictions. In *Pridgen v University of Calgary* (*Pridgen*),[35] the Court of Queen's Bench held that students disciplined by the University of Calgary for Facebook postings critical of one of their professors had had their *Charter* rights to freedom of expression violated. There, the province's *Post-Secondary Learning Act* (*PSLA*)[36] was held to implement a government program, thus bringing at least some aspects of the University within *Charter* applicability. At the Court of Appeal, however, two of the three justices declined to answer the question of the *Charter*'s applicability, choosing to decide the questions before it upon other legal principles.[37] Only Justice Paperny undertook a comprehensive *Charter* analysis. She opined that the university in question had acted pursuant to both a specific policy or program entrusted to it by the *PSLA*, *and* a grant of statutory authority owing to the power to discipline students — up to and including expulsion — granted by the *PSLA*.

Despite the fact that *Pridgen* did not bring the University sector within the *Charter*, Justice Paperny's comprehensive analysis "evoked a whole new wave of comments on the possibility of *Charter* application to universities in the media, on blogs, and from law firms."[38] In early 2020, in *UAlberta Pro-Life*, the Alberta Court of Appeal expressly waded into the unsettled *Charter* waters. Pursuant to the principle elucidated in *Eldridge*, it found that the *PSLA* evidenced a government program in its provision of public post-secondary education.[39] The Court issued this ruling despite the fact that the lower court had chosen to dispense with the specific questions before it on the basis of administrative law principles, thus skirting the more complicated issue of direct *Charter* applicability.

Reviewing courts in Ontario have declined to apply the *Charter* in situations similar to those in which it has been held to apply by courts in other jurisdictions.[40] In its attempt to secure expressive rights of "faculty, students, staff, management and guests" on campus, however, the Directive carries the potential to persuade courts in Ontario to apply the *Charter* to aspects of the University. Offering reasons relevant to the Ontario Directive, in 2016 the BC Court of Appeal in *BCCLA v University of Victoria* concluded that the *Charter* did not apply to the University. Willcock J, writing for the unanimous court, wrote that "[t]he government

33 See e.g. *Doré v Barreau du Quebec* 2012 SCC 12; *Canada Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65.

34 For example, in the Alberta case *Wilson v University of Calgary*, 2014 ABQB 190, the Court of Queen's Bench determined that the discipline of students for having ignored a formal Notice from the University — to turn the placards of a Pro-Life display inward so that one had to enter the display to view it and could not simply view it as a passer-by — was unreasonable. There, the Court ruled that the decision did not take sufficient heed of the expressive rights of Pro-Life group members.

35 Pridgen (QB), *supra* note 30.

36 *PSLA*, *supra* note 18.

37 *Pridgen v University of Calgary*, 2012 ABCA 139 [*Pridgen* (CA)].

38 Newman, *supra* note 14 at 137-38.

39 *UAlberta Pro-Life*, *supra* note 18.

40 For academic criticism of the courts' rationale, see generally *supra* note 14.

neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom," whose *Education Act*[41] obliges universities to secure free speech rights on campus. Justice Willcock concluded that BC's *Education Act* "does not describe a specific governmental program or policy which might have been affected by the impugned decisions" but also that there was "no evidence before the judge of any legislation or policy that does so."[42] The Ontario Directive goes some way to providing the type of evidence that the BC Court of Appeal might have found persuasive in that case, and that, accordingly, so might courts in Ontario in similar instances. Regardless, the possibility of the eventual application of the *Charter* to the University looms, given the recent Alberta Court of Appeal decision, the ongoing indirect applicability of the *Charter* upon administrative law principles, and the possibility of legislative changes similar to that expounded within the UK's *Education Act*.

The expressive concerns animating campus life — notably expressive freedom, academic freedom, and institutional autonomy — are at times conflicting and are not interchangeable. The addition of Ontario's Directive to unsettled provincial caselaw regarding the application of the *Charter* to universities lends urgency to the need for greater conceptual clarity about their scope and consequence. It is to these we now turn.

Part II: Academic freedom, institutional autonomy, and free expression: three interrelated, but distinct, concepts

There is scholarly support for the application of the *Charter* to the universities, particularly — though not exclusively — for purposes relating to students' free expression.[43] One motivation for this position stems from several cases where students/student groups were disciplined for, or otherwise prevented from, engaging in certain activities owing to the expressive content of those activities, and the view that that content ought normally to be allowed in a university setting. Supporters see the operation of the *Charter* within the University as a means to remedy limitations on the expressive rights of students by university administrators. The context for this position is the putative conflict between expressive rights on the one hand, and other values and principles such as equality and inclusion on the other. However, there is very little focus upon the countervailing demands emanating from within the exercise of expressive rights themselves.

Drawing in the judiciary over expressive rights on campus may opportune occasion when the judiciary is required to choose *which* expressive rights to champion. Expressive rights themselves are at times in conflict in university settings. In this context, insufficient academic and judicial differentiation among expressive freedom, academic freedom, and institutional autonomy carries implications that are underexamined. In contradistinction to the optimism in some scholarly literature, we are agnostic about the potential treatment of academic freedom under the *Charter*, proposing that it is too early for either optimism or pessimism. We seek instead to offer some initial critical reflection.

41 *Education (No. 2) Act 1986* (UK), 1986 c. 61

42 *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at paras 32-33 (underline in original).

43 Supra note 14.

In academic and judicial discussions, the term academic freedom is often conflated with freedom of expression. This stems from the fact that each is necessary to the proper functioning of the university. Jamie Cameron observes that "academic freedom and expressive freedom overlap," but they "do not serve identical purposes."[44] Academic freedom is here understood as a concept distinct from expressive freedom, pertaining to the individual rights and responsibilities of faculty members to research and teach without reference to prescribed doctrine, and to criticize the institutional decisions of the academy in the name of collegial governance.

Academic freedom derives from a longstanding notion that only members of the professoriate are sufficiently expert to command deference for their judgements on matters in which they are expert and to hold other members of the professoriate to account for theirs. Matthew W. Finkin notes that "within her sphere of professional competence a professor is not subject to lay disposition; she enjoys a professional liberty to test received wisdom, to propose new ways of thought, even to essay that which may be thoroughly distasteful — indeed, profoundly offensive — to the larger community from which the institution drew support."[45] This liberty is tied to the corollary duty to exercise it, with regard for scholarly standards "of care the determination of which, however, must lie in the hands of the academic profession."[46] Being concerned with the *legitimacy* of intellectual contribution, academic freedom is thus different from the broader notion of freedom of expression. The broader notion is both instrumentally *and* intrinsically good. Expressive freedom does not depend for its legitimacy upon the particular expertise of the speaker.

Shannon Dea asserts that expressive freedom and academic freedom are often conflated, with expressive freedom taking centre stage, sometimes to the "exclusion of academic freedom."[47] She attributes this to the fact that academic freedom, with its cluster of sub-freedoms — "to teach, to learn, to decide on which research questions to inquire into and what methods to use in that inquiry, to engage in extramural communication, and to criticize the university itself" — is more difficult to grasp than "the comparatively simpler concept of freedom of expression."[48] Indeed, in the popular imagination, academic freedom sometimes "has

44 Jamie Cameron, "Giving and Taking Offence: Civility, Respect, and Academic Freedom" in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 287 at 296.

45 Matthew W Finkin, "Academic Freedom and Professional Standards: A Case Study" " in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 65 at 65-66.The idea expressed in this quote is the basis for the American Association of University Professors' "1915 Declaration," see "1940 Statement of Principles on Academic Freedom and Tenure" online: *American Association of University Professors: Reports and Publications* <www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [perma.cc/Z2WQ-4ZCA]; "Statement on Academic Freedom" (25 October 2011) online: *Universities Canada* <www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/> [perma.cc/VK53-LHFU]; John Semley, "Are University Campuses Where Free Speech Goes to Die?" (9 July 2019) online: *The Walrus* <thewalrus.ca/are-university-campuses-where-free-speech-goes-to-die/> [perma.cc/CHV7-KLA6]. Academic freedom is not limitless: see generally the chapter by Michael Lynk in this special issue.

46 *Ibid* at 66.

47 Shannon Dea, "First Dispatch: Academic Freedom and the Mission of the University" (5 September 2018) online: *University Affairs* <www.universityaffairs.ca/opinion/dispatches-academic-freedom/first-dispatch-academic-freedom-and-the-mission-of-the-university/> [perma.cc/E4SJ-Q483].

48 *Ibid*.

a broader and more inclusive meaning"[49] and accordingly is often viewed as a subset of free expression that can extend beyond members of the academy, to students speaking on matters of academic or public interest. Importantly, academic freedom inheres in members of the professoriate, and not others, owing to their expertise.

In contrast to both academic freedom and freedom of expression, institutional autonomy inheres in the capacities of the institution itself to make decisions without deference to partisan political pressure.[50] In a recent decision, the Ontario Superior Court had reason to revisit the evolution of institutional autonomy. There, the Court cited from the 1906 Flavelle Commission, which had been instigated "as a response to past political interference in university affairs."[51] The Court cited approvingly from the Commission: "the process by which universities make decisions should be autonomous from the political whims of government."[52] Accordingly, "institutional autonomy represents a fundamental principle of university governance in Ontario dating back to the early 20th century."[53]

Institutional autonomy, thus, is related to academic freedom in that it shares the idea that the university is an institution with a specialized mission that requires insulation from external interference. For example, the decision as to what programs to offer is appropriately thought of as an institutional decision about an academic matter, subject to codified internal and external review processes as well as collegial governance structures that, in principle, is insulated from external interference.[54] While institutional autonomy and academic freedom overlap, they can also be *in conflict.* At such times, conflating the concepts can lead to divergent outcomes and conclusions.

In the most comprehensive judicial treatment to date of the applicability of the *Charter* to the operation of the University and its implication for academic freedom[55] — Justice Paperny's analysis in *Pridgen* — the various concepts; expressive freedom, academic freedom and institutional autonomy, are conflated. Justice Paperny proposes that academic freedom and freedom of expression are "inextricably linked,"[56] that there is "no legitimate conceptual con-

---

49 Cameron, *supra* note 43 at 289.

50 The important concept of institutional autonomy is instantiated via statute. It is conditioned by external funding pressures, and therefore is porous, but not without form. See e.g. *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 [*CFS*]. There, in deciding that a particular government 'initiative' was ultra vires its legislative capacity owing to its statutory duty to preserve a space for institutional autonomy, the Court recognized that the government may present general direction with regard to provision of funding, but that any direction must be consistent with its own legislative authority.

51 *Ibid* at para 38.

52 *Report of the Royal Commission on the University of Toronto* (Toronto: LK Cameron, 1906) [The Flavelle Commission], cited in *Ibid* at para 39.

53 *CFS*, *supra* note 49 at para 45.

54 We need only refer to the situation in the US, where certain institutions have been threatened with defunding if they offer certain programs, to appreciate the importance of institutional autonomy. See e.g. Amanda Jackson, "University Stands by 'Problem of Whiteness' Course" (23 December 2016) online: *CNN* <www.cnn.com/2016/12/23/health/college-course-white-controversy-irpt-trnd/index.html> [perma.cc/DU8K-3WXJ].

55 Even though the decision in *Ualberta Pro-Life*, *supra* note 18, had the effect of directly applying the *Charter* to Alberta's universities, the Court cited approvingly of Justice Paperny's earlier analysis in *Pridgen* (CA), *supra* note 37.

56 *Pridgen* (CA), *ibid* at para 115.

flict between academic freedom and freedom of expression," and that these two freedoms are "handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge."[57] At the same time, she characterizes academic freedom as an individual right of the professor, as inclusive of institutional autonomy, and as a means by which "to promote discussion in the university community as a whole."[58] While Justice Paperny uses all three terms — academic freedom, institutional autonomy, and freedom of expression — at different times in her analysis, thus suggesting that she recognizes that they are distinct concepts, the ensuing analysis elides the distinctions, failing to identify, as Cameron does, the "different purposes" they serve, leaving only what is overlapping among them.

Marin contends that "it is important not to conflate institutional autonomy and academic freedom."[59] He notes that institutional autonomy and academic freedom are in tension, precisely *because* universities may at times deploy their autonomy to override academic freedom. He maintains that, as a result, universities should not be "the sole arbiters of academic freedom" and concludes that "applying the *Charter* in a balanced manner, is probably the most appropriate forum to resolve disputes relating to academic freedom."[60] Two important facts bear noting in the relationship between institutional autonomy and academic freedom under the *Charter*. The first is that in Canada, universities are *not* the sole arbiters of academic freedom in most cases. The second is that the constitutional 'balancing' of free speech principles in the US has often served to *uphold* the institutional autonomy of universities over faculty exercises of academic freedom,[61] the very thing about which Marin is concerned.

As Michael Lynk explicates in a separate piece in this issue, in Canada the concept of academic freedom is captured as a right that is negotiated within collective agreements between universities and faculty associations.[62] Adjudication about academic freedom is generally the purview of independent arbitrators, rather than of universities themselves in their management function. This is not to suggest that the judiciary is *incapable* of dealing effectively with issues concerning academic freedom; at this point, there is little substantive basis to tell. Rather, the fact that universities in Canada are *not* the sole arbiters of such conflicts removes any urgency for judicial intervention on the basis that such conflicts are, as a matter of course, decided by one of the two contending sides.

The arbitration of conflicts over academic freedom in Canada can be contrasted with the manner in which academic freedom is treated in the US, where the courts *are* the final arbiter of such conflicts under the auspices of their First Amendment jurisprudence. In First Amend-

---

57 *Ibid* at para 117.

58 *Ibid* at paras 114-5.

59 Marin, *supra* note 14 at 56.

60 *Ibid*.

61 See generally David M Rabban, "Professors Beware: The Evolving Threat of 'Institutional' Academic Freedom," in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 23. See also Len Findlay, "Institutional Autonomy and Academic Freedom in the Managed University" in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 49.

62 See also Linda Rose-Krasnor & Michelle Webber, "Freedom with Limits? The Role Faculty Associations Play Protecting the Speech Rights of Their Members" (Fall 2018) online: *Academic Matters* <academicmatters.ca/freedom-with-limits-the-role-faculty-associations-play-protecting-the-speech-rights-of-their-members/> [perma.cc/4DE5-3QSD].

ment jurisprudence, principles of academic freedom are elucidated as individual rights of the professoriate, in *counterbalance* to the First Amendment rights of the institutions themselves. As has been noted by American jurist Richard Posner, First Amendment academic freedom refers to both the freedom of the institution *and* the freedom of the teacher and "these two freedoms are in conflict."[63] In a search for the appropriate balance between the two, academic freedom has sometimes been construed more narrowly than it might otherwise have been, to preserve a space for the constitutionally equal rights of the institution to operate.[64]

Institutional design in Canada is different. Academic freedom, as a creature of collective agreements, is protected more or less broadly by the language in the agreement made between the contending parties themselves. With this design, the reach of academic freedom is contemplated by the very experts to whom it would apply. Moreover, a relatively robust arbitral jurisprudence has developed concerning the exercise of academic freedom in the *particular* context of its existence as a collective agreement right, with its own institutional particularities, rather than a subset of the constitutional right to free expression. One particularity is that arbitrators are usually jointly selected by universities and faculty unions when issues arising between the parties require arbitration. They are selected owing to the arbitrators' expertise not only in the workplace, but in the specific *type* of workplace: the academy. Other institutional features particular to administrative decision-making, including greater access, recommend this particular design. If in fact the *Charter* is the "most appropriate forum" for adjudicating issues of academic freedom, the reason for this is not immediately obvious here; in the US, the dearth of unionized faculty makes it largely impossible to deal with these issues in any other fashion. That is not so in Canada.

The application of the *Charter* to the University would not, of course, extinguish the current administrative design.[65] In the new world of *Charter* applicability, some faculty associations might start making *Charter* arguments to bolster their claims to academic freedom. However, the addition of constitutional considerations in the form of the expressive rights of the institution[66] as well as of its individual members, namely students,[67] may increase the propensity to seek and receive judicial review of the decisions of labour arbitrators in the context of conflicts over academic freedom. Indeed, although administrative law principles already apply indirectly, the adjudication of academic freedom could now be conditioned by countervailing expressive rights of non-parties to collective agreements.

Since the Canadian judiciary has had little opportunity to expound any significant understanding of academic freedom, much less how it might weigh *against* institutional autonomy or freedom of expression in particular instances, it would likely draw upon US jurisprudence. Justice Paperny's analysis in *Pridgen* does just that to defend the proposition that academic

63 Judge Richard Posner, cited in in Rabban, *supra* note 61 at 30.

64 See generally *ibid*.

65 However, contractual arrangements between faculty and the University would not obviously escape *Charter* scrutiny, despite the fact that in *McKinney*, *supra* note 23, such contractual arrangements did. In contrast to *McKinney*, if the *Charter* is found to apply to University in view of expressive rights, it is hard to see how academic freedom could be simply excised.

66 See generally Rabban, *supra* note 61. There, he discusses the judicial evolution of academic freedom as a special subset of the First Amendment to include 'institutional' academic freedom.

67 And possibly even those not affiliated with the university at all. See *Whatcott*, *supra* note 18.

freedom and freedom of expression are "inextricably linked" and that the latter is "not universally seen as a threat" to the former.[68] She concludes that the application of the *Charter* neither undermines academic freedom nor institutional autonomy, and that it isn't obvious that academic freedom "trumps freedom of expression."[69] Should circumstances in which they do conflict arise, she says, simply, that the *Charter*'s section 1 is available "to properly balance them."[70] At this time, though, we cannot know how the judiciary would undertake that balancing.

The classroom is the site in which the three concepts — expressive freedom, academic freedom and institutional autonomy — interconnect and potentially collide. The myriad spaces on a university campus serve vastly different purposes and are not reasonably subject to the same speech regulation. The classroom is a particular space where "stricter standards should be applied" because, among other reasons, the "members of the class are in an ongoing relationship" and the space is hierarchically organized "based on the teacher's authority."[71] Thus expressive limits should be assessed differently from how such limits may be imposed in other campus spaces. At least some classroom limits on speech are inextricably tied to the exercise of academic freedom and the university's core mission as a place where one's learning is curated by a member of the professoriate. This depends, foremost, on a faculty member being able to generally claim the content and method of teaching as against others who would seek to impose different content or methodology. However, this idea becomes fraught when academic freedom is interpreted broadly as "the freedom to explore a diversity of viewpoints before coming to a conclusion,"[72] thus failing to locate the centrality of expertise.

Lindsay Shepherd, whose case is often cited to underscore the need for the Ontario campus speech Directive, is relevant here. Shepherd was a graduate student and teaching assistant at Laurier who was accused of having created a "toxic environment" for students who identify as transgender, by showing a TVO clip in the course of leading an undergraduate tutorial, featuring an interview with Jordan Peterson, without an accompanying rejection of Peterson's view.[73] She was consequently called into a meeting with the course director and the director of Office of Diversity and Equity. The substance and outcome of that meeting are well-known, so will not be repeated here.[74] A subsequent investigation cleared Shepherd of any wrongdoing

68 *Pridgen* (CA), *supra* note 37 at para 115.

69 *Ibid* at para 113.

70 *Ibid* at para 117. Notably, since most decisions pertaining to academic freedom would be administrative decisions rather than legislative ones, section 1 of the *Charter* would be unlikely to be the avenue through which they were balanced, rather; it would be via the 'balancing' that attends administrative law principles.

71 Richard Moon, "Demonstrations on Campus and the Case of Israeli Apartheid Week" in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 185 at 195.

72 Hamill, *supra* note 14, at 174.

73 Joseph Brean, "Lindsay Shepherd Sues Wilfrid Laurier, Claiming 'Attacks' Have 'Rendered Her Unemployable in Academia'" (13 June 2018) online: *National Post* <nationalpost.com/news/canada/lindsay-shepherd-files-lawsuit-against-wilfrid-laurier-university-claiming-attacks-have-rendered-her-unemployable-in-academia> [perma.cc/GQZ5-J6XJ].

74 See e.g. Rebecca Joseph, "Wilfrid Laurier Admits It Mishandled Lindsay Shepherd Academic Freedom Case" (19 December 2017) online: *Global News* <globalnews.ca/news/3923478/wilfrid-laurier-no-complaint-lindsay-shepherd/> [perma.cc/TF7B-HWCS]; Tristin Hopper, "Here's the Full Recording of Wilfrid Laurier Reprimanding Lindsay Shepherd for Showing a Jordan Peterson Video" (21 November

under university policy. Additionally, the university has apologized for its handling of the situation.[75] In the time since, Shepherd has become the face of the campus-speech cause célèbre.

The episode highlighted the tension endemic across universities, identified at the outset of this essay, with regard to what *kind* of expression is rightly proscribed, in the context of countervailing demands between expression, and other important values.[76] In its positive iteration, the incident propelled community-wide discussion necessary to the ongoing negotiation of campus expression.[77] Obfuscated in all this was the tension emanating from within the demands of expressive rights themselves. To illuminate the point, let us imagine an alternative scenario in which Shepherd is not lambasted after the fact and accused of violating both university policy and Canadian law, but is given prior work direction about how the seminar material is to be handled. In this scenario, Shepherd submits a lesson plan prior to each session as part of her prescribed duties (indeed, she was subsequently asked to do this), and the professor identifies the clip as "problematic" (as he did in his meeting with Shepherd after the fact). Imagine that he directs her to be cautious about her approach, or even directs her not to show it altogether. Clearly, there can be no positive duty on the professor to show the clip.[78] However much his position may be criticized, it sits comfortably within the bounds of what is contemplated by academic freedom. Academic freedom understood in its 'broad' sense, as in free expression related to matters of academic or public concern, suggests a different outcome to this incident than academic freedom understood as an individual right of faculty. This is why the conflation of the various concepts matters. Expressive rights on campus may be well served by *Charter* capture;[79] however, disentangling the distinctions, tensions, and affinities

---

2017) online: *National Post* <nationalpost.com/news/canada/heres-the-full-recording-of-wilfrid-laurier-reprimanding-lindsay-shepherd-for-showing-a-jordan-peterson-video> [perma.cc/AC3N-M8C3].

75 See e.g. Brian Platt, "Wilfrid Laurier University's President Apologizes to Lindsay Shepherd for Dressing-Down over Jordan Peterson Clip" (21 November 2017) online: *National Post* <nationalpost.com/news/politics/wilfrid-laurier-universitys-president-apologizes-to-lindsay-shepherd-for-dressing-down-over-jordan-peterson-clip> [perma.cc/69JS-PR77].

76 The attempt to reconcile expression with these other values is best illustrated by the idea of 'inclusive freedom.' See generally Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017). For a rejection of this view, see Nirmal Dass, "Review of Sigal R Ben-Porath, *Free Speech on Campus*" (September 2018) online: *Society for Academic Freedom and Scholarship* <www.safs.ca/newsletters/article.php?article=977> [perma.cc/8YDS-GDUA].

77 See James Turk in this special issue.

78 Recall that academic freedom in Canada is instantiated within various faculty collective agreements. Teaching assistants in Ontario are generally unionized — at Laurier that was not true in Shepherd's case, but teaching assistants there have since certified — and some of these have collective agreement language recognizing academic freedom. Where that is the case, however, such freedom is generally limited by the overriding academic freedom of the course instructor in whose course they are assisting. In other words, teaching assistants must be afforded appropriate leeway to develop and manage their seminars and tutorials, but only to the extent afforded them by the person who has primary responsibility for the course and whose determination as to content and methodology takes precedence.

79 There is notable and reasoned optimism among scholars regarding the reconcilability of expressive freedom, academic freedom, and institutional autonomy in a context of potential *Charter* application. For example, Newman, *supra* note 14 at 151, cites Justice Paperny approvingly, agreeing that academic freedom and freedom of expression are not in conflict, and that should a conflict present itself "the availability of a limitations analysis means that there always remains a mechanism by which academic freedom considerations can be part of the analysis." With such a mechanism "that *Charter* application actually has prospects of furthering academic freedom" (*ibid* at 152). Similarly, Mckay-Panos, *supra* note 14 at 92, writes

among expressive freedom, academic freedom, and institutional autonomy remains consequential to both balancing and outcome of expressive rights.

Conclusion

Reception to the Ontario Directive has been mixed. It has been applauded in some quarters for potentially solving the 'problem' of campus censorship. Others have been at pains to articulate the ways in which the *Charter* could or ought to apply to universities, consistent with relevant statutory and constitutional language, because *Charter* scrutiny would secure expressive rights on campus. This paper has articulated the possibility that the Directive could have the effect of bringing the two camps together by persuading Ontario courts, thus far reluctant to follow the lead of jurisdictions like Alberta, to apply the *Charter* to those aspects of the University intertwined with the obligatory free speech policies.

In contrast to the literature which characterizes the operation of the *Charter* as an unqualified good, however, the purpose of this general overview has been to caution against the idea that expressive freedom, academic freedom, and institutional autonomy, which courts have understood to be the expressive concerns animating campus life, can be used interchangeably without consequence. We have tried to 'trouble the waters' by highlighting that conflicts will arise from within the demands of expressive freedom itself, which will require thinking-through.

It is possible that universities will continue much as they have done, with the Directive itself and its potential invocation of the *Charter* playing a very limited role. Although it remains early days, the HEQCO report released in late 2019 and canvassing the first 9 months of the implementation of the Directive revealed that over 40,000 events on campuses took place in that time, and there was only one instance in which a complaint was lodged with a university, which appears to have been handled internally, which is consistent with the Directive.[80] Given the sheer amount of contested expression on Canadian campuses, proof of observance of free speech principles is in the (rare) breach. By the same token, courts have had to address claims of *Charter* applicability to the University in the past and will likely have to do so again. In that regard, it is not yet clear whether we are in for stormy weather or smooth sailing.

"university autonomy is not sacrificed by allowing and protecting freedom of expression on campuses in the current context. It is possible under current administrative law principles to defer to decisions of university officials and respect academic freedom while also protecting freedom of expression." Marin, *supra* note 14 at 56, claims that that freedom of expression and academic freedom are "entirely reconcilable." Our aim here is not to contradict this optimism, but to problematize the reconciliation of the distinct expressive concepts.

80 Higher Education Quality Council of Ontario, *Freedom of Speech on Campus: 2019 Annual Report to the Ontario Government* (2019) online (pdf): *Higher Education Quality Council of Ontario* <www.heqco.ca/SiteCollectionDocuments/HEQCO%202019%20Free%20Speech%20Report.pdf> [perma.cc/63LW-CQN5].