

CHARTER APPLICABILITY TO UNIVERSITIES AND THE REGULATION OF ON-CAMPUS EXPRESSION

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I. INTRODUCTION

The issue of the applicability of the *Canadian Charter of Rights and Freedoms* can be easy to pass over.¹ Often, applicability is either a foregone conclusion or already settled in the jurisprudence, to be cursorily addressed before getting to the fascinating business of defining the scope of our essential freedoms and defending those freedoms against the most powerful of all societal actors: the state. But where exactly *is* the state? The answer to this question has profound normative implications for individual rights and freedoms. Perhaps the best illustration of how vexed this question is emerges from the jurisprudence on *Charter* applicability to universities.² The oft-cited restatement of the test for applicability comes from *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*: inquire into the nature of the entity to determine whether it is itself “government” or into the nature of the activity, which may be governmental despite being carried out by a private actor.³ What the most recent case⁴ in the saga of universities and the *Charter* demonstrates is that, for some actors, this binary must be exploded. Universities are neither fish nor fowl — not quite “governmental” enough to fall into the first category, and the governmental function they perform is not quite “specific” enough to fall into the second category. The fact that they occupy this liminal institutional space, however, should not mean that they can evade scrutiny. In this comment, I will demonstrate that the government does task universities with fulfilling a governmental function: that of delivering accessible post-secondary education. The fulfillment of this function requires a freedom of inquiry to which free expression is a necessary prerequisite. For courts to ignore this on the basis that this specific objective is not enshrined in statute is to leave rights exposed to violation where they are most in need of protection from those acting pursuant to a governmental mandate.

In the first part of this comment, I review the foundational cases dealing with applicability to universities and discuss a dissenting opinion that foreshadowed debates that have continued to rage for 30 subsequent years in lower courts across the country. In the second part, I address the promise of *Eldridge v. British Columbia (Attorney General)* as a new pathway to applicability.⁵ In the third part, I problematize the vision of autonomous university governance endorsed in *McKinney v. University of Guelph*, demonstrating that,

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¹ This comment will not address the application of the *Charter* to student unions. Typically, the *Charter* is held to be inapplicable to these bodies, as non-profit corporations (see e.g. *Grant v Ryerson Students' Union*, 2016 ONSC 5519 at para 49).

² 2009 SCC 31 at para 16 [*GVTA*].

³ *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 [*UAlberta Pro-Life*].

⁴ [1997] 3 SCR 624 [*Eldridge*].

despite a lack of direct control over institutional operations, the government is indirectly present in university policy.⁶ In the fourth part, I discuss the divergent approaches to this issue that courts in British Columbia and Alberta have taken. And finally, I briefly address why *Charter* applicability matters in this context; whose rights does inapplicability leave exposed, and what are the implications of applicability for academic freedom?

II. MCKINNEY AND CONTROL-BASED APPLICABILITY

1990 saw the release of four seminal cases which articulated a conception of applicability which was premised on the degree of governmental control over the entity at issue. The entities in question were public universities,⁷ a college,⁸ and a hospital.⁹ The applicability of the *Charter* was relevant in these cases because each institution had, as part of its conditions of employment, a mandatory retirement policy which, if the *Charter* applied, would violate section 15. In *McKinney*, Justice La Forest (writing for a plurality) addressed the question of whether universities, as institutions, are “government” within the meaning of section 32.¹⁰ A number of key principles emerge from or are confirmed by this decision. First, merely being a “creature of statute” with “the legal attributes of a natural person” is not enough to attract *Charter* scrutiny.¹¹ Second, the reason courts have supervisory jurisdiction to review university decisions is not because they are “government,” but because they are “public decision-makers.”¹² Third, an entity having a “public purpose” is not enough for the *Charter* to apply.¹³ Finally, regardless of the fact that “the universities’ fate is largely in the hands of government,” the relationship between provincial governments and universities is not direct enough to attract *Charter* scrutiny because of a lack of “legal power to control” the affairs of the university.¹⁴ This lack of legal control is a result of the fact that a limited number of members of the Board of Governors are government appointees.¹⁵ That the understanding of “government” in *McKinney* is premised largely on direct governmental control is evidenced by the fact that Douglas College was found to be “government” in *Douglas*.¹⁶ In that case, the Minister had “direct and substantial control over the college” and could “establish policy or issue directives regarding post-secondary education and training, may provide services considered necessary, [approve] all by-laws of the Board and [provide] the necessary funding.”¹⁷

Justice Wilson gave a powerful dissent in *McKinney* that takes aim at the narrow understanding of “the state” espoused by the plurality’s reasons. Her reasons anticipated the concerns about the government’s ability to contract out of *Charter* compliance by delegating functions ordinarily performed by the government to non-state actors not subject to the same obligations.¹⁸ She noted that “[w]e should not place form ahead of substance and permit the

⁶ [1990] 3 SCR 229 [*McKinney*].

⁷ *Ibid*; *Harrison v University of British Columbia*, [1990] 3 SCR 451.

⁸ *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 [*Douglas*].

⁹ *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 [*Stoffman*].

¹⁰ *McKinney*, *supra* note 6.

¹¹ *Ibid* at 265–66.

¹² *Ibid* at 268.

¹³ *Ibid* at 269.

¹⁴ *Ibid* at 272–73.

¹⁵ *Ibid* at 273.

¹⁶ *Supra* note 8.

¹⁷ *Ibid* at 579.

¹⁸ *McKinney*, *supra* note 6 at 361–62.

provisions of the *Charter* to be circumvented by the simple expedient of creating a separate entity and having it perform the role.”¹⁹ Justice La Forest’s notion of “control” focused on the university Board of Governors and the question of whether or not they are appointed by the Lieutenant Governor.²⁰ Justice Wilson noted why this is a particularly blinkered vision of “control”:

One need only think of those bodies that are created by statute, that depend heavily on government funding and that receive broad policy directives concerning their overall mandate from one of the branches of government, but that are deliberately placed at arm’s length and given the freedom to make a wide range of choices about how to implement particular policies. This kind of arrangement is hardly novel, particularly in areas where ministers and government departments do not wish to be involved in complex and politically sensitive decisions concerning the allocation of government funds or the specific application of particular policies.²¹

Indeed, many commentators have picked up this line of reasoning and complicated the notion that governments do not exercise substantial control over universities.

III. THE ACTION, NOT THE ENTITY

In the wake of *McKinney* and its companion cases, many assumed that the *Charter* did not apply to universities and hospitals. When the Supreme Court of Canada had the chance to revisit *Charter* application to hospitals in *Eldridge*, Justice La Forest acknowledged that there was language in *Stoffman* that could be viewed as precluding *Charter* application to hospitals entirely.²² Similarly, while *McKinney* “arguably [established] a fairly strong presumption against the application of the *Charter* on university campuses,” the majority of the Supreme Court considered that universities might “perform some functions that would be subject to *Charter* review.”²³ The passage from *McKinney* that has repeatedly been cited in subsequent jurisprudence confirming this position is as follows: “There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government.”²⁴ Until *Eldridge*, it was unclear what such a situation might look like, but even after *Eldridge* confusion persists. Justice La Forest confirmed that “a private entity may be subject to the *Charter* in respect of certain inherently governmental actions”; such actions, however, “do not readily admit of any *a priori* elucidation.”²⁵ In other words, this will be a context-specific determination to be fleshed out in further litigation. Justice La Forest gestured at what might qualify: “[T]he implementation of a specific statutory scheme or a government program,”²⁶ “*specific* governmental policy or program,”²⁷ and carrying out a “specific governmental objective.”²⁸ He also clarified what will *not* qualify as government

¹⁹ *Ibid* at 357.

²⁰ *Ibid* at 273.

²¹ *Ibid* at 361.

²² *Eldridge*, *supra* note 5 at para 47.

²³ Craig Jones, “Immunizing Universities From *Charter* Review: Are We ‘Contracting Out’ Censorship?” (2003) 52 UNBLJ 261 at 272.

²⁴ *McKinney*, *supra* note 6 at 274.

²⁵ *Eldridge*, *supra* note 5 at para 42.

²⁶ *Ibid* at para 44.

²⁷ *Ibid* at para 43 [emphasis in original].

²⁸ *Ibid* at para 50.

action: mere performance of a “public function” or activities “public” in nature will not qualify for lack of specificity.²⁹

At issue in *Eldridge* was whether the failure to provide sign language interpretation to deaf patients in hospitals violated their section 15 rights. The “specific governmental objective” was defined as “providing medically necessary services.”³⁰ The factors which militated for *Charter* application to this specific function were that the purpose of the *Hospital Insurance Act*³¹ was to provide services to the public, the government defined both the content and the class of person entitled to receive those services, and that sections of the *HIA* designate (in a very general way) how the hospital is to spend lump sum payments given to them by the Minister to provide services.³² The facts of this case were distinguished from those in *Stoffman* because, while the negotiation of a mandatory retirement clause was not done pursuant to some governmental policy, here there was a “‘direct and ... precisely-defined connection’ between a specific governmental policy and the hospital’s impugned conduct.”³³

IV. THE UNIVERSITY’S UNCOMFORTABLE MIDDLE POSITION

In *Eldridge*, the Supreme Court of Canada had done something of an about-face on *Charter* application to hospitals. The question of whether they might do the same for universities followed naturally from the outcome in *Eldridge*. There were and are a number of reasons to view the judicial consideration of universities in *McKinney* as a poor template on which to base future applicability decisions. Although universities indisputably discharge a public function, *McKinney* did not address a circumstance in which they were acting in that public capacity; rather, it “related to a decision that was essentially private and contractual in nature.”³⁴ Additionally, the question at issue was whether public universities were an organ of government, not whether they discharged a governmental function. Before addressing whether or not the *Charter* could be found applicable to universities on the basis of *Eldridge*’s governmental function test, it is worth problematizing the understanding, endorsed in *McKinney*, of the university as an autonomous actor, free from government control.

Justice La Forest conceded that “the universities’ fate is largely in the hands of government” due to both government funding and regulation, but finds that their independent governing bodies are not subject to government control.³⁵ Christopher Henderson complicates the notion that universities are a mere recipient of funds, with which they can do as they please. Henderson suggests that the growth of government-backed research, development plans which promoted universal participation in post-secondary education, and increased graduate program enrolment signal a more indirect, though no less real, form of governmental control.³⁶ Launched in 2000 and still in operation is the Federal Government’s

²⁹ *Ibid* at para 43.

³⁰ *Ibid* at para 50.

³¹ RSC 1979, c 180 [HIA].

³² *Eldridge*, *supra* note 5 at para 49.

³³ *Ibid* at para 51.

³⁴ Michael Marin, “Should the *Charter* Apply to Universities?” (2015) 35:1 NJCL 29 at 36.

³⁵ *McKinney*, *supra* note 6 at 272–73.

³⁶ Christopher Henderson, “Searching for ‘Government Action’: Post-Secondary Education as a Case Study in the Conceptual Weakness of the *Charter*’s Government Action Doctrine” (2006) 15:3 Educ & LJ 233 at 240–42.

Canada Research Chairs Program, which invests roughly \$295 million per year to allow Canadian universities “to attract and retain a diverse cadre of world-class researchers, to reinforce academic research and training excellence.”³⁷ I do not suggest that public investment in universities is a bad thing, but where and by whom public funding is directed shapes the nature of these institutions. Over the course of the Program’s first few years, research showed that the vast majority of funding went to health, natural sciences, and engineering programs.³⁸ British Columbia’s provincial government in its 2019 budget committed \$3.3 billion over three years to post-secondary education with priority going to “health, science, trades and technology.”³⁹ So, while the government does not exert direct control over all university expenditures, the funds are provided with taut strings attached and have the effect of guiding the administration of education. Franco Silletta suggests that “such large contributions must give rise to governmental control—universities consider the government’s interests in their decisions because they are reliant on government grants for over half of their revenue.”⁴⁰ Michael Marin notes that the Provincial Budget classifies universities as “service delivery agencies” along with schools, colleges, and health organizations, which are described as delivering services “on behalf of government” and some of which are subject to the *Charter*.⁴¹

The independence of universities’ governing bodies is also questionable. In *McKinney*, Justice La Forest noted that only a minority of each Ontario university’s Board of Governors was appointed by the Lieutenant Governor in Council, and even those that are appointed have an obligation to act in the best interests of the institution, not the provincial government.⁴² In British Columbia, the *University Act* specifies that a majority of board members at provincial universities are government appointees, although they are still required to act in the best interests of the university.⁴³ Silletta, however, points out that “the existence of such a clause in the *College and Institute Act* was not dispositive in the case of *Douglas College*—Douglas College was found to be an organ of the government even though its board was to act in its own best interests, not the government’s.”⁴⁴ Additionally, the appointed board members are removable at any time at the Minister’s discretion.⁴⁵ This insecurity of tenure calls into question their ability to act independently when institutional and governmental interests conflict.⁴⁶

Beyond simply exercising indirect influence through funding and institutional governance, the government, in many circumstances, treats universities like they are government actors; for instance, in subjecting them to judicial review. Does it make sense that universities are subject to judicial review but need not be *Charter* compliant? As was mentioned above, Justice La Forest said the “basis of the exercise of supervisory jurisdiction by the courts is

³⁷ Canada Research Chairs, “About Us,” online: <www.chairs-chaire.gc.ca/about_us-a_notre_sujet/index-eng.aspx>.

³⁸ Henderson, *supra* note 36 at 241.

³⁹ British Columbia, Ministry of Finance, *Budget and Fiscal Plan 2019/20 – 2021/22* (Victoria: Ministry of Finance, 2019) at 40 [*Budget*].

⁴⁰ Franco Silletta, “Revisiting *Charter* Application to Universities” (2015) 20 *Appeal* 79 at 96.

⁴¹ Marin, *supra* note 34 at 45; *Budget*, *supra* note 39 at 26.

⁴² *McKinney*, *supra* note 6 at 273.

⁴³ RSBC 1996, c 468, ss 19, 19.1.

⁴⁴ Silletta, *supra* note 40 at 93 [footnotes omitted]; *College and Institute Act*, RSBC 1996, c 52.

⁴⁵ *University Act*, *supra* note 43, s 22.

⁴⁶ Silletta, *supra* note 40 at 93.

not that the universities are government, but that they are public decision-makers.⁴⁷ This distinction is not elaborated upon, but it seems unprincipled. Sarah Hamill notes that, on Justice La Forest's reasoning, "universities are supervised by the courts because they are public but immune from *Charter* review because they are sufficiently autonomous from government to be considered private."⁴⁸ Indeed, this distinction has only become less tenable in light of jurisprudential developments in administrative law. Marin, referring to *Doré v. Barreau du Québec*⁴⁹ and *Loyola High School v. Québec (Attorney General)*,⁵⁰ argues that "exempting [universities] from *Charter* scrutiny would be quite exceptional, particularly in light of recent jurisprudence holding that all discretionary decision-makers are bound by the *Charter* and its values."⁵¹ Perhaps, for a time, the distinction could have been maintained on the basis that administrative law review is more deferential, less violative of the university's institutional autonomy. However, in *Law Society of British Columbia v. Trinity Western University*, the Supreme Court made clear that *Charter* infringements should not be understood as being more easily upheld in the administrative law context; the proportionality analysis articulated in *Doré* is not "weak or watered-down."⁵² The distance between the robust rights protections afforded when a piece of legislation violates the *Charter* and those afforded when an administrative decision-maker violates an individual's *Charter* protections seems to be shrinking. It must be acknowledged that whether or not *Doré* stands for the sweeping proposition that all administrative decisions are subject to *Charter* scrutiny has been a matter of some debate. In *BC Civil Liberties Association v. University of Victoria*, Chief Justice Hinkson noted that in *Doré* the Barreau du Québec conceded the *Charter*'s application to the proceedings, so the question was never resolved.⁵³ Even so, the argument that the *Charter* should not apply to the university because it is merely a "public decision-maker" appears to hold less water today than it did when *McKinney* was decided.

Much of the above-reviewed criticism of the *McKinney* plurality's understanding of the university as an institution advocates for a more generalized view of government control, as articulated by Justice Wilson. One cannot help but think that if the nature of the issue in *McKinney* had focused on a matter related to a university's delivery of education as opposed to its operation as an employer, Justice Wilson's approach may have carried the day. I should note that Justice Wilson's reasons in *McKinney*, while sharply observed and attuned to the possibility of the government delegating its way out of *Charter* scrutiny, would have cast too wide a net. In my view, the majority reached the correct result in *McKinney*. What is problematic is the majority's rather narrow conception of government control and the persistent influence of the majority's reasoning in decisions which consider not whether universities are themselves government, but whether they implement government policies or programs. In *Eldridge*, the Supreme Court admirably articulated a flexible vision of applicability in greater accord with Canada's social reality: a vision which recognizes that the "government" or "not government" dichotomy is a false one.

⁴⁷ *McKinney*, *supra* note 6 at 268.

⁴⁸ 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 at 179.

⁴⁹ 2012 SCC 12 [*Doré*].

⁵⁰ 2015 SCC 12.

⁵¹ Marin, *supra* note 34 at 49.

⁵² 2018 SCC 32 at para 80.

⁵³ 2015 BCSC 39 at para 132 [*BCCLA BCSC*].

The spate of cases discussed below have taken up the awkward task of trying to shoehorn the rather broad, but undoubtedly public, function of “delivery of post-secondary education” into being a “specific governmental objective.” I will review those cases and trace the approaches taken by different provincial courts, analyzing how they alternately espouse capacious and restricted conceptions of governmental action.

V. NEW DEVELOPMENTS

The issue of *Charter* application to universities seems broadly to emerge from two sets of circumstances: disciplinary hearings and restrictions on on-campus expression by registered student groups. Commentators have noted that there is a split along provincial lines in the judicial approach to these issues, with Alberta and Saskatchewan courts taking a more purposive or holistic approach and British Columbia and Ontario courts taking a narrower, formalist approach.⁵⁴ Regardless of the outcome, if one accepts that universities fulfill a similar societal function nationwide, the notion that expressive rights are differentially protected depending on the province should be deeply troubling.

The discipline cases, while many have addressed application on the basis of the *Eldridge* “governmental objective” pathway, have been decided on the question of whether, in meting out discipline, the institution is exercising a statutory power of compulsion. Universities are granted all manner of coercive statutory powers greater than those given to private individuals. Marin notes that a line of authority from *Slaight Communications Inc. v. Davidson*⁵⁵ to *Blencoe v. British Columbia (Human Rights Commission)*⁵⁶ confirms that those exercising discretionary statutory authority must do so in a way that is *Charter*-compliant, including where the entity is non-governmental.⁵⁷ This was the basis on which the *Charter* was found to apply (by one member of the Court of Appeal of Alberta) in *Pridgen v. University of Calgary*.⁵⁸ In *Pridgen*, the University’s disciplinary function is compared to that of a professional regulator. Justice Paperny noted that the “*Charter* has often been held to apply to the rules, policies and decisions of bodies that affect the autonomy and livelihood of regulated individuals.”⁵⁹ *Charter* implications of student discipline have not yet been addressed in British Columbia, but the *University Act* delegates power to university presidents to suspend students.⁶⁰ While it may not have been the case 30 years ago, a suspension of one’s ability to attend university could foreclose on the livelihood and autonomy of students, especially in professional faculties where degrees conferred by accredited institutions are a condition precedent to entering the profession. A post-secondary education is increasingly becoming a prerequisite to employment and therefore, one’s access to that education should only be taken away where the individual’s fundamental rights and freedoms have been considered. Hamill argues that this statutory power beyond that of a “private citizen or corporation” could apply beyond just disciplinary cases.⁶¹ Since the

⁵⁴ Krupa M Kotecha, “*Charter* Application in the University Context: An Inquiry of Necessity” (2016) 26:1 Educ & LJ 21 at 31.

⁵⁵ [1989] 1 SCR 1038.

⁵⁶ 2000 SCC 44.

⁵⁷ Marin, *supra* note 34 at 47–48.

⁵⁸ 2012 ABCA 139 at para 105 [*Pridgen ABCA*].

⁵⁹ *Ibid* at para 92.

⁶⁰ *Supra* note 43, s 61.

⁶¹ Hamill, *supra* note 48 at 179–80.

“*University Act* gives universities in British Columbia greater powers to regulate their property than exist for a private landowner, it seems as though the *Charter* should apply in questions of who can hold what activities on campus.”⁶² While this argument is novel and may hold promise, so far the statutory compulsion pathway has been limited to cases of discipline and bylaw enforcement.

The pathway to application via the exercise of statutory powers of compulsion broke new ground in the jurisprudence; however, the set of circumstances in which this has applied has been relatively narrow. Indeed, Justice Wilson criticized an understanding of applicability that is based primarily on the state’s coercive role as one that is more consistent with a minimal, libertarian vision of government.⁶³ The more interesting question with broader implications is whether the reasoning in *Eldridge* could provide for application on the basis that a university fulfills a specific governmental objective. This pathway holds the most promise for confining *McKinney* to its facts and attracting robust scrutiny to universities whenever they restrict *Charter* protections in their interactions with students and staff. This question has been addressed in a number of cases, including *Pridgen*, *BCCLA*, and most recently *UAlberta Pro-Life*. Though the facts of these cases have been similar, the outcomes diverge. Below, I will discuss the analysis in each of these cases in turn and whether or not the distinctions are logically tenable.

The lengthiest engagement with, and most full-throated endorsement of, the notion that the *Charter* should apply to universities on the basis of *Eldridge* comes from Justice Strekaf (as she then was) in the *Pridgen* trial decision.⁶⁴ This case involved non-academic discipline imposed on two brothers who had posted negative comments about their professor online. In applying for judicial review of the disciplinary decisions, the brothers argued that the *Charter* applied to the University of Calgary. The Court found that “the University is tasked with implementing a specific governmental policy for the provision of accessible post secondary education to the public in Alberta.”⁶⁵ The bases for this decision were the level of government funding, reporting requirements to government actors enshrined in the *Post-Secondary Learning Act*,⁶⁶ the requirement to provide an institutional mandate to the Minister and act only within that mandate, and the *PSLA* preamble, which provides that the government is committed to providing an “accessible, responsive and flexible” post-secondary system.⁶⁷ This statement of governmental commitment in the preamble, though seemingly cursory, becomes a critical point of distinction for courts in other provinces in justifying the inapplicability of the *Charter* to universities.

While I noted above that only one appellate justice in *Pridgen* agreed that the *Charter* applied to the limitation of expression and she did so on the basis of statutory compulsion, she also acknowledged that universities perform a governmental objective. Justice Paperny addressed the contention that delivery of post-secondary education is merely “an important public function” rather than a “specific governmental objective” by claiming that, on these

⁶² *Ibid.*

⁶³ *McKinney*, *supra* note 6 at 342–43.

⁶⁴ *Pridgen v University of Calgary*, 2010 ABQB 644 [*Pridgen ABQB*].

⁶⁵ *Ibid* at para 63.

⁶⁶ SA 2003, c P-19.5 [*PSLA*].

⁶⁷ *Pridgen ABQB*, *supra* note 64 at paras 59–62.

facts, this is a distinction without a difference.⁶⁸ She stated that “*Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear.”⁶⁹ What *Eldridge* “requires” seems to grow less certain each time a court attempts to define it. What is clear is that Justice La Forest reaffirmed that “the mere fact that an entity performs what may loosely be termed a ‘public function’ is not sufficient to make it “government”; the entity must be “implementing a *specific* governmental policy or program.”⁷⁰ Where exactly to locate the articulation of such a policy is the point of contention between Ontario and British Columbia courts on the one hand and Alberta courts on the other.

British Columbia courts, in searching for a “specific governmental objective” have looked almost exclusively to universities’ constating statutes. This approach, while strictly faithful to *Eldridge*, is wanting. The facts in *BCCLA* are familiar: the executive of a pro-life student group requested an allotment of outdoor space for a club demonstration. After the Students’ Society initially approved the allotment, they reneged because prior demonstrations by the group had been disruptive. The club alleged that the subsequent revocation of club status and funding as well as the ban from using outdoor space violated their freedom of expression. Chief Justice Hinkson relied on a statement from a Court of Appeal for Ontario case as dispositive of the issue of whether or not the *Charter* could apply to the university on the basis of *Eldridge*: “[W]hen the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*.”⁷¹ On appeal, Justice Willcock cited the same passage.⁷² The British Columbia Court of Appeal’s decision is grounded in the absence of a “specific statutory direction with respect to the manner in which the University is to use its discretion to regulate, prohibit or impose requirements in relation to activities and events on its property.”⁷³ The British Columbia Court of Appeal distinguishes *Pridgen* on the basis that it “addresses a specific statutory framework that has no applicability in” British Columbia.⁷⁴ It seems clear from these two statements that whatever is meant by “specific governmental objective,” British Columbia courts view it as something that is found in statute. On applying *Eldridge* to the facts of the case, the Court found that the “government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses.”⁷⁵

Commentators have criticized this narrow reading of *Eldridge* as allowing entities that act governmentally, but not pursuant to specific statutory grants of authority, to escape scrutiny. This single-minded focus on statutory language is understandable given a certain reading of *Eldridge*. Although Justice La Forest refrained from listing activities that will count as governmental, “the implementation of a specific statutory scheme or a government program” are given as qualifying examples.⁷⁶ Additionally, in *Eldridge* itself, the analysis is primarily

⁶⁸ *Pridgen ABCA*, *supra* note 58 at para 104.

⁶⁹ *Ibid.*

⁷⁰ *Eldridge*, *supra* note 5 at para 43 [emphasis in original].

⁷¹ *BCCLA BCSC*, *supra* note 53 at para 144, citing *Lobo v Carleton University*, 2012 ONCA 498 at para 4.

⁷² *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at para 40 [*BCCLA BCCA*].

⁷³ *Ibid* at para 26.

⁷⁴ *Ibid* at para 37.

⁷⁵ *Ibid* at para 32.

⁷⁶ *Eldridge*, *supra* note 5 at para 44.

focused on the implementation of *HIA*.⁷⁷ British Columbia courts have mirrored this approach. There have been few robust judicial deployments of *Eldridge*, which may explain British Columbia courts' hesitance to depart from the formal characteristics of its analysis. That being said, the mode of communication used by health care providers which gave rise to the *Charter* breach was not something the government had specifically taken responsibility for in the *HIA*. Rather, the provision of sign language interpretation services was necessary to the achievement of the government's objective of providing medically necessary services. This raises the question of whether the British Columbia courts' framing of the inquiries have been too specific. For instance, at trial in *BCCLA* Chief Justice Hinkson found that "in booking space for student club activities, the University is neither controlled by government nor performing a specific government policy or program as contemplated in *Eldridge*."⁷⁸ In my view, *Eldridge* does not require such a granular level of governmental micromanagement to qualify as a specific governmental policy. A more functional approach to the inquiry would consider not whether the provision of spaces for free expression was *itself* a governmental objective, but whether it was a *necessary prerequisite* to achieving a governmental objective.

Eldridge contains no language that "limits identifying government objectives from the specific wording of statutes."⁷⁹ This approach fundamentally ignores the fact that governments can go about affecting policy through more than just legislating. Marin suggests that "[f]ocusing narrowly on a particular institution's enabling statute ... reveals little about the true nexus between universities and government."⁸⁰ He buttresses this claim by discussing British Columbia's Accountability Framework.⁸¹ On the province's website for the Accountability Framework, there are a series of "Mandate Letters" posted, each sent by the Minister of Advanced Education, Skills and Training, to qualifying post-secondary institutions under the *University Act*. These letters set out each institution's "statutory obligations and Government priorities" and must be signed by the chair of each institution's Board of Governors.⁸² For example, the annual mandate letter sent to the University of Victoria dated 26 February 2020 asks that their Board "make substantive progress on the following priorities and incorporate plans to complete them in the goals, objectives and performance measures section when [they] submit [their] 2019/20 Institutional Accountability Plan and Report."⁸³ The priorities deal mostly with the provision of accessible and flexible post-secondary education and transitioning students into the workforce. Regardless of the fact that these goals are not incorporated into the actual statute, "the specific governmental policies" discussed in these mandate letters "are no less binding."⁸⁴

⁷⁷ *Ibid* at para 49.

⁷⁸ *BCCLA BCSC*, *supra* note 53 at para 151.

⁷⁹ Linda McKay-Panos, "Universities and Freedom of Expression: When Should the *Charter* Apply?" (2016) 5:1 *Can J Human Rights* 59 at 83.

⁸⁰ Marin, *supra* note 34 at 31.

⁸¹ *Ibid* at 46.

⁸² British Columbia, "Mandate Letters - Post-Secondary Institutions," online: <www2.gov.bc.ca/gov/content/education-training/post-secondary-education/institution-resources-administration/mandate-letters>.

⁸³ Mandate Letter from British Columbia Ministry of Advanced Education, Skills and Training to University of Victoria (26 February 2020) at 2, online: <www2.gov.bc.ca/assets/gov/education/post-secondary-education/institution-resources-administration/mandate-letters/20-21/mandate-university_of_victoria.pdf>.

⁸⁴ Marin, *supra* note 34 at 46–47.

Is the relationship between universities and the provincial government really *that* different in British Columbia compared to Alberta? Section 48 of British Columbia's *University Act* is a noteworthy point of departure. This section encodes a principle of ministerial non-interference with the Board's activities related to the "formulation and adoption of academic policies and standards" as well as the "establishment of standards for admission and graduation."⁸⁵ This section has been cited as a justification for the inapplicability of the *Charter* to British Columbia universities' exercise of disciplinary power,⁸⁶ even though (as mentioned) university presidents' disciplinary powers are enshrined in statute. While this provision may be relevant to the *McKinney* inquiry concerning direct governmental control, governmental policies and objectives can be implemented by means other than direct ministerial intervention.

Of course, British Columbia's legislation lacks the *PSLA*'s explicit statutory mandate to provide accessible post-secondary education, but again, to view the statute as the exclusive locus of such a policy is unduly restrictive. Marin acknowledges the importance of the statutory context but submits that "it is clear that courts must look at the entire context within which a private entity operates to determine whether it implements a specific government policy or program."⁸⁷ Silletta notes that, other than Prince Edward Island, Alberta is alone among provinces in having enshrined in statute the goal of providing accessible education.⁸⁸ The distinctions between the pieces of legislation are largely "formalistic."⁸⁹ On comparing legislation from Alberta, British Columbia, Ontario, and Saskatchewan, Linda McKay-Panos submits that "[d]espite the differences between the provinces, it would seem that the administrative authorities within the universities have similar autonomous decision-making authority."⁹⁰ Marin also suggests that the above-detailed regulatory framework resembles the one operating in Ontario and, though not enshrined in legislation, overlaps with the "goals stated in the preamble of the Alberta *PSLA*."⁹¹

The most recent case in the applicability saga deepens the divide between the courts in British Columbia and Alberta. Before, the distinction could plausibly be chalked up to the fact that the *BCCLA* cases did not deal with discipline.⁹² In *UAlberta Pro-Life*, however, restrictions on the use of outdoor campus space by a pro-life student group were once again at issue.⁹³ Unlike the group in *BCCLA*, *UAlberta Pro-Life* did not have their club status and funding revoked, nor was their activity strictly banned; however, due to the risk of property damage, the University imposed a \$17,000 security fee on their proposed event. The group challenged this as a violation of their section 2(b) freedoms. McKay-Panos suggests decisions "in which the *Charter* is held to apply tend to cast the nature of the universities'

⁸⁵ *University Act*, *supra* note 43, s 48.

⁸⁶ See *Blaber v University of Victoria*, [1995] 123 DLR (4th) 255 (BCSC); *BCCLA BCSC*, *supra* note 53 at para 141.

⁸⁷ Marin, *supra* note 34 at 41.

⁸⁸ Silletta, *supra* note 40 at 95.

⁸⁹ Marin, *supra* note 34 at 41.

⁹⁰ McKay-Panos, *supra* note 79 at 87.

⁹¹ Marin, *supra* note 34 at 46.

⁹² See *BCCLA BCSC*, *supra* note 53 at para 141 (Chief Justice Hinkson cites the lack of actual discipline as a distinguishing factor).

⁹³ *UAlberta Pro-Life*, *supra* note 4.

activities in a broad, holistic, educational light.”⁹⁴ This insight applies equally to this case as the Court takes a functional approach to the applicability question.

From Justice Watson’s first paragraph, it is clear that his approach to this issue is markedly different from that taken in the *BCCLA* cases. He noted that the appeals “before the Court revolve primarily around difficult questions concerning the ability of a large university, here the University of Alberta, to set conditions which affect the exercise of freedom of expression under s 2(b) of the [*Charter*] on the campus.”⁹⁵ The British Columbia courts focus on the universities’ decisions in the abstract; for instance, in *BCCLA* the Court frames the case as being one concerned with the university’s “authority to regulate, prohibit, and impose requirements in relation to the use of real property, buildings, structures, and personal property of the University,”⁹⁶ with the *effects* of the exercise of such authority taking a back seat in the analysis. Had the Court of Appeal of Alberta taken a similar approach, it might have held that the imposition of a security fee was merely an instance of the university taking legitimate steps to protect its property. Instead, the decision is considered from the outset with the context of campus speech at the fore.

Justice Watson begins his analysis with an extended look at the history of the relationship between the University of Alberta and the provincial government, noting that it was established in the province’s first legislative session⁹⁷ and had a strictly non-sectarian policy enshrined in its home statute; this indicates a commitment “by government policy with deep Constitutional roots to a broad scope of education with surveillance by the Crown.”⁹⁸ Justice Watson goes beyond the legislative context and places the institution in its historical context. The modern university is cast as a descendent of those institutions reverentially memorialized in the verses of Roman poets. The Quad is “a classic forum for expression or for listening arguably comparable to the groves of academe at the time of Plato.”⁹⁹ The University’s motto (translated from the Latin as “whatsoever things are true”) is no mere nominal commitment; it is an expression of the institution’s truth-seeking purpose, of which freedom of expression is a necessary corollary.¹⁰⁰ From a rhetorical standpoint, the invocation of authorities like Plato, Horace,¹⁰¹ “*The Epistle of St. Paul to the Philippians*,”¹⁰² the *Oxford English Dictionary* definition of the word “universe,”¹⁰³ and Thomas Jefferson¹⁰⁴ serve to almost trivialize judicial precedent on campus expression and *Charter* applicability. What matters the opinion of the court in the face of this retinue of august and authoritative intellectual sources?

While the foregoing might be viewed as a rather florid excursus, *Eldridge* does require that courts conduct “an investigation not into the nature of the entity whose activity is

⁹⁴ McKay-Panos, *supra* note 79 at 91.

⁹⁵ *UAlberta Pro-Life*, *supra* note 4 at para 1.

⁹⁶ *BCCLA BCSC*, *supra* note 53 at para 149.

⁹⁷ *UAlberta Pro-Life*, *supra* note 4 at para 105.

⁹⁸ *Ibid* at para 109.

⁹⁹ *Ibid* at para 111.

¹⁰⁰ *Ibid* at paras 113, 117.

¹⁰¹ *Ibid* at para 111.

¹⁰² *Ibid* at para 113.

¹⁰³ *Ibid* at para 114.

¹⁰⁴ *Ibid* at para 115.

impugned but rather into the nature of the activity itself.”¹⁰⁵ What all of the context provided by Justice Watson goes to show is that the actor and the activity are not so easily separable here. The *activities* of free inquiry and expression are at the very heart of the purposes of the university *as an actor*; as Justice Watson might put it, they are the *sine qua non* for the fulfillment of the institution’s purpose. This is a point that has not been sufficiently emphasized in the applicability jurisprudence. While the Court dismissed the delineation of the governmental activity as “delivery of education” as being too broad,¹⁰⁶ they accept that in regulating “freedom of expression exercised by students on a University campus” the University of Alberta was engaging in a governmental activity and the *Charter* therefore applies.¹⁰⁷ The analytical approach is ranging. The Court cited Justice Paperny’s reading of *Eldridge* from *Pridgen*; she stated that the “objectives set out in the [PSLA], while couched in broad terms” are clear enough to be a “specific governmental objective.”¹⁰⁸ Indeed, in finding the *Charter* applicable, the Court of Appeal of Alberta does not look to specific statutory directives like the British Columbia Court of Appeal or the Supreme Court of Canada in *Eldridge*; rather, they cite the extensive governmental funding, the historical context, the expressive forum that is the Quad, and the “rule of law.”¹⁰⁹ Justice Watson connects this approach to the established principle that government cannot delegate its way out of *Charter* compliance and that there should be “no places where the government is present by proxy and yet the *Charter* writ does not run.”¹¹⁰

It is open to question, however, whether the Court of Appeal of Alberta’s approach is *too* ranging. In prescribing the new approach in *Eldridge*, Justice La Forest was careful to reaffirm the principle from *McKinney* that “the mere fact that an entity performs what may loosely be termed a ‘public function’ ... *will not be sufficient* to bring it within the purview” of the *Charter*.¹¹¹ In articulating the law in *UAlberta Pro-Life*, Justice Watson stated that “[g]overnmental action as part of a ‘public function’ *may be sufficient* to bring that activity within the purview of government and attract *Charter* scrutiny.”¹¹² On a charitable reading, this statement of the law is confusing; if an “action” is “governmental,” the *Charter* should apply, regardless of its function. On a less charitable view, this statement directly contradicts Supreme Court of Canada precedent. Regardless, the question of when something crosses the threshold from being a “public function” into being a “specific governmental objective” is clearly vexing and is likely to resurface until the Supreme Court of Canada addresses the point.

The University of Alberta did not apply for leave to appeal the Court of Appeal’s decision in *UAlberta Pro-Life* to the Supreme Court of Canada. As a result, the divergent lines of authority remain unreconciled. My position is that the Alberta Court of Appeal’s approach is closer in spirit, if not necessarily in form, to that of the Supreme Court of Canada in *Eldridge*. The framework set out in *Eldridge* and restated in *GVTA* is flexible enough to bear the Court of Appeal of Alberta’s application. What the Supreme Court of Canada should do,

¹⁰⁵ *Eldridge*, *supra* note 5 at para 44.

¹⁰⁶ *UAlberta Pro-life*, *supra* note 4 at para 145.

¹⁰⁷ *Ibid* at paras 147–48.

¹⁰⁸ *Ibid* at para 132, citing *Pridgen ABCA*, *supra* note 58 at para 104.

¹⁰⁹ *UAlberta Pro-life*, *ibid* at para 148.

¹¹⁰ *Ibid*.

¹¹¹ *Eldridge*, *supra* note 5 at para 43 [emphasis added].

¹¹² *UAlberta Pro-Life*, *supra* note 4 at para 128 [emphasis added].

if forced to reckon with this issue, is clarify that *Eldridge* does not require the location of a governmental purpose to be in statute alone. Discerning a specific governmental policy or objective involves looking at the entirety of the context. Clarity on the degree of specificity required of the governmental policy to attract *Charter* application under *Eldridge* would also be appreciated. Can the *Charter* apply when institutions act pursuant to less well-defined governmental objectives, like providing “accessible post-secondary education,” or will only more minute articulations qualify, as the British Columbia jurisprudence suggests?

VI. WHY *CHARTER* APPLICATION TO UNIVERSITIES MATTERS

Why does it matter if the *Charter* applies to universities? In *UAlberta Pro-Life*, the University asserted that students’ fundamental rights are protected by the *Alberta Human Rights Act*.¹¹³ The *Charter* and provincial human rights legislation address different situations and protect different interests. The *Charter* protects against restraints on expression by government actors or those discharging government functions; human rights legislation provides an avenue of redress for those who have been discriminated against on the basis of an enumerated ground. Though many of these statutes list “political belief” as a protected ground, British Columbia’s *Human Rights Code* does not.¹¹⁴ Derek Mix-Ross gives the example of *Macapagal and others v. Capilano College Students’ Union (No. 2)*¹¹⁵ as illustrative of the gap in protection created when the *Charter* does not apply to post-secondary institutions.¹¹⁶ A pro-life student group (Heartbeat) was denied club status on the sole basis that the Students’ Union was an officially pro-choice organization. The Students’ Union argued that not all of the members of Heartbeat rooted their opposition to abortion in their faith, and therefore, the refusal to grant club status did not constitute discrimination on the basis of religion. The Tribunal refused to dismiss the complaint on this basis. While Heartbeat was able to connect their belief to an enumerated ground, it is not difficult to envision a situation in which a security fee is imposed on a speaker, or club status is denied or revoked, because of a belief that has no nexus to an enumerated ground. For example, the university or its students’ society could cancel or restrict the exhibition of a film depicting the plight of Palestinian people put on by a diverse coalition of students dedicated to that cause; they could equally prevent an Israeli official from giving a speech put on by a club focused on politics and foreign policy. Without recourse under the *Charter*, these hypothetical student groups would be without an avenue for redress.

Why do universities object to the *Charter*’s application, and does their protest make sense? Justice Watson’s reasons give us some idea of the stakes of campus expression. The implication is that, without free expression, intellectual inquiry will be hindered, and universities will no longer be able to serve their function. Given that the *Charter* is Canada’s primary enshrinement of liberal values and rights, and universities are largely regarded as being incubators of progressive causes and liberal ideals, it may seem odd that these same

¹¹³ *Ibid* at para 146; *Alberta Human Rights Act*, RSA 2000, c A-25.5.

¹¹⁴ RSBC 1996, c 210 (“political belief” is an enumerated ground under some discrimination provisions, but not in relation to the provision of services under section 8).

¹¹⁵ 2008 BCHRT 13.

¹¹⁶ Derek B Mix-Ross, *Exploring the Charter’s Horizons: Universities, Free Speech, and the Role of Constitutional Rights in Private Legal Relations* (LLM Thesis, University of Toronto, 2009) [unpublished] at 1–4.

institutions have fought against *Charter* application. In *McKinney*, Justice La Forest puts it succinctly:

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.¹¹⁷

The idea is that the government has no place meddling with institutional autonomy. State interference in the education of its citizenry is a troubling prospect to any student of history, but “[t]he application of constitutional values to university decisions by an independent and impartial judiciary is not synonymous with government intervention.”¹¹⁸ This is the case largely because “academic freedom” is a crucial principle, highly regarded by the courts.¹¹⁹ As a result, if a university decision was found to have breached section 2(b) of the *Charter*, academic freedom concerns would weigh heavily in a section 1 analysis. But, as Dwight Newman points out, the university should be put to strict proof of justification of any rights infringement, not permitted to avoid it altogether by virtue of inapplicability.¹²⁰ Justice Paperny suggests that academic freedom and freedom of expression are “handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge.”¹²¹ Indeed, there are other examples of bodies, like law societies, whose independence is crucial to their proper function, but the *Charter* applies to their decisions nonetheless. This demonstrates that concern for institutional independence is misplaced in the context at hand.

VII. CONCLUSION

The independence of universities is a questionable proposition. Courts in British Columbia have stopped short of looking beyond what is codified in statute for expressions of government policy regarding universities. Digging deeper, it becomes clear that provincial governments formulate specific mandates, pursuant to which these institutions must act. But in order to fulfill these mandates, universities need to maintain their longstanding character as bastions of free expression and inquiry; these qualities are inseparable from their institutional mission. In affirming that the *Charter* does apply to universities in their regulation of on-campus expression, judicial reasoning will reflect a more realistic vision of the Canadian state as one whose tendrils extend beyond matters specifically prescribed in legislation.

¹¹⁷ *McKinney*, *supra* note 6 at 273.

¹¹⁸ *Marin*, *supra* note 34 at 54.

¹¹⁹ *McKinney*, *supra* note 6 at 286–87 (Justice La Forest refers to academic freedom as “essential to our continuance as a lively democracy”).

¹²⁰ Dwight Newman, “Application of the *Charter* to Universities’ Limitation of Expression” (2015) 45:1–2 *RDUS* 133 at 152.

¹²¹ *Pridgen ABCA*, *supra* note 58 at para 117.

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