ERRATA

The article, "Erosion of University Autonomy: Judicial Supervision of University Conduct" by Anna S.P. Wong, which appeared in volume 61 issue 4 of the *Alberta Law Review*, should be corrected as follows:

On page 885, in the second sentence of the second paragraph, the words "private not-for-profit" should be struck.

In footnote 31, the words "composed of the Senate (which provides a platform for the public voice), the Board (financial oversight), and University Council (academic oversight)" in the third sentence should be struck. The sentence should read: "Examples of universities with a tricameral governance structure are Queen's University, the Université de Montréal, University of Saskatchewan, and Thompson Rivers University."

The version below was corrected on 25 September 2024.

EROSION OF UNIVERSITY AUTONOMY: JUDICIAL SUPERVISION OF UNIVERSITY CONDUCT

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The university was once envisaged as an autonomous, self-governing institution where academic endeavours could flourish sans outside interference. It is a vision with diminishing correspondence to reality. This article explores the degree of autonomy afforded to universities when the university visitor was given a prominent role to play in adjudicating disputes in contrast to contemporary times when universities find themselves increasingly — and inconsistently — under the supervision of the judiciary. By examining university-focused jurisprudence involving judicial review, civil litigation, and Canadian Charter of Rights and Freedoms *challenges, the article highlights instances where universities have fallen under the scrutiny of judicial oversight, and circumstances where the courts have chosen not to intervene. The article concludes that today's universities are subject to both public and private law as administrative decision-makers and quasi-public institutions.*

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I. INTRODUCTION

As you might have heard it said before, a university is a world unto its own. It is a place where curiosity can roam, free to burrow into every grove, every crevice of intellectual topography, and ideas bloom, fiercely and in all seasons. Teaching and research take place side by side in a kind of complementary symbiosis; discussions flow, debate is courted, critique is par for the course. The university is a place of possibilities, a place of creative incubation unfettered by the pressures of social and political conformity.

Such is the idealized vision of a university. It is a vision of the university as an autonomous, self-governing, self-responsible institution exempt from outside dictates — "the republic of scholars," as John Brubacher put it,[1] or to use Jacques Derrida's phrase, "[t]he

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1 John S Brubacher, "The Autonomy of the University: How Independent Is the Republic of Scholars?" (1967) 38:5 J Higher Education 237 at 237. The concept of the republic of scholars tracks back to the eighteenth-century philosophers who considered the university to be the centre of the learned public: Quentin Landenne, "Institutional Autonomy and Political Vocation of the University. Which Model of the 'Republic of Scholars'? (Kant, Humboldt, Fichte)" in Paul Cobben, ed, *Institutions of Education: Then and Today: The Legacy of German Idealism* (Leiden: Brill, 2010) 141.

University Without Condition."[2] This being so, a question buzzes near, imploring our attention: *Does this ideal of the self-determining university bear any correspondence to reality?*

This article seeks to explore one facet of the question — namely, whether universities in Canada are vulnerable or impervious to judicial supervision as a form of external control. The answer no doubt hinges on how courts have responded to lawsuits against universities. With this in mind, this article traces the relevant jurisprudence and considers the circumstances under which courts have and have not intervened in disputes involving universities.

The article proceeds as follows. By way of context, Part II sets out to describe the historical development of the university as an autonomous institution. Part III introduces the university visitor, a figure perched at the top of the internal government of a university that kept courts from poking their noses into academic affairs. The office of the visitor has since slid into near irrelevance. Part IV examines three categories of legal actions that can be brought against universities in court today — (1) judicial review; (2) civil action; and, (3) *Canadian Charter of Rights and Freedoms*[3] challenge — and the state of the law with respect to each. Part V provides some concluding thoughts on the overall direction that the case law has taken. As will become clear as the discussion unfolds, the autonomy of today's universities is weak tea to yesterday's strong brew. Universities are increasingly treated by the courts as quasi-public institutions, a category of administrative bodies whose decisions are not immune from judicial scrutiny.

It should be noted at the outset that my focus is on universities and does not encompass colleges and other post-secondary institutes, which are created differently and are not intended to have the same historical rights and responsibilities as universities.[4]

II. THE UNIVERSITY AS AN AUTONOMOUS INSTITUTION

The concept of the modern university has the fingerprints of Wilhelm von Humboldt all over it. For the German philosopher, who co-founded the University of Berlin in 1809, a university is an autonomous academic community characterized by the unity of teaching and research, and the free search for knowledge.[5] Its autonomy was seen as a condition for the freedom to teach and the freedom to learn, and in turn to achieve *Bildung* (roughly translated, self-cultivation).[6] People educated to think independently will ultimately be more capable

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2 Jacques Derrida, "The University Without Condition" in Peggy Kamuf, ed, *Without Alibi*, translated by Peggy Kamuf (Stanford: Stanford University Press, 2002) 202 at 202–37.

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

4 For the differences between universities and other post-secondary institutions, see Barry E Hogan & Lane D Trotter, "Academic Freedom in Canadian Higher Education: Universities, Colleges, and Institutes Were Not Created Equal" (2013) 43:2 Can J Higher Education 68.

5 Wilhelm von Humboldt, "University Reform in Germany" (1970) 8:2 Minerva 242 [von Humboldt, "University Reform"]. See also Peter Josephson, Thomas Karlsohn & Johan Östling, eds, *The Humboldtian Tradition: Origins and Legacies* (Leiden: Brill, 2014).

6 *Bildung* is a complex concept in educational philosophy that has no exact parallel in English. Von Humboldt describes *Bildung* as follows:

> It is the ultimate task of our existence to achieve as much substance as possible for the concept of humanity in our person, both during the span of our life and beyond it, through the traces we leave by means of our vital activity. This can be fulfilled only by the linking of the self to the world to achieve the most general, most animated, and most unrestrained interplay.

knowledge producers, social critics, and contributing citizens than those trained to be hands without heads for the state. As such, von Humboldt argued that the interests of the state are best served by safeguarding the independence of universities from interference by political or societal elites and powerful market forces. There is admittedly a role for state control, but in von Humboldt's view, academic issues other than the appointment of teachers[7] ought to be left to the university. The state itself should interfere as little as possible in the academic sphere and public funding ought to be provided in a way that allows a university to operate freely.

Much as the university as an independent organization is often associated with von Humboldt, it existed before his time. In fact, its origins go back a few hundred years more, to Europe in the High Middle Ages when the first Western universities (the *universitas* guilds of Bologna, Paris, and Oxford) were founded.[8] The university's independent character emerged somewhat by happenstance, as a product of a society in which power was evenly divided between empire and papacy, and tension between the two ran high.[9] Masterfully playing off the two sides against each other, the university "appealed to king or council against pope, to pope against king or bishop, and to kings and popes alike against truculent town governments."[10] In the process, it secured for itself a wide measure of independence and authority over its own affairs.[11] So autonomous and self-determining was the medieval university that it functioned like a kind of sovereignty — a republic of scholars. Small and nimble, it answered to no one in particular. James Cattell put it this way: "[I]t was extraordinarily unhierarchical, democratic, anarchic, in its organization. The university was then, as it now should be, the professors and the students."[12] Likewise, Robert Hutchins wrote:

> The university corporations of the Middle Ages at the height of their power were not responsible to anybody, in the sense that they could not be brought to book by any authority. They claimed, and succeeded in making their claim good, complete independence of all secular and religious control.[13]

(Wilhelm von Humboldt, "Theory of Bildung," translated by Gillian Horton-Krüger in Ian Westbury, Stefan Hopmann & Kurt Riquarts, eds, *Teaching as a Reflective Practice: The German Didaktik Tradition* (New York: Routledge, 2010) 57 at 58.) The literature on *Bildung* is vast, for a general overview see generally David Sorkin, "Wilhelm von Humboldt: The Theory and Practice of Self-Formation (*Bildung*), 1791–1810" (1983) 44:1 J History Ideas 55; Jesper Sjöström & Ingo Eilks, "The *Bildung* Theory—From von Humboldt to Klafki and Beyond" in Ben Akpan & Teresa J Kennedy, eds, *Science Education in Theory and Practice: An Introductory Guide to Learning Theory* (Cham, Switzerland: Springer, 2020) 55.

7 Von Humboldt, "University Reform," *supra* note 5 at 249.

8 Justin Thorens, "Liberties, Freedom and Autonomy: A Few Reflections on Academia's Estate" (2006) 19:1 Higher Education Policy 87 at 92; Harold Perkin, "History of Universities" in James JF Forest & Philip G Altbach, eds, *International Handbook of Higher Education: Part One: Global Themes and Contemporary Challenges* (Dordrecht: Springer, 2007) 159 at 159. For a fascinating and nuanced history of the rise of universities in Europe in the Middle Ages, see Hastings Rashdall, *The Universities of Europe in the Middle Ages* (Oxford, UK: Clarendon Press, 1895); Hilde de Ridder-Symoens, ed, *A History of the University in Europe, Volume 1: Universities in the Middle Ages* (Cambridge: Cambridge University Press, 1992).

9 Perkin, *ibid* at 159; de Ridder-Symoens, *ibid* at 11; Alexander Brody, *The American State and Higher Education: The Legal, Political and Constitutional Relationships* (Washington, DC: American Council on Education, 1935) at 2.

10 Richard Hofstadter & Walter P Metzger, *The Development of Academic Freedom in the United States* (New York: Columbia University Press, 1955) at 8. See also Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Portland: Hart, 2010) at 64.

11 Perkin, *supra* note 8 at 159–60; Hofstadter & Metzger, *ibid* at 6–8; Howard Woodhouse, "The Contested Terrain of Academic Freedom in Canada's Universities: Where Are We Going?" (2017) 76:3 American J Economics Sociology 618 at 619.

12 J McKeen Cattell, *University Control*, vol 3 (New York: Arno, 1977) at 5.

13 Robert M Hutchins, *The University of Utopia* (Chicago: University of Chicago Press, 1953) at 75.

The golden age of apparently boundless autonomy did not last. As universities grew larger in the late medieval period, so too did their financial needs. The cost of acquiring and maintaining academic buildings was high, and fees from matriculation and graduation were not always sufficient to cover the cost.[14] Universities depended on the church and as the balance of power shifted toward secular authority, on the state, for material support.[15] Financial dependence rendered the perimeters of their autonomy porous. To compound matters, the idea of university autonomy had vocal and influential opponents. Among them was the philosopher Thomas Hobbes, who viewed universities at liberty to teach subversive doctrines as a threat to civil order. "The core of rebellion," he stated, "are the Universities; which nevertheless are not to be cast away, but to be better disciplined."[16] Worse still than harsh criticism were the actual assaults on their independence, such as the actions taken by King James II of England to impose his Catholic will on the universities of Oxford and Cambridge. The King issued a mandamus requiring the fellows of Magdalen College, Oxford, to install a papist as its president, then expelled those who resisted. He also dismissed the vice-chancellor of Cambridge for refusing to award a Master of Arts degree to a Benedictine monk who did not qualify for it, as he failed to take the statutorily required oaths.[17] Somewhat miraculously, the universities managed to cling onto a wide measure of autonomy despite such acts of attempted sabotage. Their self-governing model came to be emulated the world over.[18]

Fast-forward to contemporary Canada, many of our universities represent a transplant of Anglo-Saxon and Humboldtian ideals.[19] As Robin Harris recounted:

> There was nothing notably Canadian about any of the institutions with degree-granting powers in 1849. What was being done at Acadia, Bishop's, McGill, Queen's, Victoria, and the three King's colleges was an imitation of what was being done at Oxford or at Edinburgh or at a New England college.[20]

Higher education, a provincial responsibility under the *Constitution Act, 1867*,[21] is decentralized. The provinces, given the power to make laws in the area (and to recognize

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14 Aleksander Gieysztor, "Management and Resources" in de Ridder-Symoens, *supra* note 8, 108 at 136. See also Michael K McLendon, "State Governance Reform of Higher Education: Patterns, Trends, and Theories of the Public Policy Process" in John C Smart, ed, *Higher Education: Handbook of Theory and Research*, vol 18 (Dordrecht: Springer, 2003) 57 at 61.

15 Gieysztor, *ibid*. Universities in different locales relied on financial assistance from the government to varying degrees. The University of Paris, for example, was being reliant on the Catholic Church to sustain itself in the Middle Ages (Woodhouse, *supra* note 11 at 619).

16 Thomas Hobbes, *Behemoth or the Long Parliament* (London, UK: Simpkin, Marshall, 1889) at 58. See also Thomas Hobbes, *Leviathan* (Oxford, UK: Clarendon Press, 1909) for his critique of universities for sowing sedition, which caused the English Civil War, and for his proposed reforms to the government control university teaching so that only the "truth" is taught.

17 Christopher Wordsworth, *Social Life at the English Universities in the Eighteenth Century* (Cambridge, UK: Deighton, Bell, 1874) at 7–10. See also Jeffrey R Wigelsworth, *All Souls College, Oxford in the Early Eighteenth Century: Piety, Political Imposition, and Legacy of the Glorious Revolution* (Leiden: Brill, 2018) at 15–16, 173–75. Barendt, *supra* note 10 at 64, 76.

18 Perkin, *supra* note 8 at 160, 183; de Ridder-Symoens, *supra* note 8 at xix.

19 Carlton Osakwe et al, "The Relative Importance of Academic Activities: Autonomous Values from the Canadian Professoriate" (2015) 45:2 Can J Higher Education 1 at 2.

20 Robin S Harris, *A History of Higher Education in Canada 1663–1960* (Toronto: University of Toronto Press, 1976) at 37.

21 (UK), 30 & 31 Vict, c 3, s 93, reprinted in RSC 1985, Appendix II, No 5.

new universities), can and have adopted slightly different models for oversight.[22] For example, universities in Alberta must operate within the framework set out in the *Post-Secondary Learning Act*,[23] a comprehensive legislation that governs the whole post-secondary system. Universities in Ontario, by contrast, are not subject to any collective act. Since the early years of the twentieth century, most of the funds flowing into university coffers have come from public grants and tuition fees which are closely controlled by government (particularly tuition for domestic enrolment).[24] They are also subject to provincial freedom of information statutes that apply to a broad range of public institutions, though there is usually a statutory research exemption to protect academic freedom.[25] Even so, provincial governments have made a point to describe universities as "'eligible for public funding' rather than 'public.'"[26] It has been said that universities are "quasi-public institutions"[27] since they do not fall neatly in line with the public-private dichotomy.

There is no question, however, that Canadian universities are structurally autonomous. They are corporations established by either legislation or royal charter.[28] Aside from setting out the basic governance arrangements, the legislation or charter creating a university typically contemplates that it "will determine what it will do and how it will administer its affairs."[29] Most have a legislated bicameral governance structure, with a board of governors to oversee finances and operations, and a senate responsible for academic matters,[30] though unicameral and tricameral structures also exist.[31] In the 1960s, many universities reformed their governance structures to increase the level of faculty and student participation on governing boards in an effort to enhance accountability to internal constituencies.[32] Technically speaking, as private corporations, universities do not have to answer to anyone

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22 Theresa Shanahan, "The Legislative Framework of Postsecondary Education in Canada" in Theresa Shanahan, Michelle Nilson & Li-Jeen Broshko, eds, *Handbook of Canadian Higher Education Law* (Montreal: McGill-Queen's University Press, 2015) 3; Julia Eastman et al, "Provincial Oversight and University Autonomy in Canada: Findings of a Comparative Study of Canadian University Governance" (2018) 48:3 Can J Higher Education 65.

23 SA 2003, c P-19.5.

24 Statistics Canada, News Release, "Financial Information of Universities for the 2018/2019 School Year and Projected Impact of COVID–19 for 2020/2021" (8 October 2020), online: *Statistics Canada* [perma.cc/5WDG-XLE2]; Daniel W Lang, "Financing Higher Education in Canada: A Study in Fiscal Federalism" (2022) 84:1 Higher Education 177 at 179–80.

25 See e.g. *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F-25, s 8.1(a); *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990–91, c. L-27.1, s 17(3). See also *Eaton v University of Regina*, 2021 SKQB 40 at para 16; *University of Ottawa* (7 June 2012), Order PO-3084 at paras 25–29, online: *Information and Privacy Commissioner of Ontario* [perma.cc/GA6H-PB3V].

26 Lang, *supra* note 24 at 180.

27 Brent Davis, "Governance and Administration of Postsecondary Institutions in Canada" in Shanahan, Nilson & Broshko, *supra* note 22, 57 at 61 [footnotes omitted].

28 Eastman et al, *supra* note 22 at 69; Hans G Schuetze, "Canada" in Charles J Russo, ed, *Handbook of Comparative Higher Education Law* (Lanham, Md: Rowman & Littlefield, 2013) 63 at 69–70.

29 Glen A Jones, "The Structure of University Governance in Canada: A Policy Network Approach" in Alberto Amaral, Glen A Jones & Berit Karseth, eds, *Governing Higher Education: National Perspectives on Institutional Governance* (Dordrecht: Springer, 2002) 213 at 215 [Jones, "Structure of University Governance"].

30 *Ibid*. See also Glen A Jones, ed, *Higher Education in Canada: Different Systems, Different Perspectives* (New York: Routledge, 2012) at 4; Hogan & Trotter, *supra* note 4 at 69–70.

31 The University of Toronto, for example, is unicameral. On 1 July 1972, by provincial statute, it changed from a bicameral system of Senate and Board of Governors to a unicameral system of a Governing Council. Examples of universities with a tricameral governance structure are Queen's University, Université de Montréal, University of Saskatchewan, and Thompson Rivers University. For an overview of the governance structures of Canadian universities, see Glen A Jones, Theresa Shanahan & Paul Goyan, "University Governance in Canadian Higher Education" (2001) 7:2 Tertiary Education & Management 135.

32 Jones, "Structure of University Governance," *supra* note 29 at 216.

external. Endowed with personhood status, they are free to make their own decisions, to contract, own property, sue, and be sued. The corollary, of course, is that government is not liable for the conduct of universities or their professors.[33]

While university autonomy has received much social scientific attention, it is sparsely dealt with in Canadian legal literature. This is perhaps unsurprising considering that the autonomy of universities, understood as the freedom to manage their own academic affairs without external intervention, has never crystalized into an enforceable right vesting in the university, nor have many demands been made for it to be recognized as such. The fact that institutional autonomy is not legally protected in Canada stands us in contrast to countries that treat it with reverence and safeguard it with gusto. In Venezuela[34] and the Philippines,[35] for example, the autonomy of universities is constitutionally enshrined. Finland guarantees it by way of legislation.[36] In the United States, courts have valorized university autonomy as a "special concern of the First Amendment," even though it is nowhere mentioned in the text.[37] The justification they have given for reading it into the constitution is that an institution whose raison d'être is to promote bold inquiry must be able to insist on some assurance of self-determination, particularly with respect to who may teach, what may be taught, how it should be taught, and who may be admitted to study. Decisions on academic matters are protected as exercises of academic freedom accruing to the institution, or simply

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33 *Amrane v Ontario*, 2020 ONSC 2200 at para 21.

34 *Law on Universities (Gaceta Oficial Extraordinaria de la República Bolivariana de Venezuela)*, 1970, No 1.429 Article 9 of Venezuela's Law on Universities provides:

> Universities are autonomous. Such autonomy is covered by the provisions of this Law and its Regulations, [they have]:
>
> 1.- Organizational autonomy, by virtue of which they may dictate their internal rules;
>
> 2.- Academic autonomy, to plan, organize and carry out research, teaching and extension programs that may be necessary for the fulfillment of their purposes;
>
> 3.- Administrative autonomy, to choose and appoint their authorities and designate their teaching, research and administrative staff;
>
> 4.- Economic and financial autonomy to organize and manage its assets.

See aslo David Gómez Gamboa et al, *Academic Freedom in Latin America: A Human Rights Approach*, (AulaAbierta por la Defensa de los Derenchos Universitarios, 2020) at 73, n 57.

35 *The Amended 1973 Constitution* (Philippines), 1973, art XV, s 8(2) ("[a]ll institutions of higher learning shall enjoy academic freedom").

36 *Universities Act* (Finland), 558/2009, s 3. The *Universities Act* states:

> 1. The universities have autonomy, through which they safeguard scientific, artistic and higher education freedom. The autonomy entails the right of universities to make their own decisions in matters related to their internal administration.
>
> 2. When legislation is drafted concerning them, the universities shall be given the opportunity to express their opinion on the matter.

See also Tomi J Kallio, Kirsi-Mari Kallio & Annika Blomberg, "From Professional Bureaucracy to Competitive Bureaucracy: Redefining Universities' Organizational Principles, Performance Measurement Criteria, and Reason for Being" (2020) 17:1 Qualitative Research in Accounting & Management 82.

37 *Regents of the University of California v Bakke,* 438 US 265 (1978) at 312:

> Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom.

See also *Sweezy v New Hampshire, By Wyman, AG*, 354 US 234 (1957) at 262 [*Sweezy*], Frankfurter J, concurring: "[A] free society [depends] on free universities. This means the exclusion of governmental intervention in the intellectual life of a university." He went on to describe "'the four essential freedoms' of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" (*Sweezy*, *ibid* at 263, quoting *The Open Universities in South Africa: Published on Behalf of the Conference of Representatives of the University of Cape Town and the University of Witwatersrand, Johannesburg, held in Cape Town on 9, 10, and 11 January 1957* (Johannesburg: Witwatersrand University Press, 1957) at 10–12). *Grutter v Bollinger*, 539 US 306 (2003) at 329 ("universities occupy a special niche in our constitutional tradition"); J Peter Byrne, "Academic Freedom: A 'Special Concern of the First Amendment'" (1989) 99:2 Yale LJ 251.

institutional academic freedom, which allows it to make free teaching and scholarship possible. In a nutshell, it is said that "there must … be freedom *of* the university if there is to be freedom *in* the university."[38]

III. THE UNIVERSITY VISITOR'S EXCLUSIVE JURISDICTION

In the absence of any constitutional, quasi-constitutional, or legislative protection afforded to university autonomy, are universities subject to the strictures of the law just like any other creatures of statute whose processes and decisions are exposed to the search light of judicial scrutiny? Or is academic decision-making outside the usual purview of the courts?

In times past when the visitor was omnipresent, the answer to the latter question would have been an emphatic yes. The visitor in question is no holidaymaker nor the sort who comes calling with gifts in hand. It is an office that originated in medieval England to supervise the administration of self-governing churches and other ecclesiastical corporations.[39] The visitor was empowered to carrying out inspection, interpret founding documents, determine disputes, and remedy abuses or irregularities. He was either the institution's founder or his heirs, or someone appointed by the founder. The office was subsequently instituted in eleemosynary corporations — that is, private corporations for charity — which included the colleges of Oxford and Cambridge, their charitable purpose being the promotion and support of learning.[40] Internal difficulties and conflicts between members (students, professors, officers of the university) were resolved by the visitor according to the private laws of the university and its founding philosophy as set out in its charter, rather than by the ordinary laws of the land.

Historically, a visitor's decisions could not be judicially reviewed at all. This point was stridently made by Sir John Holt, Lord Chief Justice of the Court of King's Bench, in the 1694 case of *Philips v. Bury*.[41] "[T]he office of the visitor by the common law is to judge according to the statutes of the college, to expel and deprive upon just occasions, and to hear appeals of course," Sir Holt wrote, adding: "[I]n him the founder hath reposed so entire confidence that he will administer justice impartially, that his determinations are final, and *examinable in no other Court whosoever*."[42] *Philips v. Bury*, considered the *locus classicus*

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38 Matthew W Finkin, "On 'Institutional' Academic Freedom" (1983) 61:5 Tex L Rev 817 at 845 [emphasis in original] (note that Finkin was merely describing judicial acceptance of institutional academic freedom, but he himself is against the idea that academic freedom is an institutional prerogative).

39 *Hines v Birkbeck College*, [1986] 1 Ch 524, aff'd [1987] 1 Ch 457 (CA (Eng)) at 538 [*Hines*]. The literature on the university visitor is vast (see also Robert Home & Patrick Kelly, "The Visitorial System of University Governance: Clinging on?" [2010] 1 Education LJ 12 at 13; JL Caldwell, "Judicial Review of Universities: The Visitor and the Visited" (1982) 1:3 Canterbury L Rev 307 at 308; Peregrine Whalley & David Price, "The University Visitor in Western Australia" (1995) 25:1 Western Australian L Rev 146 at 147; William Ricquier, "The University Visitor" (1978) 4:3 Dal LJ 647 at 649–54; Adam Strombergsson-Denora, "Caught By Private Law: A Review of Visitors' Jurisdiction in Canada" (2019) 36:2 Windsor YB Access Just 284 at 295–300; Peregrine WF Whalley & Gillian R Evans, "The University Visitor: An Unwanted Legacy of Empire or a Model of University Governance for the Future?" (1998) 2 Macarthur L Rev 109 at 112.

40 Robert J Sadler, "The University Visitor: Visitatorial Precedent and Procedure in Australia" (1981) 7:1 U Tasmania L Rev 2 at 3. See also JW Bridge, "Keeping Peace in the Universities: The Role of the Visitor" (1970) 86 Law Q Rev 531 at 533–34.

41 *Philips v Bury* (1694), 91 ER 900 (KB).

42 *Ibid* at 903 [emphasis added] (Chief Justice Holt penned the judgment in dissent, which was later upheld by the House of Lords in *Philips v Bury* (1694), 90 ER 1294).

of the law of university visitation,[43] is often cited by courts in declining to hear disputes where the issue raised relates to a matter internal to a university.[44] Justice Denison said it bluntly: "This Court cannot control visitors."[45] Any judicial control was confined to the occasional use of prohibition or mandamus to ensure that visitors acted in accordance with their jurisdiction.[46] Barring any extra-jurisdictional foray, courts were powerless to interfere, however erroneous the decision might have seemed to them.[47]

Trite to say, not all disputes involving a university are of a domestic character such that they could be swept under the visitor's exclusive jurisdiction. Then, as now, universities interacted with the broader community, and such interactions between town and gown presented opportunities for disagreement. The controversies that flared between a university or its members and outside parties did not always fit under the "domestic" or "internal" banner, and those which did not had to be brought before the courts instead of the university visitor for resolution. The distinction between visitorial and judicial jurisdiction was explained in *Thomson v. University of London*:

> [W]hatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor, and only under the jurisdiction of the Visitor, and this Court will not interfere in those matters; but when it comes to a question of right of property, or rights as between the University and a third person *dehors* the University, or with regard, it may be, to any breach of trust committed by the corporation, that is, the University, and so on, or any contracts by the Corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this Court will interfere.[48]

In sum, the common law of visitation laid the foundation for a rule of judicial abstention in academic matters, thereby guaranteeing universities autonomy in managing domestic affairs.[49] Judges, for their part, seemed only too pleased to bow out.[50] As they noted, because they are "ignorant"[51] about the statutes of colleges — "a peculiar system of law" which is not necessarily aligned with the law that judges are versed in[52] — "the most mischievous consequences" may result if they were to stick their oar in such matters.[53]

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43 *R v Hull University Visitor, Ex parte Page* (1992), [1993] AC 682 (HL (Eng)) at 698 [*Hull*].

44 See e.g. *R v Bishop of Chester* (1747), 96 ER 12 (KB) at 14 [*Bishop of Chester*] ("[v]isitors have an absolute power; the only absolute one I know of in England"); *R v Dunsheath, Ex parte Meredith* (1950), [1951] 1 KB 127 (Eng) at 132 ("the court will not interfere in the matter within the province of the Visitor; and especially is this so in matters relating to educational bodies such as colleges"); *Hull*, *ibid* at 703 ("courts would have no jurisdiction to review the visitor's decision on the grounds of error of law made by the visitor within his jurisdiction (in the narrow sense)").

45 *Bishop of Chester*, *ibid* at 14.

46 *Patel v University of Bradford Senate*, [1978] 1 WLR 1488 (Ch (Eng)) at 1493, aff'd [1979] 1 WLR 1066 (CA (Eng)).

47 *Hull*, *supra* note 43 at 698; *Ex parte Buller* (1855), 1 Jurist 709 at 709–10 [*Buller*].

48 *Thomson v University of London* (1894), 33 LJ Ch 625 at 634, cited in *Re Vanek and Governors of the University of Alberta* (1975), 57 DLR (3d) 595 (Alta CA) at 605 [*Vanek*]. See also *Hines*, *supra* note 39 at 539 ("[the visitor] has no jurisdiction over matters which are not concerned with the enforcement of the internal rules of the foundation, such as disputes with non-members or contracts between the corporation and members which involve the application of the general law").

49 Ricquier, *supra* note 39 at 648.

50 *Thorne v University of London*, [1966] 2 QBD 237 at 243 ("[t]he High Court does not act as a court of appeal from university examiners; and, speaking for my own part, I am very glad that it declines this jurisdiction"). See also Ricquier, *ibid* at 683.

51 *R v Bishop of Ely* (1794), 5 TR 475 (KB (Eng)) at 269 [*Bishop of Ely*].

52 *Buller*, *supra* note 47.

53 *Bishop of Ely*, *supra* note 51 at 269.

The English tradition of visitation was adopted by the universities that sprang up in Canada beginning in the early nineteenth century. Many of their founding instruments explicitly provided for the appointment of a visitor, though the powers of the visitor were typically not spelled out in the statutes, leaving a gap to be filled by the common law. Consider, for instance, section 5 of the statute that created Dalhousie University, *A Bill to Incorporate the Governors of the Dalhousie College, at Halifax*, which simply states: "That such Person or Persons as His Majesty, His Heirs and Successors, may see fit from time to time to appoint, shall be visitor or visitors of said College."[54]

Section 8 of the original legislation founding the University of Saskatchewan is more specific as to who fills the role: "The Lieutenant Governor of the province shall be the visitor of the university with authority to do all those acts which pertain to visitors as to such Lieutenant Governor shall seem meet."[55] A statutory amendment in 1920 added a twist. It allowed the Lieutenant Governor to direct the Court of King's Bench to act as visitor on his behalf,[56] in which case the dispute would be decided by a judge.[57] It hardly needs pointing out that judges — and Lieutenant Governors — do not have specialized expertise or familiarity with academic ethos to give them an edge in resolving university disputes. As W.H. McConnell argues, "the proper discharge of the visitatorial office required not so much legal erudition as it did a detailed knowledge of the functioning of universities, what constituted necessary university standards, and a dedication to the ideals of academic freedom and the advancement of knowledge."[58] Having internal grievances roll up to judges qua visitor for final disposition does little to preserve university autonomy, and may in fact have an eroding effect.

Though judicial decisions about university visitors are few and far between, there is no mistaking that historically and with very limited exception,[59] Canadian courts have heeded the English lead in turning down invitations to interfere in a university's intramural matters.[60] "Intramural" was a broad tent that included student admission,[61] academic assessments,[62] the

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54 *A Bill to Incorporate the Governors of the Dalhousie College, at Halifax*, SNS 1820–1821, c 39, s 5.

55 *The University Act*, SS 1907, c 24, s 8; *The University Act*, RSS 1909, c 98, s 8.

56 *An Act to Amend The King's Bench Act*, SS 1919–20, c 16, s 2:

> Section 12 is amended by adding thereto the following subsection:
>
> "(3) In respect of the jurisdiction and powers of the Lieutenant Governor as visitor of corporations, conferred by statute or otherwise, the court shall, upon the direction of the Lieutenant Governor, have and exercise the jurisdiction and powers which in England, prior to the passing of *The Supreme Court of Judicature Act 1873*, were vested in, or capable of being exercised by, the Lord High Chancellor representing the Crown as visitor of corporations."

57 For examples of judges sitting as visitor: see e.g. *In re the University Act, In re University of Saskatchewan and MacLaurin*, [1920] 2 WWR 823 (Sask KB); *Mycyk v University of Saskatchewan*, 2006 SKQB 450.

58 WH McConnell, "The Errant Professoriate: An Enquiry into Academic Due Process" (1973) 37:2 Sask L Rev 250 at 278.

59 One exception is found in *Re Wilson*, [1885] 18 NSR 180 (NSSC), which was a mandamus application brought by a dismissed professor to compel the university's Board of Governors to reinstate him. The Nova Scotia Supreme Court granted the application for mandamus because the university's visitor, the Bishop of Nova Scotia, was also the president of the Board of Governors. Thus, if visitation was availed, the visitor would effectively be visiting his own decision.

60 See e.g. *Weir v Mathieson*, [1866] OJ No 309 (E & A).

61 *Pecover v Bowker and Governors of the University of Alberta* (1957), 8 DLR (2d) 20 (Alta SC).

62 *Re Polten and the Governing Council of the University of Toronto* (1975), 8 OR (2d) 749 (H Ct J (Div Ct)); *Langlois v Rector and Members of Laval University* (1973), 47 DLR (3d) 674 (Qc CA).

granting of degrees,[63] faculty dismissal,[64] and tenure appointments.[65] Judges would stay out of such matters, and by and large refused to budge even when an academic matter involves a cause of action over which the courts have always had jurisdiction, such as negligence or breach of contract. *McWhirter v. Governors of the University of Alberta* is a case in point.[66] Professor McWhirter entered into a contract with the university. It provided that the university would decide whether to grant him tenure following the process stipulated in a faculty handbook which was incorporated into the contract. After he was denied tenure, McWhirter sued for breach of contract based on the university's alleged failure to follow the procedural requirements in the handbook. Justice Steer dismissed the action on the grounds that it was for the visitor to resolve disagreements involving academic standards. As he stated, "the jurisdiction of the Visitor is exclusive,"[67] and the dispute was no less domestic because the rules and procedures in question formed the terms of a contract.

IV. JUDICIAL OVERSIGHT OF UNIVERSITY CONDUCT

A. JUDICIAL REVIEW UNDER ADMINISTRATIVE LAW

Administrative law as we know it is a fairly recent historical development. In former Chief Justice McLachlin's words, it is a "newcomer to the body of the common law."[68] Still inchoate at the turn of the twentieth century,[69] its development very swiftly kicked into high gear as statutory agencies charged with administering delegated powers multiplied in number and variety following the Second World War.[70] In deciding rights and interests and interpreting statutory provisions, these bodies wielded powers once monopolized by the judiciary. This no doubt struck a nerve with the latter, particularly among judges with a Diceyan bent who were concerned that the motley pack of administrative bodies would trample down and crush the rule of law.

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63 *R v University of Saskatchewan, Ex parte King* (1968), 1 DLR (3d) 721 (Sask CA) at 723, *aff'd King v University of Saskatchewan*, [1969] SCR 678 [*King*].

64 *Ex parte Jacob* (1861), 10 NBR 153 (NBSC).

65 *Riddle v University of Victoria* (1978), 84 DLR (3rd) 164 (BC SC), aff'd (1979), 95 DLR (3d) 193 (BC CA); *Vanek*, *supra* note 48.

66 *McWhirter v Governors of the University of Alberta* (1975), 63 DLR (3d) 684 (Alta SC(TD)).

67 *Ibid* at 718. Justice Steer's decision was appealed, but before the appeal was heard, the legislature passed to abolish the office of the university visitor: *The Universities Amendment Act, 1976*, SA 1976, c 88, s 2. As a result, the Court of Appeal returned the case to Justice Steer for a retrial, whereupon the judge heard the case in contract and granted judgment to the plaintiff. The Court of Appeal reversed the judgment, holding that there was no breach of contract: *McWhirter v Governors of University of Alberta* (1977), 80 DLR (3d) 609 (Alta SC(TD)), rev'd (1979), 103 DLR (3d) 255 (Alta CA).

68 Beverley McLachlin, "'Administrative Law Is Not for Sissies': Finding a Path Through the Thicket" (2016) 29 Can J Admin L & Prac 127 at 127.

69 Albert Dicey observed in 1908: "The words 'administrative law' … are unknown to English judges and counsel, and are in themselves hardly intelligible without further explanation": AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London, UK: MacMillan, 1915) at 214. Note though that others have argued that the principles underlying what we now call administrative law were conceived much earlier: see e.g. Edith G Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Cambridge: Harvard University Press, 1963); Paul Craig, "Administrative Law in the Anglo-American Tradition" in B Guy Peters & Jon Pierre, eds, *The SAGE Handbook of Public Administration*, 2nd ed (Los Angeles: SAGE, 2012) 333 at 333–45.

70 Heather M MacNaughton, "Future Directions for Administrative Tribunals: Canadian Administrative Justice: Where Do We Go From Here?" in Robin Creyke, ed, *Tribunals in the Common Law World* (Sydney: Federation Press, 2008) 203 at 203–204. By the late 1970s, there were in excess of 640 *permanent* agencies (that is, excluding specifically appointed commissions and public inquiries) in Canada: see WA Bogart, "Courts and Tribunals: Conflict and Co-Existence" (1989) 8 CJQ 7 at 10.

It is through the supervisory mechanism of judicial review that the rule of law is afforded tangible protection. In the first half of the twentieth century up to the 1970s, Canadian courts reacted to the rise of the administrative state by asserting an inherent power of review and taking an interventionist stance toward administrative entities that exceeded their jurisdiction, broadly conceived.[71] They sat in review of administrative decisions and struck them down when they thought it appropriate in order to keep administrative excesses in check and to provide individuals with some protection against officials who had gone rogue. Not only substantive decisions, but the processes used by certain administrative decision-makers were subject to judicial oversight, scrutinized as they were for adherence to principles of fair play and natural justice.[72] Administrative discretion could not be absolute and untrammeled,[73] the logic goes, for the law is as much made for those acting in an official capacity as it is for the rest.

The university visitor, an office that was conceived of as "extralegal," was not beyond the reach of administrative law as the field developed. It is not hard to see why. Though the visitor predates the debut of modern administrative law and does not, strictly speaking, exercise state-delegated powers or perform a public function, it bears a striking likeness to the administrative tribunals with which we are accustomed.[74] Indeed, the visitor has been described by courts in language familiar to administrative lawyers — as an "ombudsman,"[75] a "domestic tribunal,"[76] and one which could "act in a quasi-judicial capacity."[77] Visitation shares the same allure as administrative justice: in place of the formality and expense of proceeding in court, it offers "an informal system which produces a speedy, cheap and final answer."[78] It is small wonder, then, that courts brought the visitor within the fold of administrative law, and were prepared to intervene when a visitor acted in breach of natural justice[79] or abused his powers.[80]

Notably, the existence of a visitor did not shield a university from the possibility of judicial review. The Supreme Court of Canada appears to have settled as much in *King v. University of Saskatchewan*.[81] In that case, the University refused to grant Robert Daniel King, a student, a law degree because of poor performance. King appealed the matter to faculty council and then the senate, where some of the committee members had sat on an earlier committee that decided against him. After losing on the internal appeals, King commenced court proceedings for an order of mandamus to compel the university to give

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71 McLachlin, *supra* note 68 at 129.

72 See e.g. *Re General Accident Ass'ce Co of Canada*, [1926] 2 DLR 390 (Ont CA); *Knapman v Board of Health for Saltfleet Township*, [1954] 3 DLR 760 (Ont HC); *Fairbairn v Highway Traffic Board of Saskatchewan* (1957), 11 DLR (2d) 709 (Sask QB).

73 *Roncarelli v Duplessis* (1958), [1959] SCR 121 at 140.

74 Ricquier, *supra* note 39 at 682; Strombergsson-Denora, *supra* note 39 at 287.

75 *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at para 106 [*UAlberta Pro-Life*] ("the historic role of the Visitor has been for centuries very much that of an ombudsman").

76 *Patel v University of Bradford Senate*, [1978] 1 WLR 1488 (Ch) at 1499 [*Patel*]. See also *Harelkin v The University of Regina*, [1979] 2 SCR 561 at 595 [*Harelkin*] ("[university] governing bodies function as domestic tribunals when they act in a quasi-judicial capacity").

77 *Harelkin*, *ibid*.

78 *Hull*, *supra* note 43 at 704. See also *Patel*, *supra* note 76 at 1499; *AG v Talbot* (1747), 3 Atk 662 at 674 (Ch).

79 *Harelkin*, *supra* note 76.

80 *Hull*, *supra* note 43 at 704 ("[j]udicial review does lie to the visitor in cases where he has … abused his powers or acted in breach of the rules of natural justice").

81 *King*, *supra* note 63.

him a proper hearing under *The University Act*.[82] The University argued that the Court could not hear the matter because the conferring of a degree fell within the visitor's exclusive jurisdiction. That argument, though it found purchase at first instance, had no takers at the Saskatchewan Court of Appeal and the Supreme Court of Canada. As Justice Hall and Justice Spence from the respective courts reasoned, faculty council and senate were exercising statutory duties which are "in the nature of public duties,"[83] and "compliance with … statutory duty may be controlled and enforced by the ordinary Courts."[84] How the Supreme Court ruled on this issue proved fruitless for King in the end, as no denial of natural justice was found to have occurred.

King nonetheless paved the way for subjecting universities' and their visitors' actions to the ordinary operations of administrative law, something that materialized in *Pearlman v. University of Saskatchewan (College of Medicine)*[85] and *Mycyk v. University of Saskatchewan*.[86] In *Pearlman*, the University was miffed that its visitor — a Queen's Bench judge acting qua visitor at the Lieutenant Governor's request — had sided with Pearlman, a medical student, in directing the College of Medicine to restore him to its residency program. In *Mycyk*, the visitor again did not defer to the University's decision, this time regarding how surplus funds in a clinical practice plan should be distributed, and the university sought judicial review before the Saskatchewan Court of Appeal. In both cases the Court gave the visitor's decision the full treatment of merits review, applying the usual principles of administrative law. It is noteworthy that the University did not show any qualms about ceding their independence and self-determining agency to the courts, for it was the *University* that sought the Court's intervention in both cases. The possible benefits of reversing a bad decision in the specific context of the dispute must have seemed, in its calculation, to outweigh the precedent-setting hazards of inviting the courts to wade into its affairs.

In 2009, the year that *Mycyk* was decided, the visitor at the University of Saskatchewan was formally abolished by legislation.[87] It was a move welcomed by the University, which saw the development of administrative law, coupled with increasingly robust appeal mechanisms within the institution, as having made the office of the visitor obsolete.[88] Saskatchewan was not the only province to have retired visitation at its universities,[89] nor was it the first. The University of Toronto got rid of the visitor in 1906,[90] while Alberta took

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82 RSS 1953, c 167, s 76(c).

83 *King*, *supra* note 63 at 683.

84 *Ibid* (had King sought mandamus to compel the university to grant him a law degree, the Court would most certainly have declined to act).

85 2006 SKCA 105 [*Pearlman*].

86 2009 SKCA 71 [*Mycyk* CA].

87 *The University of Saskatchewan Amendment Act, 2009*, SS 2009, c 31, s 4.

88 On Campus News, "'Visitor' Left Out in Act Revisions" (17 July 2009), online: *University of Saskatchewan* [perma.cc/Q2DY-ZSNK].

89 The Saskatchewan legislature followed suit with regard to the University of Regina in 2011: *The University of Regina Amendment Act, 2011*, SS 2011, c 20.

90 *Wong v University of Toronto* (1989), 79 DLR (4th) 652 (Ont Dist Ct), aff'd (1992), 4 Admin LR (2d) 95 (Ont CA) [*Wong*], citing *An Act to amend the Charter of the University established at Toronto by His late Majesty King George the Fourth, to provide for the more satisfactory government of the said University, and for other purposes connected with the same, and with the College and Royal Grammar School forming an appendage thereof*, S Prov C 1849 (12 Vict), c 82, s 4:

> And be it enacted, That the Governor, or person administering the Government of this Province for the time being, shall be the Visitor of the said University for and on behalf of Her Majesty, Her Heirs and Successors, which Visitatorial power shall and may be exercised by Commission under

that step for its universities in 1976.[91] By the time *Harelkin v. University of Regina*[92] was heard by the Supreme Court in 1979, the University, despite then having a visitor, did not even bother bringing up the office and the exclusive nature of visitorial jurisdiction in opposing the application for certiorari and mandamus. That visitation was not raised did not stop Justice Beetz, writing for the majority, from remarking skeptically on the visitor's utility: "[O]ne might well question the practical relevance of this English institution to the modern Canadian university."[93] In a nutshell, it may be said that as administrative law flourished, visitation perished. Currently, very few universities have a visitor.[94]

A case that warrants continued attention is *Kane v. Board of Governors of the University of British Columbia*,[95] notwithstanding its age. The underlying facts, which did not involve the university visitor, yielded fodder for an administrative law decision that has been cited several hundreds of times over the past four decades. Julius Kane, a tenured professor, appealed a disciplinary suspension imposed on him by the president of University of British Columbia to the Board of Governors. The president, as a member of the Board of Governors, attended the appeal hearing. He also attended the post-hearing deliberations where he answered questions from other Board members in Kane's absence, though he did not vote. In siding with Kane that the university's process was defective, the Supreme Court of Canada let it be known that "as a constituent of the autonomy it enjoys," the board of governors of a university acting in the capacity of an adjudicative tribunal "must observe natural justice."[96] It need not take on all the trappings of a courtroom proceeding, but a "high standard of justice" is expected when a faculty member is facing potentially serious consequences.[97] The interventionist approach espoused by the majority of the Court in *Kane* has had a considerable impact on subsequent determinations of procedural fairness claims by university faculty.[98]

The availability of judicial review for decisions made by universities has come to be fully accepted and firmly entrenched over time, a trend aided by the disappearance of the visitor. With the buffer of visitation gone, universities can no longer take cover from judicial review by bringing up the visitor's exclusive jurisdiction. Judges have used their judicial review powers to overturn decisions where the university did not follow a fair process,[99] failed to provide reasons,[100] gave reasons too sparse to permit reasonableness review, or made an

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> the Great Seal of this Province, the proceedings whereof having been first confirmed by the Governor, or person administering the Government of the Province in Council, shall be binding upon the said University and its Members, and all others whomsoever.

However, the visitor was omitted in the *The University of Toronto Act*, SO 1906, c 55, which provides that all powers over the university which now are or may be exercised by the Lieutenant Governor are hereby vested in the Board.

91 *The Universities Amendment Act, 1976*, RSA 1976, c 88, s 2.

92 *Harelkin*, *supra* note 76.

93 *Ibid* at 617.

94 McGill University and the University of Western Ontario still have an official visitor, being, respectively, the Governor General of Canada and the Lieutenant Governor of Ontario.

95 [1980] 1 SCR 1105 [*Kane*].

96 *Ibid* at 1113.

97 *Ibid*.

98 David J Mullan, "Fairness in the Employment of University Faculty" (1986) 11:2 Queen's LJ 264 at 273.

99 *Khan v University of Ottawa* (1997), 148 DLR (4th) 577 (Ont CA).

100 *Dunne v Memorial University*, 2012 NLTD 41 (Gen Div).

otherwise unreasonable decision.[101] In short, the choices that universities make appear to enjoy less finality than they once did. They are subject to the general ebbs and flows in judicial deference toward administrative decision-makers, though some courts have maintained that considerable judicial restraint is called for in matters related to a university's core academic functions given the university's special role, function, and expertise.[102]

Despite broadened availability, judicial review is not without its limits. For starters, judicial review is a discretionary remedy and pursuant to the principle of prematurity, courts have denied relief when an applicant has not exhausted all university-level dispute resolution and appeal processes.[103] Second, a more fundamental limitation stems from the fact that judicial review, being a public law concept, is meant to apply to public authorities only. Its overarching objective is to ensure the legality and fairness of public decision-making by allowing courts to quash invalid public decisions, to compel public actors to act, and in other cases, to prohibit them from acting.[104] Accordingly, as the Supreme Court of Canada made clear: "Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character."[105] These two conditions — (1) an exercise of state authority with (2) a sufficiently public character — have to be met before the power of courts to judicially review a decision or process could be availed.

Divergent views have surfaced in the jurisprudence as to whether universities meet the conditions. Some courts readily frame the university as a public body on which the searchlight of administrative law scrutiny can be beamed. In *Pearlman*, for example, the Saskatchewan Court of Appeal characterized the University of Saskatchewan as being of a "thoroughly public character."[106] The following factors seem to be determinative: "The University was created by, and exists pursuant to, a public statute. Its central objective is to provide a public service in the form of education and research. It is financed substantially by way of government funds."[107]

Others have taken a more nuanced stance, recognizing that universities can move between the spheres of public and private endeavour. While universities are either creatures of statute or of royal charter, this does not mean that all of their decisions are exercises of state authority or public in nature. Thus, depending on the specific scenario and the function it is performing, a university may or may not satisfy the two conditions to fall within the remit of administrative law. Consider *Eksteen v. University of Calgary*, where the issue was whether the University's decision to terminate a professor who had breached a research and integrity policy was subject to judicial review.[108] The breach happened after Eksteen had resigned from his position as an associate professor to become a clinical associate professor,

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101 *Chambers v Dalhousie University*, 2013 NSSC 430 [*Chambers*]; *Pridgen v University of Calgary*, 2012 ABCA 139 [*Pridgen* CA].

102 *Mulligan v Laurentian University*, 2008 ONCA 523 at para 20; *Chambers*, *ibid* at para 10.

103 See e.g. *Miraliakbari v Board of Governors of Dalhousie College and University* (1989), 93 NSR (2d) 176 (SC(TD)); *Harelkin*, *supra* note 76; *Student X v Acadia University*, 2018 NSSC 70 at para 50; *Nadler v College of Medicine, University of Saskatchewan*, 2017 SKCA 89.

104 *Canada (AG) v TeleZone Inc*, 2010 SCC 62 at para 26.

105 *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 14.

106 *Pearlman*, *supra* note 85 at para at 39.

107 *Ibid*.

108 2019 ABQB 881.

a non-faculty, contract position which was nonetheless publicly funded. Justice Ashcroft held that judicial review was not available, explaining:

> [B]reaches of research integrity are governed through internal university policies. The public source of Dr. Eksteen's funding and the intersection of federal government policy with the policies of the University do not transform the Decisions into exercises of state authority. Dr. Eksteen also chose to define his relationship with the University through contract, which makes the decisions of the University further removed from any statutorily delegated authority of the University. Lastly, even if the Decisions have the potential to impact the broader public, the Decisions are not of sufficient public character in the administrative law sense.[109]

She took care to note that "[t]here may be circumstances where a decision of the University to discontinue a relationship with an individual providing instructional or other services could be found to be an exercise of state authority."[110] However, "[i]t would state the test too broadly to find that any actions and decisions made by the various agents of the University are all exercises of state authority."[111] In sum, a determination has to be made on a case-by-case basis as to whether a particular decision by a university is the kind of matter to which public law principles and remedies can be applied. That universities could be considered "public" so as to come within the fold of administrative law is a stark contrast to their historical origins as private eleemosynary corporations.

B. CIVIL ACTION: CONTRACT AND TORT

University behaviour that is not amenable to judicial review is not necessarily beyond the reach of the courts, as it may nonetheless be scrutinized in a civil action. In contrast to judicial review, whereby a university's actions would be assessed against the standards of legality and fairness applicable to public authorities, in a civil action, it is the standards of legality set by private law (for example, the law of tort and the law of contract) that are engaged. Such standards are universal in the sense that they apply to all persons in the legal system.[112] Trite to say, public law and private law standards can apply to the same entity. A university may be considered sufficiently public in exercising its statutory discretion to be bound by administrative law, as the previous section shows, but when it acts in a non-public capacity, it stands on the same footing as a private party. It may be the target of a private right of action for any private wrong committed.

Claims against universities for private law remedies such as damages for breach of contract or tort are most commonly made by students. Historically, claims of this sort were greeted with an icy reception from the bench who, in the face of the university visitor, did not want to wade into academic affairs. Apart from visitation, other considerations have been put forward in support of judicial non-intervention. One is the importance of respecting university autonomy or the "essential independence of universities."[113] Then there are the usual reasons for curial deference to administrative decision-making: expertise and

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109 *Ibid* at para 12.
110 *Ibid* at para 66.
111 *Ibid*.
112 Except for torts that can only be brought against public authorities, namely, misfeasance in public office and malicious prosecution: Malcolm Rowe & Manish Oza, "Tort Claims Against Public Authorities" (2022) 60:1 Alta L Rev 1 at 10.
113 *Blasser v Royal Institution for the Advancement of Learning* (1985), 24 DLR (4th) 507 (Qu CA) at 515.

efficiency. Universities, courts have pointed out, have specialized expertise in academic matters, making them better suited to determine the kinds of issues that commonly arise in disputes between university administrators and students (or professors). As Justice Rothman noted:

> In any university, *whether or not it has a visitor*, there are certain internal matters and disputes that are best decided within the academic community rather than by the courts. This is so, not only because the courts are not as well equipped as the universities to decide matters such as academic qualifications, grades, the conferring of degrees and so on, but also because these matters ought to be able to be decided more conveniently, more quickly, more economically and at least as accurately by those who are specialized in educational questions of that kind.[114]

With these considerations in mind, it should not surprise that educational malpractice has never been successfully litigated in the courts.[115] Recognition of such a tort or theory of recovery could see judges passing judgment on the design and implementation of educational policies — something they are reluctant to do, particularly in the university context where it might undermine academic freedom and university autonomy.[116]

Historically, when a court was confronted with an action against a university, its first order of business was to determine whether the essential character of the claim was of an academic nature. If it was fundamentally an academic dispute — that is to say, it relates to the university's organization and administration, grading, complaints and oversight programs, policies and practices, and internal academic decision-making[117] — and unless an intentional tort was involved, the action would be tossed out. This was so even though the relationship between the parties could be characterized as contractual. *Wong v. University of Toronto* serves to illustrate.[118] Fu Kar Wong, a doctoral student, got on badly with his thesis supervisor. The tension between them rose to a crescendo in Wong's fifth year when the supervisor refused to continue in the role. After he initiated a complaint within the University and an alternative supervisor was offered, Wong decided that he no longer wanted to continue his studies and sued for damages. He argued that his claim is essentially contractual, the contract being one that was formed with the University when he was accepted into the graduate program and paid the tuition. The University moved to have the action stayed. The Ontario District Court sided with the University, as did the Court of Appeal. The latter noted that the dispute, which was really about the appropriateness of the supervisor's refusal to act and the acceptability of the alternative supervisor, "has all the characteristics of an academic matter and only superficially or incidentally any of a contractual relationship."[119] Thus, regardless of any visitatorial powers, the proper forum for its resolution was not the Court but within the University pursuant to its internal procedures.

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114 *Ibid* [emphasis added].

115 *Tapics v Dalhousie University*, 2018 NSSC 53 [*Tapics* SC] at para 98, rev'd (on other grounds) 2015 NSCA 72 [*Tapics* CA]; *King v Ryerson University*, 2015 ONCA 648 at para 8 [*King v Ryerson*] (educational malpractice claims are usually dismissed or stayed on a motion at the pleadings stage; even if they are not struck, no such claim has succeeded at trial to date).

116 *Tapics* SC, *ibid* at para 105.

117 *King v Ryerson*, *supra* note 115 at paras 6–7; *Williams v Simon Fraser University*, 2019 BCCA 41 at para 15; *Gaucher v British Columbia Institute of Technology*, 2021 BCSC 289 at paras 68–69.

118 *Wong*, *supra* note 90.

119 *Ibid* at 96.

Similarly, in *Warraich v. University of Manitoba*, the Court rejected a medical resident's action for breach of contract.[120] Due to unsatisfactory performance, Naseer Warriach was put on a six-month probation period to be spent at a program outside of the University. The terms of the probation were internally appealed, but before the final-level appeal was heard, he applied to court for a declaration that the University was contractually obliged to provide him academic and practical training within the University. The University's motion to have the application struck was granted. "Dr. Warraich has certain enforceable contractual rights," but as Chief Justice Scott of the Manitoba Court of Appeal stated, "if the pith and substance of the dispute concerns academic requirements and processes, then any difficulties are to be resolved through the mechanism specifically provided for such matters by the University."[121]

To be sure, not all conduct by a university is academic in nature. An obvious example would be a university's failure to maintain its facilities in a state of good repair. Should a student or faculty member be injured on campus, a court would have no difficulty adjudicating the ensuing action. A clear-cut case like this — or like *Wong* and *Warraich* at the other end of the spectrum — are the easy ones to think about, of course; it is the ones in the middle that are more complicated. Certain university conduct could reasonably be classified as academic or otherwise depending on a party's spin on the facts, or more importantly, how the facts are interpreted by the court.

Young v. Bella is arguably one of those borderline cases.[122] Wanda Young was enrolled as a full-time student at Memorial University. After being rejected by the School of Social Work for a specialized course of study, she took whatever social work courses were on offer in hopes of getting admitted next year. Then came a bizarre sequence of events, which unfolded following her late submission of a course paper. Attached as appendix to her paper was a first person account of a woman who sexually abused the children she babysat. Young had taken it from a textbook but neglected to cite the source. The lack of citation led her professor to believe that the narrative was autobiographical, and unbeknownst to Young, child protection services were notified. Her name was then placed on the provincial child abuse registry and red-flagged by local police and social workers. Young received a mark of zero for her paper, apparently due to lateness, and her application for admission to the social work program was rejected a second time.

When Young discovered what had happened more than two years later, she sued the University and two of its professors for negligence. She claimed that her education and future in social work were brought to an untimely end by the University's internal failures.[123] The University argued that its conduct could not be blamed for Young's inability to gain admission to the school of social work, and instead, pointed to her grades which were hopelessly below the cut-off for admission; better qualified candidates were being turned away.[124]

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120 2003 MBCA 58 [*Warraich*].
121 *Ibid* at para 14.
122 2006 SCC 3.
123 *Ibid* at para 23.
124 *Ibid* at para 58.

The Supreme Court of Canada unanimously ruled in Young's favour. From the Court's perspective, the relationship between the university and a fee-paying student is a contractual one. It entails mutual rights and responsibilities which are justiciable and enforceable by ordinary courts. Chief Justice McLachlin and Justice Binnie stated without any qualification: "The relationship between the appellant and the University had a contractual foundation, giving rise to duties that sound in both contract and tort."[125] By placing the university-student relationship within the ambit of contract law, the Supreme Court arguably cleared the path for expanding the scope of judicial intervention in university-student disputes.

It is striking that the Supreme Court did not address the existing jurisprudence regarding the university's exclusive jurisdiction over fundamentally academic matters. In fact, the essential character of the claim did not feature in its analysis at all. Would a court entertain a student's claim alleging breach of contract or tort even when the pith and substance of the dispute is academic? *Young v. Bella* offers no explicit answer. It is possible, of course, that this question did not have to be answered in this case because the Supreme Court did not consider the underlying dispute to be academic in character. The actionable wrong lay in the University's failure to investigate and get the facts straight before reporting the matter to child protection services, and not in the grading of Young's paper or the University's assessment of her application. Viewed this way, the conduct at issue is non-academic and so, perfectly justiciable.

This interpretation has not however been confirmed by the Supreme Court in any decision subsequent to *Young v. Bella*. Cases involving universities that reach the Supreme Court are generally few and far between. That said, a survey of lower court authorities suggests that judges in different provinces have different takes on the impact of *Young v. Bella* on their ability to adjudicate matters with an academic orientation. Four distinctive approaches, entailing different degrees of openness to intervene in academic disputes, could be observed. Let us consider each in turn.

1. ONTARIO: ESSENTIAL CHARACTER OF THE DISPUTE DOES NOT MATTER

Ontario courts have veered farthest from tradition, having all but abdicated the principle that universities have exclusive jurisdiction over matters that are fundamentally academic. With *Young v. Bella* serving as support, the Court of Appeal held in a series of decisions starting with *Gauthier v. Saint-German* that the gravamen of the dispute is no longer to dictate whether the claim belongs in court or not.[126] Rather, "it is more telling to look at the remedy being claimed."[127] So long as damages are claimed and a valid cause of action pled, the court can hear the claim. The fact that issues relating to the university's academic function are raised or the dispute is otherwise academic poses no impediment: "[I]f the

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125 *Ibid* at para 31.

126 *Gauthier c Saint-Germain*, 2010 ONCA 309 [*Gauthier*], leave to appeal to SCC refused, 33780 (3 March 2011); *Jaffer v York University*, 2010 ONCA 654 [*Jaffer*], leave to appeal to SCC refused, 33938 (3 March 2011); *Lam v University of Western Ontario Board of Governors*, 2019 ONCA 82 [*Lam*], leave to appeal to SCC refused, 38583 (18 July 2019). There are also superior court decisions to this effect: see e.g. *Stuart v University of Western Ontario*, 2017 ONSC 6980. But see *Dawson v University of Toronto*, [2007] OJ No 591 (Sup Ct), aff'd 2007 ONCA 875.

127 *Gauthier*, *ibid* at para 46 [translated by author] (« il est plus révélateur de se pencher sur la réparation revendiquée par le demandeur »). See also *Jaffer*, *ibid* at para 26.

plaintiff alleges the constituent elements of a cause of action based in tort or breach of contract, while claiming damages, the court will have jurisdiction even if the dispute stems from the scholastic or academic activities of the university in question."[128] In short, the remedy sought has supplanted the essential character of the dispute as the determining factor of jurisdiction.

Whether the court has jurisdiction over the dispute is only part one of the inquiry, however. What must also be asked is whether the court *should* exercise its jurisdiction. It is here that deference to universities on academic issues is properly given consideration. Unless a university did something that fell outside its academic discretion, the court will decline to exercise its jurisdiction. That is because, as Justice Rouleau explained in *Gauthier*, "when a student enrols in a university, it is understood that the student will be subject to the discretion of that institution when it comes to resolving academic issues."[129] Thus, claiming that a professor was incompetent or a failing grade should have been passing would not warrant the courts stepping in — even if the claim is framed in contract or tort and damages are sought — as it is within the scope of matters that a student has impliedly agree will be resolved by the university.

The way that *Lam v. University of Western Ontario* was decided shows the extent to which the judiciary, at least at the appellate level, has shed the historical discomfort over adjudicating university disputes. The essential facts are as follows. Simon Lam's doctoral research was funded by a grant secured by his supervisor. When his supervisor died unexpectedly, he transferred out of the doctoral program into a master's program at the urging of the new supervisory committee, who apparently misled him about the funding available for him to complete a doctorate. Lam subsequently sued the University for breach of contract and breach of fiduciary duty. The University prevailed at first instance upon persuading the summary judgment motions judge that Lam's complaint was academic in nature,[130] but it lost on appeal. According to the Court of Appeal for Ontario, "the correct approach is not to ask whether the complaint falls on the academic or legal end of a spectrum."[131] The correct approach "is to ask whether the complaint is one for damages for breach of contract or tort."[132] An assertion that what the University did was something it had discretion to do within the academic purview is neither here nor there.[133]

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128 *Gauthier*, *ibid* at para 46 [translated by author] (« si la partie demanderesse allègue les éléments constitutifs d'une cause d'action fondée en délits civils ou en rupture de contrat, tout en réclamant des dommages-intérêts, la cour s'avérera compétente et ce, même si le différend découle des activités scolaires ou académiques de l'université en question »). Similar to *Wong*, *supra* note 90, the dispute in *Gauthier* arose from issues that a doctoral student had with her thesis supervisors. Gauthier alleged that her supervisors' negligence made it impossible for her to complete her degree on schedule.

129 *Gauthier*, *ibid* at para 47 [translated by author] (« il est entendu que l'étudiant s'assujettit à la discrétion de cette institution pour la résolution de questions académiques »).

130 *Lam*, *supra* note 126.

131 *Ibid* at para 32.

132 *Ibid*.

133 *Ibid*.

2. BRITISH COLUMBIA AND ALBERTA: ESSENTIAL CHARACTER OF THE DISPUTE CONTINUES TO MATTER

Courts in British Columbia and Alberta have not followed suit in opening their doors to academic disputes. They continue to espouse the customary notion that questions involving academic policies, assessment and discipline are for universities to decide, even when they are intertwined with legal rights and obligations that could be enforced in a judicial forum. The distinction between academic and ordinary disputes has been maintained thanks in part to legislation: in Alberta, the *Post-Secondary Learning Act*[134] provides a university with what has been judicially construed as "sole authority" over academic affairs;[135] in British Columbia, the *University Act* insulates a university from civil liability for acts done pursuant to its statutory authority.[136]

To determine whether the action can be heard, the question that has long been asked continues to be asked: is the essential character of the dispute academic in nature? If yes, then the university has complete autonomy to decide how it should be resolved. The courts have no jurisdiction to intervene, other than by way of judicial review once all university appeal procedures have been exhausted. Justice Hunt of the British Columbia Court of Appeal put it unequivocally in *Albu v. University of British Columbia*: "a superior court does not have jurisdiction to adjudicate matters that are fundamentally academic except through an application for judicial review."[137] It may be said, then, that if Ontario courts are at one end of the continuum with respect to their perspective on justiciability, courts in British Columbia and Alberta lie at the other end.

3. MANITOBA: ESSENTIAL CHARACTER OF THE DISPUTE AND REMEDY BOTH MATTER

Something akin to a fusion of the above approaches is favoured in Manitoba. Here, the leading case is *Hozaima v. Perry*.[138] According to the Manitoba Court of Appeal in this case, as *Young v. Bella* made clear, universities owe general and contractual duties to their students which are justiciable.[139] However, the courts' jurisdiction is subject to displacement by the broad jurisdiction that a university has to decide academic matters arising within its sphere of operation.[140] To determine whether the jurisdiction of the courts is ousted or not, two questions must be asked: "[T]he critical questions … are whether the dispute, in its essential character, is an academic dispute and whether the extant dispute resolution scheme provides an effective remedy."[141] A court should pass up hearing a complaint unless the requested remedy is only available in court *and* the matter is not fundamentally academic. Both requirements must be met, though it has subsequently been suggested that the character of

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134 *Post-Secondary Learning Act*, *supra* note 23, and before it, the now repealed *Universities Act*, RSA 2000, c U-3 and *Universities Act*, RSA 1980, c U-5.

135 *Yen v Alberta (Ministry of Advanced Education and Technology)*, 2010 ABQB 380 at para 34 [*Yen*].

136 *University Act*, RSBC 1996, c 468, s 69(2).

137 2019 BCCA 222 at para 14. See also *Williams v Simon Fraser University*, 2019 BCCA 41 at para 15; *Yen*, *supra* note 135 at para 40; *Naimji v University of Alberta* (1988), 87 AR 357 (QB); *Cruickshank v University of Lethbridge*, 2010 ABQB 186 at paras 12–13.

138 2010 MBCA 21 [*Hozaima*].

139 *Ibid* at para 27.

140 *Ibid* at para 32.

141 *Ibid*. See also *Green v University of Winnipeg*, 2015 MBCA 109 at para 31.

the dispute should be given more weight.[142] The availability of the remedy is not as meaningful since a plaintiff can always tack on a claim for damages to meet the requirement.

Consider how the conjunctive requirements are applied in *Hozaima*. The facts of the case are fairly prosaic as far as student grievances go. Lena Hozaima was forced to withdraw from the Faculty of Dentistry after she failed multiple courses. After losing her appeals within the University, instead of pursuing judicial review, she sued the institution, the faculty dean, and a professor for breaching their contractual obligations, fiduciary duty, and duty of care to her and sought damages. The wrongful acts alleged were the University's failures to provide an effective learning environment; to evaluate academic performance in accordance with appropriate academic criteria and policies; to control the conduct of the dean and professor; and to ensure fair treatment.[143] Despite these allegations having a decidedly academic orientation, the motions judge did not think the nature of the dispute was academic. He took a narrow view of what constitutes an essentially academic matter, dismissing the University's motion to stay or dismiss the action. Justice Monnin, then Chief Justice of the Manitoba Court of King's Bench, opined:

> [The allegations] go beyond the simple issue of whether the defendants have provided a suitable facility or "educated" the plaintiff.… On the contrary, it is a claim that the University and the professors are responsible for specific acts which are not in fulfillment of their contractual and other legal obligations.[144]

The Court of Appeal upheld his conclusion.[145] Since damages were pled, judicial jurisdiction remains intact.

4. SASKATCHEWAN: NO LONGER A JURISDICTIONAL QUESTION

Until very recently, courts in Saskatchewan, mirroring their British Columbia and Alberta counterparts, hewed to the orthodox view that academic issues are, as a matter of jurisdiction, reserved for universities. The courts' own jurisdiction and that of universities are distinct, like two separate boxes, and what goes into one box cannot go in the other: "[N]otwithstanding the duty of care described by the court in *Young*, claims of an essentially academic nature, are within the exclusive purview of the university."[146] Claims placed in the box marked "academic" are designated for resolution by way of a university's internal processes, while those in the other box are intended for judicial adjudication.

The boundary lines of justiciability were revisited in *Taheri v. Buhr*.[147] Ahmad Taheri was a graduate student at the University of Saskatchewan. His work was supervised by two professors (one on faculty and the other adjunct) who published a paper about his research findings without giving him credit or even notice. On discovering the paper, Taheri filed a

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142 *Al-Bakkal v de Vries*, 2016 MBQB 45 at para 69.
143 *Hozaima v Perry*, 2008 MBQB 199 at para 8.
144 *Ibid* at para 49.
145 But note Justice MacInnes' obiter comments: "I may have concluded that some of the allegations were ones better suited for decision by the university than by the courts." *Hozaima*, *supra* note 138 at para 40.
146 *Fraser v Timmon*, 2017 SKQB 376 at para 28. See also *Hebron v University of Saskatchewan*, 2015 SKCA 91 at para 66.
147 2021 SKCA 9 [*Taheri*].

complaint within the University which led to a decision by his faculty dean recommending to the University's president that the faculty supervisor be reprimanded, among other things. Not entirely satisfied, Taheri commenced a lawsuit for damages. Certain claims struck by the chambers judge for being fundamentally academic were revived by the Saskatchewan Court of Appeal on the basis that:

> It is not plain and obvious … that the resolution of an allegation about the appropriation of research by a professor and the damages said to flow from that appropriation is something that a student can be deemed to have agreed to leave for determination by the University through its internal proceedings and processes.[148]

What is notable about the case is not just this conclusion, but the larger point made about disputes with an academic orientation. Taking a page from the Ontario Court of Appeal in *Gauthier*, the Court stressed that the relationship between university and student is rooted in contract whereby "a student impliedly agrees, by enrolling in a university, to accept the university's determinations with respect to a range of academic matters."[149] This means that any civil claim must be grounded in conduct outside the scope of the university's contractually based authority,[150] an authority that is also statutorily reinforced in the case of the University of Saskatchewan.[151] But, the Court explained, in a break from tradition, this has nothing to do with the limits of the courts' jurisdiction; it has only to do with deference to universities. What is more, it is possible for the jurisdiction of the court and the university to overlap in that the same set of events could give rise to both a complaint within the university and be the subject of civil proceedings. This much is clear from how the Court decided the case. Still, in allowing the civil claim to proceed, the Court was adamant that its intent was not to usurp the University's academic function. It was simply giving the student a chance to obtain a remedy unavailable within the University.[152]

In summary, the jurisprudence across Canada is decidedly divided. While some judges have said that they have no jurisdiction over matters of an academic nature (apart from the supervisory jurisdiction of judicial review), others prefer to see it as having to do with discretion, or the courts *choosing* not to exercise their jurisdiction. The former view is likely a remnant of the past when the visitor had exclusive jurisdiction to resolve certain disputes between members of a university. The latter seems to be the more sensible view today with respect to universities where the visitor office has been written into extinction. In the absence of visitation powers, academic disputes are no less justiciable provided that a legal right, such as a contractual right or a tortious right of action, is engaged and so, there is a legal question to be answered.

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148 *Ibid* at para 39. Note that Taheri did not appeal the chambers' judge's decisions knocking out the claim against the university.

149 *Ibid* at para 30.

150 *Ibid* at para 31, citing *Gauthier*, *supra* note 126 at paras 38–39.

151 *The University of Saskatchewan Act, 1995*, SS 1995, c U-6.1.

152 *Taheri*, *supra* note 147 at para 57.

C. *CHARTER* REVIEW

The advent of the *Charter* in 1982 elevated the role of the courts to new heights, empowering them to decide "questions which go far beyond the traditional areas of legal scrutiny into the uncharted waters of central social issues,"[153] in order to give effect to the civil liberties guaranteed to individuals under its terms such as the right to freely associate and the right to express one's thoughts. They can be called upon to pronounce on social and economic issues and engage in a certain degree of what might be termed activism even. The expanded mandate of the judiciary poses a new hazard to university autonomy, as the *Charter* arguably lends an additional basis for challenging and overturning university decisions.

There is one condition to clear before the courts' newly vested powers are to be used. As section 32(1) of the *Charter* stipulates, only government actors and activities are bound by its constraints.[154] Private individuals and organizations are not. Accordingly, for the *Charter* to extend to a university, a court must be convinced that the university comes within the meaning of "government" in section 32(1). In other words, a court must be convinced that the university is not wholly autonomous from the state. Universities have tried to convince the courts otherwise to escape the constitutional wringer.

So, are universities "government" or not for the purposes of section 32(1)?

The question was put squarely before the Supreme Court of Canada eight years after the *Charter*'s launch in *McKinney v. University of Guelph*[155] and *Harrison v. University of British Columbia*.[156] The universities at issue each had a policy mandating that faculty and staff retire at age 65. Professors and staff members of the respective universities challenged the policies as being age discriminatory and in violation of section 15 of the *Charter*. In response, the universities insisted that they are not subject to the *Charter* because they are not part of government. *McKinney* and *Harrison* produced splintered decisions which were released in tandem.

Five of the seven judges, in three separate sets of reasons, held that universities are not part of the government apparatus.[157] Justice La Forest who spoke for the majority in *McKinney*, the lead judgment, explained that entities may be subject to the *Charter* by their nature or the extent of government control over them. Without a doubt, universities are statutory bodies performing a public service. Their functions and governing structures are

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153 Beverley M McLachlin, "The Role of the Court in the Post-Charter Era: Policy-Maker or Adjudicator?" (1990) 39 UNBLJ 43 at 43.

154 *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*, [1986] 2 SCR 573. The section reads: "This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province": *Charter*, *supra* note 3, s 32.

155 [1990] 3 SCR 229 [*McKinney*].

156 [1990] 3 SCR 451 [*Harrison*].

157 Justice La Forest wrote reasons for the majority of three. Justice Sopinka agreed with him that the "core functions of a university are non-governmental," but would not go so far as to say that none of the activities of a university are governmental in nature: *McKinney*, *supra* note 155 at 238. Justice Cory also agreed that a university is not government, he preferred the test articulated by Justice Wilson in dissent for determining whether an entity is government (*McKinney*, *ibid* at 155).

statutorily prescribed, they depend on public funding, and the government constricts what they could do through control over new programs, caps on tuition fees, and funding frameworks. But it follows not that they are organs of government. The government has no legal power to control universities, who have maintained their individual identity "as a community of scholars and students enjoying substantial internal autonomy."[158] Justice La Forest elaborates:

> The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.[159]

Simply put, universities manage their own affairs autonomously. That is what sets them apart from their institutional cousins — community colleges — which are subject to direct ministerial control and are considered Crown agents.[160] Along with legal autonomy universities are entrusted with academic freedom, a vital and enduring principle that is cherished by society and is "essential to our continuance as a lively democracy."[161] Still, Justice La Forest left the door open for the *Charter* to apply to universities in future cases, taking pains to emphasize that "[m]y conclusion is not that universities cannot *in any circumstances* be found to be part of government for the purposes of the *Charter*."[162]

The door left ajar in *McKinney* has slowly but surely been jimmied open. In the three decades since, even though it has not revisited the exact issue raised in *McKinney*, the Supreme Court has endorsed a more expansive understanding of the *Charter*'s reach. As it held in *Eldridge v. British Columbia (AG)*,[163] another judgment authored by Justice La Forest, otherwise private entities are bound by the *Charter* "in so far as they act in furtherance of a specific governmental program or policy."[164] Under the Court's expanded framework, there are two ways for the *Charter* to apply. First, an entity may be a government entity because of its very nature or due to substantial government control, in which case all of its activities attract *Charter* scrutiny. Second, an otherwise private entity can be brought into the *Charter*'s fold with respect to a particular activity if that activity can be ascribed to the government. In *Eldridge*, hospitals were found under the second prong to be subject to the *Charter* when they provide healthcare services. This is despite their being private entities whose day-to-day operations were conducted independent of government, just like universities.

McKinney only considered the first of the two routes to *Charter* application subsequently approved in *Eldridge* in deciding that the universities at issue are not government-controlled actors. It did not consider the second route, which would have asked whether certain university activities are governmental in nature. Accordingly, the possibility stood for lower

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158 *McKinney*, *ibid* at 273, citing *Harelkin*, *supra* note 76 at 594.
159 *McKinney*, *ibid*, citing *McKinney v University of Guelph* (1987), 63 OR (2d) 1 (CA) at 24–25.
160 *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570.
161 *McKinney*, *supra* note 155 at 286–87, 273–74.
162 *McKinney*, *ibid* at 275 [emphasis added].
163 [1997] 3 SCR 624 [*Eldridge*]. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 16.
164 *Eldridge*, *ibid* at 660.

courts to extend the *Charter* to a university notwithstanding the outcome in *McKinney*. For the possibility to be realized, the focus of analysis had to shift away from to the nature of the entity to the nature of the activity in question. A university's enabling legislation, which sets out its powers and functions and the parameters for its activities, became a focal point in subsequent litigation. As the statutes governing different universities differ, judges could and did come to different conclusions on similar facts.

Contrast *Pridgen v. University of Calgary*[165] with *Telfer v. University of Western Ontario*.[166] Decided in the same year, both concerned the same university activity: student discipline for non-academic conduct. In *Pridgen*, the University put two students on probation and required them to apologize after they criticized a professor on Facebook. In *Telfer*, a student was reprimanded by the University for harassing another student. The students in each case argued that the *Charter* applied to the disciplinary actions taken by the University and their right to free expression was infringed. The judges involved were of different minds as to whether the respective University was acting in a governmental capacity and thus subject to constitutional constraints. Justice Strekaf of the Alberta King's Bench[167] and Justice Paperny of the Alberta Court of Appeal concluded in the affirmative.[168] Their rationale ran as follows: the University of Calgary is governed by the *Post-Secondary Learning Act*,[169] which expressly states that it is within the University's role to discipline its students.[170] Thus, in disciplining students, the University is acting on statutory authority. It must exercise such authority in a *Charter*-compliant fashion since the legislature would never pass laws authorizing entities to contravene the *Charter*.[171] Moreover, the *Post-Secondary Education Act* indicates that providing accessible post-secondary education is a government objective, and the University is tasked with carrying out this specific objective. This brought the case into line with *Eldridge*. In Justice Paperny's words, "the provision of post-secondary education by universities is not dissimilar from the provision of medical services by hospitals."[172] If hospitals must abide by the *Charter* when they are implementing a government objective, it follows that universities should too, and not be insulated from *Charter* review.

The majority in *Telfer* arrived at exactly the opposite conclusion. Drawing on the Ontario Court of Appeal's obiter comments in *Freeman-Maloy v. Marsden*[173] that a university acts autonomously of government in student discipline, a point that subsequent Ontario authorities have hammered home,[174] regulating the conduct of students was held not to be

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165 *Pridgen* CA, *supra* note 101.
166 2012 ONSC 1287 [*Telfer*].
167 *Pridgen v University of Calgary*, 2010 ABQB 644 [*Pridgen* QB].
168 *Pridgen* CA, *supra* note 165. Note that the other two judges on the panel provided separate reasons for ruling in favour of the students. Justice O'Ferrall found a clever way to impose the *Charter* on the university without deciding on its applicability to student discipline. He held that the university was required to consider the students' constitutional rights of free expression in making its decision to sanction them for non-academic misconduct; because the university failed to do so, its decision was unreasonable and was set aside on judicial review. Justice McDonald also found the university's decision to be unreasonable, but did so without referring to the *Charter*.
169 *Supra* note 23.
170 *Ibid*, s 31.
171 *Pridgen* CA, *supra* note 101 at paras 91, 105; *Pridgen* QB, *supra* note 167 at para 44.
172 *Pridgen* CA, *ibid* at para 103. See also *Pridgen* QB, *ibid* at paras 59, 63.
173 (2006), 79 OR (3d) 401 (CA).
174 See e.g. *Ball v McAulay*, 2020 ONCA 481 at para 59; *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553 at paras 51–56.

government action for *Charter* purposes. As Justice Swinton of the Divisional Court put it, "[t]he University of Western Ontario was not implementing a government policy nor acting in any way as an agent of the government in developing and applying its discipline policy for students or carrying out its educational functions."[175] *Pridgen* was waved aside on the basis that it involved a different statutory scheme.[176] Unlike the legislation in question in *Pridgen* which explicitly says the University has the power to discipline students, the legislation governing the University of Western Ontario is wholly silent on the issue.

For another study in contrasts, consider *UAlberta Pro-Life v. Governors of the University of Alberta*[177] and *BC Civil Liberties Association v. University of Victoria*.[178] The two cases involved a university restricting use of campus space by students for an anti-abortion demonstration. The University in *UAlberta Pro-Life* required the student group, UAlberta Pro-Life, to post a security fee for the event, after a similar event they held the year prior prompted a large counter demonstration. As the amount for security was cost prohibitive, the group could not go ahead. The students protested to the Court, complaining that the University's action denied their exercise of free expression. They found a sympathetic audience in the Alberta Court of Appeal, who decided that the university's "core purpose" of educating students is "a responsibility given to the university by government for over a century under both statute and the *Constitution Act, 1867*."[179] As such, how speech is regulated on university grounds, "where the government is present by proxy,"[180] is subject to *Charter* scrutiny.

A similar argument floundered in *BC Civil Liberties.* The dispute arose from the University's withdrawal of permission given earlier to a student group for an on-campus anti-abortion demonstration, following a complaint about the group. The group's president petitioned for a declaration that the university's policy and decision restricting the use of campus space infringed the *Charter*. The British Columbia Court of Appeal refused to grant the relief sought, holding that the *Charter* is not applicable. Even if the university's core function is a public one, *McKinney* and *Harrison* had made clear that delivery of a public service does not automatically incorporate an organization into government.[181] *Eldridge* changes nothing since the specific act in question is not governmental in nature: "The government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses."[182] Thus, the University was not implementing a government policy or program in regulating use of its campus.

Then there are decisions like *Wilson v. University of Calgary*,[183] which come at the matter from a different angle. In *Wilson*, the Alberta Court of Queen's Bench used what is known as the *Doré* approach to judicial review to strike down a decision by the University (the same University taken to task in *Pridgen*).[184] The case had its genesis in an anti-abortion exhibit

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175 *Telfer*, *supra* note 166 at para 61.
176 *Ibid* at paras 58–59.
177 *UAlberta Pro-Life*, *supra* note 75.
178 2016 BCCA 162 [*BC Civil Liberties*].
179 *UAlberta Pro-Life*, *supra* note 75 at para 148(1).
180 *Ibid* at para 148(4).
181 *BC Civil Liberties*, *supra* note at 178 para 28.
182 *Ibid* at para 32.
183 *Wilson v University of Calgary*, 2014 ABQB 190 [*Wilson*].
184 For a similar approach, see Justice O'Ferrall's reasons in *Pridgen* CA, *supra* note 101.

organized by a student group. Citing security concerns, the University asked the group to set up its campus exhibit with the displays facing in so passersby would not be able to see what was shown. When the students refused, the University sanctioned them for breaching the University's discrimination and harassment policies. Unlike the other cases, the issue as it was framed in *Wilson* was not whether the *Charter* applies to the University, but whether the *University* applied the *Charter* in its decision-making. Instead of the usual *Charter* analysis, the Court scrutinized the University's decision to sanction the students using *Doré v. Barreau du Québec*,[185] which says that an administrative body must exercise its statutory discretion in accordance with *Charter* values. More specifically, it must properly balance any interference of *Charter* values with its statutory objectives or risk its decision being set aside by a reviewing court. The University's decision was found to be unreasonable, because it did not "attempt to balance *Charter* values by interfering 'no more than necessary.'"[186] What the University did is particularly regrettable, according to the Court, given that "the nature and purpose of a university [is to be] a forum for the expression of differing views."[187]

Inconsistent holdings that litter the landscape have created a disconcerting situation. As things currently stand, the *Charter* applies to some universities (those in Alberta and Saskatchewan),[188] but not to others (in Ontario and British Columbia).[189] The jurisprudential patchwork has spurred a raft of commentaries,[190] with one commentator calling the law in the area as looking "more like a Picasso than a Rembrandt."[191] The varying treatment of universities across the country compels us to ask whether there are sound policy justifications for it. It would seem not. Statutory language is relevant to be sure, but courts have not presented persuasive reasons for making what has been described as "formalistic distinctions between various statutes"[192] to justify going separate ways. To fixate on whether a university activity is or is not explicitly referenced in a statute, or whether post-secondary education is or is not a statutorily enshrined objective of the government, is to miss the bigger picture. There are certain functions such as student discipline that all universities perform, regardless of whether it is spelled out in their enabling legislation. It makes little sense that some universities are subject to constitutional constraints when they carry out these activities while other universities are free to do so without such constraints. The corollary — that students at some Canadian universities have the protection of the *Charter* while their peers at others are left in the lurch — highlights the practical unfairness of uneven treatment, rendering it harder to accept.

The jurisprudence may be a bit messy, but the trend is clear: judges are increasingly being asked to audit university activities for *Charter* compliance. Some are inclined to do so,

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185 2012 SCC 12.

186 *Wilson*, *supra* note 183 at para 163.

187 *Ibid*.

188 *Ibid*; *UAlberta Pro-Life*, *supra* note 75; *Yashcheshen v University of Saskatchewan*, 2018 SKQB 57.

189 See e.g. *AlGhaithy v University of Ottawa*, 2012 ONSC 142; *Lobo v Carleton University*, 2012 ONCA 498; *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39, aff'd 2016 BCCA 162; *Maughan v University of British Columbia*, 2009 BCCA 447.

190 See e.g. Michael Marin, "Should the *Charter* Apply to Universities?" (2015) 35:1 NJCL 29; Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal 79; Krupa M Kotecha, "*Charter* Application in the University Context: An Inquiry of Necessity" (2016) 26:1 Educ & LJ 21 at 31; Hayden Cook, "*Charter* Applicability to Universities and the Regulation of On-Campus Expression" (2021) 58:4 Alta L Rev 957; Linda McKay-Panos, "Universities and Freedom of Expression: When Should the *Charter* Apply" (2016) 5:1 Can J Human Rights 59.

191 Silletta, *ibid* at 92.

192 Marin, *supra* note 190 at 41.

exhibiting little sign of their predecessors' reluctance to interfere with how a university conducts its own affairs as evident in *McKinney* and *Harrison*. *Charter* review opens universities to the prying eyes of the courts, weakening, or threatening to weaken, their autonomy. Indeed, given that *Charter* litigation is often political in the sense of being ideologically charged, one might argue that external meddling in this context is particularly worrisome.

Still, some scholars have argued that applying the *Charter* to certain university activities and having the courts step in as referee may not be a negative.[193] Much of the *Charter* litigation against universities is launched in response to a university restricting or putting conditions on free speech, an act that undercuts the very justification for recognizing university autonomy in the first place. It goes to show that institutional freedom of self-determination does not inevitably empower those within to express themselves freely, and can sometimes have the opposite effect, just as too much of a good thing can prove hazardous. Thus, as Dwight Newman observes, on some occasions, "the *Charter* may actually be a means of saving [universities] and their own values from themselves."[194] Moreover, it bears remembering that institutional judgments about what to discipline students for, and what kind of speech to allow or restrict on campus, are not value neutral. They are qualitative judgments made by committees and individuals who hold a particular set of beliefs, with a particular understanding of the university's mission and values. This is most apparent in the case of universities with religious affiliations that do not encourage every point of view and, indeed, openly discourage unholy ones. With this in mind, "[a]n independent and impartial judiciary, applying the *Charter* in a balanced manner,"[195] might be most appropriately placed to resolve disputes about the parameters around speech and debate which are within the university's traditional bailiwick.

V. CONCLUSION

As social institutions, universities are not static, but in a process of untiring evolution. The same goes for judicial attitudes toward universities, with respect to where they fit on the public-private spectrum, the legal nature of their relationship with students and faculty, and the extent to which they are insulated from judicial intervention. In tracing the turns in jurisprudence, a picture of the evolution comes into focus.

Universities today are treated by the courts as administrative decision-makers and quasi-public institutions subject to the dictates of private and public law. They have evolved away from their origins in medieval society as republics of scholars, small and nimble, and governed by their own internal laws. In the past when the visitor was still a superintending figure, courts were decidedly hands-off. Whatever resolution the visitor reached was regarded as final and immune from second-guessing by the courts, with the effect that universities were beyond judicial reproach in how they treated members of their community and handled the conflicts that arose in academic life. Over time, with the office of the visitor becoming defunct, the judiciary began to step back from its vows of strict abstinence.

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193 See e.g. Marin, *ibid* at 56; McKay-Panos, *supra* note 190 at 94–95; Dwight Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45:1/2 RDUS 133 at 139.

194 Newman, *ibid* at 155.

195 Marin, *supra* note 190 at 56.

Although courts continue to preach deference (the new watchword in place of jurisdiction), requests for their intervention have increasingly been entertained. Reported cases furnish a clear record of universities being subjected to judicial review, *Charter* review, as well as contract and tort actions involving matters with an academic dimension. They are also vulnerable to secondary judicial supervision authorized under provincial human rights codes which enable statutory tribunals to review university action and permit judicial review therefrom. A recent example can be found in *Longueépée v. University of Waterloo*,[196] where the Ontario Court of Appeal chastised the University for its discriminatory admission process and directed the human rights tribunal to fix a penalty. "The deference owed to universities does not completely insulate academic decisions from tribunal or judicial scrutiny,"[197] wrote Justice Lauwers in rationalizing intervention.

Notwithstanding the unevenness of the jurisprudence in some areas which requires smoothing out by the Supreme Court of Canada, how the law has evolved on the whole is a step in the right direction. However dreamy the vision may be of the university as an isolated hall of ivy, it is incompatible with reality, where universities exist in service of society at large. They are creatures of statute, largely funded by public money, and entrusted to perform functions essential to the society that sustains them — namely, the generation of new knowledge and the grooming of capable, reflective citizens. The public has an interest in what they are doing, to see that they are responsibly run, and that the freedoms and values they claim to uphold are in fact being upheld. Supervision by the courts in disputed matters is a way to require universities to account for themselves to the public. Unlike government-imposed accountability requirements, which are implemented more or less behind closed doors, judicial supervision takes place in open court where due process protections at their strongest are assured to the university as to all other parties.

One might ask, but what of academic freedom — the liberty of members of a university to think, teach, and speak freely? Would that not be it put in jeopardy when university autonomy is curtailed? I would argue that there is no need to panic on that score. Truth is, academic freedom is best protected not in an environment where institutional self-rule is its own object, but where institutions of higher education are afforded a good measure of *responsible* autonomy. A university that does not abide by the principles of procedural fairness, basic duties under tort and contract, or the fundamental rights of individuals, should not be able to insist on institutional autonomy and use it like a smokescreen. Too cloistered of an institution can be a tyrant to those within, a tragic "fact" attested to by a former president of Cornell University, who candidly stated: "Operating under pressure, as administrators do much of the time, they can be insensitive to the most rudimentary forms of justice and fair play."[198] Affording universities discretion without checks is a dangerous invitation to abuses of power cached away from sight.

Moreover, while judicial supervision is not a bulletproof solution for campus injustice, it can offer redress when it occurs, and in turn deter its occurrence. Indeed, the mere availability of judicial intervention may persuade universities to act with attention to legality

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196 2020 ONCA 830.

197 *Ibid* at para 106.

198 James A Perkins, "The University and Due Process" (1968) 62:8 American Library Association Bulletin 977 at 980.

and justification, as well as to heed the principles of natural justice, the *Charter* and all that it embodies, on their own initiative without being forced to do so by a court.

Any abridgment of autonomy resulting from judicial supervision is unlikely to have a significant adverse impact on academic freedom, provided that supervision is carried out with restraint. It is worth emphasizing that given their juridical mandate, courts can only scrutinize university action for legal propriety. As long as the conduct does not run afoul of some law or legal principle, a court would probe no further. Notably, even now, courts still more or less defer to the university with respect to academic decisions and do not substitute them with their own. This is as it should be, for courts have no special expertise or familiarity with the standards of the academic community to assert themselves in matters of grading, testing, appointments, and the whole lot of issues emblematic of higher education. Certain divisions of labour must still be observed.

All in all, future development in the law should be guided by an awareness of the considerations canvassed and a controlled appetite for intervention. Respect for institutional autonomy should not be confused with immunity from ever being called to account in a court of law. Nor should the university be romanticized as a place of intellectual refuge that needs no oversight. Autonomy must come with accountability, and no institution should sit as final arbiter in matters in which they are concerned. The art lies in navigating the fine line between oversight and intrusion, which is something of a delicate dance.