

ARTICLE

REVISITING *CHARTER* APPLICATION TO UNIVERSITIES

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INTRODUCTION

Universities have long been considered bastions of academic freedom—freedom to safely study, research, and express innovative and even controversial opinions. However, as our society has evolved—and with it our definitions of tolerance and acceptance—many of these freedoms are now simply ignored by university governance. Often, a student whose freedom of expression has been infringed by a university decision must appeal within the same university engaging in the infringement or to a Human Rights Tribunal with limited powers.¹ Crucially, students in this position cannot invoke the broad protections provided by the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).² Following early *Charter* decisions, courts have generally found that the *Charter* has no application to universities. However, in light of more recent decisions and the modern realities of universities, this trend must be reviewed and the *Charter* must be seen to now apply in some contexts.

In order to show the importance of reconsidering *Charter* application, I first draw on examples of universities infringing *Charter* rights throughout Canada. Second, I outline the early decisions of the Supreme Court of Canada (“SCC”) on the *Charter*’s application to universities and similar institutions. Third, I examine recent decisions that have brought new life to arguments in support of the *Charter*’s application, and how these cases have been treated by other courts. Finally, I tie together the principles that have been discussed with reference to university governing legislation to identify the situations in which the *Charter* should be found to apply to universities across Canada.

PART I. WHY IT MATTERS—EXAMPLES OF RIGHTS-INFRINGEMENT AT CANADIAN UNIVERSITIES

Recent events at the University of Calgary highlight the importance of *Charter* application to protect students’ freedom of expression from discriminatory practices. Since 2006, students at the University of Calgary have participated in an ongoing, peaceful, pro-life protest. The students would form a large circle in a well-trodden area of campus and hold graphic signs that likened abortion to genocide. While proving extremely offensive to many students on campus, these displays fall within the protected ambit of freedom of expression in the *Charter*.³ In 2007, students opposed to the demonstrations physically blocked access to the protest and obstructed the displays with their own banners. The university took no action to prevent the opposing group from inhibiting the protestors’ expression. The following year, the university’s legal department demanded that the protestors turn their signs inwards, so that no passers-by could see the signs. The students refused these demands, stating that their protests would prove less effective if their message could not be seen. In response, the university charged the student protesters with trespass and penalized them under the university’s non-academic misconduct policy. The trespassing charges were stayed by the Crown; however, on appeal, the university’s board of directors upheld the non-academic misconduct penalties.⁴

1 Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013) at 17.

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

3 See *R v Spratt*, 2008 BCCA 340 (available on CanLII), which held that “[t]he right to express opposition to abortion is a constitutionally protected right” at para 91.

4 Cameron Wilson et al, “Brief of Argument”, online: Justice Centre for Constitutional Freedoms <<http://www.jccf.ca/wp-content/uploads/2013/02/Wilson-Brief-Feb-2013-re-17-April-Special-Application.pdf>>.

The university's inconsistent reasoning demonstrates the need for *Charter* protection. Rather than take actions to prevent students from physically interfering with a group's peaceful expression, the university tried to shut down the protests in the interest of "safety". However, if safety was truly the university's concern, why would it not have reprimanded the students whose attempts to obstruct the protest resulted in the unsafe environment? The university's actions suggest that it prefers students taking physical, and possibly illegal,⁵ action to disrupt unpopular demonstrations over allowing expression of divergent viewpoints. Indeed, Alberta's Court of Queen's Bench ("ABQB") found the university's board of directors' decision unreasonable in April 2014, as will be discussed in Part III of this essay.

The protestors at the University of Calgary are not alone in their struggles. At the University of Victoria, the Catholic Student's Association ("CSA") was ordered to enter into mediation with the university's Students' Society ("UVSS") because of the display of controversial pamphlets during a club promotional day in September 2012. If the CSA refused mediation, the UVSS threatened to consider further disciplinary actions. Here again, the CSA's freedom of expression and religion were curtailed because the opinions expressed were considered offensive.⁶

The Justice Centre for Constitutional Freedoms ("JCCF") released a 2013 *Campus Freedom Index* which evaluates the state of free speech at universities across Canada.⁷ The index found that all of the universities studied maintain policies that allow them to shut down the speech of students, faculty, and invited guests whose views are considered controversial, offensive, or unpopular. The implementation of these vague, arbitrary, and subjective policies led to a finding that half of the 45 universities studied actively engaged in censorship of student expression.⁸

If the *Charter* applied to universities, it could protect students from having their opinions and beliefs unjustifiably silenced. At present, universities across Canada regularly censor students in favour of maintaining an inoffensive environment. In doing so, universities seemingly disregard the *Charter*, because they strongly hold to the view that they are free from *Charter* interference.⁹ This viewpoint stems from the early *Charter* decisions discussed in Part II of this essay.

PART II. IN THE BEGINNING—EARLY CHARTER DECISIONS

A. *McKinney v University of Guelph*

The issue of *Charter* application to public universities was last addressed by the SCC nearly 25 years ago.¹⁰ In 1990, the Court released four concurrent judgments that addressed mandatory retirement employment contracts. Two of these decisions, *McKinney v University of Guelph* ("*McKinney*")¹¹ and *Harrison v University of British*

5 See *Criminal Code*, RSC 1985, c C-46, s 430: "It is an offence to obstruct, interrupt or interfere with any person in the lawful use, enjoyment or operation of property."

6 "Agenda for AGM October 17, 2013", online: University of Victoria Students' Society <<http://uvss.ca/wp-content/uploads/2012/07/Agenda-2013-10-17-AGM.pdf>>.

7 "2013 Campus Freedom Index", online: Justice Centre for Constitutional Freedoms <http://www.jccf.ca/wp-content/uploads/2013/10/October_2013CampusFreedomIndex.pdf>.

8 *Ibid* at 2.

9 In every case cited in this paper, the defendant university claimed that it was free from *Charter* scrutiny.

10 In 2001, the SCC determined that Trinity Western University was a "private institution [...] to which the *Charter* does not apply": *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 25 (available on CanLII). This paper seeks to address *Charter* application to public universities.

11 *McKinney v University of Guelph*, [1990] 3 SCR 229 (available on CanLII) [*McKinney* cited to SCR].

*Columbia*¹², addressed claims by university staff and faculty that they were being discriminated against because of their age, in violation of their section 15(1) equality rights. The remaining decisions, *Stoffman v Vancouver General Hospital* (“*Stoffman*”)¹³ and *Douglas/Kwantlen Faculty Association v Douglas College* (“*Douglas College*”)¹⁴, dealt with the same arguments in regard to hospitals and community colleges.

The divided judgments in *McKinney* demonstrate the complexity of the issue of *Charter* application to universities. Five separate judgements were delivered: Justice La Forest wrote the majority opinion, supported by Justices Dickson and Gonthier; Justices L’Heureux-Dubé and Sopinka each issued concurring opinions; and Justices Wilson and Cory dissented in separate opinions.

Justice La Forest began his analysis with an examination of the *Charter* itself, specifically section 32:

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.¹⁵

In Section 32, Parliament and the legislatures are named in addition to the government of Canada and each province. By the principles of statutory interpretation, the meaning of government cannot be limited to just those bodies. Therefore, the essential question to be addressed was what constitutes government. Justice La Forest reasoned that the *Charter* applies in four ways. First, the *Charter* applies to all legislation. Second, the *Charter* applies to governmental actors, such as the executive and administrative branches.¹⁶ This category also includes municipalities as they perform a “quintessentially governmental function”.¹⁷ Third, the *Charter* applies to bodies that are exercising a delegated statutory authority—in other words, any entity that wields statutory power.¹⁸ Finally, the *Charter* applies to entities that are governmental actors by virtue of the control the government has over them.¹⁹ The last two categories are of special importance as they prevent the legislature and government from evading their *Charter* responsibility by simply appointing a “non-governmental” entity to carry out the purposes of a statute.²⁰

Justice La Forest held that the first two categories were inapplicable to the universities at bar. The mandatory retirement provisions were not legislated, and universities were not part of the executive or administrative branches, and could not be analogized to municipalities. The third category also did not apply in this instance. The employment contracts were negotiated freely by the universities and their employees; the universities did not have any statutory power to compel their employees to enter into such contracts.

12 *Harrison v University of British Columbia*, [1990] 3 SCR 451 (available on CanLII) [cited to SCR].

13 *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483 (available on CanLII) [*Stoffman* cited to SCR].

14 *Douglas/Kwantlen Faculty Association v Douglas College*, [1990] 3 SCR 570 (available on CanLII) [*Douglas College* cited to SCR].

15 *Charter*, *supra* note 2, s 32.

16 *McKinney*, *supra* note 11 at para 25.

17 *Ibid* at para 36.

18 *Ibid* at para 29.

19 *Ibid* at para 41.

20 *Ibid* at para 29.

Justice La Forest focused his analysis on the fourth category of *Charter* application—when an entity forms part of the government due to the control the government has over it. He explicitly rejected the idea that an entity falls under sufficient government control merely because it fulfills a public purpose or is incorporated by statute. Justice La Forest found support for this decision by analogizing universities to “railroads and airlines, as well as symphonies and institutions of learning”, which all have public purposes but are “undoubtedly not part of the government”.²¹ He acknowledged that the fate of universities is largely in the hands of government, and universities are subject to important limitations on what they can do—either by virtue of government regulation or universities’ dependence on government funding.²² However, even this dependence and ostensible subordination to the government’s will was insufficient to bring universities within the ambit of governmental control.

Justice La Forest held that an entity is only considered to be under the control of the government if its governing body is made up of a majority of government-appointed members that act under the will of the Lieutenant Governor in Council. Justice La Forest noted that each of the universities at issue had its own governing body with only a minority of members appointed by the Lieutenant Governor (a significant point that will be discussed in more detail in Part IV below). Due to the structure of university governance, the government was held to have no legal power to control the institutions, even if it so wished. Any attempts by the government to influence university decisions would be strenuously objected to.²³ Justice La Forest’s reasoning may be summarized as follows: the *Charter* did not apply because universities are not government actors (by way of the executive or administrative branches); the mandatory retirement contracts were not compelled by the government (they were not legislated and the universities were not exercising statutory power); and, finally, the universities were not under sufficient governmental control.

At first glance, Justice La Forest’s judgment seemingly excludes all universities from *Charter* scrutiny; however, a closer reading of *McKinney* reveals that the issue is actually left quite open. First, Justice La Forest clarified that although the particular universities were found not to be under sufficient governmental control to attract *Charter* application, the same may not be true for all universities:

My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of the *Charter*, but rather that *the appellant universities* are not part of government given the manner in which they are presently organized and governed.²⁴

Second, Justice La Forest suggested that, in other cases, the *Charter* may apply to specific university activities:

There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing *here* to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.²⁵

21 *Ibid* at para 35.

22 *Ibid* at para 39.

23 *Ibid* at paras 40–41.

24 *Ibid* at para 46 [emphasis added].

25 *Ibid* at para 42 [emphasis added].

Justice La Forest presented two factors that may bring a university within the scope of the *Charter*. First, different universities may be sufficiently controlled by the government. In Part IV of this paper I will examine the governing structures of other universities to determine whether or not this qualification is met. Second, certain activities of a university may be considered to be a decision of the government. This reasoning forms the basis of *Eldridge v British Columbia (AG)* (“*Eldridge*”), discussed in the pages that follow.²⁶

The concurring judgments of Justices L’Heureux-Dubé and Sopinka in *McKinney* clearly did not hold that universities were entirely free from *Charter* scrutiny. Justice L’Heureux-Dubé, while agreeing that the hiring and firing of employees did not engage the *Charter*, noted that “universities may perform certain public functions that could attract *Charter* review.”²⁷ She based her opinion on the fact that universities are substantially publicly funded. Justice Sopinka held that the *Charter* did not apply in this case; however, he “would not go so far as to say that none of the activities of a university are governmental in nature.”²⁸

Justices Wilson and Cory’s dissenting judgments both found that the *Charter* applied to universities, including in the context of mandatory retirement. Justice Wilson would have found that universities act pursuant to statutory authority in furtherance of a governmental objective:

[T]he fact that universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of “government” for purposes of s. 32.²⁹

Each of the five opinions in *McKinney* held that the *Charter* may apply to universities in some circumstances, and yet, as I discuss in Part III of this essay, subsequent decisions dealing with *Charter* application to universities fail to consider whether or not the control structures and activities at issue could be distinguished from those in *McKinney*.

Stoffman, one of the companion cases to *McKinney*, is particularly relevant to this question. In *Stoffman*, the same majority ruled that a hospital is not subject to the *Charter* for the same reasons that a university is not—specifically, it holds no statutory authority, and it is not subject to sufficient governmental control.³⁰ However, unlike universities, the SCC has revisited the issue of *Charter* application to hospitals and surprised many by finding that they are, in specific cases, subject to the *Charter*.

B. *Eldridge v British Columbia (AG)*

In *Eldridge*, the plaintiffs alleged that the Province discriminated against deaf people by failing to provide them with paid interpreters for medical services. Without interpreters, they were deprived of receiving medical services equivalent to those received by hearing persons, thereby infringing their right to equality under section 15(1) of the *Charter*. Their application was dismissed at both the British Columbia Supreme Court (“BCSC”) and the Court of Appeal (“BCCA”). The BCCA held that the *Charter* could not apply in

26 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624 (available on CanLII) [*Eldridge* cited to SCR].

27 *McKinney*, *supra* note 11 at para 371.

28 *Ibid* at para 436.

29 *Ibid* at para 273.

30 *Stoffman*, *supra* note 13 at paras 87-106.

this case as “the application of the *Charter* to the actions of hospitals has been conclusively determined in the *Stoffman* case.”³¹

Surprisingly, the SCC found that the *Charter* did apply to hospitals in this instance because the hospital—despite being a private entity not under the control of government—was implementing a “specific governmental program or policy.”³² Justice La Forest, speaking for a unanimous Court, developed and clarified an additional category for when the *Charter* can be found to apply—it applies to private entities insofar as they act in furtherance of a specific governmental program or policy. Justice La Forest’s decision in *Eldridge* drew upon his reasons in *McKinney*:

[T]here may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government.³³

The specific governmental function found in this case was the provision of medical services. Justice La Forest held that the purpose of the *Hospital Insurance Act* was for the government to provide particular services to the public by way of private institutions—the hospitals. Therefore, hospitals were bound by the *Charter* when implementing the specific governmental purpose of providing health care.³⁴

Eldridge is striking in that it appeared to read down the prior decision in *Stoffman* which had been interpreted as holding that the *Charter* could not apply to hospitals—an interpretation endorsed even by the BCCA. Justice La Forest himself acknowledged that the judgments may appear contradictory:

There is language in *Stoffman* that could be read as precluding the application of the *Charter* in the circumstances of the present case. There, I wrote, at p. 516, that ‘there can be no question of the Vancouver General’s being held subject to the *Charter* on the ground that it performs a governmental function, for ... the provision of a public service, even if it is one as important as health care, is not the kind of function that qualifies as a governmental function under s. 32’. *That statement, however, must be read in the context of the entire judgment.* I determined only that the fact that an entity performs a ‘public function’ in the broad sense does not render it ‘government’ for the purposes of s. 32 and specifically left open the possibility that the *Charter* could be applied to hospitals in different circumstances.³⁵

Like the provision of health care in *Stoffman*, the Court found in *McKinney* that the provision of education, though important and a public function, did not qualify universities as being a part, or under the control, of government. However, if the SCC revisited this issue in regard to universities, it would be open to the Court to read the result in *McKinney* “in the context of the entire judgment” and find that the provision of education could constitute a specific governmental objective. In this way, universities would be subject to the *Charter* in implementing this objective. This line of reasoning has already found favour in the Alberta courts.

31 *Eldridge v British Columbia (AG)* (1995), 7 BCLR (3d) 156 at para 21 (available on CanLII) (CA).

32 *Eldridge*, *supra* note 26 at para 42.

33 *Ibid* at para 41.

34 *Ibid* at para 50.

35 *Ibid* at para 47 [emphasis added].

PART III. THE DEBATE CONTINUES—DIVIDED JURISPRUDENCE ON *CHARTER* APPLICATION

A. A New Wrinkle—Recent Alberta Judgments finding *Charter* Application

i. *Pridgen v University of Calgary* (Court of Queen’s Bench)

In 2010, the ABQB in *Pridgen v University of Calgary* (“*Pridgen*”) ruled that the University of Calgary is not a “*Charter* free zone.”³⁶ This case involved two students who commented on a Facebook page entitled “I No Longer Fear Hell, I took a Course with Aruna Mitra”. Each of the students posted a critical message of the named professor, who, in turn, complained to the university. The students were found to have committed non-academic misconduct and were required to write a letter of apology and refrain from posting or circulating any material that could be defamatory to members of the university or bring the Faculty of Communication and Culture into disrepute. One of the students was placed on 24 months’ academic probation and both were warned that failure to comply with the sanctions could result in suspension or expulsion. The students applied for judicial review to set aside the decision on various grounds, including that their *Charter* right to free expression was infringed.

Justice Strekaf began her analysis by reading *McKinney* and *Eldridge* as holding that the *Charter* could apply, on the facts before her, in one of two ways; it may apply to a government actor or it may apply to non-government actors responsible for the implementation of a specific government policy or activity. She also noted that although *McKinney* held that the *Charter* did not apply to the universities at issue in that case, the decision left open the possibility that the *Charter* could apply in different circumstances.³⁷ Like the universities in *McKinney*, the University of Calgary was not found to be an “organ” of the government, as its governing structure—namely, its senate and board—were not under sufficient governmental control.³⁸

Nevertheless, Justice Strekaf found that the *Charter* applied because the university was implementing a specific statutory scheme or government program of the kind described in *Eldridge*. The specific governmental function was the provision of education. Justice Strekaf’s finding was not based on any specific provision of the university’s governing statute, the *Post-Secondary Learning Act* (“*PSLA*”), but rather on its preamble:

[T]he Government of Alberta is committed to ensuring that Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system[...]³⁹

Further, the preamble states that “the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities.”⁴⁰ This was sufficient, in Justice Strekaf’s opinion, to make the provision of education a specific governmental objective:

In dictating the terms upon which a student may receive an education at a public institution the University is performing a function that is integrally

36 *Pridgen v University of Calgary*, 2010 ABQB 644 at para 69 (available on CanLII) [*Pridgen* QB].

37 *Ibid* at paras 38–41.

38 *Ibid* at para 48.

39 *Post-Secondary Learning Act*, SA 2003, c P-19.5, Preamble [*PSLA*].

40 *Ibid*.

connected to the delivery of post-secondary education as set out by the PSL Act. [...] The Government of Alberta retains responsibility with respect to access to, and participation in, the post-secondary system. *The University is the vehicle through which the government offers individuals the opportunity to participate in the post-secondary educational system.* When a university committee renders decisions which may impact, curtail or prevent participation in the post-secondary system or which would prevent the opportunity to participate in learning opportunities, it directly impacts the stated policy of providing an accessible educational system as entrusted to it under the PSL Act. *The nature of these activities attracts Charter scrutiny.*⁴¹

Justice Strekaf also distinguished the nature of the activity in *McKinney* from the facts before her. She held that the hiring and firing of employees does not impact the pursuit of education by students, whereas the disciplining of students and the placement of restrictions on a student's ability to exercise his or her *Charter* rights does.

ii. *R v Whatcott*

The University of Calgary appealed the *Pridgen* decision; however, prior to the decision of the Alberta Court of Appeal (“ABCA”) being released, the ABQB was faced with yet another case involving the *Charter*'s application to the University of Calgary. In *R v Whatcott* (“*Whatcott*”),⁴² Justice Jeffrey held that the university had infringed Mr. Whatcott's freedom of expression in barring him from distributing anti-abortion pamphlets on campus:

[I]n utilizing provincial trespass legislation to curtail Mr. Whatcott from disseminating his viewpoint that some other University attendee did not like, the University cannot act contrary to the *Charter* any more than could the Alberta Legislature when it created by statute the trespass offence.⁴³

This line of reasoning anticipates Justice Paperny's holding in the ABCA's subsequent decision in *Pridgen* that a university is subject to the *Charter* in exercising a statutorily-conferred coercive power. Additionally, Justice Jeffrey found that the *Charter* applied in this case by virtue of the governmental objective test, just as Justice Strekaf held in the earlier *Pridgen* decision. By restricting free expression on its campus, the university prevented Albertans from having “the opportunity to participate in learning opportunities”—a stated governmental objective of the *PSLA*.⁴⁴ Interestingly, Mr. Whatcott was not even a student of the university, and yet banning his distribution of pamphlets was found to be contrary to the *PSLA* objectives.

iii. *Pridgen v University of Calgary* (Court of Appeal)

The University of Calgary appealed the *Pridgen* decision principally on the ground that the SCC's decision in *McKinney* precluded the application of the *Charter* to universities. The university was supported by two interveners, the Association of Universities and Colleges of Canada (“AUCC”) and the Governors of the University of Alberta. The AUCC is the “national voice” for 97 public and private universities and university-degree-level colleges.⁴⁵ The AUCC's intervention indicates that the vast majority of universities

41 *Pridgen* QB, *supra* note 36 at para 67 [emphasis added].

42 *R v Whatcott*, 2012 ABQB 231 (available on CanLII).

43 *Ibid* at para 31.

44 *Ibid* at para 30.

45 “About Us”, online: Association of Universities and Colleges of Canada <<http://www.aucc.ca/about-us>>.

across the country supported and argued for the notion that the *Charter* should not apply to them. The Canadian Civil Liberties Association (“CCLA”) intervened on behalf of the students in arguing that the *Charter* should apply.

Justice Paperny of the ABCA began her analysis by dividing the application of section 32 into five categories, similar to the division in the *McKinney* and *Eldridge* cases. She held that the *Charter* applies to the following:

1. Legislative enactments;
2. Government actors by nature;
3. Government actors by virtue of governmental control;
4. Bodies exercising statutory authority; and
5. Non-governmental bodies implementing government objectives.⁴⁶

Justice Paperny held that universities generally do not qualify under the first three categories, but acknowledged that denying that universities are under governmental control could lead to “inconsistent and illogical results.”⁴⁷ She emphasized the importance of the last two categories, as they address the problem of the government “contracting out” its *Charter* obligations.⁴⁸ The fourth category recognizes that when legislation grants a non-governmental actor the ability to exercise a power of compulsion, that actor must abide by the *Charter* in so doing. However, this category does not capture the instances in which the government may allow a non-governmental actor to undertake a governmental act without granting it any statutory power of compulsion. Justice Paperny held that this gap in the law is closed by the fifth category, as was demonstrated in *Eldridge*.

Justice Paperny next affirmed that Justice Strekaf was correct in holding that the University of Calgary was subject to the *Charter* under the fifth category, the governmental objective requirement. In her view, the provision of post-secondary education by universities was a governmental objective, just as the provision of medical services by hospitals was found to be in *Eldridge*.⁴⁹ The university had submitted that, unlike in *Eldridge*, there was no “specific” governmental objective in this case. Justice Paperny found this distinction to be “without merit.” She held that “*Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSLA*, while couched in broad terms, are tangible and clear.”⁵⁰ Part IV of this essay will examine whether or not the governmental objective test is likely met by universities governed by different statutes.

Justice Paperny went on to find that the application of *Eldridge* was only one possible approach to this problem. She held that the fourth category of *Charter* application, bodies exercising statutory authority, “fits more comfortably” with the issues of imposing disciplinary sanctions. The *PSLA* granted the university power to impose sanctions that go “beyond the authority held by private individuals or organizations”—the powers to fine, suspend, or expel a student from the university.⁵¹ Consequently, the university cannot use these powers in a way that infringes upon *Charter* rights, including the right to express oneself on Facebook. The University argued that student discipline is an

46 *Pridgen v University of Calgary*, 2012 ABCA 139 at para 78 (available on CanLII) [*Pridgen CA*].

47 *Ibid* at para 83.

48 *Ibid* at para 85.

49 *Ibid* at para 104.

50 *Ibid*.

51 *Ibid* at para 105.

internal, contractual matter and not governmental in nature. Justice Paperny rejected this argument, stating that although the university could, and indeed did, form a contractual relationship with students regarding discipline, this did not change the fact that the legislature saw fit to expressly authorize disciplinary sanctions.⁵² Further, Justice Paperny held that the regulation of student speech is not just an internal matter. The public, including current and future students, has a vested interest in receiving student opinions and engaging in discussion about the quality of education that a university—or a particular class—provides. Furthermore, the potential impact on current students is not limited to the private relationship between themselves and the university because sanctions, particularly suspension or expulsion, can effectively prevent students from entering their preferred field. This essay will examine the analogous relationship between universities and professional regulators in more detail in Part IV. For now, it is sufficient to note that Justice Paperny found that for students aspiring to enter a profession like medicine or law, a university acts as a gatekeeper in the same way as a regulatory body.⁵³

Justice Paperny’s judgment provides a lucid summary of the development of *Charter* application jurisprudence over the past 25 years. She found that the *Charter* applied to the University of Calgary in this instance, and her reasons outline the circumstances in which the *Charter* could apply to other universities. The two other justices of the ABCA did not address the *Charter* question but would have found for the students based solely on administrative principles. Justice McDonald considered a *Charter* analysis inappropriate and unnecessary:

[W]hile it may be time to reconsider whether or not universities are subject to the *Charter*, it was unnecessary for the judicial review judge to do so in this case. And, in my respectful view, this Court ought not to compound that error by undertaking such an analysis now.⁵⁴

Justice O’Ferrall thought it was “perhaps even undesirable [to consider *Charter* application] because the issue of *Charter* infringement was not explored at first instance.”⁵⁵ It is unfortunate that the concurring justices did not consider the application of the *Charter*, given that the law in this area is unsettled and the fact that two groups (the AUCC and CCLA) intervened solely to argue this matter. Justice O’Ferrall, while not considering application *per se*, held, in part, that the university’s decision was unreasonable because it failed to consider the students’ rights to freedom of expression and freedom of association.⁵⁶ His reasons suggest that even if the *Charter* does not apply to the university in question, *Charter* values must still be considered in the decision-making process. Reading this holding with Justice Paperny’s decision, it is clear that even if the *Charter* does not apply directly to universities, they must at least consider the impact of possible rights infringement in exercising their disciplinary authority.

iv. *Wilson v University of Calgary*

For the third time in four years, the *Charter*’s application to the University of Calgary was considered by the ABQB in the 2014 decision of *Wilson v University of Calgary* (“*Wilson*”).⁵⁷ In this case, the plaintiff was appealing the university’s decision that students who refused to turn their pro-life protest signs inwards had thereby violated the university’s Non-Academic Misconduct Policy. The case dealt with a variety of

52 *Ibid* at para 107.

53 *Ibid* at para 109.

54 *Ibid* at para 132.

55 *Ibid* at para 183.

56 *Ibid* at para 179.

57 *Wilson v University of Calgary*, 2014 ABQB 190 (available on CanLII).

administrative law matters, but only the application of the *Charter* will be considered here. Justice Horner attempted to reconcile the differing approaches to *Charter* application that the ABCA took in *Pridgen*:

I do not read these three sets of reasons as together casting doubt upon the requirement to undertake a consideration as to the effect that disciplinary action has on a student's *Charter*-protected rights.⁵⁸

Justice Horner found that the university failed in its obligation to consider the *Charter* interests of the students when making its decision.⁵⁹ Thus, the ABQB found that a university's administrative decisions may be unreasonable if they disregard students' *Charter* rights.

B. The Same Old Story—Recent Decisions Distinguishing the Alberta Judgments

The reasoning of the *Pridgen*, *Whatcott*, and *Wilson* decisions has yet to be followed in another jurisdiction. The Ontario cases of *Lobo v Carleton University* ("*Lobo*"),⁶⁰ *Telfer v University of Western Ontario* ("*Telfer*"),⁶¹ and *AlGhaithy v University of Ottawa* ("*AlGhaithy*")⁶² were distinguished from the ABQB's *Pridgen* decision. These judgements are questionable, however, because the courts cite *McKinney* for the proposition that the *Charter* does not apply to the universities without examining the particular activities at issue in light of the subsequent decision in *Eldridge* or the contemporary realities of universities. Similarly, the January 2015 decision of the BCSC in *BC Civil Liberties Association v University of Victoria* ("*BCCLA*") considered both the ABCA decision in *Pridgen* and the ABQB decision in *Wilson*, but found that the *Charter* did not apply in the given circumstances.⁶³

i. *Lobo v Carleton University*

In *Lobo*, a group of students alleged that the University of Carleton breached their freedom of expression in failing to allocate space for pro-life displays. The ONSC found *Pridgen* to be inapplicable outside of the statutory context of Alberta:

[The ABQB] made specific reference to the governing structure of the University in that case which involved significant government involvement. On this basis, the Court found the University was delivering a specific government program in partnership with the government. *By contrast, the Carleton University Act, 1952 created an autonomous entity whose structure and governance is in no way prescribed by the government.*⁶⁴

This reasoning conflates the governmental control test applied in *McKinney* with the governmental objective test applied in *Eldridge*. The ABQB in *Pridgen* did not hold that the *Charter* was applicable because of the "governing structure of the University"; in fact, the court found that the university was not under sufficient governmental control to make it an organ of the government. Rather, according to the ABQB decision, the University of Calgary was subject to the *Charter* only because it was furthering a specific

58 *Ibid* at para 148.

59 *Ibid* at para 158.

60 *Lobo v Carleton University*, 2012 ONSC 254 (available on CanLII) [*Lobo* SC], *aff'd* 2012 ONCA 498 (available on CanLII) [*Lobo* CA].

61 *Telfer v University of Western Ontario*, 2012 ONSC 1287 (available on CanLII) [*Telfer*].

62 *AlGhaithy v University of Ottawa*, 2012 ONSC 142 (available on CanLII) [*AlGhaithy*].

63 *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39 (available on CanLII) [*BCCLA*].

64 *Lobo* SC, *supra* note 60 at para 14 [emphasis added].

governmental purpose—namely, providing educational opportunities. Simply holding that Carleton University has a different “structure and governance” does nothing to distinguish the case from *Pridgen*, where the structure and governance of the University of Calgary were not the reason why the *Charter* applied.

In the *Lobo* appeal, however, the students’ argument that the motion judge failed to consider *Eldridge* sufficiently was tersely dismissed:

As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent’s actions.⁶⁵

This conclusion is unsatisfactory for two reasons. First, framing the issue narrowly as “book[ing] spaces for non-academic extra-curricular use” ignores the crucial fact that the students were denied space only as a result of the content of their expression. The case would be far different if all non-academic bookings were automatically denied space. Instead, the university allowed what it considered to be valid expression and denied expression that it deemed controversial. Second, the motion judge did not consider what governmental policies Carleton University serves. Rather, he simply held that the structure and governance of the university are not prescribed by the government.

ii. *Telfer v University of Western Ontario; AlGhaithy v University of Ottawa*

In *Telfer* and *AlGhaithy*, the courts relied on the different legislation governing the universities in question to distinguish the cases from *Pridgen*. In *Telfer*, the ONSC found that the exercise of disciplinary authority by an Ontario university did not attract *Charter* scrutiny:

[T]he statutory scheme applicable to the University of Western Ontario is quite different from that applicable to the University of Calgary. As set out earlier in these reasons, s. 18 of the University of Western Ontario’s *Act* gives it a right to control and direct its affairs through the Board of Governors and the Senate. It is not acting as an agent of the provincial government to implement any academic policy of the government.⁶⁶

The ONSC again focused only on the university’s control structure to find that the university was not implementing a governmental policy. However, governmental control is only one way in which the *Charter* may apply. In *AlGhaithy*, the ONSC again declined to apply *Pridgen*:

[T]he case is distinguishable, given that Alberta legislation requires universities to carry out a specific government objective of facilitating access to post-secondary education. There is no equivalent legislation in Ontario.⁶⁷

Part IV of this essay will question the reasoning that education can only be seen as a governmental objective if it is included in legislation.

⁶⁵ *Lobo CA*, *supra* note 60 at para 4.

⁶⁶ *Telfer*, *supra* note 61 at para 59.

⁶⁷ *AlGhaithy*, *supra* note 62 at para 78.

iii. *BC Civil Liberties Association v University of Victoria*

The 2015 decision in *BCCLA* further highlights the need for the SCC to resolve the uncertainty that surrounds the question of *Charter* application to universities.⁶⁸ In this case, the British Columbia Civil Liberties Association (“BCCLA”), acting on behalf of a former student, Cameron Côté, petitioned the BCSC to declare that the UVSS policy on booking space on campus violated students’ *Charter* rights. The UVSS had denied Youth Protecting Youth (“YPY”)—an anti-abortion protest group—permission to hold a protest in February 2013, on the basis that the protest violated the UVSS’s Booking of Outdoor Space policy. YPY persisted in holding the event. In response, the University revoked their outdoor space booking privilege for a one year period.⁶⁹

The BCCLA’s arguments echo many of the points raised in this paper, from the application of the government function branch of *Eldridge* to the reasoning of the recent Alberta decisions. The BCSC ultimately found that the *Charter* did not apply to the university. Chief Justice Hinkson referred to Justice Paperny’s holding in *Pridgen* that the regulation of speech on university property attracts *Charter* scrutiny, but found it significant that the other two members of the ABCA in *Pridgen* “did not agree with Madam Justice Paperny.”⁷⁰ The BCSC distinguished the instant facts from *Pridgen* by noting that British Columbia’s *University Act* differs from Alberta’s and that “unlike the student in *Pridgen*, Mr. Côté was not the subject of any actual discipline by the University.”⁷¹

The Chief Justice did not go as far as holding that the *Charter* could never apply to the University of Victoria, but rather limited the breadth of his holding to the facts at issue. The BCSC held that “in booking space for student club activities, the University is neither controlled by government nor performing a specific government policy or program as contemplated in *Eldridge*” and thus “the *Charter* does not apply to the activities relating to the booking of spaces by students.”⁷² As in *Lobo*, the court narrowly defined the activity objected to, but left open the possibility of *Charter* application to other university activities.

PART IV. PUTTING THE PIECES TOGETHER—WHEN THE CHARTER SHOULD BE FOUND TO APPLY

The law of *Charter* application to universities looks more like a Picasso than a Rembrandt. In *McKinney*, Guelph, York, and Laurentian Universities were found not to be subject to the *Charter* in negotiating employment contracts; however, all five judgments left open the possibility that the *Charter* could apply under different circumstances. Though the court did not give examples of what these different circumstances could be, reading *McKinney* together with *Eldridge* suggests that universities attract *Charter* scrutiny when they are under sufficient control of the government, exercising statutory authority, or implementing a specific governmental function. The ABQB found the latter factors to be met in the *Whatcott*, *Pridgen*, and *Wilson* decisions; however, the Ontario courts chose not to follow these cases. Similarly, the BCSC found that the *Charter* did not apply to the University of Victoria, but only in the narrow circumstances of *BCCLA*.

I will now argue that the *Charter* should be found to broadly apply to universities based on these three principles: sufficient governmental control, statutory authority, and

68 *BCCLA*, *supra* note 63.

69 *Ibid* at paras 76-81.

70 *Ibid* at paras 137-38.

71 *Ibid* at para 141.

72 *Ibid* at paras 151-52.

specific governmental objectives. In support of this argument, I will draw principally upon the governing legislation of the universities in British Columbia.

A. Charter Application Factor 1—The Government Controls the Entity

In *McKinney*, Justice La Forest provided a test for determining if a university was under sufficient governmental control to make it subject to the *Charter*. In his opinion, the essential question was this: Who controlled the university's governing body? If only a minority of directors were appointed by the Lieutenant Governor in Council, then it was clear that the government had no legal control. Even if a majority of directors were appointed by the Lieutenant Governor in Council, the control test will not be met if the appointees are under a duty to act in the best interests of the university, rather than those of the government.⁷³ Justice La Forest gave the example of section 2(3) of the *University of Toronto Act*, which states that “members of the Governing Council shall act with diligence, honestly and with good faith in the best interests of the University and University College.”⁷⁴

A legislative review reveals the unlikelihood that any university would fall within sufficient governmental control by this standard. Take, for example, the University of Victoria, Simon Fraser University, and the University of Northern British Columbia, which are all governed by British Columbia's *University Act* (“*BCUA*”).⁷⁵ Unlike most universities, a majority of their board members are appointed by the Lieutenant Governor in Council (8 out of 15).⁷⁶ However, the *BCUA* also states that the board members must act in the best interests of the university,⁷⁷ and so, following *McKinney*, the government does not control the boards.

The reasoning that the government cannot be in control of a board when the legislation holds that its members must act in the best interest of the university is overly simplistic for two reasons. First, the existence of such a clause in the *College and Institution Act*⁷⁸ was not dispositive in the case of *Douglas College*—Douglas College was found to be an organ of government even though its board was to act in its own best interests, not the government's.⁷⁹ Second, this reasoning ignores other provisions, like section 22 of the *BCUA*, which states that the Lieutenant Governor may, at any time, remove from office an appointed member of the board. Thus, even though appointees are called to act in the best interests of the university, any decisions that conflict with the wishes of the government could potentially result in removal from the board. Board members without secure tenure are not necessarily free to act only in the best interests of the university.

Further, this test ignores the modern realities of universities. In *Douglas College*, Justice La Forest held that the college was under government control “both in form and in fact.”⁸⁰ However, even when, based on the test outlined above, universities are not under government control “in form”, governments inevitably exercise significant control over universities “in fact.” It may be time to reconsider Justice La Forest's holding that “though extensively regulated and funded by government, [universities] are essentially

73 *McKinney*, *supra* note 11 at para 40.

74 *University of Toronto Act*, SO 1971, c 56, s 2(3).

75 *University Act*, RSBC 1996, c 468 [*BCUA*].

76 *Ibid*, s 19.

77 *Ibid*, s 19.1.

78 *College and Institution Act*, RSBC 1996, c 52. Section 8.2 provides: “In carrying out the objects of an institution, the members of the board of the institution must act in the best interests of that institution.”

79 *Douglas College*, *supra* note 14 at para 37.

80 *Ibid* at para 49.

autonomous bodies.⁸¹ The practice of selective funding, for example, demonstrates the degree to which governments can exert influence over university decision-making. This issue is addressed below, under the third *Charter* application factor—the implementation of governmental objectives.

B. *Charter* Application Factor 2—Statutory Authority

Recall that Justice La Forest held that a body is subject to the *Charter* when it is exercising statutory authority. Case law has revealed two ways in which statutory authority has been exercised by a university. In *Pridgen*, Justice Paperny found that the University of Calgary was subject to *Charter* scrutiny when exercising the disciplinary powers given to it by the *PSLA*, such as the powers to fine, suspend, or expel a student from the university. Additionally, Justice Jeffrey in *Whatcott* found that the University of Calgary could not enforce provincial—as opposed to university-specific—trespass legislation in a manner contrary to the *Charter*. The enforcement of laws of general application are so intrinsically linked with government that it is reasonable to assume that this finding in *Whatcott* would apply to all universities across Canada. The *Charter* clearly applies to situations where campus security is used to enforce provincial laws—in 2003, the University of Western Ontario was found to contravene the *Charter* when the special police constables it employed wrongfully arrested and detained a student.⁸²

The University of Calgary is not the only university that has been given specific statutory powers. All Albertan universities must abide by the *Charter* in disciplining students, as the *PSLA* applies to them as well. Further, the *BCUA* has an analogous section that explicitly gives the president of every university in British Columbia the power to “suspend a student and to deal summarily with any matter of student discipline.”⁸³ Therefore, based on Justice Paperny’s reasoning, all British Columbian universities must abide by the *Charter* when disciplining students.

Universities across British Columbia would dispute this holding. Justice Paperny’s reasoning, while clear and compelling, was not supported by the other justices of the ABCA. It is arguable that though Justice Paperny was correct to follow *McKinney* in holding that bodies exercising statutory authority were subject to the *Charter*, her extension of this principle to student discipline policies is too far-reaching. Significantly, universities cannot exercise this authority over any citizen, but only those who choose to attend the institutions. Therefore, the powers of suspension might be characterized as arising from a contractual agreement and the university’s decisions as being merely the exercise of the same contractual powers available to any natural person. This view correlates to Professor Hogg’s formulation that “the distinctive characteristic of action taken under statutory authority is that it involves a power of compulsion that is not possessed by a private individual or organization.”⁸⁴

However, it is a fallacy to say that universities have only the powers of a natural person. The modern reality is that universities are gatekeepers to a wide range of careers. The difference in full-time paid employment rates between Canadian bachelor’s degree holders and high school graduates has increasingly widened in recent years.⁸⁵ In fact,

81 *Ibid.*

82 *Jackson v University of Western Ontario* (2003), 111 CRR (2d) 63 (available on CanLII) (ON Sup Ct J) [cited to CRR].

83 *BCUA*, *supra* note 75, s 61.

84 Peter W Hogg, *Constitutional Law of Canada*, 2013 Student Edition (Toronto: Carswell, 2013) at 37-13.

85 Statistics Canada, *Wages and Full-time Employment Rates of Young High School Graduates and Bachelor’s Degree Holders, 1997 to 2012* (Ottawa: StatCan, April 2014) online: Statistics Canada <<http://www.statcan.gc.ca/pub/11f0019m/11f0019m2014360-eng.pdf>> at 6.

even certain undergraduate degrees hold little weight in today's market, where masters degrees are increasingly becoming the norm. Professional careers like the law are completely inaccessible without extended, post-secondary education. Lawyers in British Columbia, aside from those who qualified in other jurisdictions, must have attended university or college for the equivalent of at least six years.⁸⁶ The law societies that set these regulations are clearly subject to the *Charter*; attempts to bar extra-provincial lawyers from practicing in a province have been struck down by the SCC.⁸⁷ If a law society violates the *Charter* by preventing a lawyer from practicing in another province, how can a university that can prevent someone from becoming a lawyer in the first place not also be subject to the *Charter*?

As well, universities have been granted specific statutory authority to grant degrees, powers not given to any other natural person. One has no option but to contract with a university—and therefore subject oneself to its powers of student discipline—in order to become a doctor, lawyer, engineer, nurse, teacher, or accountant, or enter into any other profession requiring a degree. When exercising the statutory power to grant degrees, it follows that universities should be made subject to the *Charter*. Further, this view falls within the framework laid out by Justice La Forest in *McKinney*. Even if the hiring and firing of staff members does not attract *Charter* scrutiny, the public dimensions of degree-granting cannot be ignored when students' fundamental freedoms are infringed.

C. *Charter* Application Factor 3—Specific Governmental Objective

Finally, the *Charter* applies to universities that are implementing a specific governmental objective. Recall that only the Alberta government has so far been found to have education as a governmental objective, and only then because the *PSLA* expressly states that “the Government of Alberta is committed to ensuring Albertans have the opportunity to participate in learning opportunities.”⁸⁸ Aside from Prince Edward Island, no other Province appears to have expressly legislated this objective.⁸⁹

Can it reasonably be said that no other provincial government considers education an objective? On the contrary, governments have long provided primary and secondary education for the purposes of equipping and enabling its citizens to participate in society and the workforce. With the growing demands for a university degree, it only makes sense that governments now continue this basic objective by providing university education.

Provincial governments' funding patterns not only reveal that education is a governmental objective, but also that the government exercises immense control over universities. Consider the University of Victoria; in the fiscal year 2012-2013, government grants made up \$264,000,000, or 52 percent, of the university's \$511,000,000 revenue.⁹⁰ It is illogical to suggest that the government would contribute so heavily to a single entity

86 Admission to the Law Society of BC presupposes the equivalent of at least three years of undergraduate study prior to completion of a bachelor of laws or equivalent degree at an approved faculty of law. See generally *Law Society Rules*, Adopted by the Benchers of the Law Society of British Columbia under the authority of the *Legal Profession Act*, SBC 1998, c 9, online: The Law Society of British Columbia <https://www.lawsociety.bc.ca/docs/publications/mm/LawSocietyRules_2014-12.pdf>.

87 See *Black v Law Society*, [1989] 1 SCR 591 (available on CanLII) [cited to SCR].

88 *PSLA*, *supra* note 39, Preamble.

89 See *University Act*, RSPEI 1988, c U-4, Preamble, which provides that “it is considered desirable, for the advancement of learning and the provision of sound instruction in the arts, the sciences and certain professional studies, to create a single, public, non-denominational institution of higher education in Prince Edward Island, having the rights and powers of a University”.

90 “2012-2013 Audited Financial Statements”, online: University of Victoria <<http://www.uvic.ca/vpfo/accounting/assets/docs/financial/uvicfinancialstatements/audited-financial-statements-2012-13.pdf>>.

except in furtherance of a specific objective. Furthermore, such large contributions must give rise to governmental control—universities consider the government’s interests in their decisions because they are reliant on government grants for over half of their revenue. This scenario applies equally to universities throughout Canada. If anything, the contribution to the University of Victoria is on the low end of the scale. Justice La Forest noted in *McKinney* that government operating grants made up 68.8 percent of York’s operating budget, and 78.9 percent of Guelph’s.⁹¹ Statistics Canada reveals that government contributions accounted for \$20.5 billion of university and college revenues across Canada in 2009.⁹²

Further, the government is not merely interested in furthering education in general, but rather uses selective funding to universities to pursue specific goals. In September 2013, the *Globe and Mail* reported the following:

Ontario’s government has taken its boldest step yet to compel universities and colleges to make hard choices about how they spend their resources, circulating a draft policy designed to stretch limited provincial dollars by narrowing some schools’ missions.⁹³

The Ontario government would greatly reduce funding to universities that refused to cater their programs to better suit the government’s objectives.

Using funding to force governmental objectives is nothing new. In 2002, Prime Minister Jean Chrétien unveiled “Canada’s Innovation Strategy”.⁹⁴ This white paper outlined the objectives of the government, which included giving universal opportunity to high school graduates to participate in postsecondary education, ensuring that fifty percent of 24 to 26-year-olds obtain postsecondary credentials, and implementing a five percent increase in admissions to masters and doctoral programs over the succeeding eight years. These objectives were ambitious and specific. One author described the import of the paper:

In a word, the federal government has set its sights on transforming Canada’s universities into [...] the entrepreneurial university and what others have described as capitalizing knowledge or academic capitalism.⁹⁵

Although this essay focuses specifically on the delivery of education by universities, the issue of selective government funding applies equally, if not more so, to university research. Not only do faculty members receive grants to conduct their research, but the universities are paid a significant administrative top-up to facilitate research programs. The government has essentially outsourced the majority of its research initiatives to universities through programs such as Canada Research Chairs and the Canada Foundation for Innovation.⁹⁶

91 *McKinney*, *supra* note 11 at para 39.

92 Statistics Canada, *Universities and Colleges Revenue and Expenditures* (Ottawa: StatCan, 31 August 2009) online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/govt31a-eng.htm>>.

93 James Bradshaw, “Specialize or risk losing funding, Ontario tells universities and colleges”, *The Globe and Mail* (18 September 2013) online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/specialize-or-risk-funding-ontario-tells-universities-and-colleges/article14393294>>.

94 David Cameron, “The challenge of change: Canadian universities in the 21st century” (2008) 45:2 *Canadian Public Administration* 145 at 164.

95 *Ibid.*

96 *Ibid* at 158.

The fact that education is a specific governmental objective is seen not only in the funding that is given to universities directly but also in the funding given to students to facilitate their education. In 2012, over 450,000 students were granted student loans so that they could attend post-secondary institutions.⁹⁷ Grants are awarded to any student of low- or middle-income families who has assessed need.⁹⁸ The government also contributes up to \$500 annually to a child's Registered Education Savings Plan.⁹⁹ Further, the amount of money that a university is able to charge its students is also regulated by the government.¹⁰⁰ Since 2005, the British Columbia government has limited tuition fee increases to 2 percent annually.¹⁰¹ Again, this array of government programs that facilitate access to education exists only because the pursuit of post-secondary education is a governmental objective.

Opponents of *Charter* application could argue that government funding alone was not sufficient to find that the *Charter* applied to universities in *McKinney*. However, recall that *McKinney* dismissed the notion that significant funding resulted in *governmental control* over a university.¹⁰² It was not until *Eldridge* that the governmental objective factor was fully elucidated. Therefore, even if the finding in *McKinney*—that government funding does not establish government control over universities—still holds true, *Charter* application to universities is still warranted on the basis that they are entrusted to fulfill a specific governmental function—the pursuit of education.

CONCLUSION—THE BENEFITS OF FREEDOM

It is understandable why universities have so vehemently opposed *Charter* application. Why would an organization willingly accept more restrictions to the way in which it operates? However, *Charter* rights are worth protecting, even at the cost of such restrictions. The clashes between universities and students canvassed in this paper have involved freedom of expression and religion, two freedoms that strengthen, rather than contradict, the purposes of universities. Justice Paperny found no conceptual conflict between academic freedom and freedom of expression:

Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist.¹⁰³

Universities exist to push the bounds of human knowledge and research, and to raise up the next generation of professionals, academics, and leaders. Mass censoring

97 Canadian Federation of Students, "BC Students on Parliament Hill this week to call for action on record high student debt", online: CNW <<http://www.newswire.ca/en/story/1247535/bc-students-on-parliament-hill-this-week-to-call-for-action-on-record-high-student-debt>>.

98 "Canada Student Grants", online: CanLearn <http://www.canlearn.ca/eng/loans_grants/grants/index.shtml>.

99 "Canada Education Savings Grant", online: CanLearn <<http://www.canlearn.ca/eng/savings/cesg.shtml>>.

100 See, for example, "Government's Letter of Expectations between the Minister of Advanced Education and The Chair of the Board of University of Victoria for 2014/15", online: University of Victoria <http://www.uvic.ca/universitysecretary/assets/docs/boardoperation/GLE_2014web.pdf> at 1: "The Government is responsible for setting the legislative, regulatory and public policy frameworks in which the public post-secondary institutions operate and which set the Institution's mandate as defined by the *University Act*."

101 "Affordable higher education for both students and taxpayers", online: Ministry of Advanced Education <<http://www.aved.gov.bc.ca/tuition>>.

102 *McKinney*, *supra* note 11.

103 *Pridgen CA*, *supra* note 46 at para 117.

of minority opinion hurts these goals and promotes a dangerous worldview—one in which it is permissible to ignore, or even silence, viewpoints that cause you to critically evaluate your own beliefs. There can be no meaningful exchange of ideas if we refuse to hear contradictory opinions. Universities' *raison d'être*, the pursuit of knowledge and the meaningful exchange of ideas, are also better served when freedom of expression, religion, and association are protected. Regardless of our religious beliefs, or lack thereof, we all have an organizational system that we use to process the information we encounter to formulate ideas and opinions. Freedom of conscience and freedom of religion protect these organizing systems, whether they are grounded in a traditional or secular belief, to ensure that democratic conversation is not stifled.¹⁰⁴

Furthermore, recognition of *Charter* application in no way prevents universities from legitimate censorship or action. Although the conflicts I have examined feature universities infringing rights in the interest of maintaining a trouble- and offence-free environment, this will not always be the case. Protection of our fundamental freedoms is subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁰⁵ The events between the student pro-life protesters and the University of Calgary are illustrative here. If the students' expressions truly did physically endanger others, then their censorship may have been justified. What makes the University's actions appear unjustified is that the danger did not stem from the protestors, but rather from another group of students who disagreed with the protestors' views. University autonomy is not threatened by requiring such important institutions to justify the infringement of students' *Charter* rights.

The recent cases that have come before the courts of Alberta, Ontario, and British Columbia reveal that the questions around *Charter* application to universities—left open by the SCC in *McKinney*—have yet to be conclusively answered. Alberta courts have reconciled *McKinney* and *Eldridge* by finding that the *Charter* applies to universities either in exercising statutory authority or in implementing the governmental objective of education. The Ontario courts have narrowly applied the former factor and have rejected outright the latter, holding that the Ontario legislation does not make education a governmental objective. However, regardless of what the legislation says, it is illogical to believe that education is not a governmental objective. One need only consider the billions of dollars of funding that is poured into universities across Canada to see that the government is using universities to fulfill its specific objectives of education and research. When the issue eventually returns to the SCC, the Court ought to declare that universities must abide by the *Charter* in facilitating the pursuit of education. Protecting the fundamental rights of students on university campuses will further the meaningful exchange of ideas and the pursuit of knowledge, the very reasons why universities exist.

104 See generally Waldron, *supra* note 1 at 9-14.

105 *Charter*, *supra* note 2, s. 1.