IMMUNIZING UNIVERSITIES FROM *CHARTER* REVIEW: ARE WE 'CONTRACTING OUT' CENSORSHIP?

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Introduction

Are Canada's university campuses a "*Charter*-free" zone?[1] Do students and faculty enjoy rights of free speech that may not be taken away at the whim of university administrations? More importantly, should they have such rights?

These questions arose again during the recent controversy at Concordia University in Montreal, where a moratorium on discussion of the Middle East was imposed after protests surrounding the Arab-Israeli conflict turned ugly. Similar questions were the subject of substantial public debate during the 1997 APEC protests at the University of British Columbia, and the subsequent inquiry.[2]

At UBC, censorship arrived in rather dramatic fashion with guns and pepper spray; as a result of the direct involvement of the RCMP, there could be no doubt that the *Charter* was in play. More recent episodes such as that at Concordia remind us that censorship of students and others at universities more often takes a form far more ethereal and possibly more insidious.[3] Is the bureaucratic crackdown at

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

[2] I disclose that, while a law student at UBC, I was arrested during the 1997 APEC protest and became a complainant before the RCMP Public Complaints Commission's Inquiry. For a description of the APEC events see W. Wesley Pue, ed., *Pepper in our Eyes: The Apec Affair* (Vancouver: UBC Press, 2000). I have also acted as counsel in two of the episodes I later describe in this article (as I will indicate where appropriate), and have had, through various executive positions with the B.C. Civil Liberties Association, involvement with others.

[3] My main concern here is with respect to out-of-classroom *student* speech as an element of academic freedom at universities. Certainly the academic freedom of professors and instructors is a serious issue, but it is bound up with traditional arguments regarding the role of the tenure system in protecting

Concordia an isolated incident? Is there perhaps a trend against free speech at our Universities?

It may be that the present degree of university censorship, as some will argue, is necessary for the maintenance of an open, dynamic and diverse learning environment. On the other hand, it might not be anything so modern and desirable at all, but instead a short-sighted reaction of those "[persons] of zeal" whom Louis Brandeis described as "well meaning but without understanding."[4] It could also be that the present situation is not the result of any real plan, benign or otherwise, but rather the result of an unprincipled process of 'muddling through' without any of the (at least somewhat) clearer guidance that constitutional precedent might provide.

Today, with the APEC events almost 5 years behind us and the *Charter of Rights and Freedoms* having reached 20 years of age, we might evaluate the state of freedom of speech within Canadian Universities. Is it better, worse, or the same? Does the *Charter* offer any protection for the students of Canada's 'independent' educational institutions? Should it?

In this brief article, I discuss some of the more and less notorious recent cases of censorship at universities, in support of my subsequent argument that some limited constitutional protection of speech may be a prudent imposition upon the traditional autonomy of Canadian universities. I will briefly consider the series of halting decisions that seems to be dissuading plaintiffs from asserting these kinds of *Charter* challenges, and bolstering universities' confidence that they can do as they please when regulating expressive conduct on campus.

A Few Anecdotal Reports

A. "Contract Censors": Universities as Regulators of Speech

If we accept that a high, if not unlimited, degree of freedom of expression is

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academic rigour and freedom of inquiry. Students do not of course enjoy tenure, and indeed the penalty for engaging in forbidden protest, display or discussion may be summary expulsion.

[4] *Olmstead v. US*, 277 U.S. 438 at 479 (1928).

fundamental to the creation of an adequate post-secondary learning environment,[5] then we would — and should — be disappointed when measures are taken by universities, generally asserting a right to use their own property as they wish, to suppress traditionally protected speech, either generally or (more often) based on its content.[6]

(i) Concordia University vs. Svend Robinson and Libby Davies

Perhaps the best-known recent example of university censorship is the aforementioned ban imposed by Concordia University in the wake of violent opposition to a speech by Israeli Foreign Minister Benjamin Netanyahu. There, protesters had asserted the most churlish form of censorship, creating a disturbance of such proportion that Mr. Netanyahu's speech could not be given, nor could his safety be assured. The University's response, however, was only slightly more enlightened. It simply imposed a broad ban on particular types of student communication (such as information display tables in the school's mezzanine concourse), and then forbade any discussion of the "Middle East Issue" at all.

Parliamentarians Svend Robinson and Libby Davies proposed to give speeches on Middle East peace to challenge the ban; the university sought — and received — an injunction to prevent it. However, Concordia rescinded the broader policy of silence before it could be challenged in Court, while predictably never conceding that there was any question whether the restriction was constitutional.

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[5] I assume here that the Canadian Association of University Teachers' views on free speech are widely held by the Canadian public. The Association stated:

> Academic freedom is essential for universities to fulfill their public responsibility to promote the unfettered search for knowledge and truth... Academic freedom means the right to freedom of speech and discussion, regardless of prescribed doctrine, political convention, or administrative convenience... Academic institutions have an obligation to defend academic freedom and not allow open discussion to be suppressed.

Canadian Association of University Teachers, "CAUT Statement on Freedom of Speech on Campus" (12 September 2002) online: <http://www.caut.ca/english/publications/news_releases/20020912FreedomSpeech.asp>.

[6] I focus here on speech that is overtly concerned with political or social commentary.

(ii) Osgoode Hall (York University) vs. Demitry Papasotiriou

A bizarre controversy began at Canada's largest law school when an Osgoode student named Omar Siddiqui, who is an adherent of the Islamic faith, wrote a series of articles in the student paper *Obiter Dicta* on subjects including Shariah (Islamic) Law. His defence of many of the more controversial practices in some Islamic countries, such as the dismemberment of thieves and the stoning to death of allegedly adulterous women, eventually led to a riposte from another student, Demitry Papasotiriou. But the latter went well beyond simple criticisms of any particular legal rules. He wrote that "contrary to Mr Siddiqui's remarks, there is NOTHING, absolutely nothing spiritual about that Islamic faith," which he described as "a protocol of social conduct, a hybrid if you will of the worst elements of communism and fascism co-existing in a monstrous symbiosis; of oppression and most pervasive and intolerable regulation."[7]

In a letter to *Obiter Dicta*, Dean Peter W. Hogg denounced Papasotiriou's article, and reminded "every member of the Osgoode community of our commitment to equality, which in this context means being respectful of the religious beliefs of fellow students."[8]

It is of course one thing to accept that everyone has an obligation to respect another's right to an opinion or belief. But should this be extended to impose an obligation to respect that opinion or belief itself, as Dean Hogg asserts? If so, what is left of criticism or debate? The Canadian Civil Liberties Association's Alan Borovoy wrote to Dean Hogg that "[r]eligious beliefs, no less than philosophical theories and political doctrines, must be fair game for the challenges and criticisms of university students." This is an expression of principle with which few Canadians, in my opinion, would find fault. Nevertheless, the University pressed ahead with disciplinary action against Papasotiriou for violation of its speech code.[9]

It may be that Mr. Papasotiriou expressed his views in an unnecessarily strident

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[7] Demitry Papasotiriou, "In Allah We Trust" *The Obiter (12* March 2001), online: <http://www.yorku.ca/obiter>.

[8] Peter W. Hogg, Letter to the Editors, *The Obiter* (19 March 2001), online: <http://www.yorku.ca/obiter>.

[9] "'Offensive' student article: Civil Liberties group says religion should be 'fair game'" *The National Post* (11 June 2001). I have been unable to determine, either from published sources or from colleagues at Osgoode, the outcome of the disciplinary proceedings, if in fact they concluded.

way. He clearly has strong views regarding the foundational principles of Islam, as well as their legal manifestations. But consider what would happen if similar criticisms were focused upon, for instance, Christianity? I haven't searched to see whether anyone has described the teachings of the Catholic Church, for instance, as "a hybrid . . . of the worst elements of communism and fascism co-existing in a monstrous symbiosis; of oppression and most pervasive and intolerable regulation" but I would be surprised if some Marxist scholar or admired activist had not used terms at least as critical as these.[10]

Of course, the pat answer is that Muslims are particularly vulnerable in a way that Catholics are not. This is possible,[11] but adopting such an analysis will require us to rank groups (and to assign expression rights) by degrees of victimization. This is no small challenge. Mr. Siddiqui's comment, for instance, that it was just to stone adulterous women to death (providing that it could be shown that they were adulterous) could easily be interpreted as intolerant, and even hurtful, speech directed at women.[12] Meanwhile, other statements that might cause offence, such as those particularly critical of American foreign policy, are vigorously defended by the academic community.[13] At the very least, one should be concerned that Dean Hogg, by some distance the most respected constitutional scholar in Canada, apparently attached so little importance to Mr. Papasotiriou's right to speak his views, and by implication so much to Mr. Siddiqui's.

The question here is not whether the speech involved transgresses the *Criminal Code* or provincial human rights legislation. If such an allegation is made, then it can

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[10] Ironically, Mr. Siddiqui, himself the "victim" of Mr. Papasotiriou's statements, was not averse to comparing the beliefs and actions of others to those of Hitler and Stalin: Omar Siddiqui, "Living in Fear", *Obiter Dicta* (9 September 2002), online: <http://www.yorku.ca/obiter>.

[11] Though campus crackdowns against mostly-Catholic anti-abortion groups suggest that there might be considerably vulnerability there as well, as I will discuss.

[12] Certainly one columnist seemed to think that Siddiqui's stated views could "jeopardize my freedom and safety if they were implemented in this country": Licia Corbella, "Intolerant of Oppression" *Calgary Sun* (6 May 2001).

[13] Consider the controversial statement of UBC professor Sunera Thobani in the wake of the 9/11 attacks that "the path of U.S. foreign policy is soaked in blood". See Sunera Thobani, "War Frenzy" online: September 11th Fallout Page <http://www.kersplebedeb.com.>. Now replace "U.S. foreign policy" with something like "the policy of Islamic regimes" and you begin to see the conundrum. For the various reactions to Thobani's words (from complaints to the RCMP of a 'hate crime' to Thobani's defenders in academia) see Glen Bohn & Kim Bolan, "Thobani accused of hate crime against Americans; Complaint sent to Ottawa police 'pure harassment', UBC professor says" *The Vancouver Sun* (10 October 2001).

be prosecuted and adjudicated in light of section 1 of the *Charter*. The question is whether a university should be able to implement regulations on offensive speech that are more restrictive than those which apply elsewhere in society, and if so, why?

B. "Sub-Contractors": The Disappointing Record of Student Government

As troubling as university censorship of students can be, the most enthusiastic censors are ironically turning out to be students themselves, acting through the delegated authority enjoyed by student governments. As private corporate entities recognized by universities but 'independent' from them, these organizations are able to exploit a rather extraordinary degree of power and immunity from effective review.

Student governments, legally at arm's length from the University itself (but tasked with broad authority on university campuses) tend to attract into their ranks well meaning and committed social activists. Unfortunately, though, such levels of energy and commitment to public service have the tendency to crowd from one's mind the idea that power over minority opinion must be exercised with restraint.

(i) Concordia Students Union vs. Hillel

It is to me infinitely regrettable that the majority of efforts to censor opinions on campus come from those who profess to be 'liberal' or 'progressive' in other areas. These groups have proven themselves able to develop a dogmatic canon of beliefs on a range of issues, and woe betide those who dare dissent.

One of these received beliefs of mainstream campus activism concerns the Arab-Israeli conflict, and, deservedly or otherwise, is most frequently critical of Israeli government policy. At Concordia, as I mentioned, such activists led a riotous opposition to Mr. Netanyahu's speech. Of course, student activists also tend to participate most actively in student government. It was therefore little surprise to some that, a few weeks after the aborted presentation, the Concordia Student Union took measures to ban the University's chapter of Hillel, a Jewish students' group, purportedly for distributing recruiting literature of the Israeli army's "Mahal" (foreign soldiers) program.

I have no informed opinion on Hillel's views on the Middle East peace process, if indeed such a group can be attributed with a single set of views on such a vast

topic. But the reaction of the Student Union to the actions of a single person — a person who may or may not have been a Hillel member, let alone representative of the organization itself — appears to have been hasty and an overreaction.[14] Indeed, one might suspect that the Union was looking for an opportunity to strike a blow, not against criminal activity, but rather against Hillel's pro-Israeli stance, which appears to offend many student activists.[15]

When the latest controversy hit the fan, appeals were made for the University to order that the Student Union reinstate Hillel; the Student Union acceded that they would do so if the University requested it. However, calling the CSU's overtures "inappropriate and self-serving", the University declined to intervene.[16]

Of course, in barring Hillel, the CSU was not acting on behalf of the University, and Concordia's refusal to intervene should not be seen as an endorsement of the Student Union's position. I am not suggesting that Student Unions generally, or any one in particular, are "sub-contractors" in the sense that they routinely do the bidding of the university with respect to censorship. But both the university itself and the student government are institutions with interests that frequently coincide. Both may be unwilling to tolerate speech that tends to be disruptive or far outside the political or social mainstream, however that is defined. At times what is within the mainstream of student interest will diverge from the universities', as with, for instance, tuition fee increases. With respect to particularly challenging and controversial issues, the views of the student bodies can be expected to coincide quite nicely with those of the university administration, as both might be happy if troublesome minorities just went away.

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[14] So hasty, in fact, that it resulted from a meeting of only 9 of the 27 Council members, conducted at midnight on the eve of exams, according to university Provost Jack Lightstone as reported in Concordia's student newspaper. Hillel, incidently, denied that it had distributed the pamphlet at all: Steven Faguy, "Concordia distances itself from Hillel suspension" *The Link* (6 January 2003), online: <http://thelink.concordia.ca/breakingnews/02/12/06/2355243.shtml>.

[15] B'nai Brith accuses the Concordia Student Union of conducting a campaign against Hillel, suggesting that the Union participated in the anti-Netanyahu riot of September 19: see Marvin Kurz, "It's good to be a Jew in Canada" *The Globe and Mail* (8 January 2003) A13. The Student Union denies that anything apart from the recruitment was at issue in the "suspension" of Hillel's funding: Yves Engler, "Union not to blame" *The Globe and Mail* (10 January 2003) A10. In fairness to the CSU, it must be pointed out that it had attempted to support the expression rights of both sides, and in fact was responsible for inviting Mr. Netanyahu to Concordia in the first place.

[16] Statement of Provost Jack Lightstone, quoted in Faguy, *supra* note 14. Hillel was later reinstated at Concordia.

(ii) Anti-Abortion Protesters in British Columbia

In British Columbia, one of the few things most people agree upon is the right of a woman to have an abortion.[17] Of course a minority opinion exists, and this opinion is often a result of devotion to a particular religious doctrine. In this province, therefore, small groups of (mostly Catholic, in my observation) students have attempted to form groups to petition their fellow students to reconsider their opinion on the abortion question.

At many, if not most universities, organized student activities desirous of using property administered by the student government must be created through formal subsidiary organizations of the students' association, *i.e.* through officially sanctioned "clubs". While this arrangement simplifies organizational tasks and liability insurance arrangements, it also gives the student government a rather unique authority over the constitution — and deconstitution — of student activist groups. This is an authority that has been, in my opinion, routinely abused.

At UBC, the Alma Mater Society (the student government) has conducted a campaign against the display by its resident anti-abortion groups of images that graphically compare abortion to incidents of historical atrocity such as the Holocaust. In one episode, the Society forced the removal from a display table of a photo album containing snapshots of such images; in another, the "Student Administrative Commission" (an executive body of the AMS) banned even the written mention of such materials from the Student Union Building. Refusal to follow such guidelines could result in the deconstitution of the club. In one notorious incident in November of 1999, three students (one was an elected member of the AMS Council; the other two were non-elected AMS "External Commissioners") attacked and destroyed a display consisting in part of these "GAP" images.[18]

Elsewhere, opposition to student anti-abortion groups is focused even less on the medium than the message. At the University of Victoria in the Fall of 2000, the UVic Students' Society (UVSS) determined that a poster by a club called "Youth Protecting Youth" (YPY) was in violation of the Society's resolutions. The poster,

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[17] A recent poll suggested that two thirds of British Columbians supported a woman's right to choose: "66% are pro-choice, poll finds" *The Vancouver Sun* (31 August 2000) A1.

[18] "GAP" stands for Genocide Awareness Project; the juxtaposed images are produced by an American group called the Center for Bioethical Reform and distributed to anti-abortion activists in Canada and the US. I was counsel for several students in a lawsuit against the Alma Mater Society and the individual students involved; none of the facts I describe here are controversial in that case.

which the UVSS had initially approved for display, indicated only that there was no criminal law in Canada against abortion. The UVSS had two policies that bore on the issue. The first policy was that the UVSS was officially "pro choice". The second was that no club could take a position opposed to an official UVSS policy. As a result, the UVSS Council met and deconstituted the YPY group, therefore depriving it of the legal right to conduct activities as a group on Campus. Only after considerable public controversy[19] and the subsequent filing of a discrimination complaint with the Human Rights Commission[20] did the UVSS relent and reconstitute the club.

Around that same time, at the University College of the Caribou, "Students for Life", another anti-abortion club, set up an information table that featured biology-lab models of fetal development. The display was banned, and the gestational models confiscated by the UCC's own Students' Society because of complaints that some had found them "offensive." A controversy erupted, with the student government debating for months whether the group should have the "right" to use the models in their anti-abortion work. In the Fall of 2000, the Students' Society voted to deconstitute the Students For Life club, ostensibly because it had barred a student reporter from one of its meetings.[21]

Elsewhere in B.C., the forced removal of another anti-abortion display (in which small white crosses were set up on a lawn in numbers supposedly equivalent to those abortions performed in an average day) suggests that the censorship of anti-abortion activists is becoming systematic wherever complaints of offence are made.[22]

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[19] Stewart Bell, "Ousted Anti-abortion Group Complains" *The National Post* (26 October 2000) A7; T. O'Neill, "At B.C.'s universities, preachers of 'tolerance' are proving to be the most intolerant of all" *Report Newsmagazine* (13 March 2000).

[20] I represented two members of YPY in their complaint to the Commission.

[21] I was involved with the Caribou controversy through my position with the B.C. Civil Liberties Association, and my knowledge is based upon conversations with some persons involved, including the University president. The events were reported in certain Christian publications, but apparently not elsewhere. See for instance: Karen Stiller, "Not a chicken or dragon in the bunch" *The Interim* (December 2000); and Jeff Dewsbury, "Civil liberties association speaks out on behalf of pro-life club" *B.C. Christian News* (October 2000), online: <http://www.canadianchristianity.com/cgi-bin/bc.cgi?bc/bccn/1100/sibc.>.

[22] Jennifer Feinberg, "Campus Abortion Display Gives Life to Complaints" *The Chilliwack Progress* (1 March 2002) A1; Lisa Jorgensen, "Anti-abortion Display Removed, UCFV Students Upset by Policy" *The (Abbotsford) Times* (1 March 2002) 2.

Nor is there reason to believe that the lot of student anti-abortion groups is better in other provinces. Recently in Ontario, a "pro-life" presentation by a guest speaker at a meeting of Lambton College's Christian Fellowship group was cancelled because the college feared that it would not be "balanced."[23] In another episode, the Ryerson Students' Administrative Council (RyeSAC) refused official group status to the Ryerson University Choose Life Association, with RyeSAC president Darren Cooney expressing concern that materials distributed by the group — apparently including quotes from Mother Teresa on abortion — were "strongly worded."[24]

These incidents raise a difficult issue: as problematic as the application of the *Charter* to universities is, students' societies, which are private bodies legally distinct from even the University's tenuous connections to government, seem immune altogether. Yet they control crucially important aspects of the university experience. Does their corporate status mean that students have no protection against them, or against a university that wished to 'contract out' to them its regulation of speech?

The *Charter* on Campus

A. Expression as an Element of a University Education

Universities are without a doubt a traditional forum for the discussion and debate of the most pressing and controversial social and political issues.[25] They could be said, at least in part, to have been created or continued by governments for such purposes. The balancing of these various commitments can be achieved without undue strain, as American universities have found:

> Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce

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[23] The College claimed that its constitution forbids "events that provide a one-sided view of a political or religious issue," according to news reports: Jack Poirier, "College cancels pro-life speaker: Decision opposed by some faculty and students" *The Observer* (Sarnia) (25 March 2003) A3.

[24] Suzanne Ma, "Pro-life group still alive" *The Eyeopener* (18 March 2003) online: <http://www.theeyeopener.com/storydetail.cfm?storyid=523>.

[25] A university campus, "at least for its students, possesses many of the characteristics of a public forum": *Widmar v. Vincent*, 454 U.S. 263 at 267; 102 S. Ct. 269, 273 n. 5 (1981).

> resources or "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* v. *New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result); see *University of California Regents* v. *Bakke*, 438 U.S. 265, 312 -313 (1978) (opinion of POWELL, J., announcing the judgment of the Court). Finally, we affirm the continuing validity of cases, e. g., *Healy* v. *James*, 408 U.S., at 188-189, that recognize a university's right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.[26]

Earlier, the US Supreme Court had foreshadowed the 'compatibility' test adopted in *Committee for the Commonwealth of Canada* with respect to universities:

> The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.'[27]

In *RWDSU v. Dolphin Delivery Ltd.*, McIntyre J. considered the importance of free expression, *inter alia*, in educational institutions. He stresses the continuity with pre-*Charter* principles:

> Freedom of expression is ... one of the fundamental concepts that has formed the basis for the historical development of the ... educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.[28]

This was reiterated in *McKinney v. University of Guelph*,[29] where Chief Justice Dickson and Justices La Forest and Gonthier described academic freedom as "essential to our continuance as a lively democracy."[30] In the Justices' view, the sole "focus" of academic freedom, which "serves a vital role in the life of the university",

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[26] *Ibid.* at 276-77.

[27] Wright, "The Constitution on the Campus" (1969), 22 Vand. L. Rev. 1027 at 1042, cited in *Grayned v. City of Rockford*, 408 U.S. 104 at 116 (1972).

[28] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583.

[29] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

[30] *Ibid.* at 286-87.

is to protect "against the censorship of ideas."[31]

B. The University as a Government Actor: McKinney after Eldridge

The Supreme Court has not had the opportunity to consider academic freedom or free speech as a *Charter* right, and the question remains open. The leading case considering the *Charter*'s application to universities, *McKinney v. University of Guelph*, found that the university was, at least for the purposes of establishing mandatory retirement rules, an actor independent of government and thus immune from *Charter*.

However, the *McKinney* ratio was cobbled together from four sets of reasons. In fact, a majority of the Court considered that universities might indeed perform some functions that would be subject to *Charter* review.[32] Nevertheless, *McKinney* arguably establishes a fairly strong presumption against the application of the *Charter* on university campuses.

McKinney did, however, provide for exceptions. Recently, in *R. v. Whatcott*,[33] the conviction of an anti-abortion protester for leafletting on the campus of the University of Regina was overturned on appeal to the Court of Queen's Bench. In reaching this decision, Justice Ball considered the special role of free speech at a university:

> The forum chosen by Mr. Whatcott to express his views was the University Campus, a locale one would expect to facilitate and encourage free and open intellectual discussions. Whether or not the purpose of the Bylaw was to prohibit the distribution of all written material or only advertising matter, its application to Mr. Whatcott's activity was intended to, and clearly did, effectively stop him from communicating his views. As such, it infringed upon his freedom of expression protected by s. 2(b) of the *Charter*.[34]

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[31] *Ibid.* at 376.

[32] *Supra* note 29 at 418 per L'Heureux-Dubé J.; 444 per Sopinka J.; and 371-79 per Wilson and Cory JJ.

[33] *R. v. Whatcott*, [2002] S.J. No. 599.

[34] *Ibid.* at para 47.

Of course, it was difficult for the University of Regina in *Whatcott* to invoke the University of Guelph's argument in *McKinney* (*i.e.*, that it was not executing a governmental decision), because the University of Regina enjoyed a statutory authority to enact bylaws that were enforceable through the provincial courts in much the same way as a municipality's are. As such, its position was closer to the defendant municipality in *Ramsden v. City of Peterborough*,[35] (where an anti-postering bylaw was struck down) than with the University of Guelph in *McKinney*.

There is a substantial question whether the shield offered to universities by *McKinney* could be said to have survived the Court's subsequent decision in *Eldridge v. British Columbia*.[36] There, the Court reconsidered the application of the *Charter* to private institutions implementing government programs. The Court found that the *Charter* applied, and that the administration of the programs in question (the provision of health care services in hospitals) must be non-discriminatory. Justice La Forest said at paras. 42 and 44 (emphases added):

> It seems clear, then, that a private entity may be subject to the *Charter* in respect of certain inherently governmental actions... *Just as governments are not permitted to escape Charter scrutiny by entering into commercial contracts or other "private" arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities*. In *McKinney*, I pointed to *Slaight*, *supra*, as an example of a situation where action taken in furtherance of a government policy was held to fall within the ambit of the *Charter*. I noted, at p. 265, that the arbitrator in that case was "part of the governmental administrative machinery for effecting the specific purpose of the statute." *"It would be strange," I wrote, "if the legislature and the government could evade their Charter responsibility by appointing a person to carry out the purposes of the statute"*; see *idem*.
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> ... As the case law discussed above makes clear, the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private." Second, an entity may be

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[35] *Ramsden v. City of Peterborough*, [1993] 2 S.C.R. 1084.

[36] *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624.

> found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. *In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities.*

Universities, while perhaps not government actors the majority of the time, are nevertheless *places* that owe their existence to governmental action. Their central function — the provision of university education and the conferral of degrees — is controlled by the government.[37]

Often they are established on government land granted free by the government, territory that is offered statutory protection against expropriation and taxation.[38] University land is not freely alienable; its use is governed by the purposes established by statute,[39] which usually requires that it be used for university purposes.[40] Is one of these purposes the fostering and protection of free speech? Certainly Justice Ball must be correct when he stated that a university is "a locale one would expect to facilitate and encourage free and open intellectual discussions."[41] One could certainly make the argument that this expectation might rise to the level of a contractual right, *i.e.*, that the existence of reasonable freedom

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[37] Professor Hogg, pre-*Eldridge*, rejected the 'public function' test in favour of that of governmental control. However, even on this point, Hogg concedes that the central question is "whether the government has assumed control *of the function*", not simply the degree of state control over the institution: Peter W. Hogg, *Constitutional Law of Canada 4th ed.* (Toronto: Carswell, 1997) at 849-50 (emphasis added).

[38] With respect to UBC, see *University Act*, R.S.B.C. 1996, c. 468, s. 54.

[39] By way of example, the University of British Columbia is a university continued pursuant to the *University Act*, R.S.B.C. 1996, c. 468, s. 3 *et seq.* That Act restricts sale of lease or land that does not conform with the terms of the grant of the land. In turn, the land upon which the University was built had been granted through the *British Columbia University Site Act, 1918*, S.B.C. 1918, c. 94. That *Act* permitted the Lieutenant Governor in Council to "grant to the University of British Columbia the said Lot 3044 for the purposes of a site for the said University." This combination of legislation appears to restrict any statutory university land from being used for non-University purposes.

[40] The *University Act, ibid.*, describes a mandate to "generally, promote and carry on the work of a university in all its branches, through the cooperative effort of the board, senate and other constituent parts of the university."

[41] *Supra* note 33.

of expression is an implied term of the agreement between a university and the student.

Like the hospitals in *Eldridge*, Canadian universities, in providing education, are acting in furtherance of governmental policy as elucidated through statute. However much independence is granted to an institution in this country, the ability to confer University degrees is rigidly controlled by statute. Despite the recent relaxing of certain rules in Ontario[42] and one or two anomalous US-affiliate schools,[43] there is as yet no 'free market' for degree-granting institutions in Canada. This appears to reflect a social choice to treat university education as a public, rather than private, function. While universities may do many things that are clearly private in nature, such as entering into the contract at issue in *McKinney*, the provision of a university education to students in itself is, in my view, a central public endeavour.

This argument is supported by the fact that, while the university does not usually exercise coercive government power in the traditional way, its authority is no less coercive. Over the last few decades, the successful completion of a university education has become a virtual prerequisite of successful careers in many, if not most, professions and trades. Indeed, when a professional school, such as Osgoode Hall in the *Papasotiriou* case discussed earlier[44] considers expelling a student for his speech, the university finds itself in a role as 'gatekeeper' to the profession of law, as was the defendant in *Andrews v. Law Society of British Columbia*,[45] where the *Charter* was found to apply.

In *Committee for the Commonwealth of Canada v. Canada*,[46] the existence of a government actor was not in dispute. The case involved federal regulation that forbade the distribution of pamphlets at airports. The majority considered it important that the function of governmental property be considered. Finding that airports were, among other things, a forum for public communications, it was held

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[42] *Post-secondary Education Choice and Excellence Act, 2000*, S.O. 2000, c. 36 as amended.

[43] Lansbridge University in New Brunswick (an internet-based school) and the University of Phoenix in B.C. offer degrees in conjunction with US institutions.

[44] I don't mean here to enter into the debate over whether law schools are best conceived as institutions for 'lawyer training' or for broader purposes; my point is only that, whatever their other functions, law schools are in the business of providing a prerequisite to participation in an important and lucrative marketplace.

[45] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

[46] *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.

that the *Charter* applied to protect the distribution of political literature there. The majority found that speech should be permitted to the extent that it did not interfere with the central functions of the place in question.

Nevertheless, the airport in question in *Committee for the Commonwealth of Canada* was still public property, and the restrictions imposed were clearly governmental. But does the importance of communication at international airports diminish if the government establishes, by statute, an independent body that then imposes restrictions on its own? Again, Justice La Forest's judgment in *Eldridge*, excerpted above, seems to anticipate and preclude such an objection.

Conclusions

I confess that I have no clear and easy solutions to the problems of speech regulation on campus. I think that the episodes I have reviewed suggest that such rules, formal or *ad hoc*, may be doing more harm than good, though both the harm and good are difficult to quantify. My preference is that, whatever 'time, place and manner' restrictions may be appropriate to ensure that unfettered speech does not interfere with the University's central purpose of instruction and research, these restrictions should be set out clearly in advance and should aspire to content-neutrality. This suggests requirements of 'prescription' and 'non-discrimination', ideas that are, not coincidentally, cornerstones of ss. 1, 2, 7, and 15 of the *Charter of Rights and Freedoms*.

Even these simple suggestions are not without their difficulties, as it is precisely the content of some speech that can make it potentially disruptive (particularly where, as in the case of the Netanyahu speech at Concordia or the anti-abortion displays at UBC, those opposed to the content threaten to become violent if it is allowed). While permitting the university a good deal of latitude in allocating its resources, there should also be *some* obligation upon the university to take reasonably prudent steps to afford a secure forum for unpopular speech.

My central argument is that, wherever the line should be appropriately drawn, it should not be entirely up the universities or their student-government proxies to draw it. There is a gulf between that level of free expression on campus in which society has a keen interest in nurturing and the level that a university (or its constituents), at any given time, might consider expedient or convenient to permit. It is just this sort of divergence of interest that constitutional rights as enshrined in the *Charter* were designed to address.

The university experience is one of the most important phases of the social and intellectual development of an informed and active citizen. Society has an overwhelming interest in ensuring that it is a time in which our dynamic liberal values are fostered and encouraged, not frustrated and stymied by the suppression, no matter how well-meaning, of unpopular ideas. The *Charter* can and should play a role in the protection of such interests.