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# Alberta Appellate Court Renders Significant Decision on University Autonomy and Expressive Rights

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Universities value their autonomy, and though subject to court supervision, have long been accorded significant leeway in managing their academic and non-academic affairs. The Alberta Court of Appeal has issued a decision that is controversial in its recognition that the *Canadian Charter of Rights and Freedoms* governs an Alberta university's control over the use of its space. This decision conflicts with jurisprudence in other jurisdictions and may be challenged, but does highlight the pressure facing university decision-makers today, particularly when managing those who assert a right of free expression.

## Background

The issue in [UAlberta Pro-Life v Governors of the University of Alberta](#) involved UAlberta Pro-Life's use of the University of Alberta "Quad" – a high traffic, public space on campus – to conduct an anti-abortion event. The University allowed the Pro-Life to use the Quad in 2015.

Pro-Life held very large placards displaying photographs of fetuses at varying stages of development and attracted a counter-protest that the University managed by directing the counter-protesters to a designated space. Based on the day's events, Pro-Life filed a complaint against several named protesters under the University's student code, relying on various principled references to freedom of "speech" and alleging a breach. The University declined to pursue the complaint.

When Pro-Life also sought to conduct a second event, the University conducted a security assessment. Based on the assessment, it gave Pro-Life an option of paying \$17,500 to cover 100% of the estimated costs of security or conducting the event in an easier to secure space. Pro-Life appealed this decision to the Dean of Students, who issued a well-reasoned eight page decision that rested on the assessment, the University's limited resources and the limited impact of its cost-shifting proposal, among other factors.

Pro-Life sought judicial review of both the University's decision not to pursue its student code complaint and the University's decision to shift its security costs. The Alberta Court of Queen's Bench dismissed the application in October 2017. The application judge's handling of the security costs decision was notably deferential. She held that the University appropriately considered and balanced *Charter* values as required by the Supreme Court of Canada's decision in *Doré* and that it

was not necessary to consider whether the *Charter* directly applied to the University.

Pro-Life appealed, and the British Columbia Civil Liberties Association intervened in support of its position. Both Pro-Life and the BCCLA argued that the *Charter* applied directly to the University.

## The Alberta Court of Appeal Decision

The Court of Appeal affirmed the student code complaint decision but declared that the application judge's handling of the security costs decision was erroneous. It did not order any other remedy, in part because the entire matter was agreed to be moot.

In affirming the student code complaint decision the Court held that Pro-Life had no standing to challenge the University's decision because, under the University's code, the University enjoyed a broad discretion in the exercise of its disciplinary powers, a discretion akin that of a prosecutor. A complainant's ability to seek review, the Court explained, is limited to situations of "fundamental unfairness."

In dealing with the University's security costs decision, the Court held that the *Charter* directly governed, ultimately stating that the *Charter* applies for the following five reasons:

- (1) The education of students largely by means of free expression is the core purpose of the University dating from its beginnings and into the future. It is a responsibility given to the university by government for over a century under both statute and the *Constitution Act, 1867*. It is largely funded by government and by private sector donors who likewise support and adhere to the core purpose of the University. Education of students is a goal for society as a whole and the University is a means to that end, not a goal in itself.
- (2) The education of students is the acknowledged core purpose of the University even by the University's own view of its mandate and responsibility. The University recognizes that society of Alberta, Canada and the World benefits from higher education and its production of wisdom, innovation and associational harmony and peace. In a sense, education of a younger generation is the primary duty of the generations that came before. Again, the University is a method for the older generations to pass both knowledge and values down to the younger generations.
- (3) The ability of students to learn and to debate and to share ideas is not only a central feature of the core purpose of the University, but also the grounds of the University are physically designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space. This involves infrastructure and land holdings granted to the University and / or sustained by money from many sources. These resources of infrastructure and land holdings are, above all, designed to permit interaction, assemblies, for a, and the ancient characteristics of educational exchange.

(4) Recognizing the *Charter* as applicable to the exercise of freedom of expression by students on the campuses of the University is a visible reinforcement of the great honour system which is the Rule of Law. The core values of human rights and freedoms, democracy, federalism, Constitutionalism, equality and respect for minority interests are continually reinforced and invigorated where it is apparent that there are no places where the government is present by proxy and yet the *Charter* writ does not run.

(5) The recognition of the University's being subject to s 32 of the *Charter* in relation to freedom of expression by students on University grounds does not threaten the ability of the University to maintain its independence or to uphold its academic standards or to manage its facilities and resources, notably in light of the degree of deference available to the University ... [at para 148]

The Court further held that the application judge's *Charter* analysis was inadequate and incorrect, primarily because she failed to place the onus on the University to justify its decision and hold the University to a "robust" form of review consistent with the *Charter's* freedom of expression guarantee. Equally significantly, following the Supreme Court of Canada's recent *Vavilov* decision, the Court held that the University decision must be correct because the decision implicates *Charter*-protected rights. It said:

[195] Those other social values also include the institutional need of the institution responsible for the place (here the University) to be a suitably regulated, peaceful and safe environment equally for all its students, faculty, staff and visitors. Those values also include the need of an institution of higher learning to focus its limited resources on its foundational educational objectives. The chambers judge referred to some of this, but only in the course of just adopting as within a group of alternatives of the University's reasoning, *not by her independent assessment*. [emphasis added]

Beyond criticizing the application judge's approach, the Court says little more about the University's decision, including whether or not it was correct. The Court was, however, clearly concerned that the shifting of 100% of the University's expected security costs established what amounted to a "heckler's veto" – a pejorative concept denoting an unthinking restriction on expression based on concerns about a violent reaction by hecklers.

## Significance

Much will be said about the Court's decision on the application of the *Charter*. It raises significant questions about universities' autonomy from government and the appropriate test for *Charter* application. There is, we note, clear jurisprudence from the Court of Appeal for Ontario and the British Columbia Court of Appeal that holds that universities are not directly subject to the *Charter* in their control of university space.

More practically, shifting the costs of security to groups seeking to use university space is not prohibited by this Alberta case and thoughtful and well-balanced university decisions should

normally prevail. In this regard, decision-makers should always consider the impact of cost-shifting on expressive activity and may wish to invite submissions on ability to pay.

If you require further information on this decision, please contact [Frank Cesario](#) at 416.864.7355, or [your regular Hicks Morley lawyer](#).