Universities, Human Rights Codes, and the Charter: Declarations of Students' Rights as a Mechanism for Protecting Fundamental Freedoms at Canadian Universities

By © Brandon Scott LeBlanc. A Thesis submitted to the

School of Graduate Studies in partial fulfillment

of the requirements for the degree of

Master of Arts in Political Science

Memorial University of Newfoundland

October 2019

St. John's, Newfoundland and Labrador

Abstract

University campuses have historically served as spaces in which individuals are free to participate in critical thought and unrestricted inquiry. The marketplace of ideas is fundamental to higher education, but is increasingly under threat. Anti-discrimination initiatives of public law have failed to sufficiently protect students from the discriminatory actions of university administrations. The judiciary's liberal constitutional interpretation of the application provisions of the Canadian Charter of Rights and Freedoms *has deemed the* Charter *applicable only to government activity, while human rights legislation suffers from a lack of consistency and has proven unreliable in the context of private entities engaged in public interests. To solve the dilemma, the author argues that universities ought to reconfigure internal policy that seeks to respect, protect, and uphold the rights and freedoms of students. Properly enforced, this improved human rights framework provides a stable alternative to abstract applications of public law.*

Acknowledgements

This thesis originates in a longstanding interest in constitutionalism that began when I was an undergraduate student at St. Thomas University and taking courses with Professors Tom Bateman and Patrick Malcolmson in the Political Science Department, and with Professor Christina Szurlej in the Human Rights Department. My thanks go to the many outstanding professors I have been fortunate to learn from, and who inspired and encouraged me to dream big.

I am deeply grateful to my supervisor, Professor Kelly Blidook, for his guidance and support throughout the development of this thesis. His feedback, advice, and insight has been enormous, and this thesis would not be possible without his dedication. My thanks to Professor and Graduate Coordinator Amanda Bittner, whose guidance and support has been invaluable throughout my time in the M.A. program. My sincere thanks to the School of Graduate Studies and the Department of Political Science at the Memorial University of Newfoundland for their generous financial support, which made my participation in the M.A. program possible.

Above all, I would like to acknowledge my family – Darren, Janet, and Justin – whose love and support has been immeasurable, and without whom I would hardly be able to chase my many ambitions, academic and otherwise.

This thesis is dedicated to my late grandmother Rae Jeannine LeBlanc (née Van Buskirk), who passed away mere weeks before my acceptance into the M.A. program.

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“Let all with something to say be free to express themselves. The true and sound will survive; the false and unsound will be vanquished.”

– Fred S. Siebert

Chapter 1

Introduction

Despite the introduction of the *Canadian Charter of Rights and Freedoms* in 1982, and multiple rounds of revitalizing provincial and federal human rights legislation, Canadian university campuses have continuously been at the centre of concerns for human rights and freedoms. University administrations have frequently sought to silence students that express unpopular and controversial viewpoints, and have repeatedly managed to evade reprimand when doing so. The predicament begs the question, what are the limitations of public law in protecting the rights and freedoms of students enrolled at Canadian universities? This study seeks to answer this question, and introduce a framework that better regulates the relationship between university administrations and students in a manner that substantially alleviates the human rights and freedoms concerns within.

Canadian university campuses have often remained within a blind spot of anti-discrimination initiatives. Due to its limited application provisions, and a dominantly liberal constitutional interpretation by the judiciary, the *Charter* is of little value to non-government entities. Likewise, the limited scope of provincial and federal human rights legislation has left many important aspects of university life outside its reaches. To address the identified problem and restore a sense of justice to university campuses in Canada, I argue that universities ought to adopt internal policy that seeks to respect, protect, and uphold the rights and freedoms of students. Statistics consistently confirm both the desire of citizens and internationals to pursue post-secondary education at Canadian universities, and an economic emphasis on providing tertiary education in Canada – a better human rights framework is necessary to protect the rights

and freedoms of these individuals. While declarations of students' rights already exist at a small number of Canadian universities, their methods of application and enforcement have been problematic – a viable solution rests in a rework of this framework. Students' unions and advocacy alliances will need to lobby for these declarations in order to pressure, and ultimately convince, universities to adopt such robust and binding policy.

Canadian Government Terminology

Canada is a federal state comprised of ten provincial governments, three territorial governments, and one federal government, and thus confusion arises when government terminology is used in general context. When discussing matters exclusive to governance in Canada, this essay adopts the terminology and definitions contained within the Parliament of Canada's *Interpretation Act*. Unless otherwise specified, 'provinces' refers collectively to the provinces and territories, 'legislatures' refers collectively to the legislative bodies of the provinces and territories, and 'governments' refers collectively to the legislature of each province and territory, and the Parliament of Canada (Canada, 1985b). 'Human rights legislation' refers collectively to the human rights acts/codes of the federal government and the provinces and territories, exclusive of the *Canadian Charter of Rights and Freedoms*, which will be referred to as the *Charter*.

Background of Study

Higher education is important to Canadian culture. Canada consistently ranks second among Organisation for Economic Co-operation and Development (OECD) countries in the attainment of tertiary education. 57 per cent of Canadian residents ages 25-64 have attained some form of tertiary education – second only to Japan, and far above the OECD average of 37 per

cent (2018: 54). Of residents ages 25-34, 61 per cent have attained the same – second only to South Korea, and also far above the average of 44 per cent (2018: 55). According to data collected from the 2016 census, Statistics Canada reports that 28.5 per cent of Canadians ages 25-64 possess a bachelor's degree or higher, while 3.1 per cent of Canadians in the same age demographic possess a university certificate below bachelor's degree (2017b: 2). In 2016, an additional 6.7 per cent of the working-age population reported having "some postsecondary [education]," but not possessing a degree, certificate, or diploma (Statistics Canada, 2017a).[1] Statistics Canada further reported that in the 2015/2016 academic year, 1,307,277 individuals were enrolled in Canadian universities, of which approximately 1,163,477 were Canadian citizens and permanent residents (2017c).[2] The OECD's 2018 Education at a Glance report indicates that Canada's total expenditure on educational institutions as a percentage of gross domestic product in 2015 was 6 per cent, above the OECD average of 5 per cent (258). The 2017 report indicates that, while total expenditures at the non-tertiary education level was slightly less than the OECD average of 3.6 per cent, total expenditures at the tertiary education level was the second highest of all OCED countries at 2.6 per cent – second only to the United States (183). These statistics suggest two things: (1) a desire of Canadian residents to pursue post-secondary education, and (2) an economic emphasis on tertiary education in Canada. Justice La Forest of the Supreme Court of Canada stated, "Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic

[1] The percentage of university education, oppose to college education, within the "some postsecondary" category is unknown.

[2] This figure assumes that the percentage of non-Canadian citizens/permanent residents enrolled in university programs has maintained since the 2014/2015 school year, the most recent year in which such statistics are available (Statistics Canada, 2016).

freedom and excellence is essential to our continuance as a lively democracy" (*Mckinney v. University of Guelph*, 1990: 286).

Despite the importance of higher education in Canadian culture, universities have continuously sought to censor students whose viewpoints are deemed controversial and unpopular by their peers. The case of Lindsay Shepherd is representative of the current attitude of university administrations. In 2017, Shepherd, a graduate student and teaching assistant at Wilfrid Laurier University, presented an undergraduate communications class two video segments from *The Agenda with Steve Paikin*, a current affairs show on Ontario public broadcast. The videos featured University of Toronto psychology professor Jordan Peterson debating the compelled use of gender-specific pronouns. Soon afterward, a meeting was held in which university administrators chastised Shepherd's decision to play the videos to the class, and threatened both termination of her employment and discipline for non-academic misconduct. One university administrator compared neutrally playing a video that is critical of gender-neutral pronouns to neutrally playing a speech by Adolf Hitler, and suggested that presenting the videos may have additionally violated both the *Ontario Human Rights Code* and the *Canadian Human Rights Act* (Hopper, 2017).[3] Following the release of Shepherd's audio recording of the meeting, university administrators issued public apologies and recanted many of their comments, while an independent investigator hired by the University exonerated Shepherd and found that there were "numerous errors in judgement" in the handling of the meeting that "never should have happened at all" (Jeffords, 2017). The matter has resulted in multiple lawsuits, including one by Shepherd against the University (McLeod, 2018).

[3] As will be discussed in Chapter 3, the *Canadian Human Rights Act* will only rarely apply to university affairs. Shepherd's actions were not contrary to the *Ontario Human Rights Code* or *Canadian Human Rights Act* (Platt, 2017).

The case of Lindsay Shepherd is just the tip of the iceberg however. An increasingly common method of censorship employed by university administrations is the refusal or cancellation of events hosted by student groups. In 2013, Queen's University seized a free speech wall that had been installed by Queen's Students For Liberty on grounds that it contained hate speech and racial slurs, claims which the University refused to elaborate, and which remain unfounded (Hopper, 2013a). In 2015, the University of Alberta declined to discipline students that forcefully obstructed an anti-abortion display setup annually by UAlberta Pro-Life.[4] The following year, the University approved the event on condition that the club pay an expected $17,500 security fee – the club had historically never been required to pay a security fee, and was only required to pay $225 the year prior (Court of Queen's Bench of Alberta, *UAlberta Pro-Life v University of Alberta*, 2015) (Court of Queen's Bench of Alberta, *UAlberta Pro-Life v. Governors of the University of Alberta*, 2017).[5] In 2017 Ryerson University ironically cancelled a panel discussion titled "The Stifling of Free Speech on University Campuses" after advocates for the censorship of speech argued that the event would serve as a platform for fascism, transphobia, and Islamophobia (Hauen, 2017). In 2018, the University of Waterloo cancelled an anti-immigration discussion planned by the Laurier Society for Open Inquiry after advocates for the censorship of speech presented security threats that caused security costs to rise from $1,600 to $28,500 (Canadian Broadcasting Corporation, 2018).

Campus Freedom Index, an annual publication by the Justice Centre for Constitutional Freedoms, attempts to measure the state of free speech at Canadian public universities, and attempts to provide university administrators and student union executives "clear standards they

[4] As will be discussed in Chapter 3, universities across Canada have repeatedly targeted events hosted by student groups that oppose abortion.
[5] The Court of Queen's Bench of Alberta dismissed UAlberta Pro-Life's challenge to the security fee, and the matter is currently being heard by the Court of Appeal of Alberta.

can adopt to better protect free speech rights for students" (2018b). The Index assigns grades ranging from 'A' to 'F' to universities and student unions on the basis of policies and practices. Policies refer to commitments, statements, and ratified policies made by the university, while practices refer to the actions of universities – in essence, policies is what a university says it will and will not do, while practices is what a university actually does. The Index's methodology utilized to assign grades on the basis of university policies is based upon four factors: the university's (1) codified commitments to free speech on campus, (2) allowing of speech deemed to be controversial or offensive, (3) refusal to allocate resources to entities engaged in ideological advocacy, and (4) commitments to prohibiting the disruption of speech on campus (Justice Centre for Constitutional Freedoms, 2017).[6] The Index's methodology utilized to assign grades on the basis of university practices is based upon five factors: the university's (1) rejection of demands to cancel events or speaking engagements on the basis of speech, (2) providing of security to events to ensure that speech is not forcefully disrupted, and not charging security fees to the hosts of such events, (3) discipline of those that engage in the disruption of speech, (4) practice of publicly speaking out against censorship by the students' union, and (5) record of censorship during the previous four academic years (Justice Centre for Constitutional Freedoms, 2017).[7] Several aspects of the Index's methodology stand out as problematic, foremost being its overly ambiguous grading scheme, and its unrealistic expectations of university administrations.[8] While the Index's methodology is substantially value-laden and

[6] A university that satisfies all four factors will receive an 'A' grade; three factors will receive a 'B' grade; two factors will receive a 'C' grade; one factor will receive a 'D' grade; and none of these factors will receive an 'F' grade (Justice Centre for Constitutional Freedoms, 2017).
[7] The grade scheme for university practices is far more ambiguous and complex than that for university policies, and partially relies upon the grade assigned to the university's policies.
[8] The expectation that university administrations pay the security fees for student events is particularly troublesome. Ironically, such a practice would seemingly contradict a portion of the Index's methodology for assigning grades on the basis of university policy: refusal to allocate resources to entities engaged in ideological advocacy.

lacking of objective standards, the Justice Centre for Constitutional Freedoms has considered a wealth of credible information in its analysis, including local newspaper articles, university codes of conducts, student and university testimony, and judicial decisions. The Index is alone in its efforts to measure the state of free speech at Canadian public universities, and while not perfect, it is perhaps the most accurate picture we have of the state of free speech on Canadian university campuses.

In regards to university policies, the Index assigned an average grade of 'C+' in 2016 (2.30), 'C' in 2017 (2.03), and 'C' in 2018 (2.02) (Justice Centre for Constitutional Freedoms, 2018b).[9] In regards to university practices, the Index assigned an average grade of 'C-' in 2016 (1.79), 'C' in 2017 (1.85), and 'C-' in 2018 (1.75). There does not appear to be a significant correlation between the grade assigned to a university for its policies, and the letter grade assigned to a university for its practices, suggesting that a university having strong policy does not result in strong practices, and a university having weak policy does not result in weak practices. While the results of the 2018 Index suggest "a very small decline in the state of freedom of expression at Canada's universities [compared to the year prior]," there is practically "no significant differences between 2017 and 2018" (Justice Centre for Constitutional Freedoms, 2018c). Despite flaws in the Index's methodology, for the purposes of this study the Index is useful as a general indicator of the state of freedom of speech on Canadian university campuses.

The failure of universities to protect freedom of expression and academic inquiry on their campuses has led to nationwide discussion, and has caught the attention of some political party

[9] Average grades were calculated by assigning numeric values to each letter grade, where 'A' is assigned a value of 4, 'B' a value of 3, 'C' a value of 2, 'D' a value of 1, and 'F' a value of 0. Numeric scores were rounded to the nearest hundredth. Scores between .20 and .50 were given a 'plus' grade, while scores between .50 and .80 were given a 'minus' grade. Average numeric scores appear in brackets following the average letter grade.

leaders. Amidst the Shepherd controversy at Wilfred Laurier University, The *Toronto Star* Editorial Board highlighted the importance of universities to provide "the maximum possible opportunity to exchange ideas," and to serve as spaces for those that wish to challenge conventional wisdom (2017). In 2017, then-Conservative Party leadership candidate Andrew Scheer argued there to be a troubling trend in which small campus groups prevent guest speakers from delivering lectures, cause events to be cancelled, and seek to ban activities and clubs that they disagree with. Scheer argued that universities have a responsibility to uphold and protect freedom of speech on campus, and that the federal government ought to consider this responsibility in assessing university grant applications (Smith, 2017). Dr. Debra Soh wrote about the dangers of not protecting free speech on university campuses, arguing that "the greatest minds must be more preoccupied with who might possibly take offence to their ideas than whether they are factually correct," and that "banning controversial speakers and unpopular opinions [has caused] … an anti-intellectual shift that is derailing our fundamental pursuit of knowledge and the truth" (2017). In 2018, Mark Mercer, President of the Society for Academic Freedom and Scholarship, argued:

> "Our public universities are coming in many ways to resemble the religious universities that take that ideological mission very seriously, only this time the ideological concern isn't producing good Christians but producing people who have the correct social attitudes towards diversity, sustainability and so on." (MacDonald, 2018)

Beginning in 2019, the Government of Ontario has made mandatory that all post-secondary institutions implement policy that protects free speech on campus – institutions that

fail to comply may be subject to a decrease in government funding (Loriggio, 2019). While the free speech debate on university campuses has been ongoing for decades, Canadian Journalists for Free Expression suggests that the debate is becoming increasingly polarized. Those that place principles such as social justice and community standards of tolerance over unfettered speech are labeled "liberal snowflakes whose progressive over-sensitivities can't handle the rigours of open debate," while those that prioritize free speech are labeled "conservatives [whose ideology] falls somewhere on the fascist spectrum" (Houston, 2017). As will be discussed in Chapter 4, others have called on the courts to intervene and hold universities subject to the *Canadian Charter of Rights and Freedoms*.

University campuses have not lived-up to the expectations of free and open inquiry – they are not the bastions of free speech that they were originally conceived to be. In an effort to create inoffensive environments, university administrations have actively sought to quash the expression of unpopular and controversial viewpoints, and have begun regulating freedoms that are integral to the core principles of education. In western liberal democracies, expression is a *freedom* while not being offended is a *desire* – how are we supposed to discuss *any* important, contentious issue without offending someone? Dialogue is integral to critical thinking and the academic process – imagine a classroom in which questions are prohibited and statements must conform to a pre-approved ideological perspective. As demonstrated, such is becoming increasingly common in extra-curricular activities on university campuses. While some may be offended and may not wish to have their core beliefs investigated, so long as dialogue remains respectful, such concern is of very little importance and is not worthy of attention; in most cases, those offended are free not to participate. When institutions of higher education regulate and censor the expression of ideas that challenge more dominant ideological perspectives, such

institutions engage in indoctrination rather than education. Rex Murphy argues that "some universities are in the business more of promoting attitudes than liberating young minds, and more concerned with fleeting 'correctness' than lasting truth" (2013). The protection of freedom of expression is not a best practice, a bonus, or an enhancer of education. Rather it is a requirement for the enterprise to succeed – education cannot exist void of freedom of expression.

In the marketplace of ideas, all vendors are welcome to setup shop and engage in fair competition, seeking to sell their viewpoints to the minds of masses. Market-goers are free to come and go as they please, and are not obligated to make a purchase; though each searches for truth, the sales tactics of vendors and the pre-existing assumptions of buyers often make truth difficult to distinguish. In such a market, the regulation and censorship of ideas is unnecessary – in his first inaugural address in 1801, Thomas Jefferson argued, "Error of opinion may be tolerated where reason is left free to combat it" (1984: 493). Unpopular ideas receive few customers and generate little revenue; their vendors struggle to remain open. The regulation of expression interrupts market operations and leaves truth and falsehoods difficult to discern. While regulation may lead to one idea's prominence, in the absence of choice and the freedom to discuss, that idea's underlying truths cannot be verified – we may wander into a cave in search of sunlight. Justice Wilson of the Supreme Court of Canada stated, "The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of the free flow of ideas" (*Mckinney v. University of Guelph*, 1990: 374). The actions of university administrations suggest that controversial and unpopular ideologies are being viewed as less worthy than their more popular counterparts. Whether or not they have acted with intent, universities have interrupted market operations and have suppressed freedom of expression on their campuses.

Purpose and Scope of Study

The purpose of this study is to explore the limitations of public law in protecting the rights and freedoms of students enrolled at Canadian universities. This study will proceed on the understanding that university administrations are failing to sufficiently respect the rights and freedoms of students, and that university administrations are a prominent actor in undermining the free flow of ideas on their campuses. A study into this matter will provide a better understanding of the readily available tools that students may utilize to defend their rights and freedoms from the actions of university administrations.

Foremost, the question that I seek to answer is: what are the limitations of public law in protecting the rights and freedoms of students enrolled at Canadian universities? But an investigation into this matter requires the consideration of many additional questions, each of which contributes some degree of clarity into the research question I have identified. These questions are:

- What rights and freedoms do university students possess?
- What powers of compulsion do universities possess?
- What is the relationship between the student and the university administration?
- Do universities form part of the government apparatus?
- Do universities implement government objectives?
- Do universities act on statutory authority?
- Do universities serve a public purpose?

- Do universities form part of the public or private sphere?
- Are universities controlled by government?
- Are university campuses public or private property?
- Does the *Canadian Charter of Rights and Freedoms* apply to private activity?
- Does the *Canadian Charter of Rights and Freedoms* apply to universities?

Some of these questions have been sufficiently addressed in the literature, while others have eluded scholarly attention. Each of these questions could be the subject of their own study, but the thorough exploration of each is beyond the scope of this study – each of these questions will be addressed only to the extent that is necessary for the purposes of this study.

As institutions incorporated by government, and engaged in the government-regulated activity of post-secondary education, the actions of university administrations may be within the scope of various branches of public law. While the actions of university administrations may be within the scope of private law, this study seeks to identify legal mechanisms available to *regulate* university administrations, rather than those available to provide *remedy* for students that have been harmed by the actions of university administrations – private law can only provide remedy, and cannot regulate. Additionally, as will briefly be discussed in Chapter 4, there are many barriers to private law and civil litigation. For such reason, it is only the legal branches of public law that are within the scope of this study – specifically constitutional, statutory, and administrative law.[10] The mechanisms of public law investigated in this study are comprised of the *Canadian Charter of Rights and Freedoms* and both federal and provincial

[10] While there are other branches of public law, such as criminal law and tax law, such branches are of virtually no-use to regulating the relationship between students and university administrations.

human rights legislation. While the branches of private law are not within the scope of this study, this study will proceed with the understanding that civil litigation remains an option, albeit a troublesome one, to students that have been harmed by the actions of university administrations.

For reason of the Supreme Court of Canada's 1990 decision in *Douglas/Kwantlen Faculty Association v. Douglas College*, the *Charter* is applicable to the actions of college administrations, and thus the identified problem is virtually non-existent on college campuses – the role of public law in protecting the rights and freedoms of students at colleges is already well understood.[11] While both public and private universities are within the scope of this study, the vast majority of private universities are religious-affiliated institutions operating in accordance with well-established ideologies – generally speaking, such institutions are transparent in their partisanship, and incorporate privately for such reasons. Indoctrination is vital to the enterprise of private universities. Upon enrolling at religious-affiliated private universities, students consent to standards and codes of conduct distinct from those at public universities, and adhere to a more limited understanding of freedom and liberty.[12] The identified problem is virtually non-existent on the campuses of private universities, and thus this study is far more significant to public universities.

Significance of Study

For the many students on Canadian university campuses today, this study yields a dismal conclusion. Due to the limited application of the *Canadian Charter of Rights and Freedoms* to non-government entities, the *Charter* will be of miniscule value in the university context. Human

[11] Colleges are not self-evidently part of the legislative, executive, or administrative branches of government, but are subject to *Charter*-scrutiny for reason that they are substantially controlled by government.
[12] Examples include Trinity Western University's *Community Covenant Agreement* and Crandall University's *Student Handbook and Community Standards*.

rights legislation, while far more applicable to private activity than the *Charter*, features many exceptions and will apply inconsistently based upon jurisdiction – human rights legislation will only be of value in the most blatant of human rights violations. While the common law principles of liberty and natural law protect the *ability* to express oneself, and various provisions of the *Criminal Code of Canada* prohibit the use of force in halting one's expression, these principles do not protect against repercussions or discrimination on the basis of this ability. In public law, there is an absence of legislation that protects freedom of expression – generally speaking, freedom of expression is protected only to the degree of which a university permits, and may be protected inconsistently.[13] The varying cultures and guiding principles of universities has led to an inconsistent protection of rights and freedoms, and has resulted in unequal access to the marketplace of ideas.

Based upon the findings of this study, I propose a new mechanism for regulating the relationship between university administrations and students – I propose that university administrations adopt internal policy that seeks to respect, protect, and uphold the rights and freedoms of students. While internal policy of this kind already exists at a small number of Canadian universities, their lackluster application provisions do not provide the rigorous framework necessary to sufficiently address the problem. Such policies, which I will refer to as 'declarations of students' rights', ought to be better attuned to the cultural beliefs and values that underlie the nation's existing human rights framework.

This study explores a matter of both policy and law in the context of universities, but its significance stretches far beyond the boundaries of university campuses. This study is not only

[13] This statement is true so far as it relates to statutory law and property law, but is not to say that universities possess a monopoly on speech on their campuses – depending upon the circumstances of a case, there may be remedies available in the other branches of law, such as criminal law, common law, and contract law.

an investigation into the role of public law in addressing human rights concerns on university campuses, but an investigation into a component of the administration of justice in Canada. Inhabitants of Canada deserve a rights framework that better protects against discriminatory actions committed by private entities engaged in public interests and services. The results of this study are significant to virtually all private entities that have been incorporated by government, are substantially regulated by government, are substantially funded by government, and those that operate at an arm's-length of government. Examples of such entities include universities, hospitals, museums, and public transportation services. Additionally, the mechanism I propose may be adapted to resolve nearly identical problems in the relationship between students and students' unions.

Chapter 2

The Philosophy of Charter Application

Despite the widespread popularity of constitutionally entrenched rights and freedoms, *Charter* application is largely constrained by a liberal constitutionalist interpretation. The legislative process that culminated in the *Charter* highlights the intent for it to restrict state action, not private action. Jurisprudence on section 32(1) interpretation has preserved a traditionally liberal constitutionalist understanding of the distinction between public and private activity, significantly limiting *Charter* application to government entities. Thomas M. J. Bateman argues that the Supreme Court of Canada's interpretation of the application provisions of the *Charter* can be explained by a clash between liberal and postliberal constitutionalisms (2000).

There is debate over what a constitution is, who it applies to, and what its limitations are. Accordingly, multiple schools of thought have emerged with diverging answers to the questions of constitutional philosophy; there are two core doctrines of constitutional interpretation in Canada, particularly in regards to the *Charter*. Liberal constitutionalists argue that constitutionally entrenched rights and freedoms are explicitly intended to limit government, and only government. Fundamental to this understanding is the traditional preservation of the distinction between public (government) and private (non-government) activity. Thus, liberal constitutionalists argue that the *Charter* need only bind government action. In contrast, postliberal constitutionalists "[refuse] to see the state as the singular, particular, or major source of oppression, inequality, and unfairness" (Bateman, 2000: 17). Accordingly, the postliberal position is that constitutionally entrenched rights and freedoms ought to bind both government

actors and private actors – the traditional separation between public and private activity is broken. Accordingly, postliberal constitutionalists argue that the actions of both government and non-government entities ought to be subject to the *Charter* (Bateman, 2000).

While postliberal constitutionalism challenges liberal constitutionalism, it is important to recognise common ground between the two. Postliberal constitutionalism is conceptualized as being the next step in the progression of liberal constitutionalism; the "post" within postliberal constitutionalism does not mean "anti" but rather "beyond" or "after" (Bateman, 2000: 17). Bateman states, "Postliberal constitutionalism is not ineradicably opposed to liberal constitutionalism; in fact, it exalts and incorporates many of its counterpart's features. Both value individual liberty, the rule of law, judicial review, and the idea of constitutional rights assertable against the state" (Bateman, 2000: 17).[14] Liberal constitutionalists overwhelmingly agree that government is not the only source of oppression, inequality, and unfairness, but unlike postliberal constitutionalists, do not consider the *Charter* to be the appropriate avenue to address other sources of such. Fundamentally, both doctrines accept that the *Charter* applies to government activity, however postliberal constitutionalism goes a step further by arguing that the *Charter* additionally ought to bind private activity.

The conception of a constitutionally entrenched bill of rights came at a convenient time: the Confederation of Tomorrow Conference in 1967 led to a strong desire for national unity, and there was a civic demand for protections on civil liberties. Peter H. Russell argues that, following the Second World War, there was a discussion by both politicians and civilians about a codified set of rights and freedoms. The stimulus of such discussions came from all levels of government.

[14] As will be discussed in Chapter 4, there appears to be fundamental disagreement in regards to how each constitutional doctrine values liberty.

Internationally there was “concern for human rights arising from the war against fascism and Canada's obligations under the United Nations Declaration of Human Rights.” Federally “there was regret concerning the treatment of Japanese Canadians during the war and the denial of traditional legal rights in the investigation of a spy ring following the Crouzenko Disclosures in 1946.” Provincially “the persecution of Jehovah's Witnesses by the Duplessis administration in Quebec, the treatment of Doukhabors[15] and other religious minorities in the west and the repression of trade unionism in Newfoundland were major *causes célèbre*” (Russell, 1983: 33). In years following, developments including the invocation of the *War Measures Act* in 1970, and excessive scandals by the Royal Canadian Mounted Police and its Security Service branch, indicated greater public support for a constitutionally entrenched bill of rights (Russell, 1983: 33-34). The movement for such a bill remained popular: two national opinion polls conducted in the summer of 1981 showed 72 per cent and 82 per cent support for a constitutional enactment that would “provide individual Canadians with protection against unfair treatment by any level of government in Canada” (Mandel, 1994: 27). For the reasons argued by Russell, along with the failure of the *Canadian Bill of Rights*, Edward J. Cottrill concludes that the *Charter* was entrenched “in recognition of the fact that state power can be misused” (2018: 79). Bateman suggests that Trudeau tasked the *Charter* with “diminishing the status and policy power of provinces in Confederation by entrenching a set of individual rights operative regardless of place of residence” (2000: 9).

The first federal draft of this idea, known as the “best efforts draft,” was privately circulated in February of 1979. Three different federal drafts would later circulate throughout the

[15] A misspelling of ‘Doukhobors,’ the spiritual Christian religious group of Russian origin that immigrated to the Canadian prairies in 1899.

summer of 1980, culminating in a First Ministers Conference. The Conference, the first to include the provinces, was a resounding failure, but the federal government insisted on its passage and sought to unilaterally entrench this version of the *Charter*. Opposition from the Progressive Conservative party in the House of Commons led to a Joint Parliamentary Committee to consider the report on the proposed resolution. The Committee's new draft of the *Charter*, submitted in October of 1980, contained only a few changes that primarily sought to broaden its scope (Romanow et al., 1984: 242-248). The new draft, the first to be made public, included the first appearance of the *Charter*'s application provisions, which were as follows:

> 29. (1) This Charter applies
>
> (a) to the parliament and government of Canada *and to all matters within the authority of Parliament* including al1 matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province *and to all matters within the authority of the legislature* of each province. (Romanow et al., 1984: 249)[16]

Bateman submits that the italicized phrases were radical in their implications. Because of the constitutional doctrine of parliamentary sovereignty, limited only by the division of powers, "parliament in each jurisdiction was supreme over all affairs and could theoretically legislate in respect to any matter" (2000: 75). All human activity could be within the authority of each legislative body, and thus both public and private affairs would be subject to the proposed *Charter*; the application provisions would be, to the highest degree, of postliberal

[16] Italics are mine.

constitutionalism. Romanow et al. states that "the wording of the new application section turned the charter not only into a constitutional document which restrained government, but a constitutional set of norms relating to the whole of society activity within the country" (1984: 250). The radical application provision was repeatedly brought to the attention of federal officials by the provinces, and was dealt with when the constitutional accord was reached in November of 1981. Lawyers responsible for the drafting of the *Charter* changed the wording of the application provisions to be in accordance with a liberal constitutional understanding (Romanow et al., 1984: 250). The changes were agreed upon by first ministers, and the application provisions as they now appear in the *Charter* are as follows:

> 32. (1) 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[17]
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. (Canada, 2011)

On its current language alone, section 32(1) suggests a liberal constitutional understanding, but leaves the door open for postliberal doctrine. The revising of the *Charter*'s application provisions, however, clarifies the language and eminently suggests a liberal constitutional understanding.

[17] Pursuant to *An Act to amend the Nunavut Act and the Constitution Act, 1867*, the *Canadian Charter of Rights and Freedoms* applies to Nunavut in the same manner as the other provinces and territories (Nunavut, 2017).

Peter W. Hogg writes of a liberal constitutional understanding of *Charter* application, stating:

> "The rights guaranteed by the Charter take effect only as restrictions on the power of government over the persons entitled to the rights. The Charter regulates the relations between government and private persons, but it does not regulate the relations between private persons and other private persons. Private action is therefore excluded from the application of the Charter … In cases where private action results in a restriction of a civil liberty, there may be a remedy for the aggrieved person under a human rights code, under labour law, family law, tort law, contract law or property law, or under some other branch of the law governing relations between private persons; but there will be no breach of the Charter." (1985: 674-675)

Cottrill concurs, arguing that the *Charter* "was designed chiefly … to reduce the state's power to impair freedoms" (2018: 80). Cottrill points to a 1968 discussion paper authored by Pierre Trudeau, which states that "[a] constitutional bill of rights … would guarantee the fundamental freedoms of the individual *from interference*, whether federal or provincial" (2018: 79).

Katherine Swinton too concurs with Hogg, stating:

> "A Charter of Rights is designed to bind governments, not private actors. That is the nature of a constitutional document: to establish the scope of governmental authority and to set out the terms of the relationship between the citizen and the

> state and those between the organs of government. The purpose of a Charter of Rights is to regulate the relationship of an individual with the government by invalidating laws and governmental activity which infringe the rights guaranteed by the document." (1982: 44-45)

Beyond the *Charter* not being intended to regulate private activity, Swinton argues that the *Charter* is not designed nor suited to deal with such. Swinton points to the longstanding tradition in American jurisprudence, where courts have avoided extension of the Bill of Rights to private activity in concern of encroachment of property rights and individual autonomy. Human rights legislation, unlike the *Charter*, can be tailored to deal with the tensions that exist between private entities – narrowly written codified rights can better account for the clash of rights and freedoms, as opposed to broadly written codified rights. Being part of the Constitution, the *Charter* is "meant to restrict governmental action," and is simply not the appropriate avenue for addressing private disputes. To settle private matters, other mechanisms are available, such as contracts, administrative law, and legal obligations arising from statute and tort (1982: 47-48). Swinton provides an example of how the *Charter* is insufficient to address private matters:

> "Statutes such as particular human rights and equal pay laws contain an administrative structure designed to promote mediated settlements of disputes, rather than resort to litigation. There is an elaborate structure of conciliation preceding adjudications by an administrative tribunal, which can have an educative effect between the parties. The Charter will be interpreted for the most part in the courts, where there is no built-in mechanism to encourage settlement." (1982: 47-48)

In *Bhindi v. B.C. Projectionists*, the majority opinion, delivered by Chief Justice Nemetz, highlighted an additional manner in which the *Charter* is not adequately designed to address private disputes: were the *Charter* to apply to private contracts, there would be a lack of section 1 defense available for the private parties of such contracts (1986: at para. 20).[18]

A convincing relic of the *Charter*'s liberal constitutionalist nature is *The Constitution and You*, a 1982 publication by the Government of Canada designed to contribute to public understanding and awareness of the new constitutional resolution, and explain the *Charter*'s importance and significance. The publication states that a constitution consists of, among other things, "the basic rules that citizens have chosen to *regulate their relationships with government*" (1982: 6). Explaining how the new constitution will protect rights and freedoms, the publication states, "if you think that you are a victim of discrimination *by governments*…" (1982: 7). Explaining the necessity of entrenching rights and freedoms into the constitution, the publication states, "you don't have to go very far back to find that basic rights have been taken away from Canadians *by governments*," and that enacting the *Charter* as a constitutional entrenchment, rather than a federal or provincial act, "makes it much more difficult *for any government or legislature* … to tamper with basic human rights and freedoms" (1982: 11-12). Perhaps most compelling, the publication's concluding explanation states that the *Charter* "limits the power of both provincial and federal governments" and that the *Charter* "serves as a powerful reminder *to all governments and legislators* that *their powers* are limited and must be exercised with respect for individual citizens" (1982: 12-13). While the phrases I have emphasised clearly demonstrate

[18] Section 1 of the *Canadian Charter of Rights and Freedoms* reads:
The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (Canada, 2011).

the *Charter*'s application to government, some sections of the guide are ambiguous, and others clearly indicate universality; private activity is not explicitly shut out.

One of the most prominent arguments for a postliberal constitutional interpretation comes from Dale Gibson, whose argument rests upon three propositions. First, Gibson separates from others in interpreting the decision of first ministers to change the wording of section 32(1) prior to the *Charter*'s enactment, arguing that this change was not a move from one doctrine to the other, but rather a compromise between the two. Gibson agrees that the change of wording removed an explicitly postliberal constitutional understanding, but argues that the drafters did not replace such wording with an explicitly liberal constitutional understanding, and instead left the wording ambiguous – had the objective been to remove the possibility of the *Charter* binding private action, the word "only" would have been inserted for clarity (1982: 213). Gibson therefore concludes:

> "Ultimately, then, it is not a question of what was intended; competing intentions cancel each other out. The courts' task is to determine for themselves, on the basis of the language used, construed in light of the kind of society to which Canadians aspire, the *Charter's* proper ambit." (1982: 214)

Second, Gibson argues that adding government into the *Charter*'s application provision was done to ensure its application to government activity, not to exclude its application to private activity. Gibson notes that, generally, legislation applies to all individuals within the jurisdiction of the enacting legislature, without explicitly referencing such. This however is not true of government, which must be explicitly referenced in legislation (1982: 214-15). The explicit

reference to government in section 32(1) does not nullify the *Charter*'s application to private parties, Gibson argues, but rather ensures that the judiciary will hold government to be within the *Charter*'s purview. Challenging Swinton's interpretation that a constitution only binds government, Gibson points out that this is not true: section 52(1) of the *Constitution Act, 1982* states without qualification that "the Constitution of Canada is the supreme law of Canada." Since all Canadians, public and private, are subject to the law, "the notion that constitutional laws are inherently inapplicable to private conduct is no longer supportable, if it ever was" (Gibson, 1982: 216).

Finally, Gibson argues that a broad interpretation is necessary in order to universally uphold the rights and freedoms that the *Charter* seeks to recognize. The concept of universality is deeply rooted in the *Charter*, and all but a few provisions concerning rights and freedoms apply to "everyone", "everybody", or "every individual."[19] Gibson argues that, were the *Charter* to only apply to government, an employee of the government would have their constitutionally entrenched rights and freedoms protected, while the same would not be true for an employee of a private entity, thus contradicting the universality of rights and freedoms (1982: 216). Likewise, section 12 states that "everyone has the right not to be subjected to *any* cruel and unusual treatment or punishment."[20] A liberal constitutional understanding would interpret this guarantee "as prohibiting improper treatment of patients in public mental hospitals or pupils in public schools, but as not protecting the inmates of similar private institutions" (1982: 216). In essence, Gibson argues that a liberal constitutional interpretation of the *Charter* would create a two-tier system of human rights and freedoms.

[19] Sections 3, 6(1), and 23 only apply to Canadian citizens, while section 6(2) only applies to Canadian citizens and permanent residents of Canada (Canada, 2011).
[20] Italics are mine.

While arguing for a postliberal constitutional approach, Gibson acknowledges that not "*every* right and freedom embedded in the *Charter*" could be applicable to private activity (1982: 217). Control of discrimination in the private sector, Gibson argues, would continue to be dealt with as it was prior to the *Charter*'s enactment: through federal and provincial human rights legislation. Sections that are expressly limited in operation would remain limited, while those sections that are written in broad language ought to be interpreted as their broad meaning suggests (1982: 217).

Guy Régimbald and Dwight Newman fiercely disagree with Gibson's interpretation of section 32(1), and make perhaps the boldest claim concerning the *Charter*'s application provisions. The authors argue "the text explicitly states that the Charter applies to both levels of government but only to government acts as opposed to private activity" (2013: 532). While the text does not explicitly rule out private activity, as claimed by the authors, such a statement does contextualize the liberal-postliberal constitutionalism debate in a manner that better reflects the current state of the argument. The argument no longer concerns whether or not the *Charter* directly applies to private activity, but rather "what constitutes government action for purposes of *Charter* application" (2013: 528). Additionally, the authors point out that, in matters concerning guarantees that require positive action, the *Charter* can also apply to government non-action, as was the case in *Vriend v. Alberta* and *Dunmore v. Ontario (Attorney General)* (2013: 533).

Donald Smiley suggests that Canadians may better identify with postliberal constitutionalism, stating that "the notion that there are rights against government is a very foreign idea to the Canadian constitutional system and the Canadian political culture" (McKercher, 1983: 104). Smiley suggests that "Canadians possess a Hobbesian understanding of

government," choosing order before freedom (McKercher, 1983: 104).[21] Bateman concurs, stating, "In the absence of a mythical distrust of the state, postliberal constitutionalism would find fertile ground in Canada" (2000: 35). Smiley's hypothesis is difficult to accurately measure, but seems plausible from a democratic perspective.[22] Supposing that Canadians do indeed possess a widespread Hobbesian understanding of government, the living tree doctrine could gradually open the door to a more postliberal constitutional approach and an expanded meaning of government.

Scholarly literature concerning the philosophy of *Charter* application overwhelmingly aligns with the doctrine of liberal constitutionalism. Although Gibson does make a convincing postliberal argument, the evidence against such an understanding weighs far heavier. The language and phrasing of the *Charter*'s application provisions, the history behind its development, and related material published by the Government of Canada, has all but explicitly stated: The *Charter* does not apply to non-government activity. My argument will proceed with the understanding that the *Charter* was implemented, and is overwhelmingly understood by scholars to be, in accordance with a liberal constitutional understanding.

The liberal constitutionalist argument should not be mistaken however. It is not argued that private action need not be regulated, nor is it argued that civil liberties need not be protected, rather it is argued that the *Charter*, as part of the constitution, is not the appropriate avenue for doing so – other legal mechanisms exist for addressing civil wrongs. To maintain the separation of mechanisms designed and suited to address government matters, and those designed to

[21] Smiley states, "In the beginning was government. In the beginning was order, and once order is secured, one can make society more egalitarian, one can have a good deal of freedom, one can have procedures" (McKercher, 1983, 104).
[22] Canada ranked 6th in The Economist's Democracy Index 2017, and was named one of nineteen "full democracies" (Economist Intelligent Unit. 2018: 5).

address private matters, the *Charter* ought to be interpreted in a liberal constitutionalist manner. Though postliberal constitutionalism appears to be gaining some degree of prominence in Canadian political culture, the historical development and language of the *Charter*'s application provisions leaves little for postliberal interpretation. The application provisions were carefully tailored in accordance with a liberal constitutional understanding – postliberal constitutionalism was purposelessly excluded, and the advancement of such would be contrary to the original intent theory of constitutional interpretation. The meaning of the word 'government' however, and which entities fit within the category, remains highly contentious among legal scholars and justices of the highest court, and thus serves as the primary entry point for postliberal interpretation.

Chapter 3

The Charter and Human Rights Legislation in the University Context

The Supreme Court of Canada has adopted a dominantly liberal constitutional interpretation of the meaning of the word "government" in section 32(1) of the *Charter*, and has shaped its application to private entities accordingly. Peter McCormick argues that the Supreme Court has two major functions: (1) "to give authoritative resolution to disputes arising over major questions of national law", and (2) "to provide leadership to the lower courts" (2004: 105). Because the lower courts preside over the overwhelming majority of legal decisions in Canada,[23] the second major function identified by McCormick is paramount. For reason that *stare decisis* operates on the *rationale* utilized in court decisions, as opposed to the *result* of such decisions, this essay will account for each individual opinion in plurality decisions of the Court in an effort to measure rationale rather than results.[24] Whether or not plurality decisions are binding, or to what extent they are binding, is highly contentious in common law.[25] By analyzing concurring and dissenting opinions, one may find a plurality result to be comprised of majority rationale, thus setting a binding precedent. While non-unanimous and plurality decisions in the Supreme

[23] Provincial and Superior Courts heard a total of 328,028 adult criminal cases in 2014/2015, while the Supreme Court of Canada heard 21 adult criminal cases in 2015 (Maxwell, 2017) (Supreme Court of Canada, 2018).
[24] "Rationale" refers to the reasoning for a decision, while "result" refers exclusively to the decision in the particular case at hand. *Stare decisis* binds lower courts to rule in accordance with the rationale established by the Supreme Court of Canada.
[25] For commentary on the binding implications of plurality decisions in common law, see James A Bloom's "Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp," at page 1377.

Court steadily declined throughout the Laskin Court,[26] the *Charter* brought with it complexity and lasting division.

Early Judicial Decisions: Charter Application and the Supreme Court of Canada

The Supreme Court of Canada first considered the question of whether the *Charter* applies to common law and non-government entities in its 1986 decision, *RWDSU v. Dolphin Delivery Ltd*. Concerning whether the *Charter* was applicable to the common law, the majority opinion, delivered by Justice McIntyre, was that "[the *Charter*] will apply to the common law … only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom" (at para. 34). Concerning the *Charter*'s application to non-government institutions, per the reasoning of the majority, the *Charter* "does not apply to private litigation completely divorced from any connection with government," but rather "applies to the legislative, executive and administrative branches of government … whether invoked in public or private litigation" (at introductory para.). While *Dolphin Delivery* was comprised of a majority opinion and two concurrences, the concurring justices agreed with the majority's decision concerning both the meaning of the word 'government', and that the *Charter* is applicable to the common law. Thus, the Court was unanimous in adopting a liberal constitutional approach to the application provisions of the *Charter*.

In deciding *Dolphin Delivery*, the majority opinion did choose to briefly discuss *Charter* application to non-government entities, but made clear that such matter is a distinct issue from the matter being decided. McIntyre stated, "Where such exercise of, or reliance upon,

[26] The frequency of plurality decisions is not constant. For an illustration of disagreement on the Supreme Court of Canada, see Figure 1 in Peter McCormick's *Blocs, Swarms, and Outliers - Conceptualizing Disagreement on the Modern Supreme Court of Canada* at page 109.

governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable" (at para. 39). For reason that the *Charter* only binds government, government intervention or intrusion is a required element for the *Charter* to apply to non-government entities. The Court's decision in *Dolphin Delivery* provided clarity on the question of *if* the *Charter* applied to private affairs, but did not sufficiently provide clarity of *how* the *Charter* applied to such. Such limited discussion was intentional. McIntyre states, "It is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the *Charter* by private litigants in private litigation" (at para. 38).

On December 6, 1990 the Supreme Court issued its decision in four cases, all of which were challenges to mandatory retirement employment contracts within non-government institutions. Despite the four decisions being issued concurrently,[27] and concerning nearly identical issues, *Mckinney v. University of Guelph* has stood out as the most prominent and influential of the four. *Mckinney*, along with *Harrison v. University of British Columbia*, were the first, and so far only, decisions by the Court to consider whether university activity could be subject to *Charter* scrutiny. As it did in *Dolphin Delivery*, the Court adopted a liberal constitutional approach in applying the *Charter*, however with substantially greater division; the decision was comprised of a plurality opinion, two concurrences, and two dissents. The seven justices were unanimous in deciding that universities *could*, in some circumstances, be subject to *Charter* scrutiny. The circumstances in which the *Charter* could apply was the point of

[27] The four decisions were *Mckinney v. University of Guelph*, *Harrison v. University of British Columbia*, *Stoffman v. Vancouver General Hospital*, and *Douglas/kwantlen Faculty Assn. v. Douglas College*. The same seven justices presided over all four cases, and utilized virtually identical reasoning in each.

contention – three of the seven justices agreed that the actions of the universities in the cases at bar were subject to *Charter* scrutiny.

Delivering the plurality opinion in *Mckinney*, Justice La Forest, supported by Justices Dickson and Gonthier, specified that, pursuant to Justice McIntyre's decision in *Dolphin Delivery*, the *Charter* is applicable to Parliament, the legislatures, and the executive and administrative branches of government. La Forest did however specify that the *Charter may* be applicable to non-government entities in two circumstances:

> (1) The private entity has exercised delegated statutory authority. (Statutory authority)
>
> (2) The private entity's decision was truly made by government, or government has sufficiently partaken in the decision enough to make the decision an act of government. (Government control)

Additionally, reading *McKinney* and *Douglas College* together, it is inferred that Justice La Forest believes there to be an additional manner in which the *Charter* will almost certainly be applicable to non-government institutions:

> (3) The private entity has been contracted, delegated, or otherwise tasked with implementing government policy. (Government objective)[28]

[28] Justice La Forest states in *McKinney*, "The most obvious form of law for this purpose is … statute or regulation. It is clear, however, that it would be easy for government to circumvent the *Charter* if the term law were to be restricted to these formal types of law-making," (Supreme Court of Canada, 1990: 276) and in *Kwantlen*, "To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated" (Supreme Court of Canada, 1990: 585).

In her dissent, Justice Wilson put forward three tests for the purpose of addressing entities that are not self-evidently part of the legislative, executive, or administrative branches of government:

> (1) Does the legislative, executive or administrative branch of government exercise general control over the entity in question? (Government control test)
>
> (2) Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state? (Government function test)[29]
>
> (3) Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest? (Statutory authority – Government objective test) (370).

It is necessary to establish that while the tests of Justice Wilson were constructed and presented in a clear and orderly fashion, as shown above, such was not the case for the tests of Justice La Forest. The plurality's tests are derived from careful analysis of Justice La Forest's lengthy decision, and by piecing together his comments to determine under which circumstances it is expressed that the *Charter* could apply to private entities. For reason that the tests of Justice La Forest were not explicitly defined, the lower courts have not frequently stated which test has been satisfied when applying the *Charter* to private action.

[29] Peter W. Hogg states, "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" (2006: 799). Hogg's comment posits a litmus test for determining whether an entity is performing a government function: If an entity lawfully acts with compulsion beyond the powers available to a natural person, the entity is acting upon statutory authority, and is thus performing a government function.

The tests of Justice La Forest and Justice Wilson have much in common. Both sets feature a test that concerns government exerting control over the entity in question, and other tests that concern the entity acting upon statutory authority or the entity acting in accordance with government objectives; Justice Wilson combines these final two into a single test,[30] and adds a test concerning entities performing a function of government. Satisfying the requirements of either set of tests does not guarantee the *Charter*'s application: Justice La Forest does not explicitly state that a private entity satisfying such criteria *will* result in the *Charter*'s application, rather implying that it *could*. Justice Wilson associates conditions with her tests, stating, "an affirmative answer to one or more of these questions … can never be more than an indicator," and likewise that "a negative answer is not conclusive that the entity is not part of government" (370). Additionally, Justice Wilson issues a warning about the use of fixed tests:

> "We must at all costs be sensitive to the fact that government is a constantly evolving organism. It follows that the kinds of questions we must ask when trying to identify government must also be capable of evolving. It seems to me that the reason why fixed tests designed to identify government inevitably fail is that they assume that government is static … the questions that I have listed above are not carved in stone. Other questions may have to be added to the list as governments enter or withdraw from different fields. The questions I have listed are intended only as practical guidelines to those trying to decide whether a body … [may] be part of government for purposes of section 32(1) of the *Charter*" (370-371).

[30] I agree with Justice Wilson that the statutory authority and government objective tests ought to be merged into a single test. Government objectives are implemented and acted upon through compulsion derived from statute. Presumably, if the tests remained separate an entity that satisfies the government objective test would automatically too satisfy the statutory authority test. This is particularly true of universities, whose existence and authority to operate is wholly derived from statute.

Accordingly, no action's occurrence can been deemed absolutely certain to trigger the *Charter*'s application to a non-government entity.

For reason that Justice Sopinka agreed with the plurality opinion so far as it related to concluding that universities are not a government entity for purposes of *Charter* application, the tests derived from Justice La Forest's opinion are binding and serve as precedent for future decisions. Due to their origin in a dissenting opinion, and having not been agreed upon by a majority of justices, the tests of Justice Wilson are not binding, nor do they serve as precedent. Nonetheless, the views of Justice Wilson should not be cast aside in their entirety – Krupa M. Kotecha argues that the tests of Justice Wilson are "reflected in the current state of the law regarding the *Charter*'s application to non-state actors" (2016: 28).

In the Supreme Court's 1997 decision in *Eldridge v. British Columbia (Attorney General)*, the Court unanimously adopted a more expanded meaning of the *Charter*'s application provisions, ruling that there are two ways in which it may apply to provincial legislation:

> "First, legislation may be found to be unconstitutional on its face because it violates a *Charter* right and is not saved by section 1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to section 52(1) of the *Constitution Act, 1982*. Secondly, the *Charter* may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In such cases, the legislation remains

> valid but a remedy for the unconstitutional action may be sought pursuant to section 24(1) of the *Charter*."[31] (at para. 20)

In cases that fall under the second method of application, "one must scrutinize the quality of the act at issue, rather than the quality of the actor" (at para. 44). The second method of application better enshrines the third method of *Charter* application to private entities that was inferred by Justice La Forest in *McKinney* and *Douglas College*, and clarifies that the private actor must be implementing a *specific* governmental policy or program. A private entity being public in nature or loosely be performing a public function "will not be sufficient to bring it within the purview of "government" for the purposes of section 32 of the *Charter*" (at para. 43). The Court addressed this method of application to alleviate concern that governments could escape *Charter* obligations by simply tasking private entities with fulfilling government objectives. Régimbald and Newman suggest that the government objective tests is still developing in current case law – as will later be discussed, I argue this to be true of all three application methods.

The decisions of the Supreme Court of Canada provide guidance on how and when the *Charter* will be applicable to private entities, but lack guidance on the specific requirements necessary to successfully meet each identified method of application. The determination of the specific requirements necessary to meet each method of application has been left to the lower courts to decide. For reason that the degree of government presence necessary to bring private

[31] Section 24(1) of the *Canadian Charter of Rights and Freedoms* reads:
Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances (Canada, 2011).

activity within confines of the *Charter* is both subjective and difficult to measure, there has been considerable disagreement amongst the lower courts in assessing such requirements.

Recent Judicial Decisions: Charter Application and the Lower Courts

In accordance with the doctrine of *stare decisis*, the lower courts have sought to apply the reasoning of the Supreme Court of Canada to their own cases at bar. With few decisions to look to for guidance, the most recent of those being *Eldridge* in 1997, the lower courts have attempted to put together the remaining puzzle pieces, and have sometimes, and sometimes not, found the *Charter* applicable to the actions of universities. Through its interpretation of the meaning of the word 'government' in section 32(1) of the *Charter*, the Supreme Court has given lower courts few grounds on which to declare the *Charter* applicable to university action. In only the narrowest of circumstances will universities be subject to *Charter*-scrutiny. While Supreme Court jurisprudence applies to public and private universities equally, due to the nature of the tests put forward by Justice La Forest, and government's minimal involvement in the operation of private institutions, it is far less common that private universities would act in a manner necessary to attract *Charter* scrutiny – none has as of yet.

A. Acceptance of the Charter

i. *R. v. Whatcott* (Saskatchewan); *Jackson v. University of Western Ontario*

In the Court of Queen's Bench for Saskatchewan's 2002 decision of *R. v. Whatcott*, Justice Ball allowed an appeal and set aside a conviction from the City of Regina Bylaw Court. After distributing graphic anti-abortion pamphlets on the University of Regina campus, William Whatcott was asked by campus police to refrain from doing such, and to remove all pamphlets already distributed. Whatcott refused and returned to campus hours later to continue distributing

flyers. Accordingly, Whatcott was charged and later found guilty of littering, contrary to the University of Regina Traffic and Parking Bylaws (at paras. 1-5). Because the University's power to enact and enforce such bylaws is conferred upon it by way of *The University of Regina Act*, an act of provincial legislation, Justice Ball ruled that the University was subject to *Charter* scrutiny by way of the government objective test (at para. 45). Though not citing *Eldridge* in the decision, Justice Ball applied the second application method, finding that the legislation was *Charter*-compliant, but the actions of the non-government entity applying it were not. Justice Ball stated that the bylaw's enactment was a "quintessentially governmental function," and that the University's actions were "indistinguishable from the enforcement of parking bylaws by a municipality" (at para. 43). Following determination that the *Charter* was indeed applicable, Justice Ball found that the University violated Whatcott's freedom of expression, guaranteed under section 2(b),[32] and was not justified by way of section 1 (at paras. 47-48). Justice Searle of the Small Claims Court of the Ontario Superior Court of Justice reached a similar conclusion in the 2003 decision of *Jackson v. University of Western Ontario*, finding that the *Charter* applied to the actions of University of Western Ontario campus police when performing an arrest pursuant to Ontario's *Trespass to Property Act*.

ii. *Pridgen v. University of Calgary* (Court of Queen's Bench)

In the Court of Queen's Bench of Alberta's 2010 decision of *Pridgen v. University of Calgary*, Justice Strekaf determined that the *Charter* applied to the University of Calgary when the University disciplined two of its students for exercising their freedom of speech. A classmate of brothers Keith and Steven Pridgen created a Facebook page titled "I NO Longer Fear Hell, I

[32] Section 2(b) of the *Canadian Charter of Rights and Freedoms* reads:
Everyone has the following fundamental freedoms: … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (Canada, 2011).

Took a Course with Aruna Mitra," in which students made posts that were "critical" of Professor Aruna Mitra (at para. 2). Following a complaint by the professor, the brothers were deemed guilty of non-academic misconduct by the Interim Dean of the Faculty of Communication and Culture, and were both required to write letters of apology and refrain from making further defamatory comments toward any member of the university community; Keith was additionally placed on a twenty-four month probation period (at paras. 5-7). On appeal to the University's General Faculties Council Review Committee, Steven received a four month probation period while Keith's probation period was lowered to six months (at paras. 9-11). Because, by way of the preamble to the *Post-Secondary Learning Act* ("*PSL Act*"), the University had been tasked with providing post-secondary education to the public, Justice Strekaf ruled that the University was subject to *Charter* scrutiny by way of the government objective test (at para. 69). Justice Strekaf found that when a university's actions curtail or prevent an individual from participating in post-secondary learning opportunities, the university is impacting the public's accessibility of the post-secondary educational system, which the university is entrusted to provide pursuant to the *PSL Act* (at para. 67). Following determination that the *Charter* was indeed applicable, Justice Strekaf found that the University violated the Pridgen brothers' freedom of expression, guaranteed under section 2(b), and was not justified by way of section 1 (at para. 83).

iii. *R. v. Whatcott* (Alberta)

In the Provincial Court of Alberta's 2011 decision of *R. v. Whatcott*, Justice Bascom ordered a stay of proceedings on a $287 ticket against William Whatcott – the same from the 2002 Saskatchewan decision. Approached by campus security for distributing anti-homosexual flyers on the University of Calgary campus, Whatcott was cooperative with the officers at all stages of their investigation. Upon discovering that Whatcott had received a trespass notice three

years prior, the officer placed him under arrest and issued a ticket pursuant to Alberta's *Trespass to Premises Act* (at para. 1). Justice Bascom ruled that the University was created by statute and that the provincial government retains responsibility for it, and is therefore subject to *Charter* scrutiny. Despite adopting the reasoning of Justice Strekaf, it is unclear whether Justice Bascom applied the government objective test, as was the case in *Pridgen*, or the statutory authority test (at paras. 12-13).[33] Following determination that the *Charter* indeed applied, Justice Bascom found that the University violated Whatcott's freedom of expression, guaranteed under section 2(b), and was not justified by way of section 1 (at paras. 22 and 28). *Whatcott* was upheld on appeal, and noteworthy is that Justice Jeffrey of the Court of Queen's Bench of Alberta found additional reasons for the *Charter* to be applied to the actions of the University (*R. v. Whatcott*, 2012: at paras. 30-37). Franco Silletta notes that Whatcott "was not even a student of the university, and yet banning his distribution of pamphlets was found to be contrary to [*PSL Act*] objectives," suggesting that universities, at least those in the province of Alberta, serve a public purpose (2015: 87).

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

The decision in *Pridgen* was upheld on appeal to the Court of Appeal of Alberta in 2012, however the ruling did not provide the clarity or reassurance that one might have expected. A majority of the judges, Justice McDonald and Justice O'Ferrall, declined to address the *Charter*-based arguments, and instead settled the matter exclusively on grounds of administrative law; Justice Paperny settled the matter on grounds of both the *Charter* and administrative law. Justice Paperny held that the *Charter* applies to the following:

[33] The uncertainty of which test was applied highlights the reason for which the statutory authority and government objective tests ought to be merged into a single test (see footnote 30).

(1) Legislative enactments;

(2) Government actors by nature;

(3) Government actors by virtue of legislative control;

(4) Bodies exercising statutory authority; and

(5) Non-governmental bodies implementing government objectives (at para. 78).

The first two categories refer to matters that are self-evidently part of government, while the remaining three represent the application tests derived from *Mckinney* and *Eldridge*. To add to the confusion, Justice Paperny's *Charter* analysis differed from that of the trial judge, choosing to classify the university as a body exercising statutory authority, rather than a non-governmental body implementing government objectives (at para. 112).[34] While the justices of the appellate court differed in their reasoning, all three dismissed the University's appeal and ruled in favour of the Pridgen brothers.

v. *Wilson v. University of Calgary*

In 2014, the University of Calgary lost its third consecutive *Charter* battle – fifth including appeals – when the Court of Queen's Bench of Alberta issued its decision in *Wilson v. University of Calgary*. For several consecutive years, Campus Pro-Life, a university-recognized student club that opposes abortion, had hosted a bi-annual event known as the Genocide Awareness Project. The event features large displays showcasing graphic material that seeks to

[34] The disagreement between Justice Strekaf and Justice Paperny over which application test ought to be applied in *Pridgen* again highlights the reason for which the statutory authority and government objective tests ought to be merged into a single test (see footnote 30).

compare abortion to the atrocities of the Holocaust, the Rwandan Genocide, and racially-motivated lynching. During the club's fall 2007 event, protestors setup their own displays directly in front of Campus Pro-Life's already-stationed displays in an attempt to obstruct the demonstration. The club asked that the University provide each group space to peacefully express their viewpoints, but the University responded by asking the club to pay a $500 security fee for all future events, and to turn their displays inward so that only those desiring to view the photographs would be shown such. Campus Pro-Life refused – the University had not objected to graphic photographs displayed by other university-recognized clubs, and had not charged a security fee for similar events hosted by other clubs (Justice Centre for Constitutional Freedoms, 2018a). Following years of conflict, the University found the Campus Pro-Life students guilty of non-academic misconduct.[35] The students attempted to appeal the decision to the University's Student Discipline Appeal Committee, but the Chair argued that the students had not established their grounds for an appeal, and refused to convene the Committee for a hearing. The students sought judicial review of this decision (at paras. 2-23). Justice Horner did not thoroughly explore the *Charter*'s application to the University of Calgary, presumably for reason that the University did not explicitly oppose nor argue against the *Charter*'s application – the University argued that even were the *Charter* to apply, reasonable steps were taken to properly balance the *Charter* rights of those involved (at paras. 146-149). Nonetheless, Justice Horner ruled that the University did not fulfill its obligation to consider the *Charter*-interests of the students when making its decision, and did not engage in analyses of proportionality or minimal impairment (at paras. 176-177). Accordingly, Justice Horner ordered the Committee to convene as soon as reasonably practical to hear the students' appeal (at para. 181). The Committee immediately allowed the

[35] In 2009, the University also had a number of the students charged with criminal trespassing, but these charges were stayed by the Crown shortly before the trial date (at para. 6).

appeal and removed the charge of non-academic misconduct from the students' files (Justice Centre for Constitutional Freedoms, 2018a). For reason that the case concerned a variety of administrative law matters alongside the *Charter*, which was not thoroughly explored, it is unclear which method of application was invoked, if any – logically, Justice Horner seems to have invoked either the statutory authority test, the government objective test, or a combination thereof.

B. Rejection of the Charter

i. *Lobo v. Carleton University*; *BC Civil Liberties Association v. University of Victoria*

In the Ontario Superior Court of Justice's 2012 decision of *Lobo v. Carleton University*, Justice Toscano Roccamo ruled that the *Charter* did not apply to Carleton University when it denied the request of a student group to utilize university property for an extra-curricular activity. Carleton Lifeline, a university-recognized student club that opposes abortion, had sought to utilize the University's main quadrangle for a graphic anti-abortion display. The University denied the club's request to utilize the quadrangle, but offered to allocate space for the display in a building on campus, and to setup a table in the main university centre where club members could invite students to the display. Despite lack of approval, the club, led by Ruth Lobo, attempted to setup their display in the quadrangle. The University called the Ottawa Police Service, which arrested the students involved in the display and charged each with trespassing (Lewis, 2010). Justice Toscano Roccamo ruled that the University is an autonomous body, and that the University's incorporating statute, the *Carleton University Act 1952*, does not establish government control or influence over the University in any manner, particularly in regards to how the University chooses to allocate space on its campus (at para. 17). Accordingly, Justice

Toscano Roccamo deemed the *Charter* inapplicable in these circumstances and ruled in favour of the University (at para. 36). Justice Hinkson of the Supreme Court of British Columbia reached a similar conclusion in the 2015 decision of *BC Civil Liberties Association v. University of Victoria*, finding that the *Charter* did not apply when the University of Victoria declined to allocate space to a student group that sought to host an anti-abortion demonstration (at para. 152). Both *Lobo* and *BC Civil Liberties* were upheld on appeal (Court of Appeal for Ontario, *Lobo v. Carleton University*, 2012) (Court of Appeal for British Columbia, *BC Civil Liberties Association v. University of Victoria*, 2016).

ii. *Telfer v. The University of Western Ontario*

In the Ontario Superior Court of Justice's 2012 decision of *Telfer v. The University of Western Ontario*, the Court ruled that the *Charter* did not apply to the University of Western Ontario when it disciplined a student on grounds of harassment. Following Richard Telfer's election to the position of President of the Society of Graduate Students, the election results were contested. Acting in her capacity as Speaker of the Society, Fiona Simpson conducted an investigation and ruled that Telfer's win was invalid. During the investigation, Telfer sent a series of aggressive emails to Simpson, referring to her as incompetent, undemocratic, and a liar – one email concluded, "Rest assured, I will defeat your stupidity in the end." Telfer had later instructed a friend to videotape Simpson in the student government office, and had acted aggressively towards Simpson in a Society meeting the following day. In accordance with the University's *Code of Student Conduct*, Simpson made a complaint of harassment, and Telfer was later found guilty of the offense by the Vice-Provost. Telfer was subject to formal reprimand and ordered not to have any contact with Simpson. Telfer appealed unsuccessfully to both the University Discipline Appeal Committee and the President of the University (at paras. 3-18). The

majority of the Court ruled that the University is an autonomous body and was acting upon its own authority when administering disciplinary action, and that government played no part in either the formulation or implementation of the University's disciplinary procedures (at para. 61). Distinguishing *Telfer* from the *Pridgen* superior court decision, the majority ruled that the statutory scheme applicable to the University of Western Ontario was different than that of the University of Calgary (at para. 59). Accordingly, the majority deemed the *Charter* inapplicable in these circumstances and dismissed Telfer's application for judicial review (at para. 61).[36]

iii. *AlGhaithy v. University of Ottawa*

In the Ontario Superior Court of Justice's 2012 decision of *AlGhaithy v. University of Ottawa*, the Court ruled that the *Charter* did not apply to the University of Ottawa when it dismissed a student from an academic program. Waleed AlGhaithy, a resident in the neurosurgery program, was the subject of numerous complaints, including concerns of interpersonal difficulties, poor attendance, and failure to provide adequate care. Concerns escalated to the point that medical staff at two local hospitals had refused to provide further training to AlGhaithy. Following a meeting by the Residency Program Committee, AlGhaithy was dismissed from the program. A complex University hierarchy allowed AlGhaithy to appeal the decision on three separate occasions – the Faculty Postgraduate Evaluation Subcommittee, the Faculty Council of the Faculty of Medicine, and the Senate Appeals Committee all rejected his appeals (para. 3-28). In his appeal to the Ontario Superior Court of Justice, AlGhaithy argued:

[36] While Justice Matlow dissented and would have ruled in favour of Telfer, the dissent was on grounds of procedural fairness and was unrelated to the *Charter*. Justice Matlow made no findings in regards to the *Charter*.

> "The University was implementing a statutory scheme because the residency program was accredited by the Royal College of Physicians and Surgeons of Canada, and once the University's program was accredited, the University was acting as an agent of the Ontario government by training medical residents in postgraduate specialties in accordance with the *Regulated Health Professions Act* … the *Medicine Act* … and the regulations made thereunder." (at para. 75)

The Court unanimously ruled that, although both the College of Physicians and Surgeons of Ontario and the Royal College of Physicians and Surgeons of Canada were involved in the program's accreditation,[37] the University is an autonomous body, and government played no role in the University's decision to dismiss AlGhaithy (at para. 79). Distinguishing *AlGhaithy* from the *Pridgen* superior court decision, the Court ruled that Alberta's *PSL Act* requires universities to implement a specific government objective in facilitating access to post-second education, but that there is no equivalent requirement in the *Act respecting the University of Ottawa* (at para. 78). Accordingly, the Court deemed the *Charter* inapplicable in these circumstances and dismissed AlGhaithy's application for judicial review (at para. 80).

iv. *Yashcheshen v. University of Saskatchewan*

The most recent jurisprudence concerning *Charter* application in the university context comes from the Court of Queen's Bench for Saskatchewan's 2018 decision in *Yashcheshen v. University of Saskatchewan*. Alicia Yashcheshen applied to the University of Saskatchewan's

[37] All academic programs require accreditation from that province's government, and the professional society of each province are involved in the accreditation process for academic programs concerning the profession that their society regulates. The acceptance of AlGhaithy's argument would have deemed the *Charter* applicable to virtually all academic programs in Canada.

College of Law, however did not include a Law School Admission Test (LSAT) score in her application, and instead included a request for accommodation. Yashcheshen requested accommodation on grounds that her physical disabilities prevented her from having a fair opportunity to write the LSAT. The College refused to consider an application unaccompanied by an LSAT score, and suggested that Yashcheshen seek accommodation with the LSAT's administrating body, the Law School Admission Council (LSAC). Yashcheshen was granted accommodation by LSAC, but not to the extent that she believed reasonable. Yashcheshen argued that the College's policy not to consider applications from persons with disabilities such as hers, absent of an LSAT score, is contrary to section 15(1) of the *Charter* (at paras. 1-16).[38] Justice Meschishnick noted that, pursuant to *The University of Saskatchewan Act*, the authority to set admissions standards belongs exclusively to the University – government does not have the authority to formulate or implement admissions standards, and thus such matters are incapable of being governmental in nature (at para. 30). Accordingly, Justice Meschishnick ruled that the College's policy does not originate in government, nor does the academic standard seek to further a specific government objective, and thus deemed the *Charter* inapplicable in these circumstances and dismissed Yashcheshen's application for judicial review (at para. 34). *Yashcheshen* was upheld on appeal (Court of Appeal for Saskatchewan, *Yashcheshen v. University of Saskatchewan*, 2019).

[38] Section 15(1) of the *Canadian Charter of Rights and Freedoms* reads:
Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (Canada, 2011).

C. Lessons from the Lower Courts

While the circumstances of these cases vary, the case law shares a common theme: the substance of the university's governing legislation served as the most important variable in the determination of whether or not the *Charter* was applicable. Save for those justices that declined to address *Charter*-based arguments, each and every one of the justices in *Lobo*, *AlGhaithy*, *Telfer*, and *BC Civil Liberties*, and justices of the appellate decisions therein, all distinguished the Alberta decisions from the case at bar by citing the unique statutory scheme of the *PSL Act*;[39] the three justices of the *BC Civil Liberties* appellate decision went so far as to refer to Justice Paperny's *Charter* analysis as *dicta* (Court of Appeal for British Columbia, 2016: at para. 37). The substance of the *PSL Act* is the leading factor in the Alberta decisions – the province in which cases are decided does not appear to be the independent variable in the outcome of these cases, rather it is the legislation that governs the university in question. In Alberta, British Columbia, and Quebec, all public universities are incorporated by, and derive authority from, a single statute that applies to all universities in that province.[40] In all other provinces, public universities are incorporated by, and derive authority from, statute unique to each. For such reason, where universities derive authority from identical statute, it is expected that there will be a greater degree of consistency in the judiciary's findings concerning *Charter* application in the university context. The same degree of consistency will not be found where universities derive authority from statute unique to each. As will later be discussed, by analysing the statutory scheme of the university in each case, and by accounting for the above distinction, the law of *Charter* application appears much more harmonized than others suggest – the University of

[39] Though only implicitly, the *Yashcheshen* superior court decision was also decided on this understanding.
[40] The *Post-Secondary Learning Act* in Alberta, the *University Act* in British Columbia, and *An Act respecting Educational Institutions at the University Level* in Quebec.

Calgary was repeatedly subject to *Charter* scrutiny for reason that the same statutory scheme was present on each occasion.

Like all legal matters, the outcome of a case will always depend upon the circumstances of the case at hand – no two legal matters are perfectly indistinguishable. Nonetheless, the case law of the lower courts serve as precedent, and will be instrumental in the adjudication of matters of a similar nature. Jurisprudence from the lower courts suggests that the *Charter* will not be applicable to the following:

(1) Student discipline that is either academic (*AlGhaithy*) or non-academic (*Telfer*) in nature.

(2) Reservation and use of university property for extra-curricular purposes (*Lobo, BC Civil Liberties*).

(3) The formulation and implementation of academic standards (*Yashcheshen*).

Due to the unique statutory scheme of the *PSL Act*, Alberta remains an outlier to these findings: matters of student discipline have repeatedly been cause for *Charter* scrutiny, while the remaining statements have yet to be tested.[41]

Regardless of provincial jurisdiction, jurisprudence strongly suggests that the *Charter* will be deemed applicable to all matters in which a university utilizes the powers of the state for

[41] Although the reservation and use of university property for extra-curricular purposes was part of the subject matter of *Wilson*, judicial review concerned student discipline and did not address whether or not the *Charter* was applicable to the University of Calgary in its allocation of space on campus.

the purpose of enforcing its own policies in the court system.[42] The presiding justices in *Jackson* and each of the *Whatcott* decisions made such findings when the universities performed arrests and issued tickets pursuant to both traffic and parking bylaws and trespass legislation. It would be both strange and dangerous if universities wielded compulsion only otherwise possessed by government, but were not constrained by the constitutional limitations of such powers.[43] On this finding, the decision of *Lobo* is unjustified – Carleton University utilized Ontario's *Trespass to Property Act* to enforce its own policies. The same cannot be said of *BC Civil Liberties*, in which the University of Victoria sought to enforce its policies by way of student discipline, as opposed to arrests, trespass legislation, and the court system. Silletta argues that the law of *Charter* application in the university context "looks more like a Picasso than a Rembrandt" (2015: 92). In the case of *Lobo*, and to the extent that there remains unclear, and perhaps unsettled, aspects of the law of C*harter* application, I agree with Silletta.

The guidance of the Supreme Court of Canada has overwhelmingly been of a liberal constitutionalist understanding, and while the same can be said of the lower courts, postliberal constitutionalism has found fertile ground in the Alberta courts. While judges such as Justice Paperny in the *Pridgen* appellate decision have moved towards a postliberal constitutionalist understanding, such is difficult to achieve while simultaneously acting in accordance with the doctrine of *stare decisis*. Although the Supreme Court's limited guidance has given the lower

[42] In *Whatcott* (2012), Justice Jeffrey stated, "[The University's] use of the province's trespass legislation engaged the powers of the state in issuing the ticket, prosecuting the charge and enforcing and receiving any fine. It is not insignificant that here the University is not appearing as litigant to enforce its private property rights but the Crown appearing as litigant to enforce the laws and interests of the state, armed with all the machinery of the state" (Court of Queen's Bench of Alberta, 2002: at para. 36).

[43] In *Whatcott* (2002), Justice Ball stated, "[The University] is engaged in governmental action which may bring an individual before the courts in the same manner as a Federal, Provincial or municipal law" (Court of Queen's Bench for Saskatchewan, 2002: at para. 44). In *Jackson*, Justice Searle stated, "It would be absurd if police employed by the federal government, a province or a municipality are subject to the Charter but those employed by a university, carrying on very similar activities, are not" (Ontario Superior Court of Justice. Small Claims Court, 2003: 4).

courts freedom in constructing the remainder of the puzzle, those pieces already laid cannot be removed or rearranged. The variance in the application methods invoked between the *Whatcott* and *Pridgen* superior court and appellate decisions, along with the inconsistency of *Lobo*, clearly indicate some degree of division and uncertainty among the lower courts, and suggests that there are pieces of the puzzle yet needed to achieve consensus. Unless the Supreme Court is to again consider the matter of *Charter* application to non-government institutions, and is to revise its stance on the issue – possibilities that I will later address – a liberal constitutionalist understanding will prevail for the foreseeable future.

The dominance of liberal constitutionalism in Canada paints a grim picture for the *Charter*'s application to universities. While the *Charter* has applied to some university actions but not others, such is intentional – "the quality of the act at issue, rather than the quality of the actor, must be scrutinized" (Supreme Court of Canada, *Eldridge v. British Columbia (Attorney General)*, 1997: at para. 44). The *Charter* will only apply to university action when it is truly the government who is acting – the *Charter* never applies to private activity, rather it applies to government activity; the latter however, may disguise itself as the former. In essence, the judiciary will only deem the *Charter* applicable to private activity in circumstances in which the *Charter*'s non-application would allow the government to circumvent its constitutional obligations. Jurisprudence strongly suggests that if a university (1) is not under substantial control by government, (2) is performing a traditionally university-autonomous function, and (3) is acting upon its own authority, as opposed to legislative authority, then its actions will not be subject to the *Charter*. Although the *Charter* is not intended nor designed to regulate private activity, human rights legislation is.

Application of Human Rights Legislation

Human rights legislation prohibits various forms of discrimination that are committed within designated regions of human activity, and can provide compensation to victims to prohibited discrimination. Unlike the *Charter*, human rights legislation directly applies to most private activity; the Canadian Centre for Diversity and Inclusion states:

> "Generally, with a few exceptions, provincial or territorial codes apply to provincial and municipal governments, businesses, non-profit organizations and individuals within that province or territory, whereas the Canadian Human Rights Act would apply to businesses that are federally regulated and federal government entities regardless of where they are located." (2018: 4)

Like the *Charter* however, such legislation will only be of value if the act in question is within the confines of legislatively protected regions of human activity. Pursuant to class 13 of section 92 of the *Constitution Act, 1867*,[44] civil rights in a province are of provincial jurisdiction, and thus each province and territory have their own unique legislation that applies to matters exclusively within their jurisdiction. The federal government retains authority for civil rights in matters exclusive to federal jurisdiction, and thus human rights legislation also exists at the federal level. Because there exists fourteen jurisdictions with legislation unique to each, both the prohibited grounds of discrimination and the protected regions of human activity vary depending upon jurisdiction – unlawful discrimination in Ontario may not be unlawful discrimination in

[44] Class 13 of section 92 of the *Constitution Act, 1867* reads:
In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say … (13) Property and Civil Rights in the Province (Canada, 2011).

Quebec, and *vice versa*. Table 1 illustrates variations in the prohibited grounds of discrimination of each jurisdiction's human rights legislation. There are additional prohibited grounds of discrimination within each jurisdiction's legislation, however there is no variation between jurisdictions on these grounds – these grounds consist of race, colour, age, sex, sexual orientation, disability, nationality/national origin/place of origin, gender identity/expression, religion/creed, and marital/family/civil status. The protected regions of human activity varies depending upon legislation, but generally includes access to goods, services, and facilities, employment and advertisements of employment, accommodations, occupancy, and tenancy of commercial and residential premises, publications and notices, and unions and associations. Unless otherwise specified in Table 1, the prohibited grounds of discrimination apply to all protected regions of human activity. Due to the complexity of enforcing human rights legislation while simultaneously maintaining a reasonable degree of freedom and individual autonomy, a number of exceptions exist within such legislation:

> (1) Pursuant to the Supreme Court of Canada's 1999 decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, human rights legislation permits the imposition of *prima facie* discriminatory standards if such is a *bona fide* occupational requirement.[45]
>
> (2) Pursuant to the Supreme Court of Canada's 1987 decision in *CN v. Canada (Canadian Human Rights Commission)*, human rights legislation permits prohibited

[45] A *prima facie* discriminatory standard may be deemed a *bona fide* occupational requirement if the employer proves, on the balance of probabilities, that (1) the standard was adopted for a purpose rationally connected to the performance of the job, (2) the standard was adopted in an honest and good faith belief that it was necessary to fulfill legitimate work-related purposes, and (3) the standard is reasonably necessary to accomplish the legitimate work-related purpose. An example includes an entity's ability, in the hiring of a translator, to discriminate against an individual on the basis of language.

discriminatory action if such action exists and operates within the confines of a special program.[46]

(3) The *Canadian Human Rights Act* provides an exception to *bona fide* occupational requirements in effort to protect the principle of universality of service within the Canadian Forces. (Canada, 1985a: 13)

(4) Each jurisdiction's legislation includes exceptions to discrimination by not-for-profit organizations that serve the interests of identifiable groups.[47]

(5) Each jurisdiction's legislation includes exceptions to discrimination on the basis of age, particularly as it relates to minimum and maximum age requirements for employment, retirement, pension plans, occupancy, tenancy, accommodation, licensing, voting, and the purchase and consumption of drugs and alcohol.[43]

(6) Whether by virtue of explicit provisions or judicial interpretation, each jurisdiction's legislation includes exceptions to discrimination on the basis of sex in regards to the operation of gender-specific residency and gender-specific services.[43]

Further, it is important to note that each jurisdictions' legislation features different terminology and definitions, and thus while appropriate to compare, the judicial interpretation of such legislation may differ slightly, and relies on precedent. Terminology may be defined in

[46] Also referred to as equity programs and affirmative action programs. George Blackburn describes affirmative action as "…any action taken to break historic social patterns of rejection, based on [prohibited grounds of discrimination], which have produced seriously disadvantaged barriers, whether or not these patterns result from cold-blooded, calculated conspiracies … or merely result from thoughtlessness, apathy and lack of awareness" (Tarnopolsky, 1982: 155).

[47] These conclusions were reached by analysing each jurisdiction's legislation and comparing the exceptions included within each. Citations for each jurisdiction's legislation can be found at the bottom of Table 1.

some legislation and not in others; complex and controversial value-laden terminology is predominantly left undefined – 'gender' is not explicitly defined in any government's human rights legislation.[48]

TABLE 1

VARIATIONS IN PROHIBITED GROUNDS OF DISCRIMINATION IN CANADA AND THE PROVINCES AND TERRITORIES

	CAN	AB	BC	MB	NB	NL	NS	ON	PEI	QC	SK	NT	NU	YT
Ancestry		*	*	*	*			*			*	*	*	*
Ethnicity / Ethnic Origin	*			*		*	*	*	*	*		*	*	*
Political Belief			*[49]	*	*	*	*		*	*		*		*
Source of Income		*	*[50]	*	*	*	*		*				*	*
Social Origin / Condition / Disadvantage				*	*	*				*		*		
Criminal Record / Charges														*[51]
Pardoned Criminal Record	*							*[52]		*[54]		*	*	
Unrelated Criminal Record			*[53]			*[54]			*[54]	*[54]				*
Receipt of Public Assistance								*[54]			*			
Citizenship								*[55]					*	
Language										*				
Genetic Characteristics	*													
Irrational Fear of Contracting Illness or Disease							*							

Sources: Alberta, 2000; British Columbia, 1996a; Canada, 1985a; Manitoba, 1987; Newfoundland and Labrador, 2010; New Brunswick, 1973; Northwest Territories, 2004; Nova Scotia, 1989; Nunavut, 2003; Nunavut, 2017; Ontario, 1990; Prince Edward Island, 1976; Quebec 1976; Saskatchewan, 1979; Yukon, 1987.

[48] Walter Surma Tarnopolsky notes that in 1982 only Quebec's human rights legislation provided a definition of 'discrimination',[48] while Prince Edward Island's legislation defines the term in a circular manner, stating, ""discrimination" means discrimination in relation to race, religion, creed, colour … etc." (1982: 83). Since 1982, only Nova Scotia and Manitoba have amended their legislation to include a definition of the term.

[49] Applies to employment, advertisement of employment, and unions/associations only.

[50] Applies to tenancy only.

[51] Does not apply to employment.

[52] Applies to employment only.

[53] Applies to employment and unions/associations only.

[54] Applies to accommodation only.

[55] Does not apply to some circumstances in which Canadian citizenship is a requirement, qualification, or consideration.

While human rights legislation is amended from time to time to include new prohibited grounds of discrimination, each and every government has declined to fill in all of the gaps.[56]

For the provisions of human rights legislation to be invoked, the activity in question will need to be within the confines of both the protected regions of human activity and the prohibited grounds of discrimination, and not be subject to an exclusion. Because both the prohibited grounds of discrimination and the protected regions of human activity vary between jurisdictions, alleged discriminatory conduct may or may not be protected – university activity that contravenes provincial human rights legislation in one province may not contravene the same in the neighbouring province(s). Pursuant to section 93 of the *Constitution Act, 1867*,[57] education is of provincial jurisdiction, and thus the *Canadian Human Rights Act* will only rarely apply to university affairs.[58]

In the university context, human rights legislation will be of use in the most blatant and straight-forward of circumstances, but less so in circumstances in which discrimination occurs in extension of a protected ground. A university denying enrollment to a prospective student because of their gender, physical disability, or skin colour would certainly be within the scope of human rights legislation, and subsequently deemed to be in violation of such. However, in jurisdictions in which discrimination is prohibited on grounds of political belief, the application of legislation becomes less clear – any opinion could conceivably be considered a political opinion. When discrimination based upon a non-prohibited ground occurs in extension of a

[56] In 2017, the Government of New Brunswick amended the *Human Rights Act* to prohibit discrimination on the basis of family status and gender identity/expression, but declined to include discrimination on the basis of ethnicity in the amendment.
[57] Section 93 of the *Constitution Act, 1867* reads:
In and for each Province the Legislature may exclusively make Laws in relation to Education… (Canada, 2011).
[58] In regards to universities, the *Canadian Human Rights Act* only applies to the Royal Military College of Canada and university personnel employed by the Government of Canada (Preston, 1997: 227).

prohibited ground, the application of legislation becomes excessively murky. Two isolated instances, concerning nearly identical matters that occurred in the province of British Columbia in 2006 illustrate the difficulty of addressing discrimination committed in extension of a prohibited ground.

In March, Capilano College Heartbeat Club, a university-recognized student club that opposes abortion, was denied club status by the Capilano College Students' Union ("CCSU") for reason that the Union considered itself to be "an official pro-choice organization" (British Columbia Human Rights Tribunal, *Macapagal and others v. Capilano College Students' Union (No. 2)*, 2008: at para. 6).[59] Heartbeat did not fit within the Union's ideological mandate. Heartbeat filed a complaint with the British Columbia Human Rights Tribunal, alleging discrimination on the basis of religion. Because Heartbeat was a group mostly comprised of Christians, and abortion is considered morally wrong in the Christian faith, the group argued that the discrimination was, by extension, on the basis of religion, contrary to section 8 of British Columbia's *Human Rights Code*. Prior to a hearing, CCSU made a motion of dismissal, which was denied by the Tribunal. Soon afterward, Heartbeat withdrew their complaint following an agreement with CCSU that would allow Heartbeat to become a registered club (Life Site News, 2008). While the Tribunal did not render a decision on the alleged discrimination, its ruling on the motion to dismiss found that there was a "reasonable prospect that the complaint would succeed" (*Macapagal and others v. Capilano College Students' Union (No. 2)*, 2008: at para. 41).

[59] Capilano College has since been renamed Capilano University, and the students' union renamed Capilano Students' Union. The Capilano College Heartbeat Club has since disbanded.

The following October, Students For Life, a university-recognized student club that opposes abortion, was denied club status by the University of British Columbia Students' Union – Okanagan ("UBCSUO") for reason that students were offended by "the methods and materials used by [Students' For Life] to promote its views" (British Columbia Human Rights Tribunal, *Gray and others v. University of British Columbia Students' Union - Okanagan (No. 2)*, 2008: at para. 14). Like Heartbeat, Students For Life filed a complaint with the British Columbia Human Rights Tribunal, and alleged discrimination on the basis that its position on abortion was an extension of the collective religion of the group. UBCSUO made a motion of dismissal, which was successful. The Tribunal concluded that there was "no reasonable prospect that [Student For Life's] complaint of discrimination because of religion [would] succeed," because the decision to not ratify the club was based on the club's offensive material, rather than the club's pro-life outlook or the religion of its members (at para. 30). The decision was upheld by Justice Wong of the Supreme Court of British Columbia, who expressed particular agreement with several of UBCSUO's written submissions, including the following:

> "It was never the intention of the Legislature in enacting the *Human Rights Code*, nor of Parliament in enacting the *Charter*, that the protection of religious freedom should become a sword by which religious groups are able to secure advantages not possessed by similarly-situated secular groups. In order to ensure against this outcome, it is necessary to draw a clear line between, on the one hand, protecting true religious practices and beliefs from discrimination, and, on the other, ensuring that no one is compelled to support the promotion of another person's religious views." (at para. 49)

Despite the students' unions discriminating against Capilano College Heartbeat Club and Students For Life for no reason beyond the religious beliefs of their members, human rights legislation was unable to assist. While religion is a prohibited ground of discrimination in each government's human rights legislation, this is not tantamount to saying that such legislation will protect each and every action that a person undertakes in accordance with their religion. As argued by Justice Wong, human rights tribunals are inherently engaged in the subjective exercise of balancing non-discrimination and individual autonomy – in the cases of Capilano College Heartbeat Club and Students For Life, the British Columbia Human Rights Tribunal ruled in accordance with individual autonomy. It appears that much of the discrimination that occurs on university campuses is committed in extension of a prohibited ground, particularly of religion in the context of anti-abortion student groups; the victims of these discriminatory acts would presumably find little assistance in human rights legislation. For reasons of variance in their content, the many exclusions within, and their failure to protect discrimination committed in extension of a prohibited ground, human rights legislation will be of limited use in the university context and cannot be relied upon as a mechanism to sufficiently solve the identified problem on university campuses.

Chapter 4

Solutions

The question of if the *Charter* is applicable to private activity has been sufficiently addressed by the judiciary, however the actions necessary for private entities to come within purview of the *Charter* is rather incalculable, and at least partially conflicting in the university context. The application tests derived from the opinions of Justice La Forest have proven to be overwhelmingly intricate and most of all, subjective – how much government influence is necessary for a private decision to be considered a government decision? Jurisprudence originating in the lower courts has provided only general indicators of applicability, but the reliability of such has been called into question due to seemingly conflicting judicial opinions. Proponents of postliberal doctrine argue there to be a disturbance in the law of *Charter* application: the lower courts are stuck in a high stakes game of tug-of-war, and the Supreme Court of Canada has yet to intervene. In addressing the dilemma, experts have successfully captured the importance of protecting fundamental freedoms on university campuses, but have failed to submit a viable solution to the problem.

The Argument for Applying the Charter to Universities

Utilizing almost identical evidence, three authors have made fundamentally comparable arguments and have produced nearly identical conclusions: there is disharmony in the lower courts concerning application of Justice La Forest's tests, and thus the Supreme Court of Canada

must intervene.[60] Arguing a postliberal stance, these authors call for a broader definition of government, and a broader interpretation of the requirements for satisfying each test. Following a review of case law concerning the *Charter*'s applicability to university action, Silletta argues that Alberta[61] courts have deemed the *Charter* applicable, while British Columbia and Ontario[62] courts have deemed otherwise (2015: 92). Linda McKay-Panos agrees, arguing that diverging jurisprudence has created a two-tier system "[where] only those students at the Universities of Calgary and Regina (and those other universities that follow recent Alberta and Saskatchewan cases) will have exposure to the full marketplace of ideas" (2016: 94). Krupa M. Kotecha concurs, categorizing the Alberta decisions as "purposive," and the Ontario decisions as "restrictive" (2016: 32-39). Following this review, Silletta and McKay-Panos address the three tests of Justice La Forest; Kotecha primarily addresses the government objective test, but makes brief comments on the others. Each argues that post-*McKinney* developments in the government-university relationship support the conclusion that universities ought to be subject to *Charter* scrutiny, and that the strongest argument for such conclusion rests in the government objective test.

Concerning the government objective test, the authors argue that universities ought to be subject to the *Charter* for reason that post-secondary education is itself a government objective. Although only Alberta and Prince Edward Island have expressly legislated education to be a government objective, Silletta argues that governments "have long provided primary and secondary education for the purposes of equipping and enabling its citizens to participate in

[60] One of these authors (Kotecha) does not explicitly argue that the Supreme Court of Canada ought to intervene, however such is the logical consequence of arguing for such an expansive approach to the government objective test while simultaneously maintaining the doctrine of *stare decisis*.
[61] The Alberta case law is comprised of *Wilson*, *Whatcott*, and both *Pridgen* decisions.
[62] The Ontario case law is comprised of *Lobo*, *Telfer*, and *AlGhaithy*, while the British Columbia case law is comprised of the *BC Civil Liberties* superior court decision.

society and the workforce," and that it logically follows that, with the growing demand for university degrees in Canada, governments would further this objective by providing university education (2015: 95). Additionally, Silletta points to the funding that provincial governments give to public universities, and argues that "it is illogical to suggest that the government would contribute so heavily to a single entity except in furtherance of a specific objective" (2015: 95-96).[63] McKay-Panos concurs with the sentiment of Silletta, and states that "universities' reliance on government funding at this level certainly gives rise to universities considering government interests when making decisions" (2016: 86-87). Kotecha too concurs, adding that government also provides funding to students by way of grants, bursaries, scholarships, and loans (2016: 40-41).

Concerning the statutory authority test, Silletta reflects on Hogg's argument regarding the power of compulsion, and argues that universities possess a wide range of powers not available to a natural person or organization. While acknowledging that the authority to discipline students may be said to derive from a contractual agreement between institution and citizen, rather than statute, Silletta argues that these powers extend beyond the powers of a natural person. Silletta states that universities have contemporarily become the "gatekeepers to a wide range of careers," citing the difference in full-time paid employment rates between bachelor degree holders and high school graduates, and noting that "masters degrees are increasingly becoming the norm"

[63] Silletta mistakenly compares government contributions towards the *total revenue* of the University of Victoria's 2012/2013 fiscal year, and government contributions towards the *operating budget* of York University and the University of Guelph in the late 1980s. The comparison is flawed for reason that it compares distinctly separate figures in vastly separate time periods. A comparison of government contributions in relation to total revenue, based on each university's 2012/2013 audited financial statements, reveals the figures to be 52 per cent at Victoria, 39.4 per cent at York, and 34 per cent at Guelph (University of Victoria, 2013: 21) (York University, 2013: 12) (University of Guelph, 2013: 32). Statistics Canada reveals the national average to have been 51 per cent in 2012/2013, demonstrating that Victoria is actually on the high end of the scale, as opposed to the low end, as is claimed by Silletta (Statistics Canada, 2018).

(2015: 94-95). Particularly, Silletta points to the difficulty this creates in professional-regulated careers such as those in law where extended post-secondary education is required.[64] Universities have been granted the exclusive power to award degrees – in order to obtain employment in professions that require an academic degree, individuals have no choice but to contract with a university, "and therefore subject oneself to its powers of student discipline" (2015: 95). McKay-Panos argues that universities rely on statutory powers to discipline students, but does not discuss Silletta's argument concerning access to professional-regulated careers (2016: 91).

Finally, concerning the government control test, Silletta argues that the test is "overly simplistic" (2015: 93). Silletta argues that, by way of the number of government-appointed directors on each university's administrative board, government may in fact have sufficient control over university administrative boards, but that the simplicity of the test renders such evidence powerless.[65] Silletta submits that it is unlikely that "any university would fall within sufficient governmental control by [the existing] standard" (2015: 93). Kotecha takes a different approach to the government control test, focusing on the Ontario government's role in overseeing the quality assurance framework of universities. The Ontario Universities Council on Quality Assurance, a government entity, oversees these frameworks – "something traditionally left to universities themselves" – and demands that university strategic plans be attuned to government priorities in exchange for government's providing of financial assistance (2016:

[64] Silletta asks, "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*?" (2015: 95).

[65] The circumstances necessary to invoke the government control test remain largely theoretical – unlike the other tests, it has yet to be invoked by the judiciary. So far as it relates to the administrative boards at universities, the government control test would seemingly require that a majority of its voting members be government appointed and acting on government interests. Even though a majority of board members at multiple universities in British Columbia are government appointed, including the board chair, section 19.1 of the *University Act* requires that "the members of the board of a university must act in the best interests of the university," and thus, in the eyes of the judiciary, such boards seem virtually incapable of being under government control (1996b).

52).[66] Kotecha argues that there is "growing evidence that many governments are making their best efforts to erode universities' institutional autonomy and exert control over [universities]" (2016: 52).

Difficulties in the Approach of Silletta, McKay-Panos, and Kotecha

Although there is some merit in the arguments of Silletta, McKay-Panos, and Kotecha, as I will later argue, the proposed solution lacks a proactive element, cannot be accomplished in a reasonable timeframe, and ultimately has very little odds of success. With respect, the authors make two crucial errors in their interpretation of the tests of Justice La Forest: (1) the tests are conceptualized incorrectly, and for such reason are applied incorrectly, and (2) the authors apply the tests too broadly. Additionally, McKay-Panos errs in the argument that legislative differences do not account for diverging jurisprudence, foremost for reason that the legislative comparison fails to account for the origins of university disciplinary powers.

To address the first error, each test must be understood as a way of clarifying and categorizing section 32(1) of the *Charter*, and are not to be considered application provisions in their own right. Consistent use of qualifying statements by Justice La Forest in *Mckinney*, such as use of the words 'could' and 'may', and the multiple warnings by Justice Wilson, strongly suggest that satisfying the requirements of a test may not be substantial enough to invoke the *Charter*. Thus, it is better understood that the actions of a private entity need not satisfy the requirements of a test, but must satisfy the principle that the tests seek to represent: an action must be a government action to invoke the *Charter*. The requirement that an action be a

[66] Since 2015, the Government of Nova Scotia has engaged in similar regulatory actions by way of the *Universities Accountability and Sustainability Act*, which authorizes the Minister of Labour and Advanced Education to withhold, decline to provide, or demand repayment of government operating grants if a university fails to satisfy the government's terms and conditions. In exchange for providing government operating grants, the Minister also has the authority to force a university to enter into a revitalization plan or outcomes agreement.

government action transcends all other requirements, including those rooted in the tests of Justice La Forest and Justice Wilson. Justice Wilson states in *McKinney*, "fixed tests designed to identify government inevitably fail," and that her tests are "intended only as practical guidelines" (1990: 370-371). One must not forget the rule at the heart of these tests: the *Charter* will only ever apply to actions that are government actions, and to decisions that are government decisions. Accordingly, a better approach to understanding the requirements necessary to satisfy each method of applying the *Charter* to private entities, is to measure the degree of government influence, rather than involvement.

To address the second error, to ensure that the *Charter* is applied to the actions of government, and to government actions only, it is necessary that the application tests be interpreted narrowly. Broad interpretation of any of the tests risks applying the *Charter* to activity void of government action. Broadly, the actions of any entity that accepts government funding could be held within purview of the *Charter* by means of the government objective test. Consider the following:

> A private construction firm accepts a contract with the Government of Canada to construct a bridge across the Saint Lawrence River in Quebec. Undoubtedly, the desire to have a bridge spanning the River, and the actions taken by government to ensure the bridge's construction, make clear that the project is a specific government objective. During the bridge's construction, a project supervisor instructs an employee to cease discussion of a particularly religious topic, threatening suspension or termination of employment if the employee does not comply. Could it reasonably be argued that the decision of the project manager to

limit the employee's freedom of expression is truly a decision made by the Government of Canada?

I answer these questions in the negative. Broadly, the decision of the project supervisor could be interpreted as being part of the collective entity that is the delegated decision-maker of government, and subject to the *Charter* for such reason. Narrowly, it is clear that government had no part in the decision of the project supervisor, and thus the decision to invoke the *Charter* to such circumstances would be applying the *Charter* to a decision not made by government. The private entity is merely conducting business with government; both the project supervisor and the employee are merely employees of the private entity. Beyond the aforementioned philosophical constitutional arguments for a narrow approach, a majority of justices in *McKinney* argued in favour of a narrow approach.[67] For such reason, the tests must be interpreted narrowly.

To address McKay-Panos' argument that legislative differences do not account for diverging jurisprudence, there are a number of flaws within. McKay-Panos argues that most Ontario universities were formed under a series of private acts "passed between 25 and 50 years ago," and are therefore "not modern enabling statutes like Alberta's [*PSL Act*]" (2016: 83). McKay-Panos argues that these private acts "were passed in an age when universities played a much different role in our society" (2016: 83). These arguments ignore the fact that these acts can be, and have been, amended by the provincial government. Additionally, it is only on the basis of their age that McKay-Panos claims that these statutes are not modernly enabling – of their content, McKay-Panos does not identify anything as being problematic. While I agree with McKay-Panos' argument that, alongside statute, the judiciary ought to consider "provincial

[67] While the Court unanimously adopted a broader approach in *Eldridge* than in *McKinney*, the approach was still fundamentally narrow and ought to be regarded as an area of overlap between the approaches of Justice La Forest and Justice Wilson.

budgets, throne speeches, commission reports and agreements" to better interpret and conceptualize the relationship between government and universities, such is an argument that the judiciary ought to consider non-statutory material in the decision-making process – this point does not advance the argument that legislative differences do not account for diverging jurisprudence (2016: 84-85). Finally, McKay-Panos states:

> "Alberta's [*PSL Act*] is the only one that specifically states that education is a governmental objective. However, as indicated by Silletta, the fact that an enabling statute does not specifically state that education is a government objective cannot reasonably mean that the other provinces do not consider education to be a governmental objective." (2016: 89)[68]

Fundamentally, McKay-Panos does not rebut the argument that legislative differences account for discrepancies in the case law. Rather, McKay-Panos takes issue with the judiciary's narrow interpretation of the government objective test, and of the judiciary's decision not to adequately consider non-statutory factors.

The discrepancies can be explained by analysing university legislation in the context of authority to administer discipline. Section 31(1)(a) of Alberta's *PSL Act* explicitly confers disciplinary powers to the general faculties councils of universities, and clearly defines a council's abilities to fine, suspend, and expel students – the section also details the right of students to appeal such discipline to the university's administrative board (2003: 29). The same cannot be said of comparable legislation in Ontario. The applicable university legislation in

[68] McKay-Panos' argument relies extensively on Michael Marin's "Should the Charter Apply to Universities?" 2015. *National Journal of Constitutional Law* 35: 29-57.

AlGhaithy does not bestow the University of Ottawa with the power to discipline students, but rather protects the University's autonomy in administering discipline (Ontario, 1965).[69] The applicable university legislation in *Telfer* makes only a single vague reference to fines, and otherwise makes no reference to disciplinary action, while the applicable legislation in *Lobo* makes no reference to disciplinary action at all (Ontario, 1982) (Ontario, 1952). These Ontario universities are not acting upon delegated powers when administering student discipline, but rather are acting upon their own volition. While British Columbia's *University Act* does make rather specific reference to disciplinary powers, comparable to those found in the *PSL Act*, the *Charter*'s application to university-administered student discipline has not yet been tested in the courts of British Columba – the subject matter of *BC Civil Liberties* concerned the reservation and use of university property for extra-curricular purposes, not student discipline (1996b).[70] Comparing case law in Alberta with that in Ontario, there is no discrepancy on the basis of legislative differences; it is only Alberta's *PSL Act* that explicitly confers disciplinary powers to universities. When universities in Alberta utilize these powers, they are acting upon statutory authority; the same cannot be said of universities in Ontario.

Concerning the government objective test, the argument of Silletta is fundamentally flawed for the reasoning provided in addressing the first error of these collective authors. Silletta is correct in stating that a significant amount of money is provided to universities by government,

[69] Section 8 of *An Act respecting Université d'Ottawa* states, "The management, discipline and control of the University shall be free from the restrictions and control of any outside body, whether lay or religious, and no religious test shall be required of any member of the Board, but such management, discipline and control shall be based upon Christian principles" (Ontario, 1965).

[70] The only disciplinary action found in *BC Civil Liberties* was administered by the University of Victoria Students' Society, as opposed to the University of Victoria. Further, the disciplinary action was applied to the student group, Youth Protecting Youth, as opposed to its individual members. Justice Hinkson found that "[the student group] is neither a corporate entity nor a society, and is thus not a legal entity and has no legal capacities" (Supreme Court of British Columbia, 2015).

and is correct in stating that post-secondary education is a government objective, however such findings alone are not cause for the decisions of universities to be attributed to government. For the decision of a university to be attributed to government by way of monetary transaction, government must provide the money for an explicit purpose, and have at least *some* method of enforcing how such money is spent, if only by means of refusing to provide further assistance. While government does provide funds to universities in accordance with reasonably established policy objectives, which may be evaluated by way of measurable outcomes, government plays very little role in administrative decisions concerning how such funds will be spent, and of how the universities will seek to fulfill such objectives. The link between government's financial support and a university's pursuit of government objectives may be described as follows: Government provides funding to universities with expectations in mind, but it is the university that chooses its path towards fulfilling these expectations. So long as the university maintains a substantially degree of freedom in designing its own path, it cannot reasonably be argued that the university's path has been decided by government.[71]

The decision of how to spend funding provided to universities by government, is a decision made by universities and their respective administrative boards. For the *Charter* to apply by way of government funding, there must be a clear link between funds provided by government, and decisions made by universities; a cause and effect relationship must be established. Government's providing of resources to universities, regardless of quantity, will never be cause for *Charter* scrutiny, rather it is the compulsion that is intertwined with such

[71] Kotecha argues that there is a growing case for government to influence, and exert control over, the strategic plans of universities in Ontario: the Ontario Universities Council on Quality Assurance has begun overseeing the quality assurance framework of universities, "something traditionally left to universities themselves" (2016: 52). In such an example, exclusive to Ontario, it would seem that universities may not have a substantial degree of freedom in designing their own paths.

funding that serves as entry point for the *Charter*. For such reason, it is unnecessary to analyse the value of funds provided by government to universities, but rather necessary to analyse the restrictions and conditions associated with such funds. The same logic can be applied to other aspects of funding provided by government in the university context, such as grants, bursaries, scholarships, and loans. Even considering the broad interpretation that Silletta favours, application of the government objective test by way of government funding would be difficult. In the 2017/2018 fiscal year, 9 universities among a national sample of 15 received less than 50 per cent of their total revenue from government – the rate decreased by an average of 3.7 per cent compared to five years prior.[72] The results suggest that a minority of universities receive over 50 per cent of their total revenue from government, and that government contributions as a percentage of university revenue is decreasing.

Additionally, while Silletta recognizes that the *Charter* will only apply to *specific* government objectives, the author errs in considering government operating grants to be specific enough to invoke the *Charter*, and only minimally explains how this element of the test is satisfied. While the threshold to consider government funding specific, as opposed to general, is unknown and perhaps wholly subjective, ostensibly it seems that funding would need to be provided conditionally. Measuring the specificity of government funds ought to be accomplished by evaluating the range of options available to the university in its spending of government-provided funds. Funds provided by government to assist a university's operating budget seem overly general for reason that there are a wide-range of options available in how the University

[72] These conclusions were reached by analysing the financial statements of ten universities in both the 2012/2013 and 2017/2018 fiscal years (Brandon University, 2018) (Dalhousie University, 2018) (Memorial University of Newfoundland, 2018) (Mount Allison University, 2018) (Simon Fraser University, 2018) (University of Alberta, 2018) (University of British Columbia, 2018) (University of Calgary, 2018) (University of Guelph, 2018) (University of Manitoba, 2018) (University of New Brunswick, 2018) (University of Saskatchewan, 2018) (University of Toronto, 2018) (University of Victoria, 2018) (University of Winnipeg, 2018).

may utilize the funds – an operating budget is comprised of a plethora of distinct items, such as employee salaries, utility costs, facility maintenance, and office supplies. The Ontario Ministry of Training, Colleges and Universities even refers to these grants as "*general* enrollment based grants" and "*basic* operating grants" (2014).[73] In *Mckinney*, the Government of Ontario provided operating grants totalling 68.8% of York University's operating budget, and 78.9% of Guelph's, with the only precise conditions concerning the rate of tuition fees that the universities could impose – if the Court did not consider these figures large enough to bring universities within purview of the *Charter*, it seems that the providing of operating grants will alone never be cause for applying the government objective test (Supreme Court of Canada, 1990: 272). While government has provided the funds, the University has decided how to spend them.[74] On the other hand, funds provided by government for the purpose of employing a professor in a particular department, or for implementing a new academic program, appear to be much more specific for reason that the funds cannot be spent otherwise. The government has provided the funds, and has also decided how to spend them. While I reject the argument that government operating grants could be considered specific enough to invoke the *Charter,* I concur with the few specific examples provided, such as government's funding of Canada Research Chairs and the aforementioned Ontario Universities Council on Quality Assurance – there exists a strong argument for *Charter* application in these circumstances.

Concerning the government control test, I concur with Silletta's argument in its entirety: the test is overly simplistic and for such reason application is unlikely. To satisfy the requirements of the test, Justice La Forest explains in *McKinney* that government would need to

[73] Italics are mine.
[74] So long as the university retains control of how government operating grants are spent, government could conceivably provide the entirety of a university's operating funds and still not come within purview of the *Charter*.

partake in the decision-making process to such extent as to make it a government decision (Supreme Court of Canada, 1990: 274). This would seemingly require that a majority of voting members on a university's administrative board be both government appointed, and acting on government interests. As Silletta argues, such a scenario is nearly impossible due to legislative clauses that prohibit government appointees to act on government interests; sufficiently proving that an appointee is acting on government interests is an impossibly high standard. It is worth noting however that application of this test would presumably be limited exclusively to decisions made by, or stemming from, university administrative boards – the *Charter* would not apply to all actors within the university community in such circumstances.

Finally, considering the statutory authority test, I disagree with the reasoning of Silletta, but submit that, under provincial-dependent circumstances, this test posits the strongest case for *Charter* application in the university context. This test has strength in that it is comparatively unambiguous: an entity either is, or is not, exercising compulsion derived from statute. While the power to confer degrees is not possessed by a natural person, and thus all universities act on statutory authority in this regard, for the aforementioned reasons the same can only be said in circumstances in which the power to administer discipline is explicitly conferred upon the university in legislation. Although discipline administered by universities can be extraordinarily consequential for the individual, such does not contribute to the discussion of whether one is, or is not, acting on statutory authority; the acknowledgment that there are severe consequences in the decisions of non-government entities does not advance the argument that such decisions are truly made by government. While acts of discipline do affect the degree granting process, virtually every decision made by University administrations can affect the degree granting process, including program entry standards, class schedules, and degree requirements.

The Common Law Argument

Derek B. Mix-Ross takes a vastly different approach to the problem. Instead of addressing how and when the *Charter* ought to apply, Mix-Ross focuses on finding a solution in accordance with its currently known boundaries. Rather than stretching the application provisions of the *Charter* to its extremities, Mix-Ross' argues that there are other remedies available within the common law that ought to be utilized in the university context. In civil disputes "where human rights are invoked but the *Charter* does not directly apply," Mix-Ross argues that the judiciary "ought to look to existing remedies at common law before employing ambiguous and subjective "values-language" to justify their conclusions" (2009: 107). While Mix-Ross submits that universities are predominantly private actors, it is argued that they are property affected with a public interest, and for such reason ought to be subject to special duties of non-discrimination. Though recognizing some overlap, Mix-Ross argues that university property ought to be viewed as property affected with a public interest, rather than the public utilizing a private business by way of contract; such an approach will "focus more on one's property rights, and the limits placed on it when he applied his property to a "public purpose"" (2009: 69). In essence, when the operation of private property serves a public purpose, the property ought to be held to a higher standard than private property that is not serving public purposes. While such doctrine has not been introduced in Canada as of yet, Mix-Ross notes that courts in the United States have utilized the doctrine, and that the necessary factors appear applicable in the context of government-funded public universities in Canada (2009: 74).

Difficulties in the Approach of Mix-Ross

The common law solution proposed by Mix-Ross is a remarkably innovative approach, and while such a solution may be viable under very precise circumstances, I argue that the

utilization of the common law as a means for regulating discriminatory behaviour in private matters to be problematic. The validity of Mix-Ross' approach relies extensively on a very particular interpretation of a series of factors concerning the relationship between property affected with a public interest and the purpose of post-secondary educational institutions[75] – a marginally different interpretation of any single aspect of the relationship could leave the argument in crumbles.

Mix-Ross' approach to have *Charter* values influence the direction of common law is akin to the argument of Régimbald and Newman: "Charter values are … meant to shape the common law, which makes the Charter still potentially very relevant to private parties" (2013: 540). While I agree with this argument, it must be understood that the relationship between *Charter* values and the common law is more complex than this. As suggested by the Supreme Court of Canada in its 2002 decision of *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, the role of the judiciary is not to "overturn a well-established rule at common law, but rather to clarify the common law given two strands of conflicting authority." The Court argued, "Any change to the common law should be incremental … proposed modifications [to the common law] that will have complex and far-reaching effects are in the proper domain of the legislature" (at para. 16). In the Supreme Court's 2009 decision of *Grant v. Torstar Corp.*, the Court emphasised that while the common law is not directly subject to *Charter* scrutiny in cases between private parties, it may be modified to bring it into harmony with the *Charter* (at para. 44). Were matters in the university context deemed to be in disharmony, there would still remain the difficulty of how quickly such changes to the common law could occur – changes to the

[75] In 1979, a majority of the Supreme Court of Canada ruled that universities are traditionally "a community of scholars and students enjoying substantial internal autonomy," and are only "in a sense" a public service (*Harelkin v. University of Regina*: 594-595). Universities may not meet the criteria of property affected with a public interest, a distinction that is crucial to Mix-Ross' argument.

common law as substantial as those proposed by Mix-Ross could take decades. In essence, the approach of Mix-Ross would partially require circumvention of the rules of *Charter* application to apply nearly identical rights and freedoms to matters in which the *Charter*'s application provisions are not engaged. Both the *Charter* and human rights legislation have been tailored carefully, and have been subject to decades of legislative and judicial review – with respect to Mix-Ross, the implementation of such a common law approach requires nothing short of judicial activism.

Four Solutions

On Canadian university campuses, current efforts to protect the rights and freedoms of students can be described as insufficient. The *Charter* overwhelmingly does not apply to universities, while human rights legislation is filled with exclusions and exceptions that all depend upon the protected regions of human activity and the prohibited grounds of discrimination within a jurisdiction's legislation. While others have sought to address the gap, each approach lacks a proactive element. While I do agree that intervention by the Supreme Court of Canada would provide some degree of clarity, and may even solve the problem if decided upon in the most favourable context, waiting for such a decision to occur leaves those advocating for a better system of protecting fundamental freedoms with little to act upon. Just as waiting and hoping for the development of a cure for a debilitating illness is not an acceptable form of treatment, waiting and hoping for a particular Supreme Court decision is not an acceptable solution to the complex reality that is the state of fundamental freedoms on university campuses. A similar response can be said of Mix-Ross' common law approach, with accounting for the difficulties exclusive to that approach. The solution that I will propose does not require

the Court's intervention, and could survive any future *Charter* decisions the courts may have in store.

Table 2 illustrates the existing mechanisms designed to restrict freedom, and the mechanisms designed to protect freedom, and in which jurisdictions these mechanisms operate.

TABLE 2		
A COMPARISON OF THE EXISTING MECHANISMS DESIGNED FOR RESTRICTING AND PROMOTING INDIVIDUAL FREEDOMS		
	Restricts Freedom	Promotes Freedom
Federal Government Jurisdiction	Federal Legislation[76]	Federal Human Rights Act
Provincial Government Jurisdiction	Provincial Legislation[77]	Provincial Human Rights Act
University Jurisdiction	Student Codes of Conduct	

There is a noticeable gap in mechanisms designed exclusively to protect freedom within university jurisdiction. I propose that this gap be addressed. Four primary solutions come to mind:

(1) Constitutional amendment to reform the application provisions of the *Charter* to apply to non-government entities.

(2) The judiciary adopt a more postliberal constitutional interpretation of the application provisions of the *Charter* in relation to non-government entities.

(3) Legislative amendment to human rights legislation to protect more grounds of discrimination, and in more regions of human activity.

[76] Examples of federal legislation that restrict freedoms include the *Criminal Code of Canada*, the *Controlled Drugs and Substances Act*, and the *Consumer Packaging and Labelling Act*.
[77] Examples of provincial legislation that restrict freedoms include the *Ontario Highway Traffic Act*, the Nova Scotia *Amusement Devices Safety Act*, and the British Columbia *Adoption Act*.

(4) Universities adopt internal policy in accordance with *Charter* values that seeks to protect the rights and freedoms of students.

Options (1), (2), and (3) all share a common theme: each requires the introduction of postliberal values to the administration of justice; each seeks a larger degree of government involvement in the regulation of private activity. The goal of postliberal constitutionalism is not inherently problematic, rather it is the desire to achieve such goals through the constitution that is problematic – as Swinton suggests, private activity is better regulated by other mechanisms (1982: 44-45). In the context of human rights and freedoms, both doctrines seek to prohibit discrimination, but these ambitions are infinitely complicated by the fact that prohibition of discriminatory conduct is itself discriminatory. While a lesser number of restrictions on individual autonomy appears preferable, such restrictions seek to safeguard against discriminatory conduct – the goal ought to be to achieve balance between the doctrines of liberal and postliberal constitutionalisms. At the liberal constitutional extremity lies a state indifferent to the suffering of those experiencing discrimination from private actors. At the postliberal constitutional extremity lies the dystopian horrors of Orwell's Big Brother or Huxley's World State. An analysis of those judicial decisions utilized in Chapter 3 of this study suggests that Canada subscribes to both doctrines, but far more often aligns with the values of liberal constitutionalism. While I seek to respect the delicate balance between these two doctrines, I am more interested in maintaining the state's predominantly liberal constitutional direction.

The preservation of freedom, liberty, and individual autonomy are deeply rooted in Canada's legal tradition, to which the furtherance of postliberal constitutionalism is a threat. For private activity to be overwhelmingly forced into the confines of the *Charter* or human rights

legislation, society must be willing to sacrifice a substantial amount of freedom and individual autonomy. In Canada, postliberal society looks vastly different from current society. A parent disciplining their child for swearing would violate the child's freedom of expression, protected by section 2(b) of the *Charter*. The operation of a women's only gym would be discriminatory against men, violating their right to equality on the basis of sex, protected by section 15(1) of the *Charter*. The exclusion of transgender persons from accessing services at their local Catholic church would violate the excluded person's right to equality on the basis of gender identity/expression, protected in each jurisdiction's human rights legislation. Even declining to befriend an individual on social media because of their ethnic origin could be deemed unlawfully discriminatory. Although such actions would be subject to the *Charter*'s reasonable limitations clause, it is unknown how such a clause would apply in a society dominated by postliberal constitutionalism. While one may wish to rid the world of discrimination, Swinton argues that the "individual right to discriminate or to choose not to associate can be regarded as a form of privacy right … equality for one individual competes with privacy and liberty for another" (1982: 47). While government has a prominent role to play in anti-discrimination initiatives, this is not tantamount to saying that government is the only entity with a role to play, or that government must be involved in all anti-discrimination initiatives. Through keeping one another accountable for their actions, and acting accordingly, each and every human has a role to play in limiting the harmful effects of discrimination.

In society's most postliberal form, everything that is immoral or unethical is illegal – the same cannot be said of liberal society. Freedom requires that individuals be permitted by law to make, and not be prosecuted for making, a reasonable degree of poor choices. Just as individuals are not tolerant if they only tolerate agreeable viewpoints, individuals are not free if they are only

free to make the right choice. In a free society, I argue individual autonomy to be the safeguard to immoral and unethical action – individuals are free to dislike and disassociate those that exhibit dangerous ideas and wrongful behaviour. In circumstances in which a private entity has authority over such an individual, the private entity may even censor, reprimand, or expel the individual. In liberal society, freedom is bilateral. Discussing the *Criminal Law Amendment Act, 1968–69*, then-Justice Minister Pierre Trudeau stated, “There's no place for the state in the bedrooms of the nation,” referring to the liberal constitutional direction that government ought to steer (1967). Trudeau voiced opposition to government legislation that regulates strictly private conduct, stating, “[what is] done in private between adults doesn't concern the Criminal Code” (1967). I seek for individual autonomy to remain the safeguard against immoral and unethical activity.

Beyond implications to freedom, liberty, and individual autonomy, the nation’s legal community has repeatedly expressed the dangers of applying the *Charter* to private activity. Anne A. McLellan and Bruce P. Elman argue that "in cases involving arrests, detentions, searches and the like, to apply the Charter to purely private action would be tantamount to setting up an alternative tort system" (1986: 367). In *Bhindi v. B.C. Projectionists*, Chief Justice Nemetz argued, “[The inclusion of] private commercial contracts under the scrutiny of the Charter could create havoc in the commercial life of the country” (Court of Appeal for British Columbia, 1986: at para. 19). In *McKinney*, Justice La Forest argued, “To open up all private and public action to judicial review could strangle the operation of society … [and] impose an impossible burden on the courts” (Supreme Court of Canada, 1990: 262-263). Council for the universities argued that doing such would "diminish the area of freedom within which individuals can act" (Supreme Court of Canada, 1990: 262). The resources necessary to enforce postliberal constitutionalism is

extraordinary, if not impossible. Similar effects could be said to occur with the third option – such would be tantamount to setting up an alternative tort system, and would present an impossible burden on human rights tribunals. Opening up the *Charter* to private activity, as would occur in the first and second options, could encourage greater use of the notwithstanding clause. Additionally, these three options can be deemed problematic for reasons unique to each.

The First Option: Constitutional Amendment

The first option, constitutional amendment to reform the application provisions of the *Charter* to apply to non-government entities, is problematic for reason of the difficulty in amending the constitution, and the risks associated with such. Pursuant to section 38(1) of the *Constitution Act, 1982*,[78] an amendment of this nature would require use of the '7/50 formula'. Speaking at the Ukrainian-Canadian Congress in 1971, then-Prime Minister Pierre Trudeau stated, "Uniformity is neither desirable nor possible in a country the size of Canada. We should not even be able to agree upon the kind of Canadian to choose as a model, let alone persuade most people to emulate it" (Government of Manitoba, 2017). Drafting constitutional amendment agreeable to seven of the provinces that collectively represent over 50 per cent of the population is a daunting and frightening task. While not explicitly required, public consultation in the form of a referendum would presumably be necessary both to give such an amendment a sense of legitimacy, and to alleviate criticism that political parties would be subject to if failing to consult the electorate. Peter H. Russell argues that, to prevent a "national unity crisis," the Charlottetown

[78] Section 38(1) of the *Constitution Act, 1982* reads:
An amendment to the Constitution of Canada may be made by proclamation
issued by the Governor General under the Great Seal of Canada where so authorized
by (*a*) resolutions of the Senate and House of Commons; and (*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces (Canada, 2011).

Accord of 1992 may have been the last time that this generation of Canadians "attempt a grand resolution of constitutional issues" (1993: 33). Although a considerable amount of time has passed since the Accord, one must wonder if Canadians are ready for a sixth round of mega constitutional politics, or if such would risk reopening the scars of division still fresh in the minds of the Québécois. While a number of constitutional amendments may be acceptable on their own, the inevitable difficulty of constitutional politics is that doing so would invite overwhelming pressure to deal with other existing issues – government could even receive backlash for only addressing a fixed number of amendments, or for prioritizing constitutional matters. The failure of mega constitutional politics would lead to greater division among the provinces, and could mean the end of our union.

The Second Option: Postliberal Judicial Interpretation

The second option, that the judiciary adopt a more postliberal constitutional approach, is problematic for two primary reasons. First, such a solution is fundamentally undemocratic. F. L. Morton argues that the adoption of the *Charter* "has replaced a century-old tradition of parliamentary supremacy with a new regime of constitutional supremacy that verges on judicial supremacy" (1992: 27). While the transfer of parliamentary power to the judiciary may seem inherently undemocratic, it may be said that this was in support of democratic values, and that the transfer of power was necessary to guarantee the protection of rights and freedoms fundamental to liberal democracy. Nonetheless, it is clear that an unelected body now wields an extraordinary degree of power over an elected body. Fears concerning the power wielded by this unelected body are not hypothetical and have been the subject of an increasing amount of

scholarly research.[79] Judicial decision-making in common law jurisdictions is based upon ever-evolving doctrines and tactics; the interpretation of words is based upon a multitude of methods, including an analysis of a word's current meaning and usage, its meaning and usage when it was written, its intended purpose, and its practical implications in today's society. The process of judicial interpretation is constrained however by the words that democratically elected bodies have legislated – the role of the judiciary is to interpret, not to write. Presumably, if the judiciary were to interpret the evidently liberal constitutional application provisions of the *Charter* in an overly postliberal constitutional manner, the judiciary would be heavily criticized and the administration of justice may be brought into disrepute.

Second, the process of compelling the Supreme Court of Canada to grant leave to appeal in a case of this matter is a battle in its own right – even if such were achieved, it would seem that convincing the Court to reverse its philosophy and decide in favour of postliberal values is virtually impossible. Bringing matters to the Supreme Court of Canada is a protracted,[80] expensive process that yields an uncertain fate. Because *Charter* application in the university context is only rarely a matter of criminal law,[81] an appeal as of right is doubtful, and thus litigants must convince the Court that their case is of upmost importance – this is no easy task. Of the 577 applications of leave submitted in 2016, only 50 were granted (Supreme Court of Canada, 2018b). Of the 66 cases heard in 2017, only 10 were non-criminal *Charter* cases

[79] See Grant A. Huscroft's ""Thank God We ' re Here": Judicial Exclusivity in Charter Interpretation and Its Consequences," Melanie Murchison's "Making Numbers Count: An Empirical Analysis of "Judicial Activism" in Canada," and Sujit Choudhry and Claire Hunter's "Measuring judicial activism on the Supreme Court of Canada: a comment on Newfoundland (Treasury Board) v NAPE."

[80] The time-lapse between the filing of a statement of claim in provincial superior court, and the Supreme Court of Canada issuing its decision, was over five years in *Mckinney*, and seven years in *Eldridge*. In 2017, the average time lapse between the filing of an application for leave to appeal to the Supreme Court of Canada, and, if leave to appeal was granted, the Court issuing its decision in the case, was 15.8 months (Supreme Court of Canada, 2018a).

[81] As seen in those judicial decisions utilized in Chapter 3 of this study.

(Supreme Court of Canada, 2018c). While providing guidance to the lower courts on this matter is important, so too is a plethora of other matters affecting Canadian society. The Court had the opportunity to address *Charter* application in the university context in *Cynthia L. Maughan v. University of British Columbia, et al.* (2010), *Waleed AlGhaithy v. University of Ottawa* (2013), and *British Columbia Civil Liberties Association, et al. v. University of Victoria, et al.* (2016), but dismissed each request for leave to appeal, suggesting that the Court does not see divergence in the jurisprudence, or that its importance is subordinate to numerous other matters. Even if such barriers are overcome, and leave to appeal is granted, the Court may choose to maintain the status quo: while there is a fair argument in favour of *Charter* application in the university context, there is perhaps a greater argument against. Such is the detrimental possibilities that I alluded to in addressing the arguments of Silletta, McKay-Panos, and Kotecha.

The Third Option: Legislative Amendment

The third option, legislative amendment to human rights legislation to protect more grounds of discrimination, and in more regions of human activity, is overwhelmingly more practical than the first and second options, but problematic to achieve in a consistent manner. Presumably, such a solution would best be implemented by adding institutional educational endeavours to the regions of human activity of which legislation applies to. Governments would be hesitant to implement such, primarily for reason that such accommodation is equally sought within many other aspects of society, such as healthcare, transportation, banking, and services affiliated with religious institutions. Applying legislation to any single one of these environments, and not to any other, would be controversial and troublesome for any government to justify. Likewise, appeasing each of these interests and applying human rights legislation to all of these environments would presumably result in the aforementioned difficulties – an alternative

tort system, diminished individual autonomy, and an impossible burden on human rights tribunals.

The Fourth Option: Declarations of Students' Rights

The fourth option, universities adopt binding internal policy in accordance with *Charter* values, is the option that I argue to be most practical and worthwhile. I will refer to these internal policies as 'declarations of students' rights', or simply 'declarations'. By addressing the identified problem without involving the current state of *Charter* application, this solution provides an opportunity to solve the problem without disturbing the delicate balance between liberal and postliberal constitutionalisms, and would remain intact irrespective of future *Charter* decisions. As will later be discussed, the resources necessary to implement and enforce this solution are minimal and readily accessible. As a document that protects students from the extraordinary power wielded by universities, these declarations will protect students from discriminatory action and uphold the principles of freedom, liberty, and individual autonomy. Of benefit to universities is a learning environment in which students are free to discuss the ideas that interest them most, and protection from civil litigation concerning matters of rights and freedoms. Despite such benefits, universities will likely be hesitant to limit their own power, and thus student advocacy groups ought to pressure universities into adopting such declarations. While already present at a small number of universities in Canada and elsewhere,[82] for reasons that will be explained these existing declarations have not yet been capable of sufficiently solving the dilemma.

[82] Declarations of students' rights exist at Texas A&M University in the United States, University of Western Australia in Australia, Malmö University in Sweden, and Prince Sattam Bin Abdulaziz University in Saudi Arabia.

Before proceeding further, it is necessary to conceptualize what is understood to be a 'declaration of students' rights,' and to assign a definition to this phrase. The University of Alberta Students' Union refers to these policies as "consolidated rights documents" that outline the rights of students in different aspects of campus life (2017: 4). Beyond this definition however, none others were found – there does not appear to be a well-defined or widely-accepted definition of declarations of students' rights. This study will proceed with the following definition: a declaration of students' rights is any university policy that is (1) ratified by a university's senate, (2) is applicable to all allegations of misconduct against students, and (3) is implemented for the purpose of protecting the rights and freedoms of students. The first condition is necessary for the policy to be legally binding in matters of civil litigation, while the second condition is necessary for the policy to have practical effect – if the rights and freedoms of students are not considered in allegations of misconduct, how is this policy to be of any effect? The third condition is simply necessary for the policy to be concerned with the subject matter at hand. This definition would thus include McGill University's *Charter of Students' Rights*, Simon Fraser University's *Human Rights Policy*, and Trent University's *Student Charter of Rights and Responsibilities*, among others. The University of Calgary however does not boast policy that would fit within this definition – the University's only commitments to the rights and freedoms of students are a series of unratified statements consisting of just 72 words that seemingly only appear on the University's website (2015).

A. Existing Declarations at Canadian Universities

Of the declarations of students' rights currently in effect at Canadian universities, each has something to offer to the future of this solution. Bishop's University's *Student Rights and Responsibilities* provides students with the rights and freedoms necessary to fully engage in the

marketplace of ideas. Article 4 of the policy provides student groups the right to "debate any matter and to engage in lawful demonstrations," and provides students the right to "organize, publicize, belong to, or participate in any lawful association, and [to not be] subject to prejudice by the University because of their membership in such groups" (2008). Article 4 further provides students with "freedom of opinion, expression and peaceful assembly," provided that these are exercised in a respectful manner (2008). Of particular interest is the preamble of the University's *Code of Student Conduct*, which describes the *Student Rights and Responsibilities* as a "community contract" of which the *Code of Student Conduct* is predicate to (2005: 1). McGill University's *Charter of Students' Rights* offers a well-rounded series of rights and freedoms for students, particularly in its provisions concerning procedural rights. Students charged with a disciplinary offence have the right to present "a full and complete defence," the right to "a full, equal and fair hearing by an impartial committee," and are presumed innocent unless found responsible "on the basis of clear, convincing and reliable evidence" (2017: 4).[83] Trent University's *Student Charter of Rights and Responsibilities* offers a practical complaint resolution process with five options for resolving grievances, ranging from independent resolution to university-facilitated mediation and formal adjudication (2017: 7). Unfortunately, there is a lack of data concerning the effectiveness of existing declarations at Canadian universities; there are no evaluations that provide a clear comparison of those institutions with declarations and those without.[84]

[83] While McGill University's *Charter of Students' Rights* is the University's sole policy concerning the rights and freedoms of students, it is best read together with the 'Jurisdiction' section of the University's *Code of Student Grievance Procedures* to understand its practical effects in regulating the relationship between the University and its students (2013).

[84] The Justice Centre for Constitutional Freedoms' Campus Freedom Index is insufficient for measuring the effectiveness of declarations for reason that the Index's analysis is limited to freedom of expression, and considers a number of variables disconnected from the rights and freedoms of students.

The difference between the declarations that I propose and the declarations that currently exist, rests in their content, conformity, and enforcement procedures. Concerning content, existing declarations protect a myriad of rights and freedoms, but like human rights legislation these rights and freedoms are sometimes subject to qualified statements and exceptions. Because each declaration has adopted the prohibited grounds of discrimination protected by its respective provincial legislation, some grounds of discrimination are not explicitly included in a university's declaration. For example, discrimination on the basis of ethnicity is not prohibited in the declaration of Simon Fraser University, ancestry in that of McGill University, and political belief in that of Trent University. Concerning conformity, the existing declarations vary to an extraordinary degree. This variance is perhaps best captured in a comparison of their length: Trent University's *Charter of Student Rights and Responsibilities* is 31 pages in length, Simon Fraser University's *Human Rights Policy* is 11 pages, and McGill University's *Charter of Students' Rights* is 6 pages. As policy that seeks to achieve similar objectives, existing declarations at Canadian universities share much in common. Because there is no guiding template however, each university has authored their own declaration, which would seemingly account for the large amount of divergence in the content of existing declarations. Concerning enforcement, the manner in which existing declarations seek to address grievances is inconsistent and insufficient – enforcement remains their most troubling quality. The University of New Brunswick's *Declaration of Rights and Responsibilities* contains just one enforcement provision: "the Positive Environment and Human Rights Office shall oversee the Declaration of Rights and Responsibilities" (1). While Trent University's *Charter of Student Rights and Responsibilities* ought to be praised for its content, its effectiveness appears questionable. In 2012, the University and the Trent Central Students' Association ("TCSA") refused club status to Trent Lifeline, a

student group that opposes abortion,[85] and in 2014 the University declined to intervene when the TCSA denied booking space to Trent Liberty, a student group that sought to erect a free speech wall on campus (Carpay and Kennedy, 2013) (Justice Centre for Constitutional Freedoms, 2014).

B. The Future of Declarations at Canadian Universities

While there is a need for fine-tuning, existing declarations of students' rights are a step in the right direction, and their universities have become both founders and leaders in a workable solution for the future. The content of these improved declarations ought to draw inspiration from the *Charter*, human rights legislation, and existing declarations of students' rights. While a high degree of commonality between declarations is necessary and preferable, like human rights legislation, perfect conformity is both undesirable and virtually impossible – a declaration's content ought to reflect the culture of the distinct university community. Regarding the grounds of discrimination that the declarations ought to prohibit, I recommend that each adopts those present in the respective provincial human rights legislation, and include additional grounds as necessary. Similar to the *Charter*, the protection of some rights and freedoms would require university action, while the majority of rights and freedoms would require that the university refrain from acting – protecting students from harassment and violence would require university action, while protecting freedom of expression would require that the university refrain from interfering in a student's peaceful expression. A detailed overview of the declaration that I envision can be seen in Appendix A.[86]

[85] The University issued club status to Trent Lifeline the following year, but only on the condition that the club allow the University unrestricted authority to censor the club's material (Carpay and Kennedy, 2013).
[86] While intended to serve as a starting point for a universal template, the declaration in Appendix A is designed to serve general exemplary purposes only – the precise configuration of a declaration will depend upon the culture and the collective needs and desires of the university community, and will require formal legal consultation. This declaration was designed based upon the *Charter*, human rights legislation, and existing declarations at Canadian

Declarations ought to be designed and divided into at least five general categories. The 'Interpretation and Application' category ought to define crucial terminology such as 'student' and 'university', and will explain the declaration's application to the university community. The 'Fundamental Rights and Freedoms' category ought to be comprised of positive rights in which the university commits to taking reasonable action to ensure student safety, and negative rights that predominantly mimic rights and freedoms contained in and inspired by both human rights legislation and the *Charter*. The 'Academic Rights' category ought to be comprised of positive rights in which the university commits to providing students with a quality learning environment and education, and negative rights that protect the rights of students to participate in the academic environment of the university. The 'Procedural Rights' category ought to be comprised of positive and negative rights that apply to all members of the university community when they are charged with, or otherwise engaged in, violating provisions of the declaration. Finally, the 'Enforcement category' ought to detail precisely how the university will give effect to the declaration, including the process for students to submit grievances, and the procedures in which the university will follow in the administration of a grievance. Declarations may be divided into additional categories as necessary – examples of which can be seen in Appendix A. The intention, practicality, and composition of the 'Procedural Rights' and 'Enforcement' categories require further explanation.

Human rights policy internal to virtually any entity is designed and implemented with multiple objectives in mind. Logically, one of these objectives must be to resolve quarrels without parties invoking civil litigation.[87] In the absence of such policy, grievances of a serious

universities. Specifically, this declaration incorporates multiple provisions originating in McGill University's *Charter of Students' Rights*.

[87] Otherwise, why not just let the offended parties file a grievance with their respective provincial human rights tribunal?

nature would presumably either be settled by civil litigation, or by private means as determined by those involved.[88] Due to barriers in accessing civil justice, it seems probable that a many number of quarrels would be left unaddressed and their harmful effects unrectified. To fulfil this objective, a most fair and robust system for addressing internal grievances is necessary – students will be encouraged to forego civil litigation for reason that the internal mechanism provides a streamlined, accessible alternative that embodies an adequate sense of justice. In an effort to minimize the number of grievances that spill into the court system, and to minimize the success of legal challenges brought against the university, universities ought to enact declarations that feature a rigorous process for handling grievances and ensuring procedural fairness.

The procedural rights category of a declaration ought to mimic both the *Charter*'s legal rights provisions, and basic common law procedure. These rights ought to include the presumption of innocence, the right to submit a defense, the right to call witnesses, the right to cross examine witnesses, the right to an impartial process, a defined standard of evidence necessary to find an individual guilty of an offense, and the right not to be compelled to be a witness to one's own actions. In accordance with the doctrine of liberal constitutionalism that binds the *Charter* exclusively to government action, declarations ought to be bound exclusively to university action. The word 'university' ought to be interpreted in a manner comparable to how 'government' is interpreted in the context of the *Charter*, and thus would include all constituent entities, departments, faculty, employees, appointees, and representatives of the

[88] Without the entity implementing policy designed to address quarrels that occur within their jurisdiction, the judiciary remains the only authority to appeal to.

university.[89] Save for commitments to take reasonable action to ensure student safety, declarations are not intended to regulate activity void of university action, and would not apply to relationships between students and other students. While it is understood that universities are first and foremost an institution for higher learning, and do not possess the resources, nor the interest, to act as a court system, upholding such procedural rights requires very little effort – there is no effort associated with preserving the presumption of innocence. Presumably, the most difficult of these procedural rights will be in providing an impartial entity to preside over matters pertaining to the declaration.

The enforcement category of a declaration ought to establish a committee that will give effect to the declaration, and establish the terms of reference of such committee. The committee would be similar in purpose to that of a human rights tribunal, and, for reason that the subject matter of a grievance may be academic in nature, would serve as a committee of the university's senate, as opposed to its administrative board. Because the committee will be presiding over allegations against the university, the committee must maintain a reasonable degree of independence from the senate, and must serve at an arms-length – declarations ought to include provisions that limit the senate's involvement in the affairs of the committee. The committee's composition will undoubtedly be the most contentious aspect of this solution – there is no perfect approach, though three formations come to mind:

[89] Which entities fit within the meaning of the word 'universities' is unambiguous. Due to the miniscule powers possessed by universities in comparison to governments, it is unreasonable to believe that this would cause a subsequent dilemma concerning the meaning of the word 'university' and which entities fit within the category.

(1) A stable composition, in which members are appointed to the committee for a defined period of time, and would serve the committee in all matters that arise – the committee's composition would remain stable for reasonable periods of time.

(2) An alternating composition, in which members are appointed to the committee exclusively to preside over a single matter – the committee's composition would change with each and every arising matter, and multiple committees may exist at any given time.

(3) A rotating composition, in which members are appointed to the committee in staggered terms, or for short periods of time – a hybrid of the above options, there would only be one committee, but its composition would change frequently.

I recommend the third option for reason that the composition appears both reasonable and sustainable in regards to the resources of a university. Staggered terms will retain a reasonable degree of institutional memory, and will allow for dynamic composition and diverse perspectives. To ensure fair representation, the committee ought to be comprised of an odd-number of voting members, of which a majority are university academic staff and the remainder are student representatives. The declaration ought to include provisions that require committee members to recuse themselves if in a perceived or actual conflict of interest.

The committee's functions may vary with the collective needs and desires of the university community, but generally ought to serve two primary functions: (1) administrate grievances, in which the committee presides over allegations that the university has violated the

provisions of the declaration,[90] and (2) review university policy and regulation, in which the committee presides over allegations that a university policy or regulation is inconsistent with the provisions of the declaration. Fundamental to common law is that the claimant bears the burden of proof – just as the university bears the burden of proof in allegations of misconduct filed under the university's code of conduct, students will bear the burden of proof in allegations of misconduct filed under the university's declaration. Because the majority, if not all, of the committee's work will be within the category of civil law, rather than criminal law, the committee ought to decide matters on the balance of probabilities. Allegations that are frivolous, made on the basis of rumour or innuendo, or have no reasonable prospect of succeeding ought to be dismissed accordingly. Beyond these procedural mechanisms being hallmarks of a fair system, these provisions will serve as motivation for the university to make meaningful efforts to respect the declaration – the more closely the university follows its declaration, the less effort necessary to defend itself against allegations.

Beyond the procedural rights and enforcement categories, there are several other matters of content that are worthy of attention. While a declaration may include a mechanism of appeal, such seems to encroach upon the level of resources beyond that of which a university is reasonably capable of providing.[91] To protect the privacy of those involved, it is not recommended that decisions of the committee be released to the public in full, but rather be provided exclusively to the plaintiff and the respondent, and to the chair of the senate for use in record-keeping purposes, in circumstances in which university action is required, and for

[90] It is not intended that the committee preside over explicitly external matters such as criminal law. Student actions that violate both university-internal policy and the *Criminal Code of Canada* may however warrant the involvement of police, the committee, or both.

[91] Alternative to enacting a mechanism of formal appeal, the President and Vice-Chancellor of a university could, on the advice of the senate, have the authority to overrule a committee's decision. Such a solution would allow for redress in the most egregious of errors and would require minimal resources.

reference in future committee work. Because parties retain the freedom to discuss and share decisions of the committee, the identity of those involved may be reasonably protected by the use of initials rather than names, as the court system does to protect the identity of victims or plaintiffs involved in highly sensitive matters.[92] While the procedures of enforcement may not be perfect, and some students may not feel that they have received adequate justice, the process is intended to be fair, not perfect; "A fair trial must not be confused with the most advantageous trial possible from the accused's point of view … nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained" (Supreme Court of Canada, *R. v. Harrer*, 1995: at para. 45).

The enactment of declarations of students' rights is a viable solution to the problem concerning rights and freedoms in the university-student relationship, but it is not without its criticism. The practicality of this solution is expected to draw a number of questions and concerns, particularly for reason that the declaration approach has already been implemented to some extent, and yet the problem remains. The most prominent and concerning of this criticism is necessary to address:

- Why would a university willingly accept additional obligations and transfer power to its students?
- What if a university does not abide by or properly enforce its declaration?

[92] Trent University's *Charter of Student Rights and Responsibilities* states, "An anonymized summary of offences and outcomes will be posted online each term to assist the community in understanding how the Charter is interpreted and applied. This summary will not include any identifying details related to individuals or the case." While Trent University has failed to implement this policy, such a provision would be helpful for purposes of transparency and accountability, and would provide students with a better understanding of their university's declaration (2017: 22).

The first question is aimed at the practicality of this solution coming to fruition, while the second is aimed at the practicality of this solution making a tangible difference on university campuses. Both questions pose barriers, all of which can be overcome.

Ostensibly, the most substantial barrier to this solution is convincing universities to implement it – the difficulty is best captured by Silletta: "why would an organization willingly accept more restrictions to the way in which it operates?" (2015: 97) The answer partially rests in Kotecha's analysis: "University autonomy is not sacrificed by allowing and protecting freedom of expression on campuses in the current context" (2016: 92). As institutions inherently engaged in academia, scholarship, and the preparation of the next generation's workforce, universities have a duty to foster a wide-range of views that are often of a virtually limitless nature. Respecting the fact that institutions may wish to narrow their focus and establish themselves as a dominant force in particular niches of academia, diversity of ideas is essential to breakthroughs in research. When students are free to explore and discuss their research interests, the fruits of their labour are more plentiful and of a higher quality; "free speech should be respected at universities not because this is legally required, but because it is fundamental to the nature of the enterprise" (Carpay, 2014). Declarations when properly enforced have the ability to prevent and protect universities from matters of civil litigation – a robust and properly enforced declaration presumably would have prevented the matters that became *Pridgen*, *Wilson*, *Lobo*, *BC Civil Liberties*, and *UAlberta Pro-Life*. But these reasons alone will not be enough to convince universities to adopt binding declarations on a large scale. While Silletta, McKay-Panos, and Kotecha argue that the Supreme Court of Canada ought to intervene and administer *force* to solve the problem, I argue that student interest groups and lobbyists ought to administer *pressure* in order to rectify the matter.

Despite the benefits, it is expected that universities will be hesitant to lead the charge in limiting their own power, and thus students' unions and advocacy alliances ought to mobilize and lobby for the introduction of such declarations. Beyond such efforts being wholly compatible with the mandate of students' unions, such organizations fighting for declarations of students' rights has historical precedent in Canada. In 1966, the Canadian Union of Students adopted the *Declaration of the Canadian Student*, along with a series of accompanying principles, which declared the right to democratic representation, the right to "exert pressure in favour of [one's] goals," and the right to education that is "guaranteed to him by society" (1-3). The declaration additionally declared the right to education for those that meet the "intellectual requirements of higher education" (2). The Canadian Federation of Students expanded upon these efforts and adopted *The Declaration of Student Rights* in 1984, comprised of 40 provisions declared to be the "undeniable rights" of all people in Canada (18-20). The *Declaration*'s preamble stated:

> We declare that a full policy of non-discrimination against students must be enforced at all educational institutions within Canadian society. Further, every person has the right to equal treatment without being discriminated against because of race, national or ethnic origin, religion, sex, age, mental or physical handicap, marital status, sexual orientation, political belief or socio-economic background. (18)

Internationally, the United States National Student Association adopted the *Student Bill of Rights* in 1947,[93] and in 1967 joined four other post-secondary education organizations in a joint statement on the rights and freedoms of students.[94] The statement's preamble states, in part:

> "Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of students, and the general well-being of society. Free inquiry and free expression are indispensable to the attainment of these goals. As members of the academic community, students should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth." (American Association of University Professors)

In 2008, the European Students' Union adopted the *Students' Rights Charter*; its preamble declared education to be a right rather than a privilege. Though not binding on university administrations, these documents demonstrate longstanding interest and effort in the solution I propose. Students serving on the administrative boards and senates of universities will be invaluable in advocating internally for the introduction of declarations.

There is concern that universities may implement declarations of students' rights, but fail to properly abide by them. Just as student interest groups ought to lead the efforts for the introduction of such declarations, such entities ought to hold universities accountable for proper enforcement of their declarations. Although universities are the sole entity capable of properly

[93] For more information on the United States National Student Association's *Student Bill of Rights*, see J. Angus Johnston's *The United States National Student Association: Democracy, Activism, and the Idea of the Student, 1947-1978*.

[94] The five organizations included the American Association of University Professors, the United States National Student Association, the Association of American Colleges, the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors.

enforcing their declarations, universities will benefit from doing so. Through the proper enforcement of declarations and the exercising of due diligence in the handling of grievances, legal challenges to university decisions on such matters will be rare, and victory for the plaintiffs will be scarce. Alternatively, if universities fail to properly respect the rights and freedoms of students, such concerns would be addressed by way of civil litigation. Such litigation however would be void of the complex, theoretical *Charter* arguments that provide the only hope for students today – judicial review would instead focus on whether or not a declaration was properly enforced. Due to the contractual obligations that universities have willingly accepted in the enactment of such declarations, it is expected that student victories on such grounds would be remarkably more attainable. For such reasons, the proper enforcement of declarations is highly beneficial for both universities and students. The courtroom need not be the battleground for justice when opposing parties employ a mechanism for peace.

Chapter 5

Conclusion

The limited application of both the *Canadian Charter of Rights and Freedoms* and human rights legislation has left university administrations unshackled by those mechanisms of public law designed to protect the rights and freedoms of Canadians – the limited application of public law has failed to protect post-secondary students engaged in the marketplace of ideas. While scholars have put forward strong arguments for the Supreme Court of Canada to apply the *Charter* to the actions of universities, there is a far stronger argument that the Court will maintain the status quo. Other options, including constitutional amendment, legislative amendment, and the judiciary adopting a substantially more postliberal constitutional interpretation, all contain a plethora of faults, and their implementation alone appears doubtful. Even if implemented, each option is anticipated to cause overwhelming adverse effects, while the resources necessary to enforce seem virtually impossible to sustain. The solution I have proposed is not the only option for fixing this dilemma, but it is the most promising and worthwhile.

To create an environment of diverse perspectives, foster the pursuit of truth, and provide students with unfettered access to the marketplace of ideas, Canadian universities must better protect the rights and freedoms of students. As those that hold administrative power in the university-student relationship, it is universities that must take the initiative to do better. The introduction of improved declarations of students' rights provides an opportunity to solve the dilemma in a mediatory manner that is acceptable to all stakeholders. Public law need not apply to private actors if private actors are willing and able to enter into bilateral agreements to

regulate their relationship – codes of conduct will regulate the actions of students, and declarations of students' rights will regulate the actions of university administrations. When the contractual relationship is not adhered to or the parties are at an impasse, civil litigation will remain an option for those that wish to pursue such. Rather than abstract arguments on unsettled areas of public law, civil litigation will focus on the contractual relationship between parties – the dilemma will shift from unsettled areas of public law to well-established areas of private law.

The introduction of declarations of students' rights is not without its challenges however. Codes of conduct are in place at every university in Canada, while declarations of students' rights exist at only a handful – why would a university transform its unilateral agreement into a bilateral one? Because in doing so universities will only forfeit their power to discriminate against students. Nonetheless, universities will be hesitant to limit their own power, and to do so in a manner so robust as to sufficiently solve the dilemma. Students' unions and advocacy alliances will need to mobilize in their respective regions, and lobby universities to introduce such declarations. While still in its early stages, the movement for such binding internal policy has already begun – now is the time for the movement to advance forward.

Looking Forward: Beyond University Administrations

In the university context, university administrations are not alone in the disregard for free and open inquiry – students' unions occupy the other side of the same coin. In discrimination against the student body, students' unions have often worked in tandem with university administrations, and in some cases have led the way. As has been briefly discussed, a number of student groups that support traditionally conservative values have had their freedom of expression limited by their respective students' union. In addition to the aforementioned cases at the University of Alberta, University of Calgary, University of Victoria, Capilano University,

UBC – Okanagan, and Trent University, anti-abortion groups have consistently been targets of discrimination by students' unions and have had club status refused or revoked, including groups at Brandon University, Carleton University, Durham College, Kwantlen Polytechnic University, Lakehead University, Memorial University of Newfoundland, Ryerson University, University of Guelph, University of Manitoba, University of Ontario Institute of Technology, and the University of Toronto – Mississauga. Several of these have resulted in court challenges,[95] while most others were settled following intervention by the Justice Centre for Constitutional Freedoms (2019). Similarly, the Men's Issues Awareness Society at Ryerson University was denied club status after the students' union concluded that the group violated the union's pro-feminism policy.[96] Students Against Israeli Apartheid at the University of Manitoba was denied club status after the students' union argued that the group discriminated against Zionists (Hopper, 2013b). In 2008, York University and the York Federation of Students ("YFS") experienced a surprising role-reversal when the YFS cancelled a debate on the topic of abortion, outlawed all anti-abortion student groups, and called for a nation-wide ban on anti-abortion groups on campus. The University offered space for the debate to be rescheduled, and pledged to provide anti-abortion groups with replacement resources to compensate for the decision of the YFS (Justice Centre for Constitutional Freedoms, 2013: 238-39). University administrations are not alone: students' unions have played a prominent role in the censorship of critical thought on university campuses.

While it is only university administrations that are within the scope of this study, students' unions have been a trusted ally in this matter – the actions of students' unions cannot

[95] See *Grant v Ryerson Students' Union*, [2016] O.N.S.C. 5519, *Zettel v. University of Toronto Mississauga Students' Union*, [2018] O.N.S.C. 1240, and *Naggar v. The Student Association at Durham College and UOIT*, [2018] O.N.S.C. 1247, respectfully.
[96] See *Arriola v. Ryerson Students' Union* [2018] O.N.S.C. 1246.

be ignored. Due to their incorporation, structure, and operations being absent of government action, the *Charter* would certainly be inapplicable to the actions of students' unions, while human rights legislation would presumably be less applicable due to their services being more private than public. Declarations of students' rights may be useful in addressing this external aspect of the dilemma, whether this is accomplished by a university forcefully applying its declaration to students' unions, students' unions willingly adopting their own declarations, or both entities jointly implementing a single declaration. Nonetheless, more research is necessary to better understand how the actions of students' unions can best be addressed in relation to the problem that I have identified.

Beyond an investigation into the role of public law in addressing human rights concerns on university campuses, this study serves as an investigation into a component of the administration of justice in Canada. While focused on the university-student relationship, this study has greater significance in the context of private parties entering into agreements of mutual respect for the rights and freedoms of one another. Self-imposed and self-governed declarations provide a stable alternative to abstract applications of public law, and provide a solution for regulating the relationship between private persons and virtually any private entity that is engaged in public interests and services, particularly those entities whose enterprise requires cooperation with government. The declaration solution is an attempt for private parties to regulate their own behaviour by way of formal agreement, and shift a disputed area of public law to a more well-established area of private law. While it is perhaps obvious that human rights and freedoms will be better protected when interacting with government, as opposed to private entities, there is ambiguity concerning private property affected with a public interest. This ambiguity must be addressed. Those who interact with private property affected with a public

interest deserve to be protected by a rights framework – declarations of rights and freedoms provide a path to achieving this.

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Appendix A

Declaration of Students' Rights

PART I: Interpretation and Application

1. (1) The word "Student" includes

(i) any person registered in the University for a course, courses, research, or writing, whether or not the person is a candidate for a degree, diploma, or certificate; or

(ii) any person previously registered in the University under section 1(i) who is on a leave of absence.

(2) For the purpose of a grievance submitted pursuant to this Declaration, the person need only have been a Student at the time of the alleged violation of any right or freedom.

2. The word "University" includes any of the University's constituent entities, departments, faculty, employees, appointees, and representatives.

3. A "Member of the University Community" includes

(i) Any faculty, employee, appointee, or representative of the University; or

(ii) Any Student.

4. The "University Context" is defined as activities or events planned, hosted, organized, or supported by the University, whether or not the activities or events occur on University property.

5. "Personal Information" is defined as information, which combined with the name or student number of a student, serves to identify the student, and which is contained in records concerning such student and held by the University.

6. The word "Declaration" is defined as this Declaration of Students' Rights.

7. The word "days" is inclusive of weekends, but not holidays.

8. The word "months" is defined as calendar months, irrespective of the number of days in each month.

9. This Declaration applies to all persons in the University Context.

10. This Declaration guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and orderly community.

11. This Declaration is the supreme policy of the University, and any policy, regulation, or decision that is inconsistent with the provisions of this Declaration is, to the extent of the inconsistency, of no force or effect.

12. Where multiple provisions of this Declaration are inconsistent with one another, the provisions shall be interpreted to the betterment of the Student.

PART II: Fundamental Rights and Freedoms

13. Students enjoy within the University all rights and freedoms recognized by law.

14. (1) Students have the right to be treated with equality, dignity, and respect, including the right to be free from violence, harassment, and discrimination on the basis of race, colour, age, nationality or national origin, ethnicity or ethnic origin, sex, sexual orientation, gender identity and expression, religion, mental or physical disability, or family or marital status.

(2) Subsection (1) does not preclude any event, activity, or program that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, colour, age, nationality or national origin, ethnicity or ethnic origin, sex, sexual orientation, gender identity and expression, religion, mental or physical disability, or family or marital status.

(3) A distinction, exclusion, or preference based on academic, cognitive, intellectual, or physical requirements established in good faith is deemed non-discriminatory.

15. Students have the following fundamental freedoms:

(i) freedom of conscience and religion;

(ii) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; and

(iii) freedom of peaceful assembly.

16. The University shall make every reasonable effort to ensure students are free from harassment and violence, including sexual harassment and sexual violence.

17. The University shall make every reasonable effort to protect the personal security and health of students.

18. No University policy or regulation may be amended retroactively to the detriment of any student.

PART III: Academic Rights

19. Students have a right to a quality education. The University's corresponding obligation is fulfilled where:

(i) The University offers an education that provides students with an adequate level of competence in the relevant field of study;

(ii) The University makes every reasonable effort to maintain the quality of education it dispenses; and

(iii) The University makes every reasonable effort to provide an appropriate environment for learning and assessment activities for the student body, including the providing of safe and suitable conditions for learning and study.

20. Students have a right to attend classes, lectures, meetings, seminars, and other activities as required for academic courses in which they are registered.

21. Students have a right to attend public lectures and speaking engagements planned, hosted, or organized by the University.

22. Students have a right to quality supervision of written and research work, particularly of work conducted in graduate programs.

23. Students have the right to be provided with sufficient information to make informed decisions about course selection and registration. This information shall include, where appropriate,

(i) course names;

(ii) course instructor;

(iii) course descriptions;

(iv) pre-requisites for courses;

(v) course availability; and

(vi) the method of evaluation.

24. Students have a right to a detailed and complete course outline for courses in which they are registered, to be provided during the first week of class. This information shall include, where appropriate,

(i) a description of the topics to be considered in the course;

(ii) a description of the means of evaluation to be used in the course;

(iii) a list of required and recommended readings or other academic materials; and

(iv) the instructor's name, contact information, office location, and office hours.

25. Students have a right to fair and reasonable assessment of their performance in a course, and to assessment that is reflective of the content of the course. The means of evaluation of a course may not be varied following the time in which students have been provided a course outline, unless the student has consented to such.

26. Students have a right to be informed, in a timely fashion, of their current academic standing or performance in a course unless the method of evaluation renders such a determination impossible.

27. Students have a right to view any written submission for which they have received a mark, and discuss the submission and its mark with an examiner, provided the request is made within a reasonable time after notification of the grade, and subject to reasonable administrative arrangements.

PART IV: Rights of Association and Representation

28. Students have a right to belong to any lawful association of their choice and shall not be subject to any discrimination or prejudice from the University by reason of their belonging to such an association.

29. (1) Every lawfully organized student group has a right to apply for University club status, and, provided that the purposes of such are lawful and is not ideologically duplicate of the purposes of an existing club, shall be offered such status.

(2) Provided that the purposes of such are lawful, every University-registered club shall have the right to

> (i) represent and identify itself by way of name, logo, colours, emblems, banners, and flags;
>
> (ii) promote the interests of its members;
>
> (iii) publicize material;
>
> (iv) organize private and public meetings, activities, and events;
>
> (v) debate any position, stance, or viewpoint in regards to any matter; and
>
> (vi) engage in peaceful demonstration.

(3) The University shall seek to treat all University-registered clubs and their members equally and respectfully, and shall seek to provide equal resources to all University-registered clubs, including the reasonable, appropriate, and lawful use of University property for meetings, events, and activities.

30. (1) All University bodies constituted to make decisions of policy or regulation in matters pertaining directly to students must provide for student membership.

(2) Recommendations for student membership shall be sought by the University from the appropriate student association where it exists. Refusal to accept a recommendation must not be based on arbitrary, unreasonable, or unlawful grounds.

Part V: Personal Information

31. All Members of the University Community have a right to access any record kept by the University containing their personal information, unless such information was transmitted to the University by a third party in circumstances of confidence, or unless the disclosure of such information is prohibited by law.

32. No personal information shall be disclosed by the University to a third party in a manner which permits the identification of the individual unless such disclosure is required by law, or unless the individual has consented to such disclosure.

PART VI: Procedural Rights

33. All Members of the University Community charged with a disciplinary offense have a right to be informed in writing of that allegation.

34. All Members of the University Community charged with a disciplinary offense have a right to retain copies of all supporting evidence of that allegation.

35. All Members of the University Community charged with a disciplinary offense have a right to present a full and complete defense within a reasonable time.

36. All Members of the University Community charged with a disciplinary offense have a right to refuse to participate in the hearing of a grievance, and the right not to have such refusal be used as evidence in the administration of a grievance, or to be used as an admission or indicator of guilt.

37. All Members of the University Community charged with a disciplinary offense have a right to be presumed innocent of the offense unless proven guilty beyond a reasonable doubt.

38. All Members of the University Community have a right to a full, equal, and fair process by an impartial committee in the administration of a grievance to which they are a party to.

39. All Members of the University Community have a right to settle a grievance to which they are a party to by way of informal means, and to have such grievance dismissed following confirmation of an informal resolution.

40. All Members of the University Community found guilty of a disciplinary offense, and if the punishment for the offence has been varied between the time of commission and the issuing of disciplinary measures, have a right to the benefit of the lesser punishment.

PART VII: Implementation

41. The University shall make reasonable efforts to ensure all Members of the University Community have access to all University policy and regulations, including this Declaration.

42. The President and Vice-Chancellor of the University, on the advice of the Senate, shall establish and maintain appropriate committees to give effect to this Declaration.

PART VIII: Amendment

43. Any amendment to this Declaration shall require notice to all members of the Senate no less than 14 days before the meeting at which such amendment is to be considered. Any amendment must be confirmed by way of a two-thirds majority vote.

44. Any amendment to this Declaration shall require adequate consultation with Students. The University's corresponding obligation is fulfilled where

> (i) the President of the Students' Union is notified of such amendment no less than 14 days before the meeting at which such amendment is to be considered; and
>
> (ii) the Chair of the Senate, or a designate of their Office, makes adequate arrangements to meet with members of the Executive Council of the Students' Union to discuss such amendment.

PART IX: Declaration Resolution Committee and Enforcement of the Declaration

DIVISION A: Mandate and Composition

45. The Senate shall establish and maintain a Declaration Resolution Committee (hereafter "the Committee") empowered to

> (i) administrate grievances, as detailed in Division B of Part VIII; and
>
> (ii) review University policy and regulation, as detailed in Division C of Part VIII.

46. (1) The Committee shall not be empowered to

> (i) administrate grievances of a criminal nature where the circumstances of such grievances have resulted in criminal charges that are proceeding to a court of law, or have already proceeded to a court of law, whether or not a verdict has been rendered; and
>
> (ii) administrate, coordinate, organize, plan, or participate in informal means of addressing a grievance.

(2) The Committee shall be empowered to administrate grievances of a criminal nature where criminal charges have been dismissed, including by way of mistrial or a stay of proceedings, and where a continuation, resumption, or return to proceedings is not foreseeable.

47. The Committee shall be at arm's length of the Senate, and shall be free from interference by the membership of the Senate. Unless otherwise pursuant to the provisions of this Declaration, the Committee shall not accept directives from the Senate.

48. (1) The Committee shall consist of five members and a Chair who shall be appointed by the Senate for staggered two-year terms. Three members and the Chair shall be University academic staff, one member shall be an undergraduate student, and one member shall be a graduate student.

(2) The Senate shall consult the undergraduate students' union in selecting an undergraduate student to be appointed to the Committee, and shall consult the graduate students' union in selecting a graduate student to be appointed to the Committee.

(3) No person shall concurrently be a member of the Senate or the Board of Governors and a member of the Committee.

49. (1) The three academic staff members, one undergraduate student member, and one graduate student member shall be voting members of the Committee. Where there is a tie of votes cast by voting members of the Committee, the Chair shall be permitted to cast a vote.

(2) Quorum shall be constituted by the Chair and three members of the Committee, at least one of which must be a student member.

50. (1) Where a member of the Committee is in a perceived or actual conflict of interest to a task of the Committee, that member shall recuse themselves from all matters related to the task of the Committee.

(2) Where a member of the Committee has recused themselves from a task of the Committee, the Senate shall appoint a member *pro tempore*. The Senate shall appoint the member *pro tempore* to fulfill the composition of members detailed under section 45(1). The member *pro tempore* shall be a member of the Committee for the duration of the task of the Committee.

51. (1) Where a member of the Committee fails to recuse themselves from a task of the Committee, and is deemed by a majority of remaining members of the Committee to be in a perceived or actual conflict of interest, the Chair of the Senate shall be empowered to remove that member from the Committee.

(2) Where the Chair of the Senate has removed a member from the Committee, the Senate shall appoint a new member. The Senate shall appoint the new member to fulfill the composition of members detailed under section 45(1). The new member shall be a member of the Committee for the duration of time remaining in the term of the former member.

DIVISION B: Terms of Reference and Applicable Procedures – Grievances

52. (1) Any Student who believes that the provisions of this Declaration have been violated by the actions of a University member, and has suffered harm or undue hardship as a result of such actions, has the right to submit a grievance to the Chair of the Committee within two years of the alleged violation.

(2) All grievances must be made in writing and include

(i) the name, position, and department of the University member who is alleged to have violated the provisions of this Declaration, with explicit reference to the provisions of this Declaration;

(ii) a description of the harm or undue hardship that the Plaintiff has suffered as a result of such violation; and

(iii) all evidence that the student wishes for the Committee to consider in its administration of such grievance.

(3) Students have a right to withdraw a grievance at any time.

53. Where a grievance has been submitted to the Committee, the Student who has submitted the grievance shall hereafter be referred to as the "Plaintiff," and the University member alleged to have violated the provisions of this Declaration shall hereafter be referred to as the "Respondent."

54. The Plaintiff bears the burden of proof to establish the actions of the Respondent, and to establish the harm or undue hardship that the Plaintiff has suffered as a result of such actions.

55. Upon receipt of a grievance, the Committee shall within 30 days invite the Respondent, and any other party that the Committee deems useful or necessary for its deliberations, to submit a written response, to be received within 30 days.

56. (1) Upon receipt of a written response from the Respondent, or upon no receipt of a written response from the Respondent after 30 days of the invitation, the Committee shall review the grievance within 30 days and shall issue a preliminary decision to either accept or reject hearing of the grievance.

(2) The Committee shall only reject the hearing of a grievance on grounds that the grievance

(i) has already been rejected by the Committee;

(ii) has already been heard and decided upon by the Committee;

(iii) has no reasonable prospect of succeeding;

(iv) alleges that a violation has been committed by a person who is no longer a Member of the University Community;

(v) is ineligible for hearing pursuant to the provisions of this Declaration; or

(vi) is ineligible for hearing by law.

(3) Where the Committee rejects hearing of a grievance, the Committee shall provide reasoning for its preliminary decision in writing. A copy of the Committee's written preliminary decision shall be distributed to the Plaintiff, Respondent, and the Chair of the Senate.

57. Where the Committee accepts hearing of a grievance, the Committee shall schedule a hearing, to take place within 30 days. The hearing shall be scheduled at a time and location that seeks to reasonably accommodate both the Plaintiff and the Respondent.

58. In all deliberations concerning a grievance, the Committee shall use any and all evidence that has been obtained

(i) in good faith;

(ii) by reasonable means;

(iii) in a manner that is not contrary to provisions of this Declaration; and

(iii) in a manner that is not contrary to law.

59. All persons providing written or verbal testimony in the hearing of a grievance have a responsibility and an obligation to be honest and truthful in their testimony.

60. The Committee may dismiss, delay, or cease hearing of a grievance at any time if

(i) the grievance has been withdrawn by the Plaintiff;

(ii) both the Plaintiff and Respondent confirm that the grievance has been settled by informal means;

(iii) the Respondent is no longer a Member of the University Community;

(iv) the Respondent's procedural rights, as established in Part VI of this Declaration, have been violated to such extent that a full, equal, and fair process cannot reasonably occur;

(v) the continuation of such is prohibited pursuant to the provisions of this Declaration; or

(vi) the continuation of such is prohibited by law.

61. (1) Within 30 days of a hearing's adjournment, the Committee shall decide, on the balance of probabilities, whether or not the Respondent has violated the provisions of this Declaration, and has caused harm or undue hardship to the Plaintiff, and shall provide reasoning for its decision in writing. A copy of the Committee's written decision shall be distributed to the Plaintiff, Respondent, and the Chair of the Senate.

(2) Where the subject matter of a grievance includes sexual harassment, sexual assault, or otherwise warrants anonymity for reasons of health, safety, or law, the Committee shall identify the Plaintiff using only initials in its written decision.

62. (1) Where the Committee decides that the Respondent has violated the provisions of this Declaration, has caused harm or undue hardship to the Plaintiff, and that disciplinary action is necessary, the Committee shall have the authority to administer the following disciplinary measures on the Respondent:

(i) verbal and/or written reprimand;

(ii) verbal and/or written apology, to be issued to the Plaintiff;

(iii) suspension from non-academic University activities and events for a period of time not greater than 6 months; and

(iv) publication of the disciplinary measures;

(2) The Committee shall seek to administer disciplinary measures that are proportional to the severity of the violation and to the harm or undue hardship that the Plaintiff has suffered, and shall consider the following factors in its decision to administer disciplinary measures on the Respondent:

(i) the Respondent's admittance of guilt and/or responsibility;

(ii) the Respondent's remorse for their actions;

(iii) the harm or undue hardship suffered by the Plaintiff;

(iv) the Respondent's sympathy and compassion for the harm or undue hardship suffered by the Plaintiff;

(v) previous violations of the Respondent and corresponding disciplinary measures;

(vi) breach of trust by the Respondent;

(vii) the Respondent being in a position of authority;

(viii) the physical and mental health of the Respondent, including addiction and substance abuse;

(ix) the Respondent's employment and social status; and

(x) the particular circumstances of the violation.

(3) Where the Committee believes that additional and/or more severe disciplinary action is necessary, the Committee may submit recommendations of such to the Chair of the Senate.

63. The periods of time specified in sections 49, 50(1), 51, 55(1) may be extended upon the unanimous consent of voting members of the Committee. No periods of time may be extended beyond 30 days.

DIVISION C: Terms of Reference and Applicable Procedures – Policy Review

64. (1) Any Student who believes that a University policy or regulation, or a provision thereof, is inconsistent with the provisions of this Declaration has the right to request of the Committee to review such policy or regulation. All requests for review shall be submitted to the Chair of the Committee.

(2) All requests submitted must be made in writing and include

(i) the name of the University policy or regulation alleged to be in violation of the provisions of this Declaration, with explicit reference to the provisions of the University policy or regulation and of this Declaration;

(ii) a description of how the University policy or regulation is in violation of the provisions of this Declaration; and

(iii) all evidence that the student wishes for the Committee to consider in its review of University policy or regulation.

65. The Senate, by way of a majority vote, may request of the Committee to review University policy or regulation, or a provision thereof, to verify its consistency with the provisions of this Declaration. All requests for review shall be submitted to the Chair of the Committee.

66. (1) Upon receipt of a request for review, the Committee shall review the request within 60 days and shall issue a preliminary decision to either accept or reject review of the University policy or regulation. The Committee shall notify the Chair of the Senate and, if applicable, the student who submitted the request for review, of the preliminary decision.

(2) The Committee shall only reject a request for review on grounds that the University policy or regulation, of a provisions thereof,

(i) has already been reviewed by the Committee since the policy or regulation's most recent amendment;

(ii) is evidently not inconsistent with the provisions of this Declaration;

(iii) is ineligible for review pursuant to the provisions of this Declaration; or

(iv) is ineligible for review by law.

(3) Where the Committee rejects review of the University policy or regulation, the Committee shall provide reasoning for its preliminary decision in writing. A copy of the Committee's written preliminary decision shall be distributed to the Chair of the Senate and, if applicable, to the student who submitted the request for review.

67. (1) Where the Committee accepts the review of University policy or regulation, the Committee shall within 60 days, decide whether or not the University policy or regulation, or a provision thereof, is inconsistent with the provisions of this Declaration, and shall provide reasoning for its decision in writing. A copy of the Committee's written decision shall be distributed to the Chair of the Senate and, if applicable, to the student who submitted the request for review.

(2) Where the Committee decides that a University policy or regulation, or a provisions thereof, is inconsistent with the provisions of this Declaration, the Committee shall

(i) declare that the policy or regulation is, to the extent of the inconsistency, of no force or effect; and

(ii) issue a suspension of invalidity for a period of time no less than 6 months and greater than 12 months, to be decided in consultation with the Chair of the Senate, and as the circumstances may warrant.

68. The periods of time specified in sections 60(1) and 61(1) may be extended upon the unanimous consent of voting members of the Committee. No periods of time may be extended beyond 60 days.

DIVISION D: Senate Response to Committee Decisions and Recommendations

69. Where the Committee provides recommendations to the Chair of the Senate concerning additional and/or more severe disciplinary measures to address the actions of a University member who has violated the provisions of this Declaration, and who has caused harm or undue hardship to a Student, the Senate shall discuss the recommendations at the next regular meeting of the Senate.

70. (1) Where the Committee decides that a University policy or regulation, or a provision thereof, is inconsistent with the provisions of this Declaration, the Senate shall discuss the Committee's decision and the relevant policy or regulation at the next regular meeting of the Senate.

(2) The Senate shall seek to amend the policy or regulation prior to the expiration of the suspension of invalidity.

71. Where the Committee decides that a University policy or regulation, or a provision thereof, is inconsistent with the provisions of this Declaration, and the Senate has failed to amend the inconsistency by the expiration of the suspension of invalidity, the University shall be prohibited from enforcing the policy or regulation, to the extent of the inconsistency.