We like our speech deep dish: Freedom of Expression on Post-Secondary Campuses Part 2

Last summer the Progressive Conservative government of Ontario ordered all provincially funded post-secondary institutions to implement free speech policies similar to the Chicago Principles.[1] Failure to do so could have ended in the withholding of funding.[2] The United Conservative government of Alberta is implementing a similar policy, but have not said whether financial penalization would be involved.[3] The Alberta deadline for post-secondary institutions is December 15, 2019.[4]

Is a provincial policy requiring that the Chicago Principles be implemented on post-secondary campuses a violation of the *Charter* guaranteed freedom of expression?

Chicago Principles

The Chicago Principles are the University of Chicago's commitment "to free and open inquiry in all matters."[5] In pursuit of these ideals:

- worries about mutual respect and civility do not justify closing off the discussion of ideas;

- restriction on expression is permitted if it is in line with established law, if the expression invades privacy or confidentiality interests or is incompatible with the University's functioning;

- the University can regulate the place, time, and manner of expression to ensure that the ordinary activities of the University are not disrupted; and

- members of the University community may not interfere with or obstruct the freedom of others to express their views, and it is the University's responsibility to protect that freedom.[6]

In the United States, over 60 campuses have adopted the Chicago Principles, or a statement that is substantially similar.[7] Though promoted as being designed to protect freedom of expression, the Principles also present opportunities for violating this right. This could occur through a university dictating when, where, and how a protest could occur, or through blocking one person's expression for the benefit of another. For example, a university could prevent counter protesters from impeding the visibility of a student club's display, or remove students who are yelling to drown out a guest speaker with whom they do not agree. It appears one reality of the Principles is that they allow post-secondary institutions to actually limit freedom of expression.

***Charter* Application**

The *Charter of Rights and Freedoms*[8] does not control every individual or institution in Canada. Simply put, it only guarantees that government, or agents of government, will not violate, restrict, or limit a person's *Charter* rights. There are times when post-secondary institutions may be implementing government policy, and hence controlled by the *Charter,* and other times when a court would treat a college or university as a private actor and not subject to *Charter* restraints.

To determine whether a *Charter* right has been violated, courts first "identify the precise source of the alleged" limitation.[9] Regarding the Chicago Principles, a court would need to decide whether the post-secondary institution or the government made the policy. The answer is unclear because post-secondary institutions do not have to implement the policy, but they risk losing government funding if they do not.

If a court decided the institution made the policy, the next step is deciding if the *Charter* applies to the school. It remains uncertain in which situations a court will decide that the *Charter* applies to post-secondary institutions. The Supreme Court of Canada ("SCC") initially decided that the *Charter* applies to:

1. all legislation;

2. governmental actors (the executive and administrative branches);

3. entities with statutory authority; and

4. actors that are considered governmental because of the control that government exerts over them.[10]

Application of the *Charter* has since grown to include a fifth category: activities that further "a specific governmental program or policy."[11] This occurs when a direct connection exists between a government policy and *Charter* violating activity.[12]

For post-secondary institutions, the SCC decided in 1990 that the *Charter* applied if the government generally had control over the institution, or if a government statute forced the institution to take a particular action.[13] Since that decision, the occasions on which a court has found the *Charter* to apply to post-secondary institutions have been few and far between. If the *Charter* does not apply, a university is considered a private actor, and could make uncontestable policies that violate *Charter* rights.

Unfortunately, the SCC has muddied the waters further. In situations where the *Charter* has been found to apply to an action to further a government policy, the Court has expected to find both that the government decided 1) the content and the persons to which the policy would apply, and 2) the entity that would deliver the program.[14] The SCC has not yet used this category specifically to test *Charter* application to post-secondary institutions.

The current situation concerns the implementation of freedom of expression policies on post-secondary campuses. Although the government is choosing what they want these

policies to look like (the content), they do not choose who the policies apply to (persons applicable). The institutions determine who is accepted for enrollment.

Leaving aside the SCC approach to the limited number of cases they have heard involving post-secondary institutions, even provincial courts fail to agree on the application of the *Charter* to these schools. In Alberta, the trend has been that the *Charter* applies on post-secondary campuses, whereas in Ontario and British Columbia, the courts have deemed post-secondary campuses *Charter* free zones.[15] A national consensus does not exist.

Do the Chicago Principles violate Freedom of Expression?

How courts decide if freedom of expression has been violated can be found in Part 1 of our series on freedom of expression on campus.

If a court were to determine that a post-secondary institution that has implemented the Chicago Principles is under the control of the *Charter,* how could the institution justify their use? A post-secondary institution would need to prove there is a pressing need to limit expression in some contexts because free and open inquiry is more broadly under threat. Is there a rational connection between the policy as implemented and the 'need'?

The institution would then need to show that the *Charter* right to freedom of expression was minimally impaired by their action. This would likely depend on how the policy is enforced. For example, requiring a buffer zone around a protest would be less impairing than banning a counter protest all together.

Finally, the school would need to prove that the value of the objective of protecting free and open enquiry more broadly, and the benefits of that policy, outweigh the restriction that is being placed on the freedom of expression of individuals in some contexts.

Conclusion

The questions are these: In order to promote the underlying values of freedom of expression, do post-secondary campuses need guidelines like the Chicago Principles? Is it constitutionally defensible for a provincial government to impose such a policy on the educational institutions? (Read Part 1 of our freedom of expression on campus series for more on that question). Or is this policy initiative more in line with the fears expressed by Justice McIntyre of the SCC back in 1990: "It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited"?[16]

[1]Joe Friesen, "Ontario colleges adopt single free-speech policy as universities rush to meet deadline", *The Globe and Mail* (16 December 2018), online: <theglobeandmail.com>.

[2]*Ibid*.

[3]Emma Graney, “UCP prepares to roll out Ford-flavoured post-secondary changes in Alberta”, *Edmonton Journal* (6 May 2019), online: <edmontonjournal.com>.

[4]Clare Clancy, “Keyano College becomes first Alberta institution to publicly roll out Chicago principles”, *Edmonton Journal* (29 July 2019), online: <edmontonjournal.com>.

[5]University of Chicago, “Report of the Committee on Freedom of Expression” at 2 online (pdf): provost.uchicago.edu <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

[6]*Ibid*at 2-3.

[7]FIRE, “Chicago Statement: University and Faculty Body Support” (12 July 2019), online: thefire.org <https://www.thefire.org/chicago-statement-university-and-faculty-body-support/>.

[8]*Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

[9]*Eldridge v British Columbia (Attorney General*), [1997] 3 SCR 624 at 643, 151 DLR (4th) 577 .

[10]Franco Silletta, “Revisiting *Charter* Application to Universities” (2015) 20 Appeal 79 at 82.

[11]*Eldridge*, *supra* note 9 at 660.

[12]*Ibid* at 665.

[13]*Mckinney v University of Guelph*, [1990] 3 SCR 229 at 269, 273, 76 DLR (4th) 545 .

[14]*Eldridge,* supra note 9 at 664-665

[15]The Constitutional Law Group, *Canadian Constitutional Law*, 5thed by Patrick Macklem, Carol Rogerson et al (Toronto, ON: Emond Montgomery Publications Limited, 2017) at 837.

[16]*Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 1008, 58 DLR (4th) 577