



Justice Centre for Constitutional Freedoms

November 28, 2013

Mike Mahon
President & Vice-Chancellor
University of Lethbridge
A762 University Hall
4401 University Drive
Lethbridge, Alberta T1K 3M4

Dear Dr. Mahon:

RE: Recent Display on Campus

We act for Caleb Van Der Weide and the Lethbridge Students for Life (“LSL”).

We understand from Mr. Van Der Weide, president of the LSL, that the LSL held a pro-life display on campus from October 30 to November 1, 2013.

The circumstances that surround this display have prompted the Justice Centre for Constitutional Freedoms (“JCCF”) to clarify the rights of the LSL on the University of Lethbridge (“U of L”) campus.

The facts surrounding the display are as follows:

Adam Long, VP Student Affairs of University of Lethbridge Student Union (“ULSU”), approved the display on October 21, as well as waiving the requirement to fill in the U of L & ULSU Club Event Activity Risk Assessment Form (“Risk form”).

Although the display had already received approval, Mr. Van Der Weide contacted Peter Ashcroft, Security Manager, on October 28, to inform him of the display and that it had been approved by Mr. Long. Mr. Ashcroft told Mr. Van Der Weide that although the display had already been approved and the requirement to fill in the Risk Form had been waived, Mr. Van Der Weide still needed to go through additional steps by both booking space and seeking the approval of Risk & Safety Services. On October 29, Mr Van Der Weide met with Adam Long and Toby Clark, Risk Analyst for Risk & Safety Services, submitted the Risk form, and gained duplicative approval for the display.

On the morning of October 30, the LSL set up the display under the supervision of Clark.

Shortly after the display was set up, Anne Baxter, Director of Risk & Safety Services, approached the display, demanding that the display be taken down for a variety of reasons. She first asserted that the display was in front of an art sculpture, violating “art policy”; then stated that she had concerns about content; and last contended that the display was obstructing a fire lane and hence was a risk to safety. She threatened to telephone police if the display was not taken down in an hour. The police never did attend the scene. Ms. Baxter did not return to speak to the LSL at all during the three days of the display.

A firefighter also approached the display on the morning of October 30, after being called by the University, and confirmed that the display was not in front of a fire lane, posing no safety risk.

On the second day of the display, October 31, there were high winds that made it unsafe to proceed with the display outside. The LSL contacted Mr. Long, receiving permission to move the display to the Devonian Walkway.

Cheri Pokarney, General Manager of ULSU, approached Mr. Van Der Weide, expressing safety concerns about the location. She then provided one alternate location, a study hall off the library hallway, for the display. However, the LSL did not agree to move to this alternate location, as the location did not provide the LSL with the opportunity to express its views effectively. Ms. Pokarney says this was the only option that the U of L administration could give the LSL. Ms. Pokarney finally suggested that the LSL move back outside, which they did.

On the third day, November 1, the LSL held the display outside, in the original location, complying with all requests made by University and student union officials, while protesters attempted to cover up the display.

Throughout the three days of the LSL display, those opposed to the content of the LSL display engaged in blocking and obstructing the display, to prevent others from viewing it. University security took no action to prevent these obstructionists from blocking and interrupting the LSL display.

On November 5, 2013, you posted a letter on the University website, stating:

In the future, public displays will be restricted to locations on campus that do not expose individuals to images they do not wish to see. We will still welcome displays that are considered controversial and will still welcome differing viewpoints. We will still encourage debate and we will protect freedom of speech that complies with the laws of our society. We will however ensure that such activities are conducted in an appropriate space on campus, that people are given a choice as to whether they wish to see the displays and engage in the debate, and that such activities are not unsafe and do not disrupt the normal operations of the University of Lethbridge.

You also stated that “the perception of many on campus was that freedom of speech appeared to trump the freedom to choose whether or not an individual, or their children, were forced to view these images”.

We reject the University's contention that anyone was "forced" to look at the LSL display. The *Charter's* freedom of expression guarantee protects the rights of individuals to express their opinions in prominent and high-visibility locations for the express purpose of maximizing exposure and communicating a message with as many people as possible. As with all expression that one may disagree with, people have a choice to avert their gaze, regardless of the location of expression. Moreover, there is no legal right to not see and hear things that one finds upsetting or disagreeable. If such legal right did exist, then no individual would have the right to express her or his opinions.

LSL did not choose the locations given. The outdoor location given was proposed and approved by the University and Student Union. Indeed, Toby Clark, Risk Analyst for Risk & Safety Services, supervised the set-up of the display. When high winds threatened the display and the LSL felt the display needed to move inside for safety reasons, they sought and received the approval of Mr. Long before they moved to the Devonian Walkway. Both locations were approved by the Student Union or both the Student Union and the University's Risk and Safety Services.

However, when Ms. Pokarney asked the LSL to move from the Devonian Walkway, she gave one and only option, suggesting that the LSL move their display to a study hall. This location did not allow the LSL to share their display with the public, thus illegally restricting their freedom of expression.

In *Pridgen v. University of Calgary*, the Alberta Court of Queen's Bench ruled that the University of Calgary was subject to the *Charter* when disciplining students. This decision was upheld by the Alberta Court of Appeal. In *R. v. Whatcott*, the Alberta Court of Queen's Bench ruled that members of the public, including non-students, have a right to distribute literature on campus. These rulings have solidified that the right to freedom of expression is protected on Alberta university campuses under section 2(b) of the *Charter*.

Therefore, the University of Lethbridge does not have the authority to choose what messages are and are not communicated on its campus, or which messages will be singled out for special restrictions. Campus authorities do not possess the authority to censor speech on the basis of its content or popularity. The University also does not have the right to prohibit any group from displaying its message in prominent, high traffic locations. The University also has a legal responsibility to protect those who are communicating a message, from physical blocking, obstruction, and interruption.

Freedom of expression is a broad right, including the right to communicate controversial messages. In *R. v. Zundel*, [1992] 2 SCR 731, Justice McLachlin (as she then was) stated that the purpose of protection for freedom of expression extends to protecting "beliefs which the majority regard as wrong or false", frequently involving "a contest between the majoritarian view of what is true or right and an unpopular minority view". She also said that "the view of the majority has no need of constitutional protection; it is tolerated in any event".

Protection for freedom of expression is required to be especially robust when it applies to controversial or disturbing speech. The U of L does not have the right to minimize or negate

protection for the LSL just because some individuals claim to be disturbed or upset by the content of the message. The U of L does not have the authority to relegate the LSL displays to a back room or location due to the disturbing nature and content of the LSL display.

U of L decision-makers also do not have the right, under administrative law, to discriminate against the LSL in relation to other clubs.

In *Roncarelli v. Duplessis*, [1959] SCR 121, the Supreme Court of Canada made it abundantly clear that administrative decision-makers must exercise their statutory discretion according to the purpose of the statute, not arbitrarily or based on irrelevant considerations. In *Roncarelli*, the Court held that the Commission's discretion under Quebec's *Alcoholic Liquor Act* could not be used to revoke the liquor licence of the restaurant of a Jehovah's Witness because he had assisted his unpopular co-religionists with their legal troubles. At page 140, Rand J stated:

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

The U of L does not have the authority to discriminate against the LSL by depriving them of space on campus that other groups would have, resigning them to a back room where the public cannot adequately view their display nor can the U of L exercise its discretion so as to stand idly by when other groups are physically blocking and obstructing the expression of the LSL on campus.

Further, discrimination against the LSL on the basis of the club's message runs counter to the U of L 2013/2014 Academic Calendar, "Our Fundamental Principles":

We protect and encourage free inquiry and expression. In keeping with the unique mandate of the university in society, the University of Lethbridge supports and protects artistic expression and the free and open scholarly discussion of issues, including those that are controversial. In the tradition of academic freedom, the University models collegial and civil debate, dissent, and controversy to critically explore and resolve issues in an atmosphere of professionalism, respect, and good will.

In respect of the above, does the U of L consider the physical obstruction of unpopular expression as falling within "collegial and civil debate"? Would the U of L condone the obstruction of other expression on campus?

The 2013/2014 Academic Calendar (under “Academic Regulations, Policies, and Program Requirements”, section “Student Discipline Policy – Non-Academic Offences”) is also especially pertinent:

Students should maintain the freedoms of other members of the University community including freedom of thought, beliefs, opinions, expression, peaceful assembly and association. Behaviour contravening or limiting these freedoms constitutes disruption” (pg. 80).

It is only by allowing dissent and debate that institutions of higher learning can provide the rich soil needed for intellectual growth. The U of L should be supporting free speech and vigorous debate, not attempting to muzzle it. As John Stuart Mill stated: “To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility”. Mill, in his essay “On Liberty” opined that “he who knows only his own side of the case, knows little of that.”

Shuna Talbot, president of the ULSU, wrote an article in the *Meliorist*, for the week of November 7th, entitled “Censorship and Freedom of Speech: A Delicate Balancing Act”. In her article, she ended by asking for “any feedback regarding policy or procedure we can put into place that will satisfy all of our staff and students on campus, without creating censorship in our post-secondary institute”. Ms. Talbot also referred to the JCCF’s yearly report, the Campus Freedom Index, which measures the state of freedom of expression on Canadian campuses.

So, in response to Ms. Talbot’s request for feedback and in light of your statements concerning restrictions on future displays, it is necessary to communicate the following information on the freedom of expression rights of our clients on the U of L campus.

Students have the right to hold and communicate controversial and disturbing viewpoints on campus. In response to Ms. Talbot’s request, no policy “will satisfy all of our staff and students on campus”, because some individuals are willing to tolerate only opinions with which they agree. We therefore encourage the U of L to educate its campus population to the effect that freedom of expression must be protected despite the fact that it may sometimes make individuals feel uncomfortable or disturbed. There is no legal right to not be offended. There is no legal right not to see expression that one disagrees with. The nature of controversial speech is that it often acts as an agent of change. Change is often uncomfortable.

There are exceptions to the rule that speech should be protected. Speech that threatens violence or genocide, public incitement of hatred, as well as obscenity, is prohibited under the *Criminal Code*. Other than these few exceptions, the right to share a particular message, despite its disturbing nature, is protected by the *Charter*, as well as under contract law and administrative law.

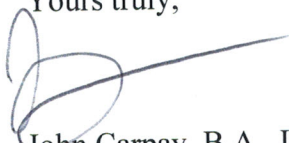
We request, in keeping with the legal principles of freedom of expression under section 2(b) of the *Charter*, that Mr. Van Der Weide not be restricted from putting up displays or sharing his

club's message in areas open to any other club on campus. His club should not be treated differently from other clubs on campus due to the nature of the LSL's message. We also request that Mr. Van Der Weide's display be protected by campus security. If other groups wish to protest in opposition, they should be allowed the same right to protest alongside the LSL. They should not, however, be allowed to cover up the expression of the LSL. Security should be required to protect the LSL, as well as all other groups and individuals attempting to communicate a message on campus.

We sincerely hope that it will not be necessary for Mr. Van Der Weide and other students to assert their rights legally against the U of L in order to secure their right to freedom of expression in future. We trust that you will respect and protect the right to freedom of expression and ensure that the LSL is not discriminated against on campus.

I look forward to your response.

Yours truly,



John Carpay, B.A., LL.B

President

Justice Centre for Constitutional Freedoms

- cc. Anne Baxter, Director of Risk & Safety Services
Al Hill, Security Manager
Toby Clark, Risk Analyst for Risk & Safety Services
Cheri Pokarney, General Manager of ULSU
Shuna Talbot, President of ULSU
Adam Long, VP Internal Affairs of ULSU
Lethbridge Students for Life
Peter Ashworth, Security Manager
John O'Keeffe, Executive Director Campus Safety