# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *BC Civil Liberties Association v. University of Victoria,* 2016 BCCA 162

Date: 20160418
Docket: CA42551

Between:

**The BC Civil Liberties Association and Cameron Côté**

Appellants
(Petitioners)

And

**University of Victoria and University of Victoria Students' Society**

Respondents
(Respondents)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated January 14, 2015 (*BC Civil Liberties Association v. University of Victoria*, 2015 BCSC 39, Vancouver Registry S137184).

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| Counsel for the Appellants: | C.E. Jones, Q.C. and M. Rankin |
| Counsel for the Respondent University of Victoria: | P. Gilligan-Hackett and K.R. Hart |
| Counsel for the Respondent University of Victoria Students' Society: | N. Iyer |
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| Place and Date of Hearing: | Vancouver, British Columbia<br>February 4-5, 2016 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>April 18, 2016 |

**Written Reasons by:**
The Honourable Mr. Justice Willcock

**Concurred in by:**
The Honourable Madam Justice Saunders
The Honourable Madam Justice Dickson

***Summary:***

*A pro-life student group applied to the respondent University for a permit to hold a demonstration on campus. The permit was granted but revoked when the University learned the organization had been sanctioned by the respondent Students' Society. The group held the demonstration. The University responded with threats of sanction. The group's president and the BC Civil Liberties Association petitioned for a declaration that Charter rights of freedom of expression applied to the University's decisions and had been infringed, and in the alternative that the decisions should be subject to judicial review and quashed as being unreasonable. The chambers judge dismissed the petition on the basis the Charter did not apply. The petitioners appealed. Held: appeal dismissed. The Charter does not apply to the University's regulation of its outdoor space. The University is not government and was not implementing a government program. The alternative ground raises a moot issue. The University decisions have been reversed or are otherwise inoperative. Quashing these decisions would have no practical effect.*

**Reasons for Judgment of the Honourable Mr. Justice Willcock:**

## Introduction

[1] On January 29, 2013, Jim Dunsdon, the Associate Vice-President of Student Affairs at the University of Victoria, approved the use of campus space by a pro-life student club, Youth Protecting Youth ("YPY"), on February 1, 2013. Shortly thereafter, when he was advised by the University of Victoria Students' Society ("UVSS") that it had prohibited YPY from the use of campus space because the Society considered the club to have engaged in harassment of students, Mr. Dunsdon withdrew that approval and instructed the president of YPY not to proceed. In doing so, he relied upon the University's *Booking of Outdoor Space by Students Policy* (the "*Policy*"), which provided bookings by student groups that had been sanctioned for a violation of a student society policy might be cancelled. The YPY activity in question, a demonstration described as a "Choice Chain", proceeded despite the cancellation of approval. On March 7, 2013, in response to the unauthorized demonstration, the University suspended YPY's outdoor space booking privileges for one year and warned YPY members that any future disregard of the University's directions could result in the imposition of non-academic discipline.

[2] Cameron Côté, in his capacity as president of YPY, and the BC Civil Liberties Association petitioned the BC Supreme Court for relief including:

> 1. A declaration under section 52 of the *Constitution Act*, *1982* that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires,* void and of no force or effect as it violates section 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1;
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> 2. A declaration that policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter of Rights and Freedoms*;
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> 3. A declaration that the decisions of Jim Dunsdon, Associate Vice-President Student Affairs, University of Victoria, dated January 29, 2013, January 31, 2013 and March 7, 2013 failed to appropriately weigh the infringement of section 2(b), (c) and (d) of the *Canadian Charter of Rights and Freedoms* against the justifications for such infringement and were therefore unreasonable;
>
> 4. An order that the decisions of Jim Dunsdon dated January 29, 2013, January 31, 2013 and March 7, 2013, are quashed and set aside; …

[3] The petition came on for hearing before the Chief Justice in chambers. For reasons indexed at 2015 BCSC 39, he held that neither the impugned decisions nor the policy could be challenged on the grounds they violated students' *Charter* rights. The petitioners appeal that decision.

## Grounds of Appeal

[4] The appellants say the acts of the University are governmental action inconsistent with the rights and freedoms guaranteed by the *Charter*, and that the judgment below is in error insofar as it finds the *Charter* inapplicable to the University's decisions. Specifically, they submit:

a) The chambers judge erred in law in failing to find that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires,* void and of no force or effect as it violates s. 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and in dismissing the application for a declaration that the policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter of Rights and Freedoms*; and

b) The chambers judge erred in law in dismissing the application for a declaration that that the decisions of the Associate Vice-President of Student Affairs, University of Victoria, dated January 29, 2013, January 31, 2013 and March 7, 2013 failed to appropriately weigh the infringement of s. 2(b), (c) and (d) of the *Canadian Charter of Rights and Freedoms* against the justifications for such infringement, and were therefore unreasonable.

[5] Further, the appellants ask us to consider a question identified in their petition but not addressed in the judgment below: whether one or all of the impugned decisions of the University should be quashed, even if those decisions cannot be characterized as governmental action, because they were made without adequate consideration of *Charter* values.

## The Appellants' Argument

### Failure to Recognize *Charter* Rights

[6] The appellants acknowledge the University of Victoria is not "an organ of the state", but say, relying upon *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, certain of the University's decisions can be subject to *Charter* challenges. They argue the University's regulation of its property pursuant to the provisions of the *University Act*, R.S.B.C. 1996, c. 486, amounts to "government activity" that attracts scrutiny under the *Charter*. The *Policy* involved an exercise of statutorily-conferred regulatory power inseparable from the University's core role: delivering publicly-funded post-secondary education. They submit the chambers judge placed undue reliance upon the Supreme Court of Canada's decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, and cases that followed that decision, including *Maughan v. University of British Columbia*, 2009 BCCA 447; *Faculty Association of the University of British Columbia v. University of British Columbia*, 2010 BCCA 189; and *Lobo v. Carleton University*, 2012 ONCA 498. The appellants say all of the justices of the Court in *McKinney* acknowledged that certain functions of a university could be governmental for the purposes of s. 32 of the

*Charter*, which confines its application to government action. The cases that follow *McKinney*, in the appellants' submission, address essentially private law disputes rather than universities' role in delivering post-secondary education. *Lobo*, they submit, turned on particular statutory provisions not applicable in this province and, in any event, is wrongly decided and should not be followed.

[7] The appellants say the case at bar is more closely analogous, on its facts, to cases where university students have been held to be entitled to assert *Charter* rights in their disputes with governing bodies: *R. v. Whatcott*, 2002 SKQB 399; *R. v. Whatcott*, 2011 ABPC 336; *Pridgen v. University of Calgary*, 2012 ABCA 139; *R. v. Whatcott*, 2012 ABQB 231; and *R. v. Whatcott*, 2014 SKPC 215.

[8] The University derives its powers and mandate from the *University Act.* Under the provisions of the *Act*, its control over property more closely resembles the regulatory powers of a municipality than those of a natural person. Here, as in *Horse Lake First Nation v. Horseman*, 2003 ABQB 152, the appellants argue, the *Charter* should apply to the impugned decisions because a decision-maker charged with the regulation of the affairs of a public body has used its statutory authority to regulate the lives of its members.

[9] They say there is a public interest in so extending the scope of *Charter* protection. The ability of students to associate in order to express complex political ideas on the University's campus is not separable from other aspects of a university education and the University should be obliged to protect that freedom of speech and association as part of the role it discharges on behalf of government. The University plays a central role in the democratic, economic and social life of the province; the appellants say it must use its statutory powers in the public interest.

[10] No support is needed for the proposition that universities are established in the public interest to serve a public purpose, or the importance, in some cases, of the physical facilities used to that end, but the appellants nonetheless recommend to this Court statements to that effect in *Pridgen*; *R. v. Whatcott,* 2011 ABPC 336 at

para. 67 (affirmed on appeal, 2012 ABQB 231); and *University of Waterloo v. Ontario (Minister of Finance),* [2002] O.J. No. 4416 (C.A.).

**Failure to Weigh *Charter* Values**

[11] As a separate ground, the appellants argue whether or not they can assert an infringement of their *Charter* rights, the University is required to take into account the underlying values of the *Charter* when applying the *Policy*, and it failed to do so. They say the chambers judge erred by implicitly concluding the University and its administrative agents were not required to consider fundamental values (including *Charter* values) when deciding whether to permit student clubs to use common campus space for expressive purposes. They submit all statutory decision-makers, including public universities, must exercise their statutorily-conferred powers in conformity with fundamental values, including *Charter* values. On that point, counsel refer us, in particular, to *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 56; *R. v. Conway,* 2010 SCC 22 at para. 103; and *Doré v. Barreau du Québec*, 2012 SCC 12.

[12] The appellants say the impugned decisions are subject to judicial review because they have a "public element". That review, they say, is a "flexible instrument for doing justice" to protect the individual from administrative decisions that are not fair or reasonable: *R. v. Panel on Takeovers and Mergers*, *Ex parte Datafin Plc.*, [1987] Q.B. 815 (C.A.) at 845-46 and 849. See also *Air Canada v. Toronto Port Authority*, 2011 FCA 347; *West Toronto United Football Club v. Ontario Soccer Assn.*, 2014 ONSC 5881.

**Discussion**

[13] The first relief sought by the appellants is a declaration under s. 52 of the *Constitution Act*, *1982,* "that Section 15.00 of the *Booking of Outdoor Space by Students Policy* is *ultra vires,* void and of no force or effect as it violates section 2(b)(c) and (d) of the *Canadian Charter of Rights and Freedoms* and is not saved by section 1". That relief is only available where the impugned law (here,

presumably, the *Policy*) has been found to be inconsistent with the provisions of the *Constitution*.

[14] The appellants also seek declaratory relief under s. 24 of the *Charter*, which they describe as an appropriate and just remedy to prevent continued infringement or denial of *Charter* rights: a declaration that policies and decisions of the University of Victoria restricting or regulating the use of its common areas for expressive purposes must be consistent with the *Charter,* and a declaration that the impugned decisions failed to appropriately weigh the infringement of s. 2(b), (c) and (d) of the *Charter* against the justifications for such infringement and were therefore unreasonable.

[15] The only remedy sought that is not contingent upon a finding that *Charter* rights have been infringed is the request for an order that the decisions of Mr. Dunsdon of January 29, 2013, January 31, 2013 and March 7, 2013, applying the *Policy* and addressing its apparent breach, be quashed.

[16] For reasons set out below, I am of the view that the chambers judge did not err in concluding that the actions of the University in creating the *Policy* and applying it cannot be said to have infringed the appellants' *Charter* rights. Further, I am of the view that it was not an error to decline to address the claim that the impugned decisions were unreasonable. That question was moot when the matter came on for hearing before the chambers judge. The decisions the appellants seek to quash have been revoked. I am of the view we should not exercise our discretion to address the moot question whether the revoked decisions were founded upon inadequate consideration of *Charter* values.

**The Appellants' *Charter* Rights Were Not Infringed**

[17] Section 2 of the *Charter* guarantees fundamental freedoms, including freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association. Those guarantees must be read in light of the fact the *Charter* is an instrument for checking the powers of government over the individual. Its central concern is direct impingement by government upon the rights and

freedoms it protects and enshrines. It is a bulwark against the intrusion of the state upon our liberty: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 156; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at 490; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 347; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 593-98; *Tremblay v. Daigle*, [1989] 2 S.C.R. 530; *McKinney*; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483.

[18] Section 32 describes the scope of the *Charter*'s application:

> 32. (1) This *Charter* applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament…; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[19] In *Dolphin Delivery*, McIntyre J, for the Court, concluded that s. 32 does not refer to government in its "generic sense – meaning the whole of the governmental apparatus of the state" but rather to a branch of government, narrowly defined. In *McKinney*, La Forest J. said the provisions of s. 32 "give a strong message that the *Charter* is confined to government action." In the companion judgment *Stoffman*, citing the views of McIntyre J. in *Dolphin Delivery*, La Forest J. noted that references to government in s. 32 "could not be interpreted as bringing within the ambit of the *Charter* the whole of that amorphous entity which in contemporary political theory might be thought of as 'the state'".

[20] On the other hand, the jurisprudence makes it clear that s. 32 should not so narrowly define the application of the *Charter* as to permit government to act with impunity through the agency of subordinate bodies. As McIntyre J. noted in *Dolphin Delivery*, the *Charter* should apply to "many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures". The edges of the apparatus of government have been described in the case law so as to exclude, among other entities, universities in Ontario and British Columbia (*McKinney*; *Harrison*) as well as

the Vancouver General Hospital (*Stoffman*); and so as to include, among others, community colleges in British Columbia (expressly determined to be agents of the Crown in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570), and the transportation authority of the Greater Vancouver Regional District (described as an entity placed in the hands of local governments by administrative restructuring, in *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295).

[21] The question whether the University of Victoria should be regarded as an agent of government or equivalent to government for all purposes, insofar as the application of the *Charter* is concerned, is settled by the decisions of the Supreme Court of Canada in *McKinney*, *Stoffman* and in particular *Harrison*. All that is said in *Harrison* about the relationship between the University of British Columbia and the Government of British Columbia is equally applicable to the relationship between the University of Victoria and the government. There are subtle distinctions in the composition of the boards of the universities but the appellants cannot point to any material distinctions that would place the present case beyond the scope of the *Harrison* decision.

[22] The appellants do not press the argument that the University is in all respects government and subject to the *Charter* generally but, emphasize, rather, that in some respects, particularly in affording students a forum for free expression, the University is effecting government policy and in doing so must be governed by the provisions of the *Charter.* In order to address that argument it is necessary to look at the discussion of the role of universities in previous *Charter* litigation. The appellants say the cases carve out an exception from the general rule into which this case fits. The University of Victoria says the jurisprudence clearly establishes that, insofar as its core functions are concerned, the University is autonomous; that being the case, and in the absence of a directive from government that a specific service or facility be provided, no aspect of its decision-making is subject to *Charter* scrutiny.

[23] The appellants say the University of Victoria is given the statutory authority to regulate the use of its property. That is clearly the case. Section 27 of the *University Act* authorizes the University of Victoria Board to maintain and keep in proper order and condition the property of the University; to make rules respecting the management, government and control of the property; to regulate, prohibit and impose requirements in relation to the use of the property; to make rules consistent with the powers conferred on the Board by the *Act*; and to provide for the hearing and determination of disputes arising in relation to the contravention of a rule.

[24] However, the argument that the *Charter* may be used to challenge all measures undertaken pursuant to the statutory provisions that create or enable a university was rejected in *McKinney.* In that case the Court said:

> … [T]he mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the *Charter*. Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government. It would significantly undermine the obvious purpose of s. 32 to confine the application of the *Charter* to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining the *Charter* to which I have already referred.

[25] Can it be said that when the University of Victoria exercises its particular statutory power, pursuant to s. 27 of the *University Act*, to regulate, prohibit or impose requirements in relation to activities and events on its property, it is acting in furtherance of a specific government policy or program? That argument must be considered in light of the decision in *Harrison*. There, the impugned decision was the enactment of a mandatory retirement policy respecting the members of the University of British Columbia faculty and administrative staff. As Wilson J. pointed out, in dissent, the mandatory retirement policy was enacted by the university's Board pursuant to s. 27(f) of the *University Act*. That fact alone, the fact that the university was specifically empowered to undertake the impugned decision by statute, was considered by the majority to be insufficient to bring the *Charter* to bear on the decision. The simple fact, in the case at bar, that the *Policy* can be said to have been adopted pursuant to s. 27

of the *University Act*, does not permit students to invoke the *Charter* in an attempt to quash the policy.

[26] The Court in *Harrison*, as in *Stoffman*, distinguished between "ultimate or extraordinary control and routine or regular control" of the entity in question. It agreed with the finding of this Court in *Harrison v. University of British Columbia* (1988), 21 B.C.L.R. (2d) 145 (C.A.) at 152, that "the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case". There is no specific statutory direction with respect to the manner in which the University is to use its discretion to regulate, prohibit or impose requirements in relation to activities and events on its property. There is no routine or regular control of that power by government.

[27] What of the argument that the specific activity affected by the decisions of the University in this case, public expression, is one the University is established to encourage in the public interest? In the particular context of this appeal, is the regulation of speech fundamentally different from the staffing and tenure issues considered in *McKinney* and *Stoffman*? The view that the core function of universities is a public good, and universities which are charged with delivery of that good thereby act as agents of the state, was rejected in *McKinney*. In *Stoffman*, La Forest J. wrote of the question whether the Vancouver General Hospital was part of the apparatus of government because of its role in delivering mandated public health care (at 511):

> If that was by itself sufficient to bring the hospital and all other bodies and individuals concerned with the provision of health care or hospital services within the reach of the *Charter*, a wide range of institutions and organizations commonly regarded as part of the private sector, from airlines, railways, and banks, to trade unions, symphonies and other cultural organizations, would also come under the *Charter*. For each of these entities, along with many others, are concerned with the provision of a service which is an important part of the legislative mandate of one or the other level of government.

[28] *McKinney* says the delivery of a public service by an agency does not automatically incorporate it into government. Doing so may, however, subject an

agency, acting as a proxy for government in relation to a specific activity, to *Charter* scrutiny. The circumstances in which that should occur were elaborated upon in *Eldridge*. The argument that the University of Victoria, in providing a forum for free speech (or restricting that forum), is a private body advancing a specific objective of the state must be founded, largely, upon the judgment of the Supreme Court of Canada in *Eldridge*.

[29] In *Eldridge*, the Court was required to look at the Vancouver General Hospital, together with other respondents, as parties charged with the delivery of medical services rather than as an autonomous institution. When the Court, in *Stoffman,* found the Vancouver General Hospital was not part of the "administrative branch" of government, it left open the argument that the hospital might for certain purposes be a private entity acting in a capacity that requires it to respect *Charter* rights. *Stoffman* was not such a case. The Court in that case expressly noted, at 516:

> [T]his is not a case for the application of the *Charter* to a specific act of an entity which is not generally bound by the *Charter*. The only specific connection between the actions of the Vancouver General in adopting and applying [the mandatory retirement policy] and the actions of the Government of British Columbia was the requirement that [the policy] receive ministerial approval. In light of what I have said above in regard to this requirement, a "more direct and a more precisely-defined connection", to borrow McIntyre J.'s phrase used in *Dolphin Delivery*, would have to be shown before I would conclude that the *Charter* applied on this ground.

[30] In *Eldridge*, the Court defined that "more direct and a more precisely-defined connection". Although *Stoffman* had determined that the Vancouver General Hospital was not part of the apparatus of government, it was found in *Eldridge* to be putting into place a government program or acting in a governmental capacity in adopting policies with respect to the delivery of medical care specifically mandated by statute. The decision in that case established that a private entity may be subject to the *Charter* in respect of what were referred to as "certain inherently governmental actions". The factors that define such actions did not admit "of any *a priori* elucidation". The Court considered whether the government retained responsibility for the program, despite the use of a private agency to deliver it; whether there could

be said to be a specific government program or policy directing the Hospital to act; and whether it could be said that the government had delegated the implementation of its policies and programs to the private entity.

[31] The Court noted two important points with respect to the scope of the applicability of the *Charter* to private entities in such circumstances:

> 43 … [T]he mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the *Charter.*

And:

> 44 … [A]n entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature -- for example, the implementation of a specific statutory scheme or a government program -- the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

[32] Applying the criteria *Eldridge* suggests we must use, I cannot find the specific impugned acts of the University of Victoria to be governmental in nature. The government neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom, s. 43(1) of the *Education (No. 2) Act 1986* (UK), c. 61, which imposes an obligation on universities and colleges to:

> … take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers.

[33] The *University Act*, by contrast, does not describe a <u>specific</u> governmental program or policy which might have been affected by the impugned decisions and there was no evidence before the judge of any legislation or policy that does so. There is no basis upon which it can be said on the evidence that when the University

regulated the use of space on the campus it was implementing a government policy or program.

[34] The Court in *McKinney* recognized the significance of the relationships between universities and provincial governments in Canada, including governments' role in determining universities' powers, objects and governmental structures, and the role of governments in their funding, but noted that they manage their own affairs and allocate government funds, tuition revenues and endowment funds to meet their needs as they see fit. The Court adopted the view expressed by Beetz J. in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, speaking of comparable Saskatchewan legislation: "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy."

[35] Part 10 of the *University Act* describes the powers and duties of universities. The following provisions are significant:

> 46.1 A university has the power and capacity of a natural person of full capacity.
>
> 47 … (2) A university must, so far as and to the full extent that its resources from time to time permit, do all of the following:
>
> > (a) establish and maintain colleges, schools, institutes, faculties, departments, chairs and courses of instruction;
> >
> > (b) provide instruction in all branches of knowledge;
> >
> > (c) establish facilities for the pursuit of original research in all branches of knowledge;
> >
> > …
> >
> > (f) <u>generally, promote and carry on the work of a university in all its branches</u>, through the cooperative effort of the board, senate and other constituent parts of the university.
> >
> > [Emphasis added.]

[36] The only statutory obligation upon which the appellants rely in support of the argument that the University of Victoria is obliged to afford students a forum for free speech as part of a government policy or program is s. 47(2)(f) of the *Act*. The appellants submit that because the University has concluded fulfillment of its

statutory mandate requires it to allocate space to students for free expression of ideas, that forum is provided pursuant to government policy and its provision and allocation must be subject to *Charter* scrutiny. That argument, however, would result in all of the core activities of the University being considered to be measures taken to effect government policy. The University, as we have seen above, does not perform its core function as part of the apparatus of government. The Court's ruling in *Harrison* is, in my view, full answer to this argument.

[37] The cases relied upon by the appellants do not convince me otherwise. *Pridgen* arose on judicial review of a disciplinary measure taken by the University of Calgary. There was no doubt judicial review was available to the respondent students in that case pursuant to the appeal provisions of the *Post-Secondary Learning Act*, S.A. 2003, c. P-19.5. The disciplinary decision was found to be unreasonable and overturned by the Court of Queen's Bench. On appeal, all three judges of the Alberta Court of Appeal concluded, on administrative law grounds, the university's disciplinary decision could not stand and the appeal should be dismissed. Paperny J.A., alone among the judges, went further in finding the disciplinary decision could be impeached as a breach of students' *Charter* rights. The analysis of the *Charter* issues by Paperny J.A. was *dicta*, and expressly not adopted by her colleagues. It addresses a specific statutory framework that has no applicability in this province. To the extent that her conclusion is founded upon the specific statutory task delegated to universities in Alberta, by the *Post-Secondary Learning Act*, it is not of assistance to us.

[38] Further, the Court in *Pridgen* clearly emphasized the fact that the appellants were not challenging the University in its day-to-day operations. As Paperny J.A. noted:

> [105] Applying the *Eldridge* analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion. The issue is whether in disciplining students pursuant to authority granted under the *PSL Act*, the University must be *Charter* compliant. The statutory authority includes the power to impose serious sanctions that go beyond the authority held by

> private individuals or organizations. Those sanctions include the power to fine, the power to suspend a student's right to attend the university, and the power to expel students from the university: *PSL Act*, section 31. Accordingly, *Charter* protection for students' fundamental freedoms, including freedom of expression, applies in these circumstances. This goes to the fundamental purpose of the *Charter* as noted by Wilson J. at 222 of her dissent in *McKinney*, where she stated that those who enacted the *Charter* "were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role".

[39] In the case at bar, the decisions challenged involve no exercise of statutory authority going beyond the authority held by private individuals or organizations.

[40] In my opinion, the chambers judge correctly concluded that the appellants' *Charter* argument stands on the same footing as that rejected by the Ontario Court of Appeal in *Lobo v. Carleton University*, 2012 ONCA 498. There, the motion judge had held the appellants failed to plead the material facts necessary to establish that the respondent university was implementing a specific government program or policy by failing to allocate space for the appellants to advance their extra-curricular objectives (which included a "Choice Chain") as a means to express their social, moral, religious or political views. The Court of Appeal dismissed the appeal by endorsement in the following terms:

> [4] … As explained by the motion judge, when the University books space for non-academic extra-curricular use, it is not implementing a specific government policy or program as contemplated in *Eldridge*. In carrying out this particular activity there is, therefore, no triable issue as to whether *Charter* scrutiny applies to the respondent's actions.

[41] In my view, the chambers judge in this case was correct to find that neither the entity whose activity is impugned, nor the activity itself, were amenable to *Charter* scrutiny.

**The Other Question is Moot**

[42] The *Policy* itself was only challenged by way of an application under s. 52 of the *Constitution,* on the grounds it was *ultra vires* as it infringed the appellants' *Charter* rights.

[43] The further relief the appellants seek, under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, is limited. The appellants do not ask for a new hearing or an opportunity to make a case before the University's Associate Vice-President of Student Affairs in relation to any of the impugned decisions. The only relief sought by the appellants pursuant to the *Judicial Review Procedure Act* is an order quashing three decisions of Mr. Dunsdon: the January 29, 2013 decision to permit the demonstration; the January 31, 2013 decision to revoke the permit; and the March 7, 2013 decision to sanction YPY and to warn its members of the consequences of future infractions. As the chambers judge pointed out, the question whether there are grounds to challenge the first decision, granting the permit, did not give rise to a justiciable issue:

> [109] While Mr. Dunsdon's letter of January 29, 2013, has not been withdrawn, it granted permission to YPY and its members to engage in the Choice Chain on February 1, 2013, albeit on terms. Those terms were agreed to and accepted by Mr. Côté. In the result, I am not persuaded that the decision referred to in that letter entitles the petitioners to any relief, and I would not entertain the relief they seek with respect to the decision reflected in that letter.

[44] The appellants say, irrespective of whether the *Charter* is engaged, the second and third decisions are unreasonable and must be set aside. They say it is clear from Mr. Dunsdon's January 31, 2013 letter that the University revoked the permit to hold the Choice Chain solely because the UVSS had imposed sanctions upon YPY and there was no rational exercise of the University's discretion to regulate speech in its public space. The University's reliance upon the *Policy* had the effect of unreasonably delegating decision-making power to the UVSS without regard for countervailing interests such as freedom of expression.

[45] Because they do not seek reconsideration of the decisions, the appellants do not intend to revisit the substantive issue: whether Mr. Dunsdon could properly have withdrawn the permit or sanctioned the YPY after having considered *Charter* values. The relief they seek will have no practical effect or significance. The University's letter of March 7, 2013, suspending YPY's outdoor space booking privileges, was withdrawn in March 2014. The threat of further sanctions for non-academic

misconduct was withdrawn at the same time. There is no longer a threat of sanctions to YPY members as a result of the 2013 decisions (Mr. Côté himself has since graduated). The *Policy* was amended in July 2014, apparently as a consequence of the dispute giving rise to this appeal.

[46] There is no need to quash the decisions that have been revoked, nor is there any apparent benefit to doing so. What is sought by the appellants, if they cannot assert *Charter* rights, is essentially – in function, if not form – a declaration that consideration ought to have been given to *Charter* values when the University made two decisions the appellants no longer have any real interest in challenging.

[47] Whether the plea for relief under the *Judicial Review Procedure Act* is moot, and if so, whether that should end our enquiry, should be considered in light of the principles set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and canvassed in Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 2008) (loose-leaf updated December 2014) at §3.3300.

[48] Where no live controversy exists which affects the rights of the parties, the issue is moot. In my view, there was no live issue in relation to the reasonableness of the impugned decisions, as opposed to the question whether the decisions infringed upon *Charter* rights, before the chambers judge.

[49] The prayer for relief in the petition was founded, in part, upon the argument that the decisions failed to appropriately weigh an *infringement* of s. 2(b), (c) and (d) of the *Charter.* The appellants submit, however, that they have also consistently sought an order quashing the decisions on the distinct ground they were unreasonably made without regard to *Charter values.* The appellants direct us to the chambers judge's description of the issues at paras. 85-87 of his reasons. The cited passages clearly describe the appellants' assertions that the impugned decisions were unreasonable because they failed to proportionately weigh *Charter* values, and in particular students' rights of expression and peaceful assembly. The chambers judge also noted the argument that the University had impermissibly and

unreasonably delegated decisions on use of University property to the UVSS. The appellants say their attack upon the reasonableness of the impugned decisions was described but not explicitly addressed by the chambers judge.

[50] The University's mootness argument with respect to the allegation of a *Charter* breach, was addressed in the following terms:

> [113] If Mr. Côté was deprived of any of his *Charter* rights by the second and third impugned decisions, he may, in my opinion, be entitled to seek relief as a result of such deprivations, notwithstanding that the deprivations are no longer operative.
>
> [Emphasis added.]

[51] In my view, it is correct to say the mootness of the balance of the judicial review application was not expressly dealt with by the chambers judge, who considered the answer to the *Charter* arguments to be determinative of the live issues before him. He clearly declined to engage in a full judicial review analysis. At para. 153 he held:

> [153] As I have concluded that the *Charter* does not apply to the activities relating to the booking of space by students it follows that I decline to make the declarations sought in paras. 1 and 3 of the Petition. Therefore, I also decline to grant the relief requested in para. 4 of the Petition.

[52] The question before this Court is whether the chambers judge's failure to further address the relief sought in para. 4 of the petition (an order quashing the impugned decisions) might be available to the appellants, despite the finding that the *Charter* did not apply to the decisions in question, was such an error in the exercise of his discretion as to warrant our intervention. In my view, it was not. The issue of the reasonableness of the impugned decisions is still moot; addressing that issue can produce no practical remedy. Answering this moot question would be particularly difficult because the evidence was not fully developed in the Supreme Court.

[53] As a general policy or practice, abstract, hypothetical or contingent questions will not be heard unless the court exercises its discretion to depart from that policy or

practice: *Borowski* at 353. The relevant factors relating to the exercise of the court's discretion to do so include:

a) whether there are still adversaries who can suitably put the question to the court;

b) whether it is in the interests of judicial economy to consider the question; and

c) whether the question should be considered in light of the court's appropriate adjudicative role.

[54] With regard to the first criterion, this appeal was fully argued on both sides and it cannot be suggested that the question was not appropriately addressed. However, with regard to the remaining criteria, concern for judicial economy and appropriate recognition of this Court's limited appellate role weigh heavily against addressing the moot issue.

[55] There will be little value in an order quashing the decisions in question. The manner and extent to which *Charter* values should be weighed by universities in the course of administrative decision-making is fact-specific and does not lend itself to general pronouncements. Here, as in *Borowski*, "[i]t is far from clear that a decision on the merits will obviate the necessity for future repetitious litigation". There is considerable jurisprudence upon which the appellants have relied in support of the rule that *Charter* values must be weighed where a discretionary administrative decision engages the protections enumerated in the *Charter,* including *Doré* and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12. A decision on the moot question posed in the case at bar will not address a lacuna in the law.

[56] Furthermore, I agree with the University's submission that the appellants only fully developed and advanced their *Charter* claims in the court below. Review of the impugned decisions for reasonableness was evidently a secondary concern of the appellants, who concentrated their submissions almost exclusively upon their claim to a *Charter* remedy. As a result, an extensive record of the University's decision-making was not developed.

[57] There was no consideration of whether the impugned decisions were appropriately the subject of judicial review and, if so, whether they were ripe for review. The University is manifestly a public body exercising some public functions amenable to judicial review and public universities enjoy no special insulation from judicial review, but not *all* decisions made by the administration of a public university are amenable to judicial review (*Harelkin,* and in particular the observations of La Forest J. in *McKinney*).

[58] The chambers judge gave no consideration to whether, as the appellants claim, a "penalty" was imposed in the wake of the Choice Chain event, and if so, whether that penalty was imposed "on YPY students". The chambers judge only briefly considered whether the appellants were obliged to exhaust internal avenues of appeal before seeking judicial review. It was open to YPY to appeal the UVSS resolution to sanction YPY, and the club was in fact encouraged to do so by Mr. Dunsdon in January 2013. YPY could have challenged Mr. Dunsdon's revocation of its permit, but chose to hold the Choice Chain event. In the wake of that event, it was open to the group to appeal the suspension of its booking privileges. It did not do so. The failure to exhaust these remedies is not *prima facie* fatal to the appellants' petition, as the chambers judge noted at paras. 114-115, but it may have posed an obstacle to the argument that *Charter* values ought to have been considered by Mr. Dunsdon before making the impugned decisions.

[59] It is clear from his reasons that the chambers judge considered the petition to turn upon the *Charter* issue (not surprisingly, considering this was the thrust of the parties' arguments). Whether students may be deprived of *Charter* rights by the University's decisions with respect to the use of its facilities and space is, as the chambers judge concluded, a question of general significance. On the other hand, the distinct judicial review issue raised by the appellants was moot by the time of the hearing and is still moot. It is of no broader legal significance. For that reason I would not accede to either the argument that the chambers judge erred in failing to address the issue or the submission that we should address it on appeal.

**Conclusion**

[60] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

**I agree:**

"The Honourable Madam Justice Saunders"

**I agree:**

"The Honourable Madam Justice Dickson"