Charter Application to Private Entities

How s.32 of the Charter applies to privately-owned, publicly-used spaces in Canada

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How s 32 of the *Charter* applies to privately-owned, publicly used spaces

by the

Alberta Civil Liberties Research Centre

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How s 32 of the *Charter* applies to privately-owned, publicly-used spaces in Canada

I. Introduction

The *Canadian Charter of Rights and Freedoms*[1] is a legal document that sets out the rights and freedoms that Canadians can expect from their government. Generally, the *Charter* applies to governments (federal, provincial and municipal), but not to private parties. However, in the years since the *Charter* has been adopted, the law regarding the application of the *Charter* has expanded; now allowing for situations in which seemingly private entities (organizations) may be subject to the *Charter*. These entities often appear to be private in nature and may even be privately owned and thus unconnected to government. However, these entities may serve a public purpose, making their distinction as purely private entities unclear. While there are other quasi-governmental entities that may be the subjects of analyses about whether the *Charter* applies (e.g., administrative bodies and Indigenous band councils), this report focuses on privately-owned properties to which the public is invited. *Some* private entities that have been examined for application of the *Charter* through a government connection include: shopping malls, universities, airports, stadiums and nursing homes .

Charter s 32(1) reads:

> **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
> - (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Canadian caselaw has developed in the years since the *Charter*'s introduction to add some entities within the meaning of "government" under section 32, when previously they

[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

were not included. Canadian Courts have determined that if there is enough of a connection between the private entity or one of its actions and the government (or government objective), the *Charter* may apply. However, determining if an entity has enough of a government connection to bring it within the purview of *Charter* scrutiny can be difficult. While the Supreme Court of Canada (SCC) has developed a test for determining if a private entity falls under the meaning of "government" in section 32 of the *Charter*, courts across Canada have interpreted this test differently. This divergence in judicial interpretation has resulted in some uncertainty as to how courts may interpret whether the *Charter* applies to a particular entity in a given context.

This paper will examine how the courts' analysis of the *Charter's* application to private entities has developed. Through examining caselaw, this paper will identify the trends seen in how courts interpret the section 32 analysis about entities to which the *Charter* may apply.

II. A Brief Overview of the *Charter*

The *Charter* came into force in 1982, guaranteeing to Canadians fundamental rights and freedoms. Some of the fundamental freedoms include freedom of conscience and religion; freedom of thought, belief, opinion and expression, freedom of peaceful assembly and freedom of association.[2] The *Charter* protects these *Charter* freedoms from unreasonable government interference. The *Charter* also guarantees democratic rights,[3] mobility rights,[4] legal rights,[5] and equality rights,[6] among others. Section 32 sets out what is subject to the *Charter*; namely the "Parliament and government of Canada"[7] and "the legislature and government of each province"[8]. The *Charter* does not apply to private matters or interactions between private citizens or bodies.[9]

[2] *Charter,* s 2.
[3] *Charter*, ss 3-5.
[4] *Charter*, s 6.
[5] *Charter*, ss 7-14.
[6] *Charter*, s 15(1).
[7] *Charter,* s 32(1)(a).
[8] *Charter*, s 32(1)(b).
[9] *Dolphin Delivery Ltd. v R.W.D.S.U., Local 580,* 1986] 2 SCR 573, 33 DLR (4th) 174 (SCC) [*Dolphin Delivery*].

Even if a *Charter* right or freedom has been infringed, that infringement may be deemed valid under section 1 of the *Charter*. Section 1 allows for the government to infringe a *Charter* right if it can be demonstrably justified as reasonable in a free and democratic society. If the government infringes upon a Canadian's *Charter* right or freedom, and the infringement cannot be justified under s 1, an individual may seek a remedy under section 24(1) of the *Charter,* where they "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[10] Alternatively, individuals can ask that a law which violates the *Charter* be declared of "no force or effect" under the *Constitution Act, 1982*, section 52.

III. Section 32 Analysis and "Private" Entities

As discussed above, section 32 states that the *Charter* applies to governments, including governments at the federal, provincial and municipal level. While the section appears to limit the application of the *Charter* to government bodies, section 32 jurisprudence has evolved over the years to include entities and bodies that appear private in nature but have a substantial enough connection to the government to bring them within the meaning of "government" in section 32, such that the *Charter* applies. The section 32 analysis was developed through several cases, where courts recognized that private entities could be under the control of government exerting control, the entities could be given authority under statutes passed by Parliament or the legislatures or the entities fulfilling or performing a government policy or objectives through their actions.

A. Caselaw on Section 32 of the *Charter*

There are three major cases in the evolution of the section 32 application to private entities analysis, including: *Dolphin Delivery, McKinney v University of Guelph*[11] and *Eldridge v British Columbia.*[12] Today, courts most often refer to the section 32 analysis found in *Eldridge*, however, understanding the evolution of reasoning in these three cases is important, as the foundation for the analysis in *Eldridge* was laid in these previous cases. A fourth case, *Greater Vancouver Transportation Authority v Canadian Federation of Students -*

[10] *Charter*, s 24(1).
[11] *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) [*McKinney*].
[12] *Eldridge v British Columbia*, [1997] 3 SCR 624, 151 DLR (4th) 572 [*Eldridge*].

British Columbia Component[13] is also often referred to when examining the section 32 analysis. as this case affirmed and solidified the reasoning found in *Eldridge*.

i. Dolphin Delivery Ltd. v R.W.D.S.U., Local 580

In *Dolphin Delivery,* the Supreme Court of Canada (SCC) examined whether private parties could fall within the meaning of "government" under section 32 of the *Charter*. The case concerned a labour dispute between two private parties with the main issue centered on freedom of association. In examining this issue, the Court first had to determine if the *Charter* applied to the private parties.

Justice McIntyre emphasized that section 32 of the *Charter* explicitly stated that the *Charter* applied to governments, where "s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government."[14] However, while Justice McIntyre emphasized that the *Charter* applied to government entities, he also noted that it was possible for private bodies to be subject to the *Charter*. In situations with "exercise of, or reliance upon [delegated legislation], governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another."[15] Justice McIntyre found that the *Charter* could apply to private bodies.

Despite the case ultimately reinforcing limiting the application of the *Charter* to government bodies and activities, Justice McIntyre's contemplation of situations in which delegated government power could result in the application of the *Charter* to a private party opened the door for further jurisprudence to expand the reach of section 32.

ii. McKinney v University of Guelph

In *McKinney,* the SCC examined the University of Guelph's policy of a mandatory retirement age for academic staff. Staff argued that the University's policy violated their section 15(1) *Charter* right to equality. During the proceedings, one of the major issues heard was whether the *Charter* applied to the University of Guelph, as it was not a

[13] *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 [*Greater Vancouver*].
[14] *Dolphin Delivery,* at para 41.
[15] *Dolphin Delivery,* at para 46.

government entity. Justice La Forest of the SCC found that while "universities are statutory bodies performing a public service" that does not "make them part of government within the meaning of s. 32 of the *Charter."*[16] Despite rejecting the *Charter*'s application to the University, Justice La Forest found that there could be situations where specific activities of a university could be said to be the decision of the government "or that the government sufficiently partakes in the decision as to make it an act of government"[17] and therefore the university would be subject to the *Charter*.

In dissent, Justice Wilson made the case for the inclusion of the University within the meaning of "government" under section 32. In making the case for inclusion, Justice Wilson examined different scholarly opinions to generate a list of factors that indicate a government connection. While Justice Wilson's dissent would eventually reflect the section 32 analysis we see today, in the years following *McKinney*, courts were restrictive in considering whether private institutions fall under section 32, focusing primarily on the question of whether the entity was government or not. However, in *Eldridge*, an important development occurred which opened the application of section 32 significantly.

iii. Eldridge v British Columbia

In *Eldridge,* the SCC significantly expanded the reach of the *Charter*'s application to private entities. The case centered on the question of whether the *Charter* would apply to a hospital's delivery of medical care. The plaintiffs in this case were hearing impaired and were not provided with translators at the hospital, which they argued infringed their section 15 *Charter* rights. The SCC held that the hospital's failure to provide translators to the patients was a violation of their equality rights.

In reaching this decision, the SCC determined that the hospital met the meaning of "government" under section 32, and thus the hospital was subject to the *Charter*. The SCC found that the provision of medically necessary services was a government objective that the hospital was tasked with fulfilling.[18] The SCC was concerned that if it did not find the hospital to be subject to the *Charter*, this would set a precedent whereby the government

[16] *McKinney,* at 268.
[17] *McKinney,* at 274.
[18] *Eldridge,* at para 50.

could escape *Charter* scrutiny by delegating power or authority to private bodies to carry out the government's policies or objectives. The SCC laid out two circumstances in which a private entity could be subject to the *Charter* when carrying out inherently governmental actions. As McKay-Panos summarizes, these circumstances include:

1. The private entity in its entirety must be considered to be government; that is, based on the degree of control exercised over it by the government, it is clearly an organ of the government; or
2. The particular activity must be considered to be 'governmental', i.e. through the implementation of a certain government program.[19]

These two situations, where either the entity is deemed to be governmental in nature, or a particular act of the entity is governmental, form the test for determining if a non-government entity may be subject to the *Charter*.

iv. Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component

In *Greater Vancouver,* the SCC followed the *Eldridge* analysis for determining if the *Charter* applied to a private entity. In this decision, the Canadian Federation of Students sought an action against the Greater Vancouver Transit Authority (comprised of "TransLink" and "BC Transit") for refusing to display the Federation's advertisements on the sides of the Transit Authorities' buses. The Federation's advertisements "sought to encourage more young people to vote in a provincial election scheduled for May 17, 2005 by posting, on buses, advertisements about the election."[20] The Transit Authority's policy did not allow for political advertisements, which they deemed the Federation's advertisements to be. The Student Federation took the position that the Transit Authority's policies violated their section 2(b) freedom of expression and sought offending articles in the policy be declared of no force and effect.

The Trial Judge found the Transit Authority to be subject to the *Charter* as the authority was "government" under section 32 of the *Charter*. However, the Court found that

[19] Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply" (2016) 5:1 Can J Hum Rts 61 at 66. [McKay-Panos].
[20] *Greater-Vancouver,* at para 2.

the Federation's freedom of expression had not been violated "since there was no history of permitting political or advocacy advertising on the sides of buses, the location was not a 'public place'".[21] The Court of Appeal reversed the trial judgment, finding that the trial judge had erred in finding that the Federation's freedom of expression had not been infringed.[22]

The Transit Authority appealed this decision to the SCC. The first issue examined by the SCC was whether the Transit Authority was subject to the *Charter*. The SCC utilized the two-step analysis in *Eldridge.* The SCC reiterated that first, a court must determine if an entity is government; if it is, all the entity's activities will be subject to the *Charter*. Or, if the entity itself is not government, a court will determine if the particular activity is governmental; if it is, that activity alone will be subject to the *Charter*.[23] In applying these two circumstances to the Transit Authority, the SCC found that the Transit Authority was a clear government entity, where the Transit Authority was a "statutory body designated by legislation as an 'agent of the government'".[24] The SCC found that since the Transit Authority as a whole was found to be a government entity, there was no need to examine the individual activities as they were all subject to the *Charter.*

B. The Section 32 Analysis (General)

In determining if a private entity will be subject to the *Charter*, courts today will refer to the *Eldridge* decision and the two circumstances it provides for when the *Charter* will apply to private entities. First, Courts will determine if the entity is "government" within the meaning of section 32. This step will involve an "inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as ' government' within the meaning of s. 32(1)."[25] If the entity as a whole is found to meet the meaning of "government" under section 32, all of the entity's activities will be subject to the

[21] *Greater Vancouver,* at para 6.
[22] *Greater Vancouver,* at paras 8-11.
[23] *Greater Vancouver,* at para 16.
[24] *Greater Vancouver,* at para 17.
[25] *Eldridge,* at para 44.

Charter. Second, if an entity is found not to be government, a specific action of the entity may still be subject to the *Charter*. If a particular activity of a non-governmental entity is found to be governmental in nature, through for example, "the implementation of a specific statutory scheme or a government program" that activity alone will be subject to *Charter* scrutiny, not the other private actions of the entity.[26] Courts will therefore examine both the entity and the specific activity in question.

C. Caselaw on *Charter* Application to Non-Government Entities

There is an abundance of caselaw revolving around the question of whether a non-government entity is subject to the *Charter*, with much of it centered around universities. Universities present unique spaces, where a focus on academic growth, freedom and expression may sometimes conflict with the rules set in place by the administration of the university. In *McKinney,* the Court recognized the importance of respecting the internal operations of institutions such as universities, while also respecting the necessity for enforcing *Charter* rights. This concern is still seen in the caselaw today, with Courts still struggling to ensure that private institutions' internal and private workings remain protected, while still ensuring that *Charter* rights and freedoms are upheld.

While universities are the subject of much of the section 32 caselaw, they are not the only private entities that have been examined by the courts regarding the application of the *Charter*. Airports, malls, hospitals, and stadiums are some of the private entities that have been examined by the Courts in relation to section 32. For many of these cases, the Courts have employed the *Eldridge* analysis, particularity in cases where the nexus between the entity and the government is unclear. In other cases, however, such as the mall cases, other methods are utilized by the Courts in determining whether the *Charter* will apply. In addition, other private entities may be subject to the *Charter* in the future.

i. Universities

Within the University *Charter* caselaw, there is a dichotomy of approaches taken by courts in interpreting the *Eldridge* section 32 analysis. Some courts, such as the Alberta

[26] *Eldridge,* at para 44.

Court of Appeal in *Pridgen v University of Calgary,*[27] have taken into consideration various factors that may implicate a university as taking a governmental action. Other courts, such as the courts in British Columbia and Ontario, have taken a more restrictive approach in applying the *Eldridge* analysis, focusing on enabling legislation. With two opposing interpretations of the *Eldridge* analysis, there is a lingering uncertainty as to how other courts will interpret this issue.

a. Pridgen v University of Calgary

In *Pridgen,* two students brought a claim against the University of Calgary (University), claiming the University had infringed their right to freedom of expression. The University had disciplined the two students for comments they made about a professor on Facebook. The University took the position that these comments amounted to non-academic misconduct and punished the students with several months of academic probation among other imposed requirements.

On judicial review, Justice Strekaf of the Alberta Court of Queen's Bench found that the University's decision had been unreasonable and had infringed the students' section 2(b) *Charter* rights and could not be saved by section 1 of the *Charter.* Justice Strekaf found that under the *Post-Secondary Learning Act*[28] the University constituted a government agent in delivering post-secondary education as the PSLA stated the Alberta government's policy to provide post-secondary education to the public in Alberta. The University appealed this decision.

At the Alberta Court of Appeal, Justice Strekaf's decision was upheld. While the majority of two appeal justices (Justice J. D. Bruce MacDonald and Justice Brian O'Ferrall) did not consider the issue of *Charter* application to universities, Justice Paperny provided a detailed analysis of her reasoning on this issue. In her decision, Justice Paperny examined the development of the section 32 caselaw, tracking its development from *Dolphin Delivery* to *Greater Vancouver*. Justice Paperny noted that through the years, the caselaw had moved away from the restrictive application of section 32 to only government agencies—as seen in *Dolphin Delivery*—to the analysis set forward in *Eldridge* and followed in *Greater Vancouver*. However, Justice Paperny noted that when utilizing the *Eldridge* analysis,

[27] *Pridgen v University of Calgary*, 2012 ABCA 139 [*Pridgen*].
[28] *Post-Secondary Learning Act*, SA 2003, c P-19.5 [*PSLA*].

determining who a government actor is or what a government act is, was still difficult. To combat this uncertainty, Justice Paperny, through reference to various authorities, listed five categories of government or government activities in which the *Charter* could apply[29]. These categories include:

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.[30]

In her decision, Justice Paperny emphasized that it was possible for these five categories to overlap and that these categories were not exhaustive.[31] She further noted that with categories four and five, the *Charter* will apply "only to activities when the entity is implementing a particular government policy, power or program and not to internal matters of the body, such as employment issues."[32]

Ultimately, Justice Paperny found that the *Charter* did apply in this case and that it fell primarily under the fourth category of statutory authority. Through imposing disciplinary measures against students under the *PSLA*, the University was exercising delegated powers that were beyond the authority a private individual or organization could have.[33] Justice Paperny further found that the *Charter* infringement could not be justified under section 1 of the *Charter*.

b. R v Whatcott

Following the *Pridgen* decision and the categories set out by Justice Paperny, the Court in *R v Whatcott*[34] also found the *Charter* applied to the University of Calgary. Mr. Whatcott, who had been the subject of several university freedom of speech cases throughout Alberta and Saskatchewan, was charged with trespassing on University of

[29] *Pridgen,* at para 78.
[30] *Pridgen,* at para 78.
[31] *Pridgen,* at para 99.
[32] McKay-Panos, at 69.
[33] *Pridgen,* at para 105.
[34] *R v Whatcott*, 2012 ABQB 231 [*Whatcott*].

Calgary property. Mr. Whatcott (who was neither a student nor staff at the University) was on campus distributing homophobic pamphlets. The University received complaints regarding the material Mr. Whatcott was distributing and campus security was called to remove him. Campus Security arrested him for trespass.

At trial, the Court found that the *Charter* did apply to the University of Calgary as Mr. Whatcott's distribution of flyers could be classified as his freedom of expression. The University's utilization of trespass legislation restricted Mr. Whatcott's freedom of expression and could not be justified under section 1 of the *Charter*.

On appeal, the first issue examined was whether the *Charter* applied to the University. The Alberta Court of Queen's Bench found that the trial judge had correctly found that the *Charter* applied to the University in this instance. Citing *Eldridge*, the Court emphasized that when a public entity such as the University is alleged to have violated the *Charter:* "it must be established that the entity, in performing that particular action, is part of 'government' within the meaning of s.32."[35] In determining if the University fell within the meaning of government in section 32, the Court referred again to *Eldridge* and examined "whether the impugned activity [was] closer to the institution's functions—its core *raison d'être,* as was the case in *Eldridge*, or to its private 'mission-neutral' activities, as was the case in *McKinney*."[36] The Court agreed with the trial judge that the University's application of provincial trespass legislation to Mr. Whatcott was a government action. The trial judge's reasoning, which was adopted from the *Pridgen* case, found that the University was performing a government function, as the "University is the vehicle through which the government offers individuals the opportunity to participate in the post-secondary educational system."[37] Through adopting the reasoning in *Pridgen*, the trial judge found "a direct connection between the institution's governmental mandate and the impugned activity and found the *Charter* to apply."[38]

In addition to the University's governmental role and the impugned activity, the University's statutory mandate of providing a space for the exchange of ideas and knowledge and a place to engage in social issues played an important role in the trial

[35] *Whatcott,* at para 20 citing *Eldridge,* at para 36.
[36] *Whatcott,* at para 21.
[37] *Whatcott,* at para 29 citing *Pridgen,* at para 67.
[38] *Whatcott,* at para 30.

decision. The Court found that the University's statutory mandate of free academic expression and engagement spoke to the "governmental intentions for the University's existence."[39] With this purpose falling more in line with the public function of the University as opposed to the private functions of the University, the Court found the removal of Mr. Whatcott contravened the University's purpose and the *Charter*. Ultimately, the Court agreed with the trial judge's finding that the University fell within the ambit of section 32 of the *Charter* and was therefore subject to *Charter* scrutiny.

c. Lobo v Carleton University

In *Lobo v Carleton University*[40], a group of students argued that the Carleton University's (University) refusal to allocate space for their pro-life displays violated their freedom of expression. At the Ontario Superior Court, Justice Roccamo found that the *Charter* did not apply to the University.[41] The students had raised the *Pridgen* decision as it shared a similar fact pattern, however the Court found that in raising *Pridgen*, the students had "failed to recognize the Court [in *Pridgen*] made specific reference to the governing structure of the university […] which involved significant government involvement."[42] The Court distinguished this case from the outcome in *Pridgen* by pointing to the University's enabling legislation, that "created an autonomous entity whose structure and governance is in no way prescribed by the government."[43]

The students appealed this decision, arguing that the Court should have found the *Charter* applied to the University pursuant to the *Eldridge* analysis. The Court of Appeal found that the lower Court had been correct in its analysis, finding that the university's booking of space for non-academic purposes was not an implementation of government power, policy or objective and therefore did not garner *Charter* scrutiny.

d. AlGhaithy v University of Ottawa

In *AlGhaithy v University of Ottawa*,[44] a medical student brought an application for judicial review of a University of Ottawa's Senate Appeal Committee decision. The Committee had decided to dismiss the student from the medical residency program due to

[39] *Whatcott*, at para 34.
[40] *Lobo v Carleton University*, 2012 ONSC 254 [*Lobo*].
[41] *Lobo,* at para 18.
[42] *Lobo,* at para 14.
[43] *Lobo,* at para 14.
[44] *AlGhaithy v University of Ottawa*, 2012 ONSC 142 [*AlGhaithy*].

unprofessional and disruptive behaviour when he made complaints about the program and his professors. The Appeal Committee found that the student's actions were serious enough to warrant his dismissal from the program.[45]

On judicial review, one of the issues examined by the Court was whether the Appeal Committee's decision violated the student's freedom of expression under the *Charter*. In considering whether the University fell within the meaning of "government" under section 32, the student argued that "the University was implementing a statutory scheme because the residency program was accredited by the Royal College of Physicians and Surgeons of Canada" and was responsible for training medical residents "in accordance with the *Regulated Health Professions Act*, *1991,* S.O. 1991, c. 18, the *Medicine Act, 1991*, S.O. 1991, c. 30 and the regulations made thereunder."[46] However, the Court disagreed and found that the University was not acting pursuant to a statutory scheme in disciplining the student. The Court further emphasized that Courts had long respected the autonomy of Universities in dealing with academic matters.[47]

Despite the *Pridgen* decision being reserved at the time of this decision, the Court distinguished *Pridgen* on the basis that the Alberta *PSLA* referred to in *Pridgen* required "universities to carry out a specific government objective of facilitating access to post-secondary education," and there was no comparable legislation in Ontario.[48] Ultimately, the Court found that the University was not implementing a government policy or acting under delegated government authority, and therefore did not meet the meaning of "government" under section 32 and therefore was not subject to the *Charter*.

e. Telfer v The University of Western Ontario

In *Telfer v The University of Western Ontario*[49] the Court examined whether the *Charter* applied to a Western student disciplinary decision. The student in this case was accused of harassing another student. The Vice-Provost found that the student's behaviour violated the *Student Code of Conduct* and the University's *Non-Discrimination and Harassment Policy*. Sanctions were imposed on the student.

[45] *AlGhaithy,* at para 28.
[46] *AlGhaithy,* at para 75.
[47] *AlGhaithy,* at para 76.
[48] *AlGhaithy,* at para 78.
[49] *Telfer v The University of Western Ontario*, 2012 ONSC 1287 [*Telfer*].

The student applied for judicial review, where the Court ultimately dismissed the application. One issue raised during the review was whether the university's decision had infringed on the student's freedom of expression. In examining this question, the Court first determined if the University fell within the meaning of "government" under section 32 through applying the *Eldridge* analysis. During this time, the *Pridgen* decision was under reserve at the Court of Appeal, however, the Court distinguished the circumstances surrounding the *Pridgen* decision from the case before them, based on the different statutory schemes. The Court referred to section 18 of the *University of Western Ontario's Act,*[50] which gave the University the "right to control and direct its affairs through the Board of Governors and the Senate" leading the Court to find that the university had not been acting as an agent of the government.[51] The Court found that the University had not been implementing government policy or acting under delegated power or as an agent of the government, and therefore was not "government" within the meaning of section 32 and was not subject to *Charter* scrutiny. The appeal was dismissed.

f. British Columbia Civil Liberties Association v University of Victoria

In *British Columbia Civil Liberties Association v University of Victoria*[52] a student group's application for outdoor space on campus to host an anti-abortion demonstration was denied by the Students' Society. The Youth Protecting Youth (YPY) student group had initially had their booking request granted, however, the Students' Society later denied the YPY's request, as the Society found that the group had engaged in harassment of students which violated the University's booking policy. Under the University's *Booking of Outdoor Space by Students Policy* (*Booking Policy*), student groups that had been sanctioned by the University could have their space bookings cancelled. The group was advised not to proceed with their demonstration; however the group ignored the warning and held their demonstration. As a result, the University suspended the group's outdoor space booking privileges for one year and cautioned that if the group disregarded the warning, the University could impose non-academic discipline.

[50] *The University of Western Ontario Act*, 1982, Bill Pr14, 1982, as amended 1988 [*University of Western Ontario Act*].
[51] *Telfer,* at para 59.
[52] *British Columbia Civil Liberties Association v University of Victoria*, 2016 BCCA 162 [*BCCLA*].

The president of the YPY and the BC Civil Liberties Association (BCCLA) brought an application to have the *Booking Policy* deemed unconstitutional for violating sections 2(b)(c) and (d) of the *Charter*. At trial, the BCCLA and YPY raised the *Pridgen* decision, however, the Court distinguished *Pridgen* on several grounds. First, the Court noted that unlike the students in *Pridgen*, the YPY president had not been subject to any disciplinary actions by the University. Second, the legislation governing the University of Calgary in *Pridgen*, and the legislation governing the University of Victoria were very different. Finally, the Court concluded that the *Pridgen* decision was distinguishable from this case as the University of Victoria was not controlled by the government, nor was it fulfilling a government policy through the booking of space for student clubs. The Court found that the booking of space for non-academic purposes fell within the "management of its privately owned land, and not to the exercise of governmental policy or the implementation of a specific government program relating to the use of University land."[53] Ultimately, the Court found that the *Charter* did not apply to the University's booking of space for student club activities.

The YPY and BCCLA appealed the decision. On appeal, the YPY and BCCLA argued that the university's regulation of property under the *University Act*[54] was government activity and therefore subject to the *Charter*.[55] They also argued that the facts of this case were more analogous to Alberta and Saskatchewan cases, where the Courts had determined that the *Charter* applied to universities and university actions.[56]

The Court of Appeal found that the University's booking policy did not violate the YPY's *Charter* rights. The Court went through a discussion of *Charter* application to universities, looking to caselaw such as *Dolphin Delivery*, *Eldridge* and *McKinney*. The Court further emphasized the distinction between this case and the *Pridgen* decision, noting that the *Pridgen* decision was decided on administrative grounds and therefore Justice Paperny's discussion of the *Charter* was *obiter dicta*.[57] The Court also noted that the statutory framework discussed in *Pridgen* was distinct from the statutory framework

[53] *BCCLA,* at para 147.
[54] *University Act*, RSBC 1996, c 468
[55] *BCCLA,* at para 6.
[56] See *R v Whatcott*, 2002 SKQB 399 (Sask QB); *R v Whatcott*, 2011 ABPC 336 (Alta PC); and *R v Whatcott*, 2014 SKPC 215 (Sask Q.B.).
[57] *BCCLA,* at para 37.

governing the University of Victoria, making the *Pridgen* decision distinguishable.[58] Ultimately, the Court found that the lower Court had been correct in finding that neither the University nor the University's act of regulating the booking of space were subject to *Charter* scrutiny and dismissed the appeal.[59]

g. Yashcheshen v University of Saskatchewan

In *Yashcheshen v University of Saskatchewan*,[60] [61] the issue of *Charter* application occurred when Yashcheshen sought admission to the College of Law at the University of Saskatchewan without submitting a Law School Admission Test (LSAT) score, because she had a disability (Crohn's Disease) that she believed would prevent her from having a fair opportunity to write the LSAT.[62] When Yashcheshen submitted her application without an LSAT score in February 2014, it was not accepted. The College suggested that, because it required everyone to submit an LSAT score and it did not administer the test, Yashcheshen should apply to the Law School Admission Council for an accommodation with respect to the LSAT.[63]

Next, in April 2015, Yashcheshen filed a complaint of discrimination with the Saskatchewan Human Rights Commission, but the Commission determined that she had not provided sufficient information to support a claim for discrimination based on disability, and advised her that she had not pursued accommodations with respect to writing the LSAT.[64]. Yashcheshen did not provide the additional information requested by the Commission, nor did she seek judicial review of the Commission's decision.[65]

The Law School Admission Council, in July 2016, informed Yashcheshen that it was prepared to grant some accommodations she requested, but declined to offer her "stop the

[58] *BCCLA,* at para 37.
[59] *BCCLA,* at para 41.
[60] *Yashcheshen v University of Saskatchewan*, 2019 SKCA 67 (Can LII) leave to appeal to SCC refused, [2020] SCCA No 320 [*Yascheschen*].
[61] This section is based on Linda McKay-Panos, "Context is Everything When it Comes to Charter Application to Universities" (September 3, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/09/Blog_LMP_Yashcheshen.pdf
[62] *Yashcheshen*, at para 1.
[63] *Yashcheshen*, at para 7.
[64] *Yashcheshen*, at para 9.
[65] *Yashcheshen*, at para 10.

clock testing" for trips to the bathroom, or grant permission to use marijuana during testing and breaks.[66]

In August 2017, Yashcheshen applied to the Saskatchewan Court of Queen's Bench (SKQB), requesting an order exempting her from submitting an LSAT score and striking the College's admissions policy's requirement of an LSAT score. She based her application on an argument that her rights under *Charter* s 15(1) were violated when she was denied equal protection and equal benefit of the law without discrimination on the basis of physical disability.[67] The SKQB dismissed her application,[68] finding that the *Charter* did not apply to the College's admission policy because the "University was not governmental in nature and because the admission policy did not further a government policy or program".[69] Yashcheshen's claim that the Dean of the College had been biased was also dismissed.[70]

On appeal to the Saskatchewan Court of Appeal (SKCA), Chief Justice Richards and Justices Caldwell and Leurer dismissed Yashcheshen's appeal. With respect to the issue of whether Yashcheshen's *Charter* rights were violated, the SKCA considered that it must answer the threshold question of whether the *Charter* applied to the LSAT aspect of the College's admission policy.[71]

The SKCA applied ***Greater Vancouver,*** quoting from para 16 of that case:

> Thus, there are two ways to determine whether the ***Charter*** applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be 'government', either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the ***Charter***. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the ***Charter***.[72]

First, the SKCA determined that the university is not government by virtue of its nature. This has also been found in numerous cases involving universities, and the SKCA

[66] *Yashcheshen*, at para 11.
[67] *Yashcheshen*, at para 12.
[68] See ***Yashcheshen v University of Saskatchewan***, 2018 SKQB 57.
[69] *Yashcheshen*, at para 13.
[70] *Yashcheshen*, at para 14.
[71] *Yashcheshen*, at para 17.
[72] *Yashcheshen*, at para 20.

relied in particular on *McKinney*. Next, the SKCA determined that the University of Saskatchewan was not "government" in the sense that the government exercises substantial control over it. Indeed, the SKCA pointed to the *University of Saskatchewan Act*, 1995,[73] where s 3 provides that the University is an "autonomous corporation", and s 6(1) gives the university the exclusive power to "formulate and implement its academic and research policies and standards" and "formulate and implement its standards for admission and graduation." Thus, there was nothing from which the SKCA could conclude that the government exercises substantial control over either the University or the College.[74]

Third, the SKCA looked at whether the College's policy requiring applicants to submit an LSAT score could be said to be an activity that is "governmental in nature" such as the application of a specific government program—as was the case in *Eldridge,* with respect to hospitals' application of health care policy. Yashcheshen had not argued that the College's LSAT (and admission) policy are connected in any way with the "implementation of a specific government policy or program". Thus, the SKCA held that the *Charter* did not apply to this aspect of the College's admission policy, and that her *Charter* argument must fail.[75]

The SKCA distinguished *Pridgen* (student discipline), *R v Whatcott*, 2014 SKPC 215 (prohibition of demonstration) and *R v Whatcott*, 2002 SKQB 399 (prohibition of pamphleting), where the *Charter* was applied to actions of universities because those actions involved the exercise of statutorily-based powers of compulsion. The SKCA indicated that the facts were not parallel to those in the case at hand and these cases were therefore unnecessary to consider when resolving the appeal.[76]

In *Yashcheshen,* no evidence was introduced to suggest that the College's admission standards either derived from or furthered a government policy. The SKQB[77] and SKCA[78] characterized the admissions policy as being closely related to matters of academic

[73] *University of Saskatchewan Act,* 1995, SS 1995 c U-6.1.
[74] *Yashcheshen*, at para 22.
[75] *Yashcheshen*, at para 24.
[76] *Yashcheshen*, at para 24.
[77] *Yashcheshen* SKQB, at paras 25 to 27.
[78] *Yashcheshen* SKCA, at para 25.

judgment, which are not subject to *Charter* scrutiny. However, Cory Giordano of Supreme Avocacy queries whether it could be argued that law school admission policies may be construed as elements of the regulation of the legal profession, thereby assisting in the pursuit of a legislated government policy, and subject to *Charter* scrutiny.[79] We shall have to wait for future cases to see this argument fully assessed.

h. UAlberta Pro-Life v Governors of the University of Alberta

The Alberta Court of Appeal (ABCA), in *UAlberta Pro-Life v Governors of the University of Alberta,*[80] [81] was again faced with similar issues as in previous cases involving freedom of expression on campus. Justices Jack Watson, Peter Martin and Michelle Crighton were asked to address appeals from two rulings made by Justice B.L. Bokenfohr in *UAlberta Pro-Life v Governors of the University of Alberta*.[82]

On March 3 and 4, 2015, the student group UAlberta Pro-Life held an anti-abortion event with large photo displays in what is called the Quad area of University of Alberta.[83] There was a counter demonstration on both days consisting of "many University students, faculty, staff, and the general public" who were "standing side by side holding signs and banners blocking the displays."[84] Chanting and cheers of protest were also heard.[85]

The first case involved a complaint by Pro-Life that the University of Alberta did not take any disciplinary action against the counter protesters under the *University Code of Student Behaviour.* The Alberta Court of Queen's Bench (ABQB) denied judicial review of the University's decision not to discipline the counter demonstrating group.[86]

The second case addressed a situation when Pro-Life applied to hold a similar event in the Quad in early 2016. This time, the University required that Pro-Life deposit $9,000 in advance to defray the costs of security, with a balance of $8,500 to be paid afterward.

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[79] "Who/What does the Charter apply to? Law Schools, for example?" August 19, 2019 online: https://canliiconnects.org/en/summaries/67294.
[80] 2020 ABCA 1 (CanLII) [*ProLife*].
[81] This section is based on Linda McKay-Panos, "Alberta Court of Appeal Concludes that University of Alberta is Subject to the *Charter*" (February 25, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/07/Blog_LMP_ProLife.pdf.
[82] *ProLife*.
[83] *ProLife,* at para 3.
[84] *ProLife,* at para 4.
[85] *ProLife,* at para 4.
[86] *ProLife,* at para 4.

Because this cost was prohibitive, the Pro-Life group argued that this denied "their exercise of freedom of expression."[87] As with the first case, the ABQB denied judicial review of the University's decision to charge in advance for the costs of security.[88]

There were a number of preliminary issues and other issues before the ABCA. This part focuses on the discussion of whether the *Canadian Charter of Rights and Freedoms* applies to protect the rights of university students.[89] Issues of freedom of expression are discussed elsewhere.

The ABCA (per Justice Watson), noted that the lower court had not found it necessary to address the question of whether the *Charter* applies to university students in the context of speech.[90] However, Justice Watson felt that he must answer this question.[91]

Noting that the University of Alberta was established by legislation in 1906,[92] Justice Watson stated that "the University and its purposes were a subject of great significance to *the Crown* when it enacted the University into existence under s 93 of the *Constitution Act, 1867.*"[93] Justice Watson stated:

> In other words, from its very inception, the University was committed by government policy with deep Constitutional roots to a broad scope of education with surveillance by the Crown (at an increasingly greater distance over the decades). In the modern era, by its own current website, the University is dedicated to higher education and to human innovation, which of course involves the broadest possible dissemination / expression of what the University discerns.[94]

Justice Watson also noted that the context (the Quad), a place where "students, faculty, staff and visitors [meet and] move about"[95] was "a classic forum for expression or for listening arguably comparable to the groves of the academe at the time of Plato."[96] Thus,

[87] *ProLife,* at para 5.
[88] *ProLife,* at para 5.
[89] *ProLife,* at paras 102 to 149.
[90] *ProLife,* at para 103.
[91] *ProLife,* at para 104.
[92] *ProLife,* at para 105.
[93] *ProLife,* at para 106.
[94] *ProLife,* at para 109.
[95] *ProLife,* at para 111.
[96] *ProLife,* at para 111.

if the University is subject to the *Charter,* it could not be open to the university to argue that the *Charter* does not protect expression in the location of the Quad.[97]

Justice Watson emphasized, however, that it was still open to the University to argue that it was not *legally* obligated to protect *Charter* freedoms of students in all contexts. Thus, it would be possible that the University was merely morally obligated to reflect *Charter* values in its relations with students.[98]

Justice Watson canvassed some early decisions that established "it has been accepted that a *Charter* right or freedom may be involved in a factual situation without the party seeking to limit it being either an aspect of government or carrying out government action under s 32 of the *Charter.*"[99] However, it is not sufficient to demonstrate that an entity is acting under statutory authority.[100] Pro-Life also had to show that the University was engaged in a form of governmental action when it set the security cost conditions in 2016.[101]

For the present case, Justice Watson held that "it is sufficient to consider whether the specific activity of the University in relation to the specific *Charter* freedom of expression *exercised by students on University campus property* is 'governmental in nature' [not the University as a whole]."[102]

Pro-Life argued that the University is bound by *Charter* s 32 to allow students to engage in freedom of expression on the Quad.[103] Pro-Life relied on the cases of *Pridgen*; *R v Whatcott*, 2012 ABQB 231; and *Wilson v University of Calgary*, 2014 ABQB 190. The difficulty with *Pridgen* is that two of the three Appeal Justices relied on administrative law principles to deal with the issues. Only Justice Paperny thought it was necessary to delve into the issue of the application of the *Charter* to (in this case) disciplinary procedures against students by universities. Nevertheless, Justice Papery thoroughly canvassed the judicial history of determining whether a body is a government or government actor.

[97] Citing *Montreal (Ville) v 2952-1366 Québec inc.*, 2005 SCC 62 at paras 64, 73-77.
[98] *ProLife,* at paras 119-120, 124.
[99] *ProLife,* at para 124.
[100] *Harrison v University of British Columbia*, [1990] 3 SCR 451.
[101] *ProLife,* at para 127.
[102] *ProLife,* at para 128.
[103] *ProLife,* at para 129.

Justice Watson quoted Justice Paperny's categories of government to which the *Charter* applies:[104]

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[105]

Justice Paperny held that the University of Calgary in *Pridgen* was exercising statutory authority and thus subject to the *Charter*.

The University of Alberta argued that the Ontario case of *Lobo* should be followed. This case held: "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*".[106] The intervenor, British Columbia Civil Liberties Association (BCCLA), argued that *Lobo* should be distinguished because it turned on the legislative history of Carleton University, and because it was merely a motion to strike out a lawsuit.[107]

The ABCA summarized the University's arguments, some of which were based on conflicting caselaw from Ontario and British Columbia, as follows:

> [104] Nothing in the University's governing legislation requires it to provide a forum for extracurricular expression by students. There is no specific government direction that such a policy be carried out by post-secondaries institutions in Alberta. While the University may choose to provide supports for extra-curricular activities by its students, it does not attract Charter scrutiny merely in doing so. This does not mean, however, that students are without protection for fundamental human rights. The University is subject to the *Alberta Human Rights Act* like any other private or statutory body in Alberta.
> . . .
> [106] This case does not relate to the imposition of discipline against a student. It does not relate to the potential or actual exclusion of a student from an academic course or program, nor to a decision relating to research, teaching, or academics. As in *BCLA* and *Lobo*, the powers being exercised here go no further than those powers held by any owner of land:
>
> > the ability to make rules about who can use the land and to place conditions on that use, including the requirement that the actual costs associated with

[104] *ProLife,* at para 131.
[105] *Pridgen,* at para 78.
[106] *Lobo*, at para 4.
[107] *ProLife,* at para 141.

> ensuring safety and security are passed on to that user. Under a proper *Eldridge* analysis, the *Charter* should not apply to this Security Cost decision.[108]

In the end, Justice Watson set out five reasons why the *Charter* should apply in the context of this case:

> (1) The education of students largely by means of free expression is the core purpose of the University dating from its beginnings and into the future. It is a responsibility given to the university by government for over a century under both statute and the *Constitution Act, 1867*. It is largely funded by government and by private sector donors who likewise support and adhere to the core purpose of the University. Education of students is a goal for society as a whole and the University is a means to that end, not a goal in itself.
>
> (2) The education of students is the acknowledged core purpose of the University even by the University's own view of its mandate and responsibility. The University recognizes that society of Alberta, Canada and the World benefits from higher education and its production of wisdom, innovation and associational harmony and peace. In a sense, education of a younger generation is the primary duty of the generations that came before. Again, the University is a method for the older generations to pass both knowledge and values down to the younger generations.
>
> (3) The ability of students to learn and to debate and to share ideas is not only a central feature of the core purpose of the University, but also the grounds of the University are physically designed to ensure that the capacity of each student to learn, debate and share ideas is in a community space. This involves infrastructure and land holdings granted to the University and / or sustained by money from many sources. These resources of infrastructure and land holdings are, above all, designed to permit interaction, assemblies, for a, and the ancient characteristics of educational exchange.
>
> (4) Recognizing the *Charter* as applicable to the exercise of freedom of expression by students on the campuses of the University is a visible reinforcement of the great honour system which is the Rule of Law. The core values of human rights and freedoms, democracy, federalism, Constitutionalism, equality and respect for minority interests are continually reinforced and invigorated where it is apparent that there are no places where the government is present by proxy and yet the *Charter* writ does not run.
>
> (5) The recognition of the University's being subject to s 32 of the *Charter* in relation to freedom of expression by students on University grounds does not threaten the ability of the University to maintain its independence or to uphold its academic

[108] *ProLife,* at para 146, quoting paras 104 and 106 from the respondent's factum.

> standards or to manage its facilities and resources, notably in light of the degree of deference available to the University under the *Dore / Loyola / TWU1 / TWU2* analysis as discussed below.[109]

Justices Crighton and Martin agreed that it was appropriate to decide whether the *Charter* applied to the University in the context of this case; they also agreed with Justice Watson's conclusion and analysis on this issue.[110] Therefore, it was open to Pro-Life to argue that its freedom of expression was protected on campus and that the University of Alberta had violated this freedom in placing restrictions on the Pro-Life Events.

ii. Commentary on University Cases

The *Eldridge* analysis provides courts with a framework to determine if a private entity meets the meaning of "government" under section 32. Through examining the entity, or a specific action taken by the entity, courts can determine whether the *Charter* should apply. However, despite the *Eldridge* analysis being utilized by courts across Canada, there are still instances of uncertainty as to how a court will decide on the question of whether the *Charter* applies to universities.

There are conflicting judgments from provincial courts of appeal on the issue of whether the *Charter* applies to universities in the context of on-campus events, even in situations with very similar facts. The distinction between these decisions appears to be very fine. While there is still some confusion on the matter, it appears that caselaw has indicated that the *Charter* applies to universities in the cases of:

- Student discipline;
- Policies prohibiting demonstrations (except in *BC Civil Liberties Association v University of Victoria*, discussed above);
- Policies prohibiting littering; and
- Policies prohibiting pamphleting.

In these situations, the university is seen to be implementing a specific statutory scheme or government program.

Courts in Alberta and Saskatchewan have predominately found the *Charter* to apply to universities in non-internal matters (e.g., matters not related to internal administration such as retirement policies). In reaching this determination, Courts often utilize the factors

[109] *ProLife,* at para 148.
[110] *ProLife,* at para 222.

laid out by Justice Paperny in *Pridgen.*[111] This substantive "holistic approach" is advocated for by Michael Marin, where he takes the position that the narrow focus on an "institution's enabling statute, […] reveals little about the true nexus between universities and government."[112] This narrow approach, with an emphasis on the enabling legislation, has primarily been the approach taken by the courts in British Columbia and Ontario. As a result of this restrictive approach, Courts in BC and Ontario have found the *Charter* not to apply to universities.

As seen in the Ontario cases of *Lobo*, *Telfer* and *AlGaithy*, the Courts all noted the different enabling legislation, in many cases distinguishing themselves from the *Pridgen* decision in Alberta on that basis. However, the legislation governing Ontario universities may not be the most solid factor on which to base the analysis. As Marin notes, the universities in Ontario were "separately incorporated under private statutes, the most recent versions of which are between 25 and 50 years old. As a result, they are not modern enabling statutes like the Alberta *PSLA."*[113] Additionally, many of these statutes were adopted when universities played a different role in Canadian society, where, unlike today "attendance was considered unnecessary beyond an elite class of individuals."[114] In today's society, where a university education has become an expectation, placing emphasis on statutes that were adopted at a different time when university was a luxury as opposed to a necessity, does not accurately reflect the role universities play in today's society, nor the role governments have in ensuring this education is provided.

Like Ontario, British Columbia Courts have also placed an emphasis on the statute governing their universities. In British Columbia, there is only one governing statute, the *University Act.* However unlike Alberta's *PSLA,* which states the Alberta Government's acknowledgement of the importance of post-secondary education and its commitment to ensuring Albertans have the opportunity to pursue it, the *University Act* "is ambiguous about the governmental mandate of the Province's universities, and focuses instead on the details of their internal management and governance."[115] By focusing on the enabling

[111] *Pridgen,* at para 78.
[112] Michael Marin, "Should the Charter Apply to Universities?" (2015) 35:1 Nat'l J. Const. L. 29 at 31 [Marin].
[113] Marin, at 41-42.
[114] Marin, at 42.
[115] Marin, at 44-45.

legislation, as was done in the *BCCLA* decision, the Courts severely limit the scope of analysis, potentially missing other factors that could illuminate a government connection between universities and the government.

The approach taken in Alberta and Saskatchewan most often follow the steps laid out in *Pridgen.* While the enabling legislation is one such factor examined by courts in determining a tie to government, the courts will also examine factors such as: legislative enactments, whether the university is a government actor by nature or by virtue of legislative control, whether the university is exercising statutory authority and whether the university is implementing government objectives.[116] By analysing a wide range of factors, Alberta and Saskatchewan courts gain a more well-rounded insight into the connections universities may have with government that bring them under the *Charter*.

This dichotomy leaves an uncertain legal landscape for the rest of Canada. How will provinces who have yet to face a university *Charter* case decide? Will they follow the Alberta and Saskatchewan approach or that of BC and Ontario? Until a further decision from the SCC is released, the Courts will be faced with two opposing approaches to the *Eldridge* analysis. It is therefore hoped that the Supreme Court of Canada can provide some principles that are universally applicable to universities and similar bodies in terms of whether they are or are not subject to the *Charter*.

iii. Airports

Like universities, airports are unique spaces that blend elements of government policy, powers and oversight with private ownership. With the federal government holding jurisdiction over aeronautics, it could be presumed that the *Charter* would undoubtedly apply to airports. However, as more and more airports transfer from government to private management/ownership, the application of the *Charter* to these entities becomes more unclear. With the lines between what is managed by the government and what is managed by an airport authority, utilizing the *Eldridge* analysis allows courts to examine both the airports and their specific actions to determine whether the *Charter* applies.

[116] *Pridgen,* at para 78.

a. Committee for the Commonwealth of Canada v Canada

Committee for the Commonwealth of Canada v Canada[117] involved individuals distributing political pamphlets at the Dorval Airport. In 1984, officials at Dorval airport in Montreal prevented three members of the Committee for the Commonwealth of Canada from communicating their political views to passers-by in the public areas of the airport.[118] The Committee members were told that their activities (of distributing leaflets and approaching passers-by) violated a federal airport regulation,[119] which provided that:[120]

> no person shall
> (a) conduct any business or undertaking, commercial or otherwise, at an airport;
> (b) advertise or solicit at an airport on his own behalf or on behalf of any person; or
> (c) fix, install or place anything at an airport for the purpose of any business or undertaking.

While most of this decision dealt with the issue of whether freedom of expression was guaranteed at a government-owned airport, there was a preliminary discussion about *Charter* s 32:[121]

> At the outset, I should point out that it seems to me obvious that s. 32 of the *Charter* applies to Regulation 7 inasmuch as it emanates from government and that such regulation does qualify as law for the purpose of s. 52 of the *Constitution Act, 1982*. Moreover, I do not believe that there is any dispute that airport administrators constitute government officials. These officials also admitted that they had an enduring and intransigent policy prohibiting all forms of solicitation and advertising except perhaps for the sale of poppies by veterans in November. Furthermore, government personnel did forbid the respondents from exercising their activities on government premises, constituting government action. Therefore the refusal of the airport authorities in this case to allow the respondents to distribute publications to members of the public, and to discuss with them their political beliefs, must be assessed in the light of the *Charter*.

This is an example of an airport that is managed/owned by the government, wherein the *Charter* applied. However, the next case illustrates the impact of private ownership.

[117] [1991] 1 SCR 139 [*CCC*].
[118] *CCC,* at para 52.
[119] *Government Airport Concession Operations Regulations,* SOR/79-373.
[120] *CCC,* at para 59.
[121] *CCC,* at para 102.

b. Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform

In *Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform,*[122] the Calgary Airport Authority (CAA) sought to file an interlocutory injunction against the Canadian Centre for Bio-Ethical Reform (CCBR) to stop their protests at the Calgary Airport. The CCBR is a non-profit organization that held anti-abortion protests at the Calgary Airport in 2011 and 2013. These demonstrations involved the group using graphic images and anti-abortion pamphlets in the arrivals area of the airport. Passengers, visitors and employees at the airport filed complaints with the CAA about these demonstrations, as many found the material displayed in the demonstrations graphic and inappropriate for the airport.

During their second demonstration at the airport, the CAA served the CCBR with trespass notices. The CCBR returned to the airport for a third time to demonstrate, despite the CAA's warning that further demonstrations would violate the *Trespass to Premises Act.*[123] Despite the warning, the CCBR held a demonstration and were issued written notices pursuant to the *Trespass to Premises Act*.[124] The Calgary Police then issued summons for contravening the TPA. The CCBR protesters were acquitted at trial: *R v Booyink*, where Judge Fradsham relied on an exception in the TPA to conclude that the protesters, who were acting on legal advice, "acted under a fair and reasonable supposition that [they] had a right to do the act complained of".[125] Alternatively, drawing on case law regarding freedom of expression in other Canadian airports, Judge Fradsham concluded that CCBR's actions were protected by s 2(b) of the *Charter*, and that the infringement was not justified by s 1.[126]

Following the third round of demonstrations, the CAA filed for an interlocutory and permanent injunction against the CCBR to prevent them from demonstrating at the airport. In 2014, the Court granted the interlocutory injunction, pending the trial of this matter.[127]

In 2019, the Alberta Court of Queen's Bench decided whether the *Charter* applied to the CAA's refusal to allow the CCBR to demonstrate at the airport.[128] Central to this

[122] *CAA v CCBR*, 2014 ABQB 493 [*CAA* ABQB 2014].
[123] *Trespass to Premises Act*, RSA 2000, c T-7 [*TPA*].
[124] *CAA* ABQB 2014, at para 29.
[125] *TPA*, s 8.
[126] *R v Booyink*, 2013 ABPC 185 at paras 117, 144.
[127] *CAA* ABQB 2014, at paras 100-101.
[128] *CAA v CCBR*, 2019 ABQB 29 at para 37 [*CAA* ABQB 2019].

question was an analysis to determine whether the airport fell within the meaning of "government" under section 32.

The CCBR argued that since the "federal government has jurisdiction over aeronautics, airports, air traffic and the licensing of planes and airports in Canada,"[129] the Calgary airport fell under the ambit and control of the government, and therefore under section 32 of the *Charter*. Prior to 1992, many Canadian airports were owned and operated by the government. However, in 1992, the federal government began to transfer the operation of some airports to airport authorities—including the Calgary Airport.[130] In 1992, the CAA and the federal government entered into a transfer agreement whereby the federal government would no longer be responsible for managing, operating and maintaining the airport, but would "continue to regulate certain matters described as 'governmental functions.'"[131] The governmental functions included:

> (a) functions relating to air navigation and air traffic control;
> (b) certain protective policing functions, particularly as they relate to the prevention of terrorism and civil aviation security; and
> (c) functions carried on by the CIS Departments within their respective statutory mandates in order to ensure that travellers and goods enter Canada at the Airport in compliance with statutory requirements. [132]

Despite the "privatization" of the airport, the government still retained the power to legislate in the area of airports and aeronautics and had the power to require the airport authority to allow government agencies to access the airport.[133]

In determining whether the airport fell within the meaning of "government" under the test, the Court utilized the *Eldridge* analysis. The Court also referred to the *Pridgen* decision and the five broad categories Justice Paperny described as being helpful in determining whether a non-government body fell within section 32. Ultimately, the Court found that the CAA was neither a government entity nor controlled by the government. The Court further found that the CAA, in issuing the trespass notices to the demonstrators, was

[129] *CAA* ABQB 2019, at para 22.
[130] *CAA* ABQB 2019, at para 22.
[131] *CAA* ABQB 2019, at para 26.
[132] *CAA* ABQB 2019, at para 26.
[133] *CAA* ABQB 2019, at paras 31-32.

"acting as a private entity exercising control over its leasehold interest. The fact that the airport is open to the public is not enough to trigger the scrutiny of the *Charter* any more than would be the case for privately run malls that are open to the public."[134] Therefore, the Court found that the *Charter* did not apply to the CAA and the CAA was within its rights to issue trespass notices to the CCBR demonstrators. The Court ordered a permanent injunction against the CCBR from demonstrating at the airport, finding the requirements for trespass and a permanent injunction had been met.

iv. Commentary on Airport Cases

In the case of airports, the *Eldridge* analysis can provide insight into the government ties that may bring an airport within section 32. As more airports privatize, moving away from total government control to a combination of government and private authority, the line between government and private entity becomes blurred. As each airport will be different in terms of privatization and lease agreements with the federal government, examining these agreements and any enabling legislation will be imperative to determining if the airport authority is purely private or government and if any or all of its actions are private. This close examination can be seen in the 2019 *CAA* decision, where the *Eldridge* analysis ultimately resulted in the Court's finding that the airport authority was a private entity and the particular action was private and not subject to the *Charter.*

The Court in *CAA* examined the enabling legislation for the airport and airport authority, looking the C*onstitution,* the *Regional Airports Authorities Act*[135] and the 1992 Transfer Agreement.[136] During the Court's *Eldridge* analysis, the Court took note of the *Pridgen* decision, referring to Justice Paperny's five categories of entities to which the *Charter* could apply. Through examining these categories, the enabling legislation and a close examination of the CAA and the CAA's act of issuing a trespass notice to the CCBR, the Court reached the conclusion that the *Charter* was not applicable to the CAA nor to its specific action.

[134] *CAA* ABQB 2019, at para 70.
[135] *Regional Airports Authorities Act*, RSA 2000, c R-9.
[136] *CAA* ABQB 2019, at para 26.

v. Malls

Unlike universities and airports, malls are privately owned and operated entities. With no government authority over the operation of malls, it would appear to be unlikely that the *Charter* could apply to them. However, there are certain situations in which aspects of mall operations have been subject to a *Charter* analysis, specifically regarding private security forces.

a. Private security officers

Private security officers occupy a unique space, where they are neither official peace or police officers, but still can make arrests and detentions. As George S. Rigakos and David R. Greener explain, security officers can make a "lawful arrest as a citizen or agent of a property owner under various provisions of the *Criminal Code*."[137] While the common law and certain laws allow for citizens (or private security officers) to make arrests, there is still the possibility of *Charter* application when an arrest is wrongfully made. In the Alberta case, *R v Lerke,*[138] the Court of Appeal found that "the power of arrest, whether exercised by a private citizen or a state actor such as a peace officer, is an exercise of a governmental function."[139] Furthermore, the Court in *R v Wilson* stated:

> [t]here is good reason for the [*Charter*] to apply to the actions of a private individual who is acting under the authority of a statute of the Parliament of Canada. If the *Charter* did not apply in that circumstance, the application of the *Charter* could be circumvented by a government that chose to authorize private individuals to do what the *Charter* prohibited it from doing.[140]

While these cases do not utilize the *Eldridge* analysis in determining *Charter* application to private entities, it is worth noting that even purely private entities such as private mall security forces may still be found to be subject to the *Charter.*

b. R v Chang

In *R v Chang*[141], a mall security guard saw two individuals behaving suspiciously inside a car in the mall's parking lot. She approached the car. and when she saw one of the individuals hide something, she asked to see it. The individual showed her a bottle of pills.

[137]George S. Rigakos & David R. Greener, "Bubbles Of Governance: Private Policing And The Law In Canada" (2000) 15:1 Can. J.L. & Soc'y 145 at page 152 (WL Can) [Rigakos & Greener].
[138]*R v Lerke*, 1986 ABCA 15, 24 CCC (3d) 129 [*Lerke*].
[139] Rigakos & Greener, at 166.
[140] *R v Wilson* (1994), 29 CR (4th) 302 at 309 [*Wilso*n].
[141] *R v Chang*, 2003 ABCA 293 [*Chang*].

The guard called police because the contents of the bottle did not match the medication name on the outside of the bottle. The police arrived and seized the pills, later charging the individual with possession of ecstasy for the purpose of trafficking.

At trial, the Court found that while the security guard was not acting under the direction of police, the security guard had been acting as an agent of the state when she requested to see the item the individual was hiding. The Court found that the *Charter* applied and that since the security guard not given the respondent any "warning of her suspicion, to tell him why she was requesting what he was concealing, or to advise him of his entitlement to counsel" the impugned evidence was excluded, and the charge dropped.[142]

The Crown appealed this decision. On appeal, the Court examined whether the trial judge erred in determining the private security guard had performed her duties as an agent of the state and if trial judge had erred in applying the *Charter* to an interaction between two private citizens.[143] In determining whether the security guard had acted as an agent of the state, the Court referred to *R v Lerke*, where the Court had found that the *Charter* may apply to any action of a private citizen that constitutes an arrest.[144] Apart from arrest, the *Charter* will not apply to private citizens or their actions unless they are categorized as government.[145]

The Court found that although the security guard was familiar with police procedures and with policing activities at the mall, there was no evidence that she was acting under their direction.[146] Rather, the Court found that the security guard's inquiry into the hidden object was closely tied to her responsibility for protecting mall property and personal well-being, and not to an intention to initiate criminal charges. The Court therefore found that the *Charter* did not apply in this situation and emphasized that even if the security guard could have been characterized as an agent of the state, the *Charter* would not apply in this situation as there had been no arrest or detention conducted by the security guard. Ultimately the Court allowed the appeal and ordered a new trial.

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[142] *Chang.*
[143] *Chang,* at para 6.
[144] *Lerke,* at para 10.
[145] *Chang,* at para 11 citing *R v Buhay*, 2003 SCC 30 at para. 25, (2003) 174 CCC (3d) 97.
[146] *Chang,* at para 13.

vi. Commentary on Mall Cases

For many private entities, Courts will employ the *Eldridge* analysis when determining if the *Charter* should apply. However, unlike the other entities explored in this paper, courts may utilize different methods of analysis for private malls and their security forces, examining different factors that may nevertheless bring them within the scope of the *Charter.*

While the mall cases do not follow the *Eldridge* analysis, the reasoning behind the analysis is similar. Ensuring that security officers are subject to the *Charter* when their actions fall under the power of detention or arrest, or they act under statutory authority, echoes the concern raised in *Eldridge* that if the *Charter* was not applied to private entities exercising government objectives or policies, the government could escape *Charter* liability through employing more and more private entities. Thus, Courts will examine whether a private security or citizen officer has filled the role of a police or peace officer through their actions, primarily looking to whether the officer effectively made an arrest or detention. By looking at this factor, the Courts are effectively looking for whether a private individual or entity has stepped into the shoes of the government or have been empowered by the government to fulfill a government objective.

V. Recommendations/Conclusion

The *Charter* is an important legal instrument in Canadian society as it ensures that Canadian's fundamental rights and freedoms are protected from undue government interference. But when interference with these rights comes from the actions of private entities, many Canadians are unsure of whether they can make a *Charter* claim against these bodies. In *Eldridge*, the Supreme Court of Canada recognized that private entities can be scrutinized under the *Charter*, if they or one of their actions is found to have enough ties to the government. Entities such as universities, airports, and malls (private security guards) have been examined under this analysis. While some have been found to be subject to the *Charter*, others have not. While there are certain trends in the application of the *Eldridge* analysis to these entities and the results that may occur, there is still uncertainty surrounding how the analysis is interpreted and applied to entities by different provinces,

particularity in the case of universities. While there is still uncertainty that demands clarification from the country's highest Court, the *Eldridge* analysis proves useful for other private entities across the country.

VI. Bibliography

Bacal, Meredith "Post, Like, and Share Away: Pridgen v University of Calgary" (24 May 2012), The Court (blog), online: <www.thecourt.ca/2012/05/post-like-and-share-away-pridgen-v-university-of-calgary>;

Braley-Rattai, Alison and Kate Bezanson, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", 2020 CanLIIDocs 3204 Centre for Constitutional Studies (ualawccsprod.srv.ualberta.ca/index.php)

Cameron, Jamie "Compelling Freedom on Campus: A Free Speech Paradox", 2020 CanLIIDocs 3200 Centre for Constitutional Studies online: ualawccsprod.srv.ualberta.ca/index.php

Comery, Sally A & Anthony Morris "Application of Canadian Charter to universities remains unclear" (June 2012), Norton Rose Fulbright (blog), online: www.nortonrosefulbright.com/knowledge/publications/67808/application-of-canadian-charter-to-universities-remains-unclear

Donlevy, J. Kent, Dianne Gereluk, and Jim Brandon "Trigger Warnings, Freedom of Speech, and Academic Freedom in Higher Education" Education & Law Journal (December, 2018) 28 Educ. & L.J. 1.

Giordano, Cory "Who/What does the Charter apply to? Law Schools, for example?" Supreme Avocacy August 19, 2019 online: https://canliiconnects.org/en/summaries/67294.

Hamill, Sarah "Of Malls and Campuses: The Regulation of University Campuses and Section 2(b) of the Charter", Dalhousie Law Journal 2017 CanLIIDocs 3511 online https://www.dal.ca/faculty/law/research/publications/dalhousie-law-journal.html)

Hanson, Sarah "Delineating the Charter's Scope in Pridgen v University of Calgary" (23 April 2012), The Court (blog), online: www.thecourt.ca/2012/04/delineating-the-charters-scope-in-pridgen-v-university-of-calgary.

Karazivan, Noura "L'application de la Charte canadienne des droits et libertés par les valuers: l'article 32" (2013) 61:2 SCLR 241.

Koshan, Jennifer "Face-ing the Charter's Application to University Campuses" (13 June 2012), Ablawg, online: ablawg.ca/2012/06/13/face-ing-the-charters-application-on-university-campuses-5.

Marin, Michael, "Should the Charter Apply to Universities?" (2015) 35:1 Nat'l J. Const. L. 29.

McKay-Panos, Linda "Alberta Court of Appeal Concludes that University of Alberta is Subject to the *Charter*" (February 25, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/07/Blog_LMP_ProLife.pdf.

McKay-Panos, Linda "BCCA Unfortunately Chooses Not to Follow Alberta's Lead on the Issue of Whether the Charter Applies to Universities" (25 May 2016), Ablawg, online: ablawg.ca/2016/05/25/ bcca-unfortunately-chooses-not-to-follow-albertas-lead-on-the-issue-of-whether-the-charter-applies-to-universities.

McKay-Panos, Linda "Context is Everything When it Comes to Charter Application to Universities" (September 3, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/09/Blog_LMP_Yashcheshen.pdf.

McKay-Panos, Linda "Does the Charter Apply to Universities? *Pridgen* Distinguished in U Vic Case" (6 February 2015), Ablawg, online: ablawg. ca/2015/02/06/5332.

McKay-Panos, Linda "Universities and Freedom of Expression: When Should the Charter Apply" (2016) 5:1 Can J Hum Rts 61.

Newman, Dwight G "Application of the Charter to Universities' Limitation of Expression", Université de Sherbrooke 2015 CanLIIDocs 443.

Newman, Stephen L "The Politics of Campus Free Speech in Canada and the United States", 2020 CanLIIDocs 3201 Centre for Constitutional Studies (ualawccsprod.srv.ualberta.ca/index.php)

Rigakos , George S. & David R. Greener, "Bubbles Of Governance: Private Policing And The Law In Canada" (2000) 15:1 Can. J.L. & Soc'y 145.

Silletta, Franco "Revisiting Charter Application to Universities" (2015) 20 Appeal 79.