Exploring the Charter’s Horizons:
Universities, Free Speech, and the
Role of Constitutional Rights in Private Legal Relations

by

Derek B. Mix-Ross

A thesis submitted in conformity with the requirements
for the degree of Master of Laws (LL.M.)

Graduate Department of the Faculty of Law
University of Toronto

© Copyright by Derek B. Mix-Ross (2009)
Exploring the Charter’s Horizons: Universities, Free Speech, and the Role of Constitutional Rights in Private Legal Relations

Derek B. Mix-Ross

Master of Laws (LL.M.)

Graduate Department of the Faculty of Law
University of Toronto

2009

Abstract

Universities have traditionally stood as bastions of academic freedom and forums for open discourse and free expression. In recent years, however, this role has been questioned in instances where university administrators have, either directly or complicity, denied students the opportunity to express certain viewpoints they deem “controversial”. This research paper explores whether a university, or its delegates, should be allowed to deny students access to campus facilities and resources solely on the basis of ideological viewpoint. The relevance of the Canadian Charter of Rights and Freedoms, statutory human rights provisions, and common law doctrines to the student-university relationship are explored in turn. It is argued that, notwithstanding the fact that universities may be “private” actors to whom the Charter does not directly apply, they are institutions invested with a public interest, and as such ought to be subject to special duties of non-discrimination.
Acknowledgments

I am deeply grateful to my thesis supervisor, Professor Peter Benson, for his kind and helpful guidance throughout the development of this thesis. His feedback, advice, and insight have been enormously beneficial.

I offer my sincere thanks to the Faculty of Law of the University of Toronto and the Law Foundation of Ontario for their generous financial support, which made my participation in the LL.M. program possible.

Above all, I would like to acknowledge my family – Patrick, Ruth, Aaron, Sarah, and Alison – whose love and support have been immeasurable, and without whom I would hardly be capable of completing a project such as this one. I would especially like to recognize the enormous support that my mother, Ruth Ann Mix Ross, has been in my academic and legal pursuits. She has spent countless hours reviewing my work over the years, including this paper, and her suggestions and insights have been invaluable. She has provided me with an extraordinary example of a lawyer committed to virtue and the pursuit of justice, as well as a mother profoundly dedicated to her family.

Finally, I wish to thank students on university campuses across the country – and the world – who speak out in furtherance of truth and justice, even when it is costly to do so. This paper is dedicated to them in the hope that their expression, and that of their successors, will not be silenced.
# Table of Contents

Acknowledgments ........................................................................................................................ iii

Table of Contents .......................................................................................................................... iv

Introduction ................................................................................................................................... 1

Chapter 1: Universities, The Charter, and Human Rights Codes ............................................... 6

1 Application of the Constitution to Universities ........................................................................ 6
   1.1 Universities and State Action ............................................................................................. 8

2 Application of Human Rights Legislation to Universities ........................................................ 11
   2.1 Macapagal v. Capilano College Students’ Union .............................................................. 13
   2.2 Gray v. UBC Student Union Okanagan ............................................................................. 14

Chapter 2: The Charter’s Indirect Application to Private Parties ............................................. 17

1 Verticalism and Horizontalism: Two Competing Views .......................................................... 17

2 Dolphin Delivery and the “Indirect Application” Model .......................................................... 21

3 Toward an Indirect Application Model ..................................................................................... 24
   3.1 Analysis of Barak’s Model ................................................................................................ 25
   3.2 Charter Values and Private Law: Entitlement & Relationship ........................................ 31
   3.3 Analysis of the Weinribs’ Model ....................................................................................... 35

4 Comparing Public Law and Private Law Values ...................................................................... 40

5 The Vagueness of Values Language: A Wider Problem ....................................................... 45

6 Expanding Charter Values Beyond the Charter ...................................................................... 48

7 An Interim Conclusion: The Horizons of Charter Values in Canada ....................................... 52

Chapter 3: Common Callings and the Common Law ................................................................. 60

1 Property Rights under Common Law ....................................................................................... 61
   1.1 Common Calling Cases: Finding a Rationale ................................................................. 64
"If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing."

– John Rawls

Introduction

Minerva was a student at Capilano College in Vancouver, British Columbia. Minerva sought to provide her fellow students with information on abortion, which she believed to be a moral wrong, and to offer them an alternative view to the pro-choice position. She was joined by a group of like-minded students, who together formed “Heartbeat”, a club committed to “proclaiming and defending the dignity of all human life from conception to natural death”. In order to engage in on-campus activities, Heartbeat, like all student clubs, required accreditation from Capilano’s Student Union. Heartbeat applied for club ratification twice over a nine-month period, and the Student Union rejected both applications. The reason for the denial was not because the club was disruptive of student activities or because its members had misbehaved in any way. Rather, on both occasions, the rejection was based solely on the “pro-life views espoused by Heartbeat and its members”. The Student Union explained that it was an “official pro-choice organization”, in which groups like Heartbeat had no place.

---

3 Ibid. at para 7.
4 Ibid. at para 6.
These were the facts in Macapagal v. Capilano College Students' Union\(^5\), a complaint brought before the British Columbia Human Rights Tribunal in 2006. Although the parties reached a settlement\(^6\) in which Heartbeat could finally be recognized as a student club\(^7\), the complaint was not an isolated incident. Instead, it is joined by dozens of similar disputes, some of which have not ended as happily, and many others which remain unresolved. Hundreds of students like Minerva on Canadian campuses continue to be denied the opportunity to express their deeply held beliefs and engage their fellow students on politically controversial issues. For example, in 2002, Concordia University imposed a moratorium on all discussion of the “Middle East Issue” on campus.\(^8\) Subsequently, Concordia’s student union attempted to ban a Jewish student group, based on allegations that they were distributing promotional literature for Israel’s “Mahal” army.\(^9\) At the University of British Columbia, the Student Union prohibited a student club from conducting activities on campus after it displayed a poster whose only “objectionable” content was its statement that “there [is] no criminal law in Canada against abortion.”\(^10\) A similar ban

\(^{5}\) Ibid.

\(^{6}\) It is important to note, however, that the settlement was reached after the Tribunal denied the Student Union’s application to preliminarily dismiss the complaint, finding that there was “a reasonable prospect that the complaint would succeed”. The Heartbeat students argued that the Student Union’s denial of club status amounted to a “denial of a service and facility customarily available to the public because of religiously-based belief”, in contravention of section 8 of British Columbia’s Human Rights Code, R.S.B.C. 1996, C. 210. For a contrary finding on similar facts, see Gray and others v. University of British Columbia Students’ Union – Okanagan (No. 2), 2008 B.C.H.R.T.D. No. 16, aff’d [2008] B.C.J. No. 2147, discussed at text accompanying notes 61-66 below.

\(^{7}\) “Human Rights Complaint Forces College to Permit Pro-Life Group Official Club Status” (May 15, 2008), online: Life Site News <http://www.lifesitenews.com/ldn/2008/may/08051511.html>.

\(^{8}\) The ban was instituted in response to the loud, and sometimes violent, opposition to a speech by Israeli Foreign Minister Benjamin Netanyahu. The ban was eventually lifted, but only after legal action was threatened and Members of Parliament become involved in the dispute: see CAUT Bulletin, Vol. 49, No. 10, “Concordia Board Lifts Moratorium” (December 2002), online: Canadian Association of University Teachers <http://www.cautbulletin.ca/en_article.asp?SectionID=618&SectionName=News&VolID=161&VolumeName=No\_2010&VolumeStartDate=12/1/2002&EditionID=19&EditionName=Vol\_2010&EditionStartDate=1/1/2002&ArticleID=1438>, See also Bram Eisenthal, “At Montreal school, Jewish student beaten a week after Palestinian riot” (September 23, 2002), online: Campus Watch <http://www.campus-watch.org/article/id/142>.

\(^{9}\) See Steven Faguay, “Concordia distances itself from Hillel suspension” The Link (6 January 2003), online: <http://thelink.concordia.ca/breakingnews/02/12/06/2355243.shtml>.

\(^{10}\) A statement which is, in fact, accurate. For a description of the incident, see Craig Jones, “Immunizing Universities from Charter Review: Are We ‘Contracting Out’ Censorship?” (2003) 52 U.N.B.L.J. 261 at 267-268.
was imposed on a pro-life club at the University College of the Caribou after it set up a laboratory display of fetal models to show the stages of gestational development. At the University of Calgary, three students were charged with trespassing after refusing to turn inward (and effectively out of sight) a display of photographs of aborted foetuses. Currently, numerous student clubs that have been de-ratified for their pro-life stance are fighting to be reinstated and are effectively unable to engage in campus activities until they are so recognized. Numerous other clubs have been unable to reorganize after being subject to bans and restrictions, supposedly imposed as “temporary measures”. Sadly, the list of examples goes on.

Jones observes that it was only after “considerable public controversy and the subsequent filing of a discrimination complaint with the Human Rights Commission” that the student government relented and reconstituted the club. A member of the student union even went so far as to confiscate the display. The union later alleged that the club’s status was revoked because a student reporter was excluded from a club’s meetings: Jeff Dewsbury, “B.C. Civil Liberties speaks up for pro-life club” in British Columbia Christian News, Vol. 20, No. 11 (November 2000), online: <http://www.canadianchristianity.com/cgi-bin/bc.cgi?bc/bcn/1100/sibc>. See also Jones, supra note 10 at 269.

The display took place over two days in November, 2008. The University originally threatened to have the students expelled or arrested, but took no action until February, 2009, when the students indicated that they would re-introduce the display: See John Carpay, “Free Speech dies a slow death on campus” (February 9, 2009), online: National Post <http://www.nationalpost.com/story.html?id=1269926>. See also Charles Lewis “University of Calgary singles out abortion for censorship” (November 26, 2008), online: National Post <http://network.nationalpost.com/nl/blogs/fullcomment/archive/2008/11/26/charles-lewis-q-amp-a-on-abortion.aspx>.

See Theresa Gilbert, “Banning Pro-life on Campus: Capilano, Guelph, and McGill” (January 2009), online: The Catholic Insight <http://catholicinsight.com/class/2002jul/article_1869.shtml>. As of the date of writing, this is the case at the University of Calgary. See Sean Myers, “U of C pro-life club appeals suspension over abortion display” Calgary Herald (12 February, 2009), online: Calgary Herald <http://www2.canada.com/calgaryherald/news/story/story.html?id=9191d07e-4c67-4092-a900-fb0f45d9ed98&p=1>. Similar cases at Lakehead University and the University of Guelph have recently been resolved, with the pro-life organizations being granted club status in both cases.

At Ryerson University, the Students’ Council refused to grant club status to the Ryerson University Choose Life Association, apparently fuelled by concerns that materials disseminated by the group were “strongly worded”: Jones, supra note 10 at 270.

For example, in a 2002 incident the University College of the Fraser Valley forced students to remove a display of small white crosses that were set up on a campus lawn, purportedly to represent the number of abortions committed in an average day. The University had originally approved of the display but reneged after a number of complaints were lodged: “University Forces Pro-Life Display Down After Giving Approval” (March 1, 2002), online: Life Site News, <http://www.lifesitenews.com/ldn/2002/mar/02030102.html>. Similarly, at Lambton
What remedies are available to these students? At first glance, recourse to the *Canadian Charter of Rights and Freedoms* seems to provide an appropriate and logical solution, given the possible violations of such rights and freedoms as equality, free expression, and free association.16 Provincial human rights codes may also be looked to for redress since they prohibit the discriminatory denial of goods and services. However, as will be discussed in greater length in Chapter 1, the sufficiency of the *Charter* as well as human rights legislation in resolving such disputes is questionable, given that the parties are (arguably) private actors, and that groups united by political ideals, rather than race or religion, may not fall within a legislatively protected “enumerated ground”.

The dilemma faced by students who are denied the opportunity to express themselves on university campuses therefore poses a conundrum of sorts: the legal relationship between these private parties raises concerns about basic human rights, but it is possible that neither the *Charter* nor human rights legislation have direct application. Many have suggested that, in such cases, the *Charter* ought to have some form of indirect application or influence on the outcome of the dispute. Chapter 2 will explore the arguments advanced by advocates of such a “horizontal” application of constitutional human rights. It will be concluded that such approaches are ultimately problematic to the extent that they lack sufficient certainty and coherence, and are inconsistent with the fundamental nature of private law. Instead, it will be suggested that the common law can, without the external “imposition” of constitutional values

---

or human rights legislation, provide a remedy sufficient to redress the injustice arising from many of these student club cases. However, it will also be recognized that, in certain circumstances, it is appropriate for courts to look beyond private law to “beliefs, values, and modes of reasoning that have public plausibility” to determine the content and meaning of the various rights and duties arising from private law. This latter approach will be supported in Chapter 3 by looking to common law cases, grounded in part by broader policy considerations, which support the notion that even private entities are precluded from acting in a discriminatory manner in certain situations. It will be concluded that these common law principles apply to the student expression cases, and provide redress for the discriminatory practices of university officials that deny equal treatment on the basis of ideological viewpoint.

---

Chapter 1
Universities, The Charter, and Human Rights Codes

1 Application of the Constitution to Universities

Where a student club is denied recognition, funding, or access to campus facilities, or is forced to take down displays or refrain from communicating with students simply because school authorities disapprove of its particular viewpoint, does the Constitution apply to protect its fundamental rights and freedoms? In the United States, the answer to this question is clearly, “Yes”. In *Good News Club et al v. Milford Central School*, the United States Supreme Court held that, although the State may be “justified in reserving [its forum] for certain groups for the discussion of certain topics”, the restriction may not discriminate on the basis of viewpoint. The Court reaffirmed two earlier decisions, *Lamb’s Chapel* and *Rosenberger*, which both held that “speech discussing otherwise permissible subjects cannot be excluded from a particular forum” on the ground that the subject is discussed from a particular viewpoint. In other words, any restriction on speech must be “viewpoint neutral”.

---

18 Further discussion on this issue can be found in my paper, “Abortion, the First Amendment, and the Charter: Comparing and Critiquing the Balance of Free Speech and Free Choice in Canada and the United States” [unpublished], excerpts of which are drawn upon herein.
22 *Good News Club, supra* note 19 at 111-112.
Although *Good News Club* dealt with the administrative decisions of a public school district, its holding is relevant to universities. In *Rosenberger*, a case cited extensively in *Good News Club*, the Supreme Court held that the University of Virginia’s decision to deny funding to a student organization for its printing expenses, simply because its publication offered a religious viewpoint, violated the First Amendment.\(^{24}\) The court made it clear that the University could not regulate speech “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction”.\(^{25}\) The issue was revisited in *Board of Regents of the University of Wisconsin System v. Southworth*.\(^{26}\) That case involved a challenge to a University’s “student fee” program, in which a group of students objected to the taxation and allocation of students’ money to fund extracurricular groups they did not support. The Supreme Court upheld the program, and found that it did not violate the students’ free speech rights, because the First Amendment permits the encouragement of extracurricular speech so long as it is done in a “viewpoint neutral” manner. The court made it clear, however, that a program would not withstand constitutional scrutiny if it did discriminate based on viewpoint (as many of the Canadian universities/student unions have done in the cases discussed above). The court also rejected the “referendum aspect” of the program, whereby a majority vote of the student body could fund or “de-fund” a student club. The court noted that this would violate the “whole theory of viewpoint neutrality” because minority views should be treated with the same respect as majority views, and that access to a public forum does not depend upon majoritarian consent.\(^{27}\) Thus, “the U.S. Constitution requires state universities to spell out clear standards in order to restrain the unbridled discretion of student government officials to fund or defund

\(^{24}\) *Rosenberger*, *supra* note 21.


\(^{26}\) 529 U.S. 217 (2000) [*Southworth*].

\(^{27}\) *Ibid.* at 235-236.
groups according to their ideological viewpoints.\textsuperscript{28}

The U.S. Supreme Court’s decisions in \textit{Rosenberger, Southworth,} and \textit{Good News Club} make it clear that, if a university funds and provide facilities for clubs dedicated to discussing particular social, religious, or political subjects, the university can not deny those same privileges to another club because its perspective on one of those topics, such as abortion, is “objectionable”. As the Supreme Court held in \textit{Rosenberger}:

\begin{quote}
The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.\textsuperscript{29}
\end{quote}

\section{Universities and State Action}

A central factor in these American decisions was the finding that the U.S. Constitution applies directly to universities. U.S. courts have held that a “sufficient nexus” exists between the government and a publicly funded university for the latter’s acts to be treated as state action and subject to the constitution.\textsuperscript{30} Canadian jurisprudence is different, however, as illustrated by the Supreme Court of Canada’s decision in \textit{McKinney v. University of Guelph.}\textsuperscript{31} In that case, a group of professors challenged the university’s mandatory retirement policy as discriminatory on the basis of age, and thus contrary to the Charter’s guarantee of equality. At issue in the appeal was whether the Charter applied to universities. In five separate opinions, a plurality of

\begin{footnotes}
\textsuperscript{29} \textit{Rosenberger}, supra note 21 at 836.
\textsuperscript{31} [1990] 3 S.C.R. 229 [\textit{McKinney}].
\end{footnotes}
the court decided that it did not. Justice La Forest, writing for Dickson C.J. and Gonthier J., and whose reasons were concurred with by Sopinka J., held that the Charter only applied to restrain government action, and was not intended to apply to private activity. He concluded that universities did not form part of government because the government “has no legal power to control the universities even if it wished to do so.”

He observed that “[t]hough the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources.” Since universities are independent of government, La Forest J. concluded, they do not form part of the government apparatus. As such, their actions “do not fall within the ambit of the Charter.”

It is important to note that the Court’s decision in McKinney is limited to universities, and does not apply to all post-secondary educational institutions. In Douglas/Kwantlen Faculty Assn. v. Douglas College, for example, the Supreme Court distinguished a community college from a public university on the basis that the former was a “Crown agency established by the government to implement government policy”. Furthermore, the Court reasoned, while a University’s board of governors acts independently, the community college’s board is appointed, removable, and at all times directed by government: “the Charter, therefore, applies to [its] activities”. Thus, it would seem that students at certain community colleges may invoke the Charter directly to protect their speech and association rights on campus.

---

32 Ibid. at para. 41.
33 Ibid.
34 Ibid. at para. 45.
36 Ibid.
At universities, however, the matter is far less certain. Although *McKinney* seems to preclude the *Charter’s* application on university campuses, arguments have been made that universities are not immune from *Charter* scrutiny in all circumstances.\(^{37}\) In fact, a majority of the justices in *McKinney* suggested that universities “may perform certain public functions that could attract Charter review”.\(^{38}\) This view found further support in the Supreme Court’s subsequent decision in *Eldridge v. British Columbia*, a case dealing with the application of the *Charter* to hospitals.\(^{39}\) The Court held that “a private entity may be subject to the *Charter* in respect of certain inherently governmental actions” and explained the rationale as follows:

In these circumstances, while it is a private actor that actually implements the program, it is government that retains responsibility for it. The rationale for this principle is readily apparent. Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other “private” arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.\(^{40}\)

In *Eldridge*, the hospital in question was found to be carrying out an “inherently governmental action” in providing medically necessary services. As such, any decisions “intimately connected” to that purpose, including the hospital’s refusal to provide sign language interpretation, was subject to *Charter* review.\(^{41}\) The Court was viewed as taking a significant step in *Eldridge*, as it had previously found that the *Charter did not* apply to hospitals in the

---

37 See *Jones*, *supra* note 10 at 272-275.
38 *McKinney*, *supra* note 31 at para. 362 per L’Heureux-Dubé J. See also para. 422 per Sopinka J. (“I would not go so far as to say that none of the activities of a university are governmental in nature.”) and para. 255 per Wilson J. (Cory J. concurring): “If the relationship between the universities and government is sufficiently close to warrant their being considered governmental for purposes of s. 32, I see no reason why their internal policies and practices should not have to conform to the dictates of the Constitution.”
39 [1997] 3 S.C.R. 624 [*Eldridge*].
40 *ibid.* at para. 42.
41 *ibid.* at para. 51.
context of mandatory retirement policies (similarly with universities in *McKinney*).\textsuperscript{42} Some have suggested that, as a result of *Eldridge*, the Court’s decision in *McKinney* is of limited application, and universities, like hospitals, may now be subject to the *Charter's* review in the performance of certain functions which are arguably “inherent government activities”, such as the provision of educational services and the conferral of degrees.\textsuperscript{43} The Supreme Court, however, has yet to revisit its decision in *McKinney*, and until it does, there exists a “fairly strong presumption against the application of the *Charter* on university campuses”.\textsuperscript{44} As such, it is necessary to examine alternative legal mechanisms that may be relevant to the student club disputes.

2 Application of Human Rights Legislation to Universities

While the *Charter* may not apply directly to university authorities, human rights legislation, which applies to private entities, clearly does. Legislation has been adopted in every Canadian province\textsuperscript{45} and territory\textsuperscript{46}, guaranteeing equal rights (and duties) in such areas as employment, housing, and services. For example, in Ontario, “[e]very person has a right to equal treatment with respect to services, goods and facilities without discrimination because of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{43} See Jones, supra note 10 at 273-276.
\item \textsuperscript{44} Ibid. at 272.
\end{itemize}
\end{footnotesize}
race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.” 47

It is evident from the cases discussed above that student clubs are routinely denied the “right to equal treatment with respect to services, goods and facilities”. However, in order for a remedy to be granted, it must also be shown that the denial of a service is discriminatory on the basis of one of the listed “immutable characteristics” in the relevant legislation such as race, sex, or religion. In some cases, it will be relatively simple to establish such discrimination. In other cases, however, student organizations may not fall within an “enumerated ground”, since their members are diverse in terms of immutable characteristics, and may identify with one another on grounds other than those listed in a human rights code. Take, for example, the pro-life clubs. Their members are not joined by sex or race but by the belief that abortion is a moral wrong. Is this “conscientious belief” an enumerated ground upon which discrimination is prohibited? In many provinces, it is. Saskatchewan’s Human Rights Code, for example, provides that “every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief” 48 Human rights statutes in Manitoba49, New Brunswick50, Nova Scotia51, Prince Edward Island52, the Yukon53, and the Northwest Territories54 all include “political belief” as a

47 Ontario Human Rights Code, supra note 45 at s. 2(1).
48 Supra note 45 at s. 4
49 Ibid. at s. 9(2)(k). Manitoba’s Human Rights Code also protects “political association” as a prohibited ground of discrimination.
50 Ibid. at s. 5(1).
51 Ibid. at s. 5(1)(u). Nova Scotia’s Human Rights Act also includes “political affiliation” as a prohibited ground of discrimination.
52 Ibid. at s. 1(1)(d).
53 Supra note 46 at s. 7(j). The Yukon’s Human Rights Act also protects “political association” as a prohibited ground of discrimination. In addition, s. 3 provides that “Every individual and every group shall, in accordance with the law, enjoy the right to freedom of religion, conscience, opinion, and belief.”
54 Ibid. at s. 5(1). S. 5(1) also protects “political association” as a prohibited ground of discrimination
prohibited ground of discrimination, while in Newfoundland “political opinion” is protected.\textsuperscript{55} In Quebec, the provincial \textit{Charter of Human Rights and Freedoms}, which applies to private parties, provides that “every person is the possessor of fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.”\textsuperscript{56} It is therefore likely that aggrieved student clubs which are discriminated against solely on the basis of the “pro-life” content of their message could successfully bring complaints before human rights tribunals in each of these provinces.

Unfortunately (although perhaps not coincidentally), most incidents of discrimination have occurred on campuses in British Columbia, Alberta, and Ontario, where (along with Nunavut and the federal \textit{Human Rights Act}) political and conscientious beliefs are not protected. In fact, to date, only two reported human rights complaints have been brought by pro-life student clubs (to the author’s knowledge), and both were adjudicated under the British Columbia \textit{Human Rights Code}. These two cases will be discussed in turn below:

\section*{2.1 \textit{Macapagal v. Capilano College Students’ Union}\textsuperscript{57}}

\textit{Macapagal} was discussed in the opening paragraphs of this research paper. In that case, the pro-life student club known as Heartbeat, was denied clubs status and funding solely on the basis of its pro-life viewpoint. In its complaint to the B.C. Human Rights Tribunal, the club alleged that it was discriminated against on the basis of \textit{religion}. The respondent Student Union

\textsuperscript{55} \textit{Supra} note 45 at s. 6(1).
\textsuperscript{56} \textit{Ibid.} at s. 3.
\textsuperscript{57} \textit{Macapagal, supra} note 2.
argued that not all members of the club were religious, and that “there [was] no nexus between its refusal of Heartbeat’s application for club status, on the one hand, and the religious beliefs of the complainants, on the other.”\textsuperscript{58} This argument, however, was rejected by the B.C. Human Rights Tribunal, which held that the students’ “pro-life views are an integral and deeply held aspect of their religious beliefs” and that this provided a sufficient “nexus” for the complaint to fall within the protected ground of “religion”.\textsuperscript{59} It should be noted, however, that the Tribunal’s decision was a preliminary one, and did not dispose of the litigation in the main action. Rather, it dealt with a procedural application brought by the Student Union to summarily dismiss the complaint. The Tribunal’s finding that there was a “reasonable prospect that the complaint would succeed” simply meant that the case should proceed to adjudication. However, it settled before reaching that next stage.\textsuperscript{60}

\textbf{2.2 \hspace{1em} Gray v. UBC Student Union Okanagan}\textsuperscript{61}

Two days after \textit{Macapagal} was decided, an opposite conclusion was reached by a different member of the B.C. Human Rights Tribunal in \textit{Gray v. UBC Student Union Okanagan}. The facts in that case were similar to those in \textit{Macapagal}: the Student Union at UBC Okanagan refused to ratify a pro-life club after a number of students objected to the club’s materials and presentations displaying aborted foetuses. Unlike in \textit{Macapagal}, however, the B.C. Human Rights Tribunal Member concluded that there was “no reasonable prospect that the complaint [would] succeed” because the decision not to ratify the club was based on the offensive content

\begin{itemize}
\item \textsuperscript{58} \textit{Ibid.} at para. 19.
\item \textsuperscript{59} \textit{Ibid.} at para. 20.
\item \textsuperscript{60} See “Human Rights Complaint Forces College to Permit Pro-Life Group Official Club Status” (May 15, 2008), online: Life Site News <http://www.lifesitenews.com/ltn/2008/may/08051511.html>.
\item \textsuperscript{61} \textit{Gray}, supra note 6.
\end{itemize}
of the club’s materials, not on the religious beliefs of its members. The Tribunal found that there “was no hostility toward Christians generally, or Catholics specifically, at the Meeting [to de-ratify the club]” and granted the Student Union’s preliminary application to dismiss the complaint. The pro-life students subsequently applied to the British Columbia Supreme Court for judicial review. In his judgment, Mr. Justice Wong held that the applicable standard of review was that of “patent unreasonableness”, an “extremely deferential standard of review” that respects the Human Rights Tribunal’s “expertise and gate-keeping role”. With very little discussion on the merits of the case, Justice Wong simply concluded that “the Tribunal member's decision to dismiss was not patently unreasonable” and dismissed the students’ petition. Although his reasons could have ended there, he made specific note that he “accepted and adopted” the Student Union’s written submissions, including the following excerpt, which were replicated in his decision:

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

It appears that, as of 2009, the decision of the British Columbia Supreme Court in Gray stands as the highest reported case directly on point in Canada. The reasons of Wong J. suggest that, notwithstanding the B.C. Human Rights Tribunal’s earlier decision in Macapagal, pro-life

---

62 Ibid. at para. 29.
63 [2008] B.C.J. No. 2147 at paras. 7-8 and 11. In order for a decision to be patently unreasonable, the court must find that the tribunal “engaged in an arbitrary decision process, clearly excluded a principle or key issue from its analysis, and made factual errors so extreme as to render the decision arbitrary” (para. 11).
64 Ibid. at para. 13.
65 Ibid.
student clubs may have difficulty bringing complaints of discrimination on the basis of "religion" unless a clear connection to the protected ground can be shown. Although the matter is not entirely free from doubt, and the *Gray* decision is only of persuasive (and not binding) value in provinces outside of British Columbia, it seems that human rights codes that do not expressly protect "political belief" may be of limited application to pro-life clubs, or any other student club that could be seen as predominantly "political". The dilemma faced by such students therefore constitutes an exceptional example of a case that seems to have "fallen between the cracks": while these student expression cases clearly raise concerns about discrimination, it is possible that neither the *Charter* nor human rights legislation have direct application. Many have suggested that, in such cases, the "values" enshrined in the *Charter* ought to have some form of indirect application or influence on the outcome of the dispute. That is, even if the *Charter* does not apply directly to the acts of private bodies, including universities and student unions, it is still of some relevance in purely private disputes. These ideas will be explored in the following chapter.

---

66 In Ontario, the *Human Rights Code, supra* note 45, also includes “creed” as a prohibited ground of discrimination. While this may seem to provide an alternative avenue for a pro-life club complaint, the Ontario Human Rights Commission has defined the term narrowly to require a clear religious component: "Creed is interpreted to mean 'religious creed' or 'religion.' It is defined as a professed system and confession of faith, including both beliefs and observances or worship. A belief in a God or gods, or a single supreme being or deity is not a requisite." See Ontario Human Rights Commission, “Policy on Creed and the Accommodation of Religious Observances”, October 20, 1996, online: [http://www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodEN/pdf](http://www.ohrc.on.ca/en/resources/Policies/PolicyCreedAccomodEN/pdf) at 2. In *Jazairi v. Ontario (Human Rights Commission)*, 175 D.L.R. (4th) 302 (leave to appeal dismissed, [1999] S.C.C.A. No. 448), the Ontario Court of Appeal upheld the finding of the Divisional Court that a complainant’s personal opinion on the relationship between the Palestinians and Israel was a “mere political opinion” and “not within the meaning of ‘creed’” (para. 27). The Court of Appeal did, however, leave open the question of whether “some other system of ‘political opinion’ could amount to a ‘creed’” (para. 28). See also *Ottawa Senior Chinese Cultural Association v. Ontario Human Rights Commission and Huang*, [2006] O.H.R.T.D. No. 1, where the Ontario Human Rights Commission found that Falun Gong, a Chinese “cultivation practice” that focuses on self-improvement, qualified as a form of “creed” within the meaning of the Code, “since it forms the deeply and sincerely held personal beliefs of the Complainant about her own spirituality” (para. 72). On judicial review, the matter was sent back to the Tribunal for a new hearing since one of the parties did not have adequate notice of the proceedings: [2007] O.J. No. 4038 (S.C.J. (Div. Ct.)).
Chapter 2

The Charter’s Indirect Application to Private Parties

“Despite the effort to keep the Charter out of the common law, it has arguably come in through the back door.”

Chief Justice Beverley McLachlin67

1 Verticalism and Horizontalism: Two Competing Views

To what extent should the rights and freedoms enshrined in a written constitution apply to private legal relationships? The traditional response has been that constitutional rights have only a “vertical” application. That is, they apply only to the relationship between the state and the individual. Fundamental rights, at least those enshrined in a constitutional bill of rights such as the Charter, are only to be invoked when a state actor is involved in the litigation, and have no application in disputes arising between purely private entities. Most “verticalists” premise their view on the “rigid distinction between the public and private sphere” and argue that the purpose of fundamental human rights protection is to “preserve the integrity of the private sphere against coercive intrusion by the state”.68 They assert that most human rights violations have historically emanated from the state, and therefore, it is the government that is most in need of legal restraint. Furthermore, verticalists advocate for a separation of private and public spheres. Private relationships are of a fundamentally different nature than relationships between individuals and the state, and this, they assert, ought to be reflected in the rules that govern each.

Similarly, they argue that private individuals, as autonomous beings, should be free to pursue their own values, free from state dictation. There needs to be a “private realm in which people are not obliged to subscribe to ‘state’ virtues and into which constitutional norms ought not to intrude.”\(^{69}\) As one commentator explains:

Maximization of the private space in which individuals are free to pursue their own conceptions of the good is seen as the ultimate goal of a society’s legal and political arrangements, and that imperative dictates that laws protecting fundamental rights apply only to the exercise of public power. Legal relations between private individuals must remain outside the reach of such law in order to preserve the sanctity of the private sphere from officious meddling by the state.\(^{70}\)

This traditional position, however, is increasingly being challenged, and a growing movement of scholars has come to criticize the “vertical” view of constitutional rights. These scholars argue that constitutional rights should apply not only to the state, but to private individuals.\(^{71}\) This idea, known as the “horizontal” application of constitutional rights, attacks the very idea of the “public-private divide”.\(^{72}\) It asserts that, since threats to rights and dignity can arise from both private and public actors, the law’s traditional concentration on the state alone as a coercive power is without foundation.\(^{73}\) Oppression originating from government “is only the tip of the iceberg, a particular aspect of a more general phenomenon, namely, the threat

---


\(^{72}\) Bateman, ibid. at 10.

\(^{73}\) Ibid. at 11.
which the strong can bring to bear on the weak.”74 Advocates of “horizontality” argue that, by focusing primarily on the government as the primary subject of constitutional rights and liberties, traditional liberalism has allowed social, economic and political inequalities to flourish in the private sphere. This critique leads to the conclusion that the same principles of justice that bind government activity ought to apply equally to private individuals and associations.75

In Canada, the debate between horizontalists and verticalists took centre stage shortly after the Charter was adopted in 1982. Naturally, the debate was focused on the scope of the Charter’s application. The relevant Charter provision is s. 32(1), which reads as follows:

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.

Based on this text it is clear that, at the very least, the Charter applies to “government action”.76 However, since section 32(1) does not expressly restrict the Charter’s application to government action only, it was initially suggested that it ought to apply to private actors as well.77 In addition to the usual arguments advanced by horizontality proponents, writers seem to

---

75 Bateman, supra note 71 at 13.
76 For a discussion of what action is included in this phrase, see Peter W. Hogg, Constitutional Law of Canada, 5th ed. supp. (Toronto: Carswell, 2007) at section 37.2.
have been motivated by the idea that “the values represented by the Charter are so good, and their interpretation and enforcement by judges will be so reliably benign, that the values ought to be imposed in the private as well as the public realm.”

Other early commentators rejected this interpretation, based on other provisions of the Charter, as well as its legislative history, and the traditional arguments supporting a vertical conception of constitutional rights. This debate “generated a welter of academic writing” and it was not long before the Supreme Court of Canada was granted the opportunity to weigh in on the issue, in its landmark decision of R.W.D.S.U. v. Dolphin Delivery.

---


78 Peter Hogg, “Case Comment”, supra note 69 at 274.


80 Section 1, for example, provides that only limits to the Charter that are “prescribed by law” will be justifiable, which “would never be true of private action in derogation of a Charter right”: Hogg, Constitutional Law of Canada, supra note 76 at s. 37-30.

81 Hogg, Constitutional Law of Canada, supra note 76 at s. 37-30. See the testimony of F.J.E. Jordan, Senior Counsel, Public Law, federal Department of Justice, in Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, First Session of Thirty-second Parliament, 1980-81, at 48:27 (January 29, 1981) and 49:47 (January 30, 1981). See also Re Bhindi and British Columbia Projectionists (1986), 29 D.L.R. (4th) 47 (B.C.C.A.) where Nemetz C.J., speaking for the majority, observed at para. 6: “[I]t is useful to consider changes from earlier versions of the Charter as an aid to the interpretation of its provisions…The earlier version of s. 32, debated in the house of Commons in April 1981, referred to ‘the Parliament and Government of Canada and to all matters within the authority of Parliament’…It can be seen that this earlier version was phrased in a way which clearly embraced private contractual activities. The rewording of s. 32 in the final version supports my view that the section is meant to restrict the application of the Charter to governmental action in respect of the citizens of this country” [Re Bhindi].

82 Supra, note 69.

83 See Andrew Clapham, Human Rights in the Private Sphere (Oxford: Clarendon Press, 1993) at 164. See also supra notes 69-77 and accompanying text.

84 [1986] 2 S.C.R. 631 [Dolphin].
2  *Dolphin Delivery* and the “Indirect Application” Model

*Dolphin* arose from a dispute between a courier company (Dolphin Delivery Ltd.) and a union, both private entities. The union threatened to picket Dolphin’s premises in order to publicize its dispute with another courier company (whose employees the union represented). Dolphin obtained an injunction to restrain the picketing, which was granted on the basis that “secondary picketing” by the union on Dolphin’s premises constituted the common law tort of inducing breach of contract.

The union challenged the injunction all the way to the Supreme Court of Canada. Its primary argument was that the injunction violated its constitutional right to free expression, guaranteed under section 2(b) of the *Charter*. This argument was rejected by the Supreme Court, however, on the basis that the *Charter* had no direct application to the dispute at hand: “[W]here…private party ‘A’ sues private party ‘B’ relying on the common law, and where no act of government is relied upon to support the action, the Charter will not apply.”

Although this seemed to be a crushing defeat to those advocating a “horizontal” application of the *Charter*, the Court went on to explain that the *Charter* was “far from irrelevant to private litigants whose disputes fall to be decided at common law”. On the contrary, private disputes based on the common law will be subjected to *Charter* scrutiny, albeit in a different and “indirect” form. Justice McIntyre affirmed that in such cases, “the judiciary ought to apply and

---

85 Since Dolphin Delivery was not a party to the industrial dispute between the union and the other courier company, any picketing on its premises would have constituted “secondary picketing”.
87 *Dolphin, supra* note 84 at 603.
develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution.\(^89\)

As a result of *Dolphin Delivery*, the *Charter* is said to be positioned somewhere between the “vertical” and “horizontal” approaches to human rights’ application. This middle approach is sometimes described as the “indirect application model”. That is, even though the *Charter* does not directly apply to purely private disputes, it has an indirect application to the extent that its values are relevant to the development and interpretation of the common law rules governing private parties.

This “indirect effect” was illustrated in the Supreme Court of Canada’s decision in *Hill v. Church of Scientology of Toronto*.\(^90\) In that case, which involved a defamation suit between two private parties, the defendants argued that the common law tort of defamation violated their *Charter* rights, specifically their freedom of expression. Rejecting this argument, the Court referred to *Dolphin*, stating that “quite simply, *Charter* rights do not exist in the absence of state action.”\(^91\) Rather, the Court held, the “most that the private litigant can do is argue that the common law is inconsistent with *Charter* values.”\(^92\) The Court explained that this would require a judge to weigh *Charter* values, “framed in general terms”, against the “principles which underlie the


\(^90\) [1995] 2 S.C.R. 1130 [*Hill*].

\(^91\) *Ibid.*, at para. 95.

\(^92\) *Ibid.*. The distinction between Charter rights and Charter values is a recurring theme in Supreme Court jurisprudence and is seen as “being critical to maintaining a meaningful distinction between government action cases within the scope of the [direct application of the *Charter*] and purely private cases outside the scope of section 32(1) but in which the court is under the obligation derived from section 52 to interpret and develop the common law in light of the values underlying the *Charter*”: Clapham, *supra* note 83 at 432. However the distinction is a confusing, if not a problematic, one: see discussion below under the heading “The Vagueness of Values Language: A Wider Problem”
common law”.93 Since more than one Charter value may be invoked in a private dispute, the Court must also consider whether the “common law strikes an appropriate balance between the two.”94 In Hill, the two conflicting values which required “balancing” were the values of “freedom of expression” and “the reputation of the individual”.95 The Court concluded that an appropriate balance between these values had already been struck in the common law, and there was no need to modify the common law tort of defamation on the merits of that particular case.

Notwithstanding its lack of impact in Hill, this balancing exercise illustrates how the Charter can “indirectly” apply to private parties; its values apply to the interpretation and development of the common law, which in turn, directly applies to and governs the outcome of private disputes. One might have thought that this idea of “indirect effect” would transform private law. However, the Supreme Court has only employed Charter values to modify the common law on a handful of occasions, and mostly in the criminal context. As such, the principles espoused in Dolphin have thus fair had “minimal impact”.96 Currently, Dolphin and Hill stand as the only two Supreme Court decisions explicitly dealing with the relationship between the Charter’s “fundamental values” and private law. Unfortunately, neither decision has been “particularly illuminating”.97 Indeed, as Professors Ernest and Lorraine Weinrib have concluded, the principles governing the relevance of Charter values in private litigation have thus far had “sketchy elucidation”.98 Nevertheless, their potential impact “may be as far

---

93 Hill, supra note 90 at para. 97.
94 Ibid. at para. 100.
95 Interestingly, the Court stated that the “reputation of the individual” was also a value reflected in the Charter, even though it is mentioned nowhere in that document. As discussed below, this highlights a major problem with a “Charter values” analysis, to the extent that it allows Court’s to create new values, or at least interpret them very broadly.
96 Weinrib & Weinrib, supra note 17 at 46.
97 Ibid.
98 Ibid. The Weinribs conclude at 46 that “the significance of the relationship between constitutional values and private law has yet to be elucidated at the highest level in Canada”.
reaching as that produced by any of the great landmark cases of private law”. The importance, therefore, of a thoughtful analysis of how Charter values might impact private law disputes, or if they even should, is most significant. Although Canadian courts have provided little guidance on this issue, it has been explored extensively in legal commentary. The following section will critically examine some of this literature.

3 Toward an Indirect Application Model

A number of writers have advanced suggestions on how constitutional rights may have an “indirect effect” in private law. One approach which has gained significant attention is the “strengthened indirect application model” developed by Aharon Barak, former President of the Supreme Court of Israel. For his part, Barak rejects the traditional “vertical” application of constitutional human rights, arguing that “danger to human rights also lurks in the conduct of private parties” thus making it necessary to “limit the power of private parties in their relations with one another”. However, he suggests that it is unnecessary for the Constitution to “directly apply” to private action, since human rights are already recognized in private law, through its “complicated and extensive system of balances and arrangements intended to make collective life possible”. Barak describes private law as “the legal regime that regulates the co-operative existence of various human rights while taking into consideration the public

99 Ibid.
102 Ibid. at 29.
103 Ibid.
interest” and suggests that it is thus the appropriate “geometric location” for “formulating remedies for an infringement by one private individual on the constitutional right of another individual.”  That is, one is entitled to enforce his or her constitutional rights against another private individual, but must find his remedy within private law. In short, “the recognition of human rights vis-à-vis private individuals must...permeate via private law channels.”  If however, no remedy exists at private law, Barak suggests that courts must create them by “means of new interpretations of existing tools” or the “creation of new tools”.

3.1 Analysis of Barak’s Model

Barak’s argument that private law should create new remedies to redress public law wrongs is quite extraordinary, and ultimately problematic. This is particularly true with respect to his proposal that “new interpretations of existing tools” be used to create “private law remedies” for “public law rights”. Barak illustrates this argument by pointing to various “value terms” in private law which, he argues, can be re-interpreted and used as “important channels through which constitutional basic rights and other legal values flow into private law”. His examples include terms such as “good faith”, “negligence”, “reasonableness”, and “public policy”. These phrases, he argues, “permit expression of constitutional human rights and public interests according to their state at various times, without any need to make a formal change in the private law balances.” As such, he suggests that they be “imbued with concrete substance” by constitutional rights and values

---

104 Ibid. at 30.
105 Ibid. at 29.
106 Ibid. at 30.
107 Ibid. at 33.
108 Ibid.
at the time of their interpretation. In other words, because these provisions permit consideration of values that are deemed appropriate and acceptable by society in balancing the competing interests of private litigants, they may be used to import constitutional values in fashioning a remedy to a particular private law dispute.\(^{109}\)

The problem with this idea is that terms such as “reasonableness” and “negligence” have fundamentally different meanings in private law and public law. For example, what may be “unreasonable” for the state is not necessarily “unreasonable” for the individual. The distinction between nonfeasance and misfeasance, which appears in private law, illustrates this point: the “reasonable” person has no duty to rescue in private law, whereas more stringent duties would be placed on state actors. In private law, persons are at liberty to act as they wish provided they do not interfere with another’s rights. In public law, the state must act for the common good: “Constitutional law conceives of the State not as a private party free to act as it wishes, but as a body politic acting within its constitutional authority for the common good.”\(^{110}\)

Thus, imbuing terms such as “unreasonable” and “negligence” with constitutional values is not as plain and simple as it sounds. It allows judges to subjectively, and perhaps arbitrarily, interpret ambiguous terms to mean just about anything. This would not only subject private individuals to more stringent standards (which have traditionally been reserved for the state), but could result in a significant alteration of, and create numerous inconsistencies within, private law. Indeed, it would be impossible to predict, with any certainty, how a private dispute might be resolved if a court were empowered to effectively create new rights and duties by imbuing private

\(^{109}\) Ibid.

\(^{110}\) Weinrib & Weinrib, supra note 17 at 53.
law doctrines with constitutional values in any given case. It could also open the floodgates to claims of constitutional violations in private litigation. As the Supreme Court of Canada held in *McKinney*, “to apply the Charter to purely private action would be tantamount to setting up an alternative tort system.” This muddying of the waters of private law should be avoided. Indeed, while there may be reasons to question traditional common law doctrines, any changes should be carefully and thoughtfully considered, not abruptly transformed through drastic reinterpretations of long-standing private law concepts.

Barak’s statement that judges should create new private law remedies for breach of public law rights is also problematic to the extent that it conflates public and private law rights. As indicated earlier, private relationships are of a fundamentally different nature than those in public law, and as such there are sound reasons to maintain separate rules to govern each. Public law exists to regulate the unique relationship between the state and the individual. The state, unlike any other entity, maintains a deep, long-term, and fundamental influence on an individual’s life, and as such, should be held to more stringent standards. To illuminate this argument, it is helpful to look to the writings of John Rawls. In his book, *Justice as Fairness: A Restatement*, Rawls proposes two principles of justice to specify the fair terms of social co-operation. Interestingly, Rawls makes it clear that these principles of justice do not apply directly to purely private relationships. Rather, the primary subject of the principles of justice is the “basic structure”, which consists of “the main

---

111 See, for example, *Re Bhindi*, supra note 81 where Nemetz C.J., speaking for the majority of the British Columbia Court of Appeal, held at para. 19, “to include…private commercial contracts under the scrutiny of the Charter could create havoc in the commercial life of the country.”
113 John Rawls, *Justice as Fairness: A Restatement* (Cambridge: Harvard University Press, 2001) [JFR]. Those principles of justice are as follows: “(a) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)” at 42-43.
political and social institutions of society”, such as “the political constitution with an independent judiciary, the legally recognized forms of property, [and] the structure of the economy.”  

Especially noteworthy are the reasons that Rawls provides in explaining why the principles of fairness only apply directly to the basic structure. Rawls explains that the basic structure, which for our purposes, can be understood to be the state, possesses special features which distinguish it from other social arrangements. For example, Rawls notes that the institutions that comprise the basic structure have the potential to impact all (or almost all) areas of an individual’s life, not only pervasively but “profoundly”. Collectively, these institutions possess coercive power, the ability to impose rights and duties on citizens, and the exclusive authority to determine the division of advantages arising from social cooperation. The basic structure therefore has the unique capacity to “importantly influence social and economic inequalities”. Indeed, its major institutions define citizens’ rights and duties and influence their life prospects, hopes, and expectations. Thus, Rawls asserts that a reasonable conception of justice would require that these institutions be constrained by principles of justice: “if the basic structure relies on coercive sanctions…the grounds of its institutions should stand up to public scrutiny.”

114 Ibid. at 10.
115 A more in-depth analysis can be found in my paper, “Rawls & Post-Liberalism: The Application of the Principles of Justice to Voluntary Associations” [unpublished], excerpts of which are drawn upon herein.
116 It is important to emphasize that the “basic structure” is not necessarily synonymous with the state, as it may encompass more than just governmental institutions. However, for the purposes of this paper, it is suggested that all of the characteristics attributed to the basic structure also apply to the state. Thus, the reasons provided by Rawls to limit the application of the principles of justice to the basic structure, can also be employed in favour of limiting the application of constitutional rights to state actors.
118 Ibid. supra note 113 at 10.
119 Ibid. at 40.
120 Thus, Rawls asserts that a reasonable conception of justice would require that these institutions be constrained by principles of justice: “if the basic structure relies on coercive sanctions…the grounds of its institutions should stand up to public scrutiny.”
121 Ibid.
In contrast, private individuals do not possess the powerful and pervasive attributes of the state – a private person can not be said to distribute societal goods amongst citizens and thus impact one’s potential opportunities or “initial chances in life” (at least not to the same extent as the state). Thus, the pressing need to constrain private action with the stringencies of a constitutional bill of rights does not exist. Although private actors may wield significant power and offend individual rights, they are still subject to the state’s ultimate authority, and “can either be regulated by government or made subject to human rights commissions”. The state, in contrast, has no “higher authority” to directly restrain and regulate its conduct, other than that imposed by its constitution.

Another distinctive characteristic distinguishes one’s relationship with the state from all other relationships: the latter are easily entered into and exited, while the former is not. Although a simple distinction, it is a fundamental one in Rawls’ writings. Rawls argues that our membership within the basic structure is not voluntary. To the contrary, completely out of our power and will, we “simply find ourselves in a particular political society at a certain moment of historical time”. Our membership in the basic structure of society is simply “given” and we “cannot know what we would have been like had we not belonged to it.” As Rawls states very plainly in Justice as Fairness, “political society is closed, as it were, and we do not, and indeed cannot, enter or leave it voluntarily…we enter the basic structure only by birth and exit it only by death.” In contrast, our private relationships are voluntarily entered into and exited,

122 Ibid.
123 McKinney, supra note 31 at 232.
124 JFR, supra note 113 at 4.
125 John Rawls, “The Basic Structure as Subject”, (1977) 14 American Philosophical Quarterly 159 at 162 [BSAS].
126 JFR, supra note 113 at 40.
and therefore need not be held to the same level of scrutiny as the basic structure. Rawls reiterates this point in his discussion of free and equal persons in *Justice as Fairness*:

> [W]e are born into society, and while we may be born into communities also, into religions and their distinctive cultures, only society with its political form of government and its law exercises coercive power. While we can leave communities voluntarily (the constitutional liberties guarantee this: apostasy is not a crime), there is a sense in which we cannot leave our political society voluntarily.\(^{127}\)

Since our relationship with the state is involuntary and inescapable, special protections need to be put into place to ensure that relationship is not abused. While some private relationships will be easier to exit than others, they are substantively distinguishable from the state in this regard. As such, there are compelling reasons to uphold the state to a higher and stricter standard than private entities. In the words of the Supreme Court of Canada in *McKinney*:

> Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals…But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.\(^{128}\)

Some like Barak would suggest that the special rules needed to “constitutionally shackle” government action should also apply to private entities. This, it is submitted, would place an unjustifiable burden on private citizens. It could completely and drastically revolutionize the duties owed by one individual to another, duties which are only appropriate for the state, based on its pervasive and powerful nature. Indeed, taken to the extreme, the approach advocated by


\(^{128}\) *McKinney, supra* note 31 at para. 22.
proponents of the “strengthened indirect application model” could severely undermine notions of personal autonomy and freedom which form the basis of private law: “The personal becomes the constitutional; my conduct becomes challengeable under the terms of the Charter...[t]his amounts to a constitutional totalism.”

3.2 Charter Values and Private Law: Entitlement & Relationship

Another leading model of “indirect horizontality” has been proposed by Professors Ernest and Lorraine Weinrib. In their article “Constitutional Values and Private Law in Canada”, the Weinribs set out to answer the question, “What is it about the nature of private law that allows it to be affected by constitutional values?” They begin by exploring the concept of private law itself, and identify three stages, or “moments”, in its elucidation. The first stage of private law is the conception of the person, who is seen as possessing inalienable human dignity. This inherent human dignity receives juridical embodiment through the notion of rights, in the second moment of private law. Rights arise from the fact that, as a person possessing inherent human dignity, one is entitled to “assert one’s dignity in relation to others and therefore be an end and not merely an ends for them.” Further, because all persons are attributed human dignity, each person must respect every other person’s rights. This gives rise to the correlative concept of duty; that is, the restraint that one person’s rights place on the exercise of another person’s freedom. The content and application of these duties vary with the nature of the right

129 Bateman, supra note 71 at 13. See also Reichman, “A Charter-Free Domain”, supra note 89 at 388, where he suggests that, if courts were to subject the common law to Charter review, they would “run the risk of adopting a state religion”.

130 Weinrib & Weinrib, supra note 17 at 47.

131 Ibid. at 47.
in question. The third moment is the operation of these rights and duties through a set of legal institutions. These institutions, such as courts, are needed to (a) guarantee the security of everyone’s rights and to (b) determine the meaning of the various rights. The Weinribs explain that, in determining the concrete meaning to be given to the rights and duties of the parties, courts may be required to “present a public justification of its conclusion by appealing to considerations that others, as self-determining beings engaged in interactions with one another, can reasonably acknowledge.” In order to do so, they may need to draw from sources that provide publicly agreed-upon values and norms: “in this way, the specific content of the rights is derived, not through philosophical speculation, but through reference to beliefs, values, and modes of reasoning that have public plausibility.” As an example of this type of reasoning, the Weinribs refer to the relevance of statutes to private law:

The behaviour that private law addresses is also regulated by a variety of statutes that are designed to promote safety and to penalise those who endanger others. These statutes may not only be enforced in their own terms but may also, where appropriate, be treated as relevant to the setting of private law standards. In Canada, such statutes are regarded not as formulating a per se standard or as grounding a distinct tort of statutory breach, but as providing evidence for determining whether the defendant should be considered negligent under the general principles of tort law. Accordingly, even where they do not directly apply to the facts being litigated, statutory norms can be regarded “as crystallizing a relevant fact situation which, because of its authoritative source, the Court [is] entitled to consider in determining, on common law principles, whether a duty of care should be raised.” In such a case the statute assists in specifying the content of private law categories in context beyond its scope as a legislative command.

The Weinribs argue that constitutional values can play a similar role, by providing elucidation for the “incidents of dignity included within private law”, and guiding courts in “the

---

132 Ibid. at 48–49.
133 Ibid. at 48.
134 Ibid. at 49
135 Ibid. (footnotes omitted).
elaboration of the principles and standards that govern the private law relationships".136 By analogizing Charter values to statutory standards employed by the court in common law reasoning, the Weinribs provide a compelling example of how constitutional principles may be relevant to private law. However, the Weinribs go on to argue that the Charter is “more than a statute writ large” and thus ought to play a more important and influential role in private law.137 They suggest that Charter values can have a substantive influence beyond that of ordinary legislation, and ought to impact the two main structural features of private law: its relational element and its entitlement element.138 The “entitlement” element of private law refers to the content of the rights, freedoms, and interests that a private litigant can invoke. The content of these rights has traditionally consisted of such matters as physical integrity, property, and freedom to contract. In order for these rights to be meaningful, they must be joined by a correlative duty placed on others not to interfere with them. This gives rise to the “relational” element of private law, which deals with the relationship between the rights of one person, and the correlative duties of another. The Weinribs suggest that private law has a “moral impulse” to maintain a transactional equality between these two parties in considering the injustice that one of them is alleged to have done to the other.139 Thus, the law does not focus solely on the plaintiff’s right without considering the interests of the defendant. Both are treated as equals, and therefore the norms of private law are said to be fair to both.

The relevance of Charter values, according to the Weinribs, affects both of these elements of private law. With respect to the entitlement element, Charter values introduce a new set of

136 Ibid. at 50-51.
137 Ibid. at 51.
138 Ibid. at 52.
139 Ibid.
interests that are eligible for legal protection, namely, “those associated with the values inherent in the constitutionally guaranteed rights”.\textsuperscript{140} This, in turn, impacts the “relational” element of private law, as the “law has to work out the effects that protecting those interests in one party has on the position of the other”.\textsuperscript{141} They suggest that this entails “the mutual adjustment of Charter values and other [private law] normative components in a way that preserves intact, so far as possible, the central range of application of each of them.”\textsuperscript{142}

To accomplish this “mutual adjustment”, the Weinribs propose a modified version of the\textit{Oakes} test geared to private law.\textsuperscript{143} Their version involves a balancing process in which “a central aspect of one normative principle is granted priority over a comparatively more marginal aspect of another.”\textsuperscript{144} Under this analysis, one asks whether the “triumph of the plaintiff’s principle would impact more heavily on the defendant’s than the triumph of the defendant’s principle would impact on the plaintiff’s.” As the Weinribs explain:

\begin{quote}
[S]ince the plaintiff and defendant have equal status in their relationship, the decision between them can not be made on the basis of considerations that reflect the normative position of only one of them – the idea of proportionality maintains the transactional equality of the two parties by treating their relationship as informed by an ensemble of normative concepts, no one of which is absolute.\textsuperscript{145}
\end{quote}

\textsuperscript{140} \textit{Ibid.} at 61.
\textsuperscript{141} \textit{Ibid.} at 53.
\textsuperscript{142} \textit{Ibid.} at 57.
\textsuperscript{143} The test was enunciated by the Supreme Court of Canada in \textit{R. v. Oakes}, [1986] 1 S.C.R. 103 to determine whether a government’s limitation on a right or freedom is reasonable and can be demonstrably justified in a free and democratic society.
\textsuperscript{144} Weinrib & Weinrib, \textit{supra} note 17 at 58.
\textsuperscript{145} \textit{Ibid.}
3.3 Analysis of the Weinribs’ Model

To the extent that the Weinribs suggest that the Charter, like other legislative and constitutional documents, provides helpful guidelines in elucidating concepts and ideas in private law, their arguments are persuasive and compelling. However, it is submitted that arguments which go beyond this premise, particularly the proportionality model, poise a number of problems. First, the proportionality model is highly subjective and unpredictable: its process of balancing “values” lacks sufficient guidelines and relies more on a judges’ personal intuition than on legal principles. For example, by simply granting priority to the party whose “principle” has the least impact on competing principles, a court would be circumventing a number of fundamental considerations inherent in, and necessary to, judicial reasoning. One such consideration is the varying degrees of importance that should be attached to competing values. The Weinribs’ approach seems to ignore that, in certain circumstances, some principles should be normatively attached a higher value than others, and should be granted priority regardless of how heavily they impact on competing principles. Instead, it seems that the principles advanced by both the plaintiff and the defendant will be attached equal importance, and be balanced not according to their moral worth but by the degree to which they impact the other. This approach seems somewhat utilitarian – instead of considering the possibility that one principle may be normatively superior to another, it seems to assert that the best outcome is the one in which all principles advanced by the parties, regardless of their moral status, are least infringed upon. For their part, the Weinribs refute the idea that their version of proportionality gives the “law a utilitarian cast”, and argue that their aim is not to “achieve a ‘utilitarianism of rights’ by
minimising the total weighted amount of all the rights violations in the legal order.”\textsuperscript{146} They instead assert that their approach examines each principle from its own normative standpoint, and “there is no summing across transactions, and thus no sacrifice of the individual in one transaction to the aggregated advantages of others.”\textsuperscript{147} While this clarification may help to remove the “utilitarian cast” of the Weinribs’ approach, it does little to provide an alternative judicial framework. Thus, the problem remains –how can a judge balance competing values in a principled fashion? The Weinribs’ model does not provide a clear answer to this question.

In the absence of any objective guidelines articulating the demands and prioritization of competing \textit{Charter} values and other legal and moral norms, it is submitted that judges would be left to their intuition to decide whether a “triumph of the plaintiff’s principle would impact more heavily on the defendant’s than the triumph of the defendant’s principle would impact on the plaintiff’s.”\textsuperscript{148} This approach would lead to inconsistent jurisprudence and \textit{ad hoc} decisions, as judges possess diverse values and perspectives, and are likely to prioritize various normative principles differently. As the famous jurist Benjamin Cardozo once wrote: “[Judges] may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”\textsuperscript{149}

These criticisms of the Weinribs’ model are perhaps best illustrated through an example, and one which is provided by the Weinribs themselves: the famous \textit{Mepisto} case, decided by

\textsuperscript{146} \textit{Ibid.} at 58.
\textsuperscript{147} \textit{Ibid.} at 58.
\textsuperscript{148} \textit{Ibid.}
the Constitutional Court of Germany in 1971. That case involved a defamation action brought against the publisher of a roman à clef based on the author’s brother-in-law, Gustaf Gründgen, a famed actor and Nazi supporter during the Third Reich. The book was intended to “expose and analyse the abject type of the treacherous intellectual who prostitutes his talent for the sake of some tawdry fame and transitory wealth”. Gründgen’s estate objected to the book’s publication as it included a number of “discreditable episodes that had not occurred in the life of [Gründgen].” As the Weinribs observe, two competing values were invoked in the dispute: the defendant’s freedom of expression and the plaintiff’s interest in protecting his reputation. The question to be asked under the Weinribs’ proportionality model, we recall, is whether the “triumph of the plaintiff’s principle would impact more heavily on the defendant’s than the triumph of the defendant’s principle would impact on the plaintiff’s.” For their part, the Weinribs conclude that “the balance inclines in favour of the defendant”. They argue that the novelist’s power to create an imaginative picture based on his own experience was central to his freedom of expression, and that although Gründgen was entitled to the protection of his reputation, the damage in this case was marginal “since the defamatory episodes were merely exaggerations”.

Although the language and reasoning employed by the Weinribs may be persuasive, it is also revealing of the subjective and unpredictable nature of their proportionality analysis. There are no tests or formulae to determine whether a principle is “central” to a Charter value or only

---


152 Weinrib & Weinrib, supra note 17 at 60.

153 Ibid.
a “marginal” aspect of it, or how competing values ought to be prioritized. Instead, this proportionality analysis simply involves the intuitive and discretionary exercise of “weighing” values and determining which side the “balance inclines in favour of”. Although the Weinribs conclude that their proportionality analysis would have favoured the plaintiff in the *Mephisto* decision, another decisionmaker, without being confined by any objective criteria, could have reached the opposite conclusion. For example, one could have reasoned that the plaintiff’s reputation interests were *severely* violated as a result of the defamatory content of the novel, since a reasonable person would have known that the book referred to the plaintiff but would have been unable to distinguish those discreditable episodes from truth. Furthermore, a judge might conclude that while the novelist was entitled to free expression, he could not exercise that freedom in a manner degrading of another’s dignity, and therefore the balance should have “inclined in favour” of the plaintiff. Indeed, it is interesting to note, this was the very conclusion that was reached by the German court in the actual *Mephisto* case.\(^\text{154}\)

The unpredictable and discretionary nature of the Weinribs’ proportionality analysis can be further demonstrated by applying it to the student club cases. In that context, one may characterize the competing principles as follows: the students’ right to freedom of expression and association on the one hand, and the university’s right to use its property as it wishes, including excluding certain activities from its premises, on the other. Faced with the task of balancing these competing values, one judge may find that the students’ right to expression and association strikes at the core of freedom of expression, and therefore far outweighs any impact on the university’s property rights. For example, in *Healy v. James*, the United States Supreme

\(^{154}\) The lower courts resolved the conflict in favour of the plaintiff Grüdgens and against the defendant publisher. The majority of the Constitutional Court held that it would “not disturb the result below if the lower courts had properly assessed the importance of the basic rights in conflict”, which, in the majority’s view, was sufficiently performed in case: Kommers, *supra* note 150 at 428.
Court held that a refusal to recognize a student organization undoubtedly and substantially violated the students’ associational rights by severely impacting free expression on campus.155 However, another judge may reach the opposite conclusion, as Justice Wong did in Gray v. UBC Student Union, where he upheld a student union’s decision not to ratify a pro-life club, and suggested it had a minimal impact on their expressive activities.156 This is precisely the problem with the “values-balancing” exercise: its language is so ambiguous and its guidelines (or lack thereof) so unstructured that one can not predict, with any measure of certainty, its results. Furthermore, this approach allows judges to make decisions without adequately exploring the meaning or content of a particular “value”. As Joseph Raz has observed, appealing to “values” in rights adjudication is problematic, since “courts tend all too often to claim that a specific policy is entailed by belief in some general value, thus avoiding a concrete justification of their decision.”157 Without any principled criteria or guidelines to direct this exercise, the Weinribs’ proportionality analysis may ultimately “depend on the idiosyncratic inferences of a few judicial minds”158, which could upset “whole areas of settled law in several domains”. 159 The following observation by Professor Bradley Miller illustrates this danger:

155 408 U.S. 169 (1972) at 181-182: “The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes... If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students. Moreover, the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. Such impediments cannot be viewed as insubstantial.” [Healy].
156 Gray, supra note 6 at para. 13: “Whether or not the Students for Life Club is ratified, its members are entitled to meet together, to act in concert to advance their views, to refer to themselves as "Students for Life" or any other name which they may choose, and otherwise to give expression to their anti-abortion views...The issue, again, is not whether the petitioners may hold the beliefs they do, or express those beliefs by any means they see fit, but rather whether they can force, in the name of religious freedom, every student on campus to fund them to do so.”
159 McKinney, supra note 31 at para. 23.
What one judges to be the principles of a free and democratic society will be largely influenced by what one judges to be sound moral and political philosophy. Given the potential for judges’ Charter interpretations (and in particular, the interpretation of s 1) to be influenced by commitments to controversial, idiosyncratic, and possibly unjustified principles of moral and political philosophy, some commentators have argued that if judges are not provided with more concrete guidance to constrain their determinations of what are the principles of a free and democratic society, judges will take on themselves too much authority to shape the law in conformity with their personal moral convictions.160

In order to avoid inconsistency, unpredictability, and unfettered judicial discretion in Canadian jurisprudence, an objective and principled framework which can guide a court’s consideration of constitutional values in private disputes, is necessary. For these reasons, it is submitted that the Weinribs’ proportionality analysis needs further elucidation and consideration before it can be employed in such a manner.

4 Comparing Public Law and Private Law Values

A second concern that arises from the Weinribs’ analysis relates to their discussion of the “central range of application” of public and private law rights. Referring to constitutional jurisprudence, the Weinribs suggest that rights have a core meaning, and violations of a right will increase in severity the more they infringe on its “essential content”. This statement may be accurate as it relates to constitutional rights. For example, the Supreme Court of Canada has found freedom of expression to possess “core” and “marginal” forms. Thus, political expression, which is said to lie “at the very heart of freedom of expression” can only be restricted “for the

most substantial and compelling reasons,”161 while advertising and pornography are considered marginal forms of expression, because they are further from the core values underlying freedom of expression.162

Rights in private law are different. There is no spectrum of “marginal” and “essential” elements of one’s right to property or bodily integrity. These rights are either violated, or they are not. Thus, concepts such as “proportionality” and “minimal impairment”, which have become commonplace in constitutional jurisprudence, would be foreign introductions in private law, and incompatible with the very nature of private law rights. There is a “clear conflict between the indeterminate and indefinite nature of the judicial balancing process and the interest of private actors in clear and calculable legal rules.”163 Again, the writings of John Rawls are illustrative. Rawls describes the need for government actors to respect “equal basic rights and liberties of citizenship” such as freedom of thought and association, and liberty of conscience.164 Rawls acknowledges that none of these constitutional rights are absolute and may need to “be limited when they conflict with one another”.165 In such conflicts, Rawls suggests that we “look for a way to accommodate the significant liberties within the central range of each”.166 Rawls proposes a criterion to delineate the significance of a particular right or liberty: “a liberty is more or less significant depending on whether it is more or less essentially involved in, or is a

162 Moon, ibid. at 35. See also R. v. Lucas, [1998] 1 S.C.R. 439 at para. 34 per Cory J.: “Quite simply, the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of this right the greater will be the ability to justify the state’s restrictive action.” See also Dagenais v Canadian Broadcasting Corporation, [1994] 3 S.C.R. 35 at para. 63 [Dagenais].
164 JFR, supra note 113 at 28.
165 Ibid. at 111.
166 Ibid. at 114.
more or less necessary institutional means to protect, the full and informed exercise of [one’s
capacity for a sense of justice] or [one’s capacity for a conception of the good].” 167

Thus, the basic liberties are said to have a “central range of application” such that some
violations will be more severe than others. According to Rawls, they are to be mutually adjusted
so that their ultimate underlying purpose – the facilitation of one’s capacity for justice and a
conception of the good – can be fulfilled. However, this idea of a “central range of application”
is unique to the basic liberties, and no parallel is found in Rawls’ writings for rights based in
contract, tort, or property law. Such rights fall under a separate regime and fulfill a purpose
different from that of the basic liberties. Indeed, if private law rights were to be adjusted with
the basic liberties in accordance with the same criterion, the latter would (likely) always be
given priority, as they are more directly connected to one’s capacity for the good or capacity for
justice. Even without Rawls’ criterion, judges asked to balance private law rights with public
law rights would, in all likelihood, be predisposed to weigh in favour of the latter. Rightly or
wrongly, the Charter is commonly viewed as the pre-eminent source of values in Canada, and
its values are likely to be perceived as more important and fundamental to those in private law.
Numerous obiter comments by the Supreme Court of Canada would seem to only perpetuate the
perception that the rights and values enshrined in the Charter: “reflect the fondest dreams, the
highest hopes and finest aspirations of Canadian society.”168 Against the backdrop of such
rhetoric, it is difficult to imagine private law rights, or any values not embodied in the Charter,
being given any measure of priority. Indeed, the Weinribs refer to the constitution as “society’s
authoritative repository of legally supreme and publicly accessible values concerning human

167 Ibid. at 113.
168 Vriend v. Alberta, [1998] 1 S.C.R. 493 at para. 67 [Vriend]. See also Hill, supra note 90 at para. 92 where the
Court observed: “The Charter represents a restatement of the fundamental values which guide and shape our
democratic society and our legal system”.
dignity” and a “pre-eminent source on which public reason can draw as it gives concrete meaning to the categories that comprise private law”.\(^{169}\) They go on to distinguish Charter values from ordinary legislation, which they refer to as “merely incidental to the development of the common law”.\(^{170}\) Charter values, they insist, are “different”: they have a “systemic normative significance for private law”, and stand as the “repository of the principles animating the polity as a whole”.\(^{171}\)

It is submitted that this rhetoric is inconsistent with the text of the Charter itself: while the Constitution is the “supreme law of Canada”, it does not claim any priority over the values enshrined in the common law when it comes to disputes between private parties. Why then should Charter values be treated any differently from those found elsewhere in the Constitution, or even outside of the Constitution? As Justice Gonthier wrote in Dagenais:

I disagree with those who argue that the Charter requires that we … discard the unique balance of fundamental values which existed in this country prior to 1982. The Charter provides a means to assure that the enumerated fundamental rights and freedoms are respected. It does not give primacy to any of those rights. The impact of the Charter will be minimal in areas where the common law is an expression of, rather than a derogation from, fundamental values.\(^{172}\)

Indeed, in Dolphin Delivery, the case cited by courts in support of the principle that the “common law must be developed in accordance with Charter values”, Justice McIntyre did not limit his comments to “Charter values” (in fact, he did not even use that term).\(^{173}\) Rather, he

\(^{169}\) Weinrib & Weinrib, supra note 17 at 50.
\(^{170}\) Ibid. at 51.
\(^{171}\) Ibid.
\(^{172}\) Dagenais, supra note 162 at para.181.
\(^{173}\) Dolphin, supra note 84.
referred to the broader category of “the fundamental values enshrined in the Constitution”. Thus, it is important to remember that, since the Charter is only one part of the Constitution, Constitutional values found outside of the Charter are equally significant in common law reasoning. Consequently, one must be careful not to read Dolphin Delivery as establishing Charter values as the ultimate, or even the primary, set of values to which the common law must adhere. One should also bear in mind that Dolphin Delivery did not establish a regime subjecting the common law to Charter-based judicial review, as discussed by Professor Amnon Reichman in his article “A Charter–Free Domain: In Defence of Dolphin”. As such, Charter values should not be viewed as exhaustive or determinative considerations. As Professor Miller writes:

While Charter values can identify certain goods and thus provide reasons to develop the common law in a particular direction, these reasons will not necessarily be conclusive reasons. There may well be good reasons to keep the law as it is, or change it in another direction, and these reasons can be supplied by other Charter values, and perhaps by other constitutional and/or moral principles as well...I can think of no reason, in principle, why it should be the case that in common law reasoning, reasons provided by the motivating principles of the Charter should automatically defeat reasons provided by other principles...With respect to common law reasoning, Charter values (like principles discerned from ordinary legislation and international treaties), are simply taken by the Court as some evidence of the moral standards of the nation. When, in practice, a reason provided by a motivating principle of the Charter is found to defeat some other reason, it is not because of its status as a Charter value but because of its soundness, assessed independently of its status as a Charter value, and by reference especially to its place in the law taken as a whole.

174 Ibid. at 603.
175 For a deeper discussion, see Miller, supra note 160.
176 Supra, note 89 at 329-330. Reichman argues that “[T]he supremacy of the Constitution… does not entail the legal conclusion that the common law is subjected to Charter-based review, or that the common law should incorporate, or conform with, constitutional rights external to the common law. Rather, the only constitutional imperative that applies to the common law, that is, the only imperative that is compatible with the respective natures of the constitutional and common law legal regimes, is the duty on the common law (and the common law courts) to strive for internal consistency and coherence within common law norms and principles — this, and nothing more or less.”
177 Miller, supra note 160 at 255-256 [footnotes omitted].
There is therefore a danger in suggesting that there is something particularly unique about Charter values that makes them different from or superior to all other values. When academic and judicial writers mischaracterize Charter values as “society’s most cherished values” and values embodied elsewhere as “less valued state objectives”, it seems inevitable that courts faced with competing principles will be tempted to “incline in favour” of Charter values, when, in actuality, there may well be good reasons to decide otherwise. 178

5 The Vagueness of Values Language: A Wider Problem

The models presented by the Weinribs and President Barak represent only two examples in an ocean of literature discussing the connection of constitutional rights and private law. 179 A

---

178 Lavoie v. Canada, [2002] 1 S.C.R. 769 at para. 91 per Arbour J.
review of all of these proposals is beyond the scope of this paper. However, many of the problems identified in the discussion above are not unique to these two models. It seems that problems of uncertainty and ambiguity will be inherent in any model based on Dolphin Delivery’s “value” analysis, because the idea of “Charter values” is itself vague and uncertain. After all, what exactly is a Charter value? The courts have referenced the term regularly, but little has been said about what the term “Charter values” actually means.

This is particularly troubling in light of the tremendous role that Charter values can play in private disputes, pursuant to the Supreme Court’s decision in Dolphin Delivery. Notwithstanding this lack of judicial elucidation, academic writers have embraced “Charter values” as an interpretive and legal tool and as providing a “stable, correct, and uncontroversial set of moral norms”. In actuality, however, a value is, by its very nature, an indeterminate idea. As such, “value balancing” is of limited use in jurisprudential reasoning:


180 See Bradley Miller, supra note 160 at 234. Miller observes at 251: “While the phrase is used a great deal in scholarly [and judicial] writing, little has been said about the function of Charter values and no one has attempted to catalogue or categorise them. Most scholarly writing that uses the concept of Charter values uses it uncritically; that is, without an explanation of the terminology or an inquiry into whether the concept is sound and can do the work in judicial reasoning that the Court intends it to do.”

181 See also McLachlin, “Bills of Rights”, supra note 67 at 200, where she suggests that the exclusion of the common law from the review of the Charter is “unsustainable”, and concludes “[i]t thus seems clear that the Canadian Charter has altered and will continue to alter the common law”.

182 See Miller, supra note 160 at 251, discussing academic writing on Charter values. See also J. Mosoff “Excessive Demand on the Canadian Conscience: Disability, Family, and Immigration” (1999) 26 Man. L.J. 176, where she states that “[t]he Charter signals the moral priorities of Canada” and is “a statement of a national commitment to certain values, including providing equality…”.

183 See, for example, J. Feinberg, Harmless Wrongdoing (Oxford: OUP, 1988) at 305-06, where he observes, “[t]he value category, after all, is quite a miscellany.”
The language of “values” is imprecise and ambiguous. A “value” lacks the directiveness of a moral norm. Unlike a moral norm, which always provides a reason for action (although it may be defeated by other, conclusive moral norms) a “value” may merely be a subjective desire or preference, which neither gives rise to moral obligations on the part of others nor even provides a reason for action for the individual deliberator. Labelling something as a “value” does not communicate what duties or rights are thought to attach in specific circumstances. The designation of “value”, at best, can indicate that something is a prima facie consideration which, on closer analysis, may or may not provide a sufficient reason for action.184

The subjectivity and open-ended nature of a “value” analysis is well illustrated in the Supreme Court of Canada’s jurisprudence, where Charter values have been found to include a wide variety of ideas but have been applied loosely and without adequate discussion. In some cases, Charter values have been equated with Charter rights. As such, “freedom of expression”185, “equality”186, the “right to disclosure”187, and “freedom of religion”188 have all been identified as Charter values. This raises a number of questions: how is the “value” of equality different from the “right” of equality? Are they to be treated in the same way, or is their content different? And if all the Charter’s rights and freedoms could also be said to be Charter values, doesn’t the line between private law and public law disappear? That is, by equating Charter rights, which apply in public law, with Charter values, which apply in private law, isn’t the Court in danger of creating a system of “direct horizontality” in which private citizens are bound by the same constitutional duties, albeit cloaked in “values” terminology, as the state? An affirmative answer to this question would seem to conflict with the Supreme Court’s statement

---

184 Miller, supra note 160 at 252-253.
185 Dolphin, supra note 84; Dagenais, supra note 162; Hill, supra note 90; RWDSU, Local 588 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R.156 [Pepsi-Cola Beverages].
that “Charter rights do not exist in the absence of state action”.189 The confusion surrounding
the distinction (or lack thereof) between Charter rights and values has been criticized as a major
“source of error” in judicial decisions, and has left the idea of Charter values all the more
ambiguous.190

6 Expanding Charter Values Beyond the Charter

In addition to defining Charter values as mirror images of Charter rights, the Supreme
Court has found Charter values to include principles which are not found in the Charter at all,
but which are said to underlie it. A leading example of a Charter value falling under this
category is “human dignity”, which is not mentioned anywhere in the Charter but which is
nonetheless said to be “a concept which underlies all the Charter rights”.191 Although the
Supreme Court “has not made clear the sources of its understanding of the place of respect for
human dignity in our constitutional order”, nor “delineated on a consistent basis the theoretical,
comparative or doctrinal content of this concept”192, it has repeatedly emphasized the
importance of “human dignity” in its reasoning. It has held that the “idea of human dignity finds
expression in almost every right and freedom guaranteed in the Charter”193 and affirmed that “a
democratic society capable of giving effect to the Charter’s guarantees is one which strives

189 Hill, supra note 90 at para. 95.
Macklem discusses the Supreme Court of Canada’s controversial decision to “read in” sexual orientation as a
protected ground under Alberta’s human rights statute in Friend, supra note 168, and suggests that the Court
erroneously equated Charter values with Charter rights in its reasoning.
191 Hill, supra note 90 at para. 120.
toward creating a community committed to equality, liberty and human dignity.” 194 Indeed, “human dignity” has played a fundamental role in the outcomes of numerous disputes, as illustrated in \textit{R. v. Salituro}. 195 At issue in that case was a common law rule prohibiting spouses from testifying against one another. The Crown wanted the Court to recognize an exception from this rule for a spouse who was “separated from the accused without any reasonable possibility of reconciliation”. 196 After reviewing the origin and historical development of the rule, Justice Iacobucci, for the majority, concluded that the traditional policy justifications which supported the rule were no longer valid in light of the values enshrined in the \textit{Charter}. In particular, Iacobucci J. found the rule was inconsistent with the value of “human dignity”:

\begin{quote}
The dignity of the person arises not only from the exercise of rights such as the freedom to choose, but also, and just as importantly, from the assumption of the responsibilities that naturally flow from participation in the life of the community. At the level of principle, it is just as much a denial of the dignity of an irreconcilably separated spouse to exempt the spouse from the responsibility to testify because of his or her status as it is a denial of the spouse’s dignity to deny his or her capacity to testify. This is all the more true where historically it has been women who have been unable to testify. 197
\end{quote}

Iacobucci J. concluded that the rule making an irreconcilably separated spouse an incompetent witness conflicted with this idea of “human dignity” and was therefore “inconsistent with the values enshrined in the \textit{Canadian Charter of Rights and Freedoms}”. As such, the common law was modified accordingly. 198

\begin{flushright}
197 \textit{Ibid.} at para. 51.
198 Iacobucci J. also noted that the rule reflected a “view of the role of women which is no longer compatible with the importance now given to sexual equality” (para 38).
\end{flushright}
The outcome of the dispute in *R. v. Salituro* may be unsurprising, if not laudable, but the reasoning is rather unusual. The court employed what it described as a constitutional value - even though it is mentioned nowhere in the constitution - to incorporate additional values, such as freedom of choice, to modify a centuries-old common law rule. However, the court spent little time discussing what the idea of “human dignity” encompasses: it was simply accepted at face value. In defining the idea of “human dignity” so vaguely, the court left open the possibility for endless additional “Charter values” to be incorporated through it. Indeed, in *Hill v. Church of Scientology*, the Court introduced a new Charter value: the “reputation of an individual”. The Court explained that, even though it “is not specifically mentioned in the Charter”, the good reputation of the individual “represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights”, and “[i]t follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.”

Although they were relatively uncontroversial, the court’s decisions in *Salituro* and *Hill* reflect the problems inherent in “values” rhetoric. It empowers the Court to simply introduce new considerations and interpret them to mean just about anything, such that judicial decisions can be based on values derived from other values, which themselves are undefined and open-ended. This reasoning, it seems, could make limitless the considerations and values that influence the outcome of any dispute. Of course, one may find these objections to the use of Charter values in judicial reasoning overstated. After all, the courts have always been free to take into account new ideas and changing social circumstances in developing the common law. What is different here, however, is that, for the first time, courts are labeling these values “constitutional”. These are no longer ordinary policy considerations or common law values, but

---

199 *Hill, supra* note 90 at para. 120.
sovereign principles crowned with the primacy of the Constitution, the “supreme law of Canada”, of which any inconsistent law is of “no force or effect”. While any amendment to a Charter right would require overwhelming majorities of the Federal and provincial legislatures, a Charter value could (at least theoretically) be created, modified, redefined, or eliminated in any particular judicial decision. The courts’ use of Charter values in private adjudication therefore runs the risk of encroaching on, if not usurping, the legislative function.

Furthermore, as discussed above, when a value is described by the Court as “supreme”, it is difficult to imagine private law rights, or any values said to be embodied outside of the Charter, being given any measure of priority. Not only does this place private law values at a severe disadvantage, it provides judges a “shortcut” in providing a justification for their decisions: instead of engaging in the merits of the arguments for and against a particular private law doctrine, they could simply refer to the “higher” Charter value as trumping the former as part of Canada’s “supreme law”. This level of abstraction “allows judges to maintain the fiction that a select ‘Charter value’, considered in isolation from other moral norms, constitutes a conclusive, undefeated reason to develop the common law in a particular way”. Indeed, one can already see this type of “short-circuit” reasoning in court decisions suggesting that equality is a master value which ought to be given priority over all other competing values.

---

200 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 at s. 52.
202 Miller, supra note 160 at 256.
203 See Ibid. at 304-305: “The danger of Charter values language is that it provides a ready ‘justification’ for an unjustifiable privileging of the moral norms underlying the enumerated sections of the Charter, over other moral norms. The characterisation of a moral norm as a Charter value does not assist in identifying whether that moral norm is defeated as a reason for action by some other moral norm. The technique allows judges to excuse themselves from providing justifications for very controversial moral judgments that they make, simply by claiming to follow the authority of some vaguely defined Charter value of unspecified weight and priority. The appeal to the apparent authority of Charter values thus short-circuits moral reasoning.”
principles[^204], or in academic writing that asserts that Charter values ought to triumph over other, “religious” values[^205]. This is particularly troubling because, as Professor Don Stuart argues, Charter values can be manipulated and used as “weasel words” that are “intentionally ambiguous or misleading”, and reliance on such terms can lead to “vague and perhaps disingenuous” legal decisions[^206]. As such, a more principled approach is needed to guide the Court’s enunciation of “Charter values” before they be given such extraordinary potential to influence – indeed, to transform – private legal relationships.

### 7 An Interim Conclusion: The Horizons of Charter Values in Canada

A number of issues have been explored in the discussion above concerning the various problems involved in “values-based” private law adjudication. Perhaps, it is for all of these reasons (or any one of them), that the Supreme Court of Canada has rarely employed the principles espoused in Dolphin Delivery to impact, in any significant way, the outcomes of purely private disputes[^207]. However, notwithstanding all of problems discussed above, there are

---

[^204]: See Trinity Western University v. British Columbia College of Teachers, [2001] S.C.R. 772 at paras. 59-60 per L’Heureux-Dubé J.


[^207]: Dolphin and Hill stand as the two most significant decisions dealing with the connection of constitutional rights to private law, and in neither case were Charter values determinative. Although the Court has applied Charter values in numerous other cases, they have not done so in such a way as to require private citizens to respect one another’s constitutional rights per se. In Dagenais, supra note 162 for example, the duty to respect Charter values was placed not on the parties but on the judge responsible for issuing the publication ban. In other cases, such as Salituro, the Court has employed Charter values to modify “outdated” common law rules. In M(A) v. Ryan, [1997] 1 S.C.R. 157, for example, the Supreme Court employed Charter values to recognize a “privilege” between a psychiatrist and his patient so as to protect psychiatric records. See also Pepsi-Cola Beverages, supra note 185, where the Court found that the common law rule rendering secondary picketing per se unlawful was out of step with the Charter value of freedom of expression.
strong arguments to support the idea that constitutional values can and do play a legitimate role in common law reasoning. One must not dismiss their usefulness in fleshing out ideas and giving crystallized meaning to the content of rights, in the same way that principles embodied in other statutes do. In this regard, the Weinribbs provide a very insightful discussion of how Charter values, like other statutory principles, can crystallize some of the “values to be recognized in the process of ascribing specific meanings to the rights and correlative duties of private law.” Just as courts have consulted statutes for the last quarter of a century to determine what constitutes reasonable conduct in negligence actions, courts can employ the Charter to facilitate a degree of “cross-pollination of the common law by constitutional principles”. An example can be found in Re Doman Forest Products Ltd, a labour dispute in which the arbitrator had to determine the admissibility of surveillance videotapes obtained by a private employer of his absentee employee. The arbitrator observed that constitutional jurisprudence dealing with privacy issues provided helpful considerations in the dispute before him:

[I]t seems to me that while s. 8 of the Charter does not apply to this dispute, as an adjudicator I am called upon to bear in mind those fundamental Charter values now articulated by the Supreme Court of Canada ... As already noted, the values extracted from those decisions are clear. Electronic surveillance by the state is a breach of an individual's right to privacy and will only be countenanced by application of the standard of reasonableness enunciated in Hunter v. Southam Inc. I must now relate those values to the realm of a private dispute between an employer and an employee whose relationship is governed by the terms of a collective agreement.

---

208 Weinrib & Weinrib, supra note 17 at 49-50.
209 Jones, supra note 10 at 373.
210 [1985] B.C.C.A.A.A. No. 79 [Re Doman].
211 Ibid. at 279.
The Weinribs, like the arbitrator in *Re Doman*, rightly recognize that private law rights need to be assessed in a larger context. Since all persons are equal and no private law rights are absolute, they need to be adjusted and limited in order to guarantee the security of everyone’s rights. As the Weinribs observe, this sometime requires looking beyond private law to “beliefs, values, and modes of reasoning that have public plausibility” to determine the meaning of the various rights.212 This is the task of the common law courts – which can draw upon (and historically have drawn upon) broader values to adjust and limit private law rights.

As the Weinribs argue, without institutions such as common law courts to determine the content of rights, “these rights cannot really function as juridical expressions of the dignity of self-determining agents.”213 Although a number of the Weinribs’ (and President Barak’s) arguments have been criticized in the discussion above, one core argument is not disputed: that the *Charter* provides ideas and principles that a court may draw upon for guidance in determining the appropriate extent and content of rights and duties at common law. This idea, that the common law provides the locus and legal tools for adjusting private law rights with broader public values, will be discussed further in Part III below.

For now, however, it must be stressed that constitutional values, just like any other value, should not be relied upon in common law reasoning as determinative considerations *per se*. Rather, they should viewed as one of many sources that a court may look to “present a public justification of its conclusion…that others, as self-determining beings engaged in interactions with one another, can reasonably acknowledge.”214 Indeed *Charter* values do not present a

---

212 Weinrib & Weinrib, *supra* note 17 at 48-49.
213 Ibid at 48.
214 Ibid.
complete or exhaustive list of social or political values. As such they should be joined with other principles in order to provide valid (though not exclusive) considerations that are helpful to, but not binding on, legal decision-makers. In this regard, it is submitted, Charter values ought to be viewed as similar to international treaties and agreements, which are treated as influential, but non-binding sources of law in Canadian jurisprudence.  

It must also be emphasized that, while Charter values may have a legitimate role in influencing private law disputes, there still remain many concerns, as discussed above, concerning their ambiguity and potential for abuse. As such, courts should be cautious in applying Charter values in private litigation and would be wise to adhere to the words of McLachlin J. (as she then was) in Watkins v. Olafson:

[M]ajor revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution.

In cases where Charter values may play some role, the manner and extent of their application will need to be more carefully explored, and presented in a more principled and satisfactory way than it has been in the literature has thus far. It should be acknowledged that this paper does not seek to articulate such a judicial framework: this discussion would be beyond the scope of this particular project. This paper instead invites further discussion on the issue by suggesting that existing suggestions are lacking. As will be discussed more fully in the following section, it also argues that the need to look to the Charter to provide new remedies in

---

private human rights disputes may be exaggerated, as courts may be overlooking a number of flexible and nuanced remedies already available at the common law. It is submitted that these options should be more deeply examined before jumping to “Charter values” for recourse.

Take, for example, the case of *R. v. Salituro* discussed above. Although the court relied on Charter values in that case to modify the common law rule in question, it is submitted that a simpler and more principled remedy was available at common law. The rule that a spouse could not testify against another spouse in criminal proceedings was based on the idea that a marriage bond is a special relationship that should be protected and preserved. However, as the court explained, “[w]here spouses are irreconcilably separated, there is no marriage bond to protect”! 217 As such, the rationale underlying the common law rule was simply irrelevant to the particular facts of the case, and the rule could have been modified accordingly, without invoking such ambiguous notions as “Charter values” and “human dignity”.

Indeed, many of the principles said to constitute “Charter values” are already present in the common law, and, in fact, pre-date the Charter’s patriation in 1982. Freedom of expression, for example, has long been recognized as a common law principle, as reflected in the various defences available in the law of libel. As the Supreme Court acknowledged in *Dolphin Delivery*,

Freedom of expression is not...a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.218

217 *Salituro, supra* note 195 at para. 44.
218 *Dolphin, supra* note 84 at para. 12.
Professor Hogg has also reiterated this point, observing that “Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights”.219 Similarly, equality and freedom of association could also be said to be principles that are latent in the common law. The former is reflected in the limits placed on one’s rights in tort law such that a person only has as much liberty as is consistent with the rights of others. The latter is evident in the common law’s treatment of voluntary associations, allowing them to define criteria of membership, internal affairs and discipline.220

Of course, it may be that, in some cases, existing common law principles can and should be illuminated by, and even modified in accordance with, broader social ideas and principles, such as Charter values.221 However, in order to maintain the integrity of private law, it is imperative that this development take place within existing common law channels, as President Barak suggests. Further, this requires more than mere lip service: courts must not try to manipulate existing common law principles to disguise a direct importation of Charter rights and duties in private law. Rather, courts must develop the common law in an internally consistent manner which recognizes the relevance of public values in certain situations, but which ultimately respects the inherent characteristics, principles and autonomy of private law.

---

219 Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985) at 713.
220 I am grateful to Professor Alan Brudner for drawing my attention to these examples of shared common law/constitutional values.
221 See A. Reichman, “Property Rights, Public Policy and the Limits of the Legal Power to Discriminate” in Daphne Barak-Erez & Daniel Friedmann eds., Human Rights in Private Law (Oxford: Hart Publishing, 2002) 245 at 279 [Reichman, “Property Rights”]: “Leaving political choices of policy to the statutory arena requires that the common law not automatically accept a political choice contained in a statute; at the same time, the common law must take note of the rationale behind the choice the community has made, and examine whether the argument embedded in the statute requires elucidation of the common law rule on point.”
An illustration of this delicate balance can be found in those instances of the common law which recognize a “privilege”: A privilege can be described as a mechanism which suspends the usual operation of the law in order to protect some broader social or political value, without changing the principles of the law themselves. In other words, the privilege operates as an exception to the governing legal principles; it does not deny their internal coherency together.222 The law of defamation provides a well known example: “there are certain occasions on which public policy and convenience require that a man should be free from responsibility for the publication of defamatory words.”223 Some of these special occasions include: statements made in the course of judicial or parliamentary proceedings, statements made pursuant to a legal, social, or moral duty, or statements that are a fair and bona fide comment on a matter of public interest. On such occasions, a privilege arises to protect the defendant (in varying degrees) for making what would otherwise be considered defamatory words. These privileges respect the integrity of the private law principles of right and duty, while recognizing broader public policy considerations: it acknowledges that the words are defamatory, but liability is suspended in light of the policy objectives of protecting freedom of expression, political discourse, and moral duties, among others.

In dealing with private law disputes, the question that should be asked is not whether the Charter can be directly or indirectly imposed on private actors, but whether there are existing common law principles relevant to the dispute which take into broader public policy considerations. These considerations may, in turn, then be informed by the values enshrined in the Charter, among other principles (no one of which is determinative). The goal of the

remainder of this paper is to apply this analysis to the student expression cases. In the absence of the *Charter* and human rights legislation, are there any common law principles that can provide a remedy to aggrieved university students? Can a university exclude students, and their expressive activities, at its whim under the common law? The following discussion will argue that the answer to these questions are “yes” and “no” respectively, by looking to a line of common law cases supporting the notion that even private entities are precluded from acting in a discriminatory manner in certain situations. The principles espoused in these cases, while partially based on broader policy considerations, preserve the integrity of the fundamental principles of private law, and provide a compelling illustration of the flexible and remedial qualities of the common law.
[W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him . . . . because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade.

Lord Holt, Chief Justice of England and Wales, 1701

Having...created a forum generally open for use by student groups...the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms.

United States Supreme Court, 1992

224 Lane v. Cotton (1701), 88 E.R. 1458 (K.B.) at 1464-65 [Lane v. Cotton].
1 Property Rights under Common Law

Generally speaking, at common law, a property owner has the right to do whatever he pleases with his own property. According to the traditional philosophy of property law, “he who owns may do as he pleases with what he owns”, or, in the early words of the Supreme Court of Canada, “chaque propriétaire est maitre chez lui”. This would include the right of a property owner to exclude certain persons from his premises, including those of a certain race, gender, religion, political viewpoint or even eye colour. This common law right to exclude has been described as the “essence of private property”, and was summarized by the Ontario High Court of Justice in Russo v. Ontario Jockey Club as follows:

There is a general principle in common law…that a landowner has the exclusive right to decide who is allowed to remain on his or her land. The landowner is not compelled to give a reason when the visitor is asked to leave the land. Furthermore, the landowner is not under any duty to follow the principles of natural justice when excluding any person.

However, the right to exclude is not absolute, and the common law has historically recognized limitations on the powers of landowners to do as they choose with their property: *sic utere tuo ut alienum non laedes*. This was evidenced, for example, in a number of common

---

226 Reichman, “Property Rights”, supra note 221 at 248.
227 R. Powell, *The Law of Real Property*, vol. 5A (Albany: M. Bender, 1995) § 746, at 494. Powell observes, however, that this viewpoint eventually evolved into “a position which hesitantly embodies an ingredient of stewardship”.
230 *Russo v. Ontario Jockey Club* (1987), 62 O.R. (2d) 731 at 733 (Ont. H.C.). In the final paragraph of his decision, Justice Boland writes, “Thus, the Canadian common and statute law clearly preserves the landowner's right to exclude persons from the property without the prerequisite that there be a reasonable ground for such action.”
231 “One must use his property so as not to injure the rights of another”. For an early discussion of the maxim, see *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37 (N.Y. Sup. Ct. 1932), dealing with a nuisance claim brought by the owner of a private residence against an adjoining factory. The court dismissed the claim because the factory’s use of its property was a reasonable one and not a nuisance *per se* but affirmed at 39 that “The general rule that no
law cases which required property owners engaged in “common callings”, such as innkeepers, common carriers, and ferry operators, to grant the public access to their property and services without discrimination.\textsuperscript{232} An early explanation of the common calling cases was provided as follows:

From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a ‘common’ or public occupation; and for a similar reason public officers were subjected to the same exceptional treatment. Such persons were innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, and gaolers. Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business.\textsuperscript{233}

In essence, the common law required those in certain professions, deemed public in nature, to abide by a number of unique duties, including the duty to provide services at a reasonable price and without discrimination.\textsuperscript{234} Discrimination was prohibited both on the basis of “group based aversion” and “individual dislike”.\textsuperscript{235} Thus, an innkeeper could

\begin{footnotesize}
\textsuperscript{233} Joseph Henry Beale, Jr. “The History of the Carrier’s Liability” (1897) 11 Harv. L. Rev. 158. \\
\textsuperscript{234} C. K. Burdick, “The Origin of the Peculiar Duties of Public Service Companies” (1911) 11 Colum. L Rev. 514 at 515: “The features which at early common law distinguished those engaged in public or common callings (the original public service companies) from those who were not so engaged, were the peculiar general duties laid upon the persons engaged in common callings to serve all applicants for their services, and to perform such services with care without a special \textit{assumpsit} to that effect. To these primary duties there are certain corollaries, namely, that the service must be reasonably adequate and rendered upon reasonable terms, and that it must be impartial.” \\
\end{footnotesize}
not deny lodging to a guest simply because of his race\textsuperscript{236}, religion\textsuperscript{237}, or because he was personally disliked.\textsuperscript{238} In the words of the Supreme Court of Michigan, once an individual “undertook to conduct a public business, he did so subject to the requirement that the business be carried on without unjust discrimination.”\textsuperscript{239}

The possible relevance of these decisions to the student club cases is clear: it could be argued by analogy that universities, as institutions open to the public and providing a public service, are akin to the common calling professions. As such, universities, like innkeepers, ferrymen, and the many other professions historically recognized in the common calling cases\textsuperscript{240}, should be prohibited from arbitrarily excluding certain students, such as those with controversial viewpoints, from campus activities. However, to support such an argument a deeper analysis of the common calling cases, and their underlying rationales, is required.

\textsuperscript{237} See Rothfield v. North British Railway Co. (1920), S.C. 805.
\textsuperscript{238} See Kenny v. O’Loughlin (1944), 78 Ir. L.T.R. 116.
\textsuperscript{240} For an impressive list, see E. Adler, “Business Jurisprudence” (1915) 28 Harv. L. Rev. 135 at 149-151. This broad list was narrowed to three categories which remain recognized as common callings, and subject to special duties at common law, to this day: innkeepers, ferrymen, and common carriers (see Reichman, “Property Rights”, supra note 221 at 249). However, modern cases have applied these duties, by analogy, to other private entities, such as hospitals, trade unions, and professional associations, as discussed below. Several commentators argue that the common calling cases should apply to most or all commercial activities – see for example, H. Molot, “The Duty of Business to Serve the Public: Analogy to the Innkeepers Obligations” (1968) 46 Can. Bar Rev. 613 at 622, where he queries “[W]hy should not ["any place to which the public is customarily admitted"] too, like the inn, be made to answer for declining service to the person with a physical deformity, long hair or eccentric dress? Is narrow-minded behaviour and prejudice of this ilk to be tolerated in such establishments merely because human rights legislation does not reach this far?” See also Reichman, “Property Rights”, supra note 221; J.W. Singer, “No Right To Exclude: Public Accommodations And Private Property” (1996) 90 Nw. U. L. Rev. 1283.
1.1 Common Calling Cases: Finding a Rationale

A number of rationales have been suggested to explain the “peculiar” common calling cases.\(^{241}\) For example, many early commentators suggested that the special duties imposed on public callings arose from the fact that those professions possessed a monopoly on certain services, and more stringent rules of law were required to ensure that those monopolistic powers were not abused.\(^{242}\) However, this rationale is questionable in light of the fact that “there is little evidence supporting a finding that a monopoly ever existed in the inn industry, or in any other historic common callings.”\(^{243}\)

Another rationale proposed has been the “prime necessity” doctrine.\(^{244}\) Under this approach, common callings were seen as providing prime necessities, such as water, transport, safe lodging, and electricity, and were therefore required to supply those goods and services to all, without discrimination. Although this doctrine may have been a factor in some decisions, it too is unsatisfactory as an explanation for all of the common calling cases. For example, although accommodation may have been a “prime necessity” for travellers in medieval England, where inns were few and far between and roads were dangerous at night, it appears that “factors such as distance, unfamiliarity, or danger of hostile environment played little role in 19th

\(^{241}\) See Burdick, supra note 234.

\(^{242}\) See for example, Bruce Wyman, “The Law of the Public Callings as a Solution of the Trust Problem” 17 Harv. L. Rev. 156 at 161. This rationale was also used by Lennox J. in Franklin v. Evans, supra note 236 at 350, where he suggested that it was necessary to find the existence of a monopoly in order for a profession to be subject to the same special duties as the common callings: “a restaurant-keeper is not at all in the same position as persons who, in consideration of the grant of a monopoly or quasi-monopoly, take upon themselves definite obligations, such as supplying accommodation of a certain character, within certain limits, and subject to recognised qualifications, to all who apply” [para. 8].

\(^{243}\) Reichman, “Professional Status”, supra note 235 at 103. See also Adler, supra note 240 at 149 where he concludes “Monopoly, therefore, cannot be accepted as an explanation of the distinction between public and private callings, either at present or in the distant past, for it does not explain the distinctions within a calling or account for the difference supposed formerly to exist between such tradespeople as innkeepers and tailors, and such as carpenters and brewers, and it fails to account for the present-day difference in the treatment of a city hotel, struggling under competition, and a coal company absolutely controlling the coal supply of a city or state.” See also Molot, supra note 240 at 631 where he reaches a similar conclusion.

\(^{244}\) See, for example, Minister of Justice for the Dominion of Canada v. The City of Levis, [1919] A.C. 505 (P.C.).
century cases, let alone in cases decided more recently.\footnote{Reichman, “Professional Status”, supra note 235 at 105.} In fact, in many of the early common law cases, the courts did \textit{not} require a finding of necessity to establish the special duties of those engaged in common callings.\footnote{Ibid.}

A third explanation of the common calling cases is that they were based on a connection between the landowner’s property and the exercise by the plaintiff of a common right, enjoyed by all members of the public. Take for example, the innkeeper cases, in which property owners were required to serve all members of the public, despite the fact that their property was privately owned. Was there any “common right” involved in these cases? A strong argument can be made that there was. As a member of the public, every individual has a common right to make use of public highways, roads, and passages without hindrance.\footnote{See Halsbury’s Laws of England, vol. 21 (2004 Reissue), “Highways, Streets and Bridges” (QL) at para. 1, defining a highway as a “way over which there exists a public right of passage, that is to say a right of all Her Majesty’s subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance”, citing \textit{Ex parte Lewis} (1888), 21 Q.B.D. 191 at 197 per Wills J.} In order to make use of these roads, however, travellers need accommodation. Indeed, without such accommodation, the value of the common right to access public highways would be severely undermined, if not eliminated, as travellers would be precluded from journeying at any significant length without encountering danger to their own health and safety.\footnote{See Peter Benson, “Equality of Opportunity and Private Law” in Daphne Barak-Erez & Daniel Friedmann eds., \textit{Human Rights in Private Law} (Oxford: Hart Publishing, 2002) 201 at 233.} Thus, if an innkeeper were to discriminatorily exclude travellers from his property, he would not only be denying them a safe haven from potential danger (which would be the basis for imposing a duty under the “necessity” doctrine), but would also, in effect, be impairing their common right to access public highways. As such, one could argue, innkeepers were prohibited from excluding
travellers from their premises without good cause. The same analysis applies to ferrymen, who transport members of the public over waterways. Since such waterways are deemed in law to be public highways, ferrymen could not use their property in a manner which denied members of the public their right of passage over such channels.

While this explanation is more compelling than the “necessity” and “monopoly” doctrines, it also seems insufficient in light of some of the common calling decisions. For example, in some cases, liability was imposed on an innkeeper who arbitrarily denied service to a traveller, even though the traveller had a selection of nearby inns available to him and was able to find alternative accommodations. In such cases, it is difficult to see how the traveller’s “right to travel” was burdened. It is also noteworthy that the common law did not require owners of private dwellings to open up their residences to travellers in need of accommodation: as such, they were able to exercise their property in a manner which burdened the public’s common right to travel. Why the distinction?

---

249 See Constantine, supra note 236. Courts have found reasonable grounds for exclusion to include “the prevention of misconduct or immorality, and the protection of the proper functioning of the business”: “Note: The Antidiscrimination Principle in the Common Law” (1991) 102 Harv. L. Rev. 1993 [“Note: The Antidiscrimination Principle”], at 1995 citing Atwater v. Sawyer, 76 Me. 539 at 541 (Sup. Ct, 1884).


251 Constantine, supra note 236 at 697 per Birkett J.: “A traveller is, in my opinion, entitled to choose the hotel at which he desires to be a guest, and the defenders are not entitled to put a traveller, desiring to use their hotel, to the trouble and expense of finding another hotel” (quoting Rothfield v. North British Railway Co., supra note 237).

252 See also Lane v. Cotton, supra note 224 at 1468: “[F]or if there are several inns on the road, and yet if I go into one when I might go into another, and am robbed, or otherwise lose my goods there, the election I had of using that, or any other inn, shall not excuse the inn-keeper.”

253 Singer, supra note 240 at 1308: “A private owner had no…duty under English law to house members of the public even if they were in dire straits.”
The answer has to lie in the actions of the innkeeper himself, as opposed to solely in the common rights of the public. It is submitted that, in the common calling cases, liability was based on the defendant’s violation of a “common right” held by the public. However, that “common right” existed because it was created by the landowner’s own actions in opening up his property to the public and inviting them to receive his goods and services. To support this interpretation, it is helpful to look to the earliest cases, and subsequent writings, on the common callings.

1.2 History of the Common Callings

The first suits against those engaged in common callings were brought pursuant to the introduction of “the action on the case” in English law.254 The “action on the case” allowed a plaintiff to recover damages for a wrong committed by the defendant, usually arising from a breach of an express or implied contract.255 In order to succeed, the plaintiff generally had to plead and prove that the defendant had specifically and expressly undertaken an assumpsit, that is, “a promise to do some act or pay something to another”, and was in breach of that assumpsit.256 However, there was an exception to this requirement: in actions against those engaged in common callings, such as common carriers and innkeepers, there was no need for the plaintiff to prove that there was an express assumpsit.257 Rather, the assumpsit was implied: it seems that the fact that one was a common carrier or innkeeper was itself a general assumpsit, an undertaking given to the public, to provide services properly and to all. An allegation of a

254 See Burdick, supra note 234 at 515.
256 Ibid., s.v. “assumpsit”.
257 James Barr Ames, “The History of Assumpsit” (1888) 2 Harv. Law Rev. 1 at 6: “Accordingly, so far as the reported cases and precedents disclose, an assumpsit was never laid in a count in case against a common carrier or innkeeper for the loss of goods.” See also Burdick, supra note 234 at 516-522 and cases cited therein.
failure to so serve was a sufficient allegation of breach of this implied *assumpsit*, and “it was therefore unnecessary to set forth these allegations of an *assumpsit* and its breach in express terms.”258 As William Blackstone summarized in his *Commentaries on the Laws of England*:

There is also in law always an implied contract with a common innkeeper, to secure his guest's goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their *general* undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but, in order to charge him with damages, a *special* agreement is required. Also, if an innkeeper, or other victualler, hangs out a sign and offers his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller.259

Thus, by the very act of entering a profession which held itself out to serve the public, an individual was deemed at law to undertake a legal obligation to, among other things, serve all members of the public who applied, and to do so with care. As an English court held in 1450, in what was possibly the “earliest case for refusal to serve”260: “[w]hen a Smith refuses to shoe my horse, or an Innkeeper refuses to give me food in his inn, I will have an Action on the case, notwithstanding that there is no act done, for this does not sound in contract.”261 One who “hung out a sign” made an invitation to the world, and in doing so vested a common right in the public to receive his services or use his property for a certain purpose. Once someone created such a common right, he had a duty not to violate it by denying services arbitrarily or discriminatorily. The fact that he did not have a monopoly on the service, or that it was not a


259 See William Blackstone, *supra* note 232 at 164-165. See also Singer, *supra* note 240 at 1309.


261 Keilway 50, pl. 4 (1503), 72 E.R. 208, quoted in Molot, *supra* note 240 at 627.
“prime necessity” to the individual seeking it, was therefore irrelevant to a finding of liability. The common caller had voluntarily undertaken an *assumpsit* to serve the public, and was liable for breaching this obligation. As Lord Holt held in the early case of *Lane v. Cotton*:

> [W]herever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him…If on the road a shoe fall off my horse, and I come to a smith to have one put on, and the smith refuse to do it, an action will lie against him, because he has made profession of a trade which is for the public good, and has thereby exposed and vested an interest of himself in all the King's subjects that will employ him in the way of his trade. If an innkeeper refuse to entertain a guest where his house is not full, an action will lie against him, and so against a carrier, if his horses be not loaded, and he refuse to take a packet proper to be sent by a carrier [emphasis added].

1.3 Property Affected with a Public Interest

The idea that one accepts special responsibilities once he vests a common right in the public is further elucidated in a line of cases dealing with “property affected with a public interest”. Those cases held that, where a property is “affected with a public interest”, the power of a landowner to do as he pleases with his property would also be limited, so that where members of the public sought to use the property for its public purpose, the owner could not bar access. Thus, while the common calling cases could be read as focusing on the contractual relationship between a business owner and the public, the “property affected with a public interest” cases focus more on one’s property rights, and the limits placed on it when he applied his property to a “public purpose”. Of course, in many cases, these two ideas overlapped: as we have seen in the innkeepers’ cases, one’s duty to provide a service often involved granting the

---

262 *Lane v. Cotton*, supra note 224 at 1464-65.
263 For a history of the doctrine, see B.P. McAllister, “Lord Hale and Business Affected With a Public Interest” (1930) 43 Harv. L. Rev. 759.
public access to his private property. Thus, it is not uncommon to see a court make reference to “property affected with a public interest” in common calling cases. For example, in *Uston v. Resorts International Hotel* the New Jersey Supreme Court held:

[W]hen property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in a . . . discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers…innkeepers … owners of gasoline service stations… or to private hospitals… but to all property owners who open their premises to the public. Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use [emphasis added].

Other famous cases dealing with “property affected with a public interest” include *Bolt v. Stennet* where the private owner of a crane on a public wharf could not deny its use to individuals who needed it to unload a boat, and *Allnut v. Inglis* where a private company that owned a warehouse certified by government to store goods free of import duties, could not charge unreasonable prices for storage. The court held that although the warehouse was privately owned, it had been granted special duty-free status by the government and as such was “affected with a public interest” and “cease[d] to be juris private only”:

There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property for the use of it: but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the

---


266 (1810) 12 East 527, 104 E.R. 206 [*Allnut*].

267 *Ibid.* at 212 per LeBlanc J.
benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms.\textsuperscript{268}

These cases could be read as stating that, when a private person applies his property in a manner that allows him to directly profit from the public’s use of it, he assumes certain obligations and responsibilities to not burden the exercise of those common rights, in return. The obligation is not so much owed to any one individual, but to the public a large, who share the common right. In short, once a landowner has designated part of his land as a public place, the property is “placed in a public domain of sorts, under a legal regime that applies to lands used for [public] purposes”.\textsuperscript{269} Activities in such places are by definition “common”. That is, either by the owner’s invitation to do business with the public, or his decision to apply his property in a manner which vests an interest in the public, the community at large is engaged and has an interest in the activities that take place on that property. As the United States Supreme Court held in \textit{Munn vs. Illinois}:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control [emphasis added].\textsuperscript{270}

As such, the law cannot permit a landowner to exclude members of the public on the basis of certain characteristics that are irrelevant to the \textit{raison d’être} of the property that is affected

\textsuperscript{268} \textit{Ibid.} at 210-11, per Lord Ellenborough C.J.

\textsuperscript{269} Reichman, “Property Rights”. \textit{supra} note 221 at 251.

\textsuperscript{270} 94 U.S. 13 (1876) per Waite C.J.
with a public interest.271 There has to be a rational relationship, a causal nexus, between the reason for the refusal and the function of the property.272

1.4 Summary: The “True” Rationale of the Common Calling Cases

In summary then, the idea underlying both the common calling and the “property affected with a public interest” cases seems to be recognition of the fact that, when one makes an invitation to do business with the world, or puts his property to a public use, he vests a common legal right in all members of the public. He thus has a duty not to unreasonably deny access to any member of the public who wishes to exercise that common right in a manner that is “consistent with the reasonable character and import of the owner’s invitation”.273

This, it is submitted, is an example of the type of common law reasoning discussed in Part II above: the common law courts modified a private law right – the right to do with one’s property as he pleases – after assessing it in the context of a broader legal framework. This required consideration of such values as the public’s interest in preserving equality of all persons, regardless of their characteristics, and accessing property in which, by nature of its use, location, and characteristics, they share a common political, economic, or social interest. In this way, the special rules attached to common callings can be seen as analogous to a legal privilege: they suspend the usual operation of the law in order to protect broader social or political values, without changing the principles of the law themselves. The question that remains, of course, is

271 Reichman, “Property Rights”, supra note 221 at 251-252.
272 See Doe v. Bridgeton Hospital, supra note 264 at 488.
273 Benson, supra note 248 at 239.
whether the common calling and “property affected with a public interest” cases have any relevance for universities.

2 Application of the Common Calling Cases to Universities

The answer to this question depends on whether universities can be said to vest a common right in the public, or apply their property to a public purpose, when they invite students and members of the public to use their facilities for expressive activities. This determination requires further exploration of what renders a particular piece of property “affected with a public interest”. The short answer is that courts have not clearly delineated the actions a landowner must take to hold his property out to the public.274 A survey of American jurisprudence suggests that determining whether a property was affected with a public interest was a finding of fact275, and many early cases left the question to a jury.276 Can any further elucidation be drawn from the case law? Some objective factors can be identified, such as whether the business in question took steps to reach the general public through advertising277, or whether the business was carried on under a license or privilege granted by the state.278 In *Doe v. Bridgeton Hospital*279, the Supreme Court of New Jersey found that a non-profit hospital was akin to the common calling professions, as it was “devoted to a use in which the public has an interest and subject to control

---

275 See, for example, *Friedman v. Shindier’s Prairie House*, 224 A.D. 232, 23 N.Y.S. 44 (Sup. Ct.1928); *Odom*, supra note 232.
277 See *Beech Grove*, supra note 239 at 227-28.
278 See *Bowlin v. Lyon*, 25 N.W. 766 (1885) at 538, where the Supreme Court of Iowa observed: “It may be that the managers of a place of public amusement, who carries on his business under a license granted him by the state, or by a municipal corporation organized under the laws of the state, would be subject to the same restrictions [as those imposed on the common callings]. We incline to think that he would; for, as he carries on the business under an authority conferred by the public, the presumption is that the intention was that whatever of advantage or benefit should result to the public under it should be enjoyed by all its members alike. The power which granted the license represented each member, with reference to those privileges which accrue to the public under it, must be on an equality with every other member.” See also *United States v. Stanley*, 109 U.S. 3 (1883) at 43, per Harlan J. dissenting.
279 *Supra*, note 264.
for the common good”. For our purposes, it is helpful to note the factors identified by the court which led it to conclude the hospital was “affected with a public interest”. They were as follows: the hospital was a non-sectarian institution which made its facilities available to the general public; it received tax benefits and exemptions; it was subject to legislative control; and it received financial assistance from state and federal governments. It would appear that all of these factors also apply to state-funded public universities in Canada – they are non-sectarian institutions that make their facilities available to their student body, if not the general public. Most public universities owe their existence to legislation and can “only do that which is expressly, or by necessary implication, authorized by their founding statute”. They are beneficiaries of significant tax exemptions and receive substantial financial support from federal and local governments, without which they could not be viable. In fact, in many cases, the very land on which universities are situated are obtained by government grant, and vested with special statutory protection against taxation and expropriation. These statutory protections also contain limitations on the use of university property, restricting its alienability and requiring that it only be used for University purposes. Other statutes vest additional property rights in universities. In Ontario, for example, the University Expropriation Powers Act empowers the

\[\text{\footnotesize 280} \text{ Ibid at 487.} \]
\[\text{\footnotesize 281} \text{ Ibid.} \]
\[\text{\footnotesize 283} \text{ C.B. Lewis, “The Legal Nature of a University and the Student-University Relationship” (1983) 15 Ottawa L. Rev. 249 at 250.} \]
\[\text{\footnotesize 284} \text{ For example, my alma mater, the University of Western Ontario, received $414,645,000.00 in funding from provincial and federal governments in the 2008 fiscal year, constituting almost one half of its total annual revenue: University of Western Ontario, “Combined Financial Statements: April 30, 2008”, online: <http://www.uwo.ca/finance/finstate/2007_08/complete.pdf>.} \]
\[\text{\footnotesize 285} \text{ See, for example, the University Act, R.S.B.C. 1996, c. 468, s. 54.} \]
\[\text{\footnotesize 286} \text{ Ibid. at s. 3.} \]
province’s public universities to expropriate all such land as it “considers necessary for the purposes of the university.” All of these factors lean toward a finding that University property is “affected with a public interest”. In exchange for the benefits of these special privileges, many of which are financed by the public purse, universities may be seen as accepting an obligation to use the property for the public’s benefit. The question raised by this analysis is, what does that obligation entail? Does it include providing equal access and facilities for students’ expressive activities?

To answer this question, it is helpful to examine the Supreme Court of Canada’s 1991 decision in Committee for the Commonwealth of Canada v. Canada. In that case, two individuals distributing political pamphlets at a Montreal airport (owned by the Government of Canada) were told to refrain from their activities, as political communication was prohibited on airport property. They sought a declaration that their freedom of expression had been violated and that the airport, as an area open to the public, constituted a public forum where fundamental freedoms could be exercised. The question before the Supreme Court was whether the government could limit expressive activities on its property without violating the Charter.

Although the Court unanimously agreed that the Charter did apply, and that the individuals’ freedom of expression had been unjustifiably infringed, the seven justices arrived at their decisions by three different routes. What is interesting is that, in all three opinions, the

---

287 R.S.O. 1990, c. U.3, s. 2(1).
289 The federal government argued that there was no constitutional right to use any of its property for purposes of public expression without it permission. Its position was summarized in the reasons of McLachlin J. at para. 220: “The government submits that as the owner of all such property, it has the absolute right to exclude the use of the property for public expression if it chooses. It relies on the fact that the owners of property are generally entitled to control who enters on it and how it is used, a right which extends to the right to control expression on their property. The Crown, it contends, should be placed in no worse position than a private property owner.”
290 The route adopted by L’Heureux-Dubé J. is discussed further below. Justices Lamer and Sopinka adopted an approach which analyzes the expressive activity to see if it is compatible with the “principle function or intended
justices agreed that the very possibility of the Charter’s application depended, in part, on the nature and purpose of the property on which the expressive activities took place. Madam Justice L'Heureux-Dubé, for example, took the position that the Charter would apply to protect expressive activities which took place in areas that could be considered “public arenas”. L'Heureux-Dubé J. provided guidelines to assist in determining whether government property

purpose of the property” (at para. 17). Lamer J. went on to hold at para. 21: “if the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall outside the sphere of s. 2(b).” In the context of distributing political literature at an airport, Justice Lamer found no such incompatibility. The third line of reasoning was advanced by Madam Justice McLachlin, who suggested an analysis which looks at whether the use of the forum in question furthers the values underlying freedom of expression.

Similar reasons have been adopted in a line of American cases referred to as the “public forum” decisions. For example, if a litigant seeks to prove that his First Amendment right has been violated, he must show that the expression took place in a public forum, that is, a place which, by its very nature, is suited to free expression, and where “where all persons have a prima facie right to express their views by any means at their disposal, subject only to reasonable ‘time, place and manner’ restrictions.” (Commonwealth, supra note 288 at para. 107). See also Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939) at 515-16, Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) at 45). All three of the opinions in Commonwealth declined to adopt the American “public forum doctrine”, opting instead to modify it for the Canadian context. Although Lamer J. agreed with many of the criticisms of the doctrine, he acknowledged that his approach reflected the same “interests underlying the [American] public forum doctrine”, namely “the reconciliation of the individual's interest in expressing himself in a place which is itself highly propitious to such expression and of the government's interest in being able to manage effectively the premises that it owns” (para. 9). He concluded that “when a person claims that his freedom of expression was infringed while he was trying to express himself in a place owned by the government, the legal analysis must involve examining the interests at issue, namely the interest of the individual wishing to express himself in a place suitable for such expression and that of the government in effective operation of the place owned by it” (see also Moon, “Access to Public and Private Property Under Freedom of Expression” (1988), 20 Ottawa L. Rev. 339 at 341). McLachlin J. also agreed with Lamer J.’s conclusion that “the test should focus on the values at stake rather than rigid concepts related to the nature of the forum” (para 233). L'Heureux-Dubé J. expressed the view that, while the “public forum doctrine” should not be imported wholesale in Canadian jurisprudence, it could be selectively drawn upon to determine what constitutes a “public area” (para. 147). She concluded: “While I do not entirely endorse the ‘public forum’ doctrine which has found favour in the American jurisprudence, the qualified definition of ‘public arenas’ is helpful to appraise the reasonableness of any ‘place’ restrictions within contested time, place, and manner regulations. While clearly not dispositive, those areas traditionally associated with, or resembling, sites where all persons have a right to express their views by any means at their disposal should be vigilantly protected from legislative restrictions on speech. That is not to say that no encumbrances of any kind can be imposed, but simply that any prospective conditions will have to be reasonable having regard to all the circumstances” (para. 207).

L'Heureux-Dubé J. took the view that some forms of expression, such as violent expression, would be excluded from s. 2(b) pursuant to the Supreme Court’s decision in Irwin Toy, Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at paras. 114, 215.
constituted a “public arena” and thus appropriately open for public expression. Those criteria were as follows:  

1. The traditional openness of such property for expressive activity.
2. Whether the public is ordinarily admitted to the property as of right.
3. The compatibility of the property's purpose with such expressive activities.
4. The impact of the availability of such property for expressive activity on the achievement of [the Charter’s guarantee of freedom of expression]’s purposes.
5. The symbolic significance of the property for the message being communicated.
6. The availability of other public arenas in the vicinity for expressive activities.

Although Commonwealth arose in a constitutional context dealing with the direct application of the Charter, L'Heureux-Dubé J.’s criteria for determining whether state-owned property constitutes a “public arena” are helpful for the purpose of determining whether property is affected with a “public interest” at common law. Applying the criteria to universities, it is evident that their campuses do indeed “bear the earmarks of public arenas”. First, universities have traditionally been opened for expressive activity – indeed, one of the cornerstones underlying the university’s very existence has been the promotion of free expression and the unfettered exploration of new and controversial ideas. As one commenter has observed, “universities are without a doubt a traditional forum for the discussion and debate of the most pressing and controversial social and political issues.” Furthermore, students, faculty, and even members of the public, are regularly invited to attend and engage in public

---

293 Commonwealth, supra note 288 at para. 147.
294 Ibid. at para. 136.
295 The fact that public expression is consistent with the historical or actual function of apace is relevant to determining whether it is protected by the Charter under constitutional jurisprudence: see Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component, 2009 SCC 31 at para. 42 [Greater Vancouver Transportation Authority]. The same, it is submitted, should apply in the context of the common law analysis discussed herein.
296 Jones, supra note 10 at 270.
lectures, debates, demonstrations, presentations, galleries, etc. In fact, students are often encouraged by University administrations to participate in extra-curricular clubs and activities, which often involve expressive activities.

Second, most areas of university property are regularly made open to students, and at least some areas are regularly made open to the public. In many cases, university campuses intermingle with public streets, sidewalks, and parks, and it is clear that students, if not the public at large\(^{297}\), often make use of campus facilities for expressive activities. A large university campus is not unlike an airport, in that it operates in many ways as a thoroughfare, which, as the Supreme Court of Canada held in *Commonwealth*, “in its open areas …can accommodate expression without the effectiveness or function of the place being in any way threatened”\(^{298}\). Third, expressive activities are compatible with a university’s purpose. The

\(^{297}\) But see *Queen's University v. Canadian Union of Public Employers (CUPE), Local 229*, [1994] 48 A.C.W.S. (3d) 571 (Ont. Ct. J. (Gen. Div.)), aff’d (1994), 120 D.L.R. (4th) 717 (Ont. C.A.), where Macleod J. found that “[T]he public does not normally have access to Queen's University Campus, since only certain members of the public, that being students registered at Queen's, faculty, staff, guests and alumni have the right to remain and use the facilities. Others may be removed from the Campus and have been removed by the University security staff. The [evidence] confirms that University security personnel routinely oust and remove members of the public who are not part of the University community from the JDUC and Mackintosh-Corry Hall… I am satisfied, on the affidavit evidence before me, in relation to the use of the buildings, particularly the Mackintosh-Corry Hall, the John Deutsch University Centre and Humphries Hall, and the by-laws that are in place in relation to commercial establishments operating within those centres, that the public does not normally have access to these facilities, and is not encouraged to have access.” Thus, not all facilities on a university campus can be said to be routinely open to the public. However, this does not negate the argument that students do have a common right to access campus facilities.

\(^{298}\) *Commonwealth, supra* note 288 at para. 24. Thus Justices Lamer and Sopinka observed that peaceful expression in a large space with a varied audience could be exercised without interfering with the operation of an airport. For a similar finding with respect to a (privately owned) train station, see *In re Hoffman* (1967) 67 Cal. 2d 845, where the California Supreme Court held that protesters had the right to express their opposition to the Vietnam war by distributing leaflets in Union Station in Los Angeles, reasoning at 851-852 that, “a railway station is like a public street or park. Noise and commotion are characteristic of the normal operation of a railway station. The railroads seek neither privacy within nor exclusive possession of their station. They therefore cannot invoke the law of trespass against petitioners to protect those interests. Nor was there any other interest that would justify prohibiting petitioners’ activities. Those activities in no way interfered with the use of the station. They did not impede the movement of passengers or trains, distract or interfere with the railroad employees’ conduct of their business, block access to ticket windows, transportation facilities or other business legitimately on the premises. Petitioners were not noisy, they created no disturbance, and did not harass patrons who did not wish to hear what they had to say. Had petitioners in any way interfered with the conduct of the railroad business, they could legitimately have been asked to leave.”
primary purpose of a university is to provide its students with a place of learning and education. The achievement of this goal requires the preservation of academic freedom, which is in large part based on free expression. As the Canadian Association of University Teachers has stated:

Academic freedom is essential for universities to fulfill their public responsibility to promote the unfettered search for knowledge and truth...Academic freedom means the right to freedom of speech and discussion, regardless of prescribed doctrine, political convention, or administrative convenience...Academic institutions have an obligation to defend academic freedom and not allow open discussion to be suppressed.299

The Supreme Court of Canada has expressed similar sentiments. In McKinney, for example, the Court300 found that the sole focus of academic freedom, which “serves a vital role in the life of the university” and is “essential to our continuance as a lively democracy,”301 is to protect “against the censorship of ideas”.302 Similarly, in Dolphin Delivery, McIntyre J. held:

Freedom of expression is...one of the fundamental concepts that has formed the basis for the historical development of the...educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.303

Indeed, allowing students to freely engage in expressive activities enhances a student’s learning experience and promotes academic freedom.304 Thus, not only are expressive activities on campus property compatible with a university’s purposes, they effectively further those

300 Per Dickson C.J., La Forest J., and Gonthier J.
301 McKinney, supra note 31 at 286-87.
302 Ibid. at 376.
303 Dolphin, supra note 84 at 583.
304 This is, of course, assuming that the activities in question are not so disruptive that they affect classes, orderly campus activities, etc. This point will be discussed more fully below.
purposes. Since expressive activities are compatible with the principal function and intended purpose of university property, and since the values underlying free expression, such as seeking and attaining the truth and participating in social and political discourse, would be furthered if exercised in a university forum, the university not only fits Justice L'Heureux-Dubé’s criteria, but also the tests proposed by Justices Lamer and McLachlin in their separate opinions in *Commonwealth*.\(^{305}\)

As such, a university can be said to be symbolically significant as a forum for free and open discussion on controversial issues. Even the word “university”, which is derived from the Latin *universitas* meaning “whole” or “community”, implies a place where the public can meet and exchange a plurality of ideas. Similarly, Justice Ball of the Saskatchewan Queen’s Bench recently held that a university is a “locale one would expect to facilitate and encourage free and open intellectual discussions”.\(^{306}\) As the modern “marketplace of ideas”, there is a special significance attached to being able to present one’s ideas and arguments on campus property.\(^{307}\) Although students could arguably present their arguments at alternative locations, this would not have the same impact in reaching fellow students, professors, and other members of the public as it would on campus property. To borrow from Mr. Justice Marshall,

> For many persons who do not have easy access to television, radio, the major newspapers, and the other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to

\(^{305}\) See note 290 above. In a subsequent decision, *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141 the Supreme Court affirmed that “[t]he basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment” (para. 74). The court explained that, to answer this question, the following factors should be considered: (a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.


\(^{307}\) See *Healy*, *supra* note 155 at 180 where the United States Supreme Court described the “college classroom with its surrounding environs” as the “marketplace of ideas”.
picket, or to handbill, or to utilize other free or relatively inexpensive means of communication. The only hope that these people have to be able to communicate effectively is to be permitted to speak in those areas in which most of their fellow citizens can be found.\textsuperscript{308}

At this point, a clarification is in order. It is not being suggested that the *Commonwealth* test ought to be employed to apply the *Charter* directly to expressive activities taking place on private property. Indeed, for the reasons discussed in Part II of this paper, one must be cautious about importing public law principles wholesale into disputes between private parties. Rather, in accordance with the Weinribs’ notion that constitutional principles can elucidate common law ideas, L’Heureux-Dubé J.’s criteria can be used as a valuable tool in elucidating the concept of “property affected with a public interest”, to the extent that they provide guidelines as to what a “public arena” looks like. In the university context, it is very revealing that land owned by a university is regularly applied in such a way that it greatly resembles a “public arena”, and has a special significance for expressive activities. The function of a university campus — and the various activities that go on there — is compatible with open public expression. The fact that it has been opened up and used for public expression suggests that the university has vested a common right in the public, or at the very least in the student body, to engage in expressive activities on its premises.

2.1 “Private-Public Property”: A Possible Exception?

One may counter that that University property, although possessing certain elements that make it appear “public”, is ultimately privately owned property, and its owners have a legitimate

\textsuperscript{308} Lloyd Corp. Ltd. v Tanner, 407 U.S. 551 (1972) at 581 [Lloyd Corp.]. See also Schneider v. State (of New Jersey), 308 U.S. 147 (1939) at 163 where the Supreme Court held “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place”. 
interest in controlling public access. In other words, it may be argued that a university campus is “private public property…to which one can not reasonably expect access”. This argument was recently advanced before the Supreme Court of Canada by a public transit authority with respect to city buses, in an effort to limit the types of advertisements that could be placed on the sides of those buses. However, the Supreme Court rejected this argument and held that city buses were public spaces, for the same reasons that have been submitted above in support of the same finding for university campuses:

The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect…protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not a private, space. Unlike the activities which occur in certain government buildings or offices, those which occur on a public bus do not require privacy and limited access. The bus is operated on city streets and forms an integral part of the public transportation system. The general public using the streets, including people who could become bus passengers, are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city. Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings. Thus, rather than undermining the purposes of [freedom of expression], expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment.

To further illustrate that university campuses are public spaces on which expression should be protected, it is helpful to look to a line of relevant American decisions dealing with shopping centres, beginning with *Marsh v. Alabama.*

---

309 *Greater Vancouver Transportation Authority, supra* note 295 at para. 43.
310 *Ibid.* at para. 43. Ironically, one of the parties seeking the right to advertise on city buses was the Canadian Federation of Students, an organization that has reportedly supported the restriction of pro-life students’ expressive activities on campuses across the country: See Jenna Murphy, “Canadian Federation of Students Votes to Support Initiatives Against Campus Pro-Life Groups” (May 28, 2008), online: Life Site News <http://www.lifesitenews.com/ldn/2008/may/08052809.html>.
311 326 U.S. 501 (1946) [*Marsh*].
2.2 Shopping Centres and Free Speech: A Case Study

In *Marsh v. Alabama*, a Jehovah’s Witness was prohibited from distributing religious literature in a privately-owned “company town”. The United States Supreme Court held that, notwithstanding the fact that the property was privately owned, the town’s prohibition on religious communication could not be upheld, and Ms. Marsh’s expression was protected under the First Amendment. The Court based its decision on the fact that the company that owned the town had made it “accessible to and freely used by the public in general.”\(^{312}\) The court observed:

The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it...Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public, and since their operation is essentially a public function, it is subject to state regulation.\(^{313}\)

The United States Supreme Court extended this reasoning to shopping malls in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*.\(^{314}\) In that case, a group of individuals had sought to picket a store in the Logan Valley mall, but were denied access by the mall’s owner. In affirming the individuals’ right to picket, the Court found that the shopping mall bore a “striking similarity” to the company town in *Marsh*, as it was “open to the public to


\(^{314}\) 31 U.S. 308 (1968) [*Logan Valley*].
the same extent as the commercial center of a normal town”. The Court held that the same principles therefore applied:

[B]ecause the shopping center serves as the community business block ‘and is freely accessible and open to the people in the area and those passing through,’ the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.

This reasoning could arguably apply to university campuses, which often serve as forums for community activities and which resemble “miniature-towns” complete with their own streets, sidewalks, parks, and pavilions open to the public. In more recent decisions, however, the United States Supreme Court has retreated from its position in Logan Valley. In Lloyd Corp Ltd. v. Tanner, for example, the Court held that anti-war protesters could be prohibited from distributing literature in a private shopping mall because the content of their message, unlike the picketers in Logan Valley, was not related to the mall’s purpose. In Hudgens v. National Labor Relations Board, the majority of the Court went even further and effectively overturned Logan Valley Plaza, concluding that “under the present state of the law, the constitutional guarantee of free expression has no part to play in a case [involving a privately-owned shopping mall].”

---

315 Ibid. at 391.
316 Ibid.
317 Supra note 308.
318 However, concurring Justices Stewart and Powell, and dissenting Justices Marshall and Brennan, all disagreed with this finding.
319 Lloyd Corp, supra note 308 at 521.
As a result of *Hudgens*, the federal constitution is no longer said to afford a general right to free expression in privately-owned shopping malls.\(^{320}\) Notwithstanding this, a number of state supreme courts have found such a right, in varying degrees, under their state constitutions, including California\(^{321}\), Colorado\(^{322}\), Massachusetts\(^{323}\), and New Jersey.\(^{324}\) The United States Supreme Court, for its part, has affirmed the “sovereign right” of the States to “adopt in [their] own Constitution[s] individual liberties more expansive than those conferred by the Federal Constitution”.\(^{325}\) Some of these cases have been criticized for placing a “serious strain on the state action doctrine”, to the extent that they “expan[d] the category of state actors to include ‘private’ parties”.\(^{326}\) This argument seems to have been a motivating factor behind the Supreme Court’s decision to overturn *Logan Valley* and narrow the category of private properties subject to constitutional requirements.\(^{327}\) Indeed, this concern is a compelling one: as discussed above, there are good reasons to avoid the subjecting of private persons to the burdens of constitutional duties. Thus, the U.S. Supreme Court may have been right in *Hudgens* to renounce its view that owners of shopping malls must respect citizens’ constitutional right of free expression. However, the fact that the owner is not constitutionally bound does not necessarily absolve him from other, common law duties imposed upon him pursuant to his own


\(^{326}\) *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

\(^{327}\) Ibid. at 365.
actions. A better analysis of the shopping mall cases may be to read them as subjecting mall owners not to a constitutional duty, but to a common law duty. Just as in the common calling cases, the shopping mall owner has made an invitation to the public, and, like an innkeeper, accepted a duty (albeit a non-constitutional one) to allow access to his property and services in a manner consistent with that invitation. As one commentator has observed:

Access is being sought not simply to a piece of property but to a forum which has been created by the property owner, a means by which an audience can be reached. The shopping mall owner has created a gathering place – a place where effective communication is possible and a forum for the expression of ideas and the communication of information – and so he/she must permit communicative access.

Further support for this interpretation can be drawn from the case law. The California Supreme Court, for example, has observed that a shopping mall owner who fully opens his premises to the public allows his property rights to become “worn thin by public usage”, and can not try to use them to undermine his invitation to the public:

It bears repeated emphasis that we do not have under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by the [shopping center]. A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations would not markedly dilute defendant's property rights. [emphasis added]
This idea has also been employed by Canadian courts, in the famous case of *Harrison v. Carswell*. That case involved a striking employee who was charged with trespassing after she refused to leave her picketing spot on a sidewalk adjacent to a shopping mall. At the Manitoba Court of Appeal, Freedman C. J. held that the shopping mall owner’s invitation to the public placed a limitation on his property interests:

In weighing the property right [of the mall owner] one cannot consider naked title alone, divorced from the reality of its setting in a shopping centre. The continuing invitation which the landlord-owner has extended to the public to come there for proper purposes has already resulted in inroads upon that property right and qualified its exercise to some degree.332 [emphasis added]

Justice Freedman concluded that the interests of the picketers in *Carswell* therefore prevailed. On appeal, however, a majority of the Supreme Court of Canada disagreed, and overturned Justice Freedman’s decision, finding that “Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.”333 In a strongly worded dissent, Justice Laskin endorsed the words of Justice Freedman in the court below, and rejected the notion that the property owner’s property interests should triumph over those of the picketers. Laskin began by acknowledging that the mall owner had created a common right in the public by inviting them unto his premises: “There can be no doubt that at least where a shopping centre is freely accessible to the public…the private owner has invested members of the public with a right of entry during the business hours of his tenants and with a right to remain there subject to lawful behaviour”.334 He further emphasized that the

---

332 48 D.L.R. (3d) 137 at para. 7.
property interests in a shopping mall differed greatly from those in purely private property, based on the public nature of the former:

The considerations which underlie the protection of private residences cannot apply to the same degree to a shopping centre in respect of its parking areas, roads and sidewalks. Those amenities are closer in character to public roads and sidewalks than to a private dwelling...What does a shopping centre owner protect, for what invaded interest of his does he seek vindication in ousting members of the public from sidewalks and roadways and parking areas in the shopping centre? There is no challenge to his title and none to his possession nor to his privacy when members of the public use those amenities. Should he be allowed to choose what members of the public come into those areas when they have been opened to all without discrimination? 335

Laskin rejected the idea that the common law provided no redress to the picketers, and went on to propose an alternative approach that would recognize a "privilege" of the public to use the mall property in a manner consistent with the owner’s invitation:

Disapproval of the owner, in assertion of a remote control over the "public" areas of the shopping centre, whether it be disapproval of picketing or disapproval of the wearing of hats or anything equally innocent, may be converted (so it is argued) into a basis of ouster of members of the public. Can the common law be so devoid of reason as to tolerate this kind of whimsy where public areas of a shopping centre are concerned?...A more appropriate approach...is to recognize a continuing privilege in using the areas of the shopping centre provided for public passage subject to limitations arising out of the nature of the activity thereon and to the object pursued thereby, and subject as well to a limitation against material damage.336

Here again we see the term "privilege" used. In this regard, Laskin’s analysis can be seen as squarely in line with the principles underlying the common calling cases. 337 Like a common innkeeper, a shopping mall owner puts his property to a use which gives it a public character, and in which the public has a common right to access. Having done so, public policy

335 Ibid. at 208.
336 Ibid. at 211.
337 See also Benson, supra note 248 at 238.
considerations dictate a suspension of the traditional operation of the rule that “an owner can do whatever he pleases with his property”. This is because a property owner can not “unreasonably deny access to any member of the public who makes use of it in a manner that is consistent with the reasonable character and import of the owner’s invitation.”

Of course, this analysis can be disputed, and although Laskin’s dissent has been much celebrated, *Harrison v. Carswell* has not been overturned and still stands as the law. As such, shopping mall owners generally do not need to allow all forms of expression on their premises. This, however, is not necessarily problematic in the context of the student club cases. Recall that the content of the common right vested in the public depends on the nature of the owner’s invitation. In the shopping mall cases, one could argue that the landowner does not invite the public to engage in discourse and expression, but to shop. As such, while Laskin’s analysis in *Harrison* was correct in theory, the majority did not err by denying access to the picketers, since their common right was not to *picket*, but to *shop*. Thus, their picketing activities were not consistent with the character of the shopping mall property, nor with the reasonable import of the owner’s invitation. If however, they were arbitrarily prohibited from their shopping activities, their common right would have been burdened, and legally actionable. This analysis is consistent with the reasons provided by the Pennsylvania Supreme Court in *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co.*

In that case, the court held that a shopping mall owner did not have to allow a political

---

338 *Ibid.* at 239
339 See *R. v. Barningham*, [2008] O.J. No. 5448 at para. 73 where the court held that *Harrison* was still binding. However, some jurisdictions in Canada have enacted legislation which would limit the effect of *Harrison v. Carswell*. In Ontario, for example, the Labour Relations Act, R.S.O. 1990, c. L.2, allows striking employees to picket at premises “to which the public normally has access and from which a person occupying the premises would have a right to remove individuals”. However, the picketing may “occur only at or near but outside the entrances and exits to the operations”: s. 11.1(1), (2), (3).
organization on his premises to collect signatures for a petition. The court found that, although the shopping mall owner invited the public to enter his property, his invitation was for “shopping, dining, and entertainment” only, and not for “political solicitation”.341 The owner had uniformly forbidden political expression on his premises, and as such was not required “to provide a political forum for persons or groups with views on public issues”.342 The court suggested that the outcome would have been different however, if the owner had “grant[ed] unfair advantage to particular interests or groups by making his premises arbitrarily available to those he favour[ed] while excluding all others”. In such a case, it is submitted, the mall owner would be inviting the public to engage in political expression on his premises and in doing so, he would be applying his property to a public purpose. As a result, he should be required to allow the expression of all viewpoints on his premises, not simply those he agrees with.

2.3 A University’s Invitation

Whether the invitation of a shopping mall owner could be said to encompass expressive activities, a much stronger argument can be made for University campuses, where students are invited to make use of University facilities for expressive purposes. In fact, the Pennsylvania Supreme Court made this very distinction in the Western Pennsylvania case discussed above, by referring to its earlier decision of Commonwealth v. Tate.343 In the latter case, a group of individuals leafleting outside a symposium at a private college were charged with trespassing. The Pennsylvania Supreme Court reversed the charges and held that the protesting individuals

341 Ibid. at 1336.
342 Ibid.
had the “right to speak freely without fear of criminal conviction” because the college had
“made itself into a public forum”.\textsuperscript{344} The Court held:

Here we are faced with an educational institution which holds itself out to the public as a community resource and cultural center, allows members of the public to walk its campus, permits a community organization to use its facilities as a forum for a public official of national importance, and at the same time arbitrarily denies a few members of the public the right to distribute leaflets peacefully to the relevant audience present at that forum…

In these circumstances, the college could not…exercise its right of property to invoke a standardless permit requirement and the state's defiant trespass law to prevent appellants from peacefully presenting their point of view to this indisputably relevant audience in an area of the college normally open to the public.\textsuperscript{345}

The Pennsylvania Supreme Court observed that unlike most shopping malls, colleges and universities are public forums and “market places for the exchange of ideas”.\textsuperscript{346} In Canada, a similar correlation can be observed from the very onset of the student-university relationship. A university’s “welcome package” often contains promotional materials advertising the various special interest groups that students can join. Students are encouraged to take part in these organizations and participate in extra-curricular speeches, colloquiums, debates, discussions, forums, conferences, seminars, and demonstrations. Where universities not only allow, but encourage and host such activities, they can be said to vest a common right in students to make use of their facilities for expressive purposes, and can not burden that right arbitrarily. Like the shopping mall owner, they have voluntarily surrendered certain aspects of their property rights, and have created a special and continuing privilege for a certain group of people (in this case, students) to engage in a certain type of activity (in this case, expression).

\textsuperscript{344} Western Pennsylvania, supra note 340 at 1337.
\textsuperscript{345} Tate, supra note 343 at 1387 and 1391.
\textsuperscript{346} Western Pennsylvania, supra note 340 at 1337.
2.4 The Public Nature of Universities

The public nature of a University campus is further evidenced by the fact that a University, like the company-owned town in *Marsh*, is “built and operated primarily to benefit the public” and performs “essentially a public function”.347 Certainly, as providers of a higher education, a task which is said to be “primarily the responsibility of the state”, universities exist for the common good.348 This was emphasized by the American Association of University Professors (AAUP) and the Association of American Colleges and Universities (AACU) in their Statement on Academic Freedom, now endorsed by more than 185 educational and professional organizations: “Institutions of higher education are conducted for the common good…The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes.”349 There is also judicial support for this idea. In *Re Polten*, a case dealing with the duty of a University Senate to hear student appeals, the Ontario High Court of Justice held: “[T]he university has been entrusted with the higher education of a large number of the citizens of this Province. This is a public responsibility that should be subject to some measure of judicial control.”350 The Court also quoted the following passage from an article written by G.H.L. Fridman, discussing the view that universities perform a public function:

[Universities] are public bodies, instituted by the state, through the medium of a legislative Act which signifies and embodies the will of the public; that they are totally, or almost completely financed by the public purse, which means that the state has an interest in the uses to which its finance is being put; that they are concerned with providing a public service, namely the education of the children of citizens, or the citizens themselves, and therefore their mode of fulfilling such service must be subject to public scrutiny; that they are professional bodies, similar

347 *Marsh*, supra note 311 at 506.
348 *Lewis*, supra note 283 at 268.
350 *Re Polten and Governing Council of the University of Toronto et al.* (1975), 59 D.L.R. (3d) 197 at para. 31.
to medical, legal and other organisations, which are subject to the overriding
supervision of the courts in the conduct of their proceedings, by reason of the
public importance of what they do and the significance of membership; and that
their internal affairs are not purely domestic but are a matter of legal concern by
reason of the extent to which the powers of universities and their governing organs
are derived not from agreement between private parties, but from the law.\textsuperscript{351}

The public’s interest in universities is also highlighted by the fundamental role that
education plays in promoting a just and co-operative society. John Rawls, for example, stressed
the importance of providing equal opportunities of education for all.\textsuperscript{352} Such opportunities are
vital in order to ensure that a society can operate as a fair system of co-operation, since they
remove unjust barriers to certain offices and positions, and improve citizens’ prospects of
success.\textsuperscript{353} More importantly, education provides a way in which citizens can “learn to conceive
of themselves as free and equal”, a notion which underlies the very possibility of a fair system
of social co-operation.\textsuperscript{354} As such, the public very clearly has an interest in, and arguably a
common right to, education.

Indeed, over the last few decades, “the successful completion of a university education
has become a virtual prerequisite of successful careers in many, if not most, professions and
trades.\textsuperscript{355} A strong argument can be made that, since universities and colleges have a monopoly
on providing a higher education, and are granted such power only by the authorization of
government,\textsuperscript{356} they have taken on a public function, and with this privilege comes the special

\textsuperscript{351} “Judicial Intervention Into University Affairs” (1973) 21 Chitty's L.J. 181 at 181.
\textsuperscript{352} See JFR, supra note 113 at 44.
\textsuperscript{353} Ibid.
\textsuperscript{354} Ibid. at 56.
\textsuperscript{355} Jones, supra note 10 at 275.
\textsuperscript{356} In the Province of Ontario, for example, the Post-secondary Education Choice and Excellence Act, 2000, S.O.
2000, c. 36, requires organizations wishing to offer programs or parts of a program leading to a degree, or to be
known as a university, to have either a consent of the Minister of Training, Colleges and Universities or an act of
the Legislative Assembly of Ontario. The responsible agency is the Postsecondary Education Quality Assessment
responsibility, the *assumpsit*, of serving the public fairly. Not surprisingly, a number of modern common law decisions have extended the special “common calling” duties of non-discrimination to unions and private professional associations on this very basis.357 These entities, although theoretically private, wield extraordinary power in the public sphere and stand as gatekeepers to employment opportunities and other public goods. As such, they assume a “public” function, or, in the words of Lord Holt, “a public trust for the benefit of the rest of [their] fellow-subjects”, and as such should be “*eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office”.358 In the words of one commenter:

[A] business licensed by the state or the municipality assumes thereby a quasi-public role. The purpose of requiring licences of specified callings is a public one, dictated by the desire of various levels of government to protect members of the community against the unskilled, the unclean, the dishonest. As was said of the common carrier, this characterization ‘was made because public policy was deemed to require that it should be under public regulation’.359

In other words, the authority to establish and maintain a university ultimately comes from the public, which includes persons of all political, religious, moral and ideological stripes. A license from the public to establish a university imports a notion of equality at such universities, among all such persons and their views. This must be so, unless it be that the common government of the public may, in the exertion of its powers, conferred for the benefit of all,

---

357 See “Note: The Antidiscrimination Principle”, *supra* note 249 at 1997-1998 and cases cited therein. See also *Southworth*, *supra* note 26 at 231 where the United States Supreme Court observed that the opportunity to receive a university education was “comparable in importance to joining a labor union or bar association”.

358 *Lane v. Cotton*, *supra* note 224 at 484.

discriminate or authorize discrimination against a particular viewpoint, solely because it happens to be politically unpopular or controversial.\textsuperscript{360} Certainly, this could not be said of a “free and democratic society”.\textsuperscript{361}

2.5 The Educational Importance of On-Campus Expression

At this point, another potential objection should be addressed. One may concede that, for the reasons discussed, the public has a common right to fair opportunities of education. As such, universities can not exercise discriminatory practices in admitting students to academic programs, and must consider each application properly.\textsuperscript{362} However, one may argue, this is fundamentally different from requiring universities to give all students equal opportunities to engage in extra-curricular expressive activities. These activities are not a formal part of one’s education, but are merely ancillary aspects of it.

In response to this objection, it is submitted that participation in extra-curricular expressive activities is, in fact, an integral component of one’s education. This was reflected in the New Jersey Supreme Court’s decision in \textit{State v. Schmid}:

The central purposes of a university are the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development of students, and the transmission of knowledge and learning to society at large. Free inquiry and free expression within the academic community are indispensable to the achievement of these goals. The freedom to teach and to learn depends upon the creation of appropriate conditions and opportunities on the campus as a whole as well as in the classrooms and lecture halls. All members of the academic community share the responsibility for securing and sustaining the general conditions conducive to this freedom…Free speech and peaceable

\textsuperscript{360} I borrow here from Justice Harlan’s dissent in the \textit{Civil Rights Cases}, 109 U.S. 3 (1883) at 43.
\textsuperscript{361} \textit{Charter, supra} note 16 at s. 1.
\textsuperscript{362} C.B. Lewis, \textit{supra} note 283 at 266.
assembly are basic requirements of the university as center for free inquiry and the search for knowledge and insight.\textsuperscript{363}

Indeed, through extra curricular campus activities, including expressive activities, students are able to explore new ideas, seek truth, learn new skills and pursue ideas not otherwise discussed in their formal curriculum. All of these constitute important aspects of one’s broader education. Perhaps this is why American courts have placed such a value on student organizations, and recognize that students have a \textit{constitutional} right to associate and express themselves on campus. For example, in \textit{Rosenberger v. Rector and Visitors of the University of Virginia}, discussed in Part I above, the United States Supreme Court emphasized the importance of student expression on university campuses:

The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them. The second, and corollary, danger is to speech from the chilling of individual thought and expression. That danger is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. In ancient Athens, and, as Europe entered into a new period of intellectual awakening, in places like Bologna, Oxford, and Paris, universities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the nation's intellectual life, its college and university campuses.\textsuperscript{364}

Although American jurisprudence protects student speech under the First Amendment, which applies directly to public universities in the United States, the ideas underlying

\textsuperscript{363} 423 A. 2d 615 (N.J. Sup. Ct. 1980) at 630 [\textit{Schmid}]. This quote was taken from Princeton University’s own mission statement, which was discussed favourably by the Court.

\textsuperscript{364} \textit{Rosenberger, supra} note 21 at 836 (citations omitted).
Rosenberger and other cases\textsuperscript{365} are illuminating in the Canadian context. These cases reveal that extra-curricular expressive activities and membership in student organizations play a vital role in obtaining an education, and in contributing to “the nation’s intellectual life”. Indeed, in order for an education to be truly full and robust, it must take place in a forum of academic freedom, where expression is openly encouraged, not censored. As universities hold themselves out to provide the public with an education, and receive significant benefits in return, they cannot unduly burden that common right by denying equal access to its facilities for students’ expressive purposes. As the New Jersey Supreme Court found in Schmid:

In examining the extent and nature of a public invitation to use its property, we note that a public presence within Princeton University is entirely consonant with the university’s expressed educational mission. Princeton University, as a private institution of higher education, clearly seeks to encourage both a wide and continuous exchange of opinions and ideas and to foster a policy of openness and freedom with respect to the use of its facilities. The commitment of its property, facilities, and resources to educational purposes contemplates substantial public involvement and participation in the academic life of the University. The University itself has endorsed the educational value of an open campus and the full exposure of the college community to the “outside world,” i.e., the public at large. Princeton University has indeed invited such public uses of its resources in fulfillment of its broader educational ideals and objectives. [emphasis added] \textsuperscript{366}

By its very nature, a university is a forum for free thought and education, where faculty and students alike are encouraged to engage in lively and free discourse concerning a wide array of political and social issues, in both curricular and extra-curricular settings. As such, American courts have found that the university campus, “at least for its students, possesses many of the

\textsuperscript{365} See also Healy, supra note 155 at 181-182where the United States Supreme Court held that a refusal to recognize a student organization undoubtedly and substantially violated the students’ associational rights based on its severe impact on expression on campus.

\textsuperscript{366} Schmid, supra note 363 at 564-565.
characteristics of a public forum.” Indeed, the expressive activities of student organizations are not only consistent with, but strike at the very core of, the “character and import of the owner’s invitation”. By applying its property to a public purpose, the university itself has given all students a common right to engage in expressive activity. That common right is unjustifiably burdened if a student is excluded simply for expressing ideas that the university administration or student union disagrees with or finds “controversial”.

It is important to emphasize that this analysis focuses not only on the public’s common right but also on the property owners’ interests and decisions. This analysis does not undermine the owner’s property rights as it vests no proprietary rights in the public. The obligation not to exclude persons from one’s property is not imposed on a landowner, but voluntarily accepted by him as a natural consequence of applying his property to a public purpose. In this regard, the law respects rather than violates the owners’ autonomy and freedom to do with his property as he chooses. Since the public’s right to access his property operates as a “privilege” (as opposed to a proprietary right), the landowner retains his property rights. Although his right to exclude is suspended in certain circumstances, he is still free to exercise that right in other circumstances, and is also free to otherwise do with his property as he pleases. Indeed, if he so desires, the landowner is free to change the use of his property; he is under no requirement, at common law, to operate a public university against his will. Thus, the suspension is not open-ended, but limited to the special circumstances arising from the landowner’s invitation to the public to access his property for a particular purpose. As long as he invites the public to make use of his

367 See, for example, *Widmar*, supra note 225 at 267. See also Nathan W. Kellum, “If it Looks Like a Duck…Traditional Public Forum Status of Open Areas on Public University Campuses” (2006) 33 Hastings Const. L.Q. 1.
368 See Benson, *supra* note 248 at 239.
premises in such a capacity, the law ought to hold him to his invitation. In the words of Professor Amnon Reichmann:

In a manner of speaking, by zoning part of the land to be used for non-individual business purposes...the landlord has placed that part under a legal regime applicable to land invested with a specific public use. Such placement, it could be argued, removes whatever vast powers of exclusion the landlord might otherwise claim, until the land is returned to uses other than for non-individual business. Of course, recognising that the owner is not all-powerful does not mean that her interests should be ignored, or that her property should be treated as public property for all purposes. However, the case law considering land imbued with a public interest could be interpreted to say that the decision to refuse access to persons seeking to purchase goods or services offered on the premises cannot be based on considerations irrelevant to the nature of the commercial enterprise. A different conclusion would be incongruent with the public nature of the property or the commercial use that the owner herself has chosen for the property.\footnote{Reichman, “Property Rights”, supra note 221 at 252.} [emphasis added].

In this sense, the need to “balance competing values” disappears. Indeed, where the law respects a landowner’s decision to apply his property to a public use, there is no tension or inconsistency between an individual’s property interests and the “common good”. A court need not look to the \textit{Charter} to introduce concepts such as “equality” in order to justify an infringement on landowners’ property rights, because no infringement exists. The law is simply respecting the landowners’ own act which made the property affected with a public interest in the first place.

3 \hspace{1cm} \textbf{Application of Common Calling Cases to Student Unions}

Much of the analysis above has focused on the duties owed by universities. However, in many cases the offending party that makes the decision to deny funding to a particular club is
actually a group of students (such as a Student Union). In such cases, a university may argue that it is not the party violating students’ rights, since expressive activities are wholly regulated by the students themselves. This argument is untenable, however. Although student unions may claim to be “independent” from the university administration, they are in many cases delegated the authority, by the university, to regulate access to classrooms and other facilities located on campus property. Additionally, it is usually the university that collects and administers the mandatory student fees that finance the student unions (and which are supposed to be distributed impartially to student organizations). Thus, student unions can hardly be described “autonomous” entities. To the contrary, student unions partner with university officials in many ways in order to fulfill their various goals and objectives, and they clearly benefit from that partnership, direct or implied. As such, they can not be immune from the requirements of the law. They, too, offer a service to students and in holding themselves out as operating for the benefit of all students, they must perform their duties without discrimination. That is, the same analysis that applies to universities as institutions “affected with a public interest” apply equally to the student organizations with which they share a “symbiotic relationship”, and in many ways, act as their agents. Otherwise, universities could “shirk their obligations by conferring certain of their powers on other entities” and delegate their responsibilities to so-called “private” student organizations. As the New Jersey Supreme Court has held, this is unacceptable:

> Where a place of public accommodation [the university] and an organization that deems itself private [the student unions] share a symbiotic relationship, particularly where the allegedly “private” entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination.  

---

370 See Godbout v. Longueuil (City), [1997] 3 S.C.R. 844 at para. 48 per La Forest J.
4 Exception to the Duty to Serve: Is the Discrimination Reasonable?

As a final note, one must recognize that there are exceptions to the general rule that the owner of a property “affected with a public interest” must accommodate all equally. Once a duty to serve the public is found to exist, the issue remains whether certain exclusions are “reasonable”, and thus permissible under the common law.372 Even in the common calling cases, courts allowed companies to exclude, or refuse service to an individual, on “reasonable grounds”. These included the “prevention of misconduct or immorality”, and the “protection of the proper functioning of the business.”373 For example, in Atwater v. Delaware Lackawanna and Western Railroad Company, the court held that a common carrier had a right to exclude certain persons:

[T]he carrier is not bound to receive gamblers, thieves, or known pickpockets, who seek to board the train to ply their vocation—persons whose conduct is riotous or disorderly, or one whose person or clothing is so filthy as to be obnoxious to other passengers, or who is afflicted with a contagious disease, or intoxicated to such an extent as to render it probable that he would be disagreeable or annoying to passengers...The carrier may also exclude a passenger who refuses to comply with the reasonable rules and regulations of the company.374

Does a university or student union have grounds to decline a good or service to student organizations whose views are controversial and may cause offence? A review of Atwater and other cases375 suggests that the answer to this question is clearly “No.” It is clear that the “reasonableness” exception to the duty to serve does not justify the exclusion of an individual “based on the perceived misconduct or offensiveness of the group to which he belongs”.376

373 Ibid. at 1995.
375 De Wolf v. Ford, 86 N.E. 527 at 530 (N.Y. C.A 1908) (describing an innkeeper's rules for the hotel in general as reasonable if designed to prevent misconduct).
376 See “Note: The Antidiscrimination Principle”, supra note 249 at 2006 [emphasis added].
Rather, the courts required *particularized* reasons about a specific individual’s likelihood of disrupting the property owner’s business or purposes, or causing damage to his premises.\(^{377}\)

Thus, courts refused to accept as “reasonable” a common calling’s exclusion of an individual simply because he was a youth\(^ {378}\), a “hippie”\(^ {379}\), or a member of a particular militia company.\(^ {380}\)

The principle, by analogy, should extend to political and conscientious beliefs. It is not reasonable to exclude from one’s premises an individual solely because of the viewpoint espoused, when students of all other viewpoints are invited to openly express themselves. When a university invites students to engage in expressive activities, it can not pick and choose the viewpoints that will be expressed: “If the streets of a town are open to some views they must be open to all.”\(^ {381}\)

Many of the cases discussed in the Introduction to this paper involved student unions and universities banning clubs *solely on the basis of the content* of their expression. In other cases, clubs were banned on the *perception* of school authorities’ that they might cause offence. Both rationales are unreasonable and therefore unacceptable grounds for exclusion under the common calling cases. Of course, universities and school authorities have a legitimate interest in controlling conduct and maintaining order on their premises. As the California District Court held in *Khadmi v. South Orange Community College District*, post-secondary institutions have a responsibility to prevent the “commission of unlawful acts on college premises and the substantial disruption of the orderly operation of the college.”\(^ {382}\) The common law respects this role by allowing owners of property affected with a public interest to exclude, but only where

---

377 Ibid. at 2006.
378 Watson v. Cross, 63 Ky. 147 (Ky. C.A. 1865).
there is evidence linking the specific individuals and their activities to a reasonable likelihood of
damage, violence, or disruption to the property owner’s purposes. In the context of universities,
this means that student organizations should only be excluded if it can be shown that they will
cause a “material disruption of classwork or...substantial disorder or invasion of the rights of
others”. The “offensiveness” of a particular expression, standing alone, is not a legally
sufficient basis to establish such a “material disruption”. Rather, as the United States
Department of Education has affirmed, in order for a disruption to be actionable, it must
constitute harassment that is “sufficiently serious (i.e. severe, persistent or pervasive) as to limit
or deny a student's ability to participate in or benefit from an educational program.” This
requirement, it is submitted, not only protects students from harassment and allows school
officials to prescribe and control conduct on university property, but ensures that they do not do
so arbitrarily or discriminatorily.

5 Application of Principles Beyond the University-Student Context:

Having discussed the principles of the common calling cases and applied them to
Universities and student unions, it is necessary to address the scope of their application to other
entities. How should this analysis be applied in other contexts? First, it is helpful to summarize
what has been presented thus far, with respect to the rationale underlying common calling cases.
This paper joins other authors in rejecting the doctrines of “monopoly” and “prime necessity” as
the rationales underlying the coming calling cases (although these features may be used as

---

383 See *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) at 513. See also
*Shamloo v. Mississippi State Board of Trustees*, 620 F.2d 516 (9th Cir. 1980) at 522.
384 Letter from Gerald A. Reynolds, Assistant Secretary, Office for Civil Rights, Department of Education (July 28,
indications to determine whether a property has a public function). Rather, it has been suggested that the special duties arising from the common callings have been a result of the actions of the landowner himself: specifically, the action of vesting a common right in the public by either (1) inviting them onto his property, or (2) applying his property to a public purpose. It has been argued that, when a landowner does so, he waives his traditional right to exclude because he has engaged the community’s interest in the property, and receives some form of benefit – economic or otherwise – in return. As a result, he must respect the community as a whole – he can not “pick and choose” or arbitrarily define for himself who constitutes a member of the community.

As Professor Reichman writes:

Should an owner demand from the community respect for her choices regarding the use of her property, she should respond in kind by respecting the community’s definition of who belongs to the community (i.e., respect minorities as a part of the community). The use of (immutable or nearly immutable) group-based characteristics disrespects the integrity of the community as a whole. It fractures the community into groups from which members cannot (realistically) extricate themselves. In other words, the community is placed in a position of self-contradiction: it demands respect from itself by requiring all not to trespass onto members’ property, and at the same time it allows disrespect to itself by accepting its dismemberment through legally enforceable classifications along immutable group-based lines.385

Having made an invitation to the public, the landowner has himself vested a common right in the community to access his property for that purpose (which he likely benefits from). He therefore cannot unreasonably deny access to any member of the public who wishes to exercise that common right in a manner that is “consistent with the reasonable character and import of the owner’s invitation”. 386

385 Reichman, “Property Rights”, supra note 221 at 254.
386 Benson, supra note 248 at 239.
How then, can these principles be applied in other cases? This paper does not attempt to set forth a rigid test, nor does it seek to engage in an in-depth application of these common law principles beyond the context of the university-student relationship discussed herein. However, from the analysis discussed above, some guidelines can be extracted to assist legal decision-makers in future cases. In a dispute in which a landowner seeks to deny access to his property which is alleged to be “affected with a public interest”, the first question to be asked is, “Has an invitation been made to the public vesting in them a common interest to access the property?” Further assistance can be attained by exploring the following questions:

1. Is the public regularly invited to access the property to engage in particular activities?
2. What is the purpose of the property? Is it consistent with the use and activities proposed by those individuals seeking to access it?
3. Does the property benefit from special privileges provided by the public, such as tax exemptions, benefits conferred by statute, or governmental financial assistance? If so, these privileges may be attached with the special responsibility of serving the public, who granted them, with fairness and equality.\textsuperscript{387}

Ultimately, if an invitation to the public is said to exist, it must be closely examined to determine what it is an invitation for. Is it, for example, to shop, dine and be entertained? If so, then members of the public seeking to access the property in order to engage in those activities must not be excluded arbitrarily. However, the fact that a landowner has vested a common right in the public to do one thing does not give them the right to access his property to do another thing altogether. An invitation to shop is not necessarily an invitation to solicit signatures for a

\textsuperscript{387} See Allnut, supra note 266 at 210-11, per Lord Ellenborough C.J.
petition, for example. Access should only be granted to do exactly that which the owner has invited the public to do, and that which is consistent with the purpose and use of the property.

It is also important to note that this analysis does not involve the subjective exercise of balancing competing values, such as “freedom of expression” and the right to property, and weighing in favour of one or the other. Rather, it is an application of the principles of property law to the specific facts of any given case which recognizes that the right to property is not absolute, and must be assessed in a broader social context.
Conclusion

This paper set out to explore how constitutional values may influence private law. In Chapter 2, it was concluded that, while such values may have a legitimate role in common law reasoning, courts ought to look to existing remedies at common law before employing ambiguous and subjective “values-language” to justify their conclusions. However, it was also acknowledged that, since private law does not operate in a vacuum but instead exists in a broader framework of background justice, courts can and should assess private law rights and duties in light of wider policy considerations, under the common law.

Chapter 3 exemplified such an analysis by applying it to the case study of student expression disputes. It argued that, in such cases where human rights are invoked but the Charter does not directly apply, there are remedies available at common law which provide redress. It also demonstrated how common law reasoning could be informed by constitutional values by recognizing the relevance of such values to the broader context in which private relationships operate. Consequently, a number of principles were drawn from constitutional jurisprudence: cases such as Commonwealth\textsuperscript{388}, Schmid\textsuperscript{389}, Greater Vancouver Transportation Authority\textsuperscript{390} and the Shopping Mall Cases.\textsuperscript{391} These cases were referenced as persuasive, though not determinative or binding, guidelines in order to elucidate such common law ideas as “property affected with a public interest”. It was concluded that, while landowners have a general right to do whatever they please with their property under private law, this general rule

\textsuperscript{388} Supra note 288.
\textsuperscript{389} Supra note 363.
\textsuperscript{390} Supra note 295.
\textsuperscript{391} See notes 310-341 and accompanying text.
is modified, or “suspended”, where the landowner opens the property to the public and vests a common right in them to, in this example, engage in expressive activities. This “privilege” recognizes that property rights are not absolute, and in certain circumstances, broader policy and social considerations require that they be modified: considerations such as equality, academic freedom, and the public’s special interest in property related to their education.

John Rawls noted that fundamental principles of justice “defining the equal basic liberties and opportunities of citizens always hold in and through all so-called [private] domains.” 392 These principles of justice may apply differently in various “spheres of life”, but ultimately, Rawls contended, “if the so called private sphere is alleged to be a space exempt from justice, then there is no such thing”. 393 When a student attempting to speak out against injustice is silenced by a university – the one institution purportedly dedicated to free expression and the open exchange of ideas – another type of injustice occurs: censorship. The fact that this injustice takes place within the “so-called private sphere” should not immunize the wrongdoer from the scrutiny of the law. I have argued in this paper that remedies to such injustices are available, at common law. These remedies are not extreme impositions on the property rights of universities. Rather, they represent the fair and reasonable consequences of a landowner’s decision to exercise his right to “do with his property as he pleases”. It may be that the values enshrined in the Charter can and should inform the courts more directly in deciding disputes between purely private parties. However, it is submitted that the various approaches suggested in the literature thus far are unprincipled and ultimately, unsatisfactory. Until a coherent and viable theoretical framework that respects the autonomy of private legal relations is formulated, courts would be

393 Ibid.
wise to look to the flexible and nuanced remedies presently available at common law. They may be pleasantly surprised.
Bibliography

JURISPRUDENCE

Canada

Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component, 2009 SCC 31.
Loew's Montreal Theatres v. Reynolds (1919), Q.R. 30 K.B.
Re Polten and Governing Council of the University of Toronto et al. (1975), 59 D.L.R. (3d) 197 (H.C.J. (Div. Ct.)).
111

Trinity Western University v British Columbia College of Teachers, [2001] S.C.R 772.

Australia


Germany

(1958) 7BVerfGE 198 (Lüth).
(1971) 30 BVerfGE 173 (Mephisto).
(2000) BVerfG NJW 1021 (Caroline of Monaco).
(2006) 1 BvR 357/05 (Airliner Case).

South Africa


United Kingdom

Ex parte Lewis (1888), 21 Q.B.D. 191.
Huzzey v Field (1835) 2 Cr M & R 432.
Keilway 50, pl. 4 (1503), 72 E.R. 208.
Lane v. Cotton (1701), 88 E.R. 1458 (K.B.).

United States

Atwater v. Sawyer, 76 Me. 539 (Sup. Ct 1884).
Covington & L. Turnpike Road Co. v. Sandford, 164 U.S. 578 (1896).
Denno v. School Board of Volusia County, 218 F.3d 1267 (11th Cir. 2000).
Brister v. Faulkner, 214 F. 3d 675 (5th Cir. 2000).
In re Hoffman, 67 Cal.2d 845 (Sup. Ct. 1967).
Kincaid v. Gibson, 236 F. 3d 342 (6th Cir. 2001).
Lloyd Corp. Ltd. v Tanner, 407 U.S. 551 (1972).
Munn vs. Illinois, 94 U.S. 13 (1876).
Orin v. Barclay, 272 F.3d 1207 (9th Cir. 2001).
Port Richmond Ferry v. Hudson County, 234 U.S. 317 (1914).
Schneider v. State (of New Jersey), 308 U.S. 147 (1939).
Shamloo v. Mississippi State Board of Trustees, 620 F.2d 516 (9th Cir. 1980).
Watson v. Cross, 63 Ky. 147 (Ky. C.A. 1865).

**LEGISLATION**

*An Act Regulating Dalhousie University*, S.N.S. 1863, c. 23.
*Saint Mary’s University Act*, S.N.S. 1970, c. 147.
*The University of Guelph Act*, 1964, S.O. 1964, c. 120.
*The University of Toronto Act*, 1947, S.O. 1947, c. 112.
MONOGRAPHS


Cardozo, Benjamin N. *The Nature of the Judicial Process* (Charleston: Bibliolife, 2009 (reprint)).


COLLECTIONS


ARTICLES/BOOK CHAPTERS

Am. L. Rev. 1.
Bateman, Thomas M. J. “Rights Application Doctrine and the Clash of Constitutionalism in Canada”, (1998) 31
Canadian Journal of Political Science 1.
horizontality and the possible role model of the German doctrine ‘mittelbare Drittwirkung der
S.A.J.H.R. 44.
Craig, John & Nico Nolte. “Privacy and Free Speech in Germany and Canada: Lessons for an English Privacy
355.
Davis, Thomas J. “Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum
de Montigny, Yves. “Section 32 and Equality Rights” in Anne Bayefsky & Mary Eberts, Equality Rights and the
Charter of Rights (Toronto: Carswell, 1985).
Eberle, Edward J. “Human Dignity, Privacy and Personality in German and American Constitutional Law” (1997)
Utah L. Rev. 963.
Philosophy 31.
Gerstenberg, Oliver. “Private Law and Constitutionalism” in C. Scott, ed., Torture as Tort (Hart Publishing,
----------, “What Constitutions Can Do (But Courts Sometimes Don't): Property, Speech and the Influence of
----------, “Distinguishing the Governors from the Governed: The Meaning of Government under s. 32(1) of the
Heldrich, Andreas & Gebhard M. Rehm. “Importing Constitutional Values Through Blanket Clauses”, in Daphne
Drake L. Rev. 949.
--------------, Is Multiculturalism Bad for Women, Boston Review (October/November 1997), available online: <http://www.bostonreview.net/BR22.5/okin.html>.


Weinrib, Lorraine E. “Human Dignity as a Rights-Protecting Principle” (2005) 17 N.J.C.L. 325


Wyman, Bruce. “The Law of the Public Callings as a Solution of the Trust Problem” 17 Harv. L. Rev. 156.

UNPUBLISHED MANUSCRIPTS/THESSES


ONLINE ARTICLES

Carpay, John. “Free Speech dies a slow death on campus” (February 9, 2009), online: National Post <http://www.nationalpost.com/story.html?id=1269926>.<br>
Eisenthal, Bram. “At Montreal school, Jewish student beaten a week after Palestinian riot” (September 23, 2002), online: Campus Watch <http://www.campus-watch.org/article/id/142>.<br>
Faguay, Steven. “Concordia distances itself from Hillel suspension” The Link (6 January 2003), online: <http://thelink.concordia.ca/breakingnews/02/12/06/2355243.shtml>.<br>
Murphy, Jenna. “Canadian Federation of Students Votes to Support Initiatives Against Campus Pro-Life Groups” (May 28, 2008), online: Life Site News <http://www.lifesitenews.com/ldn/2008/may/08052809.html>.<br>
CAUT Bulletin, Vol. 49, No. 10, “Concordia Board Lifts Moratorium” (December 2002), online: Canadian Association of University Teachers<br>http://www.cautbulletin.ca/en_article.asp?SectionID=618&amp;SectionName=News&amp;VolID=161&amp;VolumeName=No%2010&amp;VolumeStartDate=12/1/2002&amp;EditionID=19&amp;EditionName=Vol%20049&amp;EditionStartDate=1/1/2002&amp;ArticleID=143>.<br>