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Compelling Freedom on Campus: A Free Speech Paradox

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Introduction

In 1985, it was largely unknown how the Supreme Court of Canada would respond to the *Charter*.[1] At first glance, a drugstore's right to be open for business on Sunday, selling groceries, plastic cups, and a bicycle lock, seemed an unlikely source of inspiration for the Court's first pronouncement on the essence of freedom. Perhaps unexpectedly, the justices enforced the entitlement, finding that a Sunday closing law compelling a corporation to comply with the Christian Sabbath infringed section 2(a)'s guarantee of religious freedom.[2] In doing so, *R v Big M Drug Mart* defined freedom as "the absence of coercion or constraint," stating without equivocation that no one who is compelled "to a course of action or inaction" is "truly free".[3] In Justice Dickson's considered view, coercion includes "blatant forms of compulsion", such as "direct commands to act or refrain from acting on pain of sanctions", as well as forms of indirect control.[4] In plain and unmistakeable terms, *Big M* promised that, under the *Charter*, "no one is to be forced to act in a way contrary to his beliefs or conscience".[5]

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* Professor Emeritus, Osgoode Hall Law School. I thank Kate Bezanson and Alison Braley-Rattai for including me in this special issue of Constitutional Forum, and am grateful to Kate Bezanson for her comments on an earlier draft. I also thank Ryan Ng (JD 2021) for his valuable research assistance in the preparation of this paper. Finally, I note that I was a member of York University's Free Speech Working Group in fall 2018. This paper does not in any way express the views of York University or the Working Group, which has long since disbanded.

1 *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*].

3 *Ibid* at 336.

4 *Ibid*.

5 *Ibid* at 337

At a time of worrying forms of state-prescribed ideologies, creeds, and partisan positions, *Big M*'s idea of freedom remains monumental, and vital. The precarity of shared values and wedging of public discourse have loosened the bonds of democratic community, with expressive freedom emerging as one of the prime battlegrounds. Those in power realize that dominant values can be coercively defended by silencing those who offend majoritarian impulses, and can also be promoted by forcing minorities and non-conformists to adopt state-based values. In Quebec, Bill 21 compels those whose faith requires face covering and other forms of apparel-based religious observance to comply with an official policy of state secularity. Those who cannot or will not comply are disqualified from providing or receiving a variety of government services.[6] While resistance to Bill 21 is highly mobilized, there has been less focus on the crux of the law which, in coercing the adoption of secular values that offend against religious observance, is in principle a compulsion of identity. Quebec's "laicity of the state" is a profound affront to *Big M*'s principal insight that compelling a prescribed view of religion — or non-religion — is deeply destructive of freedom.[7]

Elsewhere, the government of Ontario compels gas pumps in the province to carry stickers publicizing its battle with the federal government on carbon taxes, potentially attaching significant fines to non-compliance.[8] Backwardly, the government proclaimed that its mandatory stickers advance free expression and transparency, in doing so overlooking the state's appropriation of citizen voices to create a forum for its partisan views.[9] On another front, medical professionals, institutions, and organizations are compelled to provide services and forms of treatment that offend religious and conscientious beliefs and sensibilities.[10]

Compelled expression and association also surface in forms referred to, at times, as "virtue signalling".[11] One such example, the 2017 Canada Summer Jobs program, made eligibility for federally funded summer employment contingent on an applicant's declaration of support for

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6 Bill 21, *An Act Respecting the Laicity of the State*, 1st Sess, 42nd Leg, Quebec 2019 (assented to 16 June 2019), SQ 2019, c 12.

7 See also *Mouvement laïque Québécois v City of Saguenay*, 2015 SCC 16 at paras 74-75 (endorsing "a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality", and stating that the state may not, "*by expressing its own religious preference*, promote the participation of believers to the exclusion of non-believers *or vice-versa*"; emphasis added).

8 *Federal Carbon Tax Transparency Act*, SO 2019, c 7, Schedule 23 (requiring government-prescribed stickers to be displayed in certain ways on gas pumps, and outlining the consequences and penalties for non-compliance). Though the *Provincial Offences Act* allows fines of $5000 for a first offence and $10,000 for subsequent offences, the government has indicated that inspectors will be instructed to give warnings. It is also reported that the chief justice has set fines at $150. Canadian Federation of Independent Business, "Ontario's Gas Station Carbon Tax Stickers — What You Need to Know" (2019), online: <cfib-fcei.ca/en/Ontario_Carbon_Tax_Stickers>.

9 Allison Jones, "Ford government argues carbon tax stickers on gas pumps help 'further' free expression", *CTV News* (30 October 2019) online: <toronto.ctvnews.ca/ford-government-argues-carbon-tax-stickers-on-gas-pumps-help-further-free-expression-1.4662986>.

10 See *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (finding a violation of religious freedom and upholding the limit under s 1 of the *Charter*).

11 Defined, in one source, as "behaviour that is aimed at demonstrating one's own enlightened attitudes". See Collins Dictionary, "virtue-signalling", online: <collinsdictionary.com/dictionary/english/virtue-signalling>.

governmentally prescribed values.[12] Another instance is the mandatory Statement of Principles (SOP), which required members of the legal profession to make a declaration adopting or endorsing the Law Society of Ontario's official objectives on equity in the profession.[13] That initiative inspired a revolt that led to a radical shift in law society governance, and repeal of the SOP.[14]

Among a panoply of state-based coercive measures, the introduction of mandatory free speech policies for publicly funded colleges and universities is one of the most ominous. In two provinces, Ontario and Alberta, the government has directed colleges and universities to adopt and comply with an official free speech policy that is modelled on the US-based Chicago Statement on Principles of Free Expression.[15] That model was inspired by, and responded to, a perception that some perspectives and voices had been shut down and shut out of campus discourse. Rather than respect the autonomy of colleges and universities to develop internal policies, provincial governments in Canada imposed a mandatory policy on free expression. In doing so, their actions appropriated and transformed the Chicago Statement from a policy for internal governance into a diktat of the state.

It is manifest and axiomatic that compulsion is not freedom, and that a mandatory policy is the opposite, not the epitome, of free expression. Though it may not be as egregious as Bill 21's coercion of individual identity, this compulsion of institutional and academic identity differs little in principle. While commenting in passing on the breach of institutional autonomy and academic freedom, this brief reflection lingers more on the question of compulsion. Specifically, the discussion calls for *Big M*'s conception of freedom as the absence of coercion to be refreshed, re-invigorated, and robustly promoted in this and other settings.

The Chicago Statement transformed: from freedom to coercion

The Chicago Statement presents a vision of free speech that, on its face, is more conventional than radical, explaining that a university's commitment to "free and open inquiry" demands

12 See Brian Bird, "Canada Summer Jobs Program and the *Charter* Problem", *Policy Options* (16 January 2018) online: <policyoptions.irpp.org/magazines/january-2018/canada-summer-jobs-and-the-charter-problem/> (explaining the *Charter* implications of the 2018 program's mandatory attestation that applicants respect human rights and *Charter* values, and specifically endorse reproductive rights, defined as "the right to access safe and legal abortions"; also accusing the Trudeau government of "weaponizing" the *Charter*); The following year applicants were required to attest that no funding from Canada Summer Jobs would be used to "undermine or restrict rights legally protected in Canada". Cited in David Ross, "A New Canada Summer Job Attestation: The Good, the (Potentially) Bad, and the Unknown" (20 December 2018), online (blog): *Christian Legal Fellowship* <http://www.christianlegalfellowship.org/blog/2018/12/20/a-new-canada-summer-jobs-attestation-for-2019-the-good-the-potentially-bad-and-the-unknown>.

13 See Law Society of Ontario, "Guide to the Application of Recommendation 3(1)" (undated), online (pdf): <jurisource.ca/prj/phpe7rTLf1551195791.pdf>

14 See generally, Jacques Gallant, "Law Society Scraps key diversity initiative", *The Star* (11 September 2019) online: <https://www.thestar.com/news/gta/2019/09/11/law-society-scraps-key-diversity-initiative.html>.

15 See University of Chicago, "Statement on Principles of Free Expression" (July 2012), online: ≤liberalstudiesguides.ca/wp-content/uploads/sites/2/2017/04/Statement-on-Principles-of-Free-Expression-_-Free-Expression-_-The-University-of-Chicago.pdf>; See also University of Chicago, "Report of the Committee on Freedom of Expression" (undated), online (pdf): <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

"the broadest possible latitude to speak, write, listen, challenge and learn".[16] This latitude extends to ideas that are "thought to be offensive, unwise, immoral, or wrong-headed", and is bi-directional or reciprocal in nature, directing members of the community to "act in conformity with this principle".[17] Accordingly, the Statement denounces obstruction, disruption, or interference with the freedom of others, calling on the community instead to deploy "robust counter-speech" in the face of offensive or disagreeable thoughts.[18] Recognizing, as well, that any "vibrant commitment to free and open inquiry" must tolerate limits, the Statement proposes restrictions on expression that violates the law, and allows for reasonable time, place, and manner restrictions to enable the university to function without disruption.[19]

The Chicago Statement has been remarkably influential in the United States, where it has reportedly been adopted by more than sixty institutions.[20] In an environment of perennially attentive and unrequited debate, the Statement is not without detractors who challenge its soundness and objectives. On one account, the Statement advances a "legalistic and formal framework" that applies "blunt tools" to diverse and complex dynamics that do not reduce to a "one-size-fits-all statement".[21] Put another way, rigidity in a policy on free expression is somewhat at odds with the Statement's professed objective of open inquiry. Moreover, the sermonizing tone of broad-brush principles belies the role context and community dynamics must play in any discussion of university free speech.[22] To others, the Statement serves as a proxy for resistance to policies aimed at inclusive objectives and development of a "safe space" for learning on campus.[23] Whatever its purpose or direction, the American debate on difficult questions of internal governance is by, for, and of the university community.

The Statement experienced a critical mutation when it crossed the border and re-surfaced in Canada. First endorsed by a conservative politician running for party leadership at the federal level of government, the Statement was appropriated and adopted by two provincial premiers deeply committed to the implementation of conservative policies.[24] In this way, the

16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 Victor Yang, "The Chicago Principles Arrive at Other Universities", *The Chicago Maroon*, May 23, 2019 (stating that more than 63 institutions have adopted or endorsed the Chicago Statement, or a version of it). Online: <https://www.chicagomaroon.com/article/2019/5/24/chicago-principles-arrive-universities/>.
21 Sigal Ben-Porath, "Against Endorsing the Chicago Principles", *Inside Higher Education* (11 December 2018) online: <academicmatters.ca/against-endorsing-the-chicago-principles/>.
22 *Ibid* (stating that an institution's endorsement of the principles could end the conversation and undermine its ability to fulfill its teaching mission).
23 See e.g., Richard Pérez-Peña, Mitch Smith & Stephanie Saul, "University of Chicago Strikes Back Against Campus Political Correctness", *New York Times* (16 August 2016) online: <nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html>. See also P.E. Moskowitz, *The Case Against Free Speech* (U.S.A.: Hachette Book Group, Inc., 2019) (providing extensive discussion of conservative movements and their interest in free speech issues on American campuses).
24 This initiative had its Canadian genesis in the 2015 leadership campaign of federal Conservative Party leader, Andrew Scheer. The Statement's evolution into an instrument of government control followed a pathway into Canada from Donald Trump, who first raised it as a way for American government to play a role on matters of internal university governance. A few years later, during the federal election campaign of fall 2019, then Conservative Party leader Andrew Scheer renewed his pledge to cut funding to any

Chicago Statement was converted to a mechanism of regulation, emerging as a political directive that imposed a free expression policy on colleges and universities. Thus transformed, the Statement is not a matter of abstract or scholarly debate and university governance but is understood, more cynically, as a top-down ploy to protect and promote conservative voices on campus.

To back up a moment: the paradox of advanced education in Canada is that, in principle, colleges and universities are autonomous in their mission and pursuit of knowledge, but at the same time are dependent on public funding and subject to regulation by the state. This paradox has been functional over the years because governments accept the independence of institutions that serve the public interest by educating the community and advancing knowledge. The governmental regulation of free speech on campus sets the system — and its established understandings — on a new footing.

On August 30, 2018, the government of Ontario issued a directive requiring all publicly-assisted colleges and universities in the province to post a free speech policy by January 1, 2019. The directive was clear that institutional policies must meet "a minimum standard *specified by the government*", and warned of reductions to operating grant funding for any institution not in compliance.[25] Almost one year later, Alberta's provincial government followed suit on July 4, 2019, calling on its colleges and universities to adopt the Chicago Statement or an equivalent, and setting December 15, 2019 as the deadline for compliance.[26]

This mutation diverted the Statement from its foundation in matters of university governance and re-styled it an instrument of government coercion. Compelling colleges and universities to adopt and comply with a government policy of free expression is offensive to institutional autonomy, the core mission of a university, and the academic freedom of its community. Moreover, Ontario's free speech directive is explicitly aimed at reining in the expressive activities of students; this essential aspect of the policy defies the text and purpose of the Chicago Statement.[27] Hostility to student activism is evident in the directive's demand for enforcement of government policy against students and their organizations, including disciplinary processes

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university or institute of higher learning that does not comply with the party's conception of free speech. See Melanie Woods, "Conservative Platform Makes Free Speech Policies a Requirement for University Grants", *Huffington Post* (11 October 2019) online: <huffingtonpost.ca/entry/andrew-scheer-free-speech-conservative-platform_ca_5da10705e4b087efdbae5cb8>. See Conservative Party of Canada, "Andrew Scheer's Plan for You to Get Ahead" (2019) at 61, online (pdf): <cpc-platform.s3.ca-central-1.amazonaws.com/CPC_Platform_8.5x11_FINAL_EN_OCT11_web.pdf>.

25 Office of the Premier, "Upholding Free Speech on Ontario's University and College Campuses", (31 August 2018) online: <https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [emphasis added].

26 In July 2019, the Advanced Education Minister "requested" that Alberta colleges and universities "strengthen" free expression on campus by adopting the Chicago Statement or an analogous policy compliant with the spirit of the Chicago Statement. In a letter dated July 4, 2019, the Minister advised institutions that "[i]t is your responsibility to ensure that whatever action is taken … *demonstrates clear commitment* to the key principles of free speech as found within the Chicago Statement" [emphasis added]. A copy of this letter is on file with the author.

27 Office of the Premier, *supra* note 25 (requiring institutions to consider student group compliance with the free speech policy as a condition for ongoing financial support or recognition, and to encourage student unions to adopt policies that align with the free speech policy).

in cases of "disruption" on campus.[28] A subsequent directive decreeing that student fees, an established issue of local governance, must be optional confirmed the government's antipathy to student activism. Without a hint of subtlety, the premier of Ontario stated, in defence of the policy, that "I think we all know what kind of crazy Marxist nonsense student unions get up to".[29] In fall 2019, the directive on student fees was quashed in court on the basis that the government has no legal authority to interfere in this aspect of university governance.[30]

Meanwhile, Alberta's policy sets and aspires to a different and less confrontational approach. There, the process was promoted from the start as being "collaborative and collegial" in nature.[31] Accordingly, the Minister of Advanced Education stated that he would be working closely with Alberta institutions "to ensure practice is compliant with the policies outlined".[32] The nuance there is that "[t]his unified approach provides *a common understanding* of freedom of expression throughout Alberta's post-secondary system, while giving institutions flexibility to create policies that meet their unique needs."[33] While Ontario's threat of budget repercussions for non-compliance is explicitly coercive, Alberta's does not address the implications of any failure to adopt or comply with the government's policy. Moreover, Ontario targeted student activism and Alberta has not expressly done so. Though Ontario's free speech directive is a more egregious interference, both government policies interfere with institutional autonomy, academic freedom, and the constitutionally protected rights of college and university communities.

Despite the appeal to collaboration, a negative reaction was more palpable in Alberta, where ex-premier Rachel Notley stated that "[t]his is not about free speech on campus" but is a matter of "the [United Conservative Party] dictating that colleges and universities owe everyone, including hate groups, a platform".[34] Elsewhere, the Chicago Statement was described as an "ingenious manifesto that uses 'free speech' as code for the right of the privileged and powerful to shout down everyone else".[35] As such, it was denounced for opening university cam-

28 *Ibid* (declaring that existing student discipline measures must apply to students whose actions are contrary to the policy, including "ongoing disruptive protesting" that "significantly interferes" with an event).

29 Quoted in Joe Friesen, "Doug Ford defends cutting mandatory student-union fees", *Globe & Mail* (11 February 2019) online: <theglobeandmail.com/canada/article-doug-ford-fundraising-letter-accuses-student-unions-of-crazy-marxist/>.

30 *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 [*Canadian Federation of Students*]. The decision is under appeal.

31 Moira Wyton, "Advanced Education minister promises Chicago Principles details coming soon as students, academics concerned for September deadline", *Edmonton Journal* (19 June 2019) online: <edmontonjournal.com/news/politics/advanced-education-minister-promises-chicago-principles-details-coming-soon-as-students-academics-concerned-for-september-deadline>.

32 Stephanie Babych, "Universities hand in updated free-speech policies for review by provincial government", *Calgary Herald* (updated 20 November 2019) online: <calgaryherald.com/news/local-news/universities-hand-in-updated-free-speech-policies-for-review-by-provincial-government>.

33 Government of Alberta, "Enhancing free speech on campuses", *Education News Canada* (17 December 2019) online: <educationnewscanada.com/article/organization/14113/807304/Enhancing-free-speech-on-campuses.htm> (emphasis added).

34 Rachel Notley, "This is not about free speech on campus — we already have free speech. This is the UCP dictating that universities and colleges owe everyone, including hate groups, a platform." (30 July 2019 at 12:30), online: *Twitter*, <twitter.com/rachelnotley/status/1156270897952542721?lang=en>.

35 David Climenhaga, "The 'Chicago Principles' are code for the right of the powerful and privileged to shout down everyone else" *AlbertaPolitics.ca* (30 July 2019) online: <albertapolitics.ca/2019/07/the-chicago-

puses "wide to anti-union rights extremists and advocates of Trump-style racism", and allowing "anti-abortion radicals to harass and threaten users and workers on the steps of women's health clinics".[36]

In the meantime, and albeit with some grumbling, Ontario's institutions of higher learning acquiesced in the government's assertion of control over free speech on campus, posting policies in compliance with the Chicago Statement, as required, by January 2019.[37] While Ontario's 24 colleges closed ranks to develop a single policy — not exposing any one institution to scrutiny and potential repercussions — all but three universities either developed new policies or tweaked pre-existing campus policies.[38] Almost one year later, and only a day or two after the deadline, Alberta proclaimed that the province's 26 institutions had posted policies that align with the Chicago Statement.[39]

One year after Ontario's January 2019 deadline for a government-compliant speech policy, there is little indication that campus free speech has been concretely altered or is at imminent risk from the government directive. Pursuant to the plan for ongoing monitoring and evaluation of "system-level progress on the free speech policy", Ontario's colleges and universities also complied with the instruction to file an annual report addressing "implementation progress" and a summary of [each institution's] compliance.[40] Though it found no institution in default, the Higher Education Quality Council of Ontario's Report of November 2019 flagged a systemic deficit in the policies. Specifically, the HECQO complained that university and college policies did not explicitly state that free speech is dominant and "unequivocally" takes precedence over values of civility and respect in public discourse.[41] Noting that the government did not "explicitly require a statement identifying the hierarchy of free speech over civility", the Report nonetheless described this as an "issue to watch".[42] In doing so, this observation implied and assumed that the government could have, and might still, make that a mandatory requirement of the policy.

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principles-are-code-for-the-right-of-the-powerful-and-privileged-to-shout-down-everyone-else/>.

36 *Ibid.*

37 See e.g., Public Service Alliance of Canada, "Statement on government-mandated free speech policies" (undated), online: <ontario.psac.com/statement-government-mandated-free-speech-policies> (articulating the dangers and denouncing the free speech policy, calling on the government to reconsider the directive, withdraw prescribed disciplinary measures and threatened funding cuts, and respect the autonomy of institutions and speech rights of members of the academic community); See also James Turk, "No Thank You Premier Ford" (5 September 2018), online (blog): *Centre for Free Expression Blog* <https://cfe.ryerson.ca/blog/2018/09/no-thank-you-premier-ford>.

38 See Higher Education Quality Council of Ontario, "Freedom of Speech on Campus, 2019 Annual Report to the Ontario Government" (undated), Appendix A, online: <heqco.ca/SiteCollectionDocuments/HEQCO%202019%20Free%20Speech%20Report%20to%20Government%20REVISED.pdf> (linking the free speech policies of Ontario's colleges and universities).

39 Moira Whyton, "Post-secondaries across Alberta adopt American-flavoured free speech policies", *Edmonton Journal* (17 December 2019) online: <edmontonjournal.com/news/politics/post-secondaries-across-alberta-adopt-american-flavoured-free-speech-policies>.

40 See Higher Education Quality Council of Ontario, supra note 38, Appendix B (linking the annual reports filed by Ontario colleges and universities).

41 *Ibid* at 2.

42 *Ibid.*

Furthermore, the Report maintained that the HEQCO's task is limited to matters of implementation and does not include passing judgment on or policing institutions.[43] Yet the government's response to the Report offers further, troubling indication that free speech on campuses is a captive of politics. In commenting on the HEQCO Report, the Ministry of Colleges and Universities was quick to claim that the government had "delivered on its promise" to uphold free speech on Ontario campuses, and that Ontario institutions were in "full compliance with its new free speech policy requirements".[44] That statement confirmed and cemented the government's authority to regulate free speech on campus, but did not provoke objection or challenge. Meanwhile, the coercive undercurrent and lack of transparency in Alberta's policy make it difficult for institutions to gauge the risks of non-compliance.

The relative calm of the status quo may be misleading. Contests over free speech on campus are frequent, exposing unresolved tensions in highly diverse communities whose purpose is to join issue and engage in vibrant and open inquiry actively, freely, and with passion.[45] The existence of a mandatory policy with a mechanism of oversight and threat of repercussions places institutions of higher learning at ongoing risk of government interference for — among other things — placing limits on free speech the government does not approve of, being overly solicitous of civility, or tolerating too much student activism.[46]

The mandatory free speech policies are a clear and unprecedented interference in matters of internal governance that establish and validate a hierarchical relationship of subservience to government oversight. Compliance with a mandatory government policy is about compulsion, not freedom. It is troubling that colleges and universities in two provinces have accepted their subservience to the government on campus free speech, which is a core issue of internal governance.[47] Beyond that, it is deeply concerning that this dynamic can migrate to other issues and even re-define the relationship between institutions of higher education and the government, thereby legitimizing government involvement in other aspects of university and academic governance. In short, the imposition of a mandatory free speech policy creates

43 *Ibid*.

44 Ministry of Colleges and Universities, News Release, "Ontario Protecting Free Speech on Campuses" (4 November 2019) online: <news.ontario.ca/maesd/en/2019/11/ontario-protecting-free-speech-on-campuses.html>.

45 In fall 2019 there was a near-violent confrontation between activist groups at York University. See Joseph Brean, "York University launches review after event with ex-Israeli soldiers met with massive protest", *National Post* (21 November 2019) online: <nationalpost.com/news/york-university-launches-review-after-event-with-ex-israeli-soldiers-met-with-massive-protest>.

46 Confrontation between the government and educational institutions can be avoided at moments of tension. The onus and risk of enforcing the Chicago Statement, and necessarily interfering in university affairs, are on the government. To avoid that risk, the government could defer to an institution, professing that its mandatory free speech policy set a broad framework that by design leaves the details to local implementation. The government could as easily go in a different direction, enforcing a hierarchy between free expression and civility, or directing an institution to allow an event it has decided not to permit.

47 As noted above, I was a member of York University's Free Speech Working Group in fall 2018. Within the Working Group I expressed my concerns about the constitutionality of this directive. The University's position and preferred response was to maintain that existing policies were in compliance and could be refreshed and collated, following a process of consultation with the community, to comply with the government's January 2019 deadline. I re-iterate that this paper expresses my views and not those of the University.

precedent for the government to interfere with college and universities in areas that centre and define their mission.

In addition, the mandatory free speech policy is a grave violation of section 2(b) of the *Charter*, which guarantees freedom of expression. Whether the policy is generous or restrictive of expressive freedom matters little because the fact of compulsion is a constitutional violation in itself. Up to now, and perhaps because colleges and universities have complied, the question of constitutional rights has been in the background, playing little or no role in debate and discussion of the mandatory free speech policy. Freedom from compulsion and coercion is at the core of section 2's fundamental freedoms, and it is wrong in principle for colleges and institutions to comply with directives that place them under the yoke of government oversight. In the circumstances, educational institutions that seemed quick to second their autonomy to the government might have concluded there was no other choice.

The purpose of the *Charter* is to protect the community from the violation of constitutional rights by the state. Here, the impermissible overreaching and interference by government with the institutional autonomy and academic freedom of colleges and universities also engages the *Charter*. On their face, the mandatory speech policies are aimed at compulsion, not freedom. The imposition of a mandatory policy does not advance or respect freedom but is, instead, its opposite. As such, the policies are a form of compelled expression and association that violate core *Charter* principles, including *Big M*'s conception of freedom as the absence of coercion.

Freedom: the absence of coercion or constraint[48]

Compelling expression is just as serious a violation of section 2(b) of the *Charter* as prohibiting it; in many ways, compelling affirmation or adoption of an objectionable point of view is a more egregious violation of freedom than prohibiting a point of view being voiced. In this instance, there can be no doubt that the governments' mandatory free speech policies engage constitutional rights, and the fact that institutions complied in both provinces does not negate the violation. If and when Ontario imposes a budgetary penalty or challenges a university decision - i.e., on civility, the use of university space, external speakers - section 2(b) of the *Charter* will be engaged. Constitutional rights might also be at issue in Alberta, should the promises of collaboration and flexibility break down to expose conflict between campus protocols and the government's conception of what free speech requires.

Freedom rests on two core principles and cannot thrive without a robust conception of each. First, a commitment to tolerance for offensive, repugnant, and unacceptable points of view is reflected in *Irwin Toy*'s framework principle of content neutrality.[49] The Court's commitment to that principle was confirmed and doctrinalized in its egalitarian definition of

48 *Big M, supra* note 2 at 336.

49 *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 968, 969, 58 DLR (4th) 577 (stating that freedom of expression is guaranteed so that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream," and adding therefore that the Court cannot exclude "human activity" from the scope of expressive freedom "on the basis of the content or meaning being conveyed") [*Irwin Toy*].

expression as "any attempt to convey meaning".[50] Drawing from *Big M*, the second is a vision of freedom as the absence of coercion or constraint. Both core principles are implicated where free speech on campus is at issue.

The overarching goal of these governmental policies is to superimpose an official view of free speech and control the scope of expressive activity on campus. In other words, the issue is about who controls what expression is permitted, and whether it is a matter of government authority or university governance. The government can only regulate expressive activity on campus by overriding the traditional prerogative of colleges and universities to decide this issue as a matter of institutional autonomy and local governance.[51] Yet, as the Supreme Court of Canada has declared, "[t]he government […] has no legal power to control the university even if it wishe[s] to do so".[52] More recently, *Canadian Federation of Students* explained that Ontario has had a "legislated policy of non-interference in university affairs" for more than 100 years, finding as a result that the student fees directive represented "a significant incursion into the ability of universities to govern their affairs autonomously".[53] Directives that compel universities to comply with a state-prescribed free speech policy interfere equally with institutional autonomy and academic freedom. As such, these policies raise the second key principle in the conception of freedom, and that is freedom from coercion or constraint.

Big M's contribution to the methodology of *Charter* interpretation was as monumental as its conception of freedom. Specifically, the Court's call for a "generous" interpretation of the *Charter*'s rights and freedoms, "rather than a legalistic one", has been enormously influential.[54] That generosity has only partly been realized under section 2(b); while it set a low threshold for breach when the government prohibits expressive activity, the Court has been less certain whether and in what circumstances the Charter protects freedom from compulsion by the state.

The judicial resistance to constitutional claims of freedom from compulsion traces in part to the dynamics of democratic governance. Being co-opted by government policies and programs, including those that are objectionable, is constant because it is inherent in being a member of a democratic community.[55] In principle, the protocols of democratic governance, including the rules of responsible parliamentary government and regular elections, sufficiently protect the interests of those who dislike or reject a governing party's platform. Against that understanding of the relationship between the government and its citizens, courts have found find it difficult to conceptualize and articulate when mandatory policies cross the threshold into impermissible forms of state compulsion. Mandatory gas pump stickers, the Law Society

50 *Ibid* at 969 (stating if an activity "conveys or attempts to convey meaning, it has expressive meaning and *prima facie* falls within the scope of the guarantee").

51 Local free speech governance has always been subject to the law, including criminal law concerning hate propaganda, human rights legislation, and civil law (i.e., the law of defamation).

52 *McKinney v University of Guelph,* [1990] 3 SCR 299 at 273, 76 DLR (4th) 545 (per La Forest J).

53 *Canadian Federation of Students, supra* note 30 at paras 8, 18.

54 *Big M, supra* note 2 at 344.

55 *In Lavigne v Ontario Public Service Employees Union,* [1991] 2 SCR 211 at 260, 81 DLR (4th) 545, Wilson J. maintained that freedom from association would lead to absurd results, such as the right to challenge taxes that were then used to support causes taxpayers find objectionable [*Lavigne*]. La Forest J. remarked, as well, that "it certainly could not have been intended that s.2(d) protect us against the association with others that is a necessary and inevitable part of membership in a democratic community"; *ibid* at 320.

of Ontario's mandatory declaration of values (the SOP), the Canada Summer Jobs attestation, and the citizenship oath to the Queen are among the manifold ways the government compels the voices of its community in more or less invasive ways. At the least, the *Charter* must apply when the state compels members of the community to affirm, endorse, or adopt a policy, creed, pledge, or partisan position and attaches consequences to non-compliance.[56]

Part of the resistance to constitutionalizing freedom from government compulsion is also contextual. It is surprising, for instance, that the *Charter* jurisprudence has been slow to incorporate *Big M*'s conception of freedom into the section 2(b) jurisprudence. With the exception of *Devine v. Quebec*, *Big M*'s insights on coercion have played little or no role in discussion of freedom from compulsion; only a few claims have succeeded under section 2(b), albeit without substantial or meaningful discussion of how and why coercion threatens freedom.[57]

The question of compulsion under subsections 2(b) and (d) has only received careful consideration in two cases arising in a labour union context, where the state's regulation of union membership and compulsory dues to support non-workplace issues was at stake.[58] With some justices dismissing the concept of non-association absolutely and others suggesting a higher threshold under section 2(d), the Court in *Lavigne v OSPEU* signalled its discomfort with the concept and was unable to agree on a standard for breach.[59] Only La Forest J. returned to *Big M* and relied on its conception of freedom in finding that "[f]orced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it".[60]

Justice McLachlin spoke only for herself in setting a high threshold for breach, indicating that a claim for freedom from compulsion is contingent on criteria of forced ideological conformity, public identification with an objectionable message, and the presence or absence of opportunities to disavow the offending message.[61] In principle, the question of breach should not depend on whether ideological conformity is demanded, whether the expression com-

56 In *McAteer v Canada (AG),* 2014 ONCA 578, the Ontario Court of Appeal held that a compulsory oath to the Queen, as part of citizenship eligibility, did not even constitute a *prima facie* violation of the Charter.

57 See e.g., *Devine v Quebec (AG)*, [1988] 2 SCR 790, 55 DLR (4th) 641 (citing *Big M* and finding that Quebec's outdoor advertising sign law violated s.2(b) of the *Charter* by prohibiting the use of the English language as well as by compelling the exclusive use of the French language); See also *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1 (concluding that Parliament's mandatory unattributed tobacco package warnings violated s.2(b) of the *Charter*); See also *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385 (concluding that Quebec's referendum law compelling third parties to participate either in "yes" or "no" committees, without sufficient alternative options for participation, violated s.2(b) of the *Charter*); See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1089, 59 DLR (4th) 416 (rejecting the claim that a mediator's order requiring an employer to write a mandatory reference letter violated s.2(b)).

58 *Lavigne, supra* note 55 (rejecting the claim that mandatory union dues used for non-workplace objectives are impermissible forms of compelled expression and association); See *R v Advance Cutting & Coring Ltd,* 2001 SCC 70 (rejecting the claim that mandatory union membership as a condition of employment violates s.2(d) of the *Charter*).

59 See Lavigne, supra note 55 at 263, 270 (per Wilson J, excluding the right not to associate from s.2(d) and deflecting claims of non-association to ss.2(b) and 7 of the Charter and then stating, under s.2(b), that it was not necessary to decide whether the guarantee includes a right not to express oneself at all on an issue).

60 *Ibid* at 318.

61 *Ibid* at 343, 344, and 273 (*per* Wilson J, on disavowal).

pelled is objectively and publicly identified with an individual or institution, or whether there are opportunities for those compelled to disavow the message.[62] The better view is that a standard more analogous to the low threshold for breach of expressive freedom — the *Irwin Toy* test — should apply when freedom from compelled expression or association is at issue.[63]

Even under a more onerous standard of compulsion, the governments' mandatory campus speech policies offend the *Charter*: they are a form of forced ideological conformity that publicly identifies colleges and universities with a governmental conception of free speech, and does not permit institutions to disavow the policy. Despite her hostility to the claim in *Lavigne*, Wilson J. agreed that it would clearly violate section 2(b) for the government "to put a particular message into the mouth of [an individual]".[64] That is precisely the purpose and effect of compulsory free speech policies for colleges and universities.

From the perspective of *Charter* interpretation, the deeper concern is that the rules for freedom from coercion are out of touch with section 2's core purposes. Again, that purpose is to protect vulnerable individuals and institutions from the state's coercive power, whether it operates as a prohibition on expressive freedom or a compulsion to adopt a government message or practice. In that regard, *Big M* is still the closest the Court has come to grasping section 2's essence: in the context of section 2(a)'s guarantee of religious freedom, *Big M* represents the Court's most insightful discussion of compulsion as a profound violation of freedom.

At this time, any number of current examples provide an opportunity to ameliorate the *Charter*'s approach to freedom from compelled expression and association. For instance, litigation arising from the Ontario government's mandatory gas pump stickers will allow the judiciary to incorporate and embed *Big M*'s concept of freedom from coercion in section 2(b). In similar fashion, any attempt to enforce an official government policy on campus free speech will enable, and even require, colleges and universities to defend their constitutional rights. There, as well, *Big M* vindicates the claim and, in the process, institutions might also have the opportunity to reclaim and revitalize their autonomy in matters of university governance.

Compelled freedom's paradox

In *Big M*, Justice Dickson defined coercion as "blatant forms of compulsion", such as "direct commands to act or refrain from acting on pain of sanctions".[65] That definition accurately and decisively describes Ontario's mandatory free speech policy for colleges and universities across the province. Even without the threat of immediate sanctions, it also describes Alberta's "collaborative" and flexible approach. No academic institution would freely choose to comply with dictates that so profoundly vitiate longstanding understandings of institutional autonomy, local governance, and academic freedom. As Justice Dickson again recognized, no one who is compelled to a course of action or inaction is "truly free".[66] In 1985, that included a

62 *Ibid* at 322. As La Forest J stated, "[i]t is of little solace to a person who is compelled to associate with others against his or her own will that no one will attribute the views of the group to that person."

63 Ibid at 328. Note also that La Forest J proposed a more generous conception of freedom from compelled association in *Lavigne*.

64 *Ibid* at 267.

65 *Big M*, *supra* note 2 [emphasis added].

66 *Ibid*.

corporate drugstore selling bicycle locks on a Sunday, and in 2020 it must include institutions of higher learning. The imposition of a state-based version of the Chicago Statement on Free Expression Principles constitutes an impermissible form of compelled expression and association with a governmental conception of what expression is free. In principle, is much better than a university free expression policy that is controversial or restrictive, a more generous conception of free expression imposed by government.

A byproduct of mandatory free speech is that the policies fundamentally alter the *Charter* status of colleges and universities, in two ways. First, the policies directly interfere with the section 2 rights of these institutions of higher education, and are subject to the *Charter*. Any attempt to enforce a governmental view of expressive freedom is therefore open to challenge under the *Charter*. In Ontario, student federations have successfully challenged the province's attempt to regulate student fees, albeit not in relation to the *Charter*. Second, and equally important, free speech policies in Ontario and Alberta are now a matter of government policy, and any limits on campus expression — i.e., those that were formerly a matter of local governance – are now subject to the *Charter*.[67] While some may welcome this change, others might regard it as a further loss of institutional autonomy and deference to the local governance of university affairs.

Beyond these concerns, the imposition of a mandatory free speech policy points to and reinforces a more ominous development: the rise of mechanisms — in a variety of contexts and settings — to compel members of a democratic community to observe and adopt various state-based ideological, religious, political, and partisan positions by members of the democratic community. As suggested above, these are serious incursions that fundamentally undermine *Big M*'s core conception of freedom as the absence of coercion or constraint. These incursions must be resisted and met by a robust conception of freedom from compulsion under section 2 of the *Charter*. Achieving that goal is simply a matter of adopting and acting on *Big M*'s conception of freedom under section 2 of the *Charter*, including its guarantees of expressive and associational freedom.

67 See *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 (applying the *Charter* to the university, independently of the mandatory free speech policy).