



Justice Centre for Constitutional Freedoms

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VIA EMAIL AND FACSIMILE

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Dear Mr. Cassels,

Re: Request that Campus Security Failure to Uphold Free Expression and the Rule of Law on Campus Not be Repeated

We write on behalf of Cecilia Phillipone, president of Youth Protecting Youth (“YPY”), an official student club recognized by the University of Victoria Students’ Society.

We have been advised by YPY that their flag display event for February 22, 2018 has been approved (the “2018 Display Event”). YPY looks forward to working with the University of Victoria (“UVic”) to make the 2018 Display Event a success.

As you know, on November 16, 2017, YPY members’ peaceful and university-authorized flag display on the UVic campus was vandalized by UVic students. UVic Campus Security Services (“Campus Security”) unfortunately failed to intervene to protect YPY’s flag display, and permitted the vandalism to occur.

We expect that similar inaction on the part of Campus Security will not occur regarding the 2018 Display Event, and that UVic will adhere to its policies in upholding the free expression rights of its students and disciplining students that attempt to censor YPY members by vandalizing their display.

Relevant Background

In order to ensure the success of the 2018 Display Event and prevent the unlawful interference and destruction by vandals, it is necessary to review the events of 2017.

On the morning of November 16, 2017, YPY members erected a display in an area of the UVic campus known as the “Quad”, consisting of 10,000 small blue and pink flags planted into the ground (the “2017 Display Event”). The flags represent the approximately 100,000 abortions that occur in Canada annually. The purpose of this and other similar flag displays are to raise awareness of the fact that Canada has no law regulating abortion. YPY had emailed Campus Security to notify them of the event on November 15.

A few hours after the flag display was erected, a handful of UVic students began to vandalize the display by pulling the flags out of the ground. However, they stopped when approached by YPY members.

At about noon, UVic students began to gather to protest the 2017 Display Event. The protest became larger as time went on, increasing in number and intensity. At approximately 1:30 pm, the crowd of protesting students grew to approximately 30 individuals. Some of the protesting students became verbally aggressive and told YPY members that they would remove the flags themselves if YPY refused to do so. Concerned about the protesting students’ threats, YPY called Campus Security. Many protesting students then began pulling up the flags and putting them in piles (the “Disruptive Students”).

As the Disruptive Students began to destroy the flag display, two Campus Security officers arrived, but declined to take any action. The officers simply watched as the Disruptive Students dismantled YPY members’ flag display. The officers explained to YPY members that they must remain “neutral” and that they could not take any action to protect the flag display because it could be interpreted as Campus Security taking a position in support of YPY. The officers further explained that intervention could “escalate” the situation.

Unopposed, the Disruptive Students completely destroyed 2017 Display Event.

Campus Security was Not Acting in a “Neutral” Fashion

As justification for their inaction regarding the 2017 Display Event, Campus Security claimed to be under an obligation of “neutrality”, and that if it acted to protect the flag display from student vandalism, it would not be viewed as “neutral”. Such a claim represents a gross misunderstanding of the legal duties of Campus Security to protect the property of students and to respond to violations of UVic’s policies. Campus Security’s job is to uphold the rule of law on campus, not stand idly by while a mob of bullies vandalize an approved student display.

In destroying the 2017 Display Event, the Disruptive Students engaged in “at-risk behaviour” as it is defined in section 3.00 of the *Response to At-Risk Behaviour* policy.¹ By engaging in vandalism of

¹ UVic Policy No. SS9125: <https://www.uvic.ca/universitysecretary/assets/docs/policies/SS9125.pdf>

student property and disrupting the peaceful expression of the student members of YPY, the Disruptive Students further violated sections 4.00 and 19.00 of the *Resolution of Non-Academic Misconduct Allegations* policy.² Campus Security is mandated by UVic policies to intervene when faced with student misconduct that violates UVic's policies.³

It is not “neutral” for Campus Security to ignore student violations of UVic's policies. It is not “neutral” for Campus Security to refuse to adhere to UVic's policies, and purposely fail to implement and enforce these policies, which are essential to UVic fulfilling its mandate. It is further not “neutral” to permit UVic students to use physical force to vandalize the property and expression of other students on campus. If police officers watched the smashing of a store window, taking no action to prevent this or to apprehend the perpetrators, the police behaviour would not qualify as “neutral.”

The Supreme Court of Canada has clearly affirmed that despite the broad scope of freedom of expression, “violence as a form of expression receives no such protection.”⁴ Moreover, in *Dolphin Delivery*, the Supreme Court also affirmed that freedom of expression “would not protect the destruction of property”.⁵ In destroying the 2017 Display Event, the Disruptive Students were not engaging in any legitimate form of expression worthy of consideration by Campus Security; they were vandalizing YPY members' flag display, thereby preventing the expression of YPY members. If another student group on campus had suffered the removal or destruction of its property, and if Campus Security had witnessed this vandalism taking place, would Campus Security condone this behaviour? Or is this a unique approach, reserved only for YPY?

In purporting to remain “neutral”, Campus Security actually did the opposite: they favoured illegal conduct which does not qualify as “expression”, and allowed the suppression of the legal right to express one's opinions on campus in a peaceful fashion, as YPY members were doing. By refusing to take any action, Campus Security condoned the Disruptive Students' mob censorship and vandalism. Campus Security's unwillingness to uphold university policies and protect the 2017 Display Event from vandals was a serious failure. It cannot be permitted to reoccur. Failure to uphold free expression and the rule of law on campus emboldens lawlessness and disrespect for UVic.

² UVic Policy No. AC1300: <https://www.uvic.ca/universitysecretary/assets/docs/policies/AC1300.pdf>. Appendix “A” of the *Resolution of Non-Academic Misconduct Allegations* policy states as examples of Non-Academic Misconduct “misappropriating, destroying, defacing, vandalizing [...] the property, equipment or assets of other members of the University Community”, and “obstructing University Activities or engaging in or demonstrating disruptive behaviour”: sections 2.01(b) and 2.04(a).

³ Section 20.00 of the *Resolution of Non-Academic Misconduct Allegations* policy, “[t]he university recognizes its responsibility to take measures to prevent Non-Academic Misconduct within the University Community[.]” Further, section 8.00 of the *Procedures for Responding to At-Risk Behaviour* policy states, “Campus Security has initial responsibility for assessing and managing the at-risk behaviour.”

⁴ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 970.

⁵ *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 at para 20.

The Rights of Student Members of YPY to Freedom of Expression

Freedom of expression is not merely an aspiration or ideal; it is the lifeblood of liberal democracy and the cornerstone of higher education. Further, freedom of expression is a common-law right held by students at the University of Victoria, including YPY students. The 2017 Display Event represented a legitimate form of student expression occurring on a portion of UVic's campus which is ideally suited for student expression. There should be no greater celebration of, and protection for, freedom of expression, including the expression of minority viewpoints, than at institutions of higher learning, such as UVic.

As a legal right, freedom of expression is not only explicitly protected by the *Canadian Charter of Rights and Freedoms* (the "Charter"), it also predates and transcends the *Charter*. Indeed, as noted by the Supreme Court of Canada in *RWDSU v Dolphin Delivery Ltd*:

Freedom of expression is not, however, 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.⁶ [Emphasis added]

Further, freedom of expression "protects the right to receive expressive material as much as it does the right to create it".⁷ Permitting the censorship of minority viewpoints on its campus deprives students of the right to hear and view diverse expression, which necessarily includes minority opinions and ideas that the majority disapproves of.

As John Stuart Mill stated, "To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty. All silencing of discussion is an assumption of infallibility".

UVic has explicitly acknowledged that its students have the freedom to express themselves on outdoor campus spaces and has committed itself to upholding that freedom. Section 1.0 of the *Booking of Outdoor Space by Student Groups* policy states:

Freedom of speech is a core component of intellectual inquiry and is a fundamental value of the university. Accordingly, this policy must not be interpreted or applied to restrict, open public discourse and freedom of expression except when a restriction is reasonably necessary to ensure that such open public discourse and freedom of expression occurs within the requirements of this policy. In this regard, the university recognizes and supports the importance of providing opportunities for student groups to express and advocate for their

⁶ [1986] 2 SCR 573 at para 12.

⁷ *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 SCR 1120 at paras 40- 41 citing *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at pp 1339-1340.

ideas and beliefs on the university's property subject only to such limits as are reasonably necessary to maintain the university's normal operations, to preserve the safety and security of all members of and visitors to the university community, and to maintain the integrity of the University's property.⁸ [Emphasis added]

YPY is looking forward to the 2018 Display Event and is appreciative of UVic's approval of the 2018 Display Event as well as UVic's acknowledgment of the importance of free expression on the outdoor spaces of the UVic campus.

Public Discussion of Abortion is a Recognized Right in Canada

The Supreme Court of Canada held in *R. v. Morgentaler* that the protection of unborn human life is a valid legal objective that “hangs in the balance” in the shaping of public policy about abortion,⁹ that there is a “public interest in the protection of the unborn”,¹⁰ that the state has a “compelling legal interest in the protection of the foetus,”¹¹ and that the “protection of foetal interests by Parliament is also a valid governmental objective”.¹²

In *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, the Supreme Court stated that the resolution of the debate about the personhood of the unborn child is “fundamentally normative” and must be resolved by bodies other than courts based on the open consideration of “broad social, political, moral and economic choices”.¹³ Indeed, courts affirm that “the importance of communicating those ideas and beliefs [about the “value of human life” and “the debate on abortion”] lies at the ‘very heart of freedom of expression’.”¹⁴ Further, contrary to a common misconception, access to therapeutic abortion is not a right in Canada.¹⁵

Difficult though some may find the abortion issue, there must be room for free and open discussion about the nature of unborn human life, and about whether and to what extent that life should be valued and protected within our culture and our legal system. Public educational institutions ought to be a *locus* of peaceful, vigorous debate where diversity of thought is cultivated, not regressive enclaves of censorship. Peaceful, public and vigorous advocacy regarding issues of life, abortion, and personhood is entitled to protection under the fundamental Canadian value of free expression, even if such expression is unpopular or makes some people feel uncomfortable.

⁸ http://studentaffairs.uvic.ca/assets/pdfs/Outdoor-Space-Booking-Policy_FINAL-Sept-2014.pdf

⁹ [1988] 1 SCR 30, at p 110-114; 123-28 (per Beetz and Estey JJ).

¹⁰ *Ibid* at p 146 (per McIntyre and La Forest JJ).

¹¹ *Ibid* at p 183 (per Wilson J).

¹² *Ibid* at p 75 (per Dickson CJ and Lamer J).

¹³ *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, [1997] 3 SCR 925 at para 12, citing *Tremblay v Daigle*, [1989] 2 SCR 530.

¹⁴ *Wilson* at para 157, quoting *R v Spratt*, 2008 BCCA 340 at paras 26-27.

¹⁵ See *R. v Morgentaler*; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, at para 104.

Conclusion

Peaceful expressions of opinions, especially minority opinions, should be protected by UVic from the destructive and unlawful attempts at censorship by other students who violate UVic's policies. Rather than allow mob rule to dominate, Campus Security could have and should have prevented the Disruptive Students from destroying the 2017 Display Event and fulfilled its mandate to "promote a safe and welcoming environment to enhance the well-being of students, staff, faculty and visitors". Knowingly and deliberately permitting the censorship of YPY members' expression is not an act of neutrality, but a partisan act that supported destructive behaviour.

We request that, if students threaten to vandalize or disrupt the 2018 Display Event, UVic adhere to its policies and procedures, including the *Booking of Outdoor Space by Student Groups* policy, the *Response to At-Risk Behaviour* policy, and the *Resolution of Non-Academic Misconduct Allegations* policy, and protect the 2018 Display Event.

If there are any questions in regard to the foregoing, I look forward to speaking with you.

Sincerely,



James Kitchen J.D.

Barrister and Solicitor

Justice Centre for Constitutional Freedoms

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