CITATION: University of Toronto (Governing Council) v. Doe et al. 2024 ONSC 3755
COURT FILE NO.: CV-24-00720977
DATE: 20240702

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO	*Monique J. Jilesen, Rebecca Jones, Meghan S. Bridges, Andrew Locatelli, Nikolas De Stefano* for the Applicant
Applicant	
– and –	
JOHN DOE, JANE DOE, TAYLOR DOE, PERSONS UNKNOWN, ABDURRAHEEM DESAI, AVIRAL DHAMIJA, ERIN MACKEY, HEIGO PARSA, KABIR SINGH, KALLIOPÉ ANVAR MCCALL, MOHAMMAD YASSIN, SARA RASIKH, SERENE PAUL and SAIT SIMSEK MURAT	*Jackie Esmonde, Stephen J. Moreau, Nitti Simmonds, Danielle Bisnar, Aminah Hanif, Sydney Lang, Leora Smith, Sima Atri* for the respondents Abdurraheem Desai, Aviral Dhamija, Erin Mackey, Heigo Parsa, Kabir Singh, Kalliopé Anvar Mccall, Mohammad Yassin, , Serene Paul And Sait Simsek Murat
Respondents	
	Mae Nam, Nancy Dhugga, Anson Cai for the respondent Sara Rasihk
-and-	
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, CENTRE FOR FREE EXPRESSION, UNIVERSITY OF TORONTO FACULTY ASSOCIATION, INDEPENDENT JEWISH VOICES CANADA, JEWISH FACULTY NETWORK, UNITED JEWISH PEOPLE'S ORDER, UNITED	*Louis Century*, *Emma Phillips*, *Adriel Weaver* for the Intervenor Canadian Association of University Teachers and the Centre for Free Expression

STEELWORKERS, ONTARIO PUBLIC SERVICE EMPLOYEES UNION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AMNESTY INTERNATIONAL CANADA, CENTRE FOR ISRAEL AND JEWISH AFFAIRS, UNITED JEWISH APPEAL OF GREATER TORONTO, STAND WITH US CANADA, SIMON WIESENTHAL CENTRE, THE B'NAI B'RITH CANADA, LEGAL CENTRE FOR PALESTINE, HILLEL ONTARIO, NATIONAL COUNCIL OF CANADIAN MUSLIMS, ALLIED VOICES FOR ISRAEL, COUNCIL OF ONTARIO UNIVERSITIES, ARAB CANADIAN LAWYERS ASSOCIATION, and NETWORK OF ENGAGED CANADIAN ACADEMICS Intervenors	)	*Dayna Steinfeld*, *Wassim Garzouzi, Simcha Walfish* or the Intervenor University of Toronto Faculty Association *Karen R. Spector* for the Intervenors Independent Jewish Voices Canada, Jewish Faculty Network, United Jewish People's Order *David Wright*, *Laura Johnson*, *Rebecca Jones* for the Intervenor United Steelworkers and Ontario Public Service Employees Union *Tim Gleason, Amani Rauff* for the Intervenor Canadian Civil Liberties Association *Adrienne Lei*, *Meghan Phyper* for the Intervenors Amnesty International Canada and Canadian Lawyers for International Human Rights *Mark A. Ross, Jacob Klugsberg* for the Intervenors Centre for Israel and Jewish Affairs and United Jewish Appeal of Greater Toronto *Deborah E. Palter, Scott McGrath*, *Alexander Soutter* for the Intervenor StandWithUs Canada *Jamie Spotswood*, *Tal Letourneau* for the Intervenor Simon Wiesenthal Centre *Aaron Rosenberg* for the Intervenor B'nai Brith Canada *Stephen Ellis* for the Intervenor Legal Centre for Palestine *Paul Fruitman, Matt Gottlieb, Tyler Morrison* for the Intervenor Hillel Ontario

)	*Nusaiba Al-Azem* for the Intervenor
)	National Council of Canadian Muslims
)	
)	*Zohar Levy* for the Intervenor Allied
)	Voices for Israel
)	
)	*George Avraam, Jennifer Bernardo*,
)	*Ajanthana Anandarajah* for the
)	Intervenor Council of Ontario
)	Universities
)	
)	*Dania Majid* , *Sherif Foda, Shane*
)	*Martinez* for the Intervenor Arab
)	Canadian Lawyers Association
)	
)	*Daniel Z. Naymark* for the Intervenor
)	Network of Engaged Canadian
)	Academics
)	
)	*Mae J Nam, Anson Cai, Nancy Dhugga*
)	for the Intervenor Canadian Union of
)	Public employees 3902
)	
)	
)	**HEARD:** June 19 – 20, 2024 further
	written submissions on June 24, 2024

KOEHNEN J.

REASONS FOR JUDGMENT

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OVERVIEW

[1] The applicant, the Governing Council of the University of Toronto (the "University") moves for an interlocutory injunction to end an encampment on an area known as Front Campus on its main St. George campus in downtown Toronto.

[2] The occupants of the encampment want the University to, among other things, divest itself of holdings that they believe further injustices to Palestinian residents of the West Bank and Gaza. The named respondents are students or employees of the University who have taken an active role in the encampment. Unless the context requires more specificity, I will refer to the respondents either as protesters, occupants, Occupy U of T or the respondents in these reasons.

[3] In addition, I have given 20 parties status to intervene as friends of the court and to make written submissions presenting the perspectives of their organizations. At the risk of oversimplifying, the Intervenors have generally reflected the views of Jewish groups critical of the encampment, Jewish groups supportive of the encampment, Arab, Muslim and Palestinian groups advocating for a more nuanced understanding of Palestinian aspirations, human rights organizations providing perspectives on the law, organizations of University employees and an organization representing Ontario's universities more generally.

[4] Given the way the law and the facts intersect in this case, it would have been possible to write reasons in legal short form in only a few pages. Doing that would

not, however, give the parties or Intervenors the sense that they have been heard and would make a peaceful resolution less likely. I have therefore taken the additional time to address the arguments of both sides in greater detail and have tried to write these reasons in a way that is understandable to the many non-lawyers who are interested in the outcome of this case.

[5] The fundamental issue is whether a protest encampment that has been set up at the University can remain or whether it must be dismantled. The University characterizes the case as dealing with property rights and says that, as the owner of the property, it has the right to determine how the property is used. The protesters characterize the case as dealing with freedom of expression, association and assembly. They say the University's effort to dismantle the encampment breaches these rights. The University replies that the case has nothing to do with freedom of expression because the order it seeks will allow the protesters to assemble and demonstrate throughout the University campus between 11 pm and 7 am. It would only restrain them from camping, erecting structures, and blocking access to University property.

[6] The University raises three broad objections to the encampment. It says the encampment is violent, is associated with antisemitic language and slogans and has appropriated University property. To obtain an injunction, the University must demonstrate that it has a strong prima facie case with respect to these issues, that it has suffered irreparable harm, and that the balance of convenience favours

granting an injunction. Each of these tests is explained in greater detail in the reasons. For the moment I summarize my conclusions on each.

[7] The University has not made out a strong prima facie case to show that the encampment is violent. The record before me shows that, apart from the initial seizing and the continuing exclusion of people from Front Campus, the encampment itself is peaceful. While there is some evidence of physical altercations outside the encampment, there is no evidence that any of the named respondents or other encampment occupants are associated with those incidents.

[8] The University has not made out a strong prima facie case to show that the encampment is antisemitic. Although there have clearly been instances of antisemitic hate speech outside of the encampment, there is no evidence that the named respondents or encampment occupants are associated with any of those instances. The encampment itself has people of various backgrounds including Muslims and Jews. It conducts weekly Shabbats involving Jews and Muslims. Both Jewish and Muslim members of the encampment have testified about its inclusive, peaceful nature.

[9] There was considerable controversy over certain slogans used at the encampment such as “From the River to the Sea, Palestine shall be Free.” A number of parties ask me to find that this and other slogans are antisemitic. The record does not establish a strong *prima facie* case to demonstrate that the slogans are antisemitic. The record before me shows that the slogan and a similar one used by Jewish

Israelis, convey a variety of meanings ranging from a call for a uniquely Jewish or uniquely Palestinian state in the area between the Jordan River and the Mediterranean Sea, to a single state in which Jews and Palestinians are equal, to a two state solution. The record suggests that the precise meaning depends on the circumstances in which it is used. There is no evidence that the named respondents or occupants of the encampment were using any of the slogans with antisemitic intentions.

[10] The University has made out a strong *prima facie* case to the effect that the protesters have appropriated Front Campus from the University and have prevented others from using Front Campus for over 50 days. The encampment has taken away the University's ability to control what occurs on Front Campus. The case law is clear that this type of loss of use amounts to irreparable harm.

[11] The balance of convenience test requires me to compare the harm to the respondents if an injunction is granted against the harm to the University if an injunction is not granted. In my view, the harm to the University is greater if the injunction is not granted than is the harm to the respondents if the injunction is granted.

[12] The single most important factor in that analysis is that the injunction will continue to allow the protesters to demonstrate throughout the campus. The only thing the injunction prevents the protesters from doing is camping, erecting structures, blocking entrances to University property and protesting on campus between 11

PM and 7 AM. The case law is clear that protesters do not have a right to camp, erect structures or block entrances to property. As a result, the injunction does not limit the freedom of expression that the law provides. Although I was not taken to any cases that restrain protesters from demonstrating between 11 PM and 7 AM, there is no evidence that the protesters actually wanted to do that, other than by having tents set up on Front Campus. In addition, much of the University campus is taken up by student residences. Having protesters refrain from demonstrating between 11 PM and 7 AM is a reasonable balance of rights between the protesters' rights to demonstrate and the residents' rights to sleep.

[13] The University has a series of policies that aim to ensure that free speech is assured to all community members. This includes ensuring that no voices are excluded from exercising free speech on University property. The occupants have controlled entry to Front Campus in a way that excludes opposing voices and excludes people who are apolitical and simply want to use Front Campus as an attractive recreational space.

[14] The protesters say that the restrictions on access that they have imposed on Front Campus are intended to prevent violence. That is a worthy goal. But it also raises the question of why the protesters get to impose their rules on Front Campus but the University does not get to impose its own rules, even though it owns the property.

[15] In our society we have decided that the owner of property generally gets to decide what happens on the property. If the protesters can take that power for themselves by seizing Font Campus, there is nothing to stop a stronger group from coming and taking the space over from the current protesters. That leads to chaos. Society needs an orderly way of addressing competing demands on space. The system we have agreed to is that the owner gets to decide how to use the space.

[16] In some cases, the owner's right to control its space is subject to other legal rights. If for example, the owner is a governmental entity and the space is public, access may also be governed by the rights to freedom of expression, association and assembly under the *Charter of Rights and Freedoms*. For what non lawyers might call "technical grounds" that I explain later in these reasons, I do apply the *Charter* here but do apply *Charter* values.

[17] The injunction the University seeks is consistent with *Charter* values because it preserves the full legal right to protest.

[18] The overall goal of the protesters is to get the University to divest from certain investments. The University has procedures in place to consider those sorts of requests. The University has offered to help the protesters pursue that process on an expedited basis. The protesters have had considerable success in shining a bright light on what universities should or should not invest in. They have succeeded in catching everyone's attention and in obtaining an expedited process. It is now time for the protesters to peacefully dismantle the encampment and focus

their energies on building support within the group that will investigate divestment and within the broader University community to persuade both groups that divestment is a worthy goal. Persuasion will not be achieved through occupation but through reasoned discussion. If the respondents bring the same attention and focus to that exercise as they have to the encampment, they may yet achieve their goal.

[19] I appreciate these reasons are long. As noted, they are long because I wanted to ensure that parties felt they had been heard and understood, if not always agreed with. I have tried to explain in some detail why I have not accepted the submissions of certain parties. I appreciate that a long legal decision can be a daunting read. If the protesters, want to focus in on the most critical reasons for which I have found for the University, they are found in the discussion about the balance of convenience at pages 62 to 81.

[20] Before proceeding, I add one parenthetical note, because of the nature of some of the social media attacks on people on both sides of the case, I have not used personal names in these reasons but have referred to them by their title or by their initials.

I. Background Facts

[21] On October 7, 2023, Hamas,[1] the governing party of Gaza, launched an attack on southern Israel killing approximately 1,200 people comprising 695 Israeli civilians (including at least 33 children), 71 foreign nationals, and 373 members of Israel's security forces. In addition, Hamas took approximately 250 hostages.[2]

[22] Shortly thereafter, the government of Israel launched a war in Gaza with the articulated purpose of eliminating Hamas as a governing or military entity. At the time of writing these reasons, the United Nations estimates that over 35,000 Gazans have died in the war to date, just over half of which are women and children. In addition, there are well-publicized shortages of water, food, fuel, electricity, medicines and other essentials of life for Gaza's civilian population. Over one half of the buildings in Gaza have been destroyed and more than 1.7 million people have been displaced.

[23] Events in the Middle East have created a legitimate sense of injury, threat and fear on the part of both Israelis and Gazans. Those feelings have spread to supporters of Israel and Gaza throughout the world, especially among Jews and Palestinians. Each side feels that it is the victim of either antisemitism or anti-Palestinian racism. Those feelings are raw and painful. The intensity of these feelings is exacerbated by injustices to which both groups have been historically subject throughout the

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[1] Which Canada has listed as a terrorist organization under the *Criminal Code Criminal Code*, RSC 1985, c C-46.
[2] *Strengthening the Pillars: Report of the TMU External Review* (Toronto: Toronto Metropolitan University, 2024) report of the Honourable J. Michael McDonald p. 22 – 23.

world, including in Canada. Those passions have led to dramatically increased acts of antisemitism, anti-Palestinian racism and Islamophobia in Canada and elsewhere.

[24] In an environment as charged as this, it is easy for misunderstandings to occur, tempers to flare, and intemperate positions to be taken. The situation is made even more delicate by our own society's sensitivity to some of the injustices we have committed against both Jews and Palestinians. This has created what one deponent in the proceeding described as a "moral panic" that can lead people to have instant, knee-jerk reactions to events without fully investigating the facts and without considering all of the nuances of the situation. It can also lead people to lump individuals "on the other side" together and attribute the malicious intentions of the few onto the peaceful majority.

[25] In these troubled circumstances, a group of students at the University began protesting the events in Israel and Gaza. In early April, 2024 they staged a "sit-in" outside the office of the University's President demanding that the University: 1) Disclose all investments in whatever form or account they are held;[3] 2) Divest the University's holdings from all direct and indirect investments that "sustain Israeli apartheid, occupation and illegal settlement of Palestine;" and, 3) Suspend all partnerships with Israeli academic institutions that either: operate in settlements

[3] Including endowments, short-term working capital assets, and other financial holdings of the University.

in occupied territories, or; “support or sustain the apartheid policies of the state of Israel and its ongoing genocide in Gaza.”

[26] By the end of April, 2024 the University became concerned that it might become subject to the same sorts of occupations that other universities in North America have experienced in relation to the war on Gaza. As a result, on April 27, 2024 the University erected a fence around a large grassy area known as Front Campus inside King’s College Circle on its main campus in downtown Toronto.

[27] Front campus is a large grassy area in a particularly beautiful and historic part of the University campus. It is surrounded by architecturally significant buildings such as Convocation Hall, Simcoe Hall, Knox College, University College, the Gerstein Library and the Medical Sciences Building. It is open to the entire University community and to the public at large. Although it is used for some formally scheduled events like graduation ceremonies and summer camps, it is otherwise a recreational green space that is open for gathering, picnicking, running, and other leisure activities.

[28] Front campus had been closed for three years for a complete refurbishment at a cost of approximately $100 million. It reopened in October 2023. Its formal grand opening was scheduled for late May, 2024. It was also intended to be used during the graduation ceremonies which occurred at the University between June 3 and June 21.

[29] When the University erected the fence around Front Campus, it also put up "No Tents, No Camping" signs. In addition, it published notices to students saying that it respected the right to assemble and protest within the limits of the University's policies and the law but made it clear that overnight camping would be viewed as trespassing and as contrary to the *Code of Student Conduct.*

[30] In the early morning hours of May 2, 2024, protesters who later identified themselves as belonging to Occupy U of T created an entry in the fence and set up an encampment on Front Campus. By May 24, there were as many as 177 tents in the encampment. The encampment takes up almost all of the green space on Front Campus.

[31] Encampment occupants have reinforced the fence using chains, wiring, and zip ties. Additional fence panels have been placed against the first ring of fencing to create a barrier and impede efforts to clear the fencing. Tarp has been placed over many of the fence panels to prevent people outside the fence from seeing inside.

[32] The University notes that the protesters have said that they will not leave until their demands have been met. By way of example, at a negotiation meeting with the University, on May 12, 2024, Occupy U of T's student representatives[4] told the University that if their demands were not met, they intended to "live on your lawn"

[4] Two of whom are Respondents on this motion.

for the indefinite future. On May 27, 2024, the caption on an Occupy U of T Instagram post in support of a rally held that day stated that the purpose of the rally was "to show the university WE WILL NOT BE LEAVING." That said, negotiations between the University and the protesters have led to compromises in the positions of both parties.

[33] The protesters consist of students, faculty, alumni of the University, and may include others from outside the University. The University's Students Union which represents 38,000 undergraduate students has expressed support for the protest. Occupants represent a diverse group of people of multiple faiths and national origins.

[34] The suggestion in many of the materials, especially those of several Intervenors, is that the protest is antisemitic in nature. The protesters deny this. They say their passion and urgency must be understood in the context of the war in Gaza. A war in relation to which: the International Court of Justice has issued two decisions; the Prosecutor of the International Criminal Court has issued arrest warrants for three Hamas and two Israeli leaders[5] for wilful infliction of famine and intentional attacks against civilian populations; and the United Nations Rapporteur has concluded that there are reasonable grounds for believing that Israel has surpassed the threshold

[5] Yahya Sinwar, Head of Hamas in Gaza; Mohammed Diab Ibrahim Al-Masri, Commander-in-Chief of the military wing of Hamas, known as the Al-Qassam Brigades; and Ismail Haniyeh,, Head of Hamas Political Bureau; Benjamin Netanyahu, the Prime Minister of Israel; and Yoav Gallant, Israel's Defence Minister.

for genocide in Gaza. In this context the protesters say they are not outliers in expressing their concerns.

[35] Many joined the encampment because they are Palestinian or have close personal connections to Palestine. Some have friends and family being killed and injured in Gaza. They feel helpless in the face of enormous suffering. From their perspective they are doing what they can to ensure that the University of which they are a member does not directly or indirectly support or contribute to this suffering. One protester expressed deep concern that "my university is investing my tuition in weapons manufacturing companies and those weapons are being used in the genocide against my people in Gaza."

[36] After several weeks without resolution, the University issued a Notice of Trespass on Friday May 24, 2024. The Notice informed occupants that the encampment amounted to trespass, that they could not erect or install tents, shelters or structures on University property, and that they could not occupy or gather on University property between 11 pm and 7 am. The occupants were given until Monday, May 27, at 8:00 a.m. to dismantle the encampment, failing which the University would seek a court order to remove it. The occupants did not comply with the Notice and this hearing was scheduled. The protesters submit that the Trespass Notice and this request for an injunction infringe their rights to freedom of expression, assembly and free association under the *Charter* of Rights and Freedoms. For ease of reference, in these reasons I will refer to all three rights as freedom of expression unless the context demands otherwise.

[37] With respect to the protesters' demand for divestment, the University says it has a formal Divestment Policy and a formal Divestment Procedure. That Policy and Procedure initiate a process to follow when someone questions the University's social responsibility as an investor. The University has offered to assist the protesters in implementing those mechanisms on an expedited basis.

[38] The protesters say they have no confidence in the process because it leads to a recommendation to the President which he can follow or ignore. They note that, in 2016, the current President declined to follow a recommendation to divest from fossil fuel investments. Instead, he initiated his own process which may result in fossil fuel divestment by 2030; 16 years after the request was made. The protesters submit that Gaza does not have 16 years to wait.

[39] The University replies that there is a legitimate divestment process in place but that the protesters simply do not like it. According to the University, the fact that the protesters do not like the existing process does not mean that they have the right to impose their own process with their own timing. Moreover, says the University, divestment is a financial issue, not a freedom of expression issue.

II. The University's Objections to the Encampment

[40] The University and certain Intervenors raise three concerns about the encampment: the appropriation of Front Campus to the exclusion of others, violence associated with the encampment and language used at the encampment.

A. Appropriation of Front Campus to the Exclusion of Others

[41] The University submits that the occupants of the encampment have appropriated control over Front Campus in a way that is inconsistent with the legal ownership of the property. The registered title holder of Front Campus is the Governing Council of the University of Toronto. In nonlegal language, the University owns the property.

[42] Since the encampment began, the occupants have implemented a controlled entry system to the fenced area surrounding Front Campus. Entry is controlled by a "gate team," marshals," and an "onboarding" team. They regulate access to the encampment in accordance with the encampment's community guidelines and entry policy. The gate is opened and closed for "community hours" at the discretion of the occupants. Visitors (i.e., individuals who do not sleep in the encampment overnight) are not permitted to enter before 11 a.m.

[43] Those who seek to enter are first met by a "greeter" who asks questions to determine whether the visitor should be allowed to proceed further. Protesters describe the goal of this interaction as trying to determine if the visitor is confrontational. The greeters try to remain conversational and ask about things like how the visitor heard about the encampment and where the visitor is from. People who decline to answer questions at the gate are not permitted to enter.

[44] If the visitor is permitted to continue, they proceed to the “onboarding” desk attended by members of the “onboarding team”. The desk is affixed with posters setting out the “community guidelines” that govern the encampment. The guidelines are also posted on Instagram. Those guidelines prohibit aggressive behaviour, racism or discrimination of any kind, alcohol and the use of other substances. The guidelines encourage masking to avoid surveillance. The guidelines also provide that “we [the encampment] believe in the Principles of the Resistance (Thawabit)” which includes recognition that Palestinians have the right to resistance, that Jerusalem is the capital of Palestine, and that Palestinian people have the right of return. The guidelines also state:

> Anyone can walk through our encampment but we will not platform opportunists.
>
> All messaging should be pro-the right to resist.

[45] This suggests that there may well be limits to entry based on belief.

[46] AW, a member of the "gate" and "onboarding" teams who works closely with the Marshals, testified as follows about the gate entry process during cross-examination:

> Q. And what if they just want to walk through Front Campus? They don't want to learn about what you are doing, and they don't wish to engage with you or discuss your demands to the University or discuss Palestinian liberation, they just wish to be on Front Campus.

> A. We do ask them why they are coming in, specifically. And if they understand that this is a protest and not a tourist destination, to just walk around, because there are individuals living inside.
>
> Q: And, if they wish to just go as - for a tourist destination, then you would not wish them to come in. Is that fair?
>
> A: Yeah. We do explain this to them, like as I exactly said. And then it just depends on their reaction.

[47] Front Campus is, however, a "tourist destination." It is an architecturally beautiful space that was specifically designed to attract people to, among other things, "just walk around."

[48] The University also objects to protesters blocking entry to University buildings. On May 22, 2024, a large group of protestors blocked access to the Sidney Smith building, the Health Sciences building, the Claude T. Bissell building, and the OISE building, all of which are relatively close to the encampment. Protestors, including some respondents, also blocked traffic on St. George Street. These blockages appear to have been relatively minor and were resolved when Campus Safety Officers asked the protesters to move.

[49] A more serious blockage occurred on May 27, 2024, when individuals who appeared to be associated with the encampment blocked the entrances to the Leslie L. Dan Pharmacy Building, and the McLellan Physical Laboratories building. This prevented approximately one half of a class of students from entering the building to write an examination for a summer course. The University was forced to cancel the examination. The cancellation was posted later that day on the

Occupy U of T Instagram account. Given that not anyone can post on the Instagram account, this suggests that the blockage was a more organized and deliberate event.

B. Alleged Violence and Damage to Property

i. The University's Evidence

[50] The University and some of the Intervenors submit that the encampment has been violent itself or has become a focal point for violence and damage to property. As set out in the section, I do not accept that the encampment is violent.

[51] The University and certain Intervenors say that violence since May 2, 2024 has included reports from Campus Safety and community members complaining of:

a. violence, including kicking, swarming and at least two reports of community members or counter protesters being punched by protestors;

b. reports of aggressive or potentially violent behaviour from counter protestors against encampment participants;

c. risky, unlawful behaviour, including protestors climbing on and damaging lamp posts and scaling University buildings; and

d. confrontations between the protestors and counter-protestors.

[52] The University concedes that it is not uncommon to receive reports about incidents on campus but says the number of those reports has increased significantly since the encampment began.

[53] It is important to note, however, that none of the named respondents or any occupants of the encampment have been associated with any of these complaints. One challenge involving a protest movement is that it can attract intemperate, violent elements. It is important, however, not to engage in guilt by association and conflate violent actors with peaceful protesters, as controversial as some might find the protest.

[54] The University concedes that it does not know who engaged in the reported acts of violence or vandalism. The University's point is not that the named respondents or encampment occupants are guilty of those acts but that the encampment attracts such conduct by others.

[55] There is also evidence of damage to University property as a result of the encampment. The most serious damage is to Front Campus itself. Once the protesters leave, the University expects to have to close Front Campus yet again; this time to repair the damage to the grass that the encampment has caused.

[56] In an effort to ensure health, safety and hygiene for protesters, the University had the washrooms of the Gerstein Library kept open overnight. Photographs of graffiti on the interior of the washroom stalls related to the war in Gaza were introduced in evidence. The graffiti does not appear to be extensive. The photographs

showing the graffiti also appear to show other forms of graffiti that are too blurry to read. Although I am not condoning the defacement of University property, the existence of graffiti on the interior of washroom stalls at a university is certainly not unheard of. Finally there is evidence of a damaged light pole.

[57] There is no evidence before me about the cost of repairing the property damage.

ii. Hearsay Dangers

[58] The Respondents accept that the University has included examples of incidents that are highly troubling and antisemitic. However, in a large number of instances, the evidence on these points is hearsay, sometimes double or triple hearsay. That is to say, it is evidence not from someone who saw the events but is evidence from a witness who heard about an event from someone else. In some cases, the "someone else" did not see the event either but heard about it from yet another person. The law treats such evidence with suspicion because there are dangers that the evidence becomes distorted with each retelling.

[59] The University produced hearsay evidence even though there were campus security officers in the vicinity who might be expected to have seen the events and even though there are campus security cameras posted in the vicinity of those events. There was no first-hand evidence from security officers or video feeds nor was any explanation for the lack of first-hand evidence. As a result, the identity of the perpetrators is unknown, and the respondents have had no way to challenge the allegations through cross-examination. In some cases, the alleged incidents

occurred on Harbord Street, a street that runs through part of the campus and is the rough equivalent of one block north-west of Front Campus. Harbord Street also runs several kilometres west of the University campus. The allegations do not make clear specifically where on Harbord St. the alleged incidents occurred. As a result, the respondents submit that it is difficult to conclude that the incidents are the product of the encampment as opposed to being the product of heightened tensions caused more generally by the war in Gaza.

[60] There is something to the respondents' concerns about hearsay. Two examples demonstrate the point.

[61] The first involves an allegation by the University that a father and son who were trying to use Front Campus to play football were assaulted by a protestor and threatened with a glass liquor bottle. Bystander video footage demonstrates that this description is inaccurate and misleading. The video shows the father and his adult son trying to get into the encampment with a Marshall standing calmly with his hands in his pockets. The father then films the Marshall and a person inside the fence at relatively close range. The Marshall remains impassive. The father then says "Do you have anything else to say before you take this to another level." The father then says "Will you get out of the way please" at which point he tries to push the Marshall away from the fence. The Marshall pushes the father back to maintain his place at the fence. The father then pushes the Marshall back. Bystanders rush in to fill the space between the father and the Marshall and tell the father "do not touch him". When one of the bystanders becomes verbally

aggressive with the father, the Marshall steps in to separate the bystander from the father. Although the bystander hurls obscenities at the father, there is no evidence of any physical threat to the father, let alone from a bottle. On my view of the video, the father was being excluded from Front Campus but it was the father who became physically aggressive and the Marshall who ensured that the situation did not escalate. When the father became belligerent the Marshall took one step to defend himself against being pushed away and then de-escalated the situation.

[62] The second incident involves an email that the University received on May 16, 2024 complaining that on May 10, 2024 the flag of the Al Qassam Brigade (the military wing of Hamas) was projected onto the exterior wall of the building of the Medical Science Building. The writer identified themselves as a Professor at the University and wondered whether there was a "red line" that needed to be crossed for the University "to deal with the Jew-hate and Israel- hate and Zionist-hate that has become pervasive and accepted in our University," and stated that "the projection of the flag of the Al Qassam Brigade … should perhaps be that red line". The writer expressed concern that the encampment was creating "an unsafe and harassing environment for Jewish and Zionist learners and faculty".

[63] Certain classes in the medical school were moved online as a result of this incident, although others had already been moved online. It appears that classes were moved online without a detailed investigation of the incident.

[64] The protesters explain that they did not project the flag. Rather, they were projecting an Al Jazeera newscast which momentarily showed the flag. This is an important nuance. The simple suggestion that the flag was projected by the protesters suggests that they endorsed the conduct and objectives of Hamas (including the murder of Israeli civilians on October 7). The projection of a newscast is different. The protesters have no control over the content of the newscast.

[65] The University submits that from its perspective it really does not matter whether the flag was projected independently or as part of a newscast. Its point is that the projection without the University's approval is itself an appropriation of University property and is further evidence of the sort of tension that can arise when a group of private individuals seize University property and use it for their own purposes.

iii. Respondents' Evidence About the Encampment

[66] The respondents submit that the encampment is a peaceful, organized and respectful site. They say the protestors oppose discrimination and hatred in all its forms and have established guidelines for community safety and accountability. The guidelines adopt a zero-tolerance approach and procedures both to prevent and swiftly address discriminatory conduct.

[67] Encampment occupants include both Palestinian and Jewish members of the University community in what the respondent say has become a diverse and multi-faith space. Weekly Shabbat services occur at the encampment. JBG, a Jewish

occupant, described attending the Shabbat services with both Jewish and Palestinian participants as a “deeply moving experience.” MAG, a Muslim occupant, described the atmosphere as "one of the most beautiful feelings I have had in my life” and a powerful demonstration of “mutual solidarity”. The protest “transformed my relationship to the University” and demonstrated that, as a Palestinian, “we have a place on campus.”

[68] KS, a frequent Jewish visitor to the encampment, described it as follows in her affidavit:

> 4. I first attended the protest at King's College Circle in early May. Since then, I have helped organize a weekly Shabbat dinner in the encampment every Friday. The Jewish Faculty Network and the many Jewish students involved in the protest asked me to organize the Shabbats. I spoke at the Shabbat we held on May 17, 2024.
>
> 5 . My children have joined me at the Shabbats. In particular, at the May 27th ceremony, my daughter sang a song. She and other Jewish children passed around bread and grape juice as part of the ceremony. My father also attended this Shabbat.
>
> 6. Participating in the encampment by hosting these Shabbats is an expression of my Judaism. I am the granddaughter of holocaust survivors. I believe deeply that "never again" means never again for anyone. When I attended Jewish school at UJPO, I was taught about both the Holocaust and the Nakba - and was taught to think critically, ask challenging questions, and pursue social justice. Because of this, I support the students, as they are protesting against an educational institution who invests in organizations connected to the killing of more than 30,000 people, including children.
>
> 7. When attending the encampment, I have found it is an inclusive, supportive, and caring place for Jewish people to

> gather, to carry out ceremonies, to grieve, and to be in community.
>
> 8. In my experience, the encampment is unique in that it is open to all kinds of people. For example, Muslim and Christian people have attended one of our Shabbat services. At one Shabbat in particular, Jewish and Muslim faculty members co-led the ceremony. The Jewish person read a prayer in Arabic and the Muslim person read one in Hebrew. These ceremonies are a way of showing we can coexist and be in peaceful places together, free from violence.
>
> 9. The encampment does not feel like a protest - it feels like a gathering. By this I mean that it is a welcoming, calm, caring space. When I first attended the encampment, I was surprised by how peaceful it was. Everything I had read before arriving made me nervous to come initially. For example, I saw the media describe the protest as heavily one-sided or hostile, and that Jewish people should feel scared of visiting.
>
> 10. But when I arrived, I had a very welcoming experience. I have never felt more at peace than during the Shabbats we have organized. I have found everyone to be attentive and caring. My daughter has also felt safe - to the point where she has asked to return to the encampment and visit beyond the Shabbats.

iii. Conclusion on violence

[69] Apart from the initial appropriation of Front Campus and the continued exclusion of others from it, I find that the encampment is peaceful. I accept the characterization of the respondents by their counsel as young idealists fighting for what they in good faith perceive to be an important human rights issue.

[70] I also accept that acts of intimidation and assault have been directed against Jewish passersby and encampment members at Front Campus. There is no

evidence, however, to suggest that any of the named respondents or any other encampment members were in any way involved in those acts.

C. Language

[71] The University and several Intervenors variously ask me to find that certain statements, slogans and symbols in or around the encampment are antisemitic, discriminatory, violent and amount to hate speech. Before addressing the specifics of those communications, it is important to address the context in which those issues arise.

i. The Context in Which the Issue Arises

[72] The respondents and a number of Intervenors note that the issue about language arises in a context in which the communication of certain ideas is often mistakenly assumed to be antisemitic. That conclusion is often the result of a lack of understanding of the full historical, linguistic and cultural context of the expression or the idea. They note that criticizing Israel or Israeli government policies is often conflated with antisemitism.

[73] Since October 2023, the Intervenor, Legal Centre for Palestine has recorded an exponential increase in workplace and other consequences for individuals who express support for Palestinian human rights, including within legal workplaces, high schools, and universities.

[74] This is in part the product of the “moral panic” that surrounds these issues. While heightened sensitivity to antisemitism is desirable, the protesters perceive that it

has, on occasion, crossed into a new form of McCarthyism against those who express support for Palestinian rights. A number of Intervenors, including some predominantly Jewish based groups, submit that criticism of Israeli government policy, occupation of the West Bank and Israel's identity as a Jewish state as opposed to one in which Palestinians can participate as equal citizens are not necessarily antisemitic.

[75] Part of the controversy arises out of the absence of an agreed definition of antisemitism. That too is a matter of some debate. Different Jewish Intervenor groups proposed different definitions of antisemitism and criticized each other's definitions in their submissions. Though it appears that the controversy may focus less on the definitions themselves and more on the examples various organizations give about how to apply their definition. The University's own working group on antisemitism has refused to adopt the definitions advanced by some Intervenor groups as being overly broad.[6] The details of those definitions do not matter for present purposes. What matters for present purposes is that there is disagreement even within the Jewish community about how to properly define antisemitism. Uncertainties around the definition can lead to allegations of antisemitism where they are perhaps unfounded. The respondents submit that

[6] Report of the University of Toronto Antisemitism Working Group, December 2021, CaseLines pp. A197-A200, A212-213.

this has led to significant consequences for individuals who object to certain policies of the Israeli government.

[76] Respondents' counsel took me to what they submit are two prominent examples of conflating criticism of Israel with antisemitism. The first involves the Faculty of Law at the University. In 2020 the Faculty of Law at the University had offered Dr. Valentina Azarova a position to head up a new program in international human rights at the law school. The offer was rescinded after a significant donor raised objections about her research into Palestinian rights. The withdrawal created considerable controversy. The Faculty ultimately reversed its position and re-extended the offer at which point Dr. Azarova declined. The suggestion in counsel's submission is that the offer was withdrawn because of the concern about research into Palestinian rights. I note that this suggestion is somewhat contentious. A report by former Supreme Court of Canada Justice Thomas A. Cromwell dated March 15, 2021 found that the verbal offer was rescinded because of issues concerning Dr. Azarova's immigration status and her desire to be abroad for 20% of the year. What is not contentious is that the donor raised concerns about Dr. Azarova's research into Palestinian rights.

[77] The second example that the respondents cite is the controversy at The Lincoln Alexander School of Law at Toronto Metropolitan University ("TMU") concerning a letter that a number of students signed in support of the Palestinian cause. The letter unleashed a firestorm of controversy and was quickly labelled antisemitic by the TMU Law School . A number of lawyers stated publicly that their firms would

never employ anyone who signed the letter, there were reports of blacklists with students' names and Ontario's Ministry of the Attorney General demanded that any applicants from the Lincoln Alexander Law School sign an attestation letter certifying that they had not signed the letter. The attestation was required because some signatories had signed anonymously or with initials.

[78] A subsequent review of the incident by the Honourable J. Michael McDonald, former Chief Justice of the Nova Scotia Supreme Court, concluded that the letter, while harsh, intemperate and insensitive, was not antisemitic and did not violate TMU's Code of Conduct. The report notes that students at the law school felt they had to proactively distance themselves from other students to obtain jobs and to be able to advance their careers.

[79] When lawyers publicly advocate that students should not be employed, when the Ministry of the Attorney General demands letters of attestation from students and when students feel they have to distance themselves from fellow students, the respondents' fears about the risk of a new form of McCarthyism are not without foundation. As a result, the discussion below focuses in some detail on the specific language at issue in connection with the encampment.

ii. Hate Speech

[80] There can be no doubt that some of the speech on the exterior of the encampment rises to the level of hate speech. This has included comments like: "kike", "baby killer", "get away and go be with the Jews.", "We need another holocost" [sic],

“Jews in the sea Palestine will be free”, “Jews belong in the sea Palestine will be free”, “Death To the Jews, Hamas for Prime Minister”, “You dirty fucking Jew. Go back to Europe”, “Jews should go back to Europe”, “fuck the Jews”, “I hate every fucking one of you people” (to a group of people carrying Israeli flags), and “Itbach El Yahod” (“slaughter the Jews”).

[81] It is important to note, however, that none of the named respondents and none of the encampment occupants have been associated with any of these statements. The statements by the named respondents to which I was taken during oral argument are of the nature and intensity that one might expect from a student activist in their twenties but have never approached violence or hatred.

[82] The respondents correctly note that when issues of hate speech have arisen, they have been addressed immediately, as was the case with offensive chalk messages found near the encampment which were removed in short order.

[83] Encampment occupants have also been the subject of hateful commentary. JBG describes in his affidavit that members of a group known as Israel Now (formerly the Jewish Defence League) mounted a counter protest at the encampment. Counter protesters referred to JBG and other Jewish supporters of the encampment "kapos," terrorists, and terror supporters, screamed through a megaphone that they were not "real Jews," called them baby-murderers and Nazis, and claimed that they supported the rape of Israeli women.

[84] Some social media posts about individual protesters have been hateful, violent and intimidating. One social media post showing a protester wearing a keffiah was accompanied by the tagline “Oh look, she's wearing a r@pe scarf.” A response to the post stated: “And her face is not covered, she could be in for a stoning.”

[85] In a video shown at the hearing, counter protesters referred to encampment members as Nazis. One woman tells encampment members “I hope you never need health care from U of T,” the implication being that if they did, they would not get it.

[86] Other language surrounding the encampment has been intemperate. Some comments on the Occupy U of T Instagram site have at times been intemperate and have not been conducive to creating the most effective atmosphere for negotiation. Such comments have included:

> Fuck SW[7] all my homies hate SW
>
> U of T admin can go fuck themselves
>
> [U of T President] Fuck your grass, shove this letter up your ass.

[87] Those sorts of communications, while perhaps not unusual in the context of a student protest, are nevertheless intemperate, nudge the dial towards the

[7] A Vice-Provost at the University and a member of the University team that has been working and negotiating with the Occupy U of T for Palestine group since April 2024.

unrestrained end of the spectrum, and attract less peaceful voices to the encampment and its surroundings.

iii. Slogans and Symbols

[88] There was considerable debate in the record about the use of certain slogans such as “from the river to the sea,” “glory to the martyrs, and the word “intifada”. A number of Intervenors asked me to find those phrases to be antisemitic. I accept that these expressions are perceived as hurtful and threatening to many Jews. There appears, however, to be considerable variation, nuance and context around the meaning of these terms which, in my mind, would make it improper to automatically assume that they are antisemitic, especially on an interlocutory motion.

iv. From the River to the Sea

[89] I turn first to the most common and most controversial of the phrases “From the river to the sea, Palestine will be free.” My observations here draw heavily from a paper entitled *From the River to the Sea: Palestine Will Be Free a Primer on History, Context and Legalities in Canada*.[8] Its authors are law professors Kent Roach and Jillian Rogan, history professors Esmat Ehlalaby and Anver M. Emon

[8] *Elhalaby, Emon, Paz, Roach, and Rogin From the River to the Sea: Palestine Will Be Free a Primer on History, Context and Legalities in Canada, University of Toronto Hearing Palestine, 2023.*

and anthropology Professor Alejandro Paz. All are professors at the University except for Jillian Rogan who is at the University of Windsor

[90] The authors note that much of the conversation around the Israeli-Palestinian conflict has tended to be reduced to characterizations of antisemitism and Islamophobia and that the discussion requires more context and understanding.[9]

[91] The phrase "from the river to the sea" refers to the territory between the Jordan River and the Mediterranean Sea. Historically it denoted the general geographic boundary of Palestine between the 1800s and the creation of Israel in 1948.[10]

[92] The paper notes that Israelis themselves use a similar expression to mean different things ranging from: a description of the area over which Israel should have sovereignty; opposition to occupying the West Bank and Gaza; to a call for democracy and equality in the area between the river and the sea:

> In modern Israeli Hebrew, the most common version of the phrase "from the River to the Sea" is "beyn hayarden layam," meaning "between the Jordan River and the Mediterranean Sea." (The phrase is also found reversed, beyn hayam layarden.) The meaning of this phrase differs among Jewish-Israelis themselves, especially depending on whether they have a maximalist concept of Israeli territory or criticize the Israeli post-1967 occupation of the West Bank and Gaza Strip, or if they have even stronger criticisms about Israeli state institutions. For instance, the famous 1977 platform of the ruling Likud Party pronounced a maximalist idea that "between the Sea and the Jordan there will be only Israeli sovereignty." On the other hand, the former speaker of the

[9] *Ibid.* at p. 6.
[10] *Ibid.* at p. 9.

> Knesset, Avraham Burg, used “beyn hayarden layam” as the title for a series of political interviews of both Israelis and Palestinians during the pandemic. In other words, Burg recognizes the phrase as meaningful for both Israelis and Palestinians, and also presents an anti-occupation concept. Most recently, the Hebrew phrase was used in more critical ways by some protestors at the Israeli pro-democracy demonstrations that lasted from January to September 2023. They shouted versions like “beyn hayarden layam demokratiya lekulam” which translates as “between the Jordan and the Sea democracy for everyone” (Rapoport 2023; Hager 2023). This heavier criticism is also found as the title of a report by B’Tselem, a prominent Israeli human rights organization, (in English): “A regime of Jewish supremacy from the Jordan River to the Mediterranean Sea: This is apartheid” (B’Tselem 2021).[11]

[93] The authors also point out that some Israeli politicians go further than the 1977 Likud platform and use the phrase to denote an exclusively Jewish territory:

> In July 2023, J-Space highlighted the statement of Israeli Minister of Justice Yariv Levin in the Knesset, who proclaimed that the Land of Israel (erets yisra’el) belongs to the nation of Israel (am yisra’el). J-Space expressed concern that Levin insists that all of the territory between the River and the Sea will belong only to the Jewish people. It also noted the hypocrisy of such a statement: “[W]hen Palestinians so much as utter ‘from the river to the sea’ they are accused of antisemitism.”[12]

[94] The authors then observe the following with respect to the use of the phrase by Palestinians:

> The leading Hebrew-language news portal, YNet, published a report that recognizes the multiple interpretations of the slogan: “the expression is interpreted differently by different people, and its opposing meanings have increased with the

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[11] *Ibid.* at p. 9.
[12] *Ibid.* at p. 15.

> years. … For many Palestinians, the slogan represents the 'right of return' to towns and villages where their ancestors lived before the establishment of the State of Israel. It [the slogan] also comprises a yearning for an independent and united Palestinian state that includes Gaza, the West Bank, and East Jerusalem" (Adelson 2023). The Israeli historians of the Holocaust and Genocide, Amos Goldberg and Alon Confino, argue explicitly against the eliminationist interpretation of the Palestinian use of the slogan: "When interpreting it [the slogan], it is important to insist on historical periodization and on avoiding historical anachronism, which is what is done by those who claim that it is a slogan of genocide. This insistence is important because the meaning of the slogan is open to interpretation, and depends on the concrete and historical context in which it is said and of course on the personal intention of everyone who uses this slogan" (Goldberg and Confino 2023).[13]

[95] The paper goes on to describe the views of Israeli and Palestinian scholars about the phrase:

> For instance, the Israeli Oxford historian of the Middle East and winner of the British Academy Medal, Avi Shlaim, explains in an interview with the BBC: "My interpretation of the slogan is that it is a call for freedom and equality for all the citizens between the Jordan River and the Mediterranean Sea, including Israelis" (BBC News 2023). In the same BBC segment, the Palestinian political scientist Leila Farsakh (University of Massachusetts), an expert on Palestinian economy and society, stated: "Today, when a Palestinian says "from the River to the Sea, Palestine will be Free," it may refer to more than one thing. It could be in favor of a two-state solution, it could be a call for one state. But, the primary focus is renouncing colonialism and the demand for freedom for all Palestinians. This includes Palestinians in Israel who are citizens of Israel …, the Palestinians in the West Bank …, the Palestinians in Gaza, and the Palestinians in East Jerusalem, as well as freedom for all Israelis" who live in this contested region. In a recent essay,

[13] *Ibid.* at p. 11.

> Columbia University anthropologist, Nadia Abu El-Haj, argues that the slogan "should be understood for what it is: a vision of and for a better world" (Abu El-Haj 2023).[14]

[96] The authors acknowledge that antiracism theory and hate laws aim to address the social impact of hateful speech on the targeted group,[15] and continues:

> But as noted above, the complex history of the slogan precludes a simplistic reduction of this phrase to one meaning or another. The robust history of the phrase and the slogan suggest that these 10 words cannot be understood as inherently hateful or hate-promoting. Rather, that history, as examined in this Primer, demonstrates that those using this 10-word slogan generally understand it as a call for recognition and change, deeply rooted in the quest for justice and freedom.[16]

[97] The paper recognizes that some Jewish Canadians hear the slogan as a call for ethnic cleansing of the state of Israel and its Jewish inhabitants[17] because Hamas has used the phrase to deny the legitimacy of the Israeli state.[18] The authors respond:

> Not all Jewish and Israel advocacy organizations in Canada believe the slogan necessarily embraces ethnic cleansing or genocide. A wide range of organizations, which identify as progressive Jewish organizations, disagree with the eliminationist interpretation of CIJA[19] and others. For instance the New Israel Fund, Canadian Friends of Peace Now, and J-Space Canada issued a joint-letter in July 2021 to the Government of Canada and the leaders of the major political parties about expulsions of Palestinian residents

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[14] *Ibid.* at p. 11.
[15] *Ibid.* at p. 12.
[16] *Ibid.* at p. 12.
[17] *Ibid.* at p. 14.
[18] *Ibid.* at p. 15.
[19] Centre for Israel and Jewish Affairs

> from East Jerusalem. They echoed the slogan to plead for the freedom and equality of both Israelis and Palestinians: "We call on you to urge Israel to cease its injustice against Palestinians, and to uphold the rights of all between the Jordan River and the Mediterranean Sea. Until Israel lives up to its founding declarations and principles, neither Palestinians nor Israelis will be free."[20]

[98] Thus, the phrase appears to have been used by both Israeli and Palestinian politicians on the far ends of their respective political spectrums to claim the land "from the river to the sea" as belonging exclusively to either Jews or Palestinians and by more moderate camps amongst both Israelis and Palestinians as reflecting a desire for a political solution that would allow both groups to live in freedom in either one or two states. This ultimately led the authors to conclude that the phrase's "meaning is indeterminate at best."[21]

iv. Glory to the Martyrs

[99] Similar controversy has arisen over the phrase "glory to the martyrs." Many non-Palestinians interpret the phrase as glorifying terrorists. The respondents and certain Intervenors submit that this meaning reflects a dominant narrative in Western media derived in large part because Middle Eastern terrorist groups refer to their dead members as "martyrs". A number of Palestinian based Intervenors submit a contrasting narrative which explains that the Arabic word at issue is "shaheed" which literally means "witness," although it is generally translated as "martyr." In Palestinian culture it refers to a person wrongly killed because of an

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[20] *Ibid.* at p. 15.
[21] *Ibid.* at p. 4.

ongoing fight for liberation and justice, regardless of their religious background. That would include innocent civilians who have died in the Gaza war.

v. Intifada

[100] Similar contrasting submissions have been made about the word “intifada” with some Intervenors arguing that it refers to violence against Jews. Other Intervenors submit the word "intifada" is an Arabic noun that is derived from the word "nafada," which literally means "shaking off," and is popularly used by Palestinians to refer to an uprising against oppression. They note that there are dozens of "intifadas" which have occurred throughout history in the Arab world. They say that the expression "globalize the intifada” is not a call for global violence against Jews but is a call for international support “to end the oppression of the Palestinian people.” These Intervenors note that an uprising need not be violent and can take the form of peaceful protests. They submit further that the automatic attribution of violence and antisemitism to Palestinians who protest is a further example of anti-Palestinian racism and Islamophobia.

[101] In a similar vein, objections were raised to a banner inside the encampment which reads “Free Palestine by any means necessary.” It is true that the words “by any means necessary”[22] could include a call to international violence against Jewish civilians as some Intervenors argue. Here too, context is important. Immediately following the slogan “Free Palestine by any means necessary” is the tagline “Jews

[22] CaseLines p. A901.

against Zionism." Zionism refers to the political movement that called for the re-establishment and more currently to the development and protection of a Jewish nation in Israel. There are some Jews, albeit a minority, who are anti-Zionist. If in fact the banner was hung by a group of anti-Zionist Jews, it is unlikely that they would be intending to call for international violence against Jewish civilians which would presumably include themselves.

vi. Inverted Red Triangle

[102] Inverted red triangles have been seen at the encampment. Hamas has used inverted red triangles in association with violence against Israelis. Others point out that the Palestinian flag contains an inverted red triangle when it is hung vertically, suggesting it is a symbol for Palestine, not a symbol for violence.

vii. Blood Libel

[103] The protesters posted a photograph of the University President (who is Jewish) which was described as depicting the President as a devil with the caption "blood on your hands" in bold letters beneath.

[104] One Intervenor describes this in its factum as blood libel:

> 23. This is blood libel. Also known as the "ritual murder charge", Occupy UofT's message is a contemporary iteration of one of the longest-standing forms of antisemitism.
>
> 24. Originating from the allegation that Jews used the blood of Christian children to make Matzah for Passover, versions of blood libel persist and have become more widespread in protest of Israel's response to the massacre Hamas

> committed on October 7, as Occupy UofT's conduct of June 7 demonstrates.

[105] This too requires some nuance and accuracy of description. The photograph of the President's face appears to be a stock photograph of him smiling in a perfectly normal manner. Two bloody, contorted, cartoonish hands have been imposed on the lower portion of the photograph above the caption "blood on your hands". The respondents say that the phrase "blood on your hands" is a perfectly ordinary English-language expression which has no association with antisemitism and is a common slogan used in association with war.

viii. Conclusion on Language

[106] For purposes of this motion, I do not have to determine how these phrases and symbols are being used. I review this history and analysis merely to point out that the automatic conclusion that those phrases are antisemitic is not justified; especially not on an interlocutory injunction.

[107] The genuine pain that some feel when seeing or hearing these phrases may be the result of attributing malevolent intentions to the speakers when there is no such intention and as well as to speakers using certain phrases in potentially insensitive ways which cause pain to others when that is not intended. The University's policy on Statement on Free Speech expression recognizes that freedom of expression can be hurtful to some. At the same time the Statement notes that University "members should not weigh lightly the shock, hurt anger or even the silencing effect that may be caused by" certain speech.

[108] The issue may well be the product of a misunderstanding between two cultural divides that is better resolved through open, although not easy, dialogue and mutual education rather than by judicial fiat. In making this statement I am not, however, blind to the fact that certain individuals may use the expressions at issue with the intention of advocating violence or hatred. That reality, however, makes, communication, education and restraint by nonviolent people on both sides all the more desirable.

[109] To conclude on this point, I was not taken to any evidence to suggest that any of the named respondents or encampment occupants were using these slogans or symbols with any intention of violence, antisemitism or hatred.

III. Does the *Charter* Apply?

[110] The respondents characterize this case as a *Charter* case involving the rights of freedom of expression, association and assembly.

[111] The University submits that it would be inappropriate to determine whether the *Charter* applies because the respondents have not served a notice of constitutional question under section 109 of the *Courts of Justice Act*.[23] That section requires a party who raises certain types of constitutional questions to notify the Attorneys General of Canada and Ontario that they are doing so. The notification is referred

[23] *Courts of Justice Act,* RSO 1990, c C.43

to as a notice of constitutional question. The notice informs the Attorneys General of the issue and allows them to make submissions on it both in writing and in oral argument. Section 109 requires a notice to be served if:

> The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or bylaw made under such an Act or of a rule of common law is in question.

[112] The respondents submit that a notice is not required to challenge "actions and administrative discretionary decisions that are subject to the *Charter*." They rely on the Ontario Court of Appeal's decision in *Elementary Teachers Federation of Ontario v. York Region District School Board*[24] for that proposition. I do not accept that submission. The Court of Appeal held that a notice of constitutional question was not required in that case because it did not "concern the constitutional validity or constitutional applicability of a legislative instrument or of a rule of common law."[25]

[113] In this proceeding, however, the respondents challenge the application of the *Trespass to Property Act*[26] and the common law tort of trespass when someone is trespassing for the purpose of exercising freedom of expression. That sort of challenge is captured by the language of section 109 of the *Courts of Justice Act.*

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[24] *Elementary Teachers Federation of Ontario v. York Region District School Board, 2022 ONCA 476* at para 45 aff'd at *York Region District School Board v. Elementary Teachers' Federation of Ontario,* 2024 SCC 22 without addressing the point.
[25] *Elementary Teachers Federation of Ontario v. York Region District School Board,* 2022 ONCA 476 at para. 45.
[26] *Trespass to Property Act,* RSO 1990, c T.21

It also strikes me as the sort of issue in respect of which the Attorneys General of Canada and Ontario may have an interest in making submissions. I therefore decline to address the applicability of the *Charter* to the injunction.

[114] To some extent, whether the *Charter* applies to this injunction is a bit of a red herring because both sides agree that even if the *Charter* is inapplicable, the Court must nevertheless apply the law in a manner consistent with the fundamental values enshrined in the *Charter*.[27]

[115] The University has extensive policies concerning the importance of freedom of expression on campus. Based on my interpretation of the law, it would be more appropriate to consider this injunction in light of those policies interpreted in a manner consistent with *Charter* values rather than determining whether the *Charter* applies. I will consider the free speech issue later in these reasons when applying the balance of convenience test applicable to injunctions.

[116] In the event I am wrong in this, I will nevertheless assess, in an alternative analysis whether the *Charter* applies and, if so whether the injunction the University seeks would breach *Charter* rights. To avoid interference with the overall narrative, I will address those issues in Appendix A to these reasons. That alternative analysis, however, makes no difference to the final outcome. In that alternative analysis I

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[27] *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580,* [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 at 603 (S.C.C.); See also *PEPSI-COLA CANADA BEVERAGES (WEST) LTD. V. RWSDU, LOCAL 558,* [2002] 1 S.C.R. 156, 208 D.L.R. (4TH) 385. at paras. 18-22.

conclude that the *Charter* does not apply to the University in this situation. In the further alternative I conclude that if the *Charter* did apply, the restriction on the use of Front Campus breaches the respondents *Charter* rights but that the breach is justified under section 1 of the *Charter*.

IV. The Test for an Interlocutory Injunction

[117] To obtain an interlocutory injunction, the court must consider whether:

a. The moving party has presented either a serious question to be tried or a strong *prima facie* case;

b. The moving party will suffer irreparable harm if the relief is not granted;

c. The balance of convenience favours granting the injunction.

[118] This test applies to all interlocutory injunctions, including those directed at occupations, blockades, and other protest activity.[28]

[119] The three criteria are not watertight compartments but are interrelated considerations where strength in one can compensate for weakness in another.[29]

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[28] *Canadian National Railway Company v. John Doe,* 2013 ONSC 115*; Automotive Parts Manufacturers' Association v. Boak,* 2022 ONSC 1001*; Hamilton (City) v. Loucks,* 2003 CanLII 64221 (ON SC)*; Canadian National Railway v John Doe,* 2023 ONSC 6860.

[29] *Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.), at para. 8; *Hudson Bay Mining & Smelting Co. v. Dumas,* 2014 MBCA 6, 303 Man. R. (2d) 101, at para. 82.

A. Serious Issue to Be Tried / Strong *Prima facie* Case

[120] Although the serious issue to be tried test is generally applicable to prohibitory injunctions, that is to say an injunction that prohibits someone from doing something; the test for a mandatory interlocutory injunction, that is to say an injunction that forces someone to do something, requires the moving party to establish a strong *prima facie* case.[30] Here, at least a part of the injunction the University seeks is mandatory because it requires the respondents to dismantle the encampment. It is therefore more appropriate to require the University to establish a strong *prima facie* case.

[121] To establish a strong *prima facie* case, the University must demonstrate that there is a strong likelihood on the law and the facts that it will be successful at trial or on the argument of the ultimate application.[31]

[122] In my view, the University has not demonstrated a strong prima facie case in relation to violence or the antisemitic nature of the expressions used within the encampment itself. As set out earlier in these reasons, the evidence of violence is largely hearsay, has not involved either the named respondents or occupants of the encampment and is relatively isolated in nature. The expressions used within the encampment such as “from the river to the sea…” have multiple meanings. There is no evidence to suggest that the named respondents or the occupants of

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[30] *R. v. Canadian Broadcasting Corp.,* 2018 CarswellAlta 206 (SCC), at para. 15.
[31] *R. v. Canadian Broadcasting Corp.,* 2018 CarswellAlta 206 (SCC), at para. 17.

the encampment use them in a way that is antisemitic or that is intended to incite violence.

[123] The University has, however, demonstrated a strong *prima facie* case for an injunction based on the legal principles of trespass and ejectment.

[124] Trespass has two sources: statute and common law.

[125] Section 2 of the *Trespass to Property Act*,[32] provides:

> **2** (1) Every person who is not acting under a right or authority conferred by law and who,
>
> (a) without the express permission of the occupier, the proof of which rests on the defendant,
>
> (i) enters on premises when entry is prohibited under this Act, or
>
> (ii) engages in an activity on premises when the activity is prohibited under this Act; or
>
> (b) does not leave the premises immediately after he or she is directed to do so by the occupier of the premises or a person authorized by the occupier, is guilty of an offence and on conviction is liable to a fine of not more than $10,000.

[126] It is clear that the University has a strong *prima facie* case in this regard against the protesters. The protesters have entered onto Front Campus, have set up an encampment and have excluded others from access to that property. In addition,

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[32] *Trespass to Property Act,* RSO 1990, c T.21

they have not left Front Campus immediately after they were directed to do so by the owner or occupier (the University).

[127] Common law trespass occurs if someone enters, remains on or places any object on land in the plaintiff's possession without lawful justification. Trespass must be voluntary and direct as opposed to being an indirect, unintended contact with property.[33]

[128] The University has demonstrated a strong *prima facie* case in this regard as well. The protesters have entered onto and placed objects on property that belongs to the University without any lawful justification. Their occupation of Front Campus is direct, voluntary and has continued for over 50 days.

[129] With respect to the University's claim for ejectment (or possession as it has been referred to more recently), the University must show that it has been dispossessed of its property and that the property is possessed by the respondents.[34] Again, the University has demonstrated a strong *prima facie* in this regard. The University has been dispossessed of Front Campus in the sense that it no longer has access to or control over it. Front Campus is now possessed and controlled by the respondents.

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[33] *Enbridge Pipelines v. Williams,* 2017 ONSC 1642 at para. 43.
[34] *Berscheid v. Ensign,* 1999 CanLII 6494 at paras. 66 to 68.

[130] As former Court of Appeal Justice Robert Sharpe notes in his authoritative work, *Injunctions and Specific Performance,*[35] there is a strong presumption in favour of granting injunctive relief where a plaintiff complains about trespass or other interference with property rights:

> Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favouring injunctive relief is even stronger than in the nuisance cases. Especially where the trespass is deliberate and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction. A damages award in such circumstances amounts to an expropriation without legislative sanction. The courts have expressly condoned injunctive relief, even where the balance of convenience is overwhelmingly in favour of the defendant. It has also been held that where there is no arguable case against a plaintiff's right of possession, an interlocutory injunction may be granted against a trespasser without consideration of the second and third stages of the *RJR MacDonald* test.[36]

[131] In other words, so strong is the protection of property rights that it is possible to grant an injunction based solely on the fact there has been a trespass without even considering the factors of irreparable harm and balance of convenience. I do not do that here and will consider irreparable harm and balance of convenience. These principles do, however, demonstrate that the University's case is at the stronger end of even the strong *prima facie* case spectrum.

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[35] Robert J. Sharpe*, Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada, 2020)
[36] Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters Canada, 2020), s. 4.9

[132] The respondents submit that the trespass cases are distinguishable from this case because they did not involve public property or freedom of expression issues. I am unable to agree with that submission.

[133] There are many cases where courts have forced parties to leave property and/or forced them to remove structures from property when protesters were using property belonging to someone else to exercise freedom of expression.[37] This is the case with both private[38] and public property.[39]

[134] When dealing with public property, freedom of expression issues may become more relevant and may need to be taken into account when balancing the interests of the property owner against rights of free speech. I will address this when considering the balance of convenience.

[135] The respondents have not, however, pointed me to a single case in which a court has allowed someone to appropriate private or public property for a prolonged period of time to exercise their rights of freedom of expression.

[136] On the contrary, courts have found exactly the opposite. However laudable their cause, protesters do not have the right to take property from its owner and put it

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[37] See for example: *Weisfeld v. Canada,* 1994 CanLII 3503 (FCA)*; Hamilton (City) v. Loucks, 2*003 CanLII 64221 (SCJ)*; Batty v. City of Toronto,* 2011 ONSC 686.
[38] *CN Railway Company v. John Doe* 2013 ONSC 115*; CN Railway v. John Doe* 2023 ONSC 6860
[39] *Dubois v. Saskatchewan* 2022 SKCA 100; *Weisfeld v. Canada,* 1994 CanLII 3503 (FCA)*; Hamilton (City) v. Loucks,* 2003 CanLII 64221 (SCJ)*;* and *Batty v. City of Toronto,* 2011 ONSC 686 which although strictly speaking not an injunction case, is a case where the court enforced a trespass notice against protesters from the Occupy movement who had set up an encampment in a public park.

into the hands "of an ad hoc, self-appointed, albeit well-meaning, group of individuals"[40] Even the case that the protesters cite as authority for the proposition that a peaceful encampment conveys a powerful political meaning is one where the court held that protesters were not entitled to erect tents on Parliament Hill.[41]

[137] The respondents cite three recent decisions of the Superior Court of Quebec which arise out of student protests about the Gaza war and which they submit demonstrate that the injunction should not be granted.[42] All three cases are distinguishable.

[138] In all three cases the applicants were seeking an interim injunction. An interim injunction differs from the interlocutory proceeding before me. An interim injunction is one that is sought on an emergency basis without any effective notice to the other side. While notice may be given, it is usually so short (hours or perhaps a day) that the opposing party has no meaningful chance to respond.[43] As a result, such injunctions remain in place for only 10 days. Interim injunctions also require the applicant to show some form of urgency to justify an injunction without giving the opposing party an effective opportunity to make submissions. The case before me is different. The University is not seeking an interim injunction. The

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[40] *Hamilton (City) v. Loucks,* 2003 CanLII 64221 at para. 48 (SCJ); *Batty v. City of Toronto,* 2011 ONSC 686.
[41] *Weisfeld v. Canada,* 1994 CanLII 3503 (FCA)
[42] *Medvedovsky c. Solidarity for Palestinian Human Rights McGill* 2024 QCCS 1518*; McGill University c. Association McGillienne des Professeur.e.s. de droit (AMPD) / Association of McGill Professors of Law (AMPL),* 2024 QCCS 1761; *Université du Québec à Montréal (UQAM) c. Solidarité pour les droits humains des Palestiniennes et Palestiniens à l'Université du Québec à Montréal,* 2024 QCCS 1912.

[43] *Medvedovsky c. Solidarity for Palestinian Human Rights McGill* 2024 QCCS 1518 at para. 24.

respondents have been given time to respond and have produced materials running to the thousands of pages.

[139] Two of the cases are additionally distinguishable on their facts.

[140] In *Medvedovsky c. Solidarity for Palestinian Human Rights McGill*[44] the applicants were two students at McGill University, not the University itself.[45] They sought an order to dismantle an encampment and an order that all demonstrations be banned within a distance of 100 metres from the entrances and exits of 154 buildings at McGill University. The court doubted that the applicants could show a strong *prima facie*[46] case given the breadth of the order they sought.[47]

[141] In *Université du Québec à Montréal (UQAM) c. Solidarité pour les droits humains des Palestiniennes et Palestiniens à l'Université du Québec à Montréal*[48] the applicant did not ask for the encampment to be dismantled but asked for an injunction requiring any structures to be no closer than 3 metres to a university building. The protesters proposed an order limiting structures to within 1 metre of any University building. The judge ordered that the structures be no closer than 2 metres.

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[44] *Medvedovsky c. Solidarity for Palestinian Human Rights McGill* 2024 QCCS 1518.
[45] *Medvedovsky c. Solidarity for Palestinian Human Rights McGill* 2024 QCCS 1518 at para. 4.
[46] Or more properly its civil law equivalent, l'apparence du droit.
[47] *Medvedovsky c. Solidarity for Palestinian Human Rights McGill* 2024 QCCS 1518 at para. 6, 36.
[48] *Université du Québec à Montréal (UQAM) c. Solidarité pour les droits humains des Palestiniennes et Palestiniens à l'Université du Québec à Montréal,* 2024 QCCS 1912.

[142] In light of the foregoing, I am satisfied that the University has demonstrated a strong *prima facie* case for the injunction it seeks.

B. Irreparable Harm

[143] The second branch of the test for an injunction requires the court to consider the extent to which the moving party will suffer irreparable harm if an injunction is not granted. Irreparable harm is harm that either cannot be quantified in monetary terms or cannot be cured.[49] It also includes damages that cannot be recovered because the defendant is impecunious or judgment proof.[50]

[144] The University alleges that the encampment has caused irreparable harm in the following forms: (i) unrecoverable costs incurred; (ii) exclusion from Front Campus; (iii) discrimination, violence, and harmful speech at or near the protest; (iv) safety hazards; and (v) reputational harm. I will address each in turn.

i. Unrecoverable Costs

[145] The University has incurred a number of expenses that it probably cannot recover through a judgment against the respondent students or others. This includes the cost of additional security, providing portable toilets and repairing the damage to Front Campus that the encampment has caused. Although I do not have

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[49] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at para. 59.
[50] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at para. 64.

particulars of those expenses, the concept of irreparable harm refers to the nature of the harm rather than its magnitude.[51] The issue of unrecoverable expenses supports the University's claim for irreparable harm.

ii. Exclusion from Front Campus

[146] As noted earlier, some cases hold that is not necessary to demonstrate irreparable harm in cases of trespass. Other cases have held that the act of trespass is itself the irreparable harm because "[i]t is the very essence of the concept of property that the owner should not be deprived without consent." [52] This principle has also been applied to award injunctions in protest cases.[53]

[147] As Justice I. F. Leach noted in *Windsor Salt Ltd./Sel Windsor Ltee:*[54]

> Courts have accepted that deliberate, tortious and/or criminal obstruction of lawful entry to and exit from a plaintiff's property is unlawful conduct giving rise to harm in respect of which damages are not an adequate remedy. In my view, there was every indication that such unlawful conduct, and the associated irreparable harm to the plaintiff flowing from such conduct, would continue in this case without the granting of injunctive relief.[55]

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[51] *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311 at para. 63.
[52] *1465152 Ontario Limited v. Amexon Development Inc*., 2015 ONCA 86 at para. 23;
[53] *Foxgate Developments Inc. v. Jane Doe,* 2022 ONSC 7035 at para. 149; *Hamilton (City) v. Loucks*, 2003 CanLII 64221 at para. 25-27..
[54] *Windsor Salt Ltd./Sel Windsor Ltee,* 2023 ONSC 1431.
[55] *Ibid.* at para. 30(a)(iii)

[148] The respondents submit that there is no irreparable harm here because any restriction on the use of Front Campus is temporary. I am unable to accept that argument. Access has already been restricted for over 50 days. A 50 day occupation of a large, central portion of the University campus is significant. As noted earlier, the protesters have indicated that they will not leave until their demands are met. Although there is indication that they have been flexible in their negotiations with the University, that still means that the protesters will not leave until they arrive at a solution that satisfies them. If unchecked, this in effect means that the protesters can hold the University to ransom. Any concessions the University makes in that context would amount to irreparable harm because they are compromises the University would not otherwise make. There is nothing voluntary about such concessions if they are the only way to have the protesters leave.

[149] The protesters next argue that the restriction on access is not significant because the University itself closed Front Campus for three years. While that may have been the case, the University did so of its own free will to refurbish the entire Front Campus area. The fact that someone has not used property they own for three years because it was under renovation does not give someone else the right to appropriate the property when renovations are complete and assert that the owner suffers no harm because the property was not used during the renovation. The harm is not the inability to use the property during the renovation but the inability to use the property when the renovation is complete.

[150] Although it was not strictly speaking an injunction case, both parties spent considerable time on the case of *Batty v. City of Toronto.*[56] In that case, protesters belonging to the Occupy Movement[57] took over a park in downtown Toronto for a considerable period of time. When the city tried to evict them by way of a trespass notice, the protesters argued that they were exercising their *Charter* rights to freedom of expression, association and assembly which trumped any trespass issues. The court rejected the argument and allowed the city to enforce the trespass notice. I will return to *Batty* in more detail when discussing the balance of convenience. For current purposes it is relevant because the respondents argue that the harm the City suffered in *Batty* was greater than the harm the University suffers here because, in *Batty,* the occupation took up almost "all of the Park's land", while the encampment takes up only a small portion of the University campus and only a portion of the green space at Front Campus.[58] I am unable to accept that distinction. Although Front Campus may take up only a small portion of the University campus, the encampment in *Batty* also took up only a small portion of the parkland in Toronto. Moreover, on the photographs I have seen, the encampment takes up almost all of the green space on Front Campus.

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[56] *Batty v. City of Toronto*, 2011 ONSC 686
[57] A protest movement that took hold in several countries following the financial crisis of 2008 and which protested against social and economic inequality.
[58] *Batty v. City of Toronto*, 2011 ONSC 686, at paras. 12, 13.

[151] As a result, I find that the University's continued inability to use Front Campus constitutes strong irreparable harm to the University.

iii. Violence and Antisemitic Language

[152] The University submits that further irreparable harm arises because of the violence and antisemitic language with which the encampment is associated. As noted earlier, I do not accept that the encampment itself is violent or antisemitic. I do, however, accept that there have been incidents of hate speech and physical harassment of people, predominantly but not exclusively directed at people wearing kippahs or some other indicator of Jewish identity in the general vicinity of the encampment.

[153] Although I accept that there has been a general increase in antisemitic and anti-Palestinian conduct at the University, that conduct is not necessarily connected to the encampment. At least some of those incidents could be expected to arise in any event in light of the passions that events in the Middle East arouse.

[154] In considering whether protests that create an obstruction to an otherwise public space should continue, courts have considered the likelihood of the obstruction leading to escalating tensions and altercations.[59] I find that the possibility of further escalation based on past physical altercations and past use of actual hate speech

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[59] *Ogden Entertainment Services v. United Steelworkers of America, Local 440*, 1998 CanLII 14755 (ON SC) at para. 9.

outside the encampment amounts to some level irreparable harm but not significantly so.

iv. Safety hazards

[155] In my view, the safety hazards surrounding the encampment do not amount to irreparable harm. Although the evidence is somewhat conflicting, especially about the extent to which the issues about emergency exits have been addressed, at the end of the day, Vice Provost SW agreed that safety concerns continue to be addressed through mutual discussion.

v. Reputation

[156] I accept that the University has suffered some reputational damage in the form of fear, distress, dissatisfaction and discomfort by some community members, a charged and divisive atmosphere among some community members, loss of reputation because of the University's inability to assert control over Front Campus, and cancellation of a number of activities destined for Front Campus including a grand opening of the rejuvenation project.

[157] To the extent that these harms arise because the protest has focused attention on a divisive issue, that is something all residents of a free and democratic society must be prepared to live with. That is all the more the case in a university whose mandate it to explore difficult issues.

[158] To the extent that these harms arise out of the continued inability of the University and its members to use Front Campus, it is irreparable consistent with the cases referred to in paragraphs 146 – 147 above.

[159] Although the University submitted that it had suffered damage in the form of financial contributions from alumni, the only evidence in this regard was the suspension of a single scholarship in an unknown amount. Given the quality of that evidence, I find no irreparable harm in that regard.

[160] On balance, I find that the University has in fact suffered irreparable harm, the largest single component of which arises out of the continued inability to use Front Campus.

C. The Balance of Convenience

[161] The final branch of the test for an interlocutory injunction requires the court to weigh the harm to the respondents if an injunction is granted against the harm to the University if an injunction is not granted. In this exercise the Court must consider which of the outcomes results in greater harm and whether that greater harm is justified.

i. Harm to the Respondents

[162] The respondents submit that the harm of an injunction to them is significant infringement of their right to freedom of expression.

[163] The respondents underscore the importance of universities in facilitating freedom of expression. Universities are intended to be forums for the exchange of ideas, criticism of existing orders and the betterment of society. Indeed, the very physical architecture of universities is designed to promote assembly and free speech. From their early days, universities were designed around quadrangles or "quads" which were intended to allow students and faculty to congregate and debate.[60] The University of Toronto is no different. It has numerous quads throughout its campuses including the largest one at Front Campus which is essentially a large quad surrounded by buildings on all four sides although the enclosure is not complete.

ii. Harm to the University

[164] The University submits that the harm to it if the injunction is not granted is one of the loss of use of its property and financial expense that it is unlikely to recover.

[165] As already noted, the University community has lost the daily use of Front Campus for over 50 days. It has lost its use for spring graduation ceremonies; it has lost its use as a daily recreational space and has lost its use for summer camps. If repairs are not done quickly, the University will also lose its use for fall graduation ceremonies and for the fall academic term. In addition, the University says it will continue to incur financial and human resource costs to address the logistical,

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[60] Affidavit of RL, paras. 9-12; Pablo Campos, "*The Spatial-Experiential Archetype of the 'Quad': Project Design Interpretations in New Campuses*" (2021) 24:2 Space and Culture 194.

safety, and reputational concerns that the encampment has already created. Those costs will continue to increase as long as the encampment exists.

iii. The Source and Content of Freedom of Expression

[166] As noted earlier, the respondents argue that an injunction will interfere with their freedom of expression. Although freedom of expression is a right granted under the *Charter* and the *Charter* does not apply here, the University agrees that the respondents have directionally similar rights under the University's policies to those they would under the *Charter* if it applied. This is so because, among other reasons, the University has made promises of freedom of expression, association and assembly in a variety of its policy documents.

[167] The University acknowledges the fundamental importance of freedom of expression on campus. Its Statement of Institutional Purpose provides:

> It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.

[168] The University's Statement on Freedom of Speech dated May 28, 1992 states:

> In policies approved by the Governing Council, the University community has held that the essential purpose of the University is to engage in the pursuit of truth, the advancement of learning and the dissemination of knowledge. To achieve this purpose, all members of the

> University must have as a prerequisite freedom of speech and expression, which means the right to examine, question, investigate, speculate, and comment on any issue without reference to prescribed doctrine, as well as the right to criticize the University and society at large.

[169] The protesters also submit that an injunction would infringe their rights to freedom of association and assembly. Courts have recognized that freedom of association and assembly are closely related to freedom of expression.[61] The University's Statement on Free Speech also recognizes the relationship between free speech and freedom of association as follows:

> The right to free speech is complemented by the right of freedom of association. The right to free speech extends to individuals cooperating in groups. All members have the freedom to communicate in any reasonable way, to hold and advertise meetings, to debate and to engage in peaceful assemblies and demonstrations, to organize groups for any lawful activities and to make reasonable use of University facilities, in accordance with its policies as they are defined from time to time and subject to the University's rights and responsibilities.

iii. Balancing the Competing Interests of the Parties

[170] The respondents submit that their rights to freedom of expression must prevail over the recreational uses to which the University wishes to put Front Campus.

[171] At the outset of the balancing analysis is important to make a critical contextual point. The injunction does not shut down the protesters' right to freedom of

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[61] *Mounted Police Association of Ontario v Ontario*, 2015 SCC 1 CanLII, paras. 57-58, quoting with approval Chief Justice Dickson's Dissent in *Reference re Public Service Employee Relations Act (Alta.),* 1987 CanLII 88 (SCC).

expression. The University has made it clear that the protesters continue to have the right to protest anywhere on campus between the hours of 7 AM and 11 PM. They are free to march, assemble, make speeches, chant, engage passersby, hold signs, hand out pamphlets and engage in other acts of protest. The only restriction the injunction would impose is to prohibit camping, setting up structures or blocking entry to University property.

[172] One principle underlying the University's policies on freedom of expression is that it should be preserved for all. It is generally speaking not for the University to take a position on a particular issue but to allow views to be exchanged and debated. Its Statement of Purpose makes this clear when it says:

> Often this debate may generate controversy and disputes among members of the University and of the wider community. In such cases, the University's primary obligation is to protect the free speech of all involved. The University must allow the fullest range of debate. It should not limit that debate by preordaining conclusions or punishing or inhibiting the reasonable exercise of free speech.

[173] The Policy on the Disruption of Meetings provides:

> Every member of the University is obligated to uphold freedom of expression and the freedom of individuals and groups from physical intimidation and harassment. The administration of the University has a particular responsibility to require from members and visitors a standard of conduct which does not conflict with these basic rights. That standard must allow the maximum opportunity for dissent and debate.

[174] The Code of Student Conduct provides:

> For example, peaceful picketing or other activity outside a class or meeting that does not substantially interfere with the communication inside, or impede access to the meeting, is an acceptable expression of dissent. And silent or symbolic protest is not to be considered disruption under this *Code*. But noise that obstructs the conduct of a meeting or forcible blocking of access to an activity constitutes disruption.[62]

[175] The University's request for an injunction is consistent with these three policy documents. It is not preventing the protesters from expressing their views on campus; it is preventing the protesters from silencing other voices on Front Campus.

[176] At the same time as the University recognizes the importance of freedom of expression, it must also manage the exercise of freedom of expression on its property. The University is a large institution. It has over 100,000 students. Between August 1, 2022 and July 31, 2023, the University held approximately 20,000 non-curricular events (not including online events). That number of events on campus requires management and coordination.

[177] That management and coordination is carried out through the University's Policy on the Temporary Use of Space (the "Temporary Use Policy"). The Temporary Use Policy applies to Front Campus as it does to other University property. Any booking of a space like Front Campus must be made through the University and be made in compliance with the Temporary Use Policy. The respondents did not

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[62] Code of Student Conduct, p. 6, CaseLines p. A240.

make any request to book Front Campus, nor was any such request granted. I hasten to add though that the Temporary Use Policy does not apply to outdoor protests provided they do not appropriate large spaces for indefinite periods of time.

[178] The University's policies are designed to ensure that free speech is granted to all and that it remains civil. The courts have recognized the need for policies like these. As D.M. Brown J. observed in *Batty*:

> Toronto is a densely populated city. Competing demands for the use of its limited parklands are numerous. Without some balancing of what people can and cannot do in parks, chaos would reign; parks would become battlegrounds of competing uses, rather than oases of tranquility in the concrete jungle. Our, parks would become places where the stronger, by use of occupation and intimidation, could exclude the weaker or those who are not prepared to resort to confrontation to carve out a piece of the park for their own use.[63]

[179] As passionate as the protesters may be about their cause, they do not have the unilateral right to decide how Front Campus can be used by their exercise of force, occupation or intimidation.

[180] The protesters submit that the right to occupy is inherent in freedom of expression because occupation is a form of expression. Occupation forces people to face the issue that gives rise to the occupation. In the case of Front Campus, the protesters submit that the location is particularly important because it is immediately in front

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[63] *Batty v. City of Toronto,* 2011 ONSC 6862 at para. 91.

of Simcoe Hall where the University's senior leadership offices are located, including that of the President.

[181] I cannot agree with that submission. There is ample judicial authority that says protesters have no right to set up camp on or otherwise occupy property that does not belong to them, no matter how much more effective their protest would be if they were able to do so.[64]

[182] Part of the balance of convenience analysis can, in the appropriate case, consider the effect of any order on the public interest.[65] Communities have a legitimate public interest in preserving shared spaces for recreational use. As the Court of Appeal has observed:

> Communities have an interest in maintaining the public character of shared spaces, which requires the use of legislation and regulation to prevent individuals and groups from using public space in a way that renders it unfit for the reasonable use of others. . . . .[66]

[183] In *Batty,* D.M. Brown J. put the point as follows:

> … the rigidity and absolutism of the Protesters' position -- let us keep our tents and around-the-clock occupation -- does not fit with the balancing of competing interests which our Constitution requires. I am satisfied on the evidence in this case that the City is alive to the need to balance the competing rights of the Protesters with those of the Toronto

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[64] *Hamilton (City) v. Loucks*, 2003 CanLII 64221 (ON SC); *Windsor Salt Ltd./Sel Windsor Ltée.*, 2023 ONSC 1431 at para.30(a)(iv)(3); *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at para. 77; *Batty v. City of Toronto*, 2011 ONSC 6862 at para. 111.
[65] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.
[66] *Bracken v. Niagara Parks Police*, 2018 ONCA 261 at para. 71.

> community -- the City said so in its letter and press release. I regard the two restrictions which the City seeks to enforce through its Trespass Notice to be reasonable, tailored, minimal impairments on the expressive and associational rights of the Protesters and a reasonable balancing of the rights of all who wish to use the Park.[67]

[184] I am equally satisfied here that the order the University seeks to dismantle the encampment also balances the competing rights of the protesters with those of the broader University community and the public at large.

[185] At one point during oral argument, counsel for the University asked, what if someone just wants to have breakfast? Why can't they just have breakfast on Front Campus? This was met somewhat derisively by respondents' counsel who referred to it as absurd to equate one person's desire to have breakfast with stopping the war in Gaza. I pause here for perspective. As laudable as the protesters' goals might be, it is unlikely that the war in Gaza would stop even if the University were to comply with all of the protesters' demands immediately. Returning to Counsel's question about having breakfast, the real issue underlying that question is who gets to make decisions about conflicting claims to the use of space. One group wants to have breakfast; another wants to set up an encampment until the University divests. That competition must be managed.

[186] Even the protesters have recognized the need to manage the use of space and the exercise of free speech. They have done that through their own policies that

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[67] *Batty v. City of Toronto*, 2011 ONSC 6862 arrived at a similar conclusion at para. 111.

govern who can access Front Campus, how to behave at the encampment, and what sort of language is permissible at the encampment. The protesters say these restrictions are necessary to prevent violence.

[187] Preventing violence is a worthy goal. The University, however, asks the fundamental question: If the protesters are allowed to enforce their policies with respect to Front Campus, why is the University not allowed to enforce its own policies with respect to Front Campus?

[188] When asked this question in oral argument, respondents' counsel replied that Front Campus is a quasi-public space with a particular commitment to free speech and freedom of assembly. I agree. But that does not answer the question. It is the very fact that Front Campus is a quasi-public space that makes it so important to manage its use in an orderly way. When we have a public or quasi public spaces, who gets to determine what that space is used for? Is it the legal owner of the space (whether that be a private entity or a public entity) or is it anyone who, in the words of Justice Brown, has become "the stronger, by use of occupation and intimidation"?[68]

[189] In our society we have decided that the property owner generally gets to decide what occurs on the property, subject of course to whatever other legal rules apply to the property. In the case of public property, the owners' rules must be consistent

[68] *Batty v. City of Toronto*, 2011 ONSC 6862 at para. 91.

with the *Charter*. In the case of the University, the rules must be consistent with its own internal policies and with the values that are directionally consistent with the Charter even if the *Charter* does not apply.

[190] If it is not the owner who gets to determine what happens on the property it will become a brutal free-for-all. If protesters can just take Front Campus, nothing prevents a stronger group from coming along and forcibly taking it over from the current protest group for another cause or a counter protest.

[191] I appreciate that protesters may not like the way in which an owner such as a municipality or a university makes decisions about the use of space. In that case, protesters have recourse to the courts if their rights have been violated. If their rights have not been violated but the protesters do not like the decision of the property owner, then they must use the mechanisms available to influence the decision or replace the decision-maker. In the case of a governmental owner, change is brought about through lobbying or at the ballot box. In the case of the University, there are mechanisms to bring issues to the attention of university decision-makers and there are ultimately mechanisms to change the University President. I appreciate that those mechanisms take time and may not succeed because the protesters cannot garner enough support within the decision-making mechanism to bring about change. That, however, is the system we have agreed to as a society. The alternative is simply brute force. A protest group may be content with force when they have the upper hand. They will not be as happy with it when someone else has the upper hand. If the protesters do not currently have

enough support to bring about change, the solution is to gain influence; not to resort to force.

[192] The University's approach here is to make Front Campus available to everyone, including to those who just want to eat breakfast, while at the same time making the entire campus available to protesters provided they do not appropriate or block access to University property. This means all can do what they want to the maximum extent possible, provided it does not infringe on anyone else's ability to do what they want. People who want to eat breakfast can eat breakfast. People want to protest can protest. This is consistent with the underlying foundation of liberal democracies: as much liberty as possible so long as one person's liberty does not unreasonably infringe on the liberty of others.

[193] The University's request for an injunction is consistent with this principle and its own policies. The policies are directionally consistent with *Charter* values.

[194] The protesters' conduct is inconsistent with freedom of expression. At the end of the day, the only people who are allowed onto Front Campus are those who agree with (or at least who do not openly disagree with) the protesters' beliefs. If the property truly is a quasi-public space, why should one ad hoc group of people get to determine who can use that space for a period of over 50 days?

[195] The protesters respond by arguing that the value of their speech about issues as important as the war in Gaza or University divestment are more valuable than someone's right to have breakfast on Front Campus. That may well be true. But

that again, is a decision to be made by the property owner subject to any rights the protesters may have. Moreover, when it comes to valuing different types of activity, liberal democracies allow people to be uninterested in important political issues as much as they allow people to be passionate about important political issues. Both groups have rights to space which must be managed.

[196] In *Batty,* D.M. Brown J. predicted what would happen if protesters were allowed to take over whatever space they wanted:

> Further, if the Protesters possess a constitutional right to occupy the Park and appropriate it to their use, then the next protest group espousing a political message would have the right to so occupy another park, say, Moss Park; and the next group the next park, and so on, and so forth. So would result a "tragedy of the commons", another ironic consequence of a movement advocating general popular empowerment.[69]

[197] Respondents counsel referred to this somewhat critically as a speculative “slippery slope” argument. That “slippery slope” has, however, already presented itself in relation to this very protest. Counter protesters have already tried to set up their own encampment on Front Campus and were shut down by the University. When I asked respondents’ counsel how such competing claims to University property should be managed, she suggested that counter protesters be given a separate protest zone on campus. That means another campus green space would be used

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[69] *Batty v. City of Toronto,* 2011 ONSC 6862 at para. 113.

for another encampment. It is clear that the "slippery slope" is not far fetched. It is real and immediate.[70]

[198] If the law allows protesters to occupy the property of others, they will do so. Why would they not? It would be perfectly legal and tactically advantageous. There is unfortunately no shortage of valid causes for which people of principle and good faith could justly protest: the war in Gaza, the war in Ukraine, forced labour in certain countries, child labour in other countries, human trafficking, industrial fishing fleets depriving local fishers in developing countries of food, the plight of Rohingya refugees, the war in Sudan, lack of clean water for first nations communities, lack of health care for first nations communities, suppression of human rights in a long list of countries, to name but a few. Each is worthy of passionate protest. Each would take up another green space. Each lost green space deprives city residents of a much needed source of respite and recreation. As passionate as we may be about alleviating human suffering around the world, depriving our fellow residents of green space accomplishes nothing.

iv. No Inconvenience for Illegal Protest

[199] The legal nature of the encampment is a further element to consider when assessing the balance of convenience. As noted earlier, the encampment amounts to trespass. The occupants are interfering with the University's and the

[70] I note parenthetically that counsel's suggestion to provide another protest site does not address why her clients get to have the more tactically useful spot at Front Campus and the counter protest is relegated to some lesser spot.

public's use and enjoyment of Front Campus. The law does not recognize inconvenience that flows from the inability to use someone else's property.[71]

[200] As Justice I. F. Leach noted in Windsor *Salt Ltd./Sel Windsor Ltée.*:

> On the other hand, I found it difficult to see any meaningful inconvenience that would be experienced by those who would be restrained from further participation in unlawful nuisance, trespass and intimidation activity that has been occurring to date on the picket lines.[72]

[201] Justice Brown's observation in *Batty* bears repeating here: "the Protestors' position – let us keep our tents and around-the-clock occupation – does not fit with the balancing of competing interests which our Constitution requires".[73] Similarly here that same position does not fit with the balancing of competing interests that an injunction requires.

v. Negotiation

[202] The respondents submit that the balance of convenience demands that issue be left to negotiation between the parties. They suggest that the University is behaving heavy handedly in failing to negotiate a solution.

[203] Although negotiation may be a preferable way to resolve differences in many cases, there is no legal obligation on the University to negotiate with protesters.

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[71] *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 SCR 156 at para. 77; *9646035 Canada Limited et al. v Kristine Jill Hill et al.*, 2017 ONSC 5453 at para. 104.
[72] *Windsor Salt Ltd./Sel Windsor Ltée.,* 2023 ONSC 1431 at para.30(a)(iv)(3):
[73] *Batty v. City of Toronto*, 2011 ONSC 6862 at para. 111.

The protesters in *Batty* made a similar point and argued that the City had a constitutional obligation to negotiate with them before invoking a Trespass Notice. Justice Brown rejected the argument saying:

> I see no merit in this argument. The applicants offered no jurisprudential support for the argument. That is not surprising. Such a constitutional obligation would paralyze municipal governments. Whether a municipality should consult with those who occupy public spaces before seeking to limit their use of those spaces is a matter of political prudence, not constitutional obligation. In our constitutional system, the duty to consult has been limited to the issue of aboriginal rights and interests under s. 35 of the Constitution Act, 1982, where the obligation is tied to a sui generis concept of the honour of the Crown.[74]

[204] Although the situation before me does not involve governmental or constitutional issues, directionally similar principles apply here. Absent some contractual obligation, a private party or a quasi public/private party is under no obligation to negotiate before invoking its legal rights.

[205] While it might seem harsh at first blush to say there is no obligation to negotiate, it is in fact a sensible result. At the end of the day, a property owner has the authority to determine what occurs on its property. That authority is not limited by any obligation to negotiate. If it were otherwise, property owners would be obligated to negotiate and compromise with anyone who took over their space. While the respondents might benefit from that approach in the instant case, they might be

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[74] *Batty v. City of Toronto,* 2011 ONSC 6862 at para. 115

seriously harmed by that approach if the University were compelled to compromise with a group with whom the protesters disagreed.

[206] A duty to negotiate also would risk holding the property owner ransom to potentially extortionate demands by others. The protesters here have said that the encampment will remain until they achieve a solution that is satisfactory to themselves. A duty to negotiate would ultimately mean that property owners have no power to manage their property until they have satisfied the demands of any protest group that came along. Society simply cannot function like that. It is also important to remember in this regard that negotiations have occurred over a period of more than 50 days. Even if there were an obligation to negotiate, the obligation could not mean that a property owner had to negotiate until protesters were satisfied. That would deprive the property owner of all recourse to the courts.

vi. Granting Full Injunctive Relief

[207] The protesters further submit that the balance of convenience favours them because granting an interlocutory injunction here would award the University the full relief it seeks on the application which the respondents submit courts should not do.[75] I agree that this is a valid consideration when weighing the balance of convenience. It is, however, a factor to take into account; it is not an absolute rule.

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[75] *WCP V Montreal Industrial c. 12176254 Canada Inc.*, 2023 QCCS 363, at paras 4–6; *Lord v. Domtar Inc.*, 2000 CanLII 11329 (Q.C.C.A.), at para. 12.

[208] In the circumstances of this case, the principle is offset by the strength of the University's claim to Front Campus, the strength of its claim to an injunction and its recognition of the respondents' right to continue protesting on campus.

vii. The Value of Protest and Ruined Lives

[209] Finally, with respect to the balance of convenience, the respondents point to the beneficial effects that protest movements have had on society in the past and the potentially ruinous effects on individuals who have had the courage to protest.

[210] I agree that almost all social progress has its origins in some form of protest in which people who were labelled as "troublemakers," or worse, challenged the existing order. The respondents, however, are free to continue protesting. They simply cannot deny others the right to use Front Campus.

[211] The respondents have pointed to several examples of protesters' lives being ruined because of punishments imposed for protesting. One example they gave was the treatment of protesters who occupied parts of Concordia University in Montreal in a 1968 protest against racism. Many of those students were expelled and deported. Those sanctions had lifelong consequences. Concordia ultimately apologized to those protesters in 2020 and acknowledged that their treatment amounted to institutional racism. As a further example, counsel pointed to recent events at the Lincoln Alexander School of Law referred to earlier in these reasons.

[212] The consequences that might flow to the protesters as a result of the encampment, if any, are beyond the scope of this motion. As noted earlier, however, there is no

evidence to suggest that the named respondents have engaged in any acts of antisemitism, racism, violence, hate speech, or vandalism. The record before me suggests that the named respondents are young idealists, who are motivated by immense human suffering, sometimes that of friends and family. To this point, the police have not been prepared to intervene in the absence of a court order. That might have created some ambiguity about the right of protesters to remain at the encampment. These reasons and the ensuing court order, however, remove any ambiguity about the right to remain at the encampment.

[213] I would hope that if the protesters accept the court's order and do what they can to peacefully dismantle the encampment, this would be given significant weight in how the University treats them going forward. Moderation has much to commend itself in situations like this.

[214] Going forward, however, it may well be appropriate to impose the full range of sanctions on those who do not abide by the court order. That includes physical enforcement of the order, prosecution for trespass, liability for contempt of court and the full range of disciplinary sanctions at the University. The protesters obviously do not have to agree with the order, but they are required to abide by it.

[215] The protesters have made their point. They have successfully shone a light on an issue of importance to them. The encampment, however, is only the first step of the process. It has succeeded in attracting everyone's attention. The University

is prepared to ensure that the divestment procedures are implemented on an expedited basis.

[216] It is now time for the encampment to be dismantled and for all to focus on the next step. For the respondents, that will be trying to influence the divestment process to bring about the changes they seek. That will not be done by occupation of University property but by persuading those looking into the question about why the University should divest. This is probably the more challenging task. It may involve identifying the type of people who are making the recommendation and identifying the types of issues that will resonate with them. At the same time, it may require discussions with other stakeholder groups in the University such as faculty associations, alumni associations, members of Governing Council and others to persuade them about the issue and build momentum within the University. That involves speaking to those stakeholders in "their own language," that is to say by communicating about issues that resonate with them and in a way that resonates with them. If the protesters peacefully dismantle the encampment and focus their energy on these exercises of persuasion, they may yet achieve their goal of divestment.

V. Form of Order

[217] The University seeks an order similar to orders that have been granted in other cases enjoining protesters from continued occupation of property.

[218] The respondents object to paragraph six of the order which authorizes Toronto Police Services, the Ontario Provincial Police and any other police authority to take steps to enforce the order. The respondents say the court has no jurisdiction to make such an order. They rely on the decision of the Court of Appeal for Ontario in *Ogden Entertainment Services v. Retail, Wholesale/Canada*,[76] in support of that proposition. In *Ogden* the Court of Appeal held that an order "directing" the police to enforce an order was beyond the jurisdiction of the court because civil orders were to be enforced by the Sheriff. It would be up to the Sheriff to determine whether he or she wished to invoke police assistance with respect to the enforcement of a civil order.

[219] The proposed order here, however, does not "direct" the police to do anything. It merely authorizes them to do so. That is advisable in the circumstances of this case because the police have taken the position that they will not take steps to remove the encampment unless authorized by a court to do so. The order does not interfere with or fetter police discretion in the exercise of their duties. Clarity about the authority of the police is desirable here because, as a practical matter, the Sheriff does not have the resources to enforce the order if it is not complied with voluntarily.

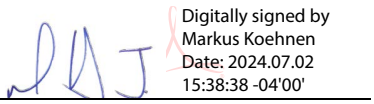
Conclusion and Costs

[76] *Ogden Entertainment Services v. Retail, Wholesale/Canada,* 1998 CanLII 1441

[220] For the reasons set out above, I grant the injunction the University seeks. The University has demonstrated a strong *prima facie* case in trespass and ejectment. The only defence is the purported exercise of the right of freedom of expression. Case law is clear that exercising freedom of expression is not a defence to trespass. The University has suffered irreparable harm because of the protesters' continued appropriation of Front Campus and their exclusion of others from Front Campus. The balance of convenience favours the University because the respondents will continue to be able to protest wherever they want on campus. The injunction does not restrain the protesters from any activity in which they have a legal right to engage but merely prevents them from camping, erecting structures blocking entry to university property, or protesting between 11 PM and 7 AM.

[221] There will be no order as to costs given that the parties have agreed to bear their own costs.

[222] In closing I thank all counsel for their very helpful written and oral submissions and for working cooperatively and professionally to get this matter to a hearing in a reasonable time.



Koehnen J.

Released: July 2, 2024

APPENDIX A: Alternative *Charter* Analysis

[223] As noted earlier, I have found that it would be inappropriate to determine whether the *Charter* applies because the respondents have not served a notice of constitutional question on the Attorneys General of Canada and Ontario. In the event I am wrong in that conclusion, I will determine here, as an alternative analysis, whether the *Charter* applies.

[224] The issue about whether the *Charter* applies to universities in Ontario arises out of section 32 of the *Charter* which provides that the *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.

[225] The question is whether the University falls within the category of "government" for purposes of the *Charter*.

[226] The analysis begins with the Supreme Court of Canada's 1990 decision in *McKinney v University of Guelph.*[77] In that case, several professors and librarians

[77] *McKinney v University of Guelph,* 1990 CanLII 60 (SCC), [1990] 3 SCR 229

claimed that the University of Guelph's mandatory retirement policy was discriminatory under section 15 of the *Charter.* The Supreme Court concluded that universities do not perform functions of government because the "manner in which they are presently organized and governed" gives them legal autonomy and ensures that they are not controlled by government.[78] In arriving at this conclusion the Supreme Court referred to the *University of Toronto Act* as an example of the modern, autonomous university governance model.[79]

[227] In 1997, the Supreme Court re-visited the issue in *Eldridge v. British Columbia (Attorney General)*[80] where it held that the *Charter* applied if:

(i) The entity at issue is governmental by its very nature or by virtue of the degree of control the government exercises over it.

(ii) A particular activity of the entity is governmental because, for example, it implements a specific statutory scheme or government program.[81]

[228] The first branch of the test involves an inquiry into the nature of the entity and the degree of government control to which it is subject. If the entity is found to be governmental in nature, then the *Charter* applies to all of its activities. The second branch of the test involves an inquiry into a specific activity. If the activity is

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[78] *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, pp. 273-274.
[79] *McKinney v University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, p. 271.
[80] *Eldridge v British Columbia (Attorney General),* 1997 CanLII 327 (SCC), [1997] 3 SCR 624 at para. 43.
[81] *Eldridge v British Columbia (Attorney General),* 1997 CanLII 327 (SCC), [1997] 3 SCR 624 at para. 44.

governmental, then the *Charter* would apply to the specific activity but not to the entity generally.

[229] The respondents say that the University falls within the second branch of the *Eldridge* analysis.

[230] In 2012, in *Lobo v. Carleton University,*[82] the Court of Appeal for Ontario addressed an issue very similar to the issue before me. In *Lobo,* students invoked the *Charter* to challenge Carleton's decision to refuse space for anti-abortion demonstrations.[83] Applying *Eldridge* and *McKinney*, the Court of Appeal held that the *Charter* did not apply to a university's decisions about the allocation and use of its property for students' non-academic extra-curricular uses.[84] *Lobo* established that under the university governance model in Ontario, universities are not government actors and decisions about the management of university affairs (and property) are not made in the furtherance of any specific government policy.[85]

[231] Like *Lobo*, the case before me concerns the University's decision about when and how its property can be used for an extra-curricular activity. The Court of Appeal held quite clearly that the *Charter* does not apply in such circumstances. If I were to decide the *Charter* issue, I would be bound to follow *Lobo* and conclude that the *Charter* does not apply.

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[82] *Lobo v Carleton University*, 2012 ONCA 498.
[83] *Lobo v Carleton University*, 2012 ONCA 498.
[84] *Lobo v Carleton University*, 2012 ONCA 498 at paras. 3-4.
[85] *Lobo v Carleton University,* 2012 ONCA 498 at para. 1.

[232] The respondents point to two Alberta Court of Appeal cases which hold that the *Charter* does apply to universities in Alberta.[86] That conclusion, however, turned on a detailed review of the statutory and regulatory schemes that apply to universities in Alberta. Those schemes indicated that Albertan universities were under much more immediate government control and direction than are universities in Ontario. Indeed, in *Lobo* the lower court considered the first instance decision in one of the Alberta cases and declined to apply it because Carleton University was established by a statute that created an autonomous entity whose structure and governance was in no way prescribed by the government.[87]

[233] The respondents point to two developments since *Lobo* which they say demonstrate that Ontario universities are now subject to greater government control to the point that it subjects them to the *Charter*.

[234] The first is a 2018 regulation that requires publicly assisted colleges and universities to develop their own free speech policies[88] (the "2018 Directive"). The 2018 Directive requires that the freedom of expression policies meet a minimum standard and requires each institution to prepare an annual report that describes its implementation of and compliance with its freedom of speech policy.

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[86] *Pridgen v University of Calgary,* 2012 ABCA 139; *UAlberta Pro-Life v Governors of the University of Alberta,* 2020 ABCA 1.
[87] *Lobo v Carleton University*, 2012 ONSC 254 at para. 14 considering *Pridgen v. University of Calgary,* 2010 ABQB 644
[88] *Higher Education Quality Council of Ontario Act,* 2005, O. Reg. 336/06,.

[235] The University implemented its freedom of speech policy in 1992 and has not changed it as a result of the 2018 Directive.

[236] The second change to which the respondents point as evidence of greater government control is Bill 166.[89] Bill 166 requires publicly assisted colleges and universities to implement, among other things, a student mental health policy and policies to combat racism and hate. Bill 166 also authorizes the Minister to require colleges and universities to provide information about the cost of attending college or university.

[237] The University does not rely on anything in the 2018 Directive or Bill 166 to justify its request for an injunction. There is no evidence that the 2018 Directive or Bill 166 have changed the University's autonomy.

[238] In 2021, the Court of Appeal for Ontario reaffirmed the autonomy of Ontario universities in *Canadian Federation of Students v. Ontario (College and Universities)* ("*CFS*"). In *CFS*, the Court of Appeal closely examined the relationship between the Minister and various Ontario universities, including the University of Toronto, and found:

a. Ontario Universities are not Crown agents;[90]

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[89] *Bill 166, An Act to amend the Ministry of Training, Colleges and Universities Act,* Royal Assent dated May 16, 2024.
[90] *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553 at para. 48.

b. Achieving the main goals of universities in Ontario "requires that universities be self-governing, and so they are;"[91]

c. "… the Legislature has chosen to establish the universities as autonomous entities, free from government interference in matters of internal governance;[92]

d. " … universities are created to be independent, self-governing bodies, and it is fanciful to suggest that they are not."[93]

[239] The uncontradicted evidence of the University on this motion is that it "is independent of and from all levels of government … The University must be self-governing in order to uphold and promote academic freedom and carry out its core mission."

[240] The respondents argue that the University is a government actor because it receives substantial funding from government and is accountable to government for that funding. The Supreme Court of Canada has already rejected that proposition twice.[94]

[241] The day after the oral argument concluded, the Supreme Court of Canada released its decision in *York Region District School Board v. Elementary Teachers'*

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[91] *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553 at para. 49.
[92] *Canadian Federation of Students v Ontario (Colleges and Universities),* 2021 ONCA 553 at para. 60.
[93] *Canadian Federation of Students v Ontario (Colleges and Universities)*, 2021 ONCA 553 at para. 64.
[94] *Harrison v University of British Columbia*, 1990 CanLII 61 (SCC), [1990] 3 SCR 451; McKinney v University of Guelph, 1990 CanLII 60 (SCC), [1990] 3 SCR 229, p. 269.

Federation of Ontario.[95] The parties asked for the opportunity to make submissions in writing about *York Region* which I received at end of day on June 24, 2024. In *York Region,* the Supreme Court of Canada held that the activities of Ontario school boards were subject to the *Charter* because school boards are "government by nature."

[242] *York Region* does not change any of the conclusions set out above. The decision is based on the extensive powers that the *Education Act*[96] gives the Minister of education with respect to school boards. This includes detailed powers to prescribe courses of study at various school levels down to the level of publishing approved lists of books for use in elementary schools.[97] That differs substantially from the autonomous nature of universities in Ontario. The Supreme Court of Canada also appears to have intended that the case be construed narrowly. Justice Rowe, writing for the majority left "for another day the question of the applicability of the *Charter* to public schools in other provinces, or to the operation of private schools."[98] In other words, any conclusions in relation to those entities would require a detailed analysis of their nature and their relationship to government.

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[95] *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22
[96] *Education Act,* RSO 1990, c E.2
[97] *Education Act* s. 8(1) (3.3)-(3.6).
[98] *York Region District School Board v. Elementary Teachers' Federation of Ontario*, 2024 SCC 22 at para. 84.

[243] Finally, the University submits that the *Charter* does not apply because freedom of expression does not protect anyone from the consequences of tortious acts. In *RWDSU, Local 558 v. Pepsi-Cola Canada Beverage (West) Ltd*.,[99] the Supreme Court of Canada refused to extend the *Charter*'s freedom of expression or freedom of association rights to tortious conduct saying:

> Picketing which breaches the criminal law or one of the specific torts like trespass, nuisance, intimidation, defamation or misrepresentation, will be impermissible, regardless of where it occurs.

[244] Justice Brown came to a similar conclusion in *Batty v. City of Toronto*[100] saying:

> The *Charter* does not permit the Protesters to take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space and then contend that they are under no obligation to leave. By taking that position and by occupying the Park, the Protesters are breaking the law. Such civil disobedience attracts consequences. In this case, the civic authority which represents the Toronto community now seeks to enforce the law. It wishes to re-open the Park to the rest of the city to enjoy as was done before. That is what the City sought to do by serving the Trespass Notice last week. For the reasons which I will set out below, I conclude that the Trespass Notice is constitutionally valid. The City may enforce it. I dismiss the application.[101]

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[99] *RWDSU, Local 558 v. Pepsi-Cola Canada Beverage (West) Ltd* ., 2002 SCC 8 at para. 77
[100] *Batty v. City of Toronto,* 2011 ONSC 6862
[101] *Batty v. City of Toronto,* 2011 ONSC 6862 at para. 15

[245] I agree with the conclusions in *RWDSU* and *Batty* in this regard. If the *Charter* conceptually applied to the University, I would find it does not apply here because the *Charter* does not protect trespass.

[246] If I am wrong in the foregoing *Charter* analysis and the *Charter* does apply with respect to the encampment, I would find that the Trespass Notice violates the protesters' rights to freedom of expression but that the violation is justified under section 1 of the *Charter*.

[247] Section 1 of the *Charter* guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The common law and statutory law of trespass constitute limits prescribed by law. When determining whether those limitations are reasonable the court must answer four questions:

i. Is there a pressing and substantial objective underlying the law or the government conduct?

ii. Is there a rational connection between the measure adopted and the pressing and substantial objective?

iii. Does the law /conduct minimally impair the right?

iv. Is there proportionality between the salutary and deleterious effects of the law/conduct? In other words, do the benefits achieved from the law /conduct outweigh the negative impact on rights?

[248] The pressing and substantial objective branch of the test requires the court to determine whether the object of the law is of sufficient importance to justify overriding a *Charter* right. In *Batty,* D.M. Brown J. found that there was a pressing and substantial objective in retaining public spaces for the use of the general public.[102] That is one objective here as well. In addition, the University's other objectives in enforcing the Trespass Notice are to restore its authority to manage competing demands on space at the University and to ensure that University property and freedom of expression on it are not unilaterally appropriated by a single group to the exclusion of others. Those all amount to pressing and substantial objectives. The goal underlying those objectives is to ensure that University space is managed peacefully and rationally rather than being subject to forceful appropriation by a single group.

[249] The rational connection branch of the test requires the court to satisfy itself that the measures adopted are carefully designed and rationally connected to the pressing and substantial objective. Enforcing the Trespass Notice is tightly connected to the University's objective. D.M. Brown J. came to a similar conclusion in *Batty* stating:

> Are the measures chosen by the City rationally connected to the objective it seeks to achieve? Without a doubt. The Parks By-law seeks to balance uses of parks to enable all in

[102] *Batty v. City of Toronto*, 2011 ONSC 6862 at para. 91.

> this city to access and use parks. The Trespass Notice seeks to ask one group of the public to let go of their monopoly over the use of the Park and share the Park with other people in Toronto and to afford the neighbouring community some peace and quiet during the midnight hours. What could be more rational?[103]

[250] The injunction the applicant seeks accomplishes the same thing at the University campus.

[251] The minimal impairment branch of the test requires the court to satisfy itself that the law impairs the right as little as possible. This involves comparing the impugned measure with other available alternatives to determine whether the objective could be achieved with less impact on rights and freedoms. The only alternative the respondents have suggested is to leave them in place and do nothing more or to have the University allow counter protesters to occupy another University property. That, however, does not accomplish what I have found to be the substantial and pressing objectives with respect to Front Campus, namely retaining public spaces for the general public, managing competing demands on University space and ensuring that freedom of expression is not appropriated by one group to the exclusion of others. The respondents' alternative suggestion would simply exclude the public from a second green space on the campus.

[252] I am satisfied that enforcement of the trespass notice minimally impairs rights to freedom of expression. The benefit of the injunction is that it allows the University

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[103] *Batty v. City of Toronto*, 2011 ONSC 6862 at para. 97.

to achieve the objectives just enumerated. The only negative impact of the injunction is to prohibit protesters from: erecting tents or other structures, excluding people from Front Campus, blocking access to University property and protesting between the hours of 11 PM and 7 AM. The respondents are otherwise free to protest and otherwise exercise of freedom of expression.

[253] The minimal impairment of the right to protest coupled with the assurance of public access to Front Campus, the orderly management of University space and the restoration of free speech to all on Front Campus, not just to the protesters, satisfies me that the injunction is proportionate. The restoration of freedom to all more than justifies the limitations on the protesters given that the limitations are on activity that the protesters have no legal right to engage in to begin with.

[254] In *Batty,* D.M. Brown J. reached a similar conclusion on the concepts of both minimal impairment and proportionality finding that the protesters insistence on around the clock occupation of property was incompatible with the balancing of competing interests that the *Charter* requires.[104]

[255] For the reasons set out above, I would conclude in my alternative analysis that the *Charter* does not apply to the University because it is neither governmental in nature nor are its activities or requests with respect to the encampment governmental. The University is not implementing any specific statutory scheme

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[104] *Batty v. City of Toronto*, 2011 ONSC 6862 arrived at a similar conclusion at para. 111.

or government program. In the further alternative, if the *Charter* were to conceptually apply to the University, I would find it does not apply here because it does not protect trespass. In a still further alternative if the *Charter* applied, I would find that the Trespass Notice violates the protesters' rights to freedom of expression but that the violation would be justified under section 1 of the *Charter*. The University's objectives are substantial and pressing. There is a rational connection between the injunction and the University's objectives. The injunction is proportional because it allows the respondents to continue protesting.

CITATION: Governing Council of the University of Toronto v. Doe et al. 2024 ONSC 3755
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE GOVERNING COUNCIL OF THE UNIVERSITY OF TORONTO

Applicant

– and –

JOHN DOE, JANE DOE, TAYLOR DOE, PERSONS UNKNOWN, ABDURRAHEEM DESAI, AVIRAL DHAMIJA, ERIN MACKEY, HEIGO PARSA, KABIR SINGH, KALLIOPÉ ANVAR MCCALL, MOHAMMAD YASSIN, SARA RASIKH, SERENE PAUL and SAIT SIMSEK MURAT

Respondents

- and -

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, CENTRE FOR FREE EXPRESSION, UNIVERSITY OF TORONTO FACULTY ASSOCIATION, INDEPENDENT JEWISH VOICES CANADA, JEWISH FACULTY NETWORK, UNITED JEWISH PEOPLE'S ORDER, UNITED STEELWORKERS, ONTARIO PUBLIC SERVICE EMPLOYEES UNION, CANADIAN CIVIL LIBERTIES ASSOCIATION, AMNESTY INTERNATIONAL CANADA, CENTRE FOR ISRAEL AND JEWISH AFFAIRS, UNITED JEWISH APPEAL OF GREATER TORONTO, STAND WITH US CANADA, SIMON WIESENTHAL CENTRE, THE B'NAI B'RITH CANADA, LEGAL CENTRE FOR PALESTINE, HILLEL ONTARIO, NATIONAL COUNCIL OF CANADIAN MUSLIMS, ALLIED

VOICES FOR ISRAEL, COUNCIL OF ONTARIO UNIVERSITIES, ARAB CANADIAN LAWYERS ASSOCIATION, NETWORK OF ENGAGED CANADIAN ACADEMICS

Intervenors

REASONS FOR JUDGMENT

Koehnen J.

Released: July 2, 2024