A Different Question of Open Access: Is There a Public Access Right to Academic Libraries in the United States and Canada?*

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Providing public access to libraries is a public service, but is it a right? This paper explores participation in depository programs, public university status, and public funding as possible bases for this right. It examines relevant cases and finds that courts respect the right of academic libraries to determine their own policies.

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Introduction

§1 The massive John P. Robarts Library at the University of Toronto has inspired intense reactions from generations of students. With its concrete façade, it has been likened to a peacock or called “Fort Book” and has been praised or derided as brutalist architecture.¹ Its most controversial moment, however, came before it even opened, in the early 1970s. The original plan to restrict the use of Robarts Library to graduate students and faculty at the university led to clashes between students and university administrators, and, eventually, to sit-ins and confrontations with police. The controversy also played out in local newspapers. Library administrators argued that restricted access was the only way to preserve the collection and properly serve primary users. Undergraduate students contended that they needed the same access as the rest of the university population.

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Members of the public observed that it was public money that was building this goldmine of a library in the middle of the city, so why shouldn't they have access, too? By the time Robarts Library opened in 1973, the university community had come to an agreement, which will be discussed later. But the issue that started this controversy remains: Who has the right to use a university library?

§2 Many papers deal with community use of academic libraries. A number relate their authors' experiences as academic librarians dealing with public users. Other papers are surveys of universities' policies regarding public use of their libraries. These papers point to two general conclusions. First, there are compelling arguments not only for admitting but also for excluding the public; second, academic libraries admit or exclude the public based on their individual circumstances, such as budget, staffing level, and location, that is, whether the sheer number of people in the community using the academic library threatens to overwhelm the primary patrons the library has been created to serve.

§3 A number of the articles discuss a right of taxpayers to use facilities they have helped to fund or simply speak of universities as public institutions that the public has a right to use. Other articles assert that the right stems from a library's participation in a government depository program. Some distinguish private university libraries by stating that there is no public right to use them. Still others talk about the right of the students and faculty of the university to be served adequately by their library, even if it means the exclusion of other users. Exploring these claims, particularly in case law, could shed more light on the question of whether there is a right of public access. When these conflicting rights are claimed, which prevails?

**Public Access to Academic Libraries: The Claimed Right**

§4 There are three main, often overlapping, reasons cited for claiming a right of public access to academic libraries:

1. An academic library's participation in its government's depository program creates a public right of access.
2. The public nature of public universities creates a right of public access to the university library. This may also be framed as a taxpayer's right to use services partially or substantially funded by taxes.
3. In a democratic state, academic libraries, which possess some of the greatest resources in the land, are required to be open to the public so people may educate themselves to become informed and active citizens.

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4. See, e.g., Pettinato, supra note 2.
§ 5 This third reason raises ethical issues that have been discussed in the library literature and addressed in statements such as the American Library Association's (ALA) Library Bill of Rights. For example, in its interpretation of article V, "A person's right to use a library should not be denied or abridged because of origin, age, background, or views," the ALA grounds this right in a democracy's requirement of an informed citizenry.

§ 6 This article analyzes the legal aspects of the question of a public access right, focusing on the first two reasons given. It explores how and when these legal arguments about public access are raised and how courts have responded in both the United States and Canada.

The Effect of Depository Services Programs

§ 7 The governments of both the United States and Canada have depository services programs, which allow for academic libraries to be designated either full or partial depositories. In return for receiving government documents free of charge, the libraries assume a number of responsibilities. In both countries, this means providing members of the public with access to those government documents.

American Libraries and the Federal Depository Library Program

§ 8 In the United States, the public access requirement of the Federal Depository Library Program (FDLP) is enshrined in the U.S. Code. The law also gives the Superintendent of Documents the power to remove a library from the FDLP if it violates this requirement. In 1993, the Superintendent of Documents wrote that, under the law, a depository library must provide access to the depository materials that is "comparable to access to the rest of the collection . . . Documents should be available to users whenever the library is open and depository reference coverage must be comparable to that for the rest of the collection." Any library imposing restrictions on access faced probation, and ultimately termination, from the FDLP.

§ 9 This interpretation of the public access requirement has been disputed. At least in the experiences of the University of Michigan Law Library and Golden Gate University, an academic law library may deviate from completely unrestricted access and still retain depository status. For example, in the 1980s, the University

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8. Id. § 1909.
of Michigan Law Library introduced a policy to restrict access to most patrons outside the core group of law students and faculty; these patrons were interviewed to determine whether they would be granted access and which level of pass they would be given.12 As of 1993, the University of Michigan's law library had been inspected twice since implementing this policy and its "Service to the General Public" had still been rated "excellent."13 Nonetheless, a number of law libraries in the United States have opted out of depository status for various reasons,14 one being so that they can be free to restrict public access to materials.

¶10 This was the case for Suffolk University in Boston. In 1999 the law library (as part of the law school) was relocated to a "more traveled and urban" part of the city.15 A new security system included the requirement that library users present identity cards to enter the building and use the elevator to gain access to the law library.16 After considering many options, and noting the many other partial depository libraries in the area, the law library determined it could no longer provide the unrestricted access mandated by the FDLP and withdrew from the program.17

¶11 Yale's law library also considered withdrawing from the FDLP in 1995.18 One of its librarians consulted with librarians from other law libraries and found that, while few libraries had actually withdrawn, a number of them wished to withdraw.19 One frequently cited reason was that "[m]andatory public access to the federal documents collection may be inconsistent with the library's access policy, which is the result of a careful balancing of security concerns and the desire to make the collection accessible to all researchers."20 Countering this was the belief that "[t]he library benefits from interaction with the local community members and associations that use the depository collection."21 Tammy R. Pettinato, a legal reference librarian, has described how this "social capital" created by the FDLP benefits both the community and the law library through the interaction between the two groups.22

¶12 In the United States, the emphasis on public access to academic law libraries can change depending on whether the library is in a private or public university.23 Suffolk University, which left the FDLP, is private, as is Yale University, which considered leaving. Librarians at Golden Gate University's law library, which restricted public access without leaving the depository program, noted that: "While

12. For a full description of the screening process, see Snow, supra note 11, at 386–87.
13. Leary, supra note 10, at 418.
14. Pettinato, supra note 2, at 708, ¶ 35.
15. McKenzie et al., supra note 2, at 282.
16. Id.
17. Id. at 283.
19. Id. at 133–34.
20. Id. at 136.
21. Id. at 137.
law libraries in publicly funded institutions often face the same problems as those in private schools, privately supported law libraries have fewer hurdles in the way of instituting cost recovery systems and excluding or controlling user groups.\textsuperscript{24}

\textsection{13} Between 1998 and 2001, there was a net loss of forty-two libraries to the FDLP, fifteen of which were academic libraries, primarily from private colleges.\textsuperscript{25} The authors of a study of those fifteen academic libraries noted that at the same time the private academic libraries were withdrawing from the FDLP, the four new academic libraries that joined the program were from public universities.\textsuperscript{26} The respondents from this new group agreed that one of the main reasons they joined was “[t]o contribute to the public good by providing government information to support an informed citizenry.”\textsuperscript{27} The authors concluded that the public/private divide was attributable to the public universities’ broader mission to support their larger communities.\textsuperscript{28}

\textsection{14} However, this belief that public universities have a higher obligation than private universities to provide public access may not be backed up in the law. Courts have been deferential to individual libraries’ policies when determining the obligations of depository libraries—in cases against the libraries at Tulane (private), Loyola New Orleans (private), and Temple (public), the courts reached similar conclusions about how depository status affected public access rights, regardless of a university’s public or private status.\textsuperscript{29}

\textsection{15} Tulane’s law library restricts public access at certain times of the day: access is restricted to affiliated patrons weekdays after 9 p.m. and all day on weekends. During the times of restricted access, members of the public are provided with a phone number to call in order to get access to government documents.\textsuperscript{30} While one member of the public sometimes obtained access to the collection during restricted hours, he alleged that on four occasions he was denied access, and this eventually led to a court case. When he did get access during restricted hours, “he was questioned as to what he was working on and why he was coming to the library.”\textsuperscript{31} The court found his claim lacked “an arguable basis in law or fact” and dismissed it as frivolous.\textsuperscript{32} The court held that both the questioning during times of restricted access—to determine if he needed to make use of the government documents—and the occasional denial of access during those times reserved for affiliated users were “minimal restrictions on [the plaintiff’s] access to the federal government publications” and “do not violate any provisions” of the depository program.\textsuperscript{33}

\textsection{16} In the Loyola case, a campus police officer asked a member of the public who had been banned from the campus to leave the library. The plaintiff, the same

\begin{flushright}
24. Carter & Pagel, \textit{supra} note 11, at 244.
26. \textit{Id.} at 418.
27. \textit{Id.}
28. \textit{Id.} at 419.
30. \textit{Id.}
31. \textit{Id.}
32. \textit{Id.}
\end{flushright}
person (using an alias) as in the Tulane case, then claimed that he had been denied access to a depository library. About Loyola, the court said, “the statute [about depository library obligations] allows private libraries the ability to restrict access to the premises despite their status as federal depository libraries.”\(^{33}\) The court denied the plaintiff’s motion for leave to file the complaint.

\(^{\text{¶17}}\) The Temple case had slightly different facts. While members of the public can use Temple’s law library at most times of the year, the library restricts public access during exams, and posts a note to this effect. Michael Downing, a member of the public with a library card for the Temple law library, asked to use it during exams. The request was denied. When Downing returned some days later, still during exam period, and was again denied access, he refused to leave and was eventually arrested. He was charged with defiant trespass and disorderly conduct.\(^{34}\) A lower court found that Downing had a valid defense to the charges—that he had a legal right to use the library because it was open to the public.\(^{35}\) The appellate court rejected this contention:

The fact that Temple, or its School of Law, serves a quasi-public service, or that the Commonwealth has designated the University as part of its System of Higher Education . . . or that the Commonwealth funds the University does not alter its character as a private educational institution. Its property is essentially private property.\(^{36}\)

The court pointed out that members of the public could only use the law library if they asked for and received a library pass, which was still revocable by the law library. It was because the law library had a practice of placing some restrictions on public access that it could lawfully exclude the public completely at various times, particularly during exams.\(^{37}\) The court found that any public access right was trumped by “the student body’s paramount right to use the law library facilities maintained, in part from their tuition, and operated for their education.”\(^{38}\) The decision to close the library to the public during exam periods was therefore “the exercise of the regulatory authority by the Law School over its facilities with which the courts cannot interfere.”\(^{39}\)

\(^{\text{¶18}}\) The fact that Temple University was also a depository library did not change its “private nature” in the eyes of the court.\(^{40}\) It found no evidence that Downing was denied access to government materials but stated that even if Downing had requested government documents, it would have been possible for them to have been made available “at another place or time without him having to enter the law library during exam period.”\(^{41}\)

\(^{\text{¶19}}\) Temple law library’s restricted access policies were again challenged in a later case, in which a member of the public argued that Temple’s depository status


\(^{35}\) Id. at 793–94.

\(^{36}\) Id. at 794.

\(^{37}\) Id. at 794–95.

\(^{38}\) Id. at 795.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id.
meant he was entitled to unrestricted access to the law library.\textsuperscript{42} Here again, the court recognized Temple's right to restrict access in order to serve its primary user group. Restricted access policies for members of the public were not "an unreasonable interpretation of the 'free use' language" in the depository law.\textsuperscript{43} The court observed, "If Congress wished to transform law libraries into general access libraries it would have said so."\textsuperscript{44}

\section*{Canadian Libraries and the Canadian Depository Services Program}

The obligations of Canadian libraries in the Canadian federal government's Depository Services Program (DSP) are not identical to those of American libraries under the FDLP. Unlike the American system, Canada's DSP began as an order-in-council and has been embodied in directives and memoranda of understanding, rather than in a statute.\textsuperscript{45} Any university library that participates in the Canadian DSP still has a responsibility to provide public access to the materials received through the program. However, the requirement for selective depository libraries, which form the vast majority of depository libraries, is that they must be "open to the public at least 20 hours a week . . . ".\textsuperscript{46} Neither the Quick Reference Guide for Depository Libraries\textsuperscript{47} nor the Depository Services Agreement that depository libraries sign specifies how many hours a full depository library must be open to the public, though the agreement does spell out public access requirements in more general terms.\textsuperscript{48}

In the literature, Canadian academic libraries, unlike American academic libraries, do not report strains caused by providing public access to depository materials, and there are few discussions of Canadian libraries considering giving up depository status. Bruno Gnassi, former head of the DSP, also found it difficult to

\begin{footnotes}
\footnotetext[43]{Id. at *5.}
\footnotetext[44]{Id.}
\footnotetext[47]{Quick Reference Guide for Depository Libraries, supra note 46.}
\footnotetext[48]{Agreement Between Publishing and Depository Services . . . and [The Library], Concerning the Provision of Canadian Government Publications and Other Related Services to the Library (n.d.) (on file at Queen's University Library System).}
\end{footnotes}
find data to determine whether Canadian libraries are withdrawing from the DSP. In 2004 he wrote that he had found anecdotal evidence that some libraries were considering withdrawing from the program, but did not identify particular institutions and concluded that the number that might have left the program would be small. At least as reflected in library literature, then, it appears that librarians in the Canadian depository program are not concerned about the current level of public access. The fact that any library can be a partial depository as long as it allows public access for twenty hours per week also appears to give libraries leeway—if they want it—to partially limit public access and still retain depository status.

Access to Public and Private University Libraries

§23 The first argument—that depository libraries are bound to provide public access—assumes that the library has made a choice: in exchange for the benefit of receiving government publications for free, it agrees to provide public access. The flip side is that if a library no longer wants to provide public access, it can give up depository status and be free of the obligation.

§24 The second argument does not see public access as one side of an optional bargain with government—it sees public access as a right that goes to the very nature of the library. The distinction is not between libraries that have opted in or opted out of a depository program, but between libraries that receive government funding and those that do not. An academic library in a public university, then, has an obligation to provide public access built right into its bricks.

§25 One of the most dramatic manifestations of this belief was the protest surrounding the building of the John P. Robarts Library at the University of Toronto in the early 1970s, mentioned at the beginning of this article. It was originally intended to be a research library where only faculty members and graduate students would be allowed into the stacks to browse the books. Under the proposed plan, most undergraduates would only be allowed to borrow books by requesting them from a librarian. To the university librarian, Robert H. Blackburn, this was a compromise between the strict rules of prominent libraries in Europe, which allowed no browsing at all, and the then current policy at the University of Toronto, which had relaxed access to the point of letting in all university students as well as paying members of the public. Now that the university was to build one of the foremost research collections in the country, there were new considerations:

Books in a research library are no longer simply books, expendable commodities replaced or substituted for as easily as cans of soup on a grocer’s shelf, or volumes in a bookshop; they are scarce or unique items built carefully into a complex structure of knowledge in which each one serves a particular purpose.

50. Id.
51. All-Night Protest Set in U of T Library Plan, TORONTO STAR, Feb. 4, 1972, at 35.
53. Id. at 228.
§26 The purpose of a policy that restricted some patrons’ access would be to preserve the collection’s ability to serve scholars. Other libraries on campus would fill the role of providing duplicate copies of materials and easy access for undergraduates.\textsuperscript{54}

§27 In 1972, to protest the exclusion of undergraduate students and the public, students staged sit-ins that were broken up by police.\textsuperscript{55} The \textit{Toronto Star} reported that these demonstrators, “backed by at least 8,000 of the 32,000 students, are demanding full privileges for all students and the general public because public money is paying for the building.”\textsuperscript{56} In his history of the University of Toronto libraries, Blackburn took issue with being portrayed as simply wanting to exclude people. The students’ campaign

invited the sympathy and support of nearly all readers, egalitarian or not, who knew the obvious and immediate value of browsing at a bookshelf and who did not have to weigh that against the needs of future generations of scholars. It left to me and a few others the more difficult task of promoting interest in the long-range and less understood value of prudent management of a resource as rare and fragile as the collection of a large research library.\textsuperscript{57}

§28 In the year that followed, students, faculty, librarians, faculty from other schools, and members of the public debated whether an expensive new university library should be able to restrict access, and if so, who could be restricted. At the same time, a Toronto judge granted an absolute discharge to two students who had assaulted police during one of the sit-ins. \textit{The Globe and Mail} reported that the judge “did not find the zeal [the students] showed in pursuing an ideal to be bad.”\textsuperscript{58} By the summer of 1973, when Robarts Library opened, all university students could have access to the stacks.\textsuperscript{59} If members of the public wanted a book, they could request it, it would be retrieved by library staff, and they could then read it in the reading room.\textsuperscript{60} There had been a victory for access for the undergraduate students, but members of the public did not gain unrestricted access.

§29 There is no doubt that there is a public demand for the kind of specialized library collections found in academic libraries. Urban academic libraries have strong collections that “attract large numbers of external library users who are not considered in funding formulas driven by student enrolment figures.”\textsuperscript{61} Common responses to this situation in times of budget cuts are to impose fees or to close the

\begin{footnotes}
\item[54.] Id. at 229.
\item[55.] Michael Keating & Michael Valpy, \textit{Students Smash Doors, Reoccupy Simcoe Hall}, \textit{GLOBE & MAIL} (Toronto), Mar. 21, 1972, at 1; 18 Arrested as Sit-in Broken up at U of T, \textit{TORONTO STAR}, Mar. 13, 1972, at 1 [hereinafter 18 Arrested].
\item[56.] 18 Arrested, \textit{supra} note 55.
\item[57.] Blackburn, \textit{supra} note 52, at 233.
\item[58.] \textit{Guilty Students Given Discharges}, \textit{GLOBE & MAIL} (Toronto), Dec. 22, 1972, at 5.
\item[59.] Ryan, \textit{supra} note 1.
\end{footnotes}
library to external users.\textsuperscript{62} One study of eighteen urban, publicly funded American academic libraries found that policies regarding external users varied greatly.\textsuperscript{63}

\textsection30 On the other hand, small communities may also rely on their academic libraries. In fact, one author has argued that academic libraries in small communities are more important to their local populations than academic libraries in large communities, as larger communities can support public libraries that fulfill their needs.\textsuperscript{64} Furthermore, the history of small universities—that they "have often grown up out of the local community"—may create obligations for the university.\textsuperscript{65} There is probably always a role for academic libraries to play in the surrounding community, whether large or small, but there are also legitimate reasons for academic libraries to restrict public access. The next section describes what happens when those restrictions are challenged.

**Public Access to American Academic Libraries**

\textsection31 An emeritus professor living in New York City once expressed his frustration at the fact that the city's most comprehensive library collections, particularly in law, were located in private universities that restricted public access.\textsuperscript{66} Werner Cohn noted that Columbia, New York University, and Fordham had all moved to restrict public access. He argued that despite their status as private universities, it was unacceptable that they were restricting "citizens' abilities to inform themselves about their government, culture, and society."\textsuperscript{67} Cohn cited ways in which the public funded these private universities: the universities' exemptions from various taxes, the fact that donations to the universities were tax-deductible, government grants to the universities, and grants to the university libraries themselves.\textsuperscript{68} A judge made a similar point about Princeton University in a court case and ultimately found, on other grounds, that the university had interfered with a nonstudent's right to freedom of expression on the campus of the private university.\textsuperscript{69}

\textsection32 It is often argued—or assumed—that private universities, because they are not relying on state funding like their public counterparts, are free to exclude from their grounds, including their libraries, people who are not affiliated with the university. The claim that because the universities are not supported by the public, there is no obligation to provide public access, can be disputed, as it was by Cohn. The claim has also been denied, as in the Princeton case. But the question of whether the status of a university should determine whether there is a right of public access remains complex.

\textsection33 If there is no general rule that private universities can exclude members of the public, neither does public funding guarantee public access to public university

\begin{itemize}
  \item \textsuperscript{62} Id. at 28.
  \item \textsuperscript{63} See id. at 29–31.
  \item \textsuperscript{64} Daniel Savage, *Town and Gown Re-examined: The Role of the Small University Library in the Community*, 45 CAN. LIBR. J. 291, 291 (1988).
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} Werner Cohn, *Private Stacks, Public Funding*, AM. LIBR., Feb. 1993, at 182.
  \item \textsuperscript{67} Id. at 182.
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} State v. Schmid, 423 A.2d 615, 621, 633 (N.J. 1980).
\end{itemize}
facilities. The U.S. Supreme Court has observed, in a case about First Amendment rights on campus, that

[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings.70

¶34 In a number of cases where nonstudents have challenged criminal trespassing charges issued to them on a university campus, state courts have affirmed this principle. In Bader v. State, Michael Bader was charged with criminal trespass for being in areas designated for student use at the University of Texas at Austin, a public university. The Texas Court of Appeals dismissed his argument that he had a right to be on campus, stating that public universities have the right to restrict public access to areas of the university.71 Bader’s location when he was charged was an academic center that “houses a library, offices, and a computer lab. These are not traditional public forums, such as a public street or park.”72 To allow Bader’s argument that a member of the public cannot trespass on university property because it is public property “would deprive the State of its ability to maintain public property for its intended purposes . . . .”73 Even though the university might be public property, the state could designate some public property for particular purposes.

¶35 In another case, a man was charged with trespassing at a public university in Ohio after preaching and refusing to leave. The Court of Appeals of Ohio affirmed that the university had a right to limit public access to parts of the university and upheld the charge.74 The public may have a right to enter parts of a campus for certain purposes, particularly to exercise the rights of freedom of speech or freedom of assembly, if the university has traditionally allowed these activities in a certain place, but the principle that publicly funded universities can lawfully exclude the public from parts of their campuses has been affirmed in these state court decisions.

¶36 Courts have also found that if private universities open themselves up sufficiently to the public, they will then assume certain obligations, such as ensuring members of the public can exercise rights to free speech and assembly.75 To a Pennsylvania appellate court, the presence of a depository library on the campus of a privately funded college was one indication that the college was in some ways open to the public.76 When private colleges do not regularly invite the public, they can exclude the public much more easily.77

72. Id. at 605 n.5.
73. Id. at 608.
37 There are a number of trespassing cases dealing specifically with the rights of members of the public to use university libraries. In *Scott v. Northwestern University School of Law*, the court held:

A private university library is not a place of public accommodations. The university library is inextricably tied to the university’s academic program. That the university permits public access to the library at various times of the year does not change its essential character as a library for the faculty and students of the university.78

38 Another case involved an undergraduate student, charged with disorderly conduct for his behavior at the law library at his university, who argued that he had a constitutional right to use the law library. The judge didn’t agree, finding that barring the student from the library was “an objectively reasonable response and thus not in violation of the First Amendment.”79 The judge cited U.S. Supreme Court precedents, including *Widmar v. Vincent*, finding that the university can restrict public access to university facilities.80

Public Access to Canadian Academic Libraries

39 Perhaps because Canadians tend to think of their universities as public institutions, and therefore presumptively open to the public, they have not considered questions of access to the same extent as Americans, whose academic culture includes private institutions along with public ones. However, the distinction of public versus private in Canada may not be straightforward either. As Lazar Sarna and Noah Sarna observe:

Most Canadian universities are not operated by the government but by private corporations, most of which are non-profit. While incorporated by royal charter or under statute, they do not fall under government management. However, most private universities are government funded, some up to 80 per cent of their operating budget.81

Furthermore, the landscape in Canada is changing: provinces in Canada, particularly British Columbia, are beginning to allow private universities,82 such as Trinity Western University and Quest University.

40 One study of two private universities in western Canada distinguished public universities from private ones in terms of “philosophy and beliefs, . . . mission, governance, financing, academic framework, faculty and students, and community standards.”83 The author concluded that “[g]eneralizations about ‘private’ universities versus ‘public’ universities can easily be misleading . . . . The private-public policy issue might be better viewed as a matter of degree.”84 Nonetheless, the fact that many Canadian universities considered public are not quite as public as

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80. Id.
83. Id. at 9.
84. Id. at 77.
often assumed, and the emergence of private universities that may not be completely private after all, suggests that a university’s public or private status cannot be the only factor in determining a public right of access to its library.

¶41 The Supreme Court of Canada has addressed the complex nature of Canadian universities. In 1979, when a former student challenged his forced withdrawal from the University of Regina, the Court had to decide what sort of power it had over the university. The majority observed that:

The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens ... its immediate and direct responsibility extends primarily to its present members ... 85

¶42 In a more recent case, McKinney v. University of Guelph, eight professors and a librarian argued that their universities’ mandatory retirement policies violated their equality rights under the Charter of Rights and Freedoms. 86 The Charter only applies to government action; in order for this group to succeed in its challenge, the Supreme Court had to find that the universities were part of government. The Supreme Court rejected this argument, stating:

The government ... has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources. 87

In declining to apply American jurisprudence on the subject, the majority noted: “Nor is there reason to consider the American authorities on state universities; Canadian universities ... are private entities.” 88

¶43 Beyond the statements from the Supreme Court, there do not appear to be many cases on public access to Canadian universities, much less to Canadian academic libraries. A number of cases on other matters show that universities regularly remove unaffiliated members of the public from campus, sometimes informally with a warning and sometimes with trespassing charges. 89

¶44 A New Brunswick judge was unsympathetic to a professor who chose to protest the introduction of a university-wide photo-identification system at the library. 90 After the implementation of the system, people who wanted to borrow books from the library had to present their photo ID cards. One evening, the defendant, an assistant professor of physics, led a group of students to take books

87. Id. at 273.
88. Id. at 274–75.
from the shelves, ask to sign them out, and refuse to produce their photo IDs, which meant they could not take out the books. They repeated this procedure until there were more than 250 books on the circulation desk. The only way to get the group to stop was to close the library altogether. The defendant repeated his protest the next day, and a few days later the president of the University of New Brunswick (UNB) suspended him. The president also applied for an injunction to keep the defendant from returning to the campus, which is how the action arose. In granting the injunction, the judge stated that once the defendant had been suspended, he would be trespassing if he returned to UNB land. Disrupting the library as he did, the defendant had struck at the heart of the university’s ability to function normally.  

¶45 In another case, an Ontario court, in its determination of where striking workers were permitted to picket, described the campus of Queen’s University as “buildings and property that are privately owned by Queen’s University as well as municipally owned public streets and sidewalks.” The court then had to decide if areas proposed for picketing, while privately owned, could be considered areas normally accessible by the public. After analyzing the bylaws governing the buildings, the judge concluded:

I am satisfied that the public does not normally have access to Queen’s University campus, since only certain members of the public, that being students registered at Queen’s, faculty, staff, guests and alumni have the right to remain and use the facilities. Others may be removed from the campus and have been removed by the university security staff.

¶46 In a 2007 case, an alumnus of the University of Toronto tried to attend a campus event, which he mistakenly believed was open to the public. He was barred from entry, and in the ensuing scuffle was arrested and charged with trespassing. He sued the university for his injuries. Though the judge was critical of how the university had handled the situation, the plaintiff was unsuccessful in his claim. “The University grounds and buildings are private property. As such the University is entitled to decide who is allowed to remain on the premises,” observed the judge, who further agreed that it was the university’s right to bar the plaintiff from the campus.

¶47 This case law suggests that courts do not see publicly funded universities as public property; rather, the public may use university facilities as the university permits. While very little of the Canadian case law specifically addresses whether there is a public right of access to university libraries, as part of university property they do not appear to be subject to a general public right of access.

91. Id. at 114–16.
92. Id. at 120.
93. Queen’s Univ., 28 C.P.C. 3d at ¶ 5.
94. Id. at ¶ 19.
96. Id. at ¶ 15.
Conclusion

¶48 From this review of jurisprudence, it appears the courts have not found a public access right to academic libraries based on the status of the university or the amount of public funding it receives. They are more interested in examining the reason the public access right is claimed. When the reason for access is to consult library materials—which has been the central question in this article—factors such as participation in a depository program, funding models, traditional use, and library policies can all be relevant. When the purpose includes doing something that could be considered protected speech or expression, the question becomes much more complex and may allow public access that would not otherwise be permitted.

¶49 The shift to electronic resources adds another dimension to the question of public access. On the one hand, open access databases of books and articles, many of which are provided by academic libraries, dramatically increase public access to academic libraries’ holdings. On the other hand, when academic libraries purchase e-resources, they are often licensed exclusively for a university’s faculty, staff, and students. This diminishes what is available to members of the public. As more resources become available only electronically, there will be an even greater challenge for academic libraries who wish to provide meaningful public access to their materials.

¶50 There is no doubt that providing access to the public is a public service, but there does not appear to be a general public access right. The case law seems to suggest that, rather than deciding public access policies based solely on considerations of the public or private nature of their universities, the amount of public funding received, or their library’s depository status, librarians can consider the individual characteristics of their own universities—the university’s mission, their patrons’ needs, their financial circumstances, and the place they see for their academic library in the larger community.