Pridgen v University of Calgary (2012) Are University Disciplinary Proceedings Subject to the Charter?

Introduction

On May 9, 2012, the Alberta Court of Appeal released its decision in *Pridgen v University of Calgary* on whether to overturn the University's disciplinary sanction issued against two students for posting critical comments about their professor on Facebook.[1] The Court found that the University's decision was unreasonable based on administrative law and determined that it was unnecessary to engage the *Charter* analysis.[2] Since the decision was released, there has been some confusion as to whether the Court applied the *Charter* to the University's disciplinary proceedings of students. This article attempts to clarify that the Court reached its conclusion from an administrative law perspective and not from a *Charter* analysis.[3]

Facts

In the fall of 2008, the Dean of the Faculty of Communication and Culture at the University of Calgary found two students, twin brothers Keith and Steven Pridgen, guilty of non-academic misconduct. The Pridgens had each posted one critical comment on a Facebook page created by fellow classmates who were unhappy with their professor, Aruna Mitra.[4] Keith Pridgen's comment read as follows:

Hey fellow LWSO [Law and Society Course] homees…

So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C!!!!! Remember when she told us she was a long-term prof? Well actually she was only sessional and picked up our class at the last moment because another prof wasn't able to do it.. lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future LWSO students![5]

The professor brought a complaint to the Dean, and the Pridgens were disciplined according to the University's *Student Misconduct Policy*.[6] The sanctions included probation of Keith and Steven Pridgen for 24 months and 4 months respectively, a letter of apology to the professor, and a prohibition from posting or circulating defamatory material about any member of the university community. Additionally, the Pridgens were warned of a possible suspension or an expulsion if they failed to comply with the sanctions.

The Pridgens appealed the Dean's decision to the University's General Faculties Council

Review Committee. Keith Pridgen's probation period was reduced to 6 months, but the rest of the Dean's decision was upheld. The Pridgens attempted to appeal the Review Committee decision to the University's Board of Governors but failed because the matter did not fall within the types of appeals the Board heard under the *Post Secondary Learning Act* (*PSLA*).[7]

Procedural History

The Pridgens brought an application for judicial review of the Review Committee's decision to the Alberta Court of Queen's Bench. On October 12, 2010, the Court ruled in favour of the Pridgens, finding that the Review Committee's decision should be quashed.[8] The Court held that the Board of Governors was in breach of its statutory duty by refusing to hear the Pridgens' appeal.[9] The Court also found that the disciplinary sanctions issued against the Pridgens were not reasonable according to administrative law. Lastly, the Court concluded that the Review Committee's decision breached the Pridgens' *Charter* right to freedom of expression guaranteed under section 2(b).[10]

The University appealed the Court of Queen's Bench decision to the Alberta Court of Appeal. The University submitted that the Court of Queen's Bench should have referred the Review Committee's decision back to the Board instead of quashing it.[11] The University did not appeal the decision that the Review Committee violated the Pridgens' freedom of expression. Rather, the University argued that the *Charter* should not apply to its disciplinary proceedings because it would undermine its institutional autonomy and academic freedom.[12]

Issues

Majority Decision (McDonald and O'Ferrall):

1. Should the Review Committee's decision be overturned?

i) Unreasonableness of the Review Committee's decision

ii) Should the Board of Governors be compelled to hear the appeal?

iii) Is it necessary to engage the *Charter* analysis?

Minority Decision (Justice Paperny):

1. Are the University of Calgary's disciplinary proceedings subject to the *Charter?*[13]

i) Definition and scope of "government" under section 32 of the *Charter* (entities and entities' actions falling within the scope of "government" are subject to the *Charter*)[14]

ii) Does the University of Calgary's disciplinary proceedings fall within "government" under section 32 of the *Charter?*[15]

a. Bodies exercising statutory authority

b. Non-governmental bodies implementing government objectives

iii) Did the University of Calgary's disciplinary proceedings violate the Pridgens' *Charter* right to freedom of expression guaranteed under section 2(b)? If so, is the violation justifiable under section 1 of the *Charter*?[16]

a. Academic freedom and institutional autonomy

Decision

Majority Decision

The Alberta Court of Appeal found that the University's sanctions against the Pridgens were unreasonable. There was insufficient evidence to support the claim that the Pridgens' conduct constituted non-academic misconduct. The Court also ruled that the Board of Governors had a statutory duty to hear the Pridgens' appeal. Instead of sending the matter back to the Board for consideration, the Court upheld the Court of Queen's Bench ruling that quashed the Review Committee's decision. The Court reached its conclusion based on administrative law and found it unnecessary to discuss whether the *Charter* applies to the disciplinary proceedings.[17]

Minority Decision

Justice Paperny found that the University's disciplinary proceedings were subject to the *Charter*. The University imposing disciplinary sanctions according to the *PSLA* was exercising statutory authority and implementing governmental objectives.[18] Hence, when it comes to the manner in which disciplinary proceedings are conducted, the University fell within Justice Paperny's broad interpretation of the word "government" under section 32 of the *Charter*.[19]

Court's Analysis

Majority Decision (McDonald and O'Ferrall):

1. Should the Review Committee's decision be overturned?

i) Unreasonableness of the Review Committee's decision

Judicial review is a process where the court reviews government actions or decisions for any excessive use of power that went beyond the prescribed authority. To conduct judicial review, the court applies one of two standards of review depending on the case: (1) standard of correctness is used if the matter involves a question of law only, and (2) standard of reasonableness is used if the matter involves a question of law as well as the facts of the case. Under the correctness standard, the court examines whether the government action or decision at issue was right or wrong in relation to law. On the other hand, for the reasonableness standard, the court determines whether the government action or decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[20] In *Pridgen,* the issue subject to review by the Alberta Court of Appeal

was whether the Pridgens engaged in non-academic misconduct. The Court determined that it involved a question of mixed fact and law and thus applied the reasonableness standard.[21]

The *Student Misconduct Policy* under which the Pridgens were found guilty defined the term "non-academic misconduct" as follows:

1. Definition

The term "non-academic misconduct" includes but is not limited to:

a. conduct which causes injury to a person and/or damage to University property and/or the property of any member of the University community.[22]

The Dean found the Pridgens guilty of non-academic misconduct based on his conclusion that their conduct "caused unwarranted professional and personal injury to Professor Mitra".[23] The Review Committee did not provide reasons for upholding the Dean's decision, and the Court inferred that the Review Committee reached the same conclusion as the Dean. However, absent Professor Mitra's direct testimony of the alleged injury, the Court did not find sufficient evidence to conclude that the professor suffered injury as a result of the Pridgens' Facebook comments.[24] Therefore, the Review Committee's decision was unreasonable.[25] In other words, the Review Committee had no reasonable basis to determine that the Pridgens' conduct constituted non-academic misconduct within the meaning of the Policy.

ii) Should the Board of Governors be compelled to hear the appeal?

The Board of Governors refused to hear the Pridgens' appeal of the Review Committee's decision based on section 31(1)(a) of the *PSLA* which describes the Review Committee's power to discipline students subject to a right of appeal to the Board of Governors.[26] The Board interpreted section 31(1)(a) to restrict the right of appeal to disciplines which resulted in fines, suspensions or expulsions, none of which were applied to the Pridgens. However, the Court of Appeal upheld the Court of Queen's Bench's interpretation of section 31(1)(a) which described the provision to allow students to appeal any discipline imposed by the Review Committee to the Board.[27] Therefore, the Board breached its statutory duty to hear the Pridgens' appeal.

Generally, when the complainant has the statutory right to appeal, the courts decline the application for judicial review.[28] Hence, in *Pridgen*, the Court recognized that the proper remedy would normally be to submit the matter back to the Board of Governors. Nevertheless, the Court determined that submitting the matter back to the Board would unnecessarily prolong matters and would be without merit because the Review Committee was not seen to be in a better position to decide the matter.[29] Thus, the Court of Appeal upheld the Court of Queen's Bench judgment to quash the Review Committee's decision.

iii) Is it necessary to engage the *Charter* analysis?

The Court relied solely on administrative law analysis to reach the conclusion to quash the Review Committee's decision. The majority judgment found it unnecessary to discuss whether the *Charter* applies to the University's disciplinary proceedings. Justice O'Ferrall further elaborated on this issue, indicating that freedom of expression is a civil liberty right which the Review Committee must consider, not the courts, during its disciplinary proceedings.[30] The Review Committee was described to be in the best position to weigh the students' freedom of speech right against other factors relevant to the University's operation and objectives.[31]

Minority Decision (Justice Paperny):

1. Are the University's disciplinary proceedings subject to the *Charter?*

Unlike the majority decision, the minority decision written by Justice Paperny engaged in an extensive*Charter* analysis. By operation of section 32 of the *Charter,* Justice Paperny determined that the University's disciplinary proceedings were subject to the *Charter*.[32] Justice Paperny determined that the Pridgens' right to freedom of expression was breached and that the violation was not justifiable under section 1 of the*Charter*.[33]

i) Definition and scope of "government" under section 32 of the *Charter*

Under section 32(1)(b) of the *Charter,* provincial or federal entities and their actions falling within the definition of "government" are subject to the *Charter* provisions.[34] In *McKinney v University of Guelph,* the Supreme Court of Canada ruled that section 32 does not apply to universities because they do not fall under the definition of "government".[35] In *Pridgen,* the University argued that *McKinney* applies to its case, but Justice Paperny rejected this argument; the facts were different in *McKinney* and the case "did not rule out*Charter* applicability on university campuses for all purposes".[36] The *McKinney* decision recognized that "universities may perform certain public functions that could attract *Charter* review".[37] Hence, Justice Paperny did not interpret the *McKinney* decision as having exempted universities from *Charter* applicability. Instead, the *McKinney* decision left it open for the *Charter* to apply to universities should the facts of the case trigger section 32 of the *Charter*.[38]

As such, Justice Paperny employed a broad interpretation of the word "government" under section 32.[39]Given the growth and complexity of modern government, confining the *Charter* to the government's traditional law making role was "outdated".[40] Furthermore, Justice Paperny referenced *Eldridge v British Columbia (AG)* which expanded the scope of section 32 to include entities performing "governmental activities" that are not necessarily "governmental actors" by nature.[41] Justice Paperny listed five categories of government to which the *Charter* applies.[42] The last two categories derived from the broad interpretation of "governmental activities" in *Eldridge*.

1. Legislative enactments;

2. Government actors by nature;

3. Government actors by virtue of legislative control;

4. Bodies exercising statutory authority; and

5. Non-governmental bodies implementing government objectives.[43]

Under the first category, any statute or subordinate legislation passed by legislative or delegate bodies must be consistent with the *Charter*.[44] The second and third categories refer to an entity that is characterized as "government" by its very nature (eg. municipality) or due to the regular governmental control exercised over it.[45] The fourth category includes entities that exercise powers of coercion delegated to it by statute "that belongs to government alone and that is not exercisable by a private individual or organization".[46] The last category is broader than the previous category in that it includes non-governmental entities carrying out a specific governmental objective without any compulsion or coercion.[47]

ii) Does the University of Calgary's disciplinary proceedings fall within "government" under section 32 of the *Charter?*

Justice Paperny found that the University's disciplinary proceeding fell under the last two categories and thus was subject to the *Charter* because the University exercised statutory authority and implemented a government objective.

a. Bodies exercising statutory authority

The Review Committee's power to impose disciplinary sanctions on students is derived from section 31(1) of the *PSLA,* which is provincial legislation.[48] This authority included the coercive power to fine, suspend or expel students, which can be held only by public or government entities.[49] Hence, the Review Committee's disciplinary proceeding was an exercise of statutory authority that is subject to the *Charter.* Not only was the *PSLA* subject to the *Charter,* but the Review Committee's application and interpretation of the*PSLA* were also subject to the *Charter*.[50]

b. Non-governmental bodies implementing government objectives

In *Eldridge,* it was found that a hospital providing medical services pursuant to legislation constituted "government" under section 32 of the *Charter* because it was carrying out a government objective.[51] The fact that the hospital's day-to-day operations were independent from government control did not matter. In*Pridgen,* the Alberta legislature's purpose in passing the *PSLA* was to provide post-secondary education to the public.[52] Under the *PSLA,* the University of Calgary was tasked with the duty to implement this objective. Justice Paperny used *Eldridge* as a precedent and found that the University of Calgary in *Pridgen*was acting as an "agent for the government" to implement government objectives pursuant to the *PSLA* and thus the University was subject to the *Charter*.[53]

iii) Did the University of Calgary's disciplinary proceedings violate the Pridgens' *Charter* right to freedom of expression? If so, is the violation justifiable?

Students' opinions about the quality of education they receive benefit the society as a whole because they contribute to the advancement of the universities' objective to promote free inquiry, debate, fairness, and respect. Justice Paperny stated that the Pridgens' critical comments "had utility in encouraging discussion and providing feedback to current and future students".[54] Therefore, the Pridgens' comments were of significant value to the general public. Hence, the Review Committee's disciplining of the Pridgens' for their comments violated their right to freedom of expression.[55]

Nevertheless, freedom of expression is not an absolute right. When a government action or legislation violates an individual's *Charter* right, the court considers whether the violation can be justified under section 1 of the *Charter*.[56] Under section 1, the government provides reasons for its legislation or actions and the court examines these reasons. In *Pridgen,* Justice Paperny held that the Review Committee's violation of the *Charter* right to freedom of expression was not justifiable under section 1 of the *Charter*.[57]

For the section 1 analysis, the courts apply the two-part test which was established in *R v Oakes*.[58] The first part examines whether the government action violating the *Charter* right has an objective relating to concerns which are pressing and substantial in a free and democratic society. In this case, the objective of disciplining students under the *Student Misconduct Policy* was to maintain an appropriate learning environment.

The second part of the section 1 analysis examines whether the purpose of the government action or legislation is proportional to the effect of limiting the *Charter* right. In *Pridgen,* Justice Paperny found that the Review Committee's disciplinary sanctions were disproportionate to the *Student Misconduct Policy*'s objective. Hence, Justice Paperny found that the Review Committee's decision that violated the Pridgens'*Charter* right to freedom of expression was not justifiable under section 1 of the *Charter*.[59]

a. Academic freedom and institutional autonomy

In this case, the University argued that its academic freedom and institutional autonomy, which are related to central decision making issues such as admission standards or curriculum development, are incompatible with freedom of expression.[60] The University claimed that the two concepts override freedom of expression, but Justice Paperny rejected this argument. Academic freedom and freedom of expression were described as serving the same goals: "the meaningful exchange of ideas, the promotion of learning and the pursuit of knowledge".[61] Freedom of expression did not undermine institutional autonomy either. Justice Paperny emphasized that applying the *Charter* to the University's disciplinary proceedings does not mean that the University loses autonomy from government in other aspects.[62]Justice Paperny added that the Supreme Court of Canada, in *Edmonton Journal v Alberta (AG),* described freedom of expression as possibly the most important guaranteed right to a democratic society.[63]

Significance of the Ruling

The majority decision in *Pridgen* demonstrated that the Court refrains from engaging a *Charter* analysis when administrative law principles alone are sufficient to reach a decision. On the other hand, Justice Paperny's minority decision dealt with the *Charter* issue and found that the *Charter* does apply to the University's disciplinary proceedings. Interestingly, Justice Paperny's extensive *Charter* analysis caused confusion for several media reports which described the minority judgment as the binding decision.[64]However, the Alberta Court of Appeal's ruling decision in *Pridgen* did not establish that the *Charter* applies to universities or their disciplinary proceedings.

Nevertheless, Justice Paperny's *Charter* analysis may be significant for future Alberta court decisions. In the majority decision, Justices McDonald and O'Ferrall did not deny the possibility that the *Charter* can apply to universities and their disciplinary proceedings. However, because the majority decision was based on administrative law, the Court found it unnecessary to discuss *Charter* applicability in this case.

[1] *Pridgen v University of Calgary*, 2012 ABCA 139 <http://canlii.ca/en/ab/abca/doc/2012/2012abca139/2012abca139.html>.

[2] Administrative law addresses the government actors and their actions by reviewing whether their decisions or actions exceeded their authority in an unfair manner.

[3] *Canadian Charter of Rights and Freedoms*, s 32, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 <http://laws-lois.justice.gc.ca/eng/const/page-15.html> ("[t]his 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" s 32(1)).

[4] *Pridgen, supra* note 1 at para 6.

[5] *Ibid* at para 11.

[6] *Student Misconduct Policy* was part of the University calendar created pursuant to section 26 of the*PSLA.*

[7] *Post-secondary Learning Act*, SA 2003, c p 19.5 <http://canlii.ca/en/ab/laws/stat/sa-2003-c-p-19.5/latest/sa-2003-c-p-19.5.html> (appeals only allowed for expulsion, suspension or fine).

[8] *Pridgen v University of Calgary*, 2010 ABQB 644 <http://canlii.ca/en/ab/abqb/doc/2010/2010abqb644/2010abqb644.html>.

[9] *Ibid* at para 92.

[10] *Charter, supra* note 3, s 2(b).

[11] *Pridgen, supra* note 1 at para 130.

[12] *Ibid* at para 2.

[13] *Charter, supra* note 3.

[14] *Charter, supra* note 3.

[15] *Charter, supra* note 3, s 32.

[16] *Charter,* supra note 3, ss 2b, 1.

[17] *Pridgen, supra* note 1; *Charter, supra* note 3.

[18] *PSLA, supra* note 8.

[19] *Charter, supra* note 3, s 32.

[20] *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 <http://canlii.ca/en/ca/scc/doc/2008/2008scc9/2008scc9.html>.

[21] *Pridgen, supra* note 1 at para 160.

[22] *Ibid* at para 14.

[23] *Ibid* at para 21.

[24] *Ibid* at para 164.

[25] *Ibid* at para 165.

[26] *PSLA, supra* note 8, s 31(1).

[27] *Pridgen v UofC, supra* note 9 at para 91.

[28] *Ibid* at para 118.

[29] *Pridgen, supra* note 1 at paras 170, 131.

[30] *Ibid* at para 180.

[31] *Ibid* at para 183.

[32] *Charter, supra* note 3.

[33] *Ibid.*

[34] *Ibid*, s 32(1)(b).

[35] *Pridgen, supra* note 1 at para 65; *McKinney v University of Guelph,* [1990] 3 SCR 229 <http://canlii.ca/en/ca/scc/doc/1990/1990canlii60/1990canlii60.html>.

[36] *Pridgen, supra* note 1 at para 66.

[37] *Ibid* at para 68.

[38] *Charter, supra* note 3.

[39] *Ibid.*

[40] *Ibid* at para 75.

[41] *Eldridge v British Columbia (AG),* [1997] 3 SCR 624 <http://canlii.ca/en/ca/scc/doc/1997/1997canlii327/1997canlii327.html>.

[42] *Pridgen, supra* note 1 at para 78.

[43] *Ibid.*

[44] *Ibid* at para 79.

[45] *Ibid* at paras 80, 82.

[46] *Ibid* at para 88.

[47] *Ibid* at para 94.

[48] *PSLA, supra* note 8, s 31(1).

[49] *Pridgen, supra* note 1 at para 105.

[50] *Ibid* at para 91.

[51] *Ibid* at para 100.

[52] *Ibid* at para 101.

[53] *Ibid*.

[54] *Pridgen, supra* note 1 at para 125.

[55] *Ibid* at para 128.

[56] *Charter, supra* note 3, s 1.

[57] *Pridgen, supra* note 1 at para 128.

[58] *R v Oakes*, [1986] 1 SCR 103 <http://www.canlii.org/en/ca/scc/doc/1986/1986canlii46/1986canlii46.html>.

[59] *Charter, supra* note 3.

[60] *Ibid* at para 123.

[61] *Ibid* at para 117.

[62] *Ibid* at para 119.

[63] *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326<http://canlii.ca/en/ca/scc/doc/1989/1989canlii20/1989canlii20.html>.

[64] Greg Harding, *Case Updates: Pridgen v University of Calgary, 2012 ABCA 139,* online: Field Law <http://www.fieldlaw.com/articles/GAH_pridgenvuofc.htm>.