

The need to explain yourself before imposing discipline under the law

By Shaun Fluker

Cases Considered:

Pridgen v University of Calgary, [2012 ABCA 139](#)

The Alberta Court of Appeal recently issued its judgment in the appeal by the University of Calgary from the October 2010 decision of Madam Justice Strekaf quashing a student discipline decision by the University (*Pridgen v University of Calgary*, 2010 ABQB 644). Madam Justice Strekaf's judicial review decision was the subject of an ABlawg post by Heather Beyko – one of our JD students – in November 2010 (See "[Facebook and Freedom of Expression](#)"). Briefly speaking, the University imposed discipline on two undergraduate students for posting comments on Facebook concerning a course of instruction taken by them in the Faculty of Communication and Culture (as it was at the time) during the Fall 2007 semester. The University decided such comments amounted to non-academic misconduct and imposed discipline on both students including several months of academic probation. The students were successful on judicial review in front of Madam Justice Strekaf, who ruled the University decision was unreasonable in law and also infringed section 2(b) of the *Charter of Rights and Freedoms*. The Court of Appeal has unanimously upheld Madam Justice Strekaf's finding that the University disciplinary decision was unreasonable under principles of administrative law. The Court of Appeal was more guarded on the *Charter* issue, with two of the three justices commenting it was unnecessary to consider the *Charter* to decide this case. My comment here focuses on the administrative law issues raised in this appeal.

The University of Calgary has the power to impose student discipline under section 31(1) of the *Post-Secondary Learning Act*, SA 2003, c P-19.5:

31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may

- (a) subject to a right of appeal to the board, discipline students attending the university, and the power to discipline includes the power
 - (i) to fine students,
 - (ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and
 - (iii) to expel students from the university;

The University also has policies on student discipline which apply when it hears a case. The general process is that a disciplinary matter is first heard within the home faculty or department, with a right of appeal to the General Faculties Council which is the primary decision-maker for academic affairs in the University. Section 31 expressly provides for a right of appeal to the

University Board of Governors on disciplinary matters. In this case, the University curiously took the position this right was only for discipline listed in subclauses (i) to (iii). Since the students here were not fined, suspended or expelled the University argued there was no right of appeal to the Board. Both levels of Court had no difficulty dismissing this argument on a literal interpretation of section 31.

The Court of Appeal upheld Madam Justice Strekaf on her selection of reasonableness as the applicable standard of review to apply to the disciplinary decision by the University's General Faculties Council. This seems fairly straightforward under post-*Dunsmuir* principles for substantive judicial review: Student discipline is clearly a specific, fact intensive matter entrusted to the University under the *Post-Secondary Learning Act*.

The Court of Appeal ruled that the discipline decision failed to meet the *Dunsmuir* test for reasonableness as a transparent, justified and intelligible decision that falls within the range of possible, acceptable outcomes defensible on the facts and law. Accordingly, the Court of Appeal unanimously ruled the decision was unreasonable and concurred with the decision of Madam Justice Strekaf to quash. The basis of the Court's ruling was an inadequacy of reasons given by the University because the reasons failed to demonstrate how academic misconduct flows from the evidence heard. According to Madam Justice Paperny, the University decision was declaratory – it made conclusory statements that the students' conduct in question constituted academic misconduct without providing an explanation (at paras 52 – 61]. The concurring Justices McDonald and O'Ferrall agreed, with Mr. Justice O'Ferrall adding the University's reasoning was inadequate for failing to consider how the *Charter* might apply to this case (at para 182).

This ruling has obvious implications for how post-secondary institutions in Alberta discipline their students. But what can we say more generally about this case? The Court of Appeal considers "adequacy of reasons" as a substantive matter, and once again clearly states the quality of reasons given by an administrative decision-maker is a question of substance. Inadequate reasons produce an unreasonable outcome. This has significant implications for administrative decision-makers who are accustomed to issuing short, conclusory decisions without much explanation.

I mentioned in an earlier post that at times it will be very difficult for a reviewing court to show deference to an administrative decision-maker where adequacy of reasons is in question. This case is an example of what I had in mind. While applying the deferential standard of reasonableness, the Court of Appeal has no difficulty with an examination of the record in judicial review. Indeed, Madam Justice Paperny states it was necessary to examine the record on judicial review because the reasons provided by the University were inadequate (at para 55). For some, this will be hard to reconcile with the judicial deference called for under the reasonableness standard of review. Indeed, this was one of the grounds of appeal argued by the University concerning the application of reasonableness by Madam Justice Strekaf.

The disciplinary character of this case, however, may distinguish it from administrative decisions more generally which are subject to judicial review under the reasonableness standard. Courts have a long history of paying special attention in judicial review to administrative matters that concern discipline. Perhaps more generally then, this case simply adheres to the principle that administrative decisions that impose discipline under legal authority must be fully explained.