

Face-ing the Charter's Application on University Campuses

By Jennifer Koshan

Case Considered:

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

Linda McKay Panos recently posted an ABlawg comment on *R v Whatcott*, [2012 ABQB 231](#), where Justice Paul Jeffrey held that the *Canadian Charter of Rights and Freedoms* applied to the actions of the University of Calgary when it was enforcing trespass legislation against a non-student distributing anti-gay leaflets on campus (see [University Campus is not Charter-Free](#)). The Court of Appeal – or more accurately one member of the Court of Appeal – came to the same conclusion in the case of *Pridgen v University of Calgary*, [2012 ABCA 139](#), albeit in different circumstances. Shaun Fluker has already commented on the administrative law aspects of *Pridgen* (see [The need to explain yourself before imposing discipline under the law](#)); I will deal with the Court’s assessment of whether the *Charter* applies to the University in the context of student discipline proceedings.

Pridgen is colloquially known as the Facebook case. It involved a number of students in the University of Calgary’s Faculty of Communication and Culture (as it then was) who posted derogatory comments about one of their instructors on a Facebook wall and were subject to discipline for non-academic misconduct by the interim dean of their faculty. The discipline ranged from mandated letters of apology to lengthy periods of probation. Some of the students appealed the faculty’s decision to the General Faculties Council (GFC) Review Committee. The GFC Review Committee upheld the finding of non-academic misconduct, and twin brothers Keith and Steven Pridgen, who each received a period of probation, sought to further appeal to the Board of Governors. At both the GFC Review Committee stage and in their appeal documents to the Board of Governors, one of the grounds for the Pridgens’ appeal was that their fundamental freedoms under the *Charter* had been violated by the actions of the University (see e.g. para. 25). The Board of Governors refused to hear the appeal, and the Pridgens sought judicial review on administrative law and *Charter* grounds. As noted by Shaun Fluker, they were successful on both grounds before Justice Jo’Anne Strekaf of the Court of Queen’s Bench ([Pridgen v University of Calgary](#), 2010 ABQB 644), and on the administrative law grounds at the Court of Appeal.

At the Court of Appeal, Justice Marina Paperny was the only judge to face the *Charter* issues head on. The University did not challenge Justice Strekaf’s finding that the actions of the University infringed the Pridgens’ freedom of expression under section 2(b) of the *Charter*, or her finding that this violation could not be justified as a reasonable limit under section 1 of the *Charter* (paras 36, 44). The issue that concerned the University was whether the *Charter* should apply to it at all. It argued that this issue should not have been addressed on judicial review because of an “evidentiary vacuum” and because the case could be decided on administrative law

principles (at para 62). If the issue was to be addressed, the University's position was that the *Charter* did not apply, and it was supported by two interveners on this point – the Association of Universities and Colleges of Canada and the Governors of the University of Alberta.

Justice Paperny decided to deal with the *Charter* application issue for several reasons. She noted that the matter had been addressed by Justice Strekaf at length, and that it properly formed one of the bases of her decision and the appeal. She also noted that the interveners in the case – the Association of Universities and Colleges of Canada, the Governors of the University of Alberta, and the Canadian Civil Liberties Association – had all been granted leave to intervene solely on the *Charter* application issue, and had made full arguments on that issue at the Court of Appeal. Justice Paperny rejected the University's contention that there was an evidentiary vacuum on the *Charter* issue, finding that all of the necessary constitutional facts were present, and that the question of whether the *Charter* applied was a matter of “statutory interpretation and legal argument, not evidence” (at para 63). Finally, quoting from Peter Hogg's *Constitutional Law of Canada* (5th ed), she held that “if a constitutional issue... is likely to recur, there is much to be said for deciding the issue then and there, even if the case could be disposed of on a non-constitutional ... basis” (at para 63). For these reasons, Justice Paperny stated that “[i]t is neither appropriate nor necessary for this Court to now decline to determine the issue” (at para 64).

These reasons all make good sense and it is regrettable that the other justices did not find it worthwhile to consider the *Charter* application issue directly (more on that below). In light of cases such as *R v Whatcott* (2012) and other instances of the University of Calgary restraining expressive activities on campus (see e.g. my post [Freedom of Expression, Universities and Anti-Choice Protests](#)), it appears that this issue is not going away and a majority of the Court of Appeal will eventually have to deal with it.

On the issue of whether the *Charter* applied to the University, Justice Paperny wrote thorough reasons considering previous case law on section 32 of the *Charter*, which provides that the *Charter* applies to the Parliament and government of Canada and the legislature and government of each province. Based on the jurisprudence, Justice Paperny found that there are five categories of cases in which the *Charter* may apply. First, the *Charter* applies to legislation enacted by federal, provincial, and territorial governments when that legislation is the source of the alleged *Charter* violation (at para 79). Second, the *Charter* applies to those that are government actors by nature – for example, municipalities (at paras 80-81, citing *Godbout v Lougueil (City)*, [1997] 3 SCR 844). Third, the *Charter* applies to those that are government actors by virtue of the routine and regular control government has over them – for example colleges, but not universities given their relative levels of autonomy (at paras 82-83, citing *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570 and *McKinney v University of Guelph*, [1990] 3 SCR 229). An important aspect of the second and third categories is that once an entity is found to be a government actor, either by nature or because of government control, the *Charter* will apply to all of that entity's activities. Fourth, the *Charter* applies to bodies exercising delegated statutory authority, particularly those with coercive powers – for example, human rights tribunals with the power to compel documents, universities enforcing parking bylaws, and professional bodies disciplining their members (at paras 85-93, citing respectively *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307; *R v Whatcott*, 2002 SKQB 399; and *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232). Here, the concern is that governments should not be able to evade their constitutional duties by delegating those responsibilities to others (at para 85). Fifth, the *Charter* applies to non-governmental bodies when implementing governmental objectives, such as hospitals implementing medically necessary services (at paras 94-98, citing *Eldridge v British Columbia*

(*Attorney General*), [1997] 3 SCR 624). Here too, the rationale is that governments cannot avoid their responsibilities by delegating the implementation of governmental activities to other actors (at para 96). For both the fourth and fifth categories, the *Charter* will only apply to those activities when the entity in question is implementing a particular government power, policy or program, and not, for example, to internal matters of the entity such as labour relations (at paras 93, 98). Justice Paperny noted that these categories are not exhaustive and may overlap in some cases (at para 99).

This is a comprehensive and helpful synthesis of the case law on *Charter* application. I am tempted to cull my constitutional law syllabus for next year and teach only *Pridgen* on section 32, although it is always difficult to let go of classic cases previously taught (especially when they are one's favourite *Charter* case, like *Eldridge*). Perhaps this could be the subject of a Facebook discussion for interested students from years past – just make sure to do it outside of class time, please. And because I have a policy not to accept friend requests from current students, I would need to have someone fill me in on the outcome of any such discussion.

Back to *Pridgen*. Applying the case law to the facts at hand, Justice Paperny noted that Justice Strekaf had relied on the fifth category, finding that the University was implementing government policy around post-secondary education in its dealings with the students. This was based on Justice Strekaf's review of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 (*PSLA*), which provides authority for the Lieutenant Governor in Council to establish universities in the province, and requires each university to establish a board of governors and general faculties council, both of which have jurisdiction over student discipline for academic and non-academic misconduct. While Justice Paperny stated that this was “a logical approach” and a proper application of *Eldridge*, she found that the Pridgens' case fit “more comfortably” within the fourth category, that of statutory compulsion (at paras 103, 105). She noted that the University, in exercising its powers of discipline, was acting pursuant to delegated powers that went beyond the authority held by private individuals or organizations (at para 105). She also rejected the University's argument that discipline was an internal, contractual matter that was not governmental in nature, noting that, in particular, regulation of student expression as a matter of non-academic misconduct went beyond any contractual relationship between the parties and was more than an internal issue (at paras 106-107). Drawing an analogy to the professional discipline cases, Justice Paperny commented on the public aspect of student opinions about the quality of their education, and stated that “the regulation of non-academic misconduct on a university campus ensures a standard of behaviour in a public institution for the benefit of the public generally, not just for some narrow and arguably outdated conception of a community of scholars” (at para 108). She also noted that access to education “is a pressing public concern,” and that for professional schools such as law and medicine, universities play a gatekeeping role “as much as any regulatory body” (at para 109). Although this was not a case where the *PSLA* and the University's Student Misconduct Policy were directly alleged to result in *Charter* violations (i.e. this was not a category 1 case), the University's discretionary application of the *PSLA* and related policies was at issue, and the *Charter* accordingly applied (at para 111, citing *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 and *Whatcott v Saskatchewan Assn of Licensed Practical Nurses*, 2008 SKCA 6).

The University's and supporting interveners' arguments about academic freedom and institutional autonomy did not undermine this conclusion. Citing authorities from the United States and United Kingdom, Justice Paperny indicated that freedom of expression and academic freedom should be seen as complementary rather than competing values. She held that if situations arise when these values conflict, section 1 of the *Charter* would be an appropriate site

to balance the competing interests (at paras 113-117). For example, freedom of expression is not without limits, and universities “must be able to place reasonable limits on speech on campus in order … to maintain a learning environment where there is respect and dignity for all” (at para 124). Similarly, the institutional autonomy of universities was not enough in law to shield the University from *Charter* application in respect of some of its activities (see categories 3 versus 4 and 5), and in fact:

It would also be wrong to overlook the changing relationship between universities, government, private industry and the public generally. Universities have cultivated partnerships and other similar collaborative relationships with government and industry. Universities are heavily reliant on state funding, as well as on funding from private and corporate donors. … Today, universities are an integral part of our societal fabric, offering opportunities for learning and research to a diverse student body for the benefit of all Canadians. To suggest that institutional autonomy is undermined by their relationship to government or “other outside influences” including industry, ignores that those relationships already exist, appear to have been embraced by, if not fostered by, universities and do not appear to have diminished the institutional autonomy so highly valued by them. (at para 120)

I agree with Justice Paperny’s conclusion that the *Charter* should apply to the University in the circumstances of the *Pridgen* case. Although I have argued previously that the *Charter* applies to universities dealing with expressive activities on campus based on Justice Paperny’s fifth category (see [Freedom of Expression, Universities and Anti-Choice Protests](#)), the fourth category also seems appropriate, especially in the disciplinary context. And although Justice Paperny seemed careful to ground her decision in the facts of *Pridgen*, involving discipline for non-academic misconduct, I think that the same reasoning would apply to discipline for academic misconduct, where again, a university would be exercising delegated powers in a context with a public interest component (particularly for students in professional schools). This is not to say, however, that the fourth category will always capture cases involving universities. To take the recent student protests in Quebec as an example, if a university was implementing government policy around tuition fees or access to education more broadly, category 5 might be more appropriate than category 4 in thinking about the application of the *Charter*.

I have expressed my opinion of regret that the other two Court of Appeal justices did not decide the *Charter* application issue in *Pridgen*. To elaborate, Mr. Justice McDonald was of the view that “[w]hile it may be time to reconsider whether or not universities are subject to the *Charter*, it was unnecessary for the judicial review judge to do so in this case. And, in my respectful view, this Court ought not to compound that error by undertaking such an analysis now” (at para 132). Mr. Justice O’Ferrall was more equivocal, finding that one of the reasons the GFC Review Committee’s decision was unreasonable was that “no consideration was given to the students’ rights to freedom of expression and freedom of association” (at para 179). In fact, by including in his decision an element of freedom of association, which is protected under section 2(d) of the *Charter*, Justice O’Ferrall broadened the scope of the case. However, he noted that the issue was not “whether the University is a “*Charter*-free zone”” (at para 179); that issue, he said, was not necessary to resolve the judicial review matter or the appeal, and to do so “was perhaps even undesirable because the issue of *Charter* infringement was not explored at first instance” (at para 183, citing *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765). Instead, Justice O’Ferrall relied on protections of freedoms of expression and association that pre-dated the *Charter* in the common

law and the *Alberta Bill of Rights* (at para 180). Although he was not explicit about his methodology in his brief judgment, Justice O’Ferrall appears to have applied a *Charter* values approach. According to this approach, even if the *Charter* does not apply directly to the actor or actions in question, *Charter* values such as those underlying freedom of expression (and association) must be taken into account indirectly in assessing the legality of the actions of an entity to which the *Charter* does not apply (see e.g. *RWSDU v Dolphin Delivery Ltd*, [1986] 2 SCR 573).

The *Charter* was thus relevant to two of the three judgments in *Pridgen*. Until such time as an appellate court clarifies that the *Charter* applies directly to universities in respect of some of their activities, *Pridgen* holds that at the very least, universities must apply *Charter* values in carrying out their coercive and governmental activities. As noted by Justice Paperny, though, universities retain the power to place reasonable limits on *Charter* rights and freedoms, which should provide some comfort to universities even if *Pridgen* results in more *Charter* litigation for them to defend against.