

BCCA Unfortunately Chooses Not to Follow Alberta’s Lead on the Issue of Whether the *Charter* Applies to Universities

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Case Commented On: *BC Civil Liberties Association v University of Victoria*, [2016 BCCA 162 \(CanLII\)](#)

There are a number of ABlawg posts dealing with the issue of whether the *Canadian Charter of Rights and Freedoms* (*Charter*) applies to universities (see: [Face-ing the Charter’s Application on University Campuses](#); [University Campus is not Charter-Free](#); [Freedom of Expression, Universities and Anti-Choice Protests](#)). Many of these decisions involve freedom of expression, which is considered to be a very important element of university life (e.g., for academic freedom, free discussion and debate of ideas). Recently, I posted about a case involving the University of Victoria (see [Does the Charter Apply to Universities? Pridgen Distinguished in U Vic Case](#)) in which the British Columbia Supreme Court did not follow the judgment of Alberta Court of Appeal Justice Paperny in *Pridgen v University of Calgary*, [2012 ABCA 139](#). Although the case law synthesized by Justice Paperny was not determinative in *Pridgen*, her judgment provides an excellent, logical synthesis of how the precedents on the application of the *Charter* should be applied in various contexts, including universities. This post discusses the BCCA decision on the University of Victoria case.

In University of Victoria (*UVic* CA), a pro-life student group (“Youth Protecting Youth”) applied to the University of Victoria (University) for a permit to hold a demonstration on campus. At first, the permit was granted, but it was later revoked when the University learned that Youth Protecting Youth (YPY) had been sanctioned by the Students’ Society at the University. YPY held a demonstration anyway, and the University threatened further sanctions. YPY’s president, Cameron Côté, and the British Columbia Civil Liberties Association (BCCLA) applied for a declaration that *Charter* s 2(b) freedom of expression applied to the University’s decisions, and had been infringed. They also argued in the alternative that the decisions should be quashed for being unreasonable. Here, I am most interested in the *Charter* discussion. The British Columbia Supreme Court (BCSC) dismissed the application and held that the *Charter* did not apply.

On appeal, Côté and the BCCLA sought a declaration under the *Constitution Act, 1982*, s 52 that section 15.00 of the *Booking of Outdoor Space by Students Policy* (Policy) is *ultra vires*, void, and of no force or effect, as it violates *Charter* sections 2(b), (c) and (d).

Côté and the BCCLA acknowledged that the University is not an organ of the state, but relied on *Eldridge v British Columbia (Attorney General)*, [1997] [3 SCR 624](#) to argue that certain decisions made by the University could be subject to *Charter* challenges. Further, they argued that the University’s regulation of its property under the authority of the *University Act, RSBC 1996, c 468* (Act), amounts to “government activity” and thus attracts *Charter* scrutiny. The University’s Policy involved the exercise of regulatory power conferred by the Act that could not

be separated from the University's core role of delivering publicly-funded post-secondary education (*UVic CA*, para 6).

Côté and the BCCLA also submitted that the lower Court had relied unduly and incorrectly on some older cases involving mandatory retirement, such as *McKinney v University of Guelph*, [1990] 3 SCR 229 and some more recent cases from other jurisdictions, such as *Lobo v Carleton University*, 2012 ONCA 498 (*UVic CA*, para 6). Côté and the BCCLA submitted that the *UVic CA* case is more closely analogous to a line of cases (from Alberta and Saskatchewan) in which university students were held to be entitled to assert *Charter* rights in disputes with governing bodies of universities (e.g., *Pridgen*) (*UVic CA*, para 7).

Côté and the BCCLA also argued that there is a public interest in extending the scope of *Charter* protection, because the ability to express political ideas on campus is not separable from other aspects of university education (*UVic CA*, para 9). Further, the University plays a central role in the democratic, economic and social life of the province, thus it must use its statutory powers in the public interest (*UVic CA*, para 9).

As a separate ground, Côté and the BCCLA argued that even if they could not assert an infringement of *Charter* rights, the University must take into account *Charter* values when applying the Policy, and had failed to do so. They had unsuccessfully made a similar argument before the BCSC (*UVic CA*, para 11).

At the BCCA, Justice Willcock, Justices Saunders and Dickson concurring, upheld the lower court decision, agreeing that the actions of the University in creating the Policy could not be said to violate Côté's *Charter* rights. Further, the question of whether *Charter* values applied was moot and should not be considered (*UVic CA*, para 16).

The BCCA embarked on a lengthy discussion of the scope of *Charter* application to universities. Justice Willcock discussed the scope of *Charter* s 32(1). This section provides:

32. (1) This 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.

He first cited *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573 for the proposition that s 32(1) does not refer to the government in its generic sense—"meaning the whole of the governmental apparatus of the state"—but rather to a branch of the government, narrowly defined (*UVic CA*, para 19). He also cited *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, where Justice LaForest—in turn relying on *Dolphin Delivery*—said that references to government in s 32 "...could not be interpreted as bringing within the ambit of the *Charter* the whole of that amorphous entity which in contemporary political theory might be thought of as 'the state'." (*UVic CA*, para 19).

Justice Willcock also noted that, at the same time, the jurisprudence on s 32 provides that it should not be so narrowly defined as to permit the government to act with impunity by using subordinate bodies (*UVic CA*, para 20). While the *Charter* likely applies to delegated legislation, regulations, orders-in-council, municipal by-laws and by-laws and regulations of other creatures

of Parliament and legislatures, cases have excluded from “government” entities such as universities in Ontario and British Columbia, and the Vancouver General Hospital, yet have included community colleges and the transportation authority of the Greater Vancouver Regional District (*UVic CA*, para 20).

Justice Willcock relied on *McKinney*, *Stoffman*, and *Harrison v University of British Columbia*, [1990] 3 SCR 451 (*Harrison*), to hold that the fact that a university is fiscally accountable under the *University Act*, does not establish government control or influence on the core functions of the university, including policies and contracts (*UVic CA*, paras 21, 26). He was not persuaded that the *UVic CA* case was distinguishable from the *Harrison* case in any material way on the issue of the application of the *Charter* to universities (*UVic CA*, para 21). It should be noted that all three of these cases relied upon by Justice Willcock are about mandatory retirement of faculty/staff.

Côté and the BCCLA argued that this case fits into an exception that is carved out from the general rule cited in *Harrison*. Because the University is given statutory authority under the *University Act* to regulate its property, the *Charter* can be used to challenge measures undertaken under these statutory provisions (*UVic CA*, paras 22, 23). Justice Willcock noted that this argument had been rejected in *McKinney* (*UVic CA*, para 24).

To respond to the argument that the specific activity that was affected by the University’s decisions—public expression—is one that the University is established to encourage in the public interest, Justice Willcock relied on *McKinney*, which said that the delivery of a public service by an agency does not automatically incorporate it into government (*UVic CA*, para 28). Justice Willcock noted that the circumstances in which an activity could subject an entity to *Charter* scrutiny were set out in *Eldridge*. Because the Vancouver General Hospital in *Eldridge* was putting into place a government program or acting in a governmental capacity in adopting policies regarding the delivery of medical care mandated by statute, these were “inherently governmental actions” and the court could consider whether the hospital was subject to the *Charter*. In particular, the court could examine whether the government maintained responsibility for the program, despite the use of a private agency to deliver it; whether there was a specific government program or policy directing the hospital to act; and whether the government had delegated the implementation of its policies and programs to the private entity (*UVic CA*, para 30).

Justice Willcock noted that *Eldridge* provided two important points about the scope of the applicability of the *Charter* to private entities. First, the mere fact that an entity performs a public function, or the fact that a particular activity may be described as public in nature, will not be enough to bring it into “government” for the purposes of s 32 (*UVic CA*, para 31, citing *Eldridge* at para 43). Second, determining whether an entity attracts *Charter* scrutiny with respect to a particular activity requires an investigation not into the nature of the entity but into the nature of the activity itself (*UVic CA*, para 31, citing *Eldridge* at para 44).

When Justice Willcock applied these two criteria from *Eldridge*, he concluded that he could not find that the specific acts in question of the University were governmental in nature. He noted that the government had neither assumed nor retained any express responsibility to provide a public forum for free expression at universities (*UVic CA*, para 32).

Justice Willcock went on to distinguish *Pridgen*, noting that it was decided on administrative grounds, and that any discussion by Justice Paperny about the *Charter*’s application was *obiter*

dicta (judge's remarks that do not form a necessary part of the decision) (*UVic CA*, para 37). Further, Alberta's statutory framework with respect to universities did not apply in British Columbia. Finally, in *Pridgen*, Justice Paperny found that disciplinary sanctions fell into the category of statutory compulsions (one of five possible categories of entities, laws and activities that could attract *Charter* scrutiny as set out by her in *Pridgen*); Justice Willcock held that the decisions at issue involved no exercise of statutory authority beyond the authority held by private individuals or organizations (*UVic CA*, paras 37 to 39).

It is interesting to note that Justice Willcock did not take note that Alberta Court of Queen's Bench Justice Strekaf in *Pridgen* would have categorized the university as a non-governmental entity implementing a government objective, similar to that in *Eldridge*, and thus the policy would have fit under a different category than that relied upon by Justice Paperny (statutory compulsion). Côté and the BCCLA had actually relied on the "implementing a government objective" category from *Eldridge* to make their arguments.

Justice Willcock also held that the lower court had correctly relied upon *Lobo*. In *Lobo*, the lower court had held that the appellants had failed to plead the material facts necessary to establish that the university was implementing a specific government program or policy when it failed to allocate space to the appellants to advance their extra-curricular objectives (*UVic CA*, para 40). In addition, the Ontario Court of Appeal had held that when the university books space for non-academic extra-curricular use, it is not implementing a particular government policy or program as considered in *Eldridge* (*UVic CA*, para 40, citing *Lobo*, para 4).

It should not be forgotten that even if the *Charter* were to apply in the circumstances of this case, the University would have the opportunity to rely on *Charter* s 1 to demonstrate that the limits on the *Charter* right were demonstrably justified in a free and democratic society. Thus, the University would not be without an opportunity to justify its actions or policies, even if its policies were subject to *Charter* scrutiny.

Commentary

Because this decision does little to clear up the division on this issue between courts in Alberta and Saskatchewan, and those in British Columbia and Ontario, I sincerely hope that the parties will consider seeking leave to appeal this decision to the Supreme Court of Canada (SCC). It is clear that *Charter* s 32 requires a contextual analysis, and courts can certainly distinguish cases based on different contexts, yet I am perplexed by this case.

Even the SCC in their majority judgments in *McKinney* (paras 42, 371 and 436) and *Stoffman* (p 507), recognized that there may be circumstances where a university is implementing a government policy such that the *Charter* could apply. These circumstances were contrasted with the situation where a university is acting as an employer, where the *Charter* clearly does not apply. This distinction would support the long-stated notion that universities should be autonomous with respect to internal operations.

If the situation described in *UVic CA* does not meet with those circumstances outlined in *McKinney*—where the university is implementing a government policy—I am at a loss to conjure up situations where *McKinney*'s “exceptional” circumstances could apply to universities.

Although Justice Paperny's five categories of circumstances where the *Charter* can apply were indeed *obiter dicta*, there is much to recommend in her logical, thoughtful summary and reconciliation of the cases. If the matter reaches the SCC, hopefully the SCC will seriously consider Justice Paperny's judgment in *Pridgen*.

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