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Facebook and Freedom of Expression

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Cases Considered:

Pridgen v University of Calgary, 2010 ABQB 644

Pridgen v University of Calgary involves twins Keith Pridgen and Steven Pridgen, two students at the University of Calgary who were enrolled in the Faculty of Communications and Culture in the fall of 2007. Both students participated in posting comments to a Facebook Wall created by a fellow student, under the name of "I NO Longer Fear Hell, I Took a Course with Aruna Mitra." Professor Mitra was teaching a Law and Society course, namely LWSO 201, which the Applicants were taking.

Steven Pridgen's post read: "Some how I think she just got lazy and gave everybody a 65....that's what I got. Does anybody know how to apply to have it remarked?"

Keith Pridgen's post stated:

> Hey fellow LWSO. 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 professor? 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 L.W.S.O. students!

Though eight other students participated in posting comments about Professor Mitra on the Facebook Wall, the twins were the ones who took legal action against the University.

Why? Because they felt their *Charter* right to freedom of expression was breached upon learning that the University of Calgary, more specifically, the Interim Dean of the Faculty of Communications and Culture, Dean Tettey, accused them of non-academic misconduct in letters sent to the twins dated November 20, 2008. These letters were sent to the students after a meeting with the students themselves as well as the Department Head, the Associate Dean, and two professors, one of whom was Professor Mitra's spouse, on September 4, 2008. The letters sanctioned Keith Pridgen to probation for 24 months, an apology letter to be sent to Professor Mitra, and an injunction from posting any further defamatory comments about Professor Mitra or any other professor at the University. Steven Pridgen's letter included similar sanctions, with the exception of the academic probation, which only his brother received. The letters indicated that the students could appeal the decisions to the General Faculties Council's Review Committee, which they did.

Upon the Review Committee's analysis of the case, the decision that the students' conduct constituted non-academic misconduct was, on a balance of probabilities, accepted. The written decisions were forwarded in a letter to the students, dated February 20, 2009, that they were both to be put on probation starting November 20, 2008 with six months probation for Keith Pridgen and four months probation for Steven Pridgen.

The students, through their counsel, advised the University that they intended to further appeal the decision. However, in a letter dated March 6, 2009, the Secretary to the General Faculties Council informed them that an appeal to the Board of Governors was not an option for them. Despite the brothers trying to fight this limitation, the University held their position and refused to hear another appeal.

This brings us to the Court of Queen's Bench in Alberta, where the students (now, the Applicants) attempted to seek justice. The Honourable Madam Justice Jo'Anne Strekaf heard the case on June 11, 2010 and released her decision to the public on October 12, 2010. Here, I will attempt to briefly summarize the arguments and the final judgment.

First, what were the issues brought to the Court's attention by the University (now, the Respondent)? The Respondent argued that the Applicants' constitutional arguments were out of time, as the first time they raised these arguments was after the six month limitation period had expired. On this issue, the Court found that although this may be true according to Rule 753.11 of the *Alberta Rules of Court*, Alta. Reg. 390/1968, this should in no way impede the Court's ability to hear arguments that go beyond the Originating Notice of Motion, which was filed in time (at para 24). Further, Justice Strekaf found that the Respondent was not prejudiced by the delay in giving notice of constitutional arguments (at para 25).

The second issue raised by the Respondent was whether the arguments of the Applicants were moot, since the probation period of both students had ended and all references to non-academic misconduct had been removed from their records. The Court found that the Respondent had not put forward any evidence to show the removal of this information had actually occurred, and that the students' application for a declaration that their rights had been breached was a live issue (at para 28).

Then it came time to address the issues brought forward by the Applicants. There were eight issues, and I have summarized them below along with Justice Strekaf's decision on each issue.

(a) Does the *Charter* apply to the disciplinary proceedings taken by the Respondent?

The Applicants argued that the coercive action taken by the University infringed on their *Charter* rights of freedom of expression (2(b)) and freedom of association (2(d)). In order for this to be established, it had to first be determined if the University is part of the government or performs actions of a governmental nature for the *Charter* to apply. The Respondent argued that the University is a private entity and therefore the *Charter* does not apply. The Court, however, found that the *Charter* does apply based on the fact that the University, though not considered a government entity, nevertheless engaged in governmental actions in sanctioning the students. Another reason the *Charter* applied was that the University, though it may be a private entity, is given its power to create policies through government legislation, namely the *Post-Secondary Learning Act*, S.A. 2003. Justice Strekaf further confirmed this while referring to the case of *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 where it was found that the

Charter applies to hospitals that are given their power through legislation when carrying out those powers. She quoted Justice La Forest who said that, "since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so" (at para 44).

(b) If so, were the Applicants' *Charter* rights infringed?

The Court found that since the Applicants put forward no evidence in regards to their freedom of association, that they had not met their burden in proving this particular right was breached (at para 71). Their freedom of expression, however, was a major point of contention and it was decided by the Court that this right was infringed by the University. Justice Strekaf used the test which was introduced in *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927: "The first step involves determining whether the individual's activity falls within the freedom of expression protected by the *Charter*. The second step is to determine whether the purpose or effect of the impugned government action is to restrict that freedom" (para 72).

The Court found that both steps in the *Irwin Toy* test were met. First, the postings to the Facebook Wall by the Applicants had expressive content conveying meaning (at para 73). Second, the sanctions imposed on the Applicants by the Review Committee had the effect of restricting their freedom of expression (at para 75). The action taken by the University was not found to be supported under section 1 of the *Charter*, which allows an infringement on rights if the governmental action can be demonstrably justified in a free and democratic society. Justice Strekaf stated as follows:

> I cannot accept that expression in the form of criticism of one's professor must be restricted in order to accomplish the objective of maintaining an appropriate learning environment... Students should not be prevented from expressing critical opinions regarding the subject matter or quality of the teaching they are receiving (para 82).

The University's actions therefore failed the minimal impairment stage of the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103).

(c) Were the actions taken by the University *ultra vires* the jurisdiction of the Province of Alberta?

The Applicants put forward the argument that state sanctioned wrongful speech is the exclusive jurisdiction of the Parliament of Canada (at para 84). Unfortunately for the Applicants, the Court did not agree. Justice Strekaf found that both the *Post-Secondary Learning Act* and the University Calendar (which defines non-academic misconduct) are validly enacted and *intra vires* the province of Alberta. This is supported by the preamble of the *Post-Secondary Learning Act*, where the "pith and substance" of the legislation is explained: "[T]he government's legislative purpose [is] that the universities and colleges established thereunder provide an accessible, responsive and flexible system of post-secondary education in Alberta through a co-ordinated and integrated system approach known as Campus Alberta" (at para 86).

In analyzing this preamble, the Court found that the purpose of the *Post-Secondary Learning Act* and the University Calendar is the administration of education, which clearly falls under the power of the province under section 93 of the *Constitution Act, 1867*.

(d) Did the Board of Governors err in refusing to hear the Applicants' appeals?

The *Post-Secondary Learning Act* states the following in section 31(1)(a):

> 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
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> > (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 Respondent argued that the right of appeal contemplated in this section is only available where the discipline imposed serious results such as fines, suspension, or expulsion (at para 91). The Court found, however, that the word "includes" should be interpreted broadly enough to include the sanctions given to the students in the case at bar and as a result, the Board of Governors was in breach of its statutory duty to hear their appeal (at para 92).

(e) Were the Applicants denied a fair hearing?

The Applicants submitted that they were denied a fair hearing because they did not get the opportunity to cross-examine Professor Mitra (as she was not in attendance at the Review Committee hearing), because the words posted by other students to the same Facebook Wall found them guilty by association, because the sanctions were excessive and inappropriate, because the length of Keith Pridgen's closing statement was limited, and because there was an unfair bias as Professor Mitra's spouse was involved in the decision process (at para 93).

The Court noted that procedural fairness is flexible and variable and because the administrative tribunal created by the University has the right to follow its own procedures, it did not deny the Applicants a fair hearing. Nonetheless, Justice Strekaf did acknowledge that there was a bias by including Professor Mitra's spouse in the review (at para 97).

(f) Did the Review Committee provide adequate reasons for its decisions?

Essentially, the answer to this question is no. Justice Strekaf found that the letters to the Applicants, though they indicated the sanctions decided upon, did not give sufficient reasons as to why the Applicants were being sanctioned (at para 105). Non-academic misconduct was defined in the University Calendar at the time as follows:

> 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; (b) unauthorized removal and/or unauthorized possession of University property; (c) conduct which seriously disrupts the lawful educational and related activities of other students and/or University staff (para 99).

Because of the lack of explanation as to the reasons for the punishment of the twins, the Court found that it would be unfair to expect other students to know what may be considered non-academic misconduct beyond the definition given in the University Calendar. There would be no benchmark for their non-academic behaviour on (or off) campus (at para 105).

(g) Did the Review Committee err in concluding that the activities of the Applicants constituted non-academic misconduct?

Based on the previous issue as well as the fact that there was no evidence provided by the Respondent that Professor Mitra indeed suffered an "injury," it was held that there was no reasonable basis for finding that non-academic misconduct had occurred within the meaning of the policy (at para 114). Further, Justice Strekaf noted that Professor Mitra could have brought a civil action for the tort of defamation against the Applicants, however chose not to (at para 111).

The Respondent continued to hold its position that "it is simply outrageous to suggest that the publication of defamatory statements by a student, directed at a professor (a member of the University Community) over the internet does not amount to non-academic misconduct by any standard" (at para 109). Unfortunately for the Respondents, the Court did not find any injury.

(h) What, if any, remedy should be granted to the Applicants?

At this point, the Respondent submitted that the Applicants should appeal the original decision to the Board of Governors Student Discipline Appeal Committee for reconsideration (at para 116). Readers may find it ironic that this Board is a subset of the Board of Governors, which originally denied any further hearings (at para 117). Perhaps the Respondent felt the pressure and finally gave in, but the Applicants argued that it was too late. The Court agreed that the Board of Governors Student Discipline Appeal Committee would not provide any more insight than the Court itself had already provided (at para 118).

What were the remedies for the Applicants? The Court quashed the Review Committee's decision and the students walked away happy. I wouldn't be surprised if they went home, logged on to Facebook, and let the whole world know that the right to freedom of expression stands for Facebook users, and that Universities are subject to the *Charter* whether they like it or not.

Comment

What do I have to say about this case? Well, I am not a Facebook user myself (yes, I am of a rare breed). However, I do find it necessary to allow students the ability to voice their opinions about their professors and overall educational experience, and Facebook seems to be a good outlet for this. At most Universities, students have the chance to "evaluate" their professors each semester when given the opportunity to fill out a professor evaluation. These evaluations, however, are anonymous and given to the professors after exams in the hopes of preventing a bias while marking the exams in the event the professors recognize the handwriting on the evaluations. I find that while this is a good exercise for the benefit of the professors as they can learn from these reports and modify their teaching methods to accommodate more student needs and desires, the evaluations do little for the students in terms of sharing opinions with one another. Instead, their opinions are shared with the professors only. Facebook, on the other hand, provides students with an outlet to share their opinions with other fellow students.

The messages posted on the Facebook Wall, "I NO Longer Fear Hell, I Took a Course with Aruna Mitra" should be taken by University students with a grain of salt. It is my belief that University students are smart enough to form their own opinions, and while their opinions may be informed by the comments of others, I do not think that the comments on the Facebook Wall would be the sole basis for a decision made as to whether or not to take a class taught by Professor Mitra. Maybe for some, it would. However, I myself would most likely do some more research into this issue. It is safe to say that the comments on that Facebook Wall would most likely be negative given the nature of its title. Acknowledging this, if I was deciding whether or not to take a class taught by Professor Mitra, I would go further than simply reading the Facebook page. I would ask students, other than those who participated in posting on the Facebook Wall, what their opinions were. I would look at the course syllabus. Further, I would perhaps try to sit down and talk with the professor herself before making a decision on whether or not to take her class.

Personally, I do feel a little badly for Professor Mitra and what she went through. Then again, I agree with Justice Strekaf's judgement in quashing the Review Committee's decision to put the twins on probation as they were validly exercising their freedom of expression, which should not be hindered in the interest of maintaining an appropriate learning environment. Overall, I found this case to be interesting from a student perspective and welcome you to post your comments on this case.

An earlier version of this comment was posted on the Canadian Civil Liberties Association Rights Watch blog.