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Does the Charter Apply to Universities? *Pridgen* Distinguished in U Vic Case

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Case Commented On: *BC Civil Liberties Association v University of Victoria*, [2015 BCSC 39](#)

In *Pridgen v University of Calgary*, [2012 ABCA 139](#), one member of the Alberta Court of Appeal, Justice Paperny, came to the conclusion that the *Canadian Charter of Rights and Freedoms* could apply to the actions of the University of Calgary in disciplining the Pridgen brothers for non-academic misconduct (see a post on that decision [here](#)). In *BC Civil Liberties Association v University of Victoria*, [2015 BCSC 39](#) (“UVic”), the British Columbia Supreme Court ruled that the *Charter* did not apply, and distinguished *Pridgen* on several grounds.

Pridgen involved a number of University of Calgary students in the Faculty of Communication and Culture (now Arts) who posted derogatory comments about one of their instructors on Facebook, and who were disciplined for non-academic misconduct. The discipline included writing mandatory letters of apology and lengthy periods of probation. Some students appealed the faculty’s decision to the General Faculties Council Review Committee, which upheld the finding of non-academic misconduct. The Pridgens sought further appeal to the University’s Board of Governors. One of the grounds of appeal was that their freedom of expression under the *Charter* had been violated by the University. Justice Jo’Anne Strekaf of the Alberta Court of Queen’s Bench granted the Pridgens’ application for judicial review on both *Charter* and administrative law grounds (see *Pridgen v University of Calgary*, [2010 ABQB 644](#)).

On appeal, only one Alberta Court of Appeal Justice in *Pridgen*, Marina Paperny, directly addressed the issue of whether the *Charter* could apply to the University; the University argued that there was an “evidentiary vacuum” that should preclude that analysis (at para 62). For a number of reasons, Justice Paperny held that the Court of Appeal should determine the issue of whether the *Charter* applied to the University in the context of the case. She provided a thorough review of the previous case law on *Charter* section 32 (which provides that the *Charter* applies to government), and concluded that there are five categories of cases in which the *Charter* may apply. These include (at para 78):

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.

While Justice Strekaf had determined that in this case, the University was a “non-governmental body implementing government objectives”, Justice Paperny would have found that the University, in imposing disciplinary sanctions, was a “body exercising statutory authority” (at para 105). Thus, the statutory authority to discipline students for non-academic misconduct (Student Misconduct Policy) must be interpreted and applied in light of the *Charter* right to freedom of expression. Furthermore, the breach of the Pridgens’ right to freedom of expression by the decision of the Review Committee could not be saved by *Charter* section 1.

The remaining two justices at the Alberta Court of Appeal did not consider the *Charter*’s application directly and decided the matter on administrative law grounds.

Pridgen is one of a number of cases that address the issue of whether and when universities are subject to the *Charter* (see, for example: *McKinney v University of Guelph*, [1990] 3 SCR 229; *Harrison v University of British Columbia*, [1990] 3 SCR 451; *R v Whatcott*, 2012 ABQB 231). In the UVic case, Cameron Côté, a former student at the University of Victoria, was on the executive of a student club called Youth Protecting Youth (“YPY”). He was informed by the President of the Students’ Society that the University had prohibited YPY from using campus space because of its prior activities (i.e., anti-abortion activities). The activity proceeded and YPY and Côté were admonished for defying the direction of the president of the Students’ Society. Mr. Côté and the British Columbia Civil Liberties Association (BCCLA) asked the BC Supreme Court, among other things, for a declaration that any restrictions or regulations placed by the UVic on students who wish to use the school for “expressive purposes” be consistent with the *Charter*.

In addressing the issue of whether the University policies were subject to the *Charter*, the BCCLA and Côté relied on Justice Paperny’s judgment in *Pridgen* to support their position that any regulation of speech on University property is subject to *Charter* scrutiny (at para 137). Recall that Justice Paperny’s reasoning was based on the determination that the university was exercising statutory authority and thus was subject to the *Charter*.

Chief Justice Hinkson of the BCSC distinguished *Pridgen* for a number of reasons. First, he noted that neither Justices O’Ferrall nor McDonald agreed with Justice Paperny in *Pridgen* in terms of the *Charter* issue. In particular, Justice O’Ferrall had held that a ruling on the application of the *Charter* was unnecessary to the lower court’s disposition of the case and to the disposition of the University’s appeal. He was further influenced in his conclusion because the issue of *Charter* infringement had not been explored in the original hearing (at para 138). Justice McDonald had held that it was neither appropriate nor necessary for the lower court to have embarked on a *Charter* analysis in *Pridgen* (at para 132).

Second, Justice Hinkson noted that Côté, unlike the Pridgens, was not subject to any actual discipline by the University (at para 141).

Third, Alberta’s applicable legislation differs from that of British Columbia, because the BC *University Act*, RSBC 1996, c 468, specifically prohibits the Minister from interfering with certain powers granted to the University, and also gives the president and senate authority over student discipline (at para 141).

Fourth, Justice Hinkson accepted the University's submission that in booking space for student club activities, the University is neither controlled by government, nor performing a specific government policy or program (following *Lobo v Carlton University*, 2012 ONCA 498).

Fifth, the *Charter* did not apply to the impugned decisions as they were undertaken "by the University with respect to the management of its privately owned land, and not to the exercise of governmental policy or the implementation of a specific government program regulating the use of University land" (at para 147). Thus, the decisions made by the University were within the University's "sphere of autonomous operational decision-making" and not subject to the application of the *Charter* (at para 148).

Justice Hinkson thereby concluded that the *Charter* did not apply to the activity of booking space by students (at para 152). He declined to grant the declarations sought by Côté and the BCCLA.

Commentary

John Dixon of the *National Post* has criticized this decision and indicated it will likely be appealed (see [here](#)). Dixon notes that it is rather ironic the UVic case begins with a quotation from University of Victoria's Vice President, Jim Dunson:

Universities are places where difficult ideas and issues are often discussed and debated. Freedom of speech is a core component of intellectual inquiry and is a fundamental value of the University of Victoria ...

Yet it was Dunson who issued the order to stop the activities and threatened further punishment of the pro-life students in the case at issue.

While Chief Justice Hinkson relied on several factors to distinguish *Pridgen*, some similar distinguishing factors were present in *R v Whatcott*, 2012 ABQB 231. In that case, however, the result was very different. The Alberta Court of Queen's Bench determined that the University of Calgary had used anti-trespassing legislation to prevent an opportunity for participation in a learning activity, and this created a direct connection between the University's governmental mandate and the impugned activity. The *Charter* applied, even to a non-student, who was using university property to distribute printed material without university permission. In contrast, in *Lobo v Carlton University*, 2012 ONCA 498, the activity—refusal of Carleton Life Line's request to display its Genocide Awareness Project in outdoor area of campus—was characterized as "book[ing] university space for non-academic extra-curricular use," and thus not subject to the *Charter* (at para 4).

Whether the *Charter* applies appears to be dependent on whether the activity is characterized as one that is related to learning or is determined to be purely non-curricular. However, when very similar activities are characterized differently, confusion results. It looks like the Supreme Court of Canada will have to settle this issue.

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