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Context is Everything When it Comes to *Charter* Application to Universities

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Case Commented On: *Yashcheshen v University of Saskatchewan*, 2019 SKCA 67 (Can LII)

The issue of whether a university is subject to the application of the *Charter* has arisen in a number of cases, some of which appear to conflict. See: BCCA Unfortunately Chooses Not to Follow Alberta's Lead on the Issue of Whether the *Charter* Applies To Universities.

In *Yashcheshen*, the issue of *Charter* application occurred when Yashcheshen sought admission to the College of Law at the University of Saskatchewan without submitting a Law School Admission Test (LSAT) score, because she had a disability (Crohn's Disease) that she believed would prevent her from having a fair opportunity to write the LSAT (at para 1). When Yashcheshen submitted her application without an LSAT score in February 2014, it was not accepted. The College suggested that, because it required everyone to submit an LSAT score and it did not administer the test, Yashcheshen should apply to the Law School Admission Council for an accommodation with respect to the LSAT (at para 7).

Next, in April 2015, Yashcheshen filed a complaint of discrimination with the Saskatchewan Human Rights Commission, but the Commission determined that she had not provided sufficient information to support a claim for discrimination based on disability, and advised her that she had not pursued accommodations with respect to writing the LSAT (at para 9). Yashcheshen did not provide the additional information requested by the Commission, nor did she seek judicial review of the Commission's decision (at para 10).

The Law School Admission Council, in July 2016, informed Yashcheshen that it was prepared to grant some accommodations she requested, but declined to offer her "stop the clock testing" for trips to the bathroom, or grant permission to use marijuana during testing and breaks (at para 11).

In August 2017, Yashcheshen applied to the Saskatchewan Court of Queen's Bench (SKQB), requesting an order exempting her from submitting an LSAT score and striking the College's admissions policy's requirement of an LSAT score. She based her application on an argument that her rights under *Charter* s 15(1) were violated when she was denied equal protection and equal benefit of the law without discrimination on the basis of physical disability (at para 12). The SKQB dismissed her application (see *Yashcheshen v University of Saskatchewan*, 2018 SKQB 57), finding that the *Charter* did not apply to the College's admission policy because the "University was not governmental in nature and because the admission policy did not further a government policy or program" (at para 13). Yashcheshen's claim that the Dean of the College had been biased was also dismissed (at para 14).

On appeal to the Saskatchewan Court of Appeal (SKCA), Chief Justice Richards and Justices Caldwell and Leurer dismissed Yashcheshen's appeal. With respect to the issue of whether Yashcheshen's *Charter* rights were violated, the SKCA considered that it must answer the threshold question of whether the *Charter* applied to the LSAT aspect of the College's admission policy (at para 17).

The SKCA applied *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 (CanLII), quoting from para 16 of that case:

> Thus, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter* (*Yashchechen* at para 20).

First, the SKCA determined that the university is not government by virtue of its nature. This has also been found in numerous cases involving universities, and the SKCA relied in particular on *McKinney v University of Guelph*, [1990] 3 SCR 229. Next, the SKCA determined that the University of Saskatchewan was not "government" in the sense that the government exercises substantial control over it. Indeed, the SKCA pointed to the *University of Saskatchewan Act, 1995*, SS 1995 c U-6.1, where s 3 provides that the University is an "autonomous corporation", and s 6(1) gives the university the exclusive power to "formulate and implement its academic and research policies and standards" and "formulate and implement its standards for admission and graduation." Thus, there was nothing from which the SKCA could conclude that the government exercises substantial control over either the University or the College (at para 22).

Third, the SKCA looked at whether the College's policy requiring applicants to submit an LSAT score could be said to be an activity that is "governmental in nature" such as the application of a specific government program – as was the case in *Eldridge v British Columbia (Attorney General)*, 1997 CanLII 327 (SCC) with respect to hospitals' application of health care policy. Yashcheshen had not argued that the College's LSAT (and admission) policy are connected in any way with the "implementation of a specific government policy or program". Thus, the SKCA held that the *Charter* did not apply to this aspect of the College's admission policy, and that her *Charter* argument must fail (at para 24).

The SKCA distinguished *Pridgen v University of Calgary*, 2012 ABCA 139 (student discipline), *R v Whatcott*, 2014 SKPC 215 (prohibition of demonstration) and *R v Whatcott*, 2002 SKQB 399 (prohibition of pamphleting), where the *Charter* was applied to actions of universities because those actions involved the exercise of statutorily-based powers of compulsion. The SKCA indicated that the facts were not parallel to those in the case at hand and these cases were therefore unnecessary to consider when resolving the appeal (at para 25)

Commentary

The distinction between these decisions appears to be very fine. While there is still some confusion on the matter, it appears that case law has indicated that the *Charter* applies to universities in the case of:

- Student discipline;
- Policies prohibiting demonstrations (except in *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 (CanLII), discussed in the post noted above);
- Policies prohibiting littering; and
- Policies prohibiting pamphleting.

In these situations, the university is seen to be implementing a specific statutory scheme or government program.

In *Yashcheshen*, no evidence was introduced to suggest that the College's admission standards either derived from or furthered a government policy. The SKQB (at paras 25 to 27) and SKCA (at para 25) characterized the admissions policy as being closely related to matters of academic judgment, which are not subject to *Charter* scrutiny. However, Cory Giordano of Supreme Advocacy queries whether it could be argued that law school admission policies may be construed as elements of the regulation of the legal profession, thereby assisting in the pursuit of a legislated government policy, and subject to *Charter* scrutiny.

We shall have to wait for future cases to have this argument fully assessed.

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