

In The Matter Of Keith Pridgen and Steven Pridgen on Findings of Non-Academic Misconduct on Appeal from the Ad Hoc Review Committee of the General Faculties Council

Keith Pridgen and Steven Pridgen (applicants) v. The University of Calgary (respondent)
(0901 12180; 2010 ABQB 644)

Indexed As: Pridgen v. University of Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary
Strekaf, J.
October 12, 2010.

Summary:

Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor. Both students were placed on probation. The students applied for judicial review to set aside the decision on various grounds, including that their s. 2(b) Charter right to freedom of expression was violated.

The Alberta Court of Queen's Bench allowed the application and quashed the Committee's decision. The Committee's decision violated the students' s. 2(b) Charter right to freedom of expression and was not a reasonable limit prescribed by law. Alternatively, the posted comments were not proved to constitute non-academic misconduct and the Committee failed to provide adequate reasons for its decision.

Administrative Law - Topic 549

The hearing and decision - Decisions of the tribunal - Reasons for decisions - Sufficiency of - Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor - Both students were placed on probation - The Alberta Court of Queen's Bench agreed with the students that the Committee did not provide adequate reasons for its decision - The court stated that "the reasons reproduce the definition of non-academic misconduct and outline the process, followed, the parties' positions and the materials presented to and considered by the Review Committee, however, there is no clear indication as to why, how or on what evidence the Review Committee reached its decision. While the Review Committee was clearly aware of the definition of non-academic misconduct, it failed to disclose why or how the comments posted on the Facebook Wall amounted to such conduct. ... The reasons given by the Review Committee are inadequate as they do not disclose the rationale for the decision but simply state a conclusion. ... The lack of any explanation as to how the Review Committee determined that the applicants' actions constituted non-academic misconduct makes meaningful review of its decision difficult." - See paragraphs 104 to 105.

Administrative Law - Topic 3342

Judicial review - General - Practice - Limitation period - Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor - Both students, placed on probation, applied for judicial review of the Committee's decision within the six month limitation period provided in rule 753.11 - However, it was well after the six month limitation period that the students raised, for the first time, arguments based on a denial of their Charter rights and the division of legislative powers - The University argued that the Charter and legislative powers arguments, not raised in the Originating Notice of Motion, were barred as out of time - The Alberta Court of Queen's Bench disagreed, stating that "there is no good reason why rule 753.11 should be interpreted as limiting the court's ability to hear arguments that go beyond the grounds listed in the Originating Notice by which the application for judicial review was commenced. The limitation analogy advanced by the [University] is not convincing as the Charter and division of legislative powers arguments do not constitute new causes of action, but rather simply represent additional reasons why the applicants argue the Review Committee's decision should be set aside." - See paragraphs 21 to 24.

Civil Rights - Topic 1843.4

Freedom of speech or expression - Limitations on - Postings on social networking websites - Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor - Both students, placed on probation, sought judicial review on the ground that the disciplinary action violated their s. 2(b) Charter right to freedom of expression - The Alberta Court of Queen's Bench stated that "I accept that the objectives of maintaining a learning environment where there is respect and dignity for all and in protecting its reputation as an institution are meritorious and accord with the values of a free and democratic society. However, I am satisfied that the measures adopted by the Review Committee of disciplining the applicants for making critical comments regarding Professor Mitra on the Facebook wall were excessive. ... Students should not be prevented from expressing critical opinions regarding the subject matter or quality of the teaching they are receiving. ... I do not find that the Review Committee's application of the Policy can be justified using a section 1 analysis. I am satisfied that the applicants' s. 2(b) Charter rights to free expression were infringed by the Review Committee's decisions, that such infringement cannot be justified under section 1 of the Charter and that these decisions must be set aside." - See paragraphs 70 to 83.

Civil Rights - Topic 8311

Canadian Charter of Rights and Freedoms - General - Application - Nongovernmental or private interference - Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor - Both students, placed on probation, sought judicial review on the ground that the disciplinary action violated their s. 2(b) Charter right to freedom of

expression - The Alberta Court of Queen's Bench held that the Charter applied to the University's disciplinary action - The court stated that "the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta ... The structure of the [Post-Secondary Learning] Act reveals that in providing post-secondary education, universities in Alberta carry out a specific government objective. Universities may be autonomous in their day-to-day operations, as both universities and hospitals were found to be when dealing with employment issues involving mandatory retirement, however, they act as the agent for the government in facilitating access to those post-secondary education services contemplated in the PSL Act ... When a university committee renders decisions which may impact, curtail or prevent participation in the post-secondary system or which would prevent the opportunity to participate in learning opportunities, it directly impacts the stated policy of providing an accessible educational system as entrusted to it under the PSL Act. The nature of these activities attracts Charter scrutiny. ... While the University is free to construct policies dealing with student behaviour which may ultimately impact access to the post-secondary system, the manner in which those policies are interpreted and applied must not offend the rights provided under the Charter." - See paragraphs 32 to 69.

Civil Rights - Topic 8348

Canadian Charter of Rights and Freedoms - Application - Exceptions - Reasonable limits prescribed by law (Charter, s. 1) - [See **Civil Rights - Topic 1843.4**].

Education - Topic 4093

Universities - Powers - Discipline - [See **Civil Rights - Topic 8311** and **Education - Topic 4510.1**].

Education - Topic 4263

Universities - Governing bodies - Board of governors - Disciplinary appeals - Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor - Both students were placed on probation - Section 31(1)(a) of the Post-Secondary Learning Act provided that the Committee, subject to an appeal to the Board of Governors, had the right to discipline students and the power to discipline included the power to impose fines, suspension or expulsion - The Board of Governors held that it had no jurisdiction to hear the students' appeal from being placed on probation, as s. 31(1)(a) limited appeals to fines, suspensions and expulsions - The Alberta Court of Queen's Bench disagreed, stating that "this interpretation is not consistent with a plain reading of the language contained in section 31(1). This section clearly provides a statutorily mandated right of appeal to the board of governors of a university from any discipline imposed by the general faculties council ("GFC"), not merely a right of appeal from discipline which resulted in fines, suspensions or expulsions. ... If the GFC has the statutory authority to impose a form of discipline, the exercise of such authority is subject to a right of appeal to the board of governors" - See paragraph 91.

Education - Topic 4510.1

Universities - Students - Non-academic misconduct - Two University of Calgary undergraduate students were found guilty of non-academic misconduct by the University's General Faculties Council Review Committee for posting negative comments on a Facebook "Wall" dedicated to an unpopular professor - Both students were placed on probation - The Alberta Court of Queen's Bench quashed the decision, as the Committee's finding of non-academic misconduct was unreasonable - The issue was whether the statements on the posts "injured" the professor - As the professor did not testify at the hearing, there was no direct evidence of injury - The only evidence of injury was hearsay and second-hand hearsay - Where "injury" was the very issue to be determined, it could not be presumed - It had to be proved - The court stated that "there was no reasonable basis, having regard to the evidence before the Review Committee, that would support the conclusion that the comments made by each of the applicants on the Facebook Wall caused injury to Professor Mitra and that their conduct constituted non-academic misconduct within the meaning of the Policy." - See paragraphs 107 to 114.

Cases Noticed:

Athabasca Chipewyan First Nation v. Alberta (Minister of Energy) et al. (2009), 481 A.R. 270; 13 Alta. L.R.(5th) 352; 2009 ABQB 576, dist. [para. 23].

Johannesson v. Workers' Compensation Board Appeals Commission (Alta.) (1995), 175 A.R. 34 (Q.B.), dist. [para. 23].

Trang et al. v. Edmonton Remand Centre (Director) et al. (2005), 363 A.R. 167; 343 W.A.C. 167; 2005 ABCA 66, reld to. [para. 28].

New Brunswick (Board of Management) v. Dunsmuir, [2008] 1 S.C.R. 190; 372 N.R. 1; 329 N.B.R.(2d) 1; 844 A.P.R. 1; 2008 SCC 9, reld to. [para. 29].

Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580, Peterson and Alexander, [1986] 2 S.C.R. 573; 71 N.R. 83, reld to. [para. 34].

McKinney v. University of Guelph et al., [1990] 3 S.C.R. 229; 118 N.R. 1; 45 O.A.C. 1, reld to. [para. 35].

Eldridge et al. v. British Columbia (Attorney General) et al., [1997] 3 S.C.R. 624; 218 N.R. 161; 96 B.C.A.C. 81; 155 W.A.C. 81, reld to. [para. 42].

Stoffman et al. v. Vancouver General Hospital et al, [1990] 3 S.C.R. 483; 118 N.R. 241, reld to. [para. 42].

R. v. Whatcott (W.) (2002), 225 Sask.R. 205; 2002 SKQB 399, dist. [para. 52].

Freeman-Maloy v. Marsden et al., [2005] O.T.C. 340; 253 D.L.R.(4th) 728 (Sup. Ct.), affd. (2006), 208 O.A.C. 307; 267 D.L.R.(4th) 37 (C.A.), dist. [para. 64].

Freeman-Maloy v. York University - see Freeman-Maloy v. Marsden et al.

Ramdath et al. v. Brown (George) College of Applied Arts and Technology, [2010] O.T.C. Uned. 2019; 2010 ONSC 2019, dist. [para. 66].

Attis v. Board of Education of District No. 15 et al., [1996] 1 S.C.R. 825; 195 N.R. 81; 171 N.B.R.(2d) 321; 437 A.P.R. 321, reld to. [para. 72].

Ross v. New Brunswick School District No. 15 - see Attis v. Board of Education of District No. 15 et al.

Irwin Toy Ltd. v. Québec (Procureur général), [1989] 1 S.C.R. 927; 94 N.R. 167; 24 Q.A.C. 2, reld to. [para. 73].

R. v. Oakes, [1986] 1 S.C.R. 103; 65 N.R. 87; 14 O.A.C. 335, reld to. [para. 78].

McNeil v. Nova Scotia Board of Censors, [1978] 2 S.C.R. 662; 19 N.R. 570; 25 N.S.R.(2d)

128; 36 A.P.R. 128, refd to. [para. 85].
Ontario (Attorney General) v. Chatterjee, [2009] 1 S.C.R. 624; 387 N.R. 206; 249 O.A.C. 355; 2009 SCC 19, refd to. [para. 85].
Canadian Western Bank et al. v. Alberta, [2007] 2 S.C.R. 3; 362 N.R. 111; 409 A.R. 207; 402 W.A.C. 207; 2007 SCC 22, refd to. [para. 85].
City National Leasing Ltd. v. General Motors of Canada Ltd., [1989] 1 S.C.R. 641; 93 N.R. 326; 32 O.A.C. 332, refd to. [para. 88].
Williams v. University of British Columbia, [2007] B.C.T.C. Uned. 544; 2007 BCSC 996, refd to. [para. 96].
Ironside et al. v. Alberta Securities Commission (2009), 454 A.R. 285; 455 W.A.C. 285; 2009 ABCA 134, refd to. [para. 97].
Carlin v. Registered Psychiatric Nurses' Association of Alberta (1996), 186 A.R. 186; 39 Admin. L.R.(2d) 177 (Q.B.), refd to. [para. 97].
Amalgamated Transit Union, Local 113 v. Labour Relations Board (Ont.) et al. (2007), 233 O.A.C. 14; 88 O.R.(3d) 361 (Div. Ct.), refd to. [para. 97].
Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; 243 N.R. 22, refd to. [para. 101].
BP Canada Energy Co. v. Energy and Utilities Board (Alta.), [2003] A.R. Uned. 584; 6 Admin. L.R.(4th) 163; 2003 ABCA 285, refd to. [para. 103].

Statutes Noticed:

Post-Secondary Learning Act, S.A. 2003, c. P-19.5, sect. 31(1) [para. 17].
Rules of Court (Alta.), rule 753.11 [para. 21].

Authors and Works Noticed:

Hogg, Peter W., Constitutional Law of Canada (5th Ed.) (2007 Looseleaf Supp.), pp. 57-1 to 57-3 [para. 87].

Counsel:

Timothy J. Boyle (Spier Harben), for the applicants;
Kevin E. Barr (MacLeod Dixon LLP), for the respondent.

This application was heard on June 11, 2010, before Strekaf, J., of the Alberta Court of Queen's Bench, Judicial District of Calgary, who delivered the following judgment on October 12, 2010.