In the Court of Appeal of Alberta

Citation: Pridgen v. University of Calgary, 2012 ABCA 139

Date: 20120509
Docket: 1001-0298-AC
Registry: Calgary

Between:

Keith Pridgen and Steven Pridgen

Respondents
(Applicants)

- and -

The University of Calgary

Appellant
(Respondent)

- and -

Association of Universities and Colleges of Canada, Canadian Civil Liberties Association and The Governors of the University of Alberta

Interveners

Corrected judgment: A corrigendum was issued on May 9, 2012; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Mr. Justice Brian O'Ferrall

Reasons for Judgment Reserved of
The Honourable Madam Justice Paperny

I. Introduction

[1] Are students at public universities entitled to use social networking to criticize the instruction they receive? The University of Calgary (the University) said "no", and disciplined the students who did. The students sought judicial review, arguing the University acted unreasonably and infringed their right to freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The chambers judge agreed with the students. The University appeals, arguing that its students do not have the right to freedom of expression because the *Charter* does not apply to it or to universities generally.

[2] This appeal raises an important issue, namely whether a university campus is a *Charter*-free zone. In arguing that the *Charter* does not apply to it, the University relies on two concepts which it says immunize it from the scrutiny of the *Charter*, institutional independence and academic freedom; two concepts that, it says, effectively shield universities from government or other outside influences, including the obligation to protect *Charter* rights.

[3] There are two aspects to the appeal. The first is an administrative law challenge to the reasonableness of the University's decision to impose disciplinary sanctions on these students in the circumstances.

[4] The second aspect, and the one which is of particular concern to the University and the interveners supporting it (the Association of Universities and Colleges of Canada and The Governors of the University of Alberta), is whether the University is obliged to consider the *Charter* rights of students in disciplinary proceedings. They argue that the Supreme Court of Canada's decision in *McKinney v University of Guelph*, [1990] 3 SCR 229, 76 DLR (4th) 545, definitively precludes the application of the *Charter* to public universities. I do not read *McKinney* this way. There are many routes by which the *Charter* can apply to non-governmental bodies. The jurisprudence on section 32, including *McKinney*, does not, in my view, preclude the application of the *Charter* to universities in all circumstances.

II. Background

i. The Impugned Conduct

[5] The facts and the history of the proceedings are germane to the analysis of both issues on appeal. Accordingly, they are set out in considerable detail. In the fall of 2007, the respondents, twin brothers Keith and Steven Pridgen, were full time undergraduate students at the University. Both were enrolled in "Law and Society" (LWSO), a legal survey course offered by the Faculty of Communication and Culture. Professor Aruna Mitra was teaching the course for the first time. The

implementing "government policy". These are matters of statutory interpretation and legal argument, not evidence. The parties were given an opportunity to argue the constitutional issues both orally and in subsequent written submissions to the chambers judge. As Professor Hogg has noted in his *Constitutional Law of Canada*, 5th ed, at p 59-22:

> If a constitutional issue has in fact been fully argued on the basis of an adequate factual record, and if the issue is likely to recur, there is much to be said for deciding the issue then and there, even if the case could be disposed of on a non-constitutional or narrower constitutional basis.

[64] Following argument on all the constitutional issues, the chambers judge concluded that the actions taken by Dean Tettey and the Review Committee violated the Pridgens' fundamental right under section 2(b) to freedom of expression, and that this infringement could not be justified under section 1 of the *Charter*. The University did not dispute those conclusions at the appeal. The only live constitutional issue on appeal, whether the *Charter* applies to the University's actions at all, was fully argued before us by both the University and the Pridgens. It was also argued at some length, both orally and in writing, by three interested parties, the Association of Universities and Colleges of Canada, the Canadian Civil Liberties Association, and the Governors of the University of Alberta, all of whom were granted leave to intervene on the appeal for the sole purpose of addressing the applicability of the *Charter*. It is neither appropriate nor necessary for this Court to now decline to determine the issue. Nor would it be appropriate to remit the question of *Charter* applicability, a legal question, to the Review Committee or to the University's Board of Governors for determination. Deciding the issue now will settle the question and render future relitigation unnecessary.

[65] The University argues that the Supreme Court of Canada's 1990 decision in *McKinney v University of Guelph*, is the final word on the issue of *Charter* applicability. It says that, pursuant to *McKinney*, universities are not part of government and that the *Charter* therefore has no application on university campuses or to a university's relationship with its students. In my view, the decision in *McKinney* and the requisite analysis do not make the answer that simple or obvious.

[66] *McKinney* did not rule out *Charter* applicability on university campuses for all purposes. The issue in that case was whether the University of Guelph had infringed the section 15 rights of its employees by imposing mandatory retirement at age 65 on professors. It did not deal, as does this case, with the imposition of discipline or the relationship between university administration and students. The majority of the seven-member panel in *McKinney* concluded that the professors' *Charter* rights had not been infringed, although the various decisions reach that conclusion by different routes. The classification of the activities of the universities as "governmental" or not was divided. LaForest J., writing for himself and two others, held that the university was not "government" for purposes of section 32 and that accordingly, the *Charter* does not apply to its activities. Two other justices (L'Heureux-Dubé and Sopinka JJ., writing independently) agreed that the university's activities in its relationships with its employees could not be considered governmental, and that therefore the *Charter* did not apply to proscribe the university's mandatory retirement policy. All three decisions, however, acknowledged that certain activities of universities could be considered governmental in nature, such that they would attract *Charter* scrutiny.

[67] For example, LaForest J. said, at para 42:

> ... There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.

[68] L'Heureux-Dubé J. said, at para 371: "... while universities may perform certain public functions that could attract *Charter* review, I am able to accept that the hiring and firing of their employees are not properly included within this category".

[69] Sopinka J. said, at para 436:

> I would not go so far as to say that none of the activities of a university are governmental in nature. For the reasons given by my colleague, I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to the *Charter*. This applies a fortiori to the university's relations with its staff which in the case of those in these appeals are on a consensual basis.

[70] Justice Wilson, with whom Justice Cory agreed, wrote a dissenting judgment in *McKinney* and would have found that the university was "government" for purposes of the application of the *Charter*, based on the following conclusions, at para 273:

> ... the fact that the universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of "government" for purposes of section 32.

[71] We must, in my view, look beyond *McKinney* to fully address the issue raised in this appeal.

[72] Since the enactment of the *Charter*, courts have struggled to find a conceptual framework for the determination of when and to whom it applies. The law has developed somewhat idiosyncratically and the various frameworks do not always fit comfortably with one another. However, there has always been widespread agreement among Canadian jurists and legal commentators that, at the least, the *Charter's* purpose is to protect individual autonomy and freedom from the coercive power of the state. In *McKinney* at para 22, LaForest J. noted:

> Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

But that is far from the end of the matter.

[73] Section 32(1) of the *Charter* states that it applies to the "Parliament and government of Canada" and to the "legislature and government of each province" in respect of all matters within their respective legislative authority. The Supreme Court of Canada has interpreted this section to mean that the *Charter* applies only to government actors and government action, and not to purely private activity: *RWSDU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174. The Court cautioned against a narrow definition of government action. McIntyre J., writing for the majority, stated at para 45 that "it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on the *Charter* by private litigants in private litigation". He went on to note that the *Charter* would apply to "many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures," and that "[w]here such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable": *Dolphin Delivery* at para 46.

[74] The jurisprudence in the 25 years since *Dolphin Delivery* bears this out. *Charter* applicability stretches well beyond a narrow conception of "government" as enactor of coercive laws. Wilson J., in her dissent in *McKinney*, also resisted viewing government action narrowly, noting at para 189 that "the concept of government as oppressor of the people and the function of government as the enactment of 'coercive laws' is no longer valid in Canada, if indeed it ever was". She argued that, given Canada's political and legislative history, governmental action must be viewed more broadly. She said, at para 220:

> ... a concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action." Governments act today through many different instrumentalities depending upon their suitability for attaining the objectives governments seek to attain. The realities of the modern state place government in many different roles vis-a-vis its citizens, some of which cannot be effected, or cannot be best and most efficiently effected, directly by the apparatus of government itself. We should not place form ahead of substance and permit the provisions of the *Charter* to be circumvented by the simple expedient of creating a separate entity and having it perform the role. We must, in my opinion, examine the nature of the relationship between that entity and government in order to decide whether when it acts it truly is 'government' which is acting.

[75] In *Lavigne v OPSEU*, [1991] 2 SCR 211 LaForest J., who had earlier authored the majority judgment in *McKinney*, embraced a similarly broad view and wrote:

> We no longer expect government to simply be a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. ... To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

[76] The reality and complexity of modern government has led to a plethora of jurisprudence

[88] Professor Hogg points out that in many (although not all) of the cases where the *Charter* has been found to apply to non-governmental actors, the entity in question is exercising a power of compulsion delegated to it by statute; that is, the statutory delegate is exercising some form of coercive power that belongs to government alone and that is not exercisable by a private individual or organization. He says, at 37-13 of his *Constitutional Law of Canada*, 5th ed supp:

> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

[89] On this basis the *Charter* has been applied, for example, to the power of a Human Rights Commission to compel documents: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307. At paras 37-38, Bastarache J. held:

> One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed), vol 2, at p 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the *Code* specifically allows the Commissioner to compel the production of documents.
>
> [...]
>
> The Commission in this case cannot therefore escape *Charter* scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by the *Charter* since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program *and exercising powers of statutory compulsion.*
>
> (emphasis added)

[90] There are many other examples of bodies exercising powers of statutory compulsion. A similar analysis has led to the application of the *Charter* to a university in the creation and enforcement of parking bylaws prohibiting the distribution of pamphlets (*R v Whatcott*, 2002 SKQB 399), and to a first nation purporting to prevent band members from protesting at the band council office (*Horse Lake First Nation v Horseman*, 2003 ABQB 152). In both cases, it was noted that the body's authority to govern and regulate the activity in question, where it was greater in scope than the authority of a private citizen or corporation, was derived from statute.

[91] Where a statutory authority is being exercised, the *Charter* will apply not only to rules and regulations enacted pursuant to that authority, but also to the application and interpretation of those rules in making decisions: *Slaight Communications.* At 1077-78 of that case, Lamer J. articulated the principle as follows (quoted with approval recently by Bastarache J. in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v Canada*, 2008 SCC 15, [2008] 1 SCR 383 at para 20):

> *The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question.* The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, *it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter*, unless, of course, that power is expressly conferred or necessarily implied .... *Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter, and he exceeds his jurisdiction if he does so.*
>
> (emphasis of Bastarache J.)

[92] Professional bodies also exercise statutory powers in the regulation of their members. This is a subset of cases that I find to be of particular relevance to the case before us. The *Charter* has often been held to apply to the rules, policies and decisions of bodies that affect the autonomy and livelihood of regulated individuals. Unlike the internal affairs of a purely private organization, the regulation of a profession often has a public dimension as, for example, in affecting the manner in which the professional may interact with the public through advertising. There are many examples of cases where a public aspect to regulation or disciplinary proceedings have led courts to conclude that limits placed on the regulated individual's freedom of expression and association are subject to the *Charter*: see *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232; *Costco Wholesale Canada Ltd. v British Columbia Association of Optometrists* (1998), 55 BCLR 253 (BCSC); *Bratt v British Columbia Veterinary Medical Assn.* (1999), 19 Admin LR (3d) 81 (BCSC); *Histed v Law Society of Manitoba*, 2007 MBCA 150; *Whatcott v Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6, 289 DLR (4th) 506.

[93] In a limited number of cases, where the matter in issue has only internal effect and is without public dimension, the *Charter* has been held to be inapplicable to professional regulators: see, for example, *Tomen v FWTAO* (1987), 43 DLR (4th) 255 (Ont. H.C.), aff'd (1989), 61 DLR (4th) 565 (CA), where a by-law of the Ontario Teachers' Federation requiring membership in a particular sub-section was said to affect only members of the organization; and *Keenan v Certified General Accountants Association of British Columbia*, [1999] BCJ No. 351, 12 Admin LR (3d) 199 (BCSC), where a pre-hearing investigation into a member's conduct was said to be directed to an "entirely internal purpose". This has been contrasted with regulatory decisions that attempt to restrict mobility rights (*Black v Law Society of Alberta*, [1989] 1 SCR 591), freedom of expression in advertising (*Re Klein and Law Society of Upper Canada* (1985), 50 OR (2d) 118 (Div. Ct.) and *Rocket v Royal College of Dental Surgeons of Ontario*), and the manner in which the regulated individual may

interact with the public and other organizations (*Costco* and *Bratt*). In all the latter circumstances, the actions of the regulator, and the activities it purports to regulate or restrict, have a public dimension to which the *Charter* should apply.

5. Non-governmental bodies implementing government objectives*: Eldridge v British Columbia (Attorney General)*

[94] Like Professor Hogg, I conclude that the "statutory compulsion" category captures many of the governmental activities performed by non-governmental entities. Arguably, it does not capture all of the instances of delegation of governmental activities, particularly where there is no obvious element of "compulsion" involved. It seems to me that the Supreme Court of Canada decision in *Eldridge*, described in this section, was an attempt to close that gap.

[95] In *Eldridge*, LaForest J. concluded that, in providing the medical services specified in the *Hospital Insurance Act*, hospitals are undertaking a "governmental" act; in providing medically necessary services, the hospital is carrying out a specific governmental objective and is subject to *Charter* scrutiny in the manner in which it carries out that objective. Importantly, no coercive power of the state was at play.

[96] The rationale for extending the reach of the *Charter* in this way flows from the principle that Parliament and the legislatures should not be able to avoid their constitutional obligations by delegating their authority or the implementation of their policies and programs to non-governmental entities. As LaForest J. explained at para 42:

> Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other 'private' arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

[97] He went on to refer to his earlier decision in *Slaight Communications*, in which the actions of a labour arbitrator attracted *Charter* scrutiny, noting:

> Although the arbitrator in *Slaight* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor.

[98] In concluding that the *Charter* should apply to hospitals with respect to some of their "governmental" activities, LaForest J. distinguished the activity in question from that at issue in *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, which, similar to *McKinney*, dealt with mandatory retirement provisions being imposed on hospital employees. He characterized the hospital's mandatory retirement policy as "a matter of internal hospital management". In contrast, the delivery of medical services was characterized as a public matter, defined and structured by government, to which the *Charter* should apply.

Conclusion on the classification of section 32 jurisprudence

[99] The five categories of cases identified above illustrate the factors that may lead a court to classify an entity as "governmental", either in and of itself or in some of its activities, for the purposes of section 32 of the *Charter*. This classification is neither exhaustive nor closed. Nor do the categories operate as independent silos; a particular entity or its activities may have elements of one or more of them. For example, in *Blencoe*, the Supreme Court concluded that the Human Rights Commission was both exercising statutory powers of compulsion *and* implementing a specific government program. In *Greater Vancouver Transit Authority*, the corporations in question were characterized as government actors but, as Professor Hogg points out, it is also possible to view them as exercising powers of statutory compulsion. Less obvious cases may require a court to consider and weigh all of the factors to determine if the *Charter* should apply.

b. Application to this case

[100] In my view, the decision in *Eldridge* was a move towards clarifying the broad statements in *Stoffman* and *McKinney* that could be interpreted as insulating some entities, like hospitals and universities, from the *Charter* with respect to all of their activities, even those that have significant public consequences. The ultimate conclusion in *Eldridge*, that otherwise private entities will be subject to *Charter* review if they are involved in governmental activities, such as "the implementation of a specific statutory scheme or governmental program", could reasonably be found to apply to any number of government policies and programs being administered by agencies, bodies and institutions of various types, public and private. Interestingly, this approach has rarely been applied since.

[101] The chambers judge applied it here to find that the provision of post-secondary education is a specific objective of the Alberta legislature, which led her to the conclusion that universities are acting as government agents in regard to the delivery of post-secondary education. She stated at para 59 of her reasons:

> In my view, the circumstances in this case are analogous to those in *Eldridge* as the University is acting as the agent of the provincial government in providing accessible post-secondary education services to students in Alberta pursuant to the provisions of the *PSL Act*.

[102] She held further at para 63:

> ... I find that the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta, thus bringing the facts of this case into line with *Eldridge*. The structure of the *PSL 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*, just as the hospitals in *Eldridge* were found to be acting as the agent for the government in providing medical services under the *Hospital Insurance Act*, RSBC 1979, c 180 (now RSBC 1996, c 204).

[103] This is a logical approach. On the basis of the *Eldridge* analysis, the provision of post-secondary education by universities is not dissimilar from the provision of medical services by hospitals. As Wilson J. noted in dissent in *McKinney*, "education at every level has been a traditional function of governments in Canada." She stated at para 272:

> It is beyond dispute that the universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed. ... Moreover, justification for state activity in this area is not hard to find. The state's interest in education in today's society does not and cannot stop at the point of ensuring basic literacy. The promotion of higher learning and the provision of access to opportunities for study at this level is clearly in the public interest. The state readily acknowledges the important role universities play not only in the education of our young people but also more generally in the advancement and free exchange of ideas in our society.

[104] That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed. The rather more fine distinction the University seeks to draw here is that it is not a "specific governmental objective", which it says *Eldridge* requires. I find this distinction to be without merit. *Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSL Act*, while couched in broad terms, are tangible and clear.

[105] Applying the *Eldridge* analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion. The issue is whether in disciplining students pursuant to authority granted under the *PSL Act*, the University must be *Charter* compliant. The statutory authority includes the power to impose serious sanctions that go beyond the authority held by private individuals or organizations. Those sanctions include the power to fine, the power to suspend a student's right to attend the university, and the power to expel students from the university: *PSL Act*, section 31. Accordingly, *Charter* protection for students' fundamental freedoms, including freedom of expression, applies in these circumstances. This goes to the fundamental purpose of the *Charter* as noted by Wilson J. at 222 of her dissent in *McKinney*, where she stated that those who enacted the *Charter* "were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role".

[106] The University argues that student discipline is an internal matter and a matter of contract, and that it is not "governmental" in nature, relying on the decision of *Freeman-Maloy v York University* (2005), 253 DLR (4th) 728 (Ont. SCJ); aff'd 2008 OAC 307, 267 DLR (4th) 37. The issue in that case was whether the president of a university was a "public officer" who could be sued

for misfeasance of public office. As a subsidiary issue, the court relied on *McKinney* to conclude that the university was independent of government for purposes of student discipline. There was no direct *Charter* challenge to the discipline imposed, as we have in this case, and a full section 32 analysis was not conducted. It does not appear that *Eldridge* was considered.

[107] I do not accept the characterization of the University's relationship with its students as a purely contractual matter, particularly when it comes to discipline for non-academic misconduct. The argument ignores the fact that the legislature has seen fit to expressly authorize sanctions for student discipline in the legislation establishing the University. The University could impose such discipline regardless of, or in addition to, any consent by or contractual relationship with the student (assuming one exists). Moreover, the regulation of student speech in the context of non-academic misconduct is not merely an internal matter. It is, in my view, analogous to the regulation of expression by professional regulatory bodies.

[108] As in the professional discipline cases reviewed earlier, the actions of the General Faculties Council and its delegate, the Review Committee, in disciplining students for their public comments are not solely private or internal in nature. The relationship between a university and its students, at least when it comes to misconduct of a non-academic nature, has a public dimension that is missing in purely private situations. Student opinions about the quality of education they are receiving and comments regarding a particular course are of obvious interest to current and future students of the institution and to the standing of that institution in the academic world. That expression has as much a public dimension as does advertising for dental services (*Rocket*) or the manner in which veterinarians may hold themselves out to the public (*Bratt*). Moreover, the regulation of non-academic misconduct on a university campus ensures a standard of behaviour in a public institution for the benefit of the public generally, not just for some narrow and arguably outdated conception of a community of scholars. A public university is neither a private club nor a true private corporation; it does not exist purely for or within itself. Rather it a place for advanced learning, study, research, dialogue and discussion for the benefit of society as a whole.

[109] Moreover, access to post-secondary education is a pressing public concern. The sanctions available to the Review Committee here, which include denial of access to public post-secondary education for the affected students, can have consequences as serious for one's ability to practice in one's chosen field as the actions of a professional regulator. In the case of many professional schools, such as medicine, dentistry or law, the university acts as gatekeeper to the profession as much as any regulatory body.

[110] Some of the professional discipline cases (such as *Rocket*) involved challenges to the validity of rules purporting to regulate expression directly. In this case, of course, the *Charter* challenge is not to the validity of the legislation nor to the University's Student Misconduct Policy, but rather to the manner in which that Policy has been interpreted and applied. But it is equally the case that rules that are constitutionally valid on their face must not be applied in a way that violates the *Charter*, "since a body exercising authority on behalf of, or as a delagatee of, the state is bound by the *Charter* as though it were government": *Histed* at para 84, citing *Slaight Communications* and Cameron, "Back to Fundamentals: Multidisciplinary Partnerships and Freedom of Association under section 2(d) of the Charter" (2000), 50 UTLJ 261 at p 266.

[111] In *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256, Charron J., in majority reasons, made it clear that the discretionary decision of a statutory delegate would be constitutionally invalid if the discretion was exercised in a way that infringed a person's freedom of expression under the *Charter*. The same principle was applied by the Saskatchewan Court of Appeal recently in reviewing the constitutionality of a finding of professional misconduct made by a nursing body against a member for words publicly expressed against Planned Parenthood in his personal time: *Whatcott v Saskatchewan Assn of Licensed Practical Nurses*, 2008 SKCA 6, 289 DLR (4th) 506. In *Whatcott*, the Committee's decision denied the member "the ability both to express himself in the way he has chosen and to work". The decision was found to have breached Mr. Whatcott's freedom of expression in a way that could not be justified under section 1 of the *Charter*.

[112] The same principle is applicable here. In exercising its statutory authority to discipline students for non-academic misconduct, it is incumbent on the Review Committee to interpret and apply the Student Misconduct Policy in light of the students' *Charter* rights, including their freedom of expression.

c. Academic Freedom, Institutional Autonomy and section 1 of the *Charter*

[113] I reject the argument by the University, supported by the intervener Association of Universities and Colleges of Canada, that the application of the *Charter* in these circumstances undermines or threatens the University's academic freedom or institutional autonomy. Academic freedom, as that idea has come to be understood, is an important value in Canadian society. LaForest J. in *McKinney* described it as the "free and fearless search for knowledge and the propagation of ideas" (para 62), that is "essential to our continuance as a lively democracy" (para 69). But, it does not follow that it trumps freedom of expression. The Supreme Court of Canada has described the purpose of the section 2(b) guarantee of free expression "to promote truth, political and social participation, and self-fulfilment" (*Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 at para 59), and has commented that "[i]t is difficult to imagine a guaranteed right more important to a democratic society": *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at p 1336.

[114] Academic freedom and freedom of expression are not conceptually competing values. Freedom of expression, of course, is guaranteed to all Canadians. Academic freedom is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution. It has also been described as having an aspect of academic self-rule – the right of academic staff to participate in academic decisions of the university, and, more broadly, an aspect of institutional autonomy – the right of the institution to make decisions, at least with respect to academic matters, free from government interference: see Eric Barendt, *Academic Freedom and the Law* (Oxford: Hart Publishing, 2010) at pp 23-34.

[115] Academic freedom and freedom of expression are inextricably linked. There is an obvious element of free expression in the protection of academic freedom, whether limited to the traditional

conception of academic freedom as protecting the individual academic professional, or applied more broadly to promote discussion in the university community as a whole. Interestingly, the protection of free speech on campus is not universally seen as a threat to academic freedom. The United States Supreme Court has linked the two concepts, noting that:

> ... state colleges and universities are not enclave immune from the sweep of the First Amendment. ... the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. ... The college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas', and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.: *Healy v James*, 408 U.S. 169 (1972) at 180.

[116] The United Kingdom has also recognized the obligation of universities to promote freedom of speech on campus. The *Education (No. 2) Act 1986* imposes an obligation on universities and colleges to take the steps that "are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers": section 43(1), quoted in Barendt, 2005, at 501.

[117] In my view, there is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist. That said, if circumstances arise where these values actually collide, a section 1 analysis would be required to properly balance them. That circumstance does not arise in this case.

[118] A pressing concern of the University and of the interveners supporting it is to protect their institutional autonomy and remain free of government interference in core academic functions. The university community actively resists control by government and therefore claims not to be a government actor for any purpose, leading to the conclusion that the *Charter* does not apply to any of its activities. This appears to be a backwards approach. It equates the application of the *Charter* with a lack of autonomy and independence from government control. The two are not synonymous. As has been seen, there are many routes to *Charter* applicability; government control is only one. The following statement from the decision of Bastarache J. at para 34 of *Blencoe* is instructive:

> The mere fact that a body is independent of government is not determinative of the *Charter*'s application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that the *Charter* does not apply.

[119] In my view, the converse is also true. Being obliged to respect the *Charter* in disciplinary proceedings does not mean that the University loses its autonomy or independence from government in other respects, particularly when it comes to its core academic functions.

Reasons for Judgment Reserved of
The Honourable Mr. Justice O'Ferrall
Concurring in the Result

[178] I agree with my colleagues that the appeal must be dismissed. I also agree that the decision of the Review Committee of the General Faculties Council was unreasonable. It was unreasonable for any number of reasons identified by the chambers judge and by my colleagues on the panel.

[179] One of the reasons I believe the decision was unreasonable was that no consideration was given to the students' rights to freedom of expression and freedom of association. However, in my view, the issue in this case is not whether the University is a "*Charter*-free zone". The issue is simply whether, in disciplining the students for their comments or for their association with the social media site which was critical of one of the University's sessional lecturers, the University's disciplinary body, the General Faculties Council, ought to have considered whether its discipline violated the students' rights to freedom of expression and freedom of association.

[180] Freedom of expression and freedom of association have enjoyed legal protection in this country long before the *Charter* was promulgated. Civil liberties are protected in various ways. The *Charter* is one of them. The common law is another. One of the ways the common law protects civil liberties is to give citizens the right to apply for the administrative law remedies which are available when those citizens have been aggrieved by illegal or unauthorized official action. These were the remedies sought in this case. There were no applications for *Charter* declarations or *Charter* remedies in this case. The students simply applied for the administrative law remedy of an order setting aside the General Faculties Council Review Committee's decision. One of their grounds was that their freedom of expression was protected by the Alberta *Bill of Rights*.

[181] While civil liberties enjoy protection, they also must be balanced against other recognized values. This case is an example. In discharging its "core function" (that of educating students), it may be that the University may properly discipline students in ways which have the effect of limiting their freedom of expression and association. But when student discipline has the effect of limiting the students' civil liberties, there must be evidence that the disciplinary body at least considered the students' civil liberties and then balanced them against the value or values which limiting the students' freedom was intended to protect.

[182] The General Faculties Council Review Committee's decision was clearly unreasonable because no consideration appears to have been given to the possibility that the students' postings and/or their association with the social media site might be protected by their rights to freedom of expression and association. In addition to that failure, the students were denied their statutory right to appeal the General Faculties Council Review Committee's decision to the Board of Governors of the University.