STATUS CHANGE: ADRESSING SECTION 32 OF THE CHARTER, UNIVERSITY DISCIPLINARY POWERS, AND THE SUPREME COURT IN LIGHT OF PRIDGEN V UNIVERSITY OF CALGARY

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I. INTRODUCTION

Are university affairs ever open to Charter scrutiny, particularly in matters of student discipline? This was one of the key questions raised, though not conclusively decided, in Pridgen v University of Calgary. This question, in an era of political polarization and mass mobilization on university campuses, directly affects Canada’s roughly two million post-secondary students.

The Pridgen ABCA case takes on a greater significance when considered in the context of the public confusion as to whether the Charter binds universities. Media reports on the decision from the Court of Appeal of Alberta in Pridgen ABCA inferred that the court definitively addressed whether the Charter applies to university affairs generally. For example, in May 2012, the National Post declared that “[u]niversities are beholden to Canada’s Charter of Rights and Freedoms, appeal court rules.” This failure to capture the realities of the decision creates further confusion, especially as various universities exercise disciplinary and administrative powers that could arguably breach the Charter.

Headlines like those in the National Post obscure the fact that only Justice Paperny, one of three judges who heard Pridgen ABCA, answered unequivocally the Charter applicability question. Justice Paperny concluded that the Charter’s application of section 32 extends to a university’s student disciplinary proceedings, where the proceedings depend on the university’s exercise of a delegated statutory power of compulsion. For separate reasons, Justices McDonald and O’Ferrall declined to answer the Charter question despite the extensive reasons by Justice Strekaf of the Court of Queen’s Bench of Alberta.

We begin by reviewing the facts and reasoning in both the Court of Queen’s Bench of Alberta and the Court of Appeal of Alberta decisions, with exclusive emphasis on their section 32 treatment. Against this backdrop, we argue that despite Justice Paperny’s well-reasoned section 32 analysis, her decision’s relative legal and public obscurity, coupled with the broad

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2 2012 ABCA 139 (CanLII) at para 4, 350 DLR (4th) 1 [Pridgen ABCA].
3 “Tuition fees: the higher cost of higher education”, CBC News (1 September 2006), online: <www.cbc.ca>.
6 Pridgen ABCA, supra note 2 at paras 99, 112, 128.
7 Ibid at paras 176, 180.
8 Pridgen v University of Calgary, 2010 ABQB 644 at 32-69 (CanLII), 479 AR 219 [Pridgen ABQB].
individual and institutional interests at stake in deciding this question, suggest a need for the Supreme Court of Canada to rectify its ambiguous interpretation of section 32 in McKinney v University of Guelph. McKinney remains the starting point for Canadian courts faced with claims at the intersection of university affairs and the Charter. This paper attempts to demonstrate an interpretive cleavage in section 32 jurisprudence surrounding universities’ exercise of disciplinary powers by contrasting the opinions expressed within the Pridgen ABCA case and the narrow application of section 32 by other courts across the country, particularly in Ontario.

In supporting our argument, we suggest the trouble left by McKinney and its companion cases is that they permit an uneven provincial application of the Charter to post-secondary students facing university disciplinary actions. We illustrate this process by distinguishing Pridgen ABCA from several recent Ontario and Alberta decisions. Building on this analysis, we submit that the difficulties universities currently face in applying administrative law principles to their complex student disciplinary procedures further necessitates clarity from the Supreme Court. We thus highlight some of these administrative difficulties as added support for our conclusion that the Charter remains a needed last resort for university students fighting non-academic misconduct charges that risk infringing their civil liberties.

II. THE PRIDGEN BROTHERS’ NON-ACADEMIC MISCONDUCT AND THE TRIAL DECISION

In 2007, the plaintiffs, brothers Keith and Steven Pridgen, were full-time University of Calgary undergraduate students who joined a Facebook group called “I NO Longer Fear Hell, I Took a Course with Aruna Mitra.” Each brother made only one post to the group’s wall. Their posts respectively questioned Professor Mitra’s marking strategy and celebrated news of her teaching contract having come to an end.

In September 2008, Ms. Mitra, no longer employed with the University, complained about the Facebook page to Dean Tettey, interim dean of the Faculty of Communication and Culture. Dean Tettey commenced disciplinary action against the Pridgen brothers and other Facebook group members for non-academic misconduct. At the conclusion of University disciplinary proceedings, which were held pursuant to provisions of the Alberta Post-Secondary Learning Act, the Dean found all members of the Facebook group to have participated in non-academic misconduct, and academic sanctions, including probationary periods, were issued. The brothers’ eventual appeals to the General Faculties Council Review Committee (Review Committee) failed and the Review Committee denied the brothers’ rights to further appeal to the Board of Governors. The Pridgens then applied for judicial review of this refusal on both administrative and Charter grounds.

At the trial level, Justice Strekaf of the Court of Queen’s Bench of Alberta supported the brothers’ appeal on both grounds and quashed the Review Committee’s decision. Specifically,
Justice Strekaf concluded that the reasons for the decision provided by the Review Committee were not adequate, thus rendering their decision unreasonable under administrative law principles. It was held that the Charter applied to the University’s disciplinary proceedings, that the Review Committee’s decision infringed the Pridgens’ right to freedom of expression under section 2(b) of the Charter, and that this breach could not be justified under section 1 of the Charter. Justice Strekaf’s approach was, in a sense, “unapologetically activist,” deciding the Charter issue on the “widest possible grounds.” The University appealed the decision on two fronts: (1) the chambers judge’s chosen standard of review; and (2) her approach to the Charter’s application. The appeal was dismissed on the first issue. For the purposes of this comment, however, we will focus on the ABCA’s treatment of the second issue.

III. ANALYSIS: JUSTICE PAPERNY’S SECTION 32 INTERPRETATION

Of the three sitting judges, only Justice Paperny fully addressed the appeal against Justice Strekaf’s decision, in that the Charter applies to the Review Committee’s disciplinary actions. Even though none of the parties disputed that the Charter applies exclusively to government-based actors or actions, resolving the question of its application to university student discipline is nonetheless complicated by the jurisprudence interpreting the language of section 32. To date, universities have not been defined as government actors within the meaning of section 32, despite their substantial government funding and crucial public function administering post-secondary education.

A more literal reading of section 32 was affirmed by the Supreme Court of Canada’s ruling in RWDSU v Dolphin Delivery Ltd, where the court entrenched the basic parameters of section 32 as excluding matters solely relating to private actors and activities. In Pridgen ABCA, Justice Paperny discussed that the Charter traditionally applies to five broad categories of government acts or actors. The third, fourth, and fifth categories are pertinent to our examination. Under the third category, the Charter applies to government actors by virtue of the degree of legislative control exercised over them. In such cases, the courts look to the entity’s enabling legislation for evidence of routine and regular control. On this basis, community colleges in the past have been found subject to the Charter in all of their activities.

Under the fourth category, the Charter applies to bodies in their exercise of a statutory authority, particularly of coercive powers. Justice Paperny cited several examples where the Charter was so applied, including where a university’s power to enact and enforce a parking bylaw was implicated. One rationale underlying this line of reasoning is the desire to prevent

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17 Ibid at 98-106.
18 Ibid at paras 69, 83.
19 Feasby, supra note 5 at 19.
20 Pridgen ABCA, supra note 2 at paras 43-44.
21 Ibid at para 61.
22 See Charter, supra note 1, s 32.
24 Supra note 2 at para 78.
25 Ibid at paras 82-84, citing Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component, 2009 SCC 31 (CanLII), [2009] 2 SCR 295.
27 Pridgen ABCA, supra note 2 at paras 85-93.
the government from evading its constitutional responsibilities through delegation to non-governmental bodies.\textsuperscript{28}

Lastly, under the fifth category, the Charter applies to non-governmental bodies implementing government objectives. In contrast to the second and third approaches, the fourth and fifth categories of the Charter’s application do not extend to all of the affected body’s activities, but only to those directly involved in implementing the particular government power, policy, or program.\textsuperscript{29}

The fifth category was developed in Eldridge v British Columbia (Attorney General), where the court determined whether there was a Charter violation in failing to provide sign language interpreters to the hearing impaired as part of publicly funded health care services.\textsuperscript{30} In Justice LaForest’s majority decision, the Charter applied because hospitals were “implementing a specific government policy or program.”\textsuperscript{31} This decision was both hailed for its perceived loosening of the strictures placed on the interpretation of section 32 and derided for its inconsistency with precedent.\textsuperscript{32}

Justice Strekaf relied on Eldridge to support her conclusion in Pridgen ABQB that the Charter applied to the Review Committee’s decision. Eldridge was carried out in the context of the University implementing a provincial government policy regarding the provision of accessible post-secondary education.\textsuperscript{33} Specifically, Justice Strekaf relied on the fact that the PSLA provides for the Lieutenant Governor in Council to establish universities in the province and requires each university to establish a board of governors and general faculties council, both of which have broad authority to make regulations.\textsuperscript{34}

Justice Paperny reached the same conclusion, yet through a more contextual than purposive reasoning pattern. She found Justice Strekaf’s application of Eldridge logically consistent but thought the facts in the case at bar fit more comfortably within the fourth category of statutory compulsion.\textsuperscript{35} Justice Paperny acknowledged that the five categories of government activities under Charter scrutiny are not exhaustive and can overlap.\textsuperscript{36} She emphasized that the University’s power to discipline its students with serious sanctions was delegated by the PSLA and thus transcended any privately held coercive authority.\textsuperscript{37} Moreover, Justice Paperny held that university discipline in this case was not a private contractual matter because the University’s coercive power was such that it could be exercised regardless of whether a student consented or a contractual relationship existed.\textsuperscript{38} She also relied on an analogy to cases involving professional discipline, where the Charter has, in several instances, been found to apply under the fourth

\textsuperscript{28} Ibid at para 85, citing McKinney, supra note 9 at para 231.
\textsuperscript{29} Pridgen ABCA, supra note 2 at paras 95-99.
\textsuperscript{30} [1997] 3 SCR 624, 1997 CanLII 327 [Eldridge].
\textsuperscript{31} Ibid at 661.
\textsuperscript{32} See e.g. Peter W Hogg, Constitutional Law of Canada, 5th ed (Toronto: Carswell, 2007) at 37-16 (arguing that Eldridge was wrongly decided because an absence of statutory compulsion in this case should have prevented the Charter’s application); Craig Jones, “Immunizing Universities from Charter Review: Are We ‘Contracting Out’ Censorship?” (2003) 52 UNBLJ 261 at 274 (arguing that Eldridge extends Charter scrutiny to activities relating to a university’s “central function—the provision of university education and the conferral of degrees” as this function is controlled by the government).
\textsuperscript{33} Supra note 8 at para 59; see also Pridgen ABCA, supra note 2 at para 101.
\textsuperscript{34} Pridgen ABQB, supra note 8 at para 61-62.
\textsuperscript{35} Pridgen ABCA, supra note 2 at paras 103, 105.
\textsuperscript{36} Ibid at para 99.
\textsuperscript{37} Ibid at para 105.
\textsuperscript{38} Ibid at para 107.
category. Specifically, Justice Paperny suggested that “[t]he sanctions available to the Review Committee … can have consequences as serious for one’s ability to practice in one’s chosen field as the actions of a professional regulator.” Finally, Justice Paperny characterized the University’s disciplinary decision as discretionary in nature in light of the students’ Charter rights. Justice Paperny cited further case law to support the proposition that the exercise of this discretion is open to Charter scrutiny. Unfortunately, since the other two sitting justices did not decide the section 32 issue, Justice Paperny’s interpretation remains obiter.

IV. DISCUSSION

(a) SECTION 32’S INTERPRETATION IN THE CONTEXT OF UNIVERSITY STUDENT DISCIPLINARY ACTION: ALBERTA AND ONTARIO SEEMINGLY INCONGRUOUS

Left out of the above analysis is the fact that the University relied on McKinney to support its position that the Charter does not apply to university affairs. At issue in McKinney, which was decided before Eldridge, was a challenge by several professorial faculty and one librarian to the adoption of mandatory retirement policies at several Ontario universities. The court ruled that the Charter did not apply because the University was not part of a government apparatus, nor was it implementing a government program or acting in a governmental capacity in adopting the policy. It was suggested, albeit in the minority opinion, that universities may perform certain public functions that could attract Charter review. Hence, although universities, as private entities, can be subject to the Charter, this is improbable because much of their activity will most likely not be deemed public in the sense described above.

It is our goal here to demonstrate how McKinney, along with the above-mentioned jurisprudence on section 32, continues to fuel contradictory results where claimants seek to invoke the Charter in the university student disciplinary context. The main contradiction left by the jurisprudence is that there is inter-provincial inconsistency in section 32’s interpretation. These incongruities rely on nothing more than what we argue are unsustainable legal distinctions. To illustrate this point we analyze several recent decisions from Ontario and Alberta, which suggest that Ontario universities are as close to a “Charter-free zone” as is possible, whereas Alberta universities are relatively well-oiled Charter zones.

39 Ibid at paras 108-10.
40 Ibid at para 109.
41 Ibid at para 111.
42 Ibid at paras 130-84 (Justice O’Ferrall reasoned it was unnecessary to decide the section 32 issue partly because the Pridgens had not, in fact, sought a declaration or remedy under the Charter. Justice McDonald found it sufficient to decide the matter exclusively on administrative law grounds. He did, however, refer to Doré v Barreau du Québec, a recent Supreme Court of Canada decision that was released after the Pridgen appeal was argued, which discussed the standard of judicial review for administrative tribunal decisions affecting an individuals Charter right).
44 McKinney, supra note 9 at 418; Eldridge, supra note 30 at para 42 (Justice LaForest clarified that “McKinney makes it clear … the Charter applies to private entities in so far as they act in furtherance of a specific governmental program or policy”).
45 Pridgen ABCA, supra note 2 at para 179, O’Ferrall J.
In the recent Ontario case of *Lobo v Carleton University*, students at Carleton alleged the University had breached their *Charter* rights by failing to allocate space for their extra-curricular activities, which included, among other things, the mounting of Pro-Life exhibits. Justice Roccamo declined to find that the *Charter* applied and went on to distinguish Justice Strekaf’s decision in *Pridgen ABQB*, saying that “[b]y contrast [to the University of Calgary’s governing structure], the *Carleton University Act, 1952* created an autonomous entity...Subsequent enactment of the *Post-secondary Education Choice and Excellence Act* in no way derogates from that autonomy.” The *Post-secondary Education Choice and Excellence Act* is an Ontario statute that sets out the requirements for organizations to provide degree-granting educational programs. By contrast, the *PSLA* provided the University of Calgary with the power to confer severe sanctions on its students. Therefore, in Ontario, without an equivalent to the *PSLA*, universities are deemed to not be agents of the provincial government and are not implementing any academic policy of the government.

Is it practically sustainable to say that because Ontario universities use government power only to legislate their private governing structure, they are less committed to providing accessible post-secondary educational services to the public than universities in Alberta? The case law sidesteps this question. In *Alghaithy v University of Ottawa*, Justice Swinton again distinguished his reasoning from Justice Strekaf in *Pridgen ABQB* saying “the case is distinguishable, given that Alberta legislation requires universities to carry out a specific government objective of facilitating access to post-secondary education. There is no equivalent legislation in Ontario.”

If Justice Strekaf’s broader *Eldridge*-based approach cannot capture the Ontario university situation, then Justice Paperny’s reasoning likely would also have not changed these results. Yet, it is the exercise of a statutory power of compulsion, rather than the implementation of educational policy, that renders these results most unsettling. Without a clear analogue to the *PSLA* in Ontario, it seems Justice Paperny’s section 32 interpretation has little relevance.

Had the Pridgens been non-students expressing strong positions on divisive public issues in Ontario, the *Charter* would have likely applied to an Ontario university’s disciplinary conduct had it been required to enforce provincial trespass legislation to remove the Pridgen brothers from the university’s property. In *R v Whatcott*, the ABCA upheld such a decision, providing similar grounds as that of Justice Strekaf in *Pridgen ABQB*. In other words, we can arguably observe a broad application of section 32 within Alberta in contrast to its narrower application in the Ontario courts.

Differential applications are normal across provinces, especially in the light of different provincial statutes and university policies. A critical observer might reply that these incongruities are not problematic because inter-provincial legislative differences are the norm in a federal state like Canada, where the provincial and federal governments are each autonomous in their

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46 2012 ONSC 254 (CanLII) at paras 2, 9, [2012] OJ No 63 (QL) [*Lobo*].  
48 SO 2000, c 36, s 2. See also *Degree Granting Act*, RSO 1990, c D.5 (which regulates the entities that can operate universities and grant degrees).  
49 See *Telfer v University of Western Ontario*, 2012 ONSC 1287 (CanLII) at para 59, 349 DLR (4th) 235 [*Telfer*] (the *Charter* again did not apply to a university student disciplinary proceeding. As in *Lobo*, the court had only Justice Strekaf’s decision in *Pridgen*, and so it declared that the University was not implementing a government policy or acting as an agent of the government. Justice Swinton distinguished that “the statutory scheme applicable to the University of Western Ontario is quite different” at para 59).  
50 2012 ONSC 142 (CanLII) at para 78, 289 OAC 382.  
51 2012 ABQB 231 (CanLII) at para 31, 538 AR 220.
respective spheres and coordinate in status. However, this critique is somewhat problematic because it also provides reason to support inter-provincial congruence when the issue concerns Charter rights. Our argument is that the Charter’s section 32 application itself is incongruous across the country and that this creates an issue that could benefit from resolution, perhaps, at the Supreme Court of Canada.

(b) CHARTER-BASED ADMINISTRATIVE DECISION MAKING VERSUS LITIGATION: RESOLVING CASES OF NON-ACADEMIC MISCONDUCT

Universities have developed complex, legalistic, disciplinary policies and procedures for handling academic and non-academic misconduct. However, universities have also had to tailor their disciplinary processes to conform to the possibility of judicial review. In this sense, extending the Charter to cover such behaviors may seem redundant. But, implicit in that argument is an acceptance that little would change if the Charter applied because administrators already must meet rather difficult standards (i.e. procedural fairness).

At present, there is no clear route to appeal a university administration’s decisions, except on administrative law grounds, which is still a remote likelihood because of the general difficulty of navigating these administrative procedures. Indeed, according to Robyn Jacobson, some universities adopt procedures that resemble civil process partly to stem judicial review of their decisions. Thus, there is tension between universities’ desire to minimize liability under administrative law principles and their ability to facilitate those principles using accessible procedures.

The risks to civil liberties inherent in such unequal private power dynamics explains in part why the Supreme Court of Canada has found it necessary to state that government should not use section 32 to delegate away its responsibilities under the Charter. Students should have recourse to rights-based entitlements in their disciplinary proceedings because the source of university autonomy as a “community of scholars and students” paradoxically depends on the protection of freedom of expression. In view of the university administrative reality, only a court can be expected to have the last say in enforcing the protection of civil liberties using the Charter.

V. CONCLUSION

A potential outcome of Justice Paperny’s judgement in Pridgen ABCA may be to encourage Charter challenges to university conduct that have little to no hope of success, thereby resulting in a wasteful use of claimants’, defendants’, and courts’ resources. This is demonstrated by the

52 See e.g. Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5.
53 Furthermore, in Alberta, Ontario and British Columbia, the provincial human rights codes do not cover expressive rights (exceptions include Saskatchewan and Quebec). For a discussion of this phenomenon, see also Derek B Mix-Ross, Exploring the Charter’s Horizons: Universities, Free Speech, and the Role of Constitutional Rights in Private Legal Relations (LLM Thesis, University of Toronto, 2009) at 13 [unpublished].
54 Robyn A Jacobson, Managing Conflicts and Resolving Disputes Involving Students on University Campuses: The Present and the Future (Dissertation, York University, 2012) at 170.
55 Ibid at 180.
56 Ibid at 186.
57 Ibid.
58 Ibid.
Ontario situation. Consequently, clear guidance is needed from the Supreme Court of Canada on the scope of the Charter’s applicability to a university’s exercise of statutorily delegated, coercive student disciplinary powers. In the process, the court will have to revisit and distinguish McKinney, as well as make sense of the differences between the Alberta and Ontario university governance terrains. We have argued that future cases with similar facts to Pridgen ABCA provide an opportunity for the court to sort out this confusing area of section 32 jurisprudence. With the added certainty that should follow an Supreme Court of Canada ruling, universities might then be better prepared to minimize the risk of infringing students’ civil liberties in the context of student disciplinary actions.