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

Reasons for Judgment Reserved of The Honourable Mr. Justice McDonald Concurring in the Result

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

Appeal from the Order by
The Honourable Madam Justice J. Strekaf
Dated the 12th day of October, 2010
Filed on the 8th day of November, 2010
(Docket: 0901-12180)

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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

Pridgens, and several other students, posted comments critical of the course to a public "wall" on Facebook. All were found guilty of non-academic misconduct in University disciplinary proceedings held pursuant to the provisions of the *Post-Secondary Learning Act*, SA 2003, c. P-19.5 (*PSL Act*) and the University calendar. The specifics of the student actions that gave rise to those proceedings are important to the judicial review of the University's decision.

[6] Some of the students in the LWSO course were decidedly unimpressed with the course as presented by Professor Mitra. One dissatisfied student created a Facebook group entitled "I no longer fear hell, I took a course with Aruna Mitra." At least ten students from the course, including the Pridgens, joined the Facebook group. The page included a public "wall", accessible to anyone searching the Internet, on which members posted comments. Between November 12, 2007 and August 26, 2008, seven student members made a total of twenty-five posts to the wall. The vast majority of those posts, twenty out of the twenty-five, were made by three students. The Pridgen brothers made one post each.

[7] Steven Pridgen was among the first to post a comment. In response to an early discussion about grades (and in specific response to two posters who had received 65% on an assignment), he made the following comment on November 13, 2007:

> some how I think she just got lazy and gave everybody a 65....that's what I got. does anybody know how to apply to have it remarked?

[8] That was his only post.

[9] Another student soon responded to Steven Pridgen's query, advising that he should attend a university office "within 15 days of receiving [his] mark to appeal the grade." The student further commented that she would "most definitely" be doing so. In fact, several students did successfully appeal their grades from the course.

[10] Other students continued to post comments throughout November 2007, many of them highly critical of Professor Mitra's qualifications, teaching skills, and assessment practices. She was variously described as "inept", "awful", "illogically abrasive" and "inconsistent." Perhaps the most inflammatory post suggested that Professor Mitra should be "drawn and quartered during a special presentation at Mac Hall." The Pridgen brothers did not post in response to any of these comments.

[11] No further posts were made until approximately two months later, after the completion of the LWSO course. On February 1, 2008, a student expressed enthusiasm for her new law class and observed that Professor Mitra did not appear to be teaching any courses that semester. After an additional six months, on August 26, 2008, Keith Pridgen offered this apparent response:

> Hey fellow LWSO homees ..
> So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C !!!!! Remember when she told us she was a long-term professor? Well actually she was only sessional and picked up our class at the last moment because

> another prof wasn't able to do it ... lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future LWSO students!

[12] Keith Pridgen's comment was based on his understanding of a conversation he had with Associate Dean Brent regarding student concerns over Professor Mitra's marking. This was his first and only post to the wall.

ii. Finding of Non-Academic Misconduct

[13] On September 4, 2008, Professor Mitra complained about the Facebook page to Dean Tettey, Interim Dean of the Faculty of Communication and Culture. By that time, Professor Mitra was no longer employed as an instructor with the University. She indicated to Dean Tettey that she had been alerted to the page by colleagues and was concerned about its contents.

[14] Dean Tettey treated the complaint as an allegation of non-academic misconduct. The University's calendar contains a Student Misconduct Policy, which includes a section on "Disciplinary Action for Non-Academic Misconduct." Non-academic misconduct is defined in section 1 of the Student Misconduct Policy as:

> 1. Definition
> The term "non-academic misconduct" includes but is not limited to:
>
> a. conduct which causes injury to a person and/or damage to University property and/or the property of any member of the University community;
>
> b. unauthorized removal and/or unauthorized possession of University property;
>
> c. conduct which seriously disrupts the lawful educational and related activities of other students and/or University staff.

[15] When a case of alleged non-academic misconduct is brought to the attention of a dean, the student is required to appear before the dean to respond to the allegations: section 2(b). Where the severity of misconduct does not warrant suspension, the dean may place a student on probation for a specified period of time, with conditions as deemed necessary.

[16] In accordance with the procedures set out in the Student Misconduct Policy, the Dean summoned ten students who were members of the Facebook group to attend a meeting on September 18, 2008 to respond to the allegations. Some of those students had not posted comments, but were simply members of the Facebook group. The meeting was attended by Dean Tettey and four other professors from the faculty, including Associate Dean Brent, who had previously spoken with students in the LWSO course about their concerns, and Dr. Chloe Atkins, who had served as a substitute lecturer to the LWSO course on more than one occasion and who is Professor Mitra's spouse.

[17] After a brief group meeting, each of the students was required to meet individually with the Dean and the four faculty members and asked to justify his or her participation in the Facebook group. Ultimately, Dean Tettey found all of the student members of the Facebook group guilty of non-academic misconduct, regardless of the nature of their comments and, in some cases, even though they had made no comments at all.

[18] The Dean notified Keith Pridgen of his finding of non-academic misconduct and the sanctions to be imposed in a letter dated November 20, 2008. His letter expressed particular concern that "information on the site" called into question Professor Mitra's qualifications and alleged a lack of due diligence in the University's hiring processes, leading the Dean to conclude "that the conduct you displayed on this publicly accessible site has clearly caused unwarranted professional and personal injury to Prof. Mitra and clearly meets the criteria for non-academic misconduct as outlined in the University of Calgary Calendar".

[19] The Dean imposed sanctions on Keith Pridgen, including the following:

1. 24 months' probation;

2. that he write an "unqualified letter of apology" to Prof. Mitra, which was to include "a demonstration of your understanding of why your actions constitute academic [sic] misconduct; an acknowledgment of the repercussions of your action on Prof. Mitra's person and professional standing; a recognition of the implications of your action for the Faculty of Communication and Culture's reputation; and lessons that you have learnt from this experience; and a commitment to conduct yourself appropriately in the future"; and

3. that he "refrain from posting or circulating any material that may be defamatory of Prof. Mitra and any other members of the university community, or unjustifiably bring the University of Calgary and/or the Faculty of Communication and Culture into disrepute".

[20] The Dean's letter concludes:

> In arriving at this decision, I took into account the following factors: i) the fact that your postings contained factual inaccuracies that impugned Prof. Mitra's professional standing and unjustifiably questioned her integrity; ii) your intransigence during the meeting with me and my colleagues; and iii) the lack of genuine remorse for your actions and their impact.
>
> …
>
> I want to state emphatically that you are not being sanctioned for expressing your opinions on this site. You are at liberty to do so. It is important, however, that your views are not based on false premises, conjectures, and unsubstantiated assertions

> that are injurious to individuals or institutions and their hard-won reputations. The University of Calgary has mechanisms for addressing students' concerns and I encourage you to use those channels if you have issues with your classes or instructors, instead of resorting to actions that not only hurt others unjustifiably but could also create problems for you.

[21] Steven Pridgen received a similar letter, also dated November 20, 2008. His involvement with the Facebook page was a single post to the wall about his grade and an inquiry as to how to apply to have his assignment re-marked. During his meeting with the Dean, he expressed a willingness to apologize for any harm his comment may have occasioned. The Dean found Steven Pridgen guilty of non-academic misconduct on the basis of his association with the site and with the comments of others. The Dean's letter stated, in part:

> It is my conclusion that the conduct displayed on this publicly accessible site has clearly caused unwarranted professional and personal injury to Prof. Mitra and clearly meets the criteria for non-academic misconduct as outlined in the University of Calgary Calendar. You lent credence to this misconduct by your association with the site and the tacit concurrence with the tenor of its name.

[22] The Dean imposed sanctions on Steven Pridgen, including a requirement that he write a letter of apology and that he refrain from posting or circulating defamatory material, in the same terms as that imposed on Keith Pridgen. Both students were also advised that a failure to comply with the sanctions and conditions imposed might result in further sanctions "including, but not limited to, suspension or expulsion".

iii. Appeal to the General Faculties Council's Review Committee

[23] Pursuant to the Student Misconduct Policy, a student may appeal the imposition of probation to the General Faculties Council Review Committee: section 2(c). The Policy also sets out the composition of and process to be followed by the Review Committee on an appeal. Section 3(b) provides that the dean, or other members of the University community, and the student shall be called to appear and give evidence before the Review Committee.

[24] The Pridgens and some of the other students launched an appeal of the Dean's decision in accordance with the Student Misconduct Policy, and an *ad hoc* Review Committee was convened (Review Committee).

[25] The Pridgens set out several grounds of appeal including: (1) that the participation of Professor Mitra's spouse in the initial meeting created an apprehension of bias; (2) that there was a lack of evidence of injury to Professor Mitra; (3) that the Pridgens' fundamental freedoms under the *Charter* had been violated; and (4) that there was an apparent disconnect between a University "known for its promotion of freedom of expression and opinion" then denying those same freedoms to its students.

[26] Keith Pridgen's hearing was held in January 2009. His counsel questioned the Dean on the

lack of evidence of actual injury to Professor Mitra or the University. The Chair of the Review Committee significantly constrained this line of inquiry, stating that injury was not a question of fact but of interpretation, to be left to the determination of the Committee. On the issue of appropriateness of sanctions, the Dean opined that membership in the Facebook group alone was sufficient to ground a sanction, but the fact that a member made a posting "was beyond" just "being involved in something like this", and called for stiffer penalties.

[27] The Dean called his colleagues from the initial sanctioning panel as witnesses in support of his position. One of them was Associate Dean Brent who, on being questioned by Keith Pridgen's counsel, agreed that, "prior to the Facebook incident", he had arranged for regrading of student papers from the LWSO class in response to a "mass appeal by the students".

[28] As part of his presentation, Keith Pridgen challenged Professor Mitra's competence as an educator. He cited various factual inaccuracies in Professor Mitra's lectures, recalling two particular incidents where Professor Mitra had informed the class that the notwithstanding clause had "not been used in Canada", and that Magna Carta was a document written "in the 1700s for native North American human rights purposes". He stated:

> ... I concluded that she was not a capable instructor, it was a fair comment that I wrote on Facebook, based on the facts which I had personally experienced about her, and since she had opened herself up to critique by being based out of the academic community.

[29] Keith Pridgen also recalled that Professor Mitra, in response to questions regarding her qualifications:

> ...told our class that she was tenured and that she had the authority to teach from the Dean, who believed she was an excellent instructor. Associate Dean Brent told myself and several others in a meeting with had [sic] within the [winter] 2008 semester, that she was sessional and not tenured ... Dr. Brent said that due to the evaluations done at the University, Miss Mitra would not be rehired by the University.

[30] Keith Pridgen also stated that he had intentionally waited until after Professor Mitra was no longer teaching at the University to make his post, and that:

> My comment on the site was written assuming the information I had received from Dr. Brent was true, and it was an opinionated posting.

[31] On January 15, 2009, the Review Committee met with Steven Pridgen and Jonathan McGill, another student member of the Facebook group. Steven Pridgen was not accompanied by counsel. That hearing also started with a statement from Dean Tettey that Steven Pridgen was "adamant" about his right to make the post, but acknowledged that "he was going to be very careful about what he said about people" in the future. Dean Tettey perceived Steven Pridgen to be someone who had "learned from what had gone on" and, as such, considered a lesser sanction of an apology was

appropriate.

[32] Steven Pridgen took exception to Dean Tettey's finding that he had "lent credence to this misconduct by ... association with this site... and the tenor of its name". He maintained that his post was a justifiable comment that should be protected "as freedom of expression". Regarding the forum itself, Steven Pridgen had this to say:

> Facebook is a very – it's a social networking site, things that are said on here are not designed to be held up to intense scrutiny, it is merely the equivalent of having an online conversation. It is as public as having, standing in the middle of the University of Calgary hallway and saying the exact same thing. It is openly, publicly available to anybody who is walking by, but its not being advertised for anybody else to come and give their opinions on this. How this would affect her professional standing, I hesitate to believe that future employers will go to Facebook sites looking for statements made by first year students and take them with any degree of seriousness.

[33] On February 20, 2009, the Review Committee issued written decisions upholding Dean Tettey's finding of non-academic misconduct. Despite the fact that the Dean had imposed no probationary period on Steven Pridgen in the original proceedings, the Review Committee imposed a probation of four months. Keith Pridgen's original twenty-four month probation period, by contrast, was decreased to a six month period. The decision regarding Steven Pridgen is set out in part below:

> . . .
>
> The Review Committee thoroughly read all of the written submissions, including those of Mr. Pridgen and the Dean, prior to the meeting.
>
> The Dean outlined his reasons for the sanctions imposed on Mr. Pridgen, which revolved around a Facebook site, "I no longer fear Hell, I took a course with Aruna Mitra." The Dean also described the investigative procedures used to obtain information and explained the procedures he used to arrive at his decision. The Appellant presented his perspective on both the web site and the investigative procedures. There was a full and fair hearing and the Review Committee members asked a large number of questions of both the Dean and the Appellant.
>
> After the January 15th meeting, the Dean submitted a written statement and the Appellant also submitted a written statement to the Review Committee outlining his case. These statements were read thoroughly by the Review Committee and the Review Committee met further to consider all of the testimony and submissions. In its determination the Review Committee took account of the comments made by the Appellant on the Facebook site in the context of the site at the time of his post, and the disrespectful nature of the Facebook site on which he was participating
>
> <u>Decision</u>

> It is the decision of the Review Committee that, based on the balance of probabilities, Mr. Steven Pridgen's posting on the Facebook site constitutes non-academic misconduct. The Review Committee places Mr. Steven Pridgen on probation for a period of four months beginning on November 20, 2008 and ending on March 20, 2009.
>
> Note that the University Regulations state:
> *A Student's record is cleared of a probation notation when the probationary periods has been completed, or upon completion of a degree program in another Faculty, or after three years have elapsed, whichever comes first.*

[34] No further explanation for the finding of non-academic misconduct or for the increase in sanction was offered. The written decision regarding Keith Pridgen is identical, except that his period of probation was reduced from 24 months to six months.

iv. Attempted Appeal to the Board of Governors

[35] The Pridgens tried unsuccessfully to appeal the decisions of the Review Committee to the University's Board of Governors. Section 31(1)(a) of the *PSL Act* provides that disciplinary decisions of the general faculties council are "subject to a right of appeal to the board [defined as the board of governors of a public post-secondary institution]". Nevertheless, the University's Board of Governors declined to hear the Pridgens' appeal. The Secretary to General Faculties Council took the position that, as the Pridgens "were placed on probation for non-academic misconduct [as opposed to being fined, suspended or expelled], an appeal to the Board of Governors is not an avenue open to them". The Pridgens delivered detailed notices of appeal to the University, but the University's position remained unchanged.

v. Judicial Review to Court of Queen's Bench

[36] The Pridgens filed an application for judicial review in the Court of Queen's Bench. The application raised several issues, including whether the *Charter* applies to disciplinary proceedings taken by the University (the chambers judge concluded that it does apply) and whether the Pridgens' *Charter* rights were infringed (the chambers judge concluded that they were infringed and that the breach was not saved by section 1). The University has not appealed the finding that the Pridgens' *Charter* rights were infringed, nor the conclusion regarding section 1 of the *Charter*. However, the threshold issue of whether the *Charter* applies to university disciplinary proceedings at all is raised on this appeal. I propose to deal with that question in the second part of my analysis.

[37] The judicial review application also raised a number of administrative law issues, questioning:

a. the fairness of the processes before the Dean and before the Review Committee;

b. the refusal of the Board of Governors to hear an appeal from the Review Committee's decision;

c. the adequacy of the Review Committee's reasons for decision; and

d. the reasonableness of the Review Committee's conclusion that the Pridgens had committed non-academic misconduct.

[38] The chambers judge found that the procedure followed by the Review Committee "generally" satisfied its duty of fairness. However, the involvement of Professor Mitra's spouse, Dr. Atkins, in the initial meeting with the Dean gave rise to a reasonable apprehension of bias, which was cured by the subsequent hearing before the Review Committee, at which Dr. Atkins did not participate as decision-maker.

[39] The chambers judge also held that the plain language of section 31(1)(a) of the *PSL Act* provides a statutorily mandated right of appeal to the Board of Governors from any discipline imposed by the General Faculties Council and is not limited by the nature of the sanction. Accordingly, the Board of Governors breached its statutory duty in refusing to hear the Pridgens' appeals from the Review Committee decision.

[40] The chambers judge further concluded that the reasons for decision provided by the Review Committee were not adequate, in that they did not explain the basis for the Review Committee's conclusion that the Pridgens had committed non-academic misconduct. She found that, based on the reasons given, the Pridgens would be unable to understand how their actions constituted non-academic misconduct, and it would be impossible for other students to use the reasons as a benchmark for their own behaviour on campus.

[41] The University takes issue with the chambers judge's determination that the Review Committee's finding of non-academic misconduct was unreasonable and that it breached the provisions of the *Charter*. The chambers judge found that there was no evidence to conclude that the Pridgens' comments caused injury and amounted to non-academic misconduct; she noted that there was no suggestion by the University that the Pridgens had committed defamation, nor had Professor Mitra brought a civil action in defamation.

[42] The chambers judge quashed the decision of the Review Committee. Her decision was based on two grounds: (1) that the decision breached the Pridgens' charter rights and could not be saved by section 1, and (2) that the decision was unreasonable under administrative law principles.

III. Grounds of Appeal

[43] The University appeals on two fronts. It submits that the chambers judge erred, firstly, by substituting her own opinion for that of the Review Committee and applying a correctness standard to her review of the Committee's decision rather than the appropriate standard of reasonableness.

[44] Secondly, the University argues that the chambers judge erred in her approach to the question of the *Charter's* applicability; that she erred by deciding that issue in a vacuum and by misapplying

the law on whether the *Charter* applies to the actions of a university. The University does not appeal the chambers judge's conclusions that the University's actions infringed the Pridgens' freedom of expression as guaranteed by section 2(b) of the *Charter*, and that the infringement cannot be justified under section 1 of the *Charter*.

[45] I intend to deal first with the administrative law issue, and then with the application of the *Charter* in this circumstance. But first, it is useful to set out the relevant legislation and regulatory context.

IV. Legislative & Regulatory Context

i. *Post-Secondary Learning Act*, SA 2003, c P-19.5 (*PSL Act*)

[46] Universities in Alberta are established by order of the Lieutenant Governor in Council pursuant to authority granted under the *PSL Act*, which also governs the operation of those universities. One of the purposes of the *PSL Act*, as set out in its preamble, is to ensure "that Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system".

[47] The *PSL Act* provides for the establishment of a board of governors and a general faculties council for each public university. The board of governors is responsible to "manage and operate the public post-secondary institution in accordance with its mandate": section 60(1)(a). The general faculties council, subject to the authority of the board, is granted responsibility for the academic affairs of a university, including the preparation of the university calendar (section 26(1)(g)); recommending the establishment of faculties and programs of study (section 26(1)(l)); and determining admissions standards and policies for students (section 26(1)(h)).

[48] The *PSL Act* specifically deals with a university's authority to discipline students. Section 31 provides:

> 31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may
>
> (a) subject to a right of appeal to the board, discipline students attending the university, and the power to discipline includes the power
>
> i. to fine students,
>
> ii. to suspend the right of students to attend the university or to participate in any student activities, or both, and
>
> iii. to expel students from the university;

> (b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper; ...

ii. The University Calendar

[49] As noted above, the general faculties council is empowered to create and publish a university calendar pursuant to section 26 of the *PSL Act*. The University calendar created under that authority includes the Student Misconduct Policy, which contains the definition of non-academic misconduct applied by the Dean and the Review Committee (and set out earlier in these reasons), as well as the procedures to be followed in student disciplinary proceedings.

[50] The University's calendar also includes a *Statement on Principles of Conduct*. This Statement reads as follows:

> 1. The University of Calgary community has undertaken to be guided by the following statements of purpose and values:
>
> - To promote free inquiry and debate
> - To act as a community of scholars
> - To lead and inspire societal development
> - To respect, appreciate, and encourage diversity
> - To display care and concern for community
>
> 2. The University seeks to create and maintain a positive and productive learning and working environment, that is, an environment in which there is:
>
> - Respect for the dignity of all persons
> - Fair and equitable treatment of individuals in our diverse community
> - Personal integrity and trustworthiness
> - Respect for academic freedom
> - Respect for personal and University property
>
> 3. Those persons appointed by the University to positions of leadership and authority have particular responsibility, not only for their own conduct, but also for ensuring, to the extent of their authority and ability:
>
> - That a positive and productive learning and working environment is created and maintained
>
> - That conflicts and concerns are addressed in a positive, timely, reasonable, and effective manner
>
> - That persons within their jurisdiction are informed of their rights and responsibilities with respect to conduct

4. The University undertakes to ensure that its policies, systems, processes, and day-to-day operations foster the goals in #1 and #2 above.

5. The University encourages and undertakes to support all members of the University community in resolving conflicts and concerns in a positive, timely, reasonable, and effective manner.

6. The University undertakes to ensure that the protection afforded by the principles of natural justice is extended to all members of the University community.

7. The University undertakes to provide resources through various offices to generate awareness related to this Statement on Principles of Conduct throughout the University community and to assist in resolving conflict in a positive way.

[51] It is apparent from the principles of conduct that the University aspires to lofty goals, including upholding the promotion of free inquiry, debate, fairness, respect and natural justice. The extent to which these principles were applied in these circumstances is considered in this appeal.

V. Analysis

i. Was the Decision of the Review Committee Reasonable?

[52] The chambers judge concluded that the decision of the Review Committee to find the Pridgens guilty of non-academic misconduct should be reviewed on the standard of reasonableness. She determined that "there was no reasonable basis, having regard to the evidence before the Review Committee" that would support the Committee's conclusion that the comments made by the Pridgens constituted non-academic misconduct within the meaning of the University's Student Misconduct Policy. The University argues that, in reaching that determination, the chambers judge improperly rejected the evidence heard by the Review Committee and substituted her own opinion on that evidence for that of the Committee, effectively applying the wrong standard of review and subjecting the decision to a review for correctness.

[53] I cannot accede to that submission. The majority decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47 defines a reasonable decision as one which demonstrates "justification, transparency and intelligibility within the decision-making process", and which "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". The Supreme Court of Canada recently clarified the task of a reviewing court in *Newfoundland and Labrador (Treasury Board) v Newfoundland and Labrador Nurses' Union*, 2011 SCC 62. It is not necessary to assess the adequacy of a tribunal's reasons separately from the reasonableness of its ultimate decision. Rather, as Justice Abella said at [14] and [15]:

> ... It is a more organic exercise - the reasons must be read together with the outcome

> and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at 'the qualities that make a decision reasonable, referring both to the process of articulating reasons and to outcomes'.
>
> In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show 'respect for the decision-making process of adjudicative bodies with regard to both the facts and the law' (*Dunsmuir*, at para 48). *This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*
>
> (emphasis added)

[54] In this case, the Review Committee was tasked with hearing an appeal that the students had committed non-academic misconduct by posting comments about Professor Mitra on a Facebook wall. In other words, the Review Committee was required to consider whether the conduct amounted to non-academic misconduct, defined in the Student Misconduct Policy as including "conduct which causes injury to a person". The reasons of the Review Committee refer to the definition but, as the chambers judge noted, those reasons do not discuss whether the conduct of the Pridgens, in particular, caused injury, or constituted some other form of non-academic misconduct. In each of the two relevant decisions, the Committee states that "[i]n its determination the Review Committee took account of the comments made by the Appellant on the Facebook site in the context of the site at the time of his post, and the disrespectful nature of the Facebook site on which he was participating". The Review Committee then makes the conclusory statement that the student's posting "constitutes non-academic misconduct". No further explanation as to how or why is attempted.

[55] Because the sparse reasons of the Review Committee fail to articulate the basis for its conclusion, it was necessary for the chambers judge to look to the record in order to assess whether that conclusion was one of the "possible, acceptable outcomes" that are "defensible in respect of the facts and law". She had to consider whether a reasonable interpretation of the definition of non-academic misconduct in the Student Misconduct Policy could capture the conduct of the students here.

[56] The reasons of the Review Committee do not disclose any consideration of what exactly constituted the misconduct: Was it the existence of the site? The fact of the postings? The content of the postings, viewed independently or as a whole? If the misconduct was the content of the postings broadly, there is no discussion as to whether a defence of justification or fair comment would or could apply in the circumstances.

[57] Nor is there any distinction made between comments that might be gratuitous or inflammatory versus those that state facts or ask questions. There is no attempt to assess the students' comments on an individual basis. The most that can be said is that the Review Committee focussed not on the comments, but on the nature of the site and those who chose to "associate" with it by posting comments or becoming members. On the basis of the record, it is unreasonable to hold

the Pridgens accountable for the comments and actions of other students or one another. This is particularly apparent in the case of Steven Pridgen; the more inflammatory comments of others did not even exist at the time of his posting about his grade.

[58] Dean Tettey concluded that the Pridgens' conduct had "caused injury" to Professor Mitra. The reasons of the Review Committee do not reveal whether it reached the same conclusion, but I will, for the purpose of this analysis, infer that it did. Professor Mitra did not appear before the Review Committee (or before the original sanctioning panel) to speak to any effect the Facebook postings may have had on her, professionally or otherwise. Nor did she seek to tender any affidavit material or any written statement regarding the incident. The only information before the Review Committee that touched on that issue at all came in the form of statements by Dean Tettey. The University concedes that there was no direct evidence of injury presented to the Review Committee, but argues that hearsay evidence is admissible in administrative proceedings. It relies on statements made by Dean Tettey at the Review Committee hearing to the effect that he was told by Professor Mitra that she had been alerted to the existence of the site by some "colleagues and associates".

[59] It is generally open to administrative tribunals to admit hearsay evidence. But the relaxation of the rules of evidence does not relieve an administrative decision-maker of the responsibility to assess the quality of the evidence received in a reasonable manner in order to determine whether it can support the decision being made. And in a subsequent judicial review, the reviewing court must consider whether the decision is "one of a range of possible outcomes", based on the evidence that was received and assessed by the decision-maker. It is not an error for a reviewing judge to consider the quality of the evidence and the manner in which it was assessed in conducting that analysis.

[60] The evidence on which the University relies is not merely hearsay, it is double or triple hearsay of an extremely vague nature from an unnamed source or sources. It is simply not reasonable to conclude that "injury" within the meaning of the Student Misconduct Policy has been established on the basis of the information provided to the Review Committee, and the chambers judge committed no error in reaching that conclusion.

[61] For all of these reasons, the decision of the Review Committee is unreasonable and this ground of appeal is dismissed.

ii. Are University Disciplinary Proceedings Subject to the Charter?

[62] As a preliminary matter, the University submits that the chambers judge should not have addressed the *Charter* arguments; that the question of the *Charter's* applicability to the University was decided in an evidentiary vacuum, and that it was unnecessary to address the *Charter* question because the matter could have been decided under the principles of administrative law.

[63] I disagree. The chambers judge dealt with the constitutional issues at length as one basis for setting aside the Review Committee's decision. She was entitled to do so. There was no difficulty in deciding the constitutional issues on the basis of the record before the court; no constitutional facts were missing. The "factual vacuum" now alleged by the University consists of the context and history of the *PSL Act*, matters that led the chambers judge to conclude the University is

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

assessing the "governmental" characteristics of various entities in order to determine if they or their activities attract *Charter* scrutiny. The Supreme Court of Canada has recently confirmed that, broadly speaking, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity (whether the entity itself is "government", in which case all of its activities will be subject to the *Charter*), or by enquiring into the nature of the particular activity in question: *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 at para 16.

[77] The second part of that analysis was described by LaForest J. in *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 151 DLR (4th) 577 at para 44 as follows:

> ... an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly 'governmental' in nature - for example, the implementation of a specific statutory scheme or a government program - the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

a. Classification of section 32 cases

[78] Despite these statements, the task of determining who is a government actor or what is a government act remains a challenge. A review of the authorities yields five broad categories of government or government activities to which the *Charter* applies.

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.

The categories can be described as follows:

1. Legislative enactments

[79] The *Charter* operates as a limitation on the powers of Parliament and the legislatures. As such, any statute enacted by those legislative bodies which is inconsistent with the *Charter* will be outside the power of the enacting body and will be invalid: Hogg, *Constitutional Law of Canada*, 5th ed supp, p 37-9. The same is true of subordinate legislation passed pursuant to statutory authority, including, for example, regulations and by-laws: Hogg, *Constitutional Law of Canada*, 5th ed supp, at 37-13. The case before us is not a challenge to legislation, but rather to actions taken pursuant to statutory authority.

2. Government actors by nature

[80] As noted above, the Supreme Court of Canada has developed a two-pronged approach to determining whether the *Charter* applies to a particular entity. The first prong considers whether the entity is a government actor. The applicable principles were summarized by LaForest J. in *Eldridge* at para 44:

> ... the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of section 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, *either by its very nature or in virtue of the degree of governmental control exercised over it*, properly be characterized as "government" within the meaning of section 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity it is engaged in could, if performed by a non-governmental actor, correctly be described as "private".
>
> (emphasis added)

[81] Municipalities have been found to be "government" by their very nature: *Godbout v Longueil (City)*, [1997] 3 SCR 844, 219 NR 1. LaForest J., writing for a minority of the Court (the majority chose to deal with the case under the *Quebec Charter*), noted a number of qualities that make municipalities "governmental". For instance, they are democratically elected, have general taxing powers, are empowered to make, administer and enforce laws, and, most significantly, they

> ... derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the Canadian *Charter* clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority.: *Godbout* at para 51.

3. Government actors by virtue of legislative control

[82] Other entities have been found to be "government" not because of their governmental nature, but because of the degree of governmental control exercised over them, generally determined through a detailed review of the entity's constituent statute. This was the case, for example, with community colleges: see *Douglas/Kwantlen Faculty Assn v Douglas College*, [1990] 3 SCR 570, 77 DLR (4th) 94 and *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211. In *Douglas College*, the determining factor seemed to be that the college's constituent Act expressly described it as an agent of the Crown, established by government to implement government policy: *Douglas College* at para 16. In *Lavigne* it was sufficient that the Act gave the Minister the power to conduct and govern the colleges, "assisted" by the college's Council: pp 311-12. In both cases, the Court determined that the government had "routine or regular control" over the college such as to bring it within the meaning of "government".

[83] Universities, on the other hand, notwithstanding significant government funding and regulation, have been characterized as autonomous bodies, not under sufficient government control

to be classified as essentially "governmental": see *McKinney* and *Harrison v University of British Columbia*, [1990] 3 SCR 451, both companion cases to *Douglas College*. It has been pointed out that this distinction leads to inconsistent and illogical results. For example, collaborative programs between universities and colleges can lead to the anomalous result that a student's freedom of expression will be protected, or not, depending on whether he is involved in the university or college portion of his education: see C. Henderson, *Searching for 'government action': post-secondary education as a case study in the conceptual weakness of the Charter's government action doctrine*, (2006) 15 Educ & LJ 233 at 259. Moreover, the reclassification of a college as a degree-granting institution (as has happened in Alberta with respect to, for example, Mount Royal University), could mean that students' *Charter* rights would be protected one day and not the next.

[84] The Supreme Court has most recently applied the government control test in *Greater Vancouver Transit Authority v Canadian Federation of Students* to find that two corporations that operate public transit systems in British Columbia are subject to *Charter* scrutiny in the development of policies for advertising on buses. One of the corporations, British Columbia Transit, was a statutory body designated by legislation as an "agent of the government", with a board of directors all appointed by the Lieutenant Governor in Council. On this basis, the Court unanimously concluded that it was "clearly a government entity". The other, the Greater Vancouver Transit Authority (TransLink), was not an agent of government, but the Court concluded that it was substantially controlled by a local government entity (the Greater Vancouver Regional District), making TransLink itself a government entity.

4. Bodies exercising statutory authority

[85] As discussed in the preceding section, the *Charter* will apply to entities that are under sufficient government control. That category does not address the problem of governments "contracting out" of their *Charter* obligations, something the Supreme Court has cautioned against in several decisions: see, for example, Wilson J. in dissent in *McKinney* at para 231; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, 59 DLR (4th) 416; *Eldridge* at para 42. Governments must not be permitted to avoid their constitutional obligations by delegating to outside individuals or organizations the authority to exercise their powers.

[86] The second prong of the section 32 analysis described in *Eldridge*, that particular entities will be subject to *Charter* scrutiny in respect of the performance of "governmental activities" even if the entity itself cannot be described as "governmental", attempts to address that concern. Unfortunately, what constitutes "governmental activity" is not easy to articulate or discern. In *Godbout*, LaForest J. stated at para 49 that the body in question must do more than perform a public service; it must be "acting in what can accurately be described as a 'governmental' ... capacity". He went on to note that "[t]he factors that might serve to ground a finding that an institution is performing 'governmental functions' do not readily admit of *a priori* elucidation".

[87] It is perhaps appropriate, then, to undertake an *a posteriori* analysis to determine what courts have classified as 'governmental activities'. This brings us to what I see as the fourth broad category of section 32 cases: bodies exercising statutory authority.

[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.

[120] It would also be wrong to overlook the changing relationship between universities, government, private industry and the public generally. Universities have cultivated partnerships and other similar collaborative relationships with government and industry. Universities are heavily reliant on state funding, as well as on funding from private and corporate donors. Their role in society has become more prominent, public and accessible. Today, universities are an integral part of our societal fabric, offering opportunities for learning and research to a diverse student body for the benefit of all Canadians. To suggest that institutional autonomy is undermined by their relationship to government or "other outside influences" including industry, ignores that those relationships already exist, appear to have been embraced by, if not fostered by, universities and do not appear to have diminished the institutional autonomy so highly valued by them.

[121] That governments in Canada share this view of universities as instrumental to the economic and social well-being of the country is evidenced by legislation such as Alberta's *PSL Act*. The legislation represents a commitment by the government to ensure that "Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system".: *PSL Act*, preamble.

[122] One can no longer maintain a pastoral view of university campuses as a community of scholars removed from the rest of society. This does not mean that a university should not be able to direct its own affairs, certainly in academic matters, free from government interference. It should. Respecting *Charter* rights in disciplining students will not, in my view, inhibit it in the exercise of that institutional independence or the exercise of academic freedom. Rather, it will promote the institution as a place of discourse, dialogue and the free exchange of ideas; all the hallmarks of a credible university and the foundation of a democratic society.

[123] Although the University has not couched its arguments regarding academic freedom and institutional autonomy in terms of an analysis under section 1 of the *Charter*, those concepts would inform a thorough analysis of whether a particular infringement is justifiable as a reasonable limit on *Charter* rights. For example, the University expressed a concern that an obligation to respect *Charter* rights could interfere with decisions in areas central to its autonomy, such as admission standards and curriculum development. If in some future case a university can establish that the protection of a *Charter* right will interfere with academic freedom or institutional autonomy, the latter could, in my view, adequately be protected as a reasonable limit pursuant to section 1.

[124] The chambers judge in this case considered whether the infringement of the Pridgens' freedom of expression was justifiable under section 1. She rightly noted that freedom of expression, while vitally important in a democratic society, is not an unqualified right. The University must be able to place reasonable limits on speech on campus in order, for example, to maintain a learning environment where there is respect and dignity for all. Criticism and debate are essential to ensuring the place of universities as centres for discussion.

[125] In this case, however, the chambers judge concluded that the critical opinions made by the students, although some were not particularly gracious, had utility in encouraging discussion and providing feedback to current and future students. The imposition of discipline in this case went beyond what was necessary to achieve the objective of the Student Misconduct Policy to maintain

an appropriate learning environment. The University did not challenge these conclusions on appeal, and, in any event, I agree with the chambers judge that the actions of the dean and the Review Committee in this case went too far to be considered a reasonable limit on the exercise of free expression.

[126] The chambers judge did not have the benefit of the Supreme Court of Canada's recent decision in *Doré v Barreau du Quebec*, 2012 SCC 12. That decision provides guidance on how to determine whether administrative decision makers have properly exercised their statutory discretion in accordance with the *Charter*, emphasizing that "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it": [4]. Among other things, the decision in *Doré* emphasizes the question of proportionality that is at the heart of a section 1 analysis. The question to be asked is whether the administrative decision maker properly balanced its statutory mandate with the *Charter* right and its fundamental importance.

[127] Neither the Review Committee nor the Board of Governors undertook any *Charter* inquiry. No attempt was made to balance the statutory mandate with freedom of expression. That was a result of the University's position that its statutory mandate precludes the application of the *Charter*. Notwithstanding that position, the chambers judge was alive to the competing policies that would inform the section 1 analysis. In the context here, those might include the types of issues described above - access to education, fostering an environment of open exchange of ideas, the prevention of incivility, intimidation, disrespect and fear, and the fostering of a safe environment to discuss and debate contemporary issues within and among a diverse student body. The balance to be struck is between the seriousness of the impugned conduct and its effect on the tenor of debate, and the student's ability to criticize, comment on or refute the quality of education he or she receives. The University's actions in disciplining the Pridgens did not balance their expressive rights with the University's statutory objectives; indeed, the University denied the existence of those rights entirely.

VI. Conclusion

[128] The *Canadian Charter of Rights and Freedoms* applies to the disciplinary proceedings undertaken by the University. The decision of the Review Committee failed to take into account the Pridgens' right to freedom of expression under the *Charter*. The decision breached the Pridgens' freedom of expression and cannot be saved by section 1. Moreover, the Review Committee's decision was unreasonable from an administrative law perspective. The decision of the chambers judge to quash the Review Committee's decision is upheld and the appeal of the University is dismissed.

VII. Costs

[129] The parties have 40 days from the date of these reasons to speak to costs. In default of any further order of this Court respecting costs, the respondents shall have their costs of this appeal, including any costs occasioned by the role of the interveners herein; said costs to be paid by the appellant. The interveners shall all bear their own costs throughout.

Appeal heard on November 9, 2011

Reasons filed at Calgary, Alberta
this 9th day of May, 2012

Paperny J.A.

Reasons for Judgment Reserved of
The Honourable Mr. Justice McDonald
Concurring in the Result

I. Introduction

[130] This appeal by the University of Calgary is from a judicial review judge's order quashing a finding of non-academic misconduct as against two students (the respondents) sanctioned by the University of Calgary for posting comments about one of their professors on a social networking site. The judicial review judge also concluded that the Board of Governors (the Board) was in breach of its statutory duty when it refused to hear the respondents' appeal.

[131] I agree with the judicial review judge that, given the lengthy history of this matter and the efforts made to date by all of the parties, it would unnecessarily prolong matters to remit the matter to the Board. In my view, the judicial review judge's decision that the respondents' comments did not constitute non-academic misconduct was correct.

[132] While it may be time to reconsider whether or not universities are subject to the *Charter*, it was unnecessary for the judicial review judge to do so in this case. And, in my respectful view, this Court ought not to compound that error by undertaking such an analysis now.

II. Background

[133] The facts are not in dispute and are set out in detail in the judicial review decision: *Pridgen v University of Calgary*, 2010 ABQB 644 at paras 2-15, 497 AR 219. Consequently, only the facts essential to this appeal follow.

[134] Two full-time undergraduate students, Steven Pridgen and Keith Pridgen (the respondents), each posted a single comment to a social networking site created by another student. The ground on the site was titled "I no longer fear Hell, I took a course with Aruna Mitra". Including the respondents and their comments, 25 comments were posted to the site by seven students enrolled in Professor Mitra's class. The 25 comments ranged from supportive to neutral to pejorative.

[135] In response to a student's comment that the course marks were available for viewing, a second student's post asking "how did everybody do??", and two responses that said they received a grade of 65, Steven Pridgen commented: "somehow I think she just got lazy and gave everybody a 65 ... that's what I got. does anybody know how to apply to have it remarked?".

[136] After the course had ended, one of the students inquired how everyone's new semester was going and stated that, for her, the "best part is NO MITRA". Keith Pridgen commented:

> Hey fellow LWSO [Law and Society] homees . .

> So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C!!!!! Remember when she told us she was a long-term prof? Well actually she was only sessional and picked up our class at the last moment because another prof wasn't able to do it . . lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future LWSO students!

Faculty Hearing and Decision

[137] Following a complaint by Professor Mitra, the interim Dean of the applicable faculty emailed each student stating that their comments may constitute academic misconduct, and summoned them to a meeting.

[138] After that meeting, the Dean's letter to Keith Pridgen noted that Keith Pridgen had "albeit reluctantly" acknowledged that the information on the site included personal attacks about the professor's qualifications and professionalism that lacked merit and supporting evidence, and had maligned her. Further, it contained derogatory comments about the hiring practices of the applicable faculty, and by extension, the University "claims that you contributed to in whole or in part and which neither you nor any member of the Facebook group has been able to substantiate". He sanctioned Keith Pridgen to 24 months' probation, required him to write an apology, and prohibited him from posting or circulating defamatory material or otherwise unjustifiably bringing the faculty or the University into disrepute.

[139] The Dean "state[d] emphatically that you are not being sanctioned for expressing your opinions on this site. You are at liberty to do so. It is important however that your views are not based on false premises, conjectures, and unsubstantiated assertions that are injurious to individuals or institutions and their hard-won reputations."

[140] The letter concluded with the statement that the sanctions could be appealed to the General Faculties Council (GFC) in accordance with the University's rules. The letter to Steven Pridgen was similar but his sanctions were a letter of apology and a prohibition on posting or circulating defamatory and unjustified material.

GFC Hearing and Decision

[141] The respondents appealed to the GFC, which appointed an *ad hoc* committee (the Review Committee) to hear the appeal. In general terms, the issues on appeal concerned whether the statements constituted non-academic misconduct, and whether the Dean's decision was reasonable and justified.

[142] After hearing the respondents' appeals, the Review Committee concluded that each of the respondents' posts "constitutes non-academic misconduct" and sanctioned Steven Pridgen to four months' probation and Keith Pridgen to six months' probation.

Unsuccessful Attempt to Appeal to the Board of Governors

[143] The respondents served an appeal of the Review Committee decision on the Board. Their covering letter was addressed to the Board's "Governance Coordinator". The grounds of appeal were under three headings: lack of jurisdiction, bias, and breaches of natural justice (procedural fairness). On the same day, the GFC Secretary, Osler, wrote the respondents' lawyer. She attached and referred to section 5.3 of the *The Board of Governors Student Discipline Appeal Committee Principles and Guidelines* and section 31(1) of the *Post Secondary Learning Act* (set out in full below), which permit appeals to the Board when the GFC has imposed a fine, suspension or expulsion. She concluded by writing "[t]herefore, as both Keith Pridgen and Steven Pridgen were placed on probation for non-academic misconduct, an appeal to the Board of Governors is not an avenue open to them" (emphasis in original).

[144] The same day, the respondents' lawyer responded, asserting that this view was "inconsistent with basic principles of statutory interpretation"; the Guidelines were immaterial to the interpretation of the governing legislation; and section 31(1) made it clear that the GFC's right to discipline was subject to a right of appeal to the Board. Accordingly, any discipline meted out by the GFC was *ipso facto* subject to a Board appeal. The letter also pointed out the "absurdity" of the University's position: either the GFC's right of sanction is limited by section 31(1) (to fines, suspensions or expulsions), in which case the sanctions it imposed on the respondents were without jurisdiction; or it had jurisdiction to impose broader sanctions, in which case the Board, by the same principles of interpretation, was obliged to hear appeals from those sanctions.

[145] The letter also noted that, as secretary to the GFC, Osler should not also be advising the Board, the GFC's appellate body. On March 12, Osler wrote the respondents' lawyer advising him "that the University's position remains unchanged".

[146] The respondents sought judicial review. It is convenient to set out the governing legislation and the University's Guidelines as a framework for understanding the judicial review decision.

III. Legislation and University Guidelines

[147] Section 31(1) of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 ("*Act*") sets out the process for student discipline at Alberta's universities.

> *Student discipline*
>
> 31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may
>
> > (a) **subject to a right of appeal to the board** [defined as the board of governors of a public post-secondary institution], discipline students

> attending the university, and the power to discipline includes the power
>
> > (i) to fine students,
> > (ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and
> > (iii) to expel students from the university;
>
> (b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper;
>
> (c) give to a student organization of the university the powers to govern the conduct of students it represents that the general faculties council considers proper.
>
> [emphasis added]

[148] The University of Calgary has (non-statutory) policies in place to govern the student discipline process before the matter reaches the GFC. Of importance is the part of the University Calendar that contains the *Student Misconduct Policy*, which includes a section on "Disciplinary Action for Non-Academic Misconduct". It provides:

> 1. Definition
> The term "non-academic misconduct" includes but is not limited to:
>
> > a. conduct which causes injury to a person and/or damage to University property and/or the property of any member of the University community;
> > ...
> > c. conduct which seriously disrupts the lawful educational and related activities of other students and/or University staff.

[149] The non-statutory *The Board of Governors Student Discipline Appeal Committee Principles and Guidelines* (adopted by the Executive Committee of the Board of Governors on June 7, 2004) governs appeals from the GFC.

[150] It provides, among other things, that the Board may delegate up to five of its members (the Student Discipline Appeal Committee) to hear discipline appeals, and three of the five members shall hear a particular appeal: ss 4.1, 4.4. The procedures governing such appeals include the

following: a student wishing to appeal from a GFC decision "delivers an appeal to the Secretary to the Board of Governors within fifteen calendar days of the GFC decision, in accordance with Section 31(1) of the Act [defined as the *Post Secondary Learning Act*] ...": s 7.1. Thereafter the "Secretary undertakes the following activities: (a) sends a letter of acknowledgment to the Appellant; and (b) sends a copy of the appeal to the Chair of the Student Discipline Appeal Committee...": s 7.3.

[151] "Discipline, as it relates to section 31(1) of the *Act*, **means** only academic or non-academic misconduct as defined **by the Calendar** and determined by the General Faculties Council, upon which a decision was made by the GFC that resulted in fines, suspension from the University, and/or expulsion from the University": s 3.6, (bolding in original). Section 5.3 provides that:

> Except for cases of student discipline, as provided under Section 31(1)(a) of the Act the Board does not have jurisdiction to act as an appellate body in any other matter and, specifically, there is no other right to appeal a decision of GFC to the Board of Governors under the *Post-Secondary Learning Act.*

[152] The *Act* is silent as regards the process to be followed once a right of appeal to the Board is exhausted.

IV. Standard of Review

[153] Once a Court of Queen's Bench judge has undertaken judicial review, an appeal of that review is governed by the standard of review common to all appeals from that Court as established by *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235.

[154] The judicial review judge's selection and application of the standard of review are each reviewed on a correctness standard: *Dr Q v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para 43, [2003] 1 SCR 226; *Alberta (Minister of Municipal Affairs) v Telus Communications Inc*, 2002 ABCA 199 at paras 24-26, 312 AR 40. In other words, this Court does not defer to the judicial review judge's selection of the standard of review or to the application of that standard to the issues raised by the tribunal's actions.

[155] The judicial review judge did not have the benefit of recent Supreme Court jurisprudence, which indicates that, absent a few exceptions (none of which apply here), judicial review proceeds on the reasonableness standard: see generally *Canada (Canadian Human Rights Commission) v Canada*, 2011 SCC 53 at paras 15-24. Accordingly, the reasonableness standard (not the correctness standard as she concluded at para 89) applies to the assessment of whether the Board erred in refusing to hear the appeal. She properly determined that the reasonableness standard applied to the issue of whether there had been non-academic misconduct by the respondents.

V. Judicial Review

[156] Given my conclusions on this appeal, only two of the judicial review judge's conclusions are relevant: (a) the Board was in breach of its statutory duty by refusing to hear the respondents'

appeals (para 92); and (b) the respondents' comments did not constitute non-academic misconduct (para 114).

(a) Board's Refusal to Hear the Appeal

[157] In coming to the conclusion that the Board was in breach of its statutory duty when it refused to hear the respondents' appeals, the judge had regard to section 31(1)(a) of the *Act* and the University's submission that the right of appeal it contemplates is only available if the discipline imposed is a fine, suspension or expulsion.

[158] The judicial review judge concluded that such an interpretation was inconsistent with a plain reading of the provision, in that it "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": para 91. She observed that the word "includes" indicates that the three listed sanctions "are simply examples of discipline that could be imposed by the GFC": *ibid*. Moreover, nothing in the *Act* "prevents the GFC from imposing probation as a form of discipline provided that whatever discipline is imposed is subject to a right of appeal to the board of governors": *ibid.* She concluded at para 91:

> If the word discipline was narrowly construed to only include fines, suspension or expulsion, not only would that interpretation fail to give meaning to the word "includes" but there would be no statutory basis for other forms of discipline (such as probation) to be imposed by the GFC. 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, by virtue of section 31(1)(a).

[159] However, rather than remitting the matter to the Board, the judge said at para 118:

> [T]his is not a case where the matter need be referred to the Board of Governor's Student Discipline Review Committee to consider an appeal from that decision. Although normal practice would be to correct the error and refer the application back to the administrative body, there is nothing to be gained from doing that in the present circumstances. The facts are not in dispute nor is the Board of Governor's Student Discipline Review Committee in a better position to decide the matters at issue. Hence, the decision of the Review Committee is quashed.

(b) Did the Respondents' Comments Constitute Non-academic Misconduct?

[160] The judicial review judge determined that the issue of whether the respondents engaged in non-academic misconduct involved a question of mixed fact and law subject to review on a standard of reasonableness. She had regard to the inadequacy of reasons, and properly concluded at paragraph 107 that her task was to assess whether the finding of non-academic misconduct fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[161] In considering the question, she concluded that each respondent should only be held responsible for his own statement or those he endorsed, not for other statements on the site posted by other students.

[162] She rejected the respondents' submission that "injury" (as defined in the Misconduct Policy) should be limited to physical harm, because "[t]here is no grammatical or policy reason to justify such narrow interpretations that are not consistent with the ordinary meaning of the words": para 110. She also dismissed the contention that the Misconduct Policy did not apply because Professor Mitra was no longer employed at the University when Keith Pridgen posted his comment.

[163] She did not accept the University's argument that all defamatory statements made by a student about a professor constituted non-academic misconduct. She concluded that she was not required to decide the issue of defamation, and whether it would have been established "is not relevant to whether the students committed non-academic misconduct as defined in the Policy": para 111.

[164] On the question of whether there was an "injury", the judicial review judge noted that Professor Mitra was not called as a witness; therefore, the only evidence was the Dean's hearsay and second hand hearsay that he had received a complaint from Professor Mitra, "who indicated that she had been told by unidentified colleagues and associates of that website which in their and her estimation seemed to bring her into disrepute and impacted her professional stature in some unspecified manner": para 112. The judge concluded this was inadequate to assess whether Professor Mitra suffered injury as a result of the respondents' comments.

[165] This led her to conclude 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": para 114.

VI. Analysis

(a) Board's Refusal to Hear the Appeal

[166] A fundamental principle of administrative law is that the statutory scheme established by a Legislature or Parliament must be used; it is not discretionary, and courts ought not usurp the functions entrusted to statutory delegates. Administrative delegates ensure the expeditious and proper functioning of the schemes of which they are a part. It is unnecessary to discuss the benefits

of such schemes, other than to observe that they are an essential element of Canada's regulatory scheme and without them the judicial system would be overwhelmed.

[167] The traditional common law discretion to refuse relief on judicial review includes the existence of adequate alternative remedies: see for example *Harelkin v University of Regina*, [1979] 2 SCR 561. This Court has repeatedly cited *Harelkin* and confirmed that "[j]udicial review is discretionary and an application for judicial review should be declined if an adequate statutory right of appeal exists": *Foster v Alberta (Transportation and Safety Board)*, 2006 ABCA 282 at para 14, see also *Merchant v Law Society of Alberta*, 2008 ABCA 363; *KCP Innovative Services Inc. v. Alberta (Securities Commission)*, 2009 ABCA 102.

[168] The discretion to refuse relief on judicial review when an alternate remedy is available may have been elevated to a question of jurisdiction. In *Canadian Pacific Ltd. v Matsqui Indian Band*, [1995] 1 SCR 3, 122 DLR (4th) 129, the Court said that "[e]xcept in special circumstances, it is the practice of the courts to decline jurisdiction in favour of the statutory appeal procedure - this is the 'adequate alternative remedy' principle.": see *Foster.* A useful overview of the jurisprudence, the principles and their purpose is found in *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at para 30 - 33, which is reproduced as *Appendix A* to this judgment.

[169] As mentioned above, procedural rules also inform the judicial review process. At the relevant time, these were found in Part 56.1 of the *Alberta Rules of Court*, Alta Reg 390/68. The rules authorized courts to grant the following relief on applications for judicial review: "an order in the nature of *mandamus*, prohibition, *certiorari*, *quo warranto* or *habeas corpus*; and "a declaration or injunction": r 753.04(1). The other permitted remedies included a setting aside order (r. 735.05), directing a reconsideration and determination (r. 735.06), or correcting technical defects (r. 735.07). The list is likely exhaustive when there is no statutory right of appeal or language in the constating statute granting the court additional jurisdiction.

[170] As noted, the respondents filed an appeal of the Review Committee's decisions to the Board, and, by way of letter from the GFC's secretary, were advised that "an appeal to the Board of Governors is not an avenue open to them": para 12. Despite concluding that the Board "was in breach of its statutory duty in refusing to hear the respondents' appeals": (para 92), the judge did not remit the matter back to the Board because "there is nothing to be gained from doing that in the present circumstances": para 118.

[171] As a general proposition, circumventing the process established by the Legislature for student discipline is not the proper approach. Courts can – and should – give guidance to statutory delegates to ensure the proper functioning of the statutory scheme. Not granting an order in the nature of *mandamus* on these facts would normally constitute an error: see e.g., *KCP Innovative Services Inc* at para 13, and *Foster* at para 16-22. Of note in the latter are the majority's comments that the process was less than ideal, but the solution lay with the Legislature, not the courts.

(b) Did the Respondents' Comments Constitute Non-academic Misconduct?

[172] Although the better course would be to remit this question to the Board and direct it to hear the appeal, it would be improvident to do so at this late stage of these protracted proceedings. The dispute has continued far too long, and the respondents deserve to have the matter now ended with finality. I agree with the judicial review judge's conclusion that "conduct which causes injury to a person" (part of the definition of non-academic misconduct in Misconduct Policy) is not limited to physical injury.

[173] Accordingly, had the University proven injury, whether to reputation, mental distress, or something else, there may have been a basis upon which to conclude that the respondents' posts, however innocuous they might appear when parsed or viewed in isolation, constituted non-academic misconduct. However, as the judge noted, no such evidence was tendered, nor can injury be inferred. For these reasons, the Review Committee's decisions were unreasonable and must be quashed.

VII. Conclusion

[174] The judicial review judge refused to decline jurisdiction to hear the judicial review on the basis that the Board was the proper body to hear the respondents' appeals from the Review Committee's decisions. Notwithstanding the University's non-statutory documents to the contrary, section 31(1)(a) compels the Board to hear appeals from the GFC (which, of course, includes its Review Committee).

[175] The judicial review judge correctly concluded that the Review Committee's decisions – the respondents' comments on the social networking site constituted non-academic misconduct – were unreasonable.

VIII. Application of the *Charter* to this Case

[176] Subsequent to this appeal being argued, the Supreme Court of Canada released its reasons in *Doré v Barreau du Québec*, 2012 SCC 12. In my view, *Doré* does not alter my analysis herein. Furthermore, the Supreme Court of Canada did not deal expressly with the issue raised in *McKinney*. As this matter can be decided solely on well established administrative law grounds, there is no need to resort to a *Charter* analysis in this case.

IX. Disposition of the Appeal

[177] The appeal is dismissed on the grounds that the judicial review judge properly held that the Review Committee's decisions were unreasonable. However, in my view it was neither appropriate nor necessary for the judicial review judge to have embarked on a *Charter* analysis. Given the prolonged and protracted history of this unfortunate matter, I decline to exercise our jurisdiction to refer these matters back to the Board, which after all had wrongfully declined to hear the respondents' appeals in the initial instance. In the result, I hold that the decisions of the Review Committee are quashed as being unreasonable.

Appeal heard on November 9, 2011

Reasons filed at Calgary, Alberta
this 9th day of May, 2012

McDonald, J.A.

Appendix "A"

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point [citations omitted].

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway [citations omitted]. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience [citations omitted]. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge [citations omitted].

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality

is high [citations omitted]. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be granted [citations omitted]. ..., the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

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.

[183] A ruling on either the *Charter*'s applicability to university student discipline or a ruling on whether the students' rights, as guaranteed by the *Charter*, had been infringed upon in this case was not necessary to the chambers judge's disposition of the students' complaint or to our disposition of the University's appeal. The chambers judge's ruling that the students' *Charter* rights had been violated was perhaps even undesirable because the issue of *Charter* infringement was not explored at first instance where the Supreme Court in *R v Conway*, 2010 SCC 22, [2010] 1 SCR 765 suggests it is preferable that such analysis be undertaken, namely at the General Faculties Council Review Committee. The Review Committee is in the best position to weigh the students' rights to freedom of speech and association against considerations such as academic freedom, encouraging a respectful learning environment, and perhaps, other factors which the Court might not be familiar with. Unfortunately, the Review Committee failed to engage in such analysis. That failure alone was all that was necessary to justify setting aside the General Faculties Review Committee's decision, given that the University's Board of Governors declined to hear the students' appeal of that decision.

[184] In conclusion, I would dismiss the University's appeal on the basis that the decision of the General Faculties Council's Review Committee was unreasonable for the reasons given by the chambers judge, including the fact that no consideration appears to have been given to the students' civil liberties. I would also dismiss the appeal on the basis that the Board of Governors' refusal or failure to hear the students' appeal contravened section 31(1)(a) of the *Post-Secondary Learning Act,* SA 2003, c P-19.5.

Appeal heard on November 9, 2011

Reasons filed at Calgary, Alberta
this 9th day of May, 2012

O'Ferrall J.A.

Appearances:

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C. Crosson
for the Respondents

J.L. Lebo, Q.C.
M.E. Toews
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C.C.J. Feasby
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G. Harding, Q.C.
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Corrigendum of the Memorandum of Judgment

The pagination has been changed. The new pages are 1 - 44.

Appendix “A” is now found at page 40 and that is also reflected in the Table of Contents.

Mr. Justice O’Ferrall’s Reasons for Judgment Reserved begin at [178] instead of [179] and that is also reflected in the Table of Contents

The Corrigendum contains the whole of the judgment, please replace your old copy accordingly.