**FTR Now**

# Court finds Discipline of Students for Online Comments about Professor to be Unreasonable

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Are students entitled to use social networking sites to criticize the instruction they receive? The University of Calgary said "no" and disciplined the students who did. In the case of *Pridgen v. University of Calgary*, released May 9, 2012, the Alberta Court of Appeal found that the University's decision to discipline the students was unreasonable.

This *FTR Now* discusses the approach taken by the lower court and the Court of Appeal, and the implications of the Court of Appeal decision for school boards and colleges.

## BACKGROUND

The case arose out of comments made by students about a course taught by Professor Aruna Mitra at the University of Calgary. The Pridgens, along with a number of other students, posted comments critical of the course to a public wall on Facebook. One student – not the Pridgens – created a Facebook group entitled "I no longer fear hell, I took a course from Aruna Mitra." Steven Pridgen posted a comment: "somehow I think she just got lazy and gave everybody a 65…that's what I got. does anybody know how to apply to get it remarked?"

His brother Keith Pridgen subsequently posted a comment: "…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 [the course] students."

Professor Mitra complained. The Dean concluded that the students were guilty of non academic misconduct. Following an appeal to an *ad hoc* committee appointed by the General Faculties Council, a sanction of probation was imposed.

## THE COURT DECISIONS

The Pridgens sought judicial review, arguing the University acted unreasonably and infringed their right to freedom of expression as guaranteed by the *Charter*. The reviewing judge found that the decision was unreasonable under administrative law principles, but also breached the students' right to freedom of expression and could not be saved by section 1 of the *Charter.*

At the Alberta Court of Appeal, Justice Paperny considered whether the *Charter* applies to this debate within the University setting. She determined that *Charter* protection for students' fundamental freedoms, including freedom of expression, applies in the circumstances, and the University failed to take into account the Pridgens' right to freedom of expression in the disciplinary proceedings. Justice Paperny stated that "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." The two other justices on the Court of Appeal panel concluded that the decision could be simply based on administrative law grounds; as such they declined to perform the *Charter* analysis.

The Court of Appeal further concluded that the University's decision was unreasonable on a number of grounds, including the denial of the right of the students to appeal to the Board of Governors. In addition, there was no satisfactory explanation of how or why the students' posting constituted "non-academic misconduct." The reasons, said Justice Paperny, "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 apply in the circumstances."

Justice Paperny pointed to the extremely vague nature of the evidence with respect to whether the Pridgens' conduct had "caused injury" to Professor Mitra. The only information before the review committee that touched on that issue came in the form of what the Court of Appeal called "double or triple hearsay". As such, Justice Paperny confirmed that it was unreasonable to conclude that "injury" within the meaning of the Student Misconduct Policy had been established.

## IMPLICATIONS OF THE DECISION

This decision has some valuable guidance for Ontario colleges and school boards when responding to students' use of social media to criticize their courses or instructors. The ultimate conclusion that the students were not guilty of non-academic misconduct under the University's code of conduct provides helpful insight for educational institutions into the management of a response in similar circumstances. The comments made by the Alberta Court of Appeal on the "reasonableness" of the University's decision are especially insightful. Decisions of disciplinary bodies must be ones which demonstrate "justification, transparency and intelligibility" in accordance with the Supreme Court of Canada's judgment in *Dunsmuir* and its more recent judgment in the *Newfoundland Nurses* case.

Also of key importance to the outcome was the absence of quality evidence in respect of actual harm to the professor. In this respect, Justice McDonald noted that if the University had proven injury—whether to reputation, mental distress, or something else—there may have been a basis upon which to conclude that the Pridgens' posts constituted non-academic misconduct. No such proof was offered.

Although the *Charter* debate in this decision is not applicable to Ontario colleges and school boards, as it has previously been determined that the *Charter* applies to them, the conclusions of Justice Paperny (the sole judge to engage in the *Charter* analysis) provide an indication of how *Charter* rights might be treated should similar issues arise in the college or school board sector. Justice Paperny's ruling indicates that issues like 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 will all be part of a *Charter* analysis into whether an individual's freedom of expression has been infringed in this context.

We can anticipate that cases involving social media, its use and alleged misuse, will continue to be brought before courts. This decision emphasizes the importance of due process, and in appropriate circumstances, a balancing of rights in disciplinary procedures.

Should you have any questions regarding this decision, please contact Siobhan O'Brien at 613.369.8411 or your regular Hicks Morley lawyer.

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