Failing Students by Taking a Pass on the Charter *in* Pridgen v University of Calgary

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I. Introduction

What is the appropriate approach when a judge is presented with a *Charter* issue? Should a judge simply decide the issue based on the arguments presented by the parties? Or should a judge seek out alternative and more limited reasons for deciding the *Charter* issue or even reasons to avoid deciding the *Charter* issue altogether? There is little guidance in Canadian academic literature on these questions. This article raises these questions in the context of a concrete example—*Pridgen v University of Calgary*—where judges on two Courts took three different approaches to a *Charter* issue.[1]

The issue in *Pridgen* was whether the *Charter* applied to the University of Calgary or, more narrowly, the University of Calgary's student discipline process. At the Court of Queen's Bench, Justice Strekaf applied the Supreme Court of Canada's reasoning in *Eldridge v British Columbia (Attorney General)*[2] to find that the *Charter* applied to the University of Calgary in the delivery of post-secondary education. As will be discussed in detail below, the Court of Appeal divided over whether to decide the *Charter* issue at all.

The judges in *Pridgen* can be described as exercising varying degrees of activism or restraint in relation to the *Charter* issue. Critics claim that *Charter* review is undemocratic because it usurps the role of Parliament.[3] The leading defence of the democratic legitimacy of *Charter* review is dialogue theory which asserts that Courts make *Charter* decisions as part of an ongoing debate with Parliament over the meaning of the *Charter*.[4] A problem with dialogue theory is that it offers little guidance as to how and when *Charter* review is to be conducted. If it is accepted that *Charter* review is legitimate, should judges then feel no constraint and decide *Charter* cases without regard to the criticisms of *Charter* review?

The chambers judge in the Court of Queen's Bench, Justice Strekaf, took an unapologetically activist approach. She decided the *Charter* issue on the widest available grounds. By contrast, the approaches taken by the Court of Appeal judges in *Pridgen* can be seen to be examples of judicial minimalism—a kind of judicial restraint—even if they are not self-identified as such. Judicial minimalism is an approach to decision-making that has enjoyed recent prominence in the United States. Judicial minimalism has gained favour amongst academics—most notably Cass Sunstein—and Justices of the U.S. Supreme Court.[5] Judicial minimalism, simply put, is the practice of either not deciding constitutional issues at all or deciding constitutional issues on the narrowest and shallowest available grounds. A minimalist judge will try to avoid

deciding a constitutional question whenever possible and, if forced to decide, will decide the question in such a way as to have as little impact on policy and jurisprudence as possible. Judicial minimalism is often defended on the grounds that it is practical, humble, and leaves as much space as possible for democratic decision-making.[6]

One of the problems with *Pridgen* is that none of the justices in the Court of Appeal explained their approach to deciding the *Charter* issue. Justice Paperny conceded that the broad approach to the *Charter* issue employed by Justice Strekaf was "one possible approach," but she concluded that the *Charter* issue "fits more comfortably within the analytical framework of statutory compulsion."[7] Similarly, Justices McDonald and O'Ferrall conceded that the *Charter* issue was ripe but concluded that it was "unnecessary" to decide the *Charter* issue because the appeal could be dispensed with on administrative law grounds.[8] Neither of the judges explained why it was "unnecessary" to decide the *Charter* issue and why the lack of necessity justified their silence on the *Charter* issue. This article considers whether judicial minimalism is an adequate explanation for the approaches taken by the different Court of Appeal judges in *Pridgen*.

Part II of this article sketches a brief outline of the decisions in *Pridgen*. Part III describes the U.S. debate over judicial minimalism and outlines the more limited Canadian scholarship on judicial minimalism. The approaches by the judges in *Pridgen* are evaluated in Part IV and tentative suggestions concerning the role of judicial minimalism in Canadian judicial decision-making going forward are offered.

II. *Pridgen v University of Calgary*

a) Background

Controversy over freedom of expression in universities has been brewing for a number of years. There have been instances where prominent controversial speakers have been prevented from speaking.[9] For a time at Concordia University, discussion of Israel-Palestine issues was prohibited.[10] Perhaps the most common conflict over freedom of expression on university campuses has involved the silencing of "pro-life" student groups. At Carleton University, members of a pro-life group were arrested for participating in a demonstration on campus.[11] In two separate disputes in British Columbia, pro-life student groups brought complaints against student unions in the B.C. Human Rights Tribunal.[12]

The University of Calgary is involved in two cases involving freedom of expression in addition to *Pridgen*. The first, *R v Whatcott*, involves an activist who was apprehended by campus security and charged with trespass while distributing anti-gay leaflets.[13] The second, *Wilson v University of Calgary*, involves disciplinary action taken against pro-life students who were disciplined for displaying distasteful signs at a demonstration on campus.[14] Both cases promise to find their way to the Alberta Court of Appeal in the near future.

The common thread that runs through the various controversies over freedom of expression on university campuses is that universities consider themselves sovereign and largely unconstrained in their ability to regulate expression on campus. Given the power imbalance between universities and students or even student groups, it is likely that the controversies that have found their way into the media, the courts, or human rights tribunals represent only a fraction of the contestable decisions to regulate expression on university campuses in Canada.

b) The Facts

The 2007 fall session of Law and Society 201 at the University of Calgary was taught by Aruna Mitra, a sessional instructor. Mitra, it seems, earned the enmity of a number of her students. One student created a Facebook Wall titled "I NO Longer Fear Hell, I Took a Course with Aruna Mitra." Ten different students posted to the Wall. The Pridgen brothers each made one post to the Wall.

> Steven Pridgen: "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?"[15]

> Keith Pridgen: "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 L.W.S.O. students!"[16]

Other students made multiple posts to the Wall and one student suggested facetiously that Mitra should be "drawn and quartered during a special presentation at Mac Hall."[17]

The Pridgen brothers, together with all of the other students who posted to the Wall, were summoned before the Interim Dean of the Faculty of Communication and Culture and before four other professors to discuss the Wall. The Interim Dean later advised Keith Pridgen that he had committed non-academic misconduct and that he would be on probation for 24 months. The Interim Dean also found that Steven Pridgen had committed non-academic misconduct, but no period of probation was imposed. Both of the Pridgen brothers were required as a part of their penalty to (a) refrain from making any statements that "unjustifiably bring the University of Calgary and/or the Faculty of Communication and Culture into disrepute" and (b) write an apology letter to Mitra. Failure to comply with these requirements could result in expulsion.[18]

The Pridgens appealed the Interim Dean's decisions to the General Faculties Council's Review Committee. The Review Committee upheld the substance of the Interim Dean's decisions but shortened Keith Pridgen's probation period and imposed four months of probation on Steven Pridgen so that the end of the brothers' probation periods coincided at six months after notice of the initial discipline by the Interim Dean.[19]

The Pridgens attempted to appeal the Review Committee decision to the Board of Governors, but the University took the position that such an appeal was not available according to the *Post Secondary Learning Act*.[20] As a result, the Pridgen brothers filed an Originating Notice seeking judicial review of the decision of the Review Committee. The Originating Notice pleaded that the decision of the Review Committee should be quashed on administrative law grounds and also pleaded that the students' right to freedom of expression as guaranteed by the *Alberta Bill of Rights*[21] had been violated. The Originating Notice did not plead the *Charter* as a ground for judicial review. However, prior to the judicial review hearing, the students sought leave prior to the Queen's Bench hearing to advance arguments based on the *Charter*. Justice Nation granted an order permitting the Pridgen brothers to file supplementary written argument on the *Charter* issue.[22]

c) The Queen's Bench Decision

i. *Charter*

Justice Strekaf dealt with the *Charter* issues before dealing with the administrative law grounds.[23] She then considered whether the *Charter* applied to the University of Calgary's disciplinary process. She rejected the University of Calgary's position that *McKinney v University of Guelph*[24] stood for the proposition that the *Charter* does not apply to universities. Instead, she applied the reasoning in *Eldridge* where it was held that a hospital could be subject to the *Charter* even though it was a non-governmental entity because it was implementing a specific government policy. She held that, "the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta."[25]

ii. Administrative Law

The Pridgens advanced four administrative law grounds for overturning the Review Committee decision: (1) the Board of Governors erred in law in refusing to hear the students' appeals; (2) the students were denied a fair hearing; (3) the Review Committee failed to provide adequate reasons for its decisions; and (4) the Review Committee erred in concluding that the activities constituted non-academic misconduct.[26]

Justice Strekaf found that the Review Com-

mittee decision should be quashed because the Board of Governors erred in law in refusing to hear the students' appeals and because the Review Committee provided inadequate reasons for its decision.[27] Justice Strekaf found that the Review Committee hearing process was fair but that there was no reasonable basis for concluding that the students' activities constituted non-academic misconduct.[28]

d. The Court of Appeal

Several months before the appeal was to be heard, Justice McDonald granted three parties the right to intervene in the proceedings: the Canadian Civil Liberties Association, the Association of Universities and Community Colleges, and the University of Alberta. The interventions were explicitly limited to the question of whether the *Charter* applied to the University of Calgary's discipline process.[29]

The vast majority of the written and oral submissions to the Court of Appeal concerned the applicability of the *Charter* to universities generally and the University of Calgary's discipline process in particular. The University of Calgary spent little time defending the merits of its administrative process or the conclusions of the Review Committee. Not surprisingly, then, Justice Paperny's decision deals with the administrative law issues in succinct fashion. She upheld Justice Strekaf's conclusions in ten short paragraphs finding that the Review Committee's decision was unreasonable. The vast bulk of her reasons are dedicated to the more contentious *Charter* issue, upon which the three intervenors were specifically granted leave to make submissions.

Justice Paperny's *Charter* decision is perhaps the most lucid exposition of section 32 of the *Charter* found anywhere including leading constitutional law texts.[30] She outlined five categories of government or government activity to which the *Charter* can apply:

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.[31]

Paperny JA upheld the decision of Justice Strekaf on the *Charter* but for different and narrower reasons. While she allowed that the *Charter* might be found to apply for the reasons in *Eldridge* as Justice Strekaf did, she found that in the case before the Court the *Charter* applied to the University of Calgary because it was exercising a statutory power of compulsion.[32] In other words, the *Charter* applied to the University of Calgary because it was exercising a disciplinary power granted by statute. The University in this sense was akin to the Law Society or other professional governing bodies. Justice Paperny left open for another day the more general question answered by Justice Strekaf of whether the *Charter* applied to the University of Calgary in the delivery of post-secondary education.

At the oral hearing, Justice McDonald was openly sceptical of the relevance of the *Charter*. His questions suggested that he would either decide that the *Charter* did not apply or that it was unnecessary to decide the *Charter* issue. Rather than writing a rebuttal to Justice Paperny's *Charter* decision, Justice McDonald opted to leave the issue for another day. He concluded:

> [w]hile 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.[33]

Justice O'Ferrall, in separate concurring reasons, agreed with Justice McDonald, holding that: "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."[34] Justice O'Ferrall went on to say that it was preferable for *Charter* analysis to be undertaken by the General Faculties Council Review Committee because it has greater familiarity with the context and is better position to engage in a balancing analysis.[35]

In her reasons, Justice Paperny addressed

the necessity issue raised by Justices McDonald and O'Ferrall. She observed that Justice Strekaf was entitled to decide the *Charter* issue because it had been fully argued before her and there was a complete factual record notwithstanding belated complaints to the contrary raised by the University of Calgary on appeal.[36] Justice Paperny further justified her choice to decide the *Charter* issue by quoting Peter Hogg:

> 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.[37]

To this, Paperny JA added that it was not "appropriate or necessary" to avoid the *Charter* issue after granting the intervenors leave to intervene on that very issue.[38] She also noted that it is not appropriate, as Justice O'Ferrall had suggested, to have the Review Committee or the University's Board of Governors decide a legal question such as a *Charter* issue.[39]

III. Judicial Minimalism and Constitutional Decision-Making

a) Judicial minimalism in the U.S.

Judicial minimalism is a style of decision-making rather than a theory of law. In the constitutional arena, judicial minimalism stands in contrast to decision-making based on a judge's moral view, as Dworkin would have it, or based on an understanding of the original intent of the framers of the Constitution, as Justice Scalia would have it.[40] The easiest and most effective way to avoid making sweeping constitutional decisions is to not make constitutional decisions at all. One of the leading critics of judicial review and one of the intellectual forefathers of modern judicial minimalism, Alexander Bickel, explained that courts should use "passive virtues" to decline jurisdiction and avoid making constitutional decisions.[41] Bickel's "passive virtues" include denying that the court has jurisdiction to hear an issue, denying that a party has standing to bring a complaint, denying leave to appeal, declining to decide political questions, and deciding a case on alternative grounds. Cass Sunstein and other contemporary judicial minimalists all build upon the foundation laid by Bickel.[42]

When forced to decide a constitutional case, a minimalist following Sunstein seeks to decide the case on narrow and shallow grounds. A narrow decision is one that decides only the case before the Court and does not seek to propound a rule of general application.[43] A shallow decision is one that is justified by abstract reasoning or incompletely theorized reasons. Shallowness, Sunstein suggests, facilitates consensus whereas theoretical perfectionism sows the seeds of disagreement.[44] Sunstein's account of judicial minimalism goes beyond simply prescribing that decisions should be narrow and shallow and I willingly concede that my description of Sunstein's judicial minimalism in this article does not capture the complexity of his argument.

Proponents of minimalism contend that it has a number of advantages over other approaches to judicial decision-making. By changing the law gradually, judicial minimalism promotes stability and the rule of law.[45] Minimalism, because it takes small steps and is predicated on incompletely theorized arguments, allows for future changes in the law. By not committing to a specific theory or broad rule, a minimalist decision allows future courts to change the course of the law without having to overrule precedent. In other words, the law is less likely to stray far from the correct path before a mistake is discovered if it is moving slowly.

Judicial minimalism is also promoted as a humble approach to decision-making.[46] A minimalist recognizes the limits of human beings to understand and process information. Accordingly, a judicial minimalist eschews propounding a general theory or a rule of broad application because she recognizes that she cannot know all of the possible implications of the theory or rule. Judicial minimalism is also ostensibly ideologically and value neutral in the sense that it does not recommend outcomes that are liberal or conservative.[47]

The closest that judicial minimalism has to a theoretical underpinning is that it preserves

space for democratic decision-making. While minimalists accept the legitimacy of judicial review, they are also cognizant of the criticism that judicial review usurps the role of democratically elected decision-makers. Minimalist judgments tread as little as possible on the domain of elected representatives. By deciding cases on narrow and shallow grounds, thorny constitutional issues remain unresolved and in the political domain longer. This, in theory, allows for increased democratic deliberation and the potential for consensus and legislated resolutions.

Judicial minimalism is not monolithic. Sunstein identifies two sub-categories of judicial minimalists: (1) Burkean Minimalists; and (2) Rationalist Minimalists.[48] Burkean minimalists value established social traditions or practices and judicial precedent which represents collected wisdom. Whether Burkean minimalism supports a constitutional challenge or not depends on the nature of government action. A Burkean minimalist will generally favour the *status quo,* whether the impetus for change comes in the form of judicial or legislative action. By contrast, a rationalist minimalist is often sceptical of tradition and views it as the product of historical power relationships and often a source of injustice rather than a repository of wisdom. Sunstein highlights the historical sex discrimination found throughout the law as an example of a tradition that would be questioned and rejected by rationalist minimalists.

Judicial minimalism has attracted significant criticism.[49] Dworkin contends that minimalism's lack of substantive content—one of its strengths according to Sunstein—is in fact a weakness.[50] Minimalism without morality preserves space for elected representatives to enact immoral laws. When presented with an immoral law, a dogmatic minimalist judge will only invalidate the law to the least extent possible. This will require often under resourced individuals and groups to embark on a campaign of litigation to vindicate their constitutional rights and, in the meantime, suffer the infringement of their rights. Dworkin cites the example of the U.S. Supreme Court's use of passive virtues to avoid considering the constitutionality of statutory bans on interracial marriage in the decade prior to deciding such bans were unconstitutional in 1967.[51] According to Dworkin, it was clear for many years prior to 1967 that there was a consensus on the court that bans on interracial marriage were unconstitutional and that it was the court's strategic decisions not to take cases that prevented the issue from being described. As a result, he notes, individuals in interracial marriages continued to be persecuted and jailed under anti-miscegenation laws for over a decade after there was a consensus that such laws were unconstitutional.

Sunstein's minimalism is premised in part on trusting constitutional issues, including minority and individual rights, to the democratic process.[52] While court-centric accounts of minority rights may sometimes sell short the capacity of the public and elected representatives to appreciate constitutional values, history has shown that there are times when majorities enact laws that oppress individuals or minority groups. Indeed, the potential of a tyranny of the majority is one of the reasons for judicial review in the first place. Elected representatives are elected by majorities and are at risk of succumbing to the temptation to enact laws that entrench themselves or favour majorities at the expense of minorities. Given this reality, it is not clear why judges should defer to elected representatives or accord them too much space in making decisions concerning the democratic process or minority or individual rights.

b. Judicial Minimalism in Canada

Even though the *Charter* is still a relatively new feature on the Canadian legal landscape, there has been remarkably little angst over the legitimacy of *Charter* review. Certainly compared to the U.S. debates, Canadian disagreement over *Charter* review has been mild. While politicians occasionally complain about judge made law, the only serious academic criticism of *Charter* review was made by Ranier Knopff and Ted Morton.[53] Knopff and Morton argued that the *Charter* usurped the role of democratically elected representatives and that the judiciary formed a "Court Party." The Knopff and Morton critique was effectively answered by Hogg and Bushell who explained that *Charter*

review was consistent with democratic governance because the Court was really engaged in a dialogue with Parliament and the legislatures.[54] Essentially, through the process of invalidating legislation and giving reasons, the Court gives Parliament or a legislature an opportunity to respond through revised legislation. Through this iterative process, in most cases democratic objectives can be achieved through constitutional means. Hogg and Bushell's dialogue theory has won broad acceptance within the community of legal academics and with members of the Supreme Court of Canada.[55]

Hogg and Bushell's work leaves open the question of precisely how courts and legislatures should approach dialogue. This gap is starting to be filled by other scholars. The key question is whether dialogue is better facilitated by robust court decisions or by minimalist court decisions. Kent Roach argues that robust judicial review conducted by judges following moral principles in the tradition of Dworkin best facilitates dialogue.[56] Roach goes on to explain that the different features of the *Charter* and the Canadian political system—most notably, section 1 and section 33 of the *Charter*, and the unity of executive and legislative power in our Parliamentary system—make the "intermediate strategies" of judicial minimalism unnecessary.[57] In other words, Parliament has the power to react promptly and effectively to court decisions that it disagrees with, whereas the U.S. political system cannot react as effectively because it lacks the constitutional tools and because the separation of powers tends to blunt the speed and strength of reactions to court decisions.

The most prominent Canadian proponent of minimalism is Patrick Monahan. Monahan accepts dialogue theory as the foundation for the legitimacy of *Charter* review; however, he disagrees with Roach and concludes that judicial minimalism is, in most instances, the decision-making style that best facilitates dialogue with Parliament and the legislatures. Monahan explains that "[m]inimalist rulings are attractive in that they decide only a limited range of issues, thereby leaving the greatest scope possible for potential responses by the legislative and executive branches."[58] Monahan is not a dogmatic judicial minimalist in that he allows that there are times when a Court should "announce a broad rule that will categorically resolve in advance a wide range of potential litigation."[59]

Paul Horowitz has suggested that Canadian courts should use a style he calls "open-textured minimalism" when writing *Charter* decisions.[60] He explains that open-textured minimalism has both aesthetic and theoretical components. Open-textured minimalism involves narrow decisions, but rejects Sunstein's emphasis on shallowness. Horowitz explains that "it is an approach that attempts to decide questions narrowly, without laying down too much doctrine, while still providing suggestive and evocative prose that will be the starting point for ongoing conversations about *Charter* values."[61] The version of minimalism expounded by Horowitz seeks not to preserve space for democratically elected representatives to resolve policy issues; rather, it seeks through narrow but deep rulings to prompt democratic decision-makers to engage in a more reasoned dialogue.[62]

The Canadian judicial tradition is replete with examples of activism and minimalism. A proponent of either approach to judicial decision-making can find ample support for his or her position in the annals of Canadian law. A few observations, however, are appropriate. Canadian courts are less likely than U.S. courts to deploy "passive virtues" to avoid making decisions.[63] Canadian courts rarely deny standing in constitutional cases, often decide moot cases, and give sweeping advisory opinions on highly politicized subjects. With this said, judicial minimalism is consistent with the common law tradition of making decisions one case at a time that informs the experience of the judges in nine of Canada's ten provinces. The modest incrementalism that is the stuff of judicial minimalism comes easily to judges steeped in the common law tradition. In this regard, it should be noted that before the *Charter*, there was authority that minimalism was the appropriate approach in constitutional cases. Chief Justice Laskin observed that "in constitutional cases, Courts should not, as a rule, go any farther than is necessary to

determine the main issue before them."[64]

No one should be surprised that in the first decades of the *Charter* era the Supreme Court of Canada made many sweeping decisions. When there are no precedents to draw upon and no established framework of jurisprudence, it is inevitable that decisions will be broad and sometimes represent a marked departure from the *status quo*. Just as no one should be surprised at the activism of the early *Charter* years, it will be unremarkable if the Supreme Court of Canada takes a minimalist turn as *Charter* jurisprudence matures. Indeed, as the blank canvas of the *Charter* is filled with decisions, there is less space for the Court to effect change without departing from precedent. Except in extraordinary circumstances when precedent is discarded or a truly novel issue arises, the jurisprudence of a mature constitution is a jurisprudence of nuance and subtlety.

The emerging practice of having Supreme Court judges appear before a Parliamentary committee to answer questions, even if the Parliamentary committee has no power over Supreme Court appointments, is likely to reinforce any trend toward minimalism. Judges, mindful of their audience, irrespective of their ideological outlook, will tend to explain their approach to decision-making in terms that are deferential to Parliament. Having made public statements on the nature of judicial decision-making, a judge will then be less likely to adopt a decision-making style that would open him or her up to be criticized as hypocritical. A case in point is Justice Rothstein who made a number of comments on judicial decision-making in his appearance before the Parliamentary committee. Rothstein J began his remarks by noting the limited role of the Court in relation to Parliament. When questioned directly about judicial activism by Diane Ablonczy, Justice Rothstein highlighted the fact that judges have to look at "everything on a case-by-case basis." He went on to observe that judges "have to have recognition that the statute they're dealing with was passed by a democratically elected legislature, that it's unlikely that the legislature intended to violate the *Charter*" and that "they have to approach the matter with some restraint."[65] Rothstein J also seemingly criticized one of the most controversial tools of Canadian judicial activism—reading in—by saying, "[W]e just can't read words in where they aren't. That's kind of the cardinal rule for judges, or at least it's the cardinal rule for me."[66]

IV. Evaluating the Approaches to Decision-Making in *Pridgen*

Now that I have drawn a sketch of judicial minimalism, it is appropriate to return to *Pridgen* and ask some questions about the decision-making styles of the various judges in the case and to consider which was the most appropriate in the circumstances. The first question is whether Justice Strekaf's decision was really as activist as it seems at first glance and, if so, whether that is inappropriate in a decision of a court of first instance. The University of Calgary argued that *McKinney* was a controlling precedent that stood for the proposition that universities are not subject to the *Charter*. Critics might argue that Justice Strekaf's decision effectively reversed *McKinney* because so much of a university's activities are inextricably involved with the provision of education to the public. Such critics might say that following the logic of Strekaf J's decision, it is possible that only the internal workings of universities—for example, the relationship with university staff in issue in *McKinney*—would remain free from *Charter* scrutiny.

Just because Justice Strekaf's decision would have had a large impact if it had been allowed to stand does not mean that it is activist. Sometimes even the narrowest and shallowest decisions have a large impact. Strekaf J's decision was shallow because it did not propound a new theory or rule; instead, it simply applied the existing precedent, *Eldridge*. Contrary to position of the University of Calgary, it is clear from the various sets of reasons in *McKinney* and the extra-judicial writings of the judges that decided *McKinney* that the Supreme Court of Canada by no means intended to foreclose the future application of the *Charter* to universities in different contexts. Moreover, the Supreme Court of Canada in *Eldridge* set out a test to be

used to determine whether the *Charter* applies non-governmental actors including universities. Justice Strekaf's decision can be seen to be a straightforward application of *Eldridge*.

While Justice Strekaf's decision can be described as shallow, it is not narrow. The Court of Appeal demonstrated that there were at least two alternative and narrower paths to decide the case. However, to say that Justice Strekaf's decision was activist does not mean that it was the wrong approach even if you accept Monahan's view that there should be a presumption in favour of minimalism. Justice Strekaf, sitting in a court of first instance, is situated in a much different position than the Supreme Court of Canada or even the Court of Appeal. When a judge of the Court of Queen's Bench or its sister courts in other Provinces is faced with deciding a case, should he or she pick and choose amongst the issues seeking to minimize the impact of a decision? Regardless of how the *Charter* issue was raised in *Pridgen*, the judicial review record was complete and the parties had a full opportunity to brief the *Charter* issue. In the interests of efficiency and fairness to the parties, a judge in a court of first instance should decide all issues properly before the Court and justify his or her decision. When a judge in a court of first instance fails to decide an issue, there is the ever present possibility that the case will be remitted to the judge following appeal to deal with the undecided issue. Serial litigation of issues is inefficient and disregards the real-life cost of litigation that parties must bear. In a court of first instance, a judge should not limit the opportunity of an appellate court to evaluate all possible reasons for a decision. On this measure, Justice Strekaf took the correct approach deciding all of the issues put squarely before her by the parties and not limiting in any way the scope of issues for the Court of Appeal to decide.

By deciding the case on administrative instead of *Charter* grounds, McDonald and O'Ferrall JJA vindicated the students, though not on their preferred grounds, and let the University live to fight another day on the *Charter* issue. Superficially, this appears to be a reasonable outcome. The problem with McDonald and O'Ferrall JJA's decisions are that they leave the law in a state of considerable uncertainty and provide no guidance to either students or universities with respect to freedom of expression on university campuses. From Sunstein's perspective, this outcome would be desirable because it leaves the question unsettled and in the public domain for debate and resolution by elected representatives. However, the reality of the situation is that the rights of students in the university discipline system attracts little attention from the legislature. There seems little point in leaving the issue in the political domain if political actors are not interested in discussing the subject.

Since McDonald and O'Ferrall JJA declined to decide the *Charter* issue, Alberta Queen's Bench judges confronting issues of freedom of expression are left with the reasons of Justice Strekaf and Justice Paperny to guide them. While McDonald JA may have thought that his passive virtues approach left the *Charter* issue unresolved, the practical effect of failing to decide the *Charter* issue is to leave the decisions of Strekaf J and Paperny JA as the only guidance for future cases. Justice O'Ferrall's decision only muddies the waters by suggesting that the idea of freedom of expression should be considered in the university disciplinary process without providing any indication how this is to be done. The best way for McDonald and O'Ferrall JJA to have given guidance to students and universities and to minimize future litigation would have been to decide the *Charter* issue, one way or the other.

According to Justice Côté, the role of a provincial appellate court is twofold: (a) error correction; and (b) making law.[67] This is to be contrasted with the role of the Supreme Court of Canada which is primarily concerned with making law in a narrow set of cases that it determines to be of public importance.[68] Courts of Appeal must act reasonably and should not make law unless it is appropriate in the circumstances—*i.e.* the issue is properly before the Court and fully argued. However, as Justice Côté notes, "[a]n important role of Courts of Appeal is to settle the law, so it is unfortunate when they avoid reasonable chances to do so."[69] It is hard to understand, except from a dogmatic

minimalist perspective, why Justice McDonald failed to address the *Charter* issue when he acknowledged at the outset of his reasons that "it may be time to reconsider whether or not universities are subject to the *Charter*."[70] Courts of Appeal should not shy away from deciding important issues, or making law as Justice Côté puts it, because the Supreme Court of Canada exercises supervisory jurisdiction on questions of public importance. Indeed, a decision not to decide a constitutional issue in the fashion of McDonald and O'Ferrall JJA in *Pridgen*, denies the Supreme Court of Canada the opportunity to consider the issue. The Supreme Court of Canada is unable to perform its role deciding cases of public importance as effectively if Provincial Courts of Appeal avoid *Charter* decision-making.

What, then, is an appropriate form of minimalism for a Provincial Court of Appeal? Paperny JA's approach in *Pridgen* provides a good example. Her decision is critical of the traditional view that universities are not subject to the *Charter* in the fashion of Sunstein's rationalist minimalist, but it is narrow and deep similar to the style of minimalism advocated by Horowitz. Justice Paperny weighed the important, but circumscribed, theoretical issue of how to reconcile freedom of expression and the ideas of academic freedom and institutional independence. She also provided important guidance and certainty to both students and universities by indicating that the *Charter* applied to the student discipline process. This is particularly important given the other cases in the Alberta courts concerning the University of Calgary and the use of its discipline process to regulate freedom of expression on campus. At the same time, her decision does not endorse the reasons of the court below which could be interpreted to extend the *Charter* to large parts of university operations beyond student discipline. Although Paperny JA does not explain her decision to limit her reasons to the University of Calgary's exercise of statutory power and therefore student discipline, it may be that she understood that a broader application of the *Charter* could raise unforeseen issues not fully argued before the Court.

V. Conclusion

Judicial minimalism will be a continuing and perhaps even a growing approach to decision-making at the Supreme Court of Canada as *Charter* jurisprudence matures. A trend toward minimalism at the Supreme Court of Canada —especially if it is a rationalist minimalism or open-textured minimalism—is nothing to be concerned about and may even be desirable. After all, not every case—even cases meeting the test of public importance—merits broad and deep reasons. With that said, it would be regrettable if the Supreme Court of Canada adopted a Burkean or dogmatic minimalism or became overly dependent on passive virtues to avoid making *Charter* decisions. The Supreme Court of Canada must maintain the flexibility and the courage to weigh in with broad and deep decisions when circumstances require.

Provincial trial courts and provincial appellate courts must be more wary of minimalism than the Supreme Court of Canada. Overuse of minimalism by lower courts risks producing a body of decisions that leave the Supreme Court of Canada in a weaker position to carry out its role in deciding issues of public importance. If lower courts are overly minimalist, they will produce fewer decisions on questions of public importance and will not provide deep enough reasons to engage the policy issues that the Supreme Court of Canada is mandated to resolve. If provincial trial courts and provincial appellate courts adopt a form of minimalism, it should be a rationalist or open-textured minimalism that is not blindly accepting of tradition and which provides some depth of reasoning even if decisions are narrow. This kind of minimalism would not avoid decision-making through passive virtues. Instead, such a minimalism would produce decisions that are an adequate foundation for dialogue with elected representatives or, indeed, appeals to the Supreme Court of Canada.

Notes

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expressed in this article are those of the author and not of Osler or the CCLA. The author is grateful for the comments of Thomas Gelbman and Jessica Moon on an earlier version of this article.

1 *Pridgen v University of Calgary,* 2010 ABQB 644 [*Pridgen QB*] aff'd 2012 ABCA 139 [*Pridgen CA*]. For a comment on the administrative law issues in *Pridgen CA*, see Shaun Fluker, "The Need to Explain Yourself Before Imposing Discipline Under the Law" *Ablawg.ca* (17 May 2012) online (www.ablawg.ca). For a comment on the *Charter* issues in *Pridgen CA*, see Jennifer Koshan, "Face-ing the *Charter*'s Application on University Campuses" *Alblawg.ca* (13 June 2012)online: (www.ablawg.ca) [Koshan].

2 [1997] 3 SCR 624 [*Eldridge*].

3 FL Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000) at 149 [Morton & Knopff].

4 Peter Hogg & Allison A Bushell "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter Of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75 [Hogg & Bushell]; Peter. Hogg, "The *Charter* Revolution: Is it Undemocratic?" (2001) 12:1 Const Forum Const 1 [Hogg, *Charter* Revolution].

5 Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, (Cambridge, MA: Harvard University Press, 1999) [Sunstein *One Case at a Time*]. See, Robert Anderson IV, "Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court" (2009) 32 Harv JL & Pub Pol'y Policy 1045 showing that minimalism has a statistically significant impact on the decision-making of the U.S. Supreme Court.

6 Sunstein, *One Case at a Time, supra* note 5 at 26.

7 *Pridgen CA*, *supra* note 1 at para 105.

8 *Ibid* at paras 132, 179.

9 See Craig Jones, "Immunizing Universities from *Charter* Review: Are We 'Contracting Out' Censorship?" (2003) 52 UNBLJ 261 at 263 [Jones]; DerekB Mix-Ross, *Exploring the Charter's Horizons: Universities, Free Speech, and the Role of Constitutional Rights in Private Legal Relations* (LLM Thesis, University of Toronto, 2009) at 1-3.

10 Jones, *supra* note 9 at 261.

11 *Lobo v Carleton University*, 2012 ONSC 254 aff'd 2012 ONCA 498.

12 *Macapagal (and others) v Capilano College Students Union (No. 2)*, 2008 BCHRTD 13 (CanLII); *Gray and others v University of British Columbia Students' Union—Okanagan (No 2)*, 2008 BCHRTD 16 (CanLII) aff'd 2008 BCSC 1530.

13 2012 ABQB 231. For a discussion of this case, see Linda McKay-Panos, "University Campus is not *Charter*-Free," *Ablawg.ca* (28 May 2012) online (www.ablawg.ca).

14 Court of Queen's Bench Court File No1101-04894 online: http://www.jccf.ca/images/application.pdf.

15 *Pridgen QB*, *supra* note 1 at para3.

16 *Ibid*, at para 4.

17 *Pridgen CA*, *supra* note 1 at para 10.

18 *Pridgen QB*, *supra* note 1 at para 6.

19 *Pridgen CA, supra* note 1 at para 33.

20 SA 2003, c P-19.5; *Pridgen QB*, *supra* note 1 at paras 12, 14, 91.

21 RSA 2000, c A-14.

22 *Pridgen QB*, *supra* note 1 at para 25.

23 *Ibid*, paras 25-26.

24 [1990] 3 SCR 229.

25 *Pridgen QB*, *supra* note 1 at para 63.

26 *Ibid*, para 31.

27 *Ibid*, paras 98-106.

28 *Ibid*, paras 97 and 114.

29 Order of Justice McDonald, filed May 9, 2011.

30 Koshan, *supra* note 1 remarked, "I am tempted to cull my constitutional law syllabus for next year and teach only [Paperny JA's decision in] *Pridgen* on section 32...." In addition, Paperny JA's decision is the first serious consideration of the relationship between academic freedom and freedom of expression in Canadian jurisprudence

31 *Pridgen CA, supra* note 1 at para 78.

32 *Pridgen CA*, *supra* note 1 at para 105.

33 *Ibid*, para 132.

34 *Ibid*, para 183.

35 *Ibid*, para 183.

36 *Ibid*, para 63.

37 *Ibid* quoting Peter. Hogg, *Constitutional Law of Canada,* 5th ed (Toronto: Carswell, 2007) at para 59.22.

38 *Ibid*, para 64.

39 *Ibid*, para 64.

40 Ronald Dworkin, *Taking Rights Seriously*, (Cambridge, MA: Harvard University Press, 1977); Antonin Scalia & Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul, MN: Thomson/West, 2012).

41 Alexander M Bickel, "The Supreme Court, 1960 Term-Foreword: The Passive Virtues" (1961) 75 Harv L Rev 40 at 75-79 [Bickel, "The Passive Virtues"]; *The Least Dangerous Branch*: *The Supreme Court at the Bar of Politics* 2d ed (New Haven: Yale University Press, 1986) at 111.

42 Bickel, "The Passive Virtues," *supra* note 41 at 75-79.

43 Sunstein, *One Case at a Time, supra* note 5 at 10.

44 *Ibid* at 11.
45 Cass R Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996) at 39.
46 Sunstein, *One Case at a Time*, *supra* note 5 at 39-41.
47 *Ibid*, at 51.
48 Cass R Sunstein, "Burkean Minimalism" (2006) 105 Mich L Rev. 353. See also, Cass R Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What it Meant Before*, (Princeton, NJ: Princeton University Press, 2009).
49 See, for example, Tara Smith, "Reckless Caution: The Perils of Judicial Minimalism" (2010) 5 NYUJL & Liberty 347; Neil S Siegel, "A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar" (2005) 103 Mich L Rev 1951.
50 Ronald Dworkin, "Looking for Cass Sunstein," *New York Review of Books* (30 April 2009).
51 *Ibid*.
52 Sunstein, *One Case at a Time*, *supra* note 5 at 24-25.
53 Knopff & Morton, *supra* note 3.
54 Hogg & Bushell, *supra* note 4.
55 See Peter M Hogg, Allison A Bushell Thornton, & Wade K Wright, "*Charter* Dialogue Revisited—Or "Much Ado About Metaphors" (2007) 45 Osgoode Hall LJ. 1 discussing the various Supreme Court of Canada cases citing their original article and discussing dialogue theory.
56 Kent Roach, "Sharpening the Dialogue Debate: The Next Decade of Scholarship" (2007) 45 Osgoode Hall L.J. 169 at 179 note 30.
57 *Ibid* at 183.
58 Patrick Monahan, "The Supreme Court in the 21st Century" (2001) 80 Can Bar Rev 374 at 392
59 *Ibid* at 392-393.
60 Paul Horowitz, "Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law" (2000) 38 Osgoode Hall LJ 101.
61 *Ibid* at 124.
62 *Ibid* at 140-142.
63 Hogg, "*Charter* Revolution," *supra* note 4 at 1-2.
64 *Re Anti-Inflation Act*, [1976] 2 SCR 373 at 419.
65 Transcript of Rothstein J's testimony on file with the author at 21.
66 *Ibid*, at 32.
67 JE Côté, *The Appellate Craft,* (Ottawa: Canadian Judicial Council, 2009) online: http://cjc.gc.ca/cmslib/general/ACC-Appellate-Craft-book-final-E.pdf at 4 [Côté].
68 *The Supreme Court Act*, RSC 1985, c S-26, s 40 (1).
69 Côté, *supra* note 67 at 7.
70 *Pridgen CA*, *supra* note 1 at para 132.