The Charter and Civil Law:
Judicial Minimalism at the Alberta Court of Appeal: Failing Students
by Taking a Pass on the Charter in Pridgen v. University of Calgary

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JUDICIAL MINIMALISM AT THE ALBERTA COURT OF APPEAL: 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.

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 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. The leading defence of the democratic legitimacy of Charter review is the dialogue theory which asserts that Courts make Charter decisions as part of an ongoing debate with Parliament over the meaning of the Charter. A problem with dialogue theory is that it offers little guidance as to how and when Charter review is to be conducted.

1 Partner, Osler, Hoskin & Harcourt LLP and Counsel to the Canadian Civil Liberties Association in Pridgen v. University of Calgary. The views expressed in this article are those of the author and not of Osler or the CCLA. This article is in draft and is not for quotation or citation prior to publication. The author is grateful for the comments of Thomas Gelbman and Jessica Moon on an earlier version of this article.


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. 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.

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.” 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. 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

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7 Pridgen CA, supra note 2 at para. 105.