



## Students' Freedom of Expression Gets a Status Update

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While most students' Facebook news feeds are filled with their friends' status updates, new photos and foursquare notices, perhaps they should consider posting the following update: be careful what you post.

Two recent cases out of Alberta and Ontario addressed the issues that can arise when students take to Facebook to express themselves. In both cases, the courts were asked to stand up for free speech and apply section 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> (the "*Charter*"). In the first, free speech prevailed and the students were successful in their appeals. In the second, the court decided that the student's comments fell outside the limits of free speech and the appeal was denied.

### *Pridgen v. University of Calgary*

In *Pridgen v. University of Calgary*<sup>2</sup>, the applicants were identical twin brothers and full-time students enrolled at the University of Calgary. Both students enrolled in a course called Law and Society, taught by Professor Aruna Mitra who was teaching the course for the first time. Professor Mitra was not popular with the students. Another student in the class created a Facebook page entitled "I NO Longer Fear Hell, I Took a Course with Aruna Mitra". Each of the Applicants posted a single message about Professor Mitra on the page and subsequently each was sanctioned for non-academic misconduct and put on probation. After being denied an appeal by the Board of Governors of the University, the applicants applied to the Court of Queen's Bench of Alberta for judicial review of the decision.

The Applicants argued that the University infringed their right to freedom of expression guaranteed under s. 2(b) of the *Charter*. The Court applied *Eldridge v. British Columbia (Attorney General)*<sup>3</sup> in determining that the *Charter* applied to the University when it was implementing a specific government policy or program, as it was in this case.<sup>4</sup>

The Court then determined that the applicants' activities were a form of expression protected by the *Charter*<sup>5</sup>, and the purpose of the decision by the University was, quite clearly, to restrict that expression.<sup>6</sup>

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<sup>1</sup> *The Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

<sup>2</sup> 2010 ABQB 644

<sup>3</sup> [1997] 3 SCR 624

<sup>4</sup> The University of Calgary was providing accessible post-secondary education services to students in Alberta pursuant to the *Post-Secondary Learning Act*, S.A. 2003, c.P-19.5.

<sup>5</sup> Facebook postings are a form of expression analogous to any form of written expression and section 2(b) of the *Charter* must be extended to include them. This is so even though the drafters of the *Charter* did not contemplate its application to social media. Facebook founder Mark Zuckerberg wouldn't even be born until 2 years after the *Charter* was enacted.

The issue then turned to whether the infringement by the University was justifiable under section 1 of the *Charter*, which states that "[t]he *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In determining that the infringement was not justified, the Court said:

Students should not be prevented from expressing critical opinions regarding the subject matter or quality of the teaching they are receiving. As an educational institution, the University should expect and encourage frank and critical discussion regarding the teaching ability of professors amongst students, even in instances where the comments exchanged are unfavourable. While certain of the comments made about Professor Mitra were not particularly gracious and might have reflected a lack of maturity, the Facebook Wall does have utility as a forum of discussion.<sup>7</sup>

The Court ultimately quashed the decision of the University and the Applicants were removed from probation.<sup>8</sup>

### ***Zhang v. University of Western Ontario***

In *Zhang v. University of Western Ontario*<sup>9</sup>, the Applicant was a first year law student<sup>10</sup> at the University of Western Ontario. Several complaints about his behaviour had been lodged with the University. The incidents included asking questions in class that were characterized by some as "unduly gruesome", "macabre", "frightening" and "graphic", some of which included references to individual students. The Applicant also controlled a Facebook page under the name "Dr. Frank N. Stein"<sup>11</sup> on which he made controversial postings such as "Dr. is eating babies", "Dr. is free to observe torture without criminal liability", "Dr. is learning how to get away with murder in his criminal law class".

Mr. Zhang was subsequently suspended from the Faculty by then Dean Ian Holloway. However, shortly after returning from suspension, a new incident involving a posting to his Facebook page resulted in Mr. Zhang's permanent expulsion from the Faculty of Law. Mr. Zhang appealed the decision to the University Discipline Appeal Committee and, after being denied, applied to the Ontario Superior Court of Justice, Divisional Court for judicial review of the decision.

The Court upheld the decision of the University and the Appeal Committee to expel Mr. Zhang from the University. As in *Pridgen*, the Court had to decide whether Mr. Zhang's actions, including his Facebook postings, were protected by section 2(b) of the *Charter*. However, unlike in *Pridgen*, the Court in *Zhang* decided that there are limits to free speech, and Mr. Zhang's postings fell outside those limits. The Court said:

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<sup>6</sup> The court applied the two-step test from *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 to determine that there had been a *prima facie* infringement.

<sup>7</sup> *Supra* note 2 at para 82.

<sup>8</sup> One need only imagine the applicants' Facebook updates following the release of this decision.

<sup>9</sup> 2010 ONSC 6489

<sup>10</sup> Interestingly or not, both cases involve students who were enrolled in law related courses.

<sup>11</sup> Those students who seek anonymity by creating Facebook pages under pseudonyms should be aware of the fate of Dr. Frank N. Stein, otherwise known as Mr. Zhang, former law student.

This court is mindful of the historical importance of encouraging free speech on university campuses, and rigorously defending the rights of students to debate difficult and often highly unpopular issues with passion. However, free speech has its limits, including the making of threats and defamation of character.<sup>12</sup>

The Court also held that universities have the right to exert control over the non-academic behaviour of students, including Facebook postings, because they have a duty to protect members of the University community.<sup>13</sup>

### **Free Speech Hits the Facebook Wall**

These two cases stand for the proposition that while universities do have the right to exert control over the non-academic behaviour of students, students' Facebook postings are protected by their constitutional right to freedom of expression. Universities should always be mindful of encouraging free speech in any form. However, there are limits on what type of expression will be protected. While students can and should express critical opinions regarding the subject matter or quality of the teaching they are receiving, any Facebook posts that are interpreted to be threatening or defamatory may not be protected by freedom of expression and students could be disciplined appropriately.<sup>14</sup> Though not directly addressed in these cases, these principles could be extended to include cyber-bullying, where students use social media outlets to bully their peers. This creates a serious issue of safety in the school environment, and freedom of expression should not be relied on to protect this type of online behaviour.

### **Conclusion**

Students and adults alike should think twice before posting updates to their Facebook pages. There are no shortage of stories and articles posted about improper Facebook behaviour and the trouble it can cause.<sup>15</sup> However, these two cases now show that students' Facebook posts are subject to disciplinary action by universities that can result in probation, suspension and even expulsion. In considering disciplinary action against a student, schools must be mindful to balance the importance of free speech in academic environments while ensuring a safe school environment for students.

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<sup>12</sup> *Ibid* at para 35.

<sup>13</sup> *Ibid* at para 38.

<sup>14</sup> It is alright to post this article on Facebook, so long as you ensure not to defame the writer in the process.

<sup>15</sup> Take, for example, the frustrated employee who took to Facebook to air her grievances about her employer, only to remember that she had previously added him as a friend on Facebook. The woman was fired in a subsequent Facebook post by her employer.