Court of Queen's Bench Clarifies Law on Academic Disputes in *Al-Bakkal v. de Vries*, 2016 MBQB 45

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Students throughout Canada commonly sue post-secondary educational institutions with respect to academic matters. Actions brought by students against their university or college are almost universally framed in terms of breach of contract, negligence, and/or breach of fiduciary duty.

These claims are frequently subject to motions to strike on the basis that the statements of claim do not disclose a reasonable cause of action or for a lack of jurisdiction. However, in recent years, the outcome of these motions to strike have become inconsistent and unpredictable.

The recent decision of Chief Justice Joyal in *Al-Bakkal v. de Vries et. al.,* 2016 MBQB 45 provides a welcome clarification of the law in a heavily-litigated area. This decision provides significant assistance to post-secondary educational institutions who are the subject of litigation related to academic matters.

Prior to 2006, actions relating to academic matters were routinely dismissed by way of motions to strike. For example, in *Warraich v. University of Manitoba,* 2003 MBCA 58, the Manitoba Court of Appeal struck out a claim on the basis that the inherent jurisdiction of the Manitoba Court of Queen's Bench had been displaced by the University's statutory dispute resolution regime.

In *Bella v. Young,* 2006 SCC 3, the Supreme Court of Canada clarified that universities may owe students concurrent duties in contract and in tort. This decision did not fit easily within the framework established by *Warraich* and the numerous cases that followed.

As a result, courts began to struggle with the application of the *Warraich* framework to claims that were pled on the basis of contract and tort. For example, in *Hozaima v. Perry,* 2010 MBCA 21, the Manitoba Court of Appeal upheld the dismissal of a motion to strike and allowed an action for damages relating to the plaintiff's inability to complete a degree in dentistry to proceed.

The Ontario Court of Appeal in *Gauthier c. Saint-Germain,* 2010 ONCA 309 and *Jaffer v. York University,* 2010 ONCA 654 held that a properly pled claim framed in contract or tort could be allowed to proceed, even if the claim related to matters that are academic in nature. These decisions constituted a significant change in course from a number of previous Ontario decisions which were consistent with *Warraich*. See for example: *Wong v. University of Toronto,* (1992) 4 Admin. L.R. (2d) 95 (Ont.C.A.), *Dawson v. University of Toronto,* 2007 ONCA 875, and *Zabo v. University of Ottawa,* [2005] O.J. No. 2664 (Ont.C.A.), leave to appeal refused [2005] S.C.C.A. No. 354.

Al-Bakkal involved an action brought by a former student in the Faculty of Dentistry at the University of Manitoba. The plaintiff received a failing grade in a course from her course instructor. The plaintiff successfully sought judicial review of this grade before the Court of Queen's Bench in the case of *Al-Bakkal v. de Vries,* 2003 MBQB 198. The Court in that case granted a declaration that the plaintiff had passed the course, and permitted her to register in her fourth year of studies. In the Judicial Review decision, the Court made a number of strong findings against the Faculty, including that it had acted in a biased and "grossly unfair" manner toward the plaintiff.

The plaintiff subsequently issued an action against the University and a number of faculty members seeking damages on the basis of breach of contract, negligence, and breach of fiduciary duty. The defendants brought a motion for summary judgment.

Joyal C.J.Q.B. distinguished *Bella v. Young* and held (at para. 61) that "the jurisprudence from Manitoba and the rest of Canada continues to support the proposition that claims involving matters of an essentially academic nature and character ought not to be permitted to proceed as an action pled in contract and/or negligence."

The Court distilled the following principles from the jurisprudence (at para. 77):

> (a) where the essential character of the dispute involves an academic matter, the superior court will demonstrate institutional deference and defer its jurisdiction to the university, except of course on an application for judicial review of the matters arising from the university's own academic appeal processes;
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> (b) in circumstances where the "essential character" of a dispute involves an academic matter or where the dispute focusses on the academic requirements, rules and/or regulations that the university applies to students, a civil suit for damages is not an available remedy;
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> (c) even where non-compliance with its own processes has been noted by the university (or others), the student seeking to bring an action against the university in respect of academic matters is in no better or different a position than where the university does not make such a finding;
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> (d) actions brought by students involving academic matters may be dismissed even where a student has been successful on a prior application for judicial review. This is so "even if the plaintiff could not have obtained a damages award through [those] other proceedings ...."; and
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> (e) in a university context there is "no cause of action at law as damage to life and career ... that is simply frivolous and vexatious".

Joyal C.J.Q.B. summarized his conclusion as follows (at paras. 88 and 91):

> The jurisprudence is clear. In cases involving "academic matters", the court has no role in the connected dispute except to fulfill its role in the context of a judicial review. In cases that do involve non-academic misconduct, like that in *Bella v. Young*, the court need not defer to the academy and it can and should exercise its concurrent jurisdiction to adjudicate the case and if justified, provide an award of damages. Such cases might include situations where, for example, a student is assaulted by an instructor. That type of dispute is clearly non-academic and the pursuit of damages in a civil court would be a possibility. Conversely, where a student fails a course or a year, or is expelled from a faculty, there is no recourse to a superior court except on judicial review. To the extent that a student wishes to seek a remedy, that remedy would lie in the university's internal appeal mechanism and/or with the court on judicial review.
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> [...]

> I am persuaded by the defendants' submissions that assuming without deciding that Al-Bakkal may have a cause of action as a pure matter of law, the concurrent jurisdiction of this court ought not be exercised given what I see in the circumstances is the required deference to the university's appeal mechanism. That appeal mechanism did operate in the present case to redress Al-Bakkal's complaints - even if more unevenly and slowly than desired. In that connection, I note that a significant legal safeguard in the university's appeal process was the important layer of judicial review which typically provides, where necessary, the required oversight. Indeed, it is through this mechanism that Al-Bakkal successfully accessed the only relief to which she was entitled. To the extent that delay was incurred, much of that delay is the unfortunate reality attendant to any appellate process. If any resulting prejudice for delay should have been identified and if such prejudice so warranted it, costs of a more punitive nature could have been awarded at the judicial review stage.
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> [Emphasis added]

In the result, Joyal C.J.Q.B.'s decision in *Al-Bakkal* provides a powerful and cogent argument to post-secondary educational institutions who are faced with actions relating to academic matters.

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