Fall 2017 Issue 01

DISCOVERY

ATLANTIC EDUCATION AND THE LAW

STEWART McKELVEY
LAWYERS • AVOCATS

COVER STORY

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Welcome to the first issue of Discovery, our new publication specifically designed for universities and colleges. As a leading law firm in Atlantic Canada, we have a special interest in the success of our region's universities and colleges. We know it is not always easy to identify legal issues, or know what to do when they arise, and so we aim to clear the confusion and give you practical and reliable information from legal experts that you can trust.

We want this publication to be informative, but above all, useful to universities and colleges in Atlantic Canada. In this inaugural issue you'll find a mixture of articles, features, and updates on a wide array of topics including marijuana, tenure and cloud computing. Also, drawing on our 2017 Legal Issues Affecting Universities Seminar that we hosted in the spring, Sacha Morisset offers additional insight on the issue of accommodation.

I hope you enjoy this first issue and let us know if there are any topics that you would like to see covered in the future.

– Melisa Marsman, Associate
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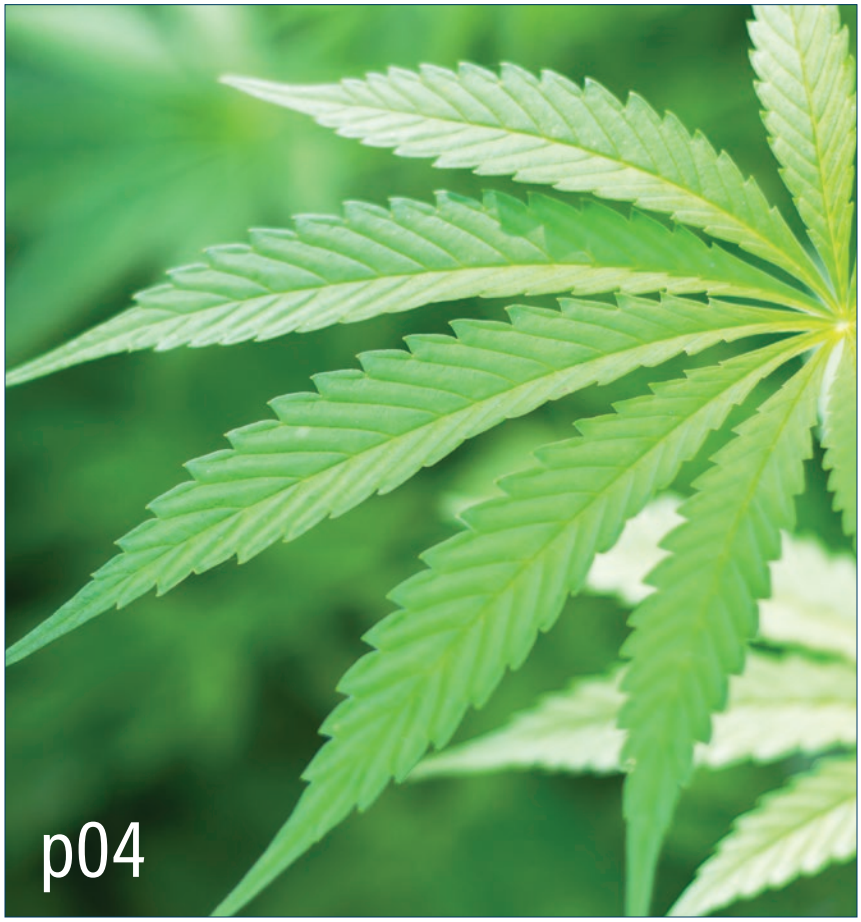

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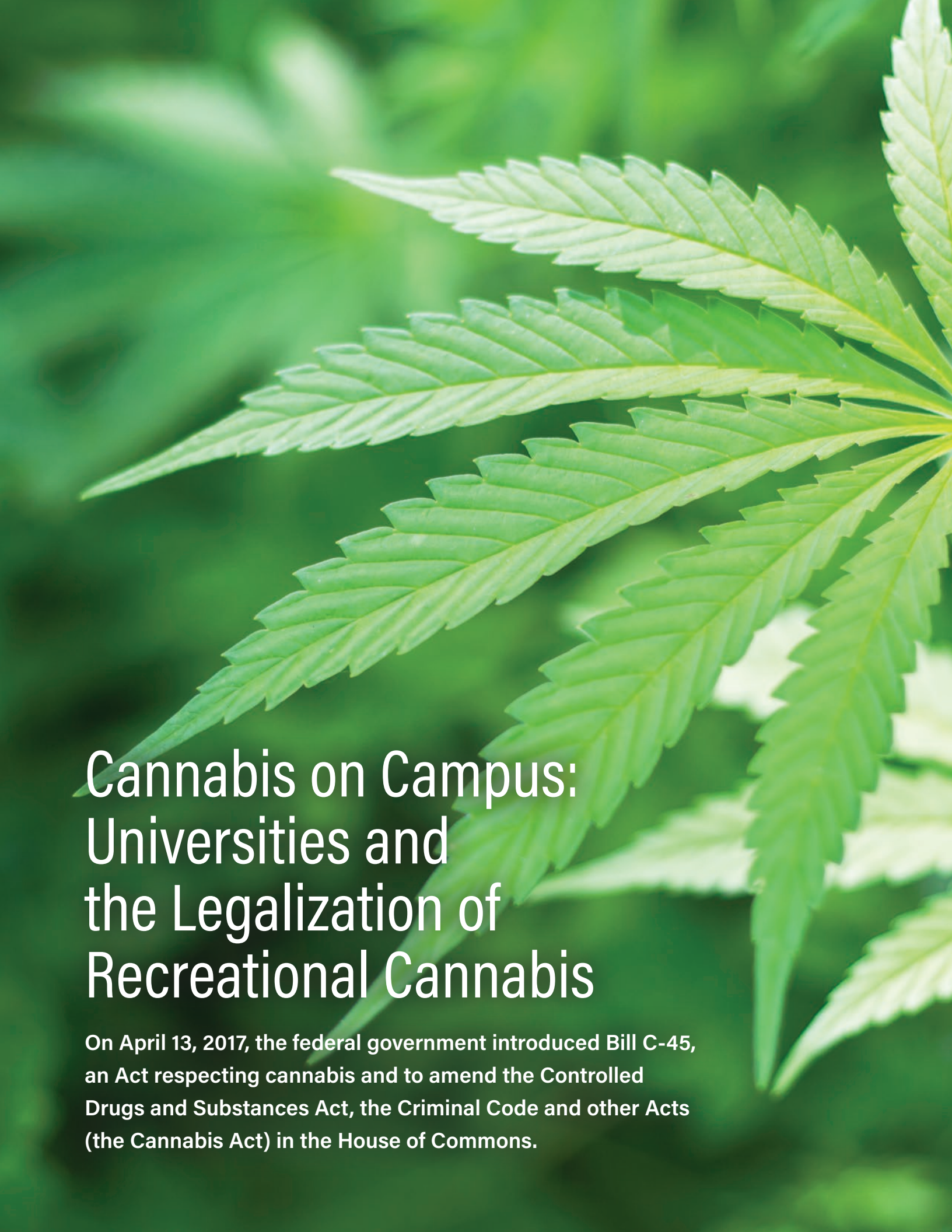

Cannabis on Campus: Universities and the Legalization of Recreational Cannabis

On April 13, 2017, the federal government introduced Bill C-45, an Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts (the Cannabis Act) in the House of Commons.

THE *CANNABIS ACT*: A BRIEF OVERVIEW

The Cannabis Act ("the Act") will legalize cannabis for recreational use (non-medical use) and the Act will control and regulate the production, distribution and sale of recreational cannabis in Canada.

The federal government is aiming for a legalization date of July 1, 2018 or earlier and until that time, existing laws with respect to cannabis will continue to be enforced.

The *Cannabis Act's* objectives are to prevent young persons from accessing cannabis, to protect public health and public safety, to deter criminal activity, and to reduce the burden on the criminal justice system. To achieve these objectives, the Act establishes product safety and product quality requirements. The Act also imposes criminal penalties on those who operate outside the Act.

Once the *Cannabis Act* is enacted, provincial and territorial governments will play a key role in licensing and regulating the retail sale and distribution of cannabis. Also, the provinces and territories will have the power to raise the minimum benchmarks in the Act such as the minimum age. Some provinces are considering age 19 as the minimum in order to conform with existing alcohol and tobacco legislation.

IMPACT ON UNIVERSITIES

When recreational cannabis becomes legal, universities will need to address the various health, safety and social issues which may affect students, faculty and staff on campus.

Universities should review their existing alcohol and drug policies, disciplinary policies, student and employee codes of conduct, and other procedures and regulations.

> **"When recreational cannabis becomes legal, universities will need to address the various health, safety and social issues which may affect students, faculty and staff on campus."**

When the Act comes into force, Canadians over the age of 18 will be legally permitted to:

- Purchase cannabis products,
- Possess up to 30 grams of dried cannabis,
- Share up to 30 grams of cannabis with other adults,
- Cultivate up to 4 plants (not exceeding 1 metre in height) per household, and
- Alter cannabis to prepare edibles for personal use (provided no dangerous solvents are used).

These documents will likely need revision in light of the new reality of legal recreational marijuana use in Canada. For example, any references to cannabis or marijuana as an illegal or illicit drug will need to be revised once the *Cannabis Act* comes into force. Universities should review and update both their student *and* employee policies.

While the federal government is legalizing marijuana, universities will have the right to restrict the use and possession of cannabis on campus for both students and employees in the same way that universities currently regulate alcohol and tobacco use on campus.

The *Cannabis Act* will amend the federal *Non-Smokers' Health Act* to restrict cannabis smoking in federally-regulated places. That does not affect universities but the provincial *Smoke-free Places Act* may prohibit marijuana smoking or vaping in public spaces on university campuses even in the absence of a university rule (each province's *Smoke-free Places Act* should be consulted in this regard).

Issues Affecting Students

Universities have students of various ages – some of whom will not be legally permitted to use or possess cannabis.

Research indicates that younger people are particularly vulnerable to the effects of marijuana because their brains do not fully develop until the age of 25.[1] For younger persons, marijuana use can negatively impact memory, judgment, perception and coordination which in turn, can lead to problems with learning, sports performance, impaired judgment and decision-making in the short-term and problems with reduced memory and lower IQ in the long-term.[2]

The *Cannabis Act* prohibits young persons under the age of 18 from possessing or distributing more than 5 grams of cannabis and there are penalties under the *Youth Criminal Justice Act* for young persons who contravene the *Cannabis Act*. The *Cannabis Act* imposes severe penalties for adults who give or sell cannabis to young persons. In fact, distributing cannabis to a young person could result in a 14 year prison sentence (s. 9(5)(a)(i) of the *Cannabis Act*). Furthermore, the Act provides that it is not a defence that the accused believed that the person they provided cannabis to was over the age of 18 unless the accused took reasonable steps to ascertain the person's age (s. 9(3) of the Act).

Similar to alcohol and tobacco, there are health and social risks associated with marijuana use. A research study from 2015 found that students who use marijuana miss more classes and are less likely to join extracurricular activities.[3] Universities may wish to promote responsible marijuana use which informs students of the risks associated with marijuana. A university could accomplish this through educational campaigns and workshops both on campus and on social media. There may also be a need for increased counselling and psychological services on campus for students who find themselves dependant on marijuana or who are suffering from other problems associated with recreational use.

> **"Universities may wish to promote responsible marijuana use which informs students of the risks associated with marijuana."**

Given the severe penalties under the *Cannabis Act*, universities may wish to educate students about the legal consequences if they are caught using while underage or if they are caught sharing or selling cannabis to underage students.

Student issues which universities should address during policy review include:

- Whether students will be permitted to use and possess cannabis (including edibles) on campus, both in public spaces and university residences;
- Whether smoking or vaping will be permitted on campus (while provincial smoke-free places legislation may determine this for campus public spaces, universities will want to decide whether smoking or vaping is allowed in dormitories and apartment-style residences);
- Whether students will be permitted to grow marijuana plants on campus or in their residences;
- Whether student clubs or societies for cannabis/marijuana/hemp will be permitted to operate on campus; and
- Discipline and penalties for violations of policies, regulations, rules, and/or codes of conduct.

In New Brunswick, St. Thomas University has established a health research chair on cannabis. The chair will teach courses, provide scholarly research on cannabis issues and will be expected to educate students about social responsibilities.[4] Other Atlantic universities may wish to follow suit and establish a similar position on campus.

[1] Carmela Fragomeni, "Forum says McMaster must prepare to deal with marijuana legalization", The Hamilton Spectator (March 28, 2017) <https://www.thespec.com/news-story/7213905-forum-says-mcmaster-must-prepare-to-deal-with-marijuana-legalization/>.

[2] Rich Barlow, "Legalized Marijuana: What You Need to Know", BU Today (December 15, 2016) < https://www.bu.edu/today/2016/legalized-marijuana-what-you-need-to-know/>.

[3] Nelson Mensah-Aborampah, "Opinion: How will Canadian universities deal with marijuana?", Vancouver Sun (November 6, 2016) <http://vancouversun.com/opinion/opinion-how-will-canadian-universities-deal-with-marijuana>.

[4] "Health Research Chair on Cannabis to Be Established During 2017-18", St. Thomas University Campus News (May 8, 2017) <http://w3.stu.ca/stu/News/159201>.

Issues Affecting University Employees

The common law permits employers to require that its employees remain sober or unimpaired while at work. The *Cannabis Act* will not change that. This means that a university will still be able to enforce workplace policies regarding drug and alcohol impairment. A university as an employer would be able to discipline (subject to collective agreements, workplace policies and codes of conduct) employees who are working while impaired by cannabis.

However, it is generally more difficult to monitor marijuana use than alcohol use as impairment by alcohol is more easily detected.

Workplace issues which universities should address during policy review include:

- The expectation that employees not be under the influence of cannabis while working;
- Measures to ensure that employees in safety-sensitive positions on campus are not impaired by cannabis while working;
- Disciplinary measures to punish employees who work while impaired by cannabis;
- Definitions in existing policies regarding drugs or illegal drugs;
- Drug testing or other methods of detection for impairment for cannabis;
- Providing support for employees addicted to cannabis; and
- Accommodation for employees battling cannabis addiction.

Universities should keep in mind that unilaterally introducing new policies, regulations or procedures into the workplace may result in objections from unions representing faculty and staff. Employers are permitted to introduce new rules provided the new policy meets certain criteria such as: being consistent with the collective agreement; being reasonable; being clear; and having been brought to an employee's attention prior to the employer acting on it. If discharge could result, then the employee must be made aware of this, and the employer must consistently enforce the policy.[5]

WHAT NEXT?

The *Cannabis Act* has not come into force yet and no federal regulations or any provincial and territorial legislation have been drafted or enacted yet. Thus, there is still time for universities to plan and prepare for the impact that legalized marijuana is going to have on their campuses. Universities can ready themselves through such measures as policy development, education and awareness campaigns; by promoting healthy and responsible use; or, by providing in-house training for students, faculty and staff.

[5] This is known as the KVP criteria from an arbitration case, Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. Ltd. (1965), 16 L.A.C. 73 (Robinson)

HOW STEWART MCKELVEY CAN HELP

Stewart McKelvey provides a full range of legal services covering all aspects of legal issues affecting universities in Atlantic Canada. With cannabis legalization on the horizon, Stewart McKelvey can:

- Assist with cannabis policy development, including reviewing and revising existing drug and alcohol policies for both students and employees;
- Draft new, or review existing, campus regulations and disciplinary rules;
- Advise on your university's legal rights, responsibilities, and potential liabilities;
- Advise on the content of external and internal communications relating to cannabis on campus;
- Provide in-house training and other educational campaigns;
- Provide legal advice and representation;
- Provide ongoing support; and
- Provide updates on legislation, regulatory requirements and emerging issues.

Please contact Stewart McKelvey with questions about what you can do to prepare your university for the legalization of cannabis.

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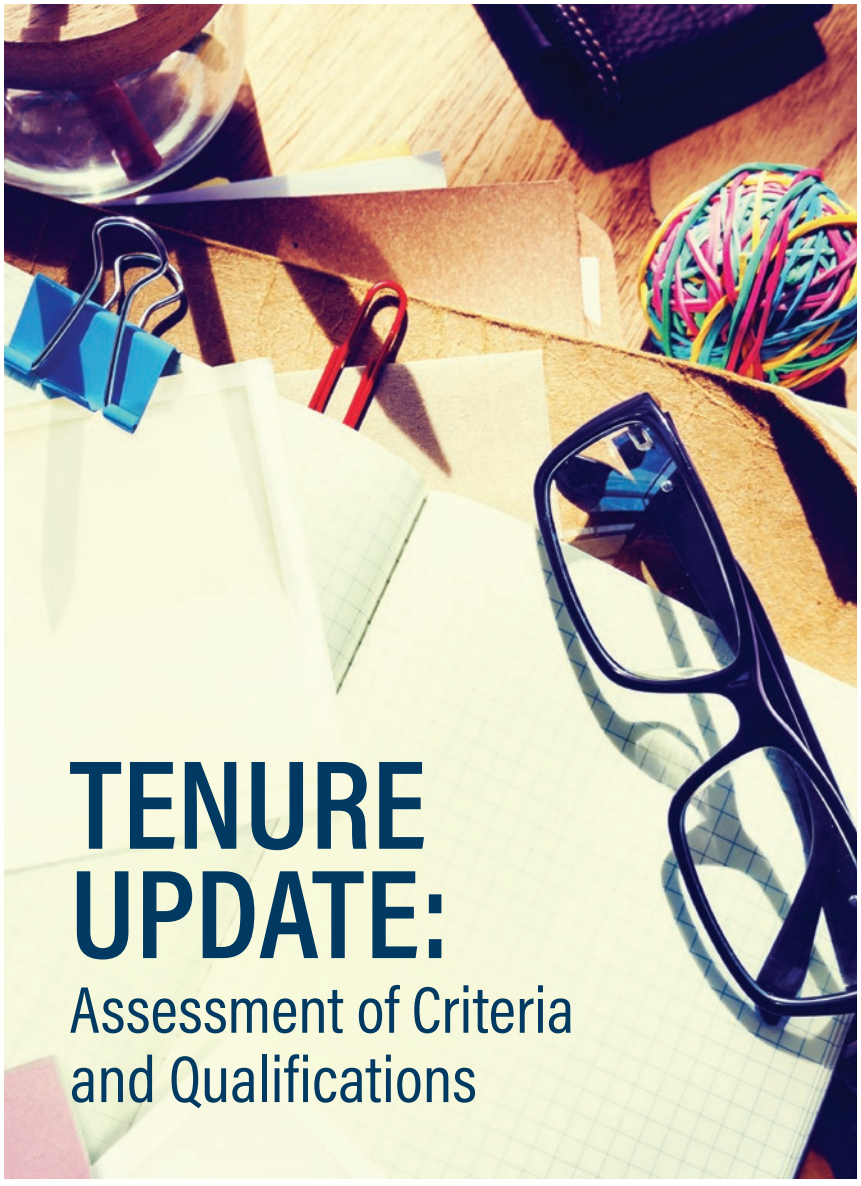

TENURE UPDATE:

Assessment of Criteria and Qualifications

Tenure cases are complicated, for a number of reasons. Tenure processes tend to be detailed and complex, involving assessments of various academic criteria by a number of different stages of evaluators. Depending on the field of study, these evaluations can be, by their very nature, subjective. Generally, collective agreements contain very detailed provisions about the process, qualifications and criteria, but little substantive guidance on the manner in which those qualifications and criteria ought to be assessed.

Some recent arbitration decisions provide some helpful guidance on the assessment of tenure files and the resources that evaluators may use in making a determination to award or deny tenure.

The Tenure Process

A decision to approve or deny tenure carries serious, long-lasting consequences for a candidate and the university. As a result, arbitrators apply a "high standard of justice" when reviewing tenure decisions.

If challenged, tenure decisions are examined in a two stage process.

At the compliance stage, an arbitrator examines whether or not the collective agreement has been complied with. There is no discretion to

deviate from the collective agreement and as a result, the standard of review at this stage is correctness.

At the assessment stage, the university's decision to deny tenure is owed significant deference, and is reviewable on a standard of reasonableness.

Put another way, on process issues the university has to get it right. If the university fails to follow the process and principles contained in the collective agreement, there is a good chance that a tenure denial might be quashed by an arbitrator. If the process is followed correctly and the assessment of the candidate's qualifications are at issue, an arbitrator will typically exercise latitude and deference, because academic assessors are best situated to evaluate the file.

Assessing Qualifications

Generally speaking, an arbitrator will not substitute his or her views for the views of expert assessors unless the assessment was arbitrary, discriminatory, in bad faith, or unreasonable.

Often, a faculty union will allege that the assessor considered facts or materials that were outside the scope of the collective agreement, and as a result, the decision is unreasonable.

> "At the assessment stage, the evaluator's decision will attract significant deference from an arbitrator, provided it is considered and well-reasoned."

In one recent decision, the union challenged a dean's finding that the candidate did not meet the scholarly endeavours qualifications. The arbitrator determined that the dean's findings were subjective, unsupported and therefore unreasonable, stating: "Obviously, it would be preferable, if one is to question the quality of the journals, that some evidence be provided to substantiate the claim other than the fact the journal was not found on a web search".

In another decision, the university led detailed evidence about the scope of assessment of scholarly endeavours. The assessors researched impact factors and H Index scores of the candidate's publications. The research revealed low scores and publication of fewer articles in lesser known journals. Evidence also established that impact factors and indices are commonly considered in tenure deliberations and it was consistent for assessors to place greater weight on publications in higher status journals. The tenure denial was upheld.

In another decision, the university relied on low impact factors, a lack of internal and external grant funding, lack of publication in refereed journals, lack of articles where the candidate received first position credit in published works, low output and failure to publish in English. The union alleged that the assessment criteria were unreasonable and inconsistent with academic freedom. They argued that the candidate had the freedom to choose where to publish, and what language to publish in. They contended that impact factors were unreliable and reliance upon them was outside the scope of the collective agreement.

The arbitrator disagreed and upheld the tenure denial. He commented that, although the collective agreement was very specific about the criteria and the standard, it was absolutely silent on where or how the assessor is to set the bar. Standards applied by various assessors, though they could very well be different, are nonetheless legitimate. This is consistent with the collegial nature of the process. That clearly begs the assessor to consider the influence and impact of the scholarship in the candidate's academic field. Assessors could give an opinion off the top of their head or they could offer a reasoned explanation of their conclusions. Clearly the latter is preferable. Where there are metrics available, acceptable in the academic community, for assessing the relative influence of academic journals, it makes little sense to prohibit reference to them.

What This Means To You

At the assessment stage, the evaluator's decision will attract significant deference from an arbitrator, provided it is considered and well-reasoned. Evaluators may rely on assessment tools like impact factors, provided that there is a well-balanced assessment of the file. In other words, it may be necessary to consider evidence that could offset external metrics. In conclusion, it's important for the evaluator's decision to be well-researched, reasoned and written, and based upon established academic principles and metrics.

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Accommodation of Students With Disabilities in Post-Secondary Institutions

According to the World Health Organization, an estimated 15% of the world's population identify as suffering from some form of disability.[1] In Canada, approximately 14% of our population aged 15 and older are identified as having a disability.[2] Human rights legislation in each province guarantees everyone the right to equal treatment without discrimination, including in education services while attending colleges and universities, whether publicly or privately funded.

The enrolment of persons with disabilities in post-secondary institutions has consistently increased over the last decades and is likely to continue to rise. While enrollment rates have risen, data shows that persons with disabilities are only half as likely to obtain university level degrees[3] and the rate of success declines as the severity of the disability increases.[4] While this data dates back to 2012, the Statistics Canada 2017 Canadian Survey on Disability is underway, and it will allow for a more comprehensive understanding of the evolution across 5 years in the accommodation of students with disabilities in post-secondary institutions.

The accommodation of students with disabilities will continue to be a challenge as post-secondary institutions strive to fulfill their legal duty and eliminate barriers to higher learning.

Failing to discharge one's duty to accommodate does not need to be intentional. Discrimination can take many forms. In the field of education, discrimination can occur, for example, when an education service provider fails to provide the support, technology or to change the "normal" that is required to afford the student the possibility to reach his/her real potential. Discrimination can

[1] Disability in Canada: Facts and Figures, Easter Seals Canada.

[2] Canadian Survey on Disability, 2012, Statistics Canada.

[3] Report on Equality Rights of People with Disabilities, Canadian Human Rights Commission, 2012.

[4] Canadian Survey on Disability, 2012, Statistics Canada.

be as simple as a rule, a policy or a standard that may appear to apply to everyone equally, but in reality has a negative impact on certain groups of people when put into practice.

The term "disability" generally includes mental disabilities and physical disabilities. Education service providers have a duty to accommodate which means that they must do what is required in the circumstances to avoid discrimination related to the disability-related needs of students up to the point of undue hardship.

Examples of Accommodation

Accommodations can take many forms depending on the disability. For example, accommodation could mean an adapted curriculum, extended time for exams and assignments, alternative forms of evaluation, providing academic materials in advance, and/or in alternative formats, note-taking assistance, assistive technology (e.g., screen readers, text-to-speech software, Smart Pens), priority registration, or consideration given to flexible attendance policies. A reasonable accommodation does not mean finding the perfect solution. It does not mean that the student in need of accommodation is entitled to the exact accommodation that has been requested. Rather, appropriate accommodation is what is reasonable given the particular circumstances of each situation.[5]

> "Accommodations can take many forms depending on the disability."

Duty to Accommodate – Process Investigation

When a request for accommodations is received by an education service provider, it triggers the duty to accommodate which begins with a duty to investigate. The education service provider must individually assess the person with a disability and take the appropriate steps in order to sufficiently determine a range of appropriate accommodations. It may be necessary to consult experts to fully understand the relevant facts and information.

The duty to accommodate has both a substantive component and a procedural component. The procedural component refers to methods and steps taken to develop and implement the accommodations; the substantive component applies to the appropriateness of the accommodation, or whether it cannot be provided because it would cause the education service provider undue hardship.

Delays in Accommodation

When a request for an accommodation is received, it must be dealt with promptly as a delay may be found to be discriminatory. In the event that the necessary accommodations cannot be provided promptly, strong consideration must be given to providing an interim accommodation.

Ongoing Obligation to Ensure Appropriateness

Disabilities are not static and therefore accommodations must be monitored, assessed and, where indicated, changed over time. In cases where education service providers identify the need to modify an existing accommodation, the duty to re-investigate the situation is triggered.

Duty to Accommodate – Substance

Accommodation given to students must be appropriate and individualized, but must also respect the dignity of the student. Accommodation depends on context, and on the individual needs and strengths of the student with a disability; what is appropriate for one student may not be appropriate for another student.

As part of the duty to accommodate, education service providers have a duty to initiate discussions about potential accommodation if they believe a student may have a disability that requires it, even if the student has not previously raised the issue. However, education service providers may not impose an accommodation if a student refuses it.

Unless it can be proven that providing the accommodation would cause undue hardship on it, an education service provider is required to provide reasonable accommodations. Difficulty and inconvenience does not automatically translate and result in undue hardship: the conclusion that there would be undue hardship must be based on an objective assessment of the facts and evidence, not on guesswork.

Undue Hardship

There are several factors that impact the determination of undue hardship. However, an important one is the size of the institution. Indeed, it is presumed that larger institutions are in a better position to absorb the costs associated with the accommodation and have more resources at hand to facilitate accommodation

[5] Central Okanagan School District v. Renaud, [1992] 2 S.C.R. 970, (paras. 43-44).

than smaller institutions. Other factors that are assessed in determining whether undue hardship would ensue are the costs of the accommodation, the essential requirements of the program, the opinions of experts, and other factors if shown to be relevant to the analysis.

Essential Requirement

Essential requirements are usually the most important and complex factor to deal with. An essential requirement is a bona fide requirement of a task, course or program that cannot be altered without compromising the fundamental nature of the task, course or program. It is a requirement that is indispensable, vital and very important. Accommodation does not mean that education providers are required to lower their academic standards. On the contrary, students with disabilities are expected to develop and demonstrate the same knowledge or skill required to meet the learning outcomes of the course or program. The manner in which those skills are developed or tested may differ, however.

Difficulties often arise when considering whether the successful completion of a particular type of evaluation is an "essential requirement", for example, an in-class essay test worth 100% of the student's final grade. In order for any aspect of a course to be considered an "essential requirement", it must be shown that the aspect in question reflects an essential skill or knowledge that must be acquired. If this cannot be shown, this may be found to discriminate against a student with a disability that makes it difficult to process and/or produce large amounts of written material under strict time constraints.

> **"Challenges will always exist to ensure that institutional disability policies are responsive to the needs of students, faculty and other stakeholders."**

As such, there is often a difficulty to distinguish a true "essential requirement" as opposed to a traditional method used to evaluate and measure students' skills and comprehension. The process in determining if something is to be characterized an essential requirement starts with having the request for an accommodation approved by a school official who will in turn suggest an appropriate form of accommodation. That suggestion will then have to be approved by the professor teaching the course to ensure that the recommended accommodation does not compromise the academic standards of the course.

Responsibilities of the Student

Students have an obligation to inform their post-secondary institution of their need for accommodation. It is important for students to raise the issue of accommodation early in order to give the education provider sufficient time to make the appropriate investigations and subsequent arrangements. In order to determine the reasonableness of an accommodation, we must look at the totality of the circumstances

and avoid a compartmentalized approach.[6] In assessing the request for accommodation, education providers can require a letter or report from a medical professional outlining the functional impairments or capabilities and the type of accommodation required, but it is unnecessary for such reports to include the specific diagnosis of the disability. In cases where a student is receiving accommodation and it is not working effectively, it is the student`s responsibility to advise the education provider. If the education provider is offering the student a reasonable accommodation of the disability, the student cannot refuse the accommodation simply because it is less than the ideal accommodation.

Conclusion

Human rights law applies in the everyday delivery of education services. Challenges will always exist to ensure that institutional disability policies are responsive to the needs of students, faculty and other stakeholders. Beyond policies and centralized disability services, increased education and training of faculty and front-line educators is key to ensure the smooth coordination and implementation of accommodation measures.

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Lawyer Spotlight

Erin Best, Partner

St. John's, Newfoundland and Labrador

Recently nominated as one of Canadian Lawyer's Top 25 Most Influential lawyers in Canada, Erin wears many hats for her clients, including litigator, intellectual property ("IP"), privacy and media lawyer. She is chair of the Stewart McKelvey litigation group in Newfoundland and Labrador ("NL"), is one of only five trademark agents in NL and has been heavily involved in consultations on the *Trade-marks Act and Regulations*. As an executive officer of the Canadian Bar Association ("CBA") national IP section, and chair of the NL CBA IP section, Erin has co-authored several legislative submissions on amendments to Canadian IP legislation, as well as the article *Access Copyright wins at Federal Court: A loss for Canadian universities and a narrowing of the scope of fair dealing in the university context.*

[6] Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ); 2008 SCC 43 (at para. 21).

Reading the Paper in the Clouds:
The Role of Cloud Service Agreements

Universities and colleges are increasingly relying on cloud-based IT services for storing, accessing and using institutional data. While there are many benefits to cloud-based services, there are also many risks, especially when sensitive personal, confidential or proprietary data is involved. A well drafted cloud service agreement can help manage those risks, and provide an opportunity to alleviate some of the challenges associated with cloud-based services.

The general purpose of a cloud service agreement is to clearly document the responsibilities of each of the service provider and the university or college, and to provide meaningful remedies in the event one of them fails to fulfill its stated responsibilities. Cloud service providers typically use their own form of cloud service agreements. Those agreements, which often take the form of complex, multi-layered paperwork, are usually drafted in favour of the service provider and rarely provide the institutions with the terms they need to adequately manage their associated risks. However, the traditional 'take it or leave it' approach to cloud service agreements is changing. We are seeing more negotiating of cloud service agreements, and, consequently, improved risk allocation between the parties. Universities and colleges are especially well positioned for negotiation when shared resource initiatives are leveraged and when the services are procured through a public procurement process.

With that in mind, here are some key areas that universities and colleges should consider when negotiating a cloud service agreement:

1. Description of Services
A well drafted cloud service agreement should clearly describe the scope of services to be provided by the service provider, including a documented reference to the specifications and functionality of the cloud-based service.

2. Service Level Standards
Cloud-based services are a service, and as with all services the agreement should spell out the expected level of service. There should be clear expectations for uptime and downtime, clearly stated response times and corrective actions, and pre-determined penalties for failures which are set with the goal of motivating the service provider to provide high levels of service.

3. Representations and Warranties
Several key representations and warranties from the service provider should be stated in the service agreement, including compliance with applicable laws, adherence to service standards and non-infringement on third party intellectual property rights. Universities and colleges should also carefully review the representations and warranties expected from them in the cloud service agreement. Many cloud service agreements contain terms of acceptable use and restricted use conditions. Understanding those conditions and restrictions, and negotiating changes where the institution cannot meet or internally manage compliance, will help avoid a breach by the institution which could result in service being abruptly suspended or terminated.

4. Security
A cloud service provider's data security measures should be clearly documented in the cloud service agreement. Simply stating "reasonable security measures" is vague and may be difficult to enforce. There should also be express commitment from the service provider that those security measures will be maintained throughout the duration of the agreement. Prior to documenting the security measures in the service agreement, the security measures should be assessed by qualified IT security personnel.

5. Privacy
Where the cloud-based service involves personal information, the cloud service agreement should require compliance with applicable privacy laws. Universities and

colleges in Nova Scotia (and their service providers) should be particularly mindful of the obligations under the *Personal Information International Disclosure Protection Act*. Additional regulatory requirements may also be required for other types of personal information, for example, personal health information.

6. Jurisdiction, Foreign Laws and Foreign Access

Knowing where your data is stored is important for reasons beyond privacy law obligations. When data is in the custody of a third-party service provider operating on foreign soil, it can be subject to the laws of that country. This could mean, for instance, that you may be obliged to respond to a subpoena or other mechanism that would give law enforcement officials access to your data. This also means that obtaining judgements to enforce your contract may be difficult and costly, and equally difficult to enforce the judgement in a foreign jurisdiction. More cloud service providers are using Canada-based data centres than in the past. However, with the United States raising concerns about restrictions on cross-border data flows[1], time will tell whether this trend will continue.

7. Subcontractors

Service providers are sometimes reluctant to share the details about, or grant approval rights over, their subcontractors. However, universities and colleges need to know where their data is being handled, and by whom, in order to adequately manage their risks and, in some instances, fulfill regulatory requirements. Balancing these two concerns during the negotiation process can be challenging, but should not be overlooked.

Cloud-based IT services are transforming how universities and colleges are supporting their administrative, academic and research activities. Check out this seven part series Preparing the IT Organization for the Cloud published by EDUCAUSE Center for Analysis and Research at www.educause.edu/ecar/ecar-working-groups/cloud.

8. Data Ownership, Use and Retrieval

Many cloud service providers are willing to acknowledge that the data is owned by the university or college, and are often agreeable to stated limitations on using the data. However, many cloud service providers have not taken the step of expressing those statements in their standard form service agreements, and do not always spell out the institution's rights to access and retrieve the data at the end of the contract, including access procedures, timelines, data format and whether there are any additional costs. Universities and colleges should be mindful to address these items in negotiations.

9. Indemnification

Indemnities (and limitation on liabilities) are usually the most contentious clauses in the agreement. Indemnities are an allocation of risk. When negotiating indemnity clauses it is helpful to consider which party is in the best position to bear the risk at hand, having regard to their level of responsibility. We are seeing cloud service providers, at a minimum, indemnifying against negligence and willful misconduct by the service provider's employees and subcontractors, and for breaches of confidentiality, privacy and security, intellectual property infringement claims, violations of law, personal injury and death. Some indemnities may be capped, while others are not, depending on the circumstances. Universities and colleges should specifically consider whether the service provider will be required to reimburse the costs associated with breach notifications.

10. Limitations of Liability

If not careful, a cloud-based service agreement that significantly caps or broadly excludes the service provider's liability can undermine the positive changes that result from successful negotiations. Pay careful attention to the types of activity purported to be excluded from liability (e.g., data loss), as well as the maximum dollar amount of liability. Making specific carve outs for critical items that will not be subject to the capped dollar amount should be considered, or at a minimum, specifying a higher cap, depending on the circumstances.

Stewart McKelvey can assist universities and colleges to work through these, and other, cloud service agreement issues for all types of administrative, academic and research cloud-based activities.

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[1] http://nationalpost.com/news/politics/canadians-personal-data-on-the-table-in-nafta-negotiations/wcm/8b3c7cd6-72d6-43a3-9748-653d186694bc

People-focused.

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