

DISCOVERY

ATLANTIC EDUCATION AND THE LAW

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COVER STORY
**Environmental, social and
governance factors in
pension and endowment
fund investment**

IN THIS ISSUE

Campus sexual assaults: policy and
liability considerations

Talent beyond our borders: making the
most of Canada's immigration programs

Étudiants internationaux: les complexes
ramifications en matière d'immigration de
crimes mineurs

Privileged records and access to
information reviews: to produce or not
produce?

Making the grade: court review
of university decision-making

Lessons learned from #MeToo

New *Occupational Health and Safety Act*
regulations on violence and harassment
in the workplace/civil liability for violence
on campus



Editor's Corner

A new school year has begun and fall is in the air. Students and faculty are re-charged and ready for what the year has in store. In this issue, we discuss the latest trends and topics in education law to help you navigate the issues that arise in this unique landscape.

Have a story for us? We are always looking for new ideas and legal topics to write about, so please don't hesitate to contact us to share your thoughts.



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This publication is intended to provide brief informational summaries only of legal developments and topics of general interest and does not constitute legal advice or create a solicitor-client relationship. This publication should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law. If you have specific questions related to this publication or its application to you, you are encouraged to consult a member of our Firm to discuss your needs for specific legal advice relating to the particular circumstances of your situation. Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.



p12

Cover Story: Environmental, social and governance factors in pension and endowment fund investment



p20

Privileged records and access to information reviews: to produce or not produce?



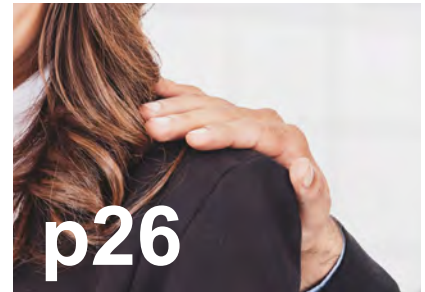
p22

Making the grade: court review of university decision-making



p04

Campus sexual assaults: policy and liability considerations



p26

Lessons learned from #MeToo



p08

Talent beyond our borders: making the most of Canada's immigration programs



p16

Étudiants internationaux: les complexes ramifications en matière d'immigration de crimes mineurs



p28

New Occupational Health and Safety Act regulations on violence and harassment in the workplace/civil liability for violence on campus



**Campus sexual assaults:
policy and liability
considerations**

INTRODUCTION

Public awareness about the issue of sexual assault has been growing, and post-secondary institutions need to be equipped to deal with these allegations within the campus community.

In addition to working toward *preventing* sexual assaults on campus, colleges and universities need to be prepared to handle allegations of sexual assault and ensure both the complainant and the accused are treated fairly. Having a sexual assault policy in place can provide guidance if such allegations arise.

SEXUAL ASSAULT – DEFINITION AND PREVALENCE

Sexual assault is unwanted sexual activity, which includes grabbing, kissing, fondling, and rape.¹

On campuses, sexual assault may involve students, professors, staff, or even visitors or other outsiders who are not part of the campus community. Anyone can be a victim of a sexual assault, but the majority of victims in Canada (not just on campus) are females between the ages of 15 and 24.² We do not need statistics to tell us that this demographic makes up a large part of campus communities across Canada.

Unfortunately, sexual violence is common across campuses in Canada with 1 in 5 women experiencing sexual assault at colleges and universities.³ Another unfortunate statistic is the low rate of reporting by victims of sexual assault. The CBC recently conducted a study and found that there were 700 reported

sexual assaults at 77 colleges and universities in Canada from 2009 to 2013; while this number may seem high to a layperson, an advocate against sexual violence called those stats “laughingly low”.⁴ In other words, sexual violence is quite prevalent on campuses in Canada.

Island. In Nova Scotia, the provincial government signed a memorandum of understanding in 2016 with its ten universities requiring these institutions to have specific sexual violence policies.⁶

If your institution does not have

“ If your institution does not have a sexual assault policy in place, now is the time to implement one. ”

IMPORTANCE OF HAVING A SEXUAL ASSAULT POLICY

Post-secondary institutions have a duty to provide a safe learning environment where students, faculty and staff are free from all sexual violence. When a complaint of sexual assault occurs in a post-secondary environment, the institution should have a process in place under a sexual assault policy so that it can investigate the incident and impose sanctions when appropriate.

Having a stand-alone sexual assault/sexual violence policy in place is important, as colleges and universities are under increasing pressure for how they handle allegations of sexual assault. Statistics from 2014 indicate that as of that date, only 9 out of 102 post-secondary institutions in Canada had a sexual assault policy.⁵ Since then, several provinces in Canada now have legislation requiring post-secondary institutions to implement sexual violence policies. Unfortunately, Atlantic Canada is lagging in this area and there is no such legislation in New Brunswick, Newfoundland and Labrador or Prince Edward

a sexual assault policy in place, now is the time to implement one. Even if you currently have a policy, all policies should be reviewed periodically and it is important to make sure that your sexual assault policy is current and robust.

The decision of *Mpega c. Université de Moncton*⁷ highlights the importance of having an adequate sexual assault policy in place. In that case, a student filed a complaint under the University’s sexual harassment policy against another student, alleging he had sexually assaulted her. The University’s complaints committee heard the complaint, ruled in favour of the complainant and submitted its report to the president of the University who concluded the respondent was guilty of a “serious offence” and expelled him.

The New Brunswick Court of Appeal overturned the decision on the basis the committee had exceeded its jurisdiction. Specifically, the Court noted that the sexual harassment policy defined “sexual harassment” as requiring an element of **repetitive** conduct over

1 “The Law of Consent in Sexual Assault”, Women’s Legal Education and Action Fund. <<https://www.leaf.ca/the-law-of-consent-in-sexual-assault>>
2 Shana Conroy and Adam Cotter, “Self-reported sexual assault in Canada, 2014”, Canadian Centre for Justice Statistics, July 11, 2017. <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2017001/article/14842-eng.htm>>
3 “Sexual Violence on Campus”, Canadian Federation of Students-Ontario, December 2015. <<https://cfsontario.ca/wp-content/uploads/2017/07/Factsheet-SexualAssault.pdf>>
4 Timothy Sawa and Lori Ward, “Sex assault reporting on Canadian campuses worryingly low, say experts”, CBC News, February 9, 2015. <<https://www.cbc.ca/news/canada/sex-assault-reporting-on-canadian-campuses-worryingly-low-say-experts-1.2948321>>
5 “Sexual Violence on Campus”, Canadian Federation of Students-Ontario, December 2015. <<https://cfsontario.ca/wp-content/uploads/2017/07/Factsheet-SexualAssault.pdf>>
6 Anqi Shen, “Universities across Canada implement sexual violence policies”, University Affairs/Affaires universitaires, August 4, 2017. <<https://www.universityaffairs.ca/news/news-article/universities-across-canada-implement-sexual-violence-policies>>
7 2001 NBCA 78

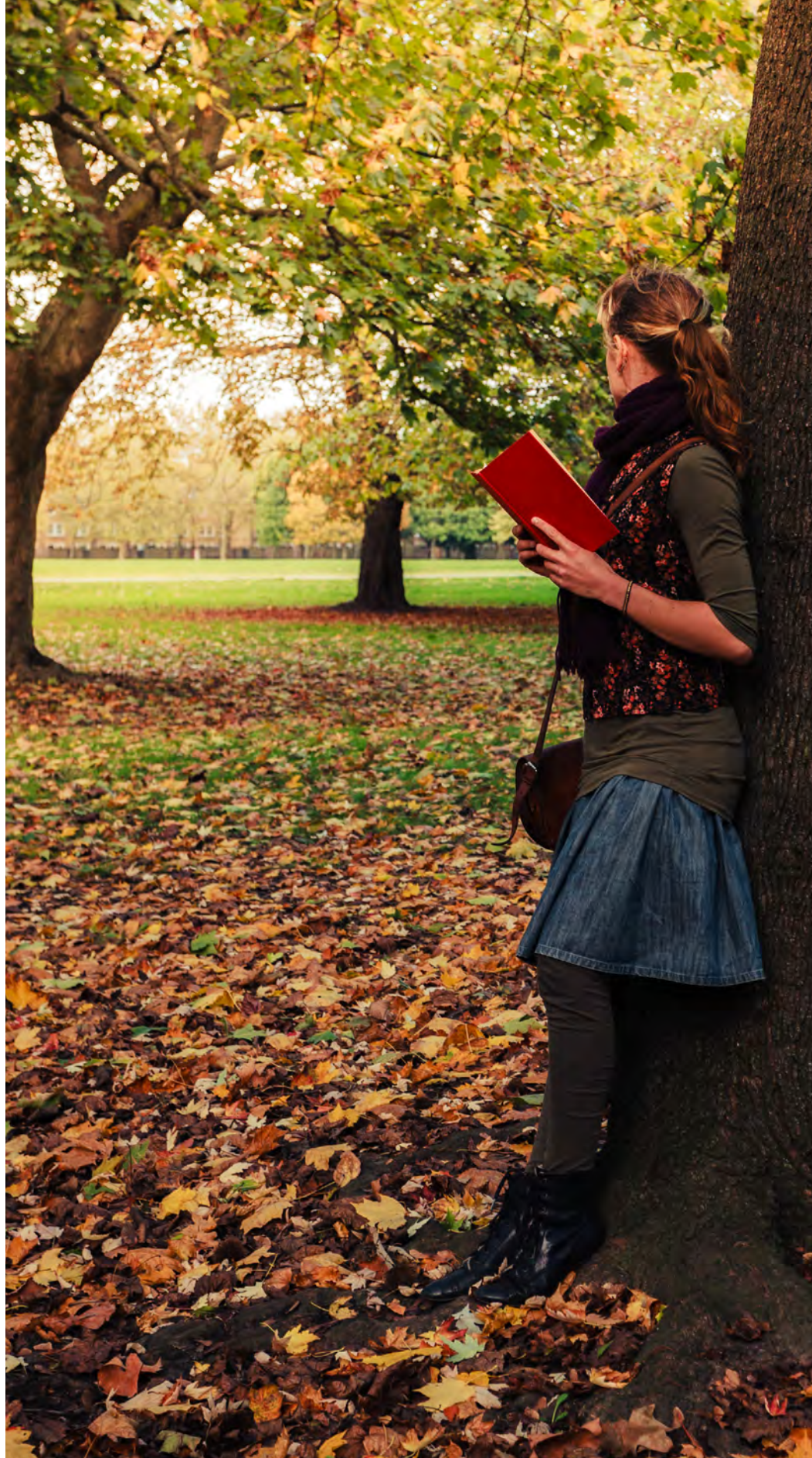
time, rather than a single event such as sexual assault which was the case in that situation.

The Court also found the committee exceeded its jurisdiction by conducting an inquiry into whether the respondent had sexually assaulted the complainant – an alleged criminal offence – thereby invading the federal government’s exclusive jurisdiction over criminal procedure. The Court of Appeal clarified that the committee’s mandate was limited to hearing complaints filed under the policy, determining if the behaviour complained of fell within the policy and deciding whether there had been a breach of the policy.

The *Mpega* case is a warning to colleges and universities about their jurisdictional limitations with respect to criminal matters. It should be noted that an encroachment on the federal government’s jurisdiction is permitted when the encroachment is merely *incidental* to a finding within the university’s jurisdiction. In other words, if a university were to find that a student violated its sexual assault policy, any encroachment would be incidental to the university simply enforcing its policies.

Any inquiries into a sexual assault complaint should focus not only on whether the sexual assault occurred, but how it impacted the victim as a student, whether the victim’s grades suffered, and whether the incident of sexual assault hindered the victim’s ability to study in an environment free from sexual violence.

It is also important to note that the committee, in accordance with the policy, suspended its investigation into the complaint



until the police had concluded their investigation and only resumed after it was decided no charges would be laid against the respondent. This is a good practice to avoid tainting or interfering with a criminal investigation.

Taking these steps and making findings such as these will help with establishing that a finding of a criminal act (i.e. sexual assault) is only incidental to the main finding that the alleged perpetrator breached a university policy.

POTENTIAL LIABILITY OF COLLEGES AND UNIVERSITIES

In addition to protecting members of the campus community from sexual violence, colleges and universities have another compelling reason to make sure they take sexual assault seriously – post-secondary institutions can be held liable to victims.

Recently, two class action lawsuits were filed by former college wrestlers at Ohio State University. The former athletes allege officials at Ohio State knew that a team doctor was abusing them during medical exams in the 1980's and 90's. The plaintiffs claim Ohio State is liable because officials *"had actual and/or constructive notice of sexual assault, battery, molestation, and harassment committed"* by the team doctor. The plaintiffs also claim there was a culture of sexual abuse which was reported to administrators and to the head of the athletic department but that the University turned a blind eye.⁸

In Canada, several sexual assault victims have also sued universities. One plaintiff is suing Queen's University and two other defendants

for \$950,000 in damages claiming the University is vicariously liable for alleged sexual assaults by a residence facilitator and a house president that took place in the University's residence. One of the plaintiff's claims is that the

on campus. If your institution does not currently have a sexual assault policy in place, you should consider implementing one. Stewart McKelvey can assist with reviewing existing policies, developing and drafting new policies, advising on

“ ...a culture of sexual abuse which was reported to administrators and to the head of the athletic department but that the University turned a blind eye. ”

University did not have adequate information or education provided to students about sexual assault. When interviewed, the plaintiff stated that the University needed to take responsibility for its students because *"[h]aving students come and pay really high fees to come to university, you expect you're going to be in a safe learning environment"*.⁹

In 2009, the victim of a sexual assault in a university chemistry lab sued Carleton University for over \$500,000 claiming the University was negligent in failing to take adequate security measures on campus. The plaintiff claimed damages for mental suffering and psychological harm, out-of-pocket expenses and future loss of earnings.¹⁰

your institution's responsibilities and potential liabilities, providing in-house training for staff, legal advice and representation and ongoing support.



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CONCLUSION

As outlined above, colleges and universities need to take sexual assault seriously to ensure safety

8 Jean Casarez, Laura Dolan and Holly Yan, "Class-action suits claim OSU ignored doctor's alleged sex abuse" July 18, 2018, CNN. <<https://www.cnn.com/2018/07/17/us/ohio-state-class-action-lawsuit-strauss/index.html>>

9 Iain Sheriff-Scott, "University faces lawsuit over residence sexual assaults", Queen's Journal, June 25, 2018. <<https://www.queensjournal.ca/story/2018-06-25/news/university-faces-lawsuit-over-residence-sexual-assaults>>

10 Karen Pinchin, "Sex-assault victim sues Carleton for negligence", Macleans, August 10, 2009. <<https://www.macleans.ca/education/uniandcollege/sex-assault-victim-sues-carleton-for-negligence>>



Talent beyond our borders: making the most of Canada's immigration programs

INTRODUCTION

Educational institutions have a tradition of seeking out the best and brightest as well as those with unique talents who can share their knowledge with students and faculty. Whether it is guest lecturers, public speakers, visiting professors or new faculty members, foreign nationals can offer a great source of skill and talent.

However, inviting or hiring foreign nationals can also pose immigration concerns, especially as Canada's Temporary Foreign Programs are being increasingly monitored and Border Services Officers continue to exercise wide discretion at the port of entry.

Despite these challenges, immigration does not have to be a source of frustration. If you are able to plan ahead and maximize the use of programs aimed at increasing mobility of highly or uniquely skilled individuals, the process can be much easier.

MAKING A PLAN

Start thinking about an immigration strategy as soon as you know that the person you have invited or engaged is not a Canadian or a Permanent Resident. The sooner you understand what they will need in order to enter and stay in Canada, the easier it is to figure out an appropriate schedule for their arrival - making the process easier for everyone involved.

DOES THE PERSON NEED A WORK PERMIT?

The first question to ask is whether the individual needs a work permit or if they are exempt. While the Immigration and Refugee Protection Regulations define "work" very broadly, there are many exemptions tailored to educational institutions.

Public speakers or guest lecturers such as academic speakers at university or college functions can qualify for a work permit exemption. This exemption also extends to seminar leaders for small classes, short intensive courses or conferences lasting less than five days.

A relatively recent exemption exists for researchers coming to Canada for less than 120 days. This was introduced under the Global Skills Strategy in 2017 to allow researchers at publicly funded degree-granting institutions or affiliated research institutions to work in Canada for one 120-day period once every 12 months.

your institution while complying with immigration laws.

WHAT KIND OF WORK PERMIT CAN THEY OBTAIN?

If the temporary worker requires a work permit, consideration needs to be made regarding the type of permit that should be obtained.

Generally, every foreign national requiring a work permit must also have a Labour Market Impact Assessment ("LMIA") to support their application. A positive LMIA is issued by Employment and Social Development Canada where the employer shows that there were no suitable Canadian or Permanent Residents for the position.

“ ... allow researchers at publicly funded degree-granting institutions or affiliated research institutions to work in Canada for one 120-day period once every 12 months. ”

A similar exemption applies to highly skilled workers which includes those who are professionals (in accordance with the National Occupation Classification) who want to work for very short durations. These individuals can qualify for a work permit exemption for 15 consecutive days, once every six months or 30 days once a year.

Utilizing the above exemptions where applicable makes it easier to invite foreign nationals to

There are, however, some important exemptions to the LMIA requirement which may be applicable. For example, foreign nationals can qualify for work permits under programs designed to allow those creating significant social, cultural or economic benefits to work in Canada. This includes an exemption for academic exchanges for visiting professors or guest lecturers.

Another important type of work permit is based on international

agreements including the North American Free Trade Agreement (“NAFTA”). Under NAFTA, librarians, college and university professors and research assistants from the United States or Mexico can qualify for LMIA-exempt work permits. This makes it much easier for those individuals to take temporary positions in Canada.

Post-graduate fellows and research award recipients can also qualify for work permits exempt from an LMIA. This allows those individuals to take time-limited positions to teach and advance their studies or research in Canada.

Lastly, depending on the long-term plan, Atlantic Canadian employers may consider enrolling in the Atlantic Immigration Pilot Program as an option for hiring global talent. This program is aimed at providing an avenue for permanent residence and has a stream dedicated to highly skilled workers. It also provides the option of applying for a work permit so that the individual can work in Canada while their permanent residency application is being processed.

No matter which of the programs apply, the employer must be mindful of their obligations. This includes upfront requirements such as applying for an LMIA or submitting an Online Offer of Employment and Compliance fee before the worker applies for a permit.

HOW DO THEY GET THEIR PERMIT?

Depending on a person’s nationality they may or may not be eligible to apply for their permit at the Canadian border. Individuals requiring a visa to enter Canada will need to make their applications for work permits outside of Canada.

Applicants applying outside of Canada should be aware of the

Global Skill Strategy introduced last year which provides for two week processing for highly skilled workers. This can significantly cut down on processing times for those ineligible to make their application at the Canadian border.

WHAT OTHER OFFICIAL DOCUMENTATION DO THEY NEED?

Depending on the purpose of the visit or the type of permit the individual is eligible for, there are a number of documents they will need to gather. The foreign national must carefully consider the requirements of the program and prepare their application package with the necessary documents even if they intend to apply at the port of entry. However, there are a few requirements which will need to be considered each time a foreign national is preparing to enter Canada in order to avoid delays or surprises.

All travellers to Canada must consider what they require to be admissible to the country whether they are going to be working or visiting. This can include a Temporary Resident Visa (“TRV”) for which the applicant may need a letter from the institution who has invited them to visit. Alternatively, they may simply need to obtain an electronic Travel Authorization (“eTA”) for their trip to Canada.

Another consideration is whether the individual requires an Immigration Medical Examination before applying for a work permit. Applicants from designated countries coming to Canada for more than six months will need to undergo a medical examination by a designated panel physician prior to their application.

Finally, this summer Immigration, Refugees and Citizenship Canada have increased the requirements





for biometrics (fingerprints and photographs) in order to enter Canada. This tool is being used to establish identity for immigration purposes. As of July 31, 2018 individuals applying for visitor visas, work permits, study permits, or permanent residence from Europe, the Middle East or Africa will need to give biometric data as part of their application. Those from Asia, Asia Pacific and the Americas will need to provide biometrics beginning December 31, 2018.

CONCLUSION

Inviting or hiring foreign nationals at your institution requires some up front planning, but there are many programs and exceptions tailored to educational institutions.

For assistance in making the most of immigration programs, or in determining the best options and requirements, Stewart McKelvey would be happy to assist.



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Environmental, social and governance factors in pension and endowment fund investment



INTRODUCTION

Universities hold significant assets in pension, endowment and similar funds that are invested to maximize returns so as to deliver on promises supported by those funds. While the identification of sound investment opportunities has typically relied upon financial metrics, recent years have seen a shift towards expanding the range of factors considered in this analysis in the form of environmental, social and governance (“ESG”) investing.

ESG investing involves incorporating environmental, social and governance factors into investment decisions and is sometimes referred to in more general terms as “responsible investing”. There is an important distinction to be made, however, between ESG investing and other related practices that focus on divestment and negative screening of target industries or companies for ethical purposes, such as socially responsible investing or impact investing. Importantly, ESG investing is conducive to investing for the sole purpose of financial returns as it is based on the premise that ESG factors identify risk and opportunity that would otherwise be obscured and accordingly has a material effect on investment performance and the returns obtained on behalf of beneficiaries.

Research supports the central notion of ESG investing that environmental, social and governance practices, when combined with traditionally relied upon financial data, are valuable indicators of future performance.¹ The potential value of non-financial indicators in predicting risk and return is frequently exemplified by the hypothetical scenario wherein a company displays solid

financials, but upon inquiries into their environmental, social and governance practices, it is revealed that the cost advantage that is reflected in the numbers is the result of poor governance, abusive labour practices or environmental shortcuts that increase the risk that long-term profitability will be unsustainable.

Growing interest in ESG investing has prompted the establishment of the United Nations Principles of Responsible Investments, a multilateral global initiative that sets out investment principles to guide signatories in

of fiduciary duty arises from the common misconception that ESG investing requires investors to prioritize ethical considerations at the expense of financial returns. However, the emerging consensus from a legal perspective is that factoring in the environmental, social and governance practices of prospective investment targets is entirely consistent with the exercise of fiduciary duty. In light of the empirical evidence that identifies the potential for ESG factors to better analyze investment-related risks and the widespread adoption of the practice, legal scholarship

// ... the emerging global trend towards increased legislative activity in the area of responsible investment regulation suggests that more universities may see themselves subject to regulations requiring that, at the very least, they consider incorporating ESG factors into their pension fund investment policies. //

incorporating ESG issues into their investment practices, and to which a number of Canadian universities are signatories.²

CONSISTENT WITH FIDUCIARY DUTY

A commonly cited concern with respect to pursuing ESG investing is whether it is consistent with the legal obligations to which fund administrators are subject. Trustees of university pension and endowment funds are bound by the duty to act as fiduciaries with respect to these funds.³ In the context of fund management, part of the legal fiduciary duty of a trustee to manage the fund in the best interests of its beneficiaries is to adhere to the standard of a prudent investor.⁴

The concern about possible breach

supports the integration of ESG factors as being “*within the scope of what a prudent investor can do.*”⁵

REGULATORY TRENDS

To date, commitments to ESG investing by Canadian university pension funds have been predominantly voluntary. However, the emerging global trend towards increased legislative activity in the area of responsible investment regulation suggests that more universities may see themselves subject to regulations requiring that, at the very least, they consider incorporating ESG factors into their pension fund investment policies.

So far, Ontario has led the way in Canada as the only province to legislate ESG reporting requirements for pension funds. As of January 2016, the regulations

1 Susan N. Gary, *Values and Value: University Endowments, Fiduciary Duties, and ESG Investing*, Journal of College and University Law, (2016) 42:4 at Part IV [Gary, “Values and Value”].
3 United Nations Principles of Responsible Investing, “What are the Principles for Responsible Investing?” online: <<https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment>>.
4 In Canada, this duty is founded in common law and codified in pension standards legislation.
4 Gary, *Values and Value*, supra note 1 at 255.
5 Gary, *Values and Value*, supra note 1 at 306.

under the *Pension Benefits Act* require pension plan's statement of investment policies and procedures to include information as to whether ESG factors are incorporated into the plan's investment policies and procedures and, if so, how those factors are incorporated.⁶ Reporting requirements of this nature follow similar pension regulations in place in the United Kingdom, European Union, Germany and South Korea.⁷

Without going as far as the Ontario regulations, Manitoba's pension standards legislation permits plan administrators to use non-financial criterion in the formulation of investment policy subject to the provisions of that province's *Pension Benefits Act*, including the prudent investor standard.⁸

While there are no legislative developments on the immediate horizon for Atlantic Canada, global trends and the rules in Ontario and Manitoba suggest that some level of ESG-related pension regulation could be in our future.

UNIVERSITY-SPECIFIC INCENTIVES TO ADOPT ESG INVESTING

In addition to the demonstrated financial benefits of ESG investing, universities are particularly motivated to consider this practice in the investment of their pension and endowment funds.

Notably, concerns about universities' investment practices have been the subject of student activism for many years. This has traditionally taken the form of impassioned efforts aimed at prompting universities to divest from particular industries or regions, with most of the focus tending to be on climate-related issues.

This type of campus activism recently reached new heights at Harvard University, where a student-led campaign advocating for the university's endowment fund to divest from fossil fuels took the notable step of bringing the matter before court. In a lawsuit filed in 2015, the Harvard Climate Justice Coalition sought a permanent injunction ordering Harvard to divest its endowment fund from any fossil fuel companies on the basis that these investments contribute to climate changes, "*which adversely impact their education and in the future will adversely impact the university's physical campus.*"⁹ The action was dismissed by the lower and appeal courts on the basis that the student group lacked standing to bring the case, with the Massachusetts Court of Appeal declining to find that the students had "*been accorded a personal right in the management or administration of Harvard's endowment that is individual to them or distinct from the student body or public at large.*"¹⁰

While legal recourse by students is not prevalent now, there is little doubt that this issue will continue to feature prominently in campus politics. Committing to ESG investing therefore has the added benefit of responding to the concerns of a socially - and environmentally - conscious student body in a manner that is simultaneously recognized as a best practice in maximizing long-term investment returns.

In addition to pressure from students, universities may see endowment fund donations coming with conditions that require the gift be invested in accordance

with ESG investing. Having experience with and institutional knowledge about this practice will permit fund administrators to readily facilitate such requests.

PRACTICAL TIPS

There are several important considerations for universities to keep in mind when initiating or reviewing their ESG investment practices with respect to pension or endowment funds.

Consideration of ESG should be made in accordance with the fund's governance processes, including consideration by internal staff and an investment committee. As with other decisions, the options considered and rationale for the decision should be documented.

Once the most appropriate way to adopt ESG investing has been determined, this approach should be incorporated into the applicable statement of investment policies and procedures. An articulation of how ESG investing fits into the fund's goals and objectives may note how the consideration of ESG criteria will factor into the selection and assessment of investment managers and fund performance.

The desired approach to ESG investing should also be clearly communicated to investment managers and set out in investment management agreements. Once a mandate to take ESG factors into account is established, investment managers will rely on various methods and resources to put this into practice. ESG should be considered in selecting, instructing and monitoring investment managers.

6 O Reg 909, s. 78(3).
7 United Nations Principles for Responsible Investment, "Global Guide to Responsible Investment Regulation," online <<https://www.unpri.org/policy-and-regulation/global-guide-to-responsible-investment-regulation/207.article>> at 14-15.
8 *Pension Benefits Act*, CCSM c P32, s. 28.1.
9 *Harvard Climate Justice Coalition et al. v President and Fellows of Harvard College et al.* (2015) 90 Mass.App.Ct. 444 at 445 ["Harvard Climate Justice"].
10 *Harvard Climate Justice* at 1.

Increasingly, investment firms are developing capabilities to integrate ESG factors into their research and analytical processes, while some will collaborate with specialized analytics firms to get ESG-related data. Further, a number of different ESG ratings systems are available to assist investment managers in this process. Like other benchmarks and ratings, no rating systems should be taken as determinative, especially since ratings will vary, even for the same investment. Investment managers should be expected to investigate beyond the ratings and any investment considered in light of the particular investment context and strategy of the fund. Appropriate benchmarks and processes should be discussed and confirmed with investment managers. Other ESG directed actions that can be taken by managers such as proxy voting should also be considered.

Implementation, measurement and analysis of ESG is an ongoing process. Policies and their application should be regularly reviewed, including on how an ESG investing approach fits with the overall investment strategy of the fund. While ESG will always require some measure of qualitative analysis, universities should count on having ESG as part of their investment practices.



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**Étudiants internationaux:
les complexes ramifications
en matière d'immigration
de crimes mineurs**

Every year university students are charged with criminal offences. While such events are stressful and difficult for any student, they are of particular concern for international students. For international students, a criminal conviction, even for minor offences, will generally result in revocation of their study permit and deportation from Canada. International students who are aware of the immigration consequences of criminal charges early in the process stand a much better chance of having the penal consequences of their actions addressed in a manner that does not also force them to withdraw from their studies and to leave Canada.

We are pleased to feature this French piece in Discovery. Authors Josie Marks and Dominique Landry are bilingual lawyers within our Moncton office who provide counsel on a variety of legal topics concerning the university sector. Please reach out to them if you have any questions.

DÉPORTATION D'ÉTUDIANTS INTERNATIONAUX ACCUSÉS D'UN CRIME AU CANADA

Imaginez ce scénario : en conduisant à la maison après une fête, une étudiante universitaire est appréhendée par la police et accusée de conduite en état d'ébriété. Embarrassée et inquiète, l'étudiante comparait en cour. Puisqu'il s'agit de sa première accusation criminelle, elle est informée qu'elle sera poursuivie par procédure sommaire et que si elle accepte de plaider coupable, sa peine sera limitée à l'amende minimale obligatoire de 1 000,00 \$. L'étudiante plaide coupable, paie son amende et reprend une vie normale.

Pour un étudiant international, le même scénario est beaucoup plus complexe. À moins que l'étudiant soit suffisamment informé et

s'assure que les conséquences en matière d'immigration d'une condamnation pénale soient portées à l'attention de la cour, l'amende de 1 000\$ sera accompagnée d'une détermination que celui-ci est « inadmissible au Canada pour raisons de criminalité », de la révocation de son permis d'étude, et d'une ordonnance de déportation du Canada. Ces conséquences

plus, le *Code criminel* prévoit que, pour plusieurs infractions, la Couronne peut choisir le mode d'accusation en fonction des circonstances entourant l'infraction. Par contre, peu importe si la Couronne choisit la procédure sommaire, s'il s'agit d'une infraction où la Couronne avait le choix de la procédure par mise en accusation, cette infraction est

« La Loi sur l'immigration et la protection des réfugiés (« LIPR ») prévoit qu'un étranger au Canada, y compris un étudiant international, sera sujet à une ordonnance de déportation si celui-ci est déclaré coupable de criminalité. »

supplémentaires découlent de la *Loi sur l'immigration et la protection des réfugiés* (« LIPR »), la loi fédérale qui gouverne le droit de l'immigration au Canada et qui n'est malheureusement pas toujours bien connue par ceux qui sont impliqués dans le système de justice pénale avant qu'il ne soit trop tard.

La LIPR prévoit qu'un étranger au Canada, y compris un étudiant international, sera sujet à une ordonnance de déportation si celui-ci est déclaré coupable de criminalité. Être tenu coupable de criminalité signifie être déclaré coupable d'une infraction punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits. Quels genres d'infractions sont compris dans cette catégorie?

Le *Code criminel du Canada* prévoit le mode d'accusation qui doit être employé pour chaque infraction. Une infraction peut être poursuivie par mise en accusation ou par procédure sommaire. De

assimilée à une infraction par mise en accusation indépendamment du mode de poursuite effectivement retenu. Il est souvent surprenant d'apprendre que des infractions telles que la conduite en état d'ébriété, une simple voie de fait, un vol de moins de 5 000,00 \$, la conduite d'un véhicule à moteur de façon dangereuse et bien d'autres sont toutes des infractions où la Couronne peut choisir la procédure.

Alors, vous êtes étudiant international au Canada et vous vous retrouvez avec une accusation qui semble être mineure. Rappelez-vous, tant que la Couronne a le choix de procéder par mise en accusation ou par voie sommaire, la LIPR prévoit que, peu importe son choix, cette infraction sera assimilée à une infraction par mise en accusation. Donc, si vous êtes trouvé coupable suite à un procès, ou si vous plaidez coupable souhaitant vous débarrasser de cette accusation, vous serez bientôt sujet à une ordonnance de déportation.

CONSIDÉRATION DES CONSÉQUENCES D'IMMIGRATION LORS DE LA DÉTERMINATION DE LA PEINE

Il existe par contre une façon d'échapper à la déportation. En 2013, la Cour Suprême du Canada a confirmé que suite à une conclusion de culpabilité (par verdict ou par plaidoyer), un des facteurs pertinents à tenir en compte lors de la détermination de la peine inclut les conséquences indirectes en matière d'immigration. Donc, il est important que la question des conséquences en matière d'immigration soit portée à l'attention du juge qui déterminera la peine que recevra l'accusé. Lorsque les circonstances le permettent, un juge peut décider d'accorder une peine plus légère, ou bien imposer une peine alternative lorsque la peine normalement imposée aurait pour effet d'entraîner une ordonnance de déportation pour l'accusé. Cela dit, la peine que recevra l'accusé doit être juste eu égard au crime commis et aux circonstances particulières de l'accusé. C'est-à-dire que la peine doit demeurer « *proportionnelle à la gravité de l'infraction et au degré de responsabilité du délinquant* ».

UNE ABSOLUTION AU LIEU D'UNE CONDAMNATION – CONNAÎTRE LA DIFFÉRENCE

Il est aussi important de tenir compte que lorsqu'un accusé plaide coupable ou est déclaré coupable d'une infraction où il n'existe aucune peine minimum prescrite, ou si l'infraction n'est pas punissable par une peine de 14 ans ou de la vie en prison, le juge peut décider d'accorder une absolution. Une absolution signifie que l'accusé sera reconnu coupable de l'infraction, mais aucune condamnation ne sera enregistrée contre celui-ci. Afin qu'une absolution soit accordée, cette peine doit être dans le meilleur intérêt de l'accusé et ne pas nuire à l'intérêt du public. Avec

l'obtention d'une absolution, un accusé échappe à la condamnation wet à la conséquence indirecte de celle-ci, la déportation.

Une absolution peut être inconditionnelle ou sous condition. Lorsqu'une absolution sous condition est accordée, les mêmes conditions qui seraient imposées lors d'une condamnation peuvent aussi être imposées, incluant une période de probation, une amende, l'achèvement d'un cours de réhabilitation, etc. Une mention demeurera au casier judiciaire de l'accusé pendant un an suivant l'ordonnance de la peine lorsqu'une absolution inconditionnelle est accordée ou pour trois ans dans le cas d'une absolution sous condition. La mention sera automatiquement retirée du dossier de l'accusé à l'expiration de la période applicable si l'accusé n'a commis aucun autre crime lors de cette période

Récemment, la Cour du Banc de la Reine du Nouveau-Brunswick a annulé la condamnation d'un étudiant international au motif que le juge en première instance n'avait pas été informé du statut de l'accusé ni des conséquences de la peine en matière d'immigration et ne les avait donc pas considérés lorsqu'il a refusé d'accorder une. Le juge en appel accordé une absolution avec l'imposition des mêmes conditions qui avaient été imposées lors de la détermination de la peine initiale. Bien que les conditions soient demeurées les mêmes, le fait que celles-ci aient été imposées dans le cadre d'une absolution au lieu d'une condamnation fut déterminant pour l'étudiant qui avait déjà tant investi dans son éducation canadienne. L'ordonnance de déportation qui avait été émise contre lui a été annulée. Celui-ci a pu demeurer au Canada pour terminer ses études postsecondaires et faire demande pour un permis d'études supérieures.

ET POUR LES RÉSIDENTS PERMANENTS?

Bien que les résidents permanents bénéficient d'une protection plus large que les étrangers, ils ne sont pas complètement protégés contre la déportation.

La LIPR prévoit qu'un non-citoyen déclaré coupable d'un crime de « grande criminalité » devient interdit de territoire et sera sujet à une ordonnance de déportation. Ceci s'applique aux étrangers ainsi qu'aux résidents permanents du Canada. Afin qu'un crime commis au Canada soit considéré comme étant de « grande criminalité », un accusé doit être déclaré coupable d'une infraction punissable d'un emprisonnement maximal d'au moins 10 ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé. Certaines infractions qui entrent dans cette catégorie incluent, entre autres, les contacts sexuels sur ou l'agression sexuelle d'une personne âgée de moins de 16 ans, la production de pornographie juvénile, la décharge d'une arme à feu avec insouciance et les voies de fait graves.

QU'EN EST-IL DE LA CONDUITE EN ÉTAT D'ÉBRIÉTÉ?

Présentement, la peine pour conduire un véhicule à moteur avec une capacité de conduite affaiblie par l'effet de l'alcool ou d'une drogue varie entre une amende de 1 000,00 \$ et une peine d'emprisonnement n'excédant pas 5 ans. C'est-à-dire qu'un résident permanent ne peut être sujet à une ordonnance de déportation avec une déclaration de culpabilité à cette infraction.

Par contre, à partir du 18 décembre 2018, des changements seront apportés au *Code criminel* afin de dissuader la conduite en état d'ébriété. Les changements prévus comprennent notamment

l'augmentation de la peine maximale de 5 ans à 10 ans d'emprisonnement. Ceci aura pour effet de rendre la conduite avec facultés affaiblies un crime de « grande criminalité » selon la LIPR. Cela signifie que même si la peine maximale n'est pas imposée, le fait que cette infraction pourra dorénavant être punissable par un maximum de 10 ans d'emprisonnement aura pour effet d'emporter une interdiction de territoire et une déportation imminente pour les résidents permanents qui commettent cette infraction. Puisque ce n'est pas la peine imposée qui importe,

mais bien la peine maximale qui aurait pu être imposée, le fait de recevoir une simple amende pour cette infraction pourrait entraîner de graves conséquences.

APPUI AUX ÉTUDIANTS INTERNATIONAUX

Il est donc très important pour un étudiant international de connaître les conséquences potentielles en matière d'immigration dans l'éventualité où celui-ci ferait face à une accusation criminelle. Un étudiant international devrait toujours soulever son statut d'étranger au Canada avec le juge si l'accusé n'est pas

représenté, ou avec son avocat, et s'assurer que celui-ci soit pris en considération à chaque étape du processus. Sensibiliser les étudiants internationaux (ainsi que les résidents permanents à partir du 18 décembre 2018) à la nécessité de demander un avis juridique à l'égard des conséquences en matière d'immigration d'une condamnation pénale dès le début du processus fournira aux étudiants concernés une plus grande chance de faire face aux conséquences pénales de leurs actions sans être obligés d'abandonner de leurs études et de quitter le Canada.



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Level advises pension and benefit plan sponsors and administrators, and has worked for many of the largest plans in Atlantic Canada. He works with employers and plan sponsors to help them manage risk and liability in the governance, administration, investment management and amendment of pension and employee benefits plans, as well as to defend them against claims under those plans. A knowledgeable and experienced leader, Level takes regional, national and international approaches to labour and employment, pension and benefits and executive compensation issues. He was named a Lexpert Rising Star: Leading Lawyer Under 40 (2016), was the recipient of the Canadian Pension and Benefits Institute Atlantic Region Volunteer of the Year award (2015) and the CBA Nova Scotia Zöe Odei Young Lawyers Award (2010).



Privileged records and access to information reviews: to produce or not produce?

INTRODUCTION

Solicitor-client privilege is intended to foster candid conversation between a client and legal counsel in order to ensure that the client receives appropriate legal advice and can make informed decisions. It protects the solicitor-client relationship. By comparison, litigation privilege attaches to records that are created for the dominant purpose of preparing for litigation. It offers protection for clients to investigate and prepare

their case. Both privileges are vital to an effective legal system.

Enter access to information legislation. Legislation in each Atlantic province provides some form of exception to disclosure for privileged records.¹ But a public body's application of access to information legislation is overseen by a statutory office in every jurisdiction. What happens when the public body's

application of the exception for privileged records is challenged?

THE LEADING DECISIONS

That question gave rise to the Supreme Court of Canada's well-known decision in *Alberta (Information and Privacy Commissioner) v University of Calgary*.² In that case, a delegate of the Alberta Information and Privacy Commissioner issued a notice to the University to produce records over which the University had claimed solicitor-client privilege. The University in turn challenged the Commissioner, and argued that it was not obliged to produce such records. The dispute worked its way through the courts, and eventually landed on the doorsteps of the Supreme Court. The majority of the Court agreed with the University and determined that the University was not obligated to produce solicitor-client privileged records to the delegate for review.

The Supreme Court's decision was based upon statutory interpretation, and depended greatly on the specific wording of the Alberta *Freedom of Information and Protection of Privacy Act*. The Alberta legislation requires a public body to produce records to the Commissioner despite "*any privilege of the law of evidence*."³ But the Supreme Court determined that production of records under access to information legislation engages solicitor-client privilege as a substantive right – not in the evidentiary context. Case law has long affirmed that as a substantive right, solicitor-client privilege "*must remain as close to absolute as possible and should not be interfered with unless*

¹ In New Brunswick, see *The Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6 at s 27; in Newfoundland and Labrador, see *Access to Information and Protection of Privacy Act*, 2015, SNL 2015 c A-1.2 at s 30; in Nova Scotia, see *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5 at s 16; and in Prince Edward Island, see *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c 15.01 at s 25.

² [2016] 2 SCR 555, 2016 SCC 53 (CanLII).

³ *Ibid.*, at s 56(3).

absolutely necessary”.⁴ Therefore, the Court determined that the requirement to produce records despite “*any privilege of the law of evidence*” was not “*sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege*.”⁵ This interpretation was found to be consistent with the scheme of the legislation. A similar approach was subsequently taken by the Court with respect to litigation-privileged records in *Lizotte v Aviva Insurance Company of Canada*. The Court noted that like solicitor-client privilege, a statute must contain “*clear, explicit and unequivocal language*” in order to lift litigation privilege.⁶

THE IMPLICATIONS FOR ATLANTIC CANADA

The implications of these decisions on access and privacy law in Atlantic Canada remains to be seen. The legislation describing the Commissioners’ powers of production varies across the Atlantic provinces. As a result, the analysis in each jurisdiction requires a nuanced consideration of the language and the scheme of the legislation in issue in order to determine if the Commissioner does have the ability to require production of records over which solicitor-client or litigation privilege is claimed. Public bodies should be mindful of the need for the legislation to use language that is sufficiently clear, explicit and unequivocal, to set aside the privilege. But perhaps more importantly, is the question of whether a Commissioner ought to request records for which solicitor-client privilege or litigation privilege is claimed.

The *University of Calgary* decision received a great deal of attention when it was released. But little attention has been paid to the Majority’s closing comments regarding the appropriateness of the delegate’s decision to seek production of records over which solicitor-client privilege was claimed – in the event the delegate could require their production. In this respect, the Supreme Court emphasized that “*even courts will decline to review solicitor-client documents to ensure that privilege is properly asserted unless there is evidence or argument establishing the necessity of doing so to fairly decide the issue*.”⁷ The Court was mindful of the fact that the University had identified the records in accordance with the practice in civil litigation in the province, and found that in the absence of evidence to suggest that the University had improperly claimed privilege, the delegate erred in determining that the documents had to be reviewed.

This commentary suggests that even if Commissioners in Atlantic Canada have the authority to require production of records over which solicitor-client privilege is claimed, an exercise of that authority may not always be appropriate. Similar commentary regarding review of litigation privileged records has not been provided from our top Court. However, it is arguable based on the strength of the Supreme Court’s decision in *Lizotte*, that a similar approach could be expected should the issue be considered. At least one Information and Privacy Commissioner in Canada – the Alberta Information and

Privacy Commissioner who was bound by the decision in *University of Calgary* – has issued a practice note that treats the privileges the same on review and requires affidavit evidence attesting to why the records are solicitor-client or litigation privileged. This is based upon civil litigation practice in Alberta.⁸

THE TAKE-AWAY

While civil litigation practice can – and does – vary from province to province, should you find yourself in a position where the Commissioner is seeking review of records over which you have claimed solicitor-client or litigation privilege, the Supreme Court’s commentary and the Alberta approach may provide a means by which to have the Commissioner resolve the claim without risking privilege and requiring production of the records in issue.



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4 *Ibid*, at para 43, internal citations omitted.

5 *Ibid*, at para 44.

6 [2016] 2 SCR 521, 2016 SCC 52 (CanLII) at para 64.

7 *Supra*, note 2 at para 68.

8 By comparison, on subsequent review of the Commissioner’s decision respecting a claim for privilege, it is likely that the Court will exercise its powers of oversight and view the records over which solicitor-client privilege is claimed. See for instance: *Calgary (Police Service) v Alberta (Information and Privacy Commissioner)*, 2018 ABCA 114 (CanLII).



**Making the grade:
court review of university
decision-making**

INTRODUCTION

Universities have a variety of internal procedures that permit students to challenge a number of academic decisions. For example, there are often procedures allowing students to appeal grades or to challenge other decisions such as being expelled.¹

However, these decisions are not necessarily final. Students who exhaust the appeal procedures established by a university may generally apply to a superior court for judicial review. This article will summarize how courts assess these types of academic decisions and outline what courts expect from universities in order to uphold their decisions. In other words, this legal cheat sheet is intended to help universities make the grade in a courtroom.

DISTINCTION BETWEEN ACADEMIC ISSUES AND OTHER LEGAL ISSUES

At the outset, it is important to note that courts treat academic issues differently from other legal issues that may arise within universities. For example, students who have a pure academic dispute are generally required to exhaust the internal procedure before initiating a court proceeding. On the other hand, matters of a general legal nature – such as an allegation that a university was negligent and caused harm to a student – are permitted to proceed immediately to court.

While this distinction appears to be clear at face value, it is often more obscure in practice. For example, consider the circumstances of a student who alleges that their course failure was caused by negligent instruction by the

university. Is this an academic issue or a legal one? Most recently, this question has been resolved by examining the remedy being sought by the student. If the student wishes to have a grade of “fail” changed to a “pass,” then the decision is purely academic in nature and ought to go through the internal procedure at the university. However, if the student is seeking monetary compensation for lost opportunities, the issue is a legal one and the student may immediately start a legal proceeding in negligence.² Courts will generally not entertain claims for monetary compensation when the claim is, in substance, an attempt to reverse a grading decision by the university.

extends a considerable amount of deference or respect to the internal decision-makers at the university.

This deference to university decision-making is appropriate because, when students enroll at a university, “*it is understood that the student agrees to be subject to the institution’s discretion in resolving academic matters, including the assessment of the quality of the student’s work.*”³ And, in the academic context, that discretion has been recognized as being broad.⁴ After all, provincial legislatures generally grant responsibility over academic policies, including the authority to “*render a final decision on academic*

“ ... it is important to note that courts treat academic issues differently from other legal issues that may arise within universities. ”

DEFERENCE WILL GENERALLY BE EXTENDED TO THE UNIVERSITY’S DECISION

The distinction between academic disputes and other legal issues also has an impact on the role of the court in the proceeding. If the claim is a legal one, then the court will make its own factual findings and reach its own legal conclusions. However, if the dispute is purely academic in nature, the role of the court will be to “review” the decision made by the university. The court does not consider the matter afresh and make its own findings. Rather, the court

appeals,” to the governing bodies of universities – and not to the courts.⁵

Courts have also accepted that universities have particular expertise over academic matters. This expertise also engenders respect from the court.⁶ For example, in a decision concerning whether it was reasonable for a university to transfer a PhD student to another program because the faculty did not have the expertise to supervise the project in question, the court stated it was “*simply not equipped*” to determine the issue.⁷

1 For example, the University of Prince Edward Island has the following procedure for appealing a grade: (1) an informal appeal with an instructor; (2) a formal appeal with the departmental Chair; (3) a formal appeal with the faculty Dean; and (4) a formal appeal to the Senate Academic and Discipline Appeals Committee.
2 *Jaffer v. York University*, 2010 ONCA 654 at para. 26.
3 *Ibid.* at para. 27.
4 *Ibid.* at para. 28.
5 See e.g. *University Act*, R.S.P.E.I. 1988, c. U-4, s. 24.
6 See e.g. *Lam v. University of Western Ontario*, 2017 ONSC 6933 at paras. 39-47.
7 *Ibid.* at paras. 42, 44 and 50.

When the relative expertise of universities in academic matters is considered together with the autonomy granted to universities by legislatures, courts are generally reluctant to interfere in academic affairs.⁸ In fact, there are a number of cases where courts have said that an academic decision can only be reviewed to ensure that the university followed a fair process.⁹ Deference will therefore generally be extended to universities in academic matters.

MAKING THE GRADE

Courts typically conduct only a procedural review of academic decisions. The objective of the review process is to ensure that the student has been treated fairly by the university. Judicial review will therefore generally focus on the requirements of procedural fairness. Understanding these obligations is therefore essential if a university expects to receive a passing grade from the court.

To start, the requirements of procedural fairness are context-specific. Some cases, such as disciplinary matters that lead to expulsion, attract a high level of fairness.¹⁰ Other administrative matters – such as a decision to re-admit a student into a program – attract a lower level of procedural fairness.¹¹ However, no matter the nature of the academic decision at issue, the following basic elements of procedural fairness will ordinarily apply:

Bias: Just as a chemistry student is expected to justify her conclusions by using independent and objective

methods, a university is similarly expected to justify its academic decisions in a manner that is free of bias. Internal decision-makers must be impartial in their dealings with a student. This requirement applies to all types of academic decision-making. For example, a professor should not – after a student has appealed their grade – change their reasoning for failing the student.¹² This type of conduct suggests that the initial grading decision was arbitrary and not animated by relevant academic considerations.

Reasons: For students, answering the question “why?” is a common and legitimate pursuit at university. Nothing less is expected when a university makes an academic decision about a student. The provision of reasons allows the student – and the reviewing court – to understand the justification for a particular decision.¹³ In other words, the university, like the student, must show its work. In the absence of reasons, students may feel that a decision was motivated by arbitrariness. Courts too have had difficulty upholding decisions that were made by universities in the absence of reasons.¹⁴ However, the content of those reasons may vary in the circumstances. There is a direct relationship between the impact of a decision on the student and the quality of reasons expected from the university. For example, formal written reasons are often necessary in disciplinary matters (i.e. expulsion of a student from the university), but not expected in matters that are administrative in nature (i.e. denying a student re-admission to a program).¹⁵

Opportunity to be heard:

Universities foster an academic environment that encourages participation by students. Courts require much the same from universities when they make decisions affecting the academic interests of students. They must provide students with an opportunity to participate in the decision-making process and, more specifically, they are required to ensure that students have an opportunity to explain why a particular decision ought to be changed. The form of that opportunity, however, varies depending on the circumstances. For example, an oral hearing is ordinarily required when a student faces expulsion or when credibility will weigh heavily in the final outcome.¹⁶ Where the consequences are less severe or credibility is not at issue, a hearing in writing may suffice. For example, if a student has requested re-admission to a program, courts have held that a university can discharge its duty by providing “an opportunity to be heard” in writing only.¹⁷

CONCLUSION

A review of the case law demonstrates that courts will generally defer to academic decisions by university decision-makers. Universities are considered to have expertise in such matters and enjoy broad discretion over the academic interests of students. However, the case law also determines that courts will scrutinize the appeal procedures adopted by universities as part of their academic policies. A reviewing court will examine an academic decision

8 *Ibid.* at para. 31.

9 See *Green v. University of Winnipeg*, 2015 MBCA 109 at para. 31; *Dawson v. University of Toronto*, 2007 CanLII 4311 at para. 5 (ONSC); and *Fufa v. University of Alberta*, 2012 ABQB 594 at para. 24.

10 *Khan v. Ottawa (University of)*, 1997 CanLII 941 (ONCA).

11 See e.g. *Green v. University of Winnipeg*, 2018 MBQB 4.

12 *Al-Bakkal v. De Vries*, 2003 MBQB 198 at paras. 36-37.

13 *Mohamed v. University of Saskatchewan*, 2006 SKQB 23 at para. 44.

14 *Zelony v. Red River College*, 2007 MBQB 308 at para. 136 and following.

15 *Supra* note 11 at paras. 78-82.

16 *Supra* note 10.

17 *Supra* note 11 at paras. 51-54.

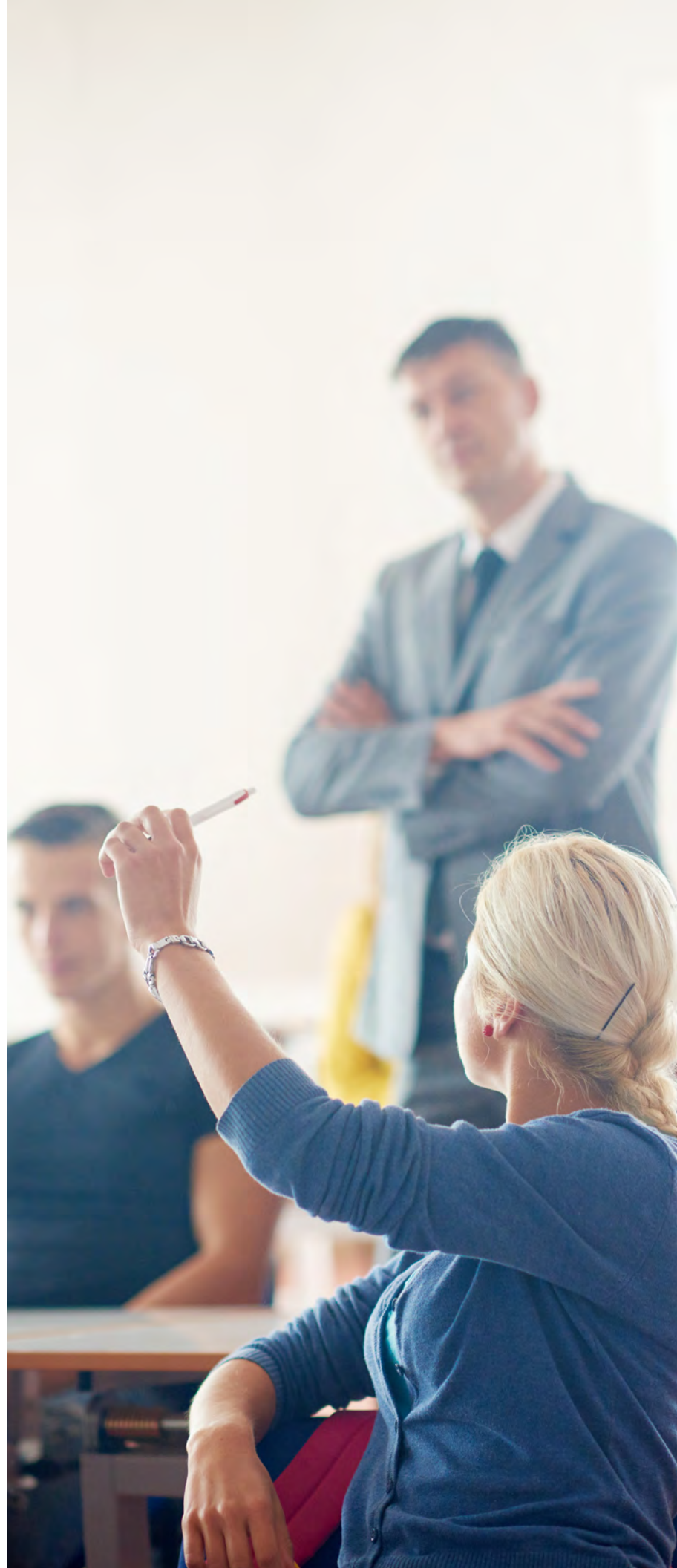
to ensure that it was free of bias, that the student had a meaningful opportunity to be heard, and that the university provided reasons to justify its decision. If the court is not satisfied that the procedure used by the university was fair in the circumstances, it may set aside the decision. Keeping these elements of procedural fairness in mind will be essential if universities expect to make the grade on judicial review.



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Lessons learned from #MeToo

INTRODUCTION

On October 5, 2017 the New York Times published an article detailing serious sexual harassment allegations involving Hollywood mogul Harvey Weinstein. Three days later the board of directors of The Weinstein Company terminated his employment. On October 15, 2017 actor Alyssa Milano wrote on Twitter: “if you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet”. This followed the 2006 use of #MeToo by activist Tarana Burke. #MeToo has been posted or commented millions of times since. Time Magazine named “The Silence Breakers” the 2017 person of the year. Harvey Weinstein now has 93 accusers.

The crux of the #MeToo movement is not about sex but rather about

the implicit system of power which exists in workplaces. As described by actor Ashley Judd “I am a 28 year old woman trying to make a living and a career. Harvey Weinstein is a 64 year old, world famous man and this is his company. The balance of power is me: 0, Harvey Weinstein: 10.”

Many lessons have been learned from #MeToo. Inappropriate sexual comments and behavior are occurring everywhere (to female reporters experiencing people who are yelling “FHRITP”, in advertising, at sporting events, etc.), and it is inevitable that they will continue to occur at workplaces and universities. This article specifically considers what universities can learn from #MeToo.

LESSONS LEARNED

1. Underestimating sexual harassment: Canadian executives still continue to drastically underestimate sexual harassment. 94% of Canadian executives believe that sexual harassment is not a problem at their company and 93% believe they have a corporate culture that prevents sexual harassment, according to a C-Suite Survey by the Gandalf Group. At the same time, 2017 Statistics Canada said that 30% of women had experienced workplace sexual harassment and the 2017 Insights West and Abacus Data survey found this number was closer to 50%. An Angus Reid poll released in February 2018 found that 4 in 5 women reported taking some kind of action to prevent or avoid sexual harassment - 52% of

women said they had experienced sexual harassment at work and 28% of women said they had experienced non-consensual sexual touching, a broad category that included everything from touching to rape. Change begins at the top.

2. Policies are important: Review and update them at regular intervals. Audit policies for compliance. Collect data and report metrics (including any patterns). Weinstein had reached at least eight settlements with women over three decades. They were not investigated as once a settlement was reached the underlying complaint was withdrawn so the organization took the view that there was nothing left to investigate.

3. Processes are important: Investigations are designed to assign fault. Alternate dispute resolution, particularly restorative justice and transformative mediation, are designed to address harms and are more likely to result in complainant(s) and respondent(s) being able to work together productively. If an investigation is the default process, ensure the investigator is properly trained as there is a price to pay (both financial and reputational) for poor investigations.

4. Be proactive: Policies and processes are reactive and in order to manage reputational and brand risk, universities must also be proactive. Consider situational risk factors and what you can do to mitigate increased risk in relation to these factors: significant cultural and/or language differences; significant age or gender imbalance; valuing customers/clients over worker wellbeing; isolated workplaces or encouraging consumption of intoxicating substances.

5. Importance of culture: Consider metrics to evaluate whether there is a “culture of silence” and/or toxicity vs. a culture of open communication

and accountability. Consider having multiple channels for reporting, including anonymous whistleblower hotlines managed by third parties.

6. Understand bystander apathy: The social psychological phenomenon known as “bystander apathy” refers to cases in which individuals do not offer any means of help to a victim when other people are present. The probability of offering help is inversely related to the number of bystanders.

“ While it’s important to have processes in place to support and believe complainants, decision-makers cannot give into social media pressure to rush to judgment. ”

In other words, the greater the number of bystanders, the less likely it is that any one of them will help. Ensure that bystander intervention forms a part of your policy and that you engage in regular bystander intervention training and campaigns.

7. Consent: Understand and provide training on what is meant by “consent”. The issue of consent does not fully determine whether or not sexual harassment has occurred. There should be a positive obligation to disclose any consensual sexual relationship between people if there is a power imbalance.

8. Impact on mentoring: Since #MeToo, almost 50% of male managers report being uncomfortable participating in common work activities with women, including things like mentoring, working alone, socializing and travelling for work. Understand that #MeToo could actually result in a decline of vital mentoring and sponsoring opportunities for women and take steps to address this.

9. Understanding the demographics: Findings from an Angus Reid Institute poll released in February 2018 challenge the belief that young men (aged 18-34) are more in step with young women. Men aged 18-34 were significantly different (more permissive) in their views and attitudes (one question such as “is it okay to make a comment about a colleague’s body”) than all other demographics.

10. Accountability: Post #MeToo, no one is untouchable and the more senior the person the more likely it seems that the allegations will be publicized on social media. Publicly, the pendulum appears to have shifted from victim blaming to assuming the respondent is guilty without any due process. While it’s important to have processes in place to support and believe complainants, decision-makers cannot give into social media pressure to rush to judgment. Due process takes time.



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***New Occupational
Health and Safety Act***
**regulations on violence
and harassment in the
workplace/civil liability
for violence on campus**

INTRODUCTION

In light of recent court decisions in the United States and upcoming legislative changes in New Brunswick, there are two ways in which Canadian post-secondary institutions may begin to see an extension of their liability in tort.

First, New Brunswick has recently filed amendments to the *General Regulation 91-191* (“General Regulations”)¹ under the *Occupational Health and Safety Act*² (“OHSA”) to protect employees from violence and harassment. New Brunswick is the last jurisdiction in Canada to enact such legislation. Having this protection entrenched in legislation will impose a requirement on employers to ensure they have policies in place to protect their employees. If their policies fall short, employers may open themselves up to liability under the OHSA.

Second, the California Supreme Court recently held that universities owe a duty to protect their students from foreseeable harm in the curricular setting. While this is not a Canadian decision, it is telling of a shift in the cultural attitude towards the liability of post-secondary institutions and, generally, the relationship between educational institutions and their students. If an educational institution is aware of a potential risk of harm and takes no mitigating steps, it may be held liable for harm that results.

In light of the above noted shifts, Canadian universities and colleges should review their workplace violence and campus violence policies. If no such documents exist, universities and colleges

should begin to think about creating policies to ensure they are limiting their potential liability in the case of violence on campus.

NEW REGULATIONS – VIOLENCE AND HARASSMENT IN THE WORKPLACE

Back in November 2017, as a response to the labour movement occurring in the province, the Government of New Brunswick began addressing some of the concerns that were being expressed. One of the concerns raised was the lack of legislation on the topic of problematic workplace conduct. The New Brunswick OHSA and its regulations did not address workplace violence and/or harassment. Every other jurisdiction in Canada already has some form of legislation in place on this topic.

The government established a steering committee to help foster stronger relationships between the government and the labour movement. The steering committee was comprised of five ministers and four representatives from labour groups. This committee oversaw five working groups that were tasked with drafting recommendations to the government on how workplace violence and harassment could be addressed.³

On April 28, 2018, the government introduced the first draft of the legislation that will amend the General Regulation under the OHSA (the “New Amendments”) to include new provisions respecting workplace violence and harassment. Labour, Employment and Population Growth Minister Gilles LePage stated:

“Your Government recognizes workplace violence and harassment is a serious issue. We will continue to work closely with our partners and other stakeholders to continue educating the public, workers and employers on the importance of creating safe and healthy workplaces that are free from discrimination and harassment.”⁴

The New Amendments were posted for public review until May 16. After this, the regulation was sent back for discussion with the steering committee to ensure that the New Amendments will adequately address the labour market and public’s concerns.

The New Amendments filed outline specific precautions and procedures employers must follow to prevent and address workplace violence and harassment. The New Amendments were filed on August 22, 2018 and are currently set to come into force on April 1, 2019.

The New Amendments were announced on the National Day of Mourning, a day to recognize those who have been injured or killed because of workplace-related hazards. In his announcement, Minister LePage explained that these New Amendments are part of an attempt to minimize workplace hazards and ensure that employees are safe at work.⁵ The hope is that these New Amendments will ensure that all employers are actively working to mitigate the risk of such incidents occurring and to decrease the number of workplace-related incidents of violence and harassment in New Brunswick.

While many employers may already have policies in place to

1 *General Regulation – Occupational Health and Safety Act*, NB Reg 91-191 [General Regulation].

2 *Occupational Health and Safety Act*, SNB 1983, c O-0.2 [OHSA].

3 Government of New Brunswick, *New Workplace Regulations Will Aim to Prevent Violence and Protect Workers*, News Release, 18 October 2017.

4 Government of New Brunswick, *Regulations Proposed to Address Workplace Violence and Harassment*, News Release, 28 April 2018.

5 Government of New Brunswick, *Regulations Proposed to Address Workplace Violence and Harassment*, News Release, 28 April 2018.

address violence and harassment in their workplace, many will need to either create policies or update their current policies to conform to the New Amendments which are scheduled to come into force April 1, 2019. The following are the two most significant changes employers will see:

1. Added definitions of violence and harassment

The New Amendments will add definitions for violence and harassment to the regulation. The definitions are similar to those in other provinces and reflect an attempt to cover various types of conduct that include actions, comments, and displays. The conduct may be a one-time occurrence or continuous.

The New Brunswick Nurses Union has criticized the initial draft of the New Amendments for being too restrictive in its definitions, and has recommended that the definition of violence be expanded to include psychological violence and that the definition of harassment be expanded to include conduct that would cause offence or humiliation to a worker.⁶

2. Employers must establish a code of practice

The New Amendments will require employers to actively prevent workplace harassment and violence. Employers will be required to assess the risk of violence at their place of employment. If a risk of violence is found, or if any other criteria outlined in the New Amendments is met (i.e. more than 20 employers, or employees in certain professions or fields) the employer must establish a written code of practice to mitigate this risk. This assessment must

be conducted every time there is a change in the conditions at the place of employment or when ordered to do so.

Employers will also be required to establish a written code of practice with respect to harassment. The related subsections of the New Amendments set out the required contents of the code of practice and establish an onus on the employer to ensure adherence to the code.

Employers will need to establish a training program for employees and supervisors in respect of codes

of practice established. There are no provisions regarding what this training program needs to look like other than it must address the codes of practice in place. The codes have to be reviewed once each year and will need to be updated where there is a change in conditionals at the place of employment or when ordered to do so.

In regards to investigations into complaints, employers will be required to ensure that the names of persons involved remain confidential unless it is necessary for the investigation, in order to take corrective measures, or required by law. Employers may only collect the minimum amount of personal information required for the purposes of the incident. This provision is likely an attempt to encourage individuals to come forward with complaints.

LIABILITY AT UNIVERSITIES – A DUTY TO PROTECT?

The second manner in which post-secondary institutions may see their liability extended is through a duty to protect students. Recently in the United States, tort liability of universities has been extended to include a duty to protect students from foreseeable violence during curricular activities. In *The Regents of the University of California v SC (Rosen)*⁷, the Supreme Court of California overturned the decision of the Court of Appeal of California and held that the duty to protect students exists.

“ The New Amendments will require employers to actively prevent workplace harassment and violence. Employers will be required to assess the risk of violence at their place of employment. ”

In that case, a student began experiencing auditory hallucinations which made him believe that other students were criticizing him. School administrators were made aware of the situation and attempted to provide mental health treatment to the student. Unfortunately, the student stabbed a fellow student, Katherine Rosen, during a chemistry lab. Ms. Rosen then sued the university and several of its employees for negligence. Her argument centered on the university's failure to protect her from foreseeable violent harm.

The Supreme Court of California considered the “*unique features of the college environment*” and concluded that post-secondary institutions have “*a special relationship with students while they are engaged in activities that are part of the school's curriculum*”

6 New Brunswick Nurses Union, *Speak up – Public Review of Workplace Violence Draft Regulations*, 7 May 2018.
7 *The Regents of the University of California v SC (Rosen)*, Case No: S196248 (2018) [Rosen].

or closely related to its delivery of educational services".⁸ The court, however, did not impose liability on the university in this case but merely held the duty exists. The court remanded to the Court of Appeal to decide whether there were any triable issues of material fact remaining and to determine whether the university would be liable.

This decision follows similar holdings and *obiter* comments made by courts in other states. The Supreme Judicial Court of Massachusetts held that colleges have a duty to protect their students against criminal attacks. The Supreme Court of Florida discussed that a special relationship may exist between universities and their adult students that warrants a duty to protect. Lastly, the Supreme Court of Delaware held that universities have a duty to regulate and supervise foreseeable dangerous activities occurring on its property including the negligent or intentional activities of third persons.⁹

These decisions have begun broadening the scope of liability of post-secondary institutions in the United States. The decisions establish that universities and colleges must take reasonable steps to prevent violence towards students during curricular events and events occurring on their property. In light of these decisions, Canadian post-secondary institutions should be aware of their potential liability and the potential duty to protect students from foreseeable harm.

WHAT STEWART MCKELVEY CAN DO FOR YOU

With the proposed addition of the New Amendments regarding workplace violence and harassment, it is foreseeable that

Canadian educational institutions may begin to see an increase in liability for harm caused to students and staff. It will be important for universities and colleges to ensure they are aware of any potential risks of violence and ensure their policies adequately outline the steps they will take to mitigate this risk. Stewart McKelvey can assist in developing clear policies and guidelines to ensure compliance with the new regulations.



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8

Ibid., at p 17.

9

All of these cases can be found on pp 18-19 of Rosen, *supra* note 7.

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