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Discovery

ATLANTIC EDUCATION AND THE LAW

STEWART McKELVEY
LAWYERS • AVOCATS

INSIDE

Keeping international students in our communities:

updates to immigration programs

While springtime for universities and colleges signal the culmination of classes, new graduates and a slower pace around campus, it doesn't mean legal issues can be put on hold.

In this latest edition of Discovery, we cover a variety of topics that post-secondary institutions may be interested in, or should be aware of. From discrimination claims in scholarships and student travel liability, to alternative dispute resolution and cannabis, we hope you find this publication to be informative and useful.

Inspired by the freshness of spring, we've decided to give Discovery a brand new look and feel, which we hope you enjoy. Please let us know if there are any topics that you would like to see covered in the future.

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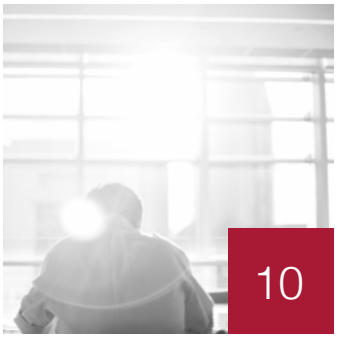

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Enrollment of international students is on the rise across Canada.

Keeping international students in our communities:

updates to immigration programs

Immigration program changes that will impact international graduates.

Enrollment of international students is on the rise across Canada. Federal programs are designed to help provinces keep those students in Canada after graduation. These programs make studying in Canada an attractive option for foreign nationals - adding diversity to our classrooms and communities.

As the first point of contact, educational institutions provide information and guidance to their international students. Immigration programs are frequently updated or changed, which makes staying on top of the options for students difficult, but necessary. In order to help you provide the best information to prospective and current students, as well as alumni, this article outlines recent changes to two programs that will impact your international graduates.

Post Graduate Work Permit

OVERVIEW

The Post Graduate Work Permit ("PGWP") makes it possible for recent graduates to stay in Canada after graduation. The permit is ideal because it is able to be obtained even if the graduate does not already have a job offer, unlike other programs. Therefore, it can allow graduates to remain in Canada after they complete their program of study while they search for work. The ability for students to gain full-time work experience in Canada can also help them qualify for certain permanent residency programs.

GENERAL REQUIREMENTS

To be eligible for a PGWP, international students must graduate from a designated learning institution, from a program at least eight months in duration. Degrees, diplomas or certificates from most public post-secondary institutions will allow the student to be eligible, but it is important for students to check that their learning institution qualifies, as there are some exceptions.

There are also restrictions on the types of programs that qualify. For example, neither English or French as a second language program, nor programs completed mostly by distance learning, will qualify a graduate to obtain a PGWP. The international student must have maintained full-time status during each semester of the program with the exception of the final semester.

The PGWP will be valid based on the duration of the program completed. Programs between eight months and two

years will yield a permit for the same duration as the studies. A program that is two years or more can support a permit valid up to three years. This program is only available to students once, and they cannot receive a second PGWP.

UPDATES

In February, Immigration, Refugees and Citizenship Canada ("IRCC") made it easier for international graduates to stay in Canada after graduation by announcing two significant changes to the PGWP program.

The policy announced on February 14, 2019 increases the amount of time students have to submit their applications for PGWPs. The extension doubles the time students have to make their submission from 90 days to 180 days from the date their final marks have been issued. With the stress of completing exams and the business of graduation, this time extension will mean fewer students will be left scrambling to make their applications.

The announcement further removed the requirement for the student to hold a valid permit at the time of application. This change makes the extension announcement meaningful since most students' study permits will expire shortly after they complete their studies or within a few of months of completion.

Despite some restrictions, the PGWP Program is often a great option for most students. The program even allows them to start working in Canada while waiting for a decision on their application. Once they have the permit it allows them time to apply for jobs, gain work experience in Canada and, for some, consider options for permanent residency.

Atlantic International Graduate Program

OVERVIEW

The Atlantic Immigration Pilot Program has a stream that directly targets international graduates who studied in the Atlantic provinces. Under the Atlantic International Graduate Program ("AIGP"), graduates who attend a recognized publicly funded post-secondary institution in New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island may qualify for an expedited route to permanent residency.

Current international students will be pleased to know that IRCC has announced that the Atlantic Immigration Pilot Program will be extended until December 31, 2021.

GENERAL REQUIREMENTS

This program is aimed at graduates who already have an attachment to Atlantic Canada. The applicant must have lived in Atlantic Canada for at least 16 months within the two years before they obtained their credential from the Atlantic institution. It is also essential that the applicant held proper immigration permits for their training and any work in Canada during that time.

Like the PGWP, there are some restrictions on what programs of study make an applicant eligible. Ineligible credentials include those obtained for the study of English or French as a second language (or where English or French as a second language was at least half of the program). Another restriction is for programs having distance learning as half of the program or more. The AIGP requires that the degree, diploma, certificate, or trade/apprenticeship credential has been obtained as a full-time student.

Under AIGP the applicant must show proof of sufficient funds to support themselves and their family. They must also be offered a full-time job from an employer designated under the Atlantic Immigration Pilot Program.

UPDATES

On March 1, 2019 IRCC announced a significant update to the AIGP. Applicants now have 24 months after obtaining their credentials to apply under the program. Previously, applicants only had one year to apply and therefore this program change is quite beneficial to future applicants.

Many foreign nationals will use the program only for their permanent residency ("PR") application; however, there is an option to obtain a one-year work permit while the permanent residency application is being processed. An update to the requirements for the permit in March announced that applicants applying for a work permit under the program will have to include their language proficiency test results, proof of their work experience and the education credentials. This will

impact all applicants under the Atlantic Immigration Pilot Program, not only the International Graduate Stream. This change can be significant as it means applicants will need to gather their documentation earlier should they need a work permit. It could also potentially create delays in an individual's ability to obtain a work permit if they, for some reason, have difficulty gathering any of this documentation. Luckily for AIGP applicants, they will have Canadian credentials, which do not have to be assessed by a designated organization. These applicants also do not need to have work experience to qualify for the program - they will however need valid language test results.

CONCLUSION

The PGWP and AIGP both offer international students options to stay in Canada to use the skills and education they have obtained from Atlantic Canadian schools. Updates to these programs should make them even more accessible to graduates. International students in Canada have begun to establish themselves in our region throughout their time at school, and these immigration options are a great way to help them plan for their futures and remain in Canada for the longer term, eventually also allowing them to make significant contributions to our economy and communities. ➤

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Lecturer's discrimination claim dismissed:

courts award university $13,000 in costs

The New Brunswick Court of Appeal sets precedent for universities and colleges when addressing human rights complaints in employment.

> *"Human rights codes and legislation prohibit employers from discriminating against persons in matters of employment on the basis of recognized prohibited grounds of discrimination; they do not require employers to hire the best qualified person to fill a position."*

This opening paragraph of the New Brunswick Court of Appeal's decision in *Ayangma v. Université de Moncton*[1] sets the tone for a new decision from the province's highest court that provides guidance on the process of hiring faculty and the role of human rights legislation within that process.

When current faculty are passed over, the question of qualifications may certainly arise in the context of a grievance but an allegation of discrimination will not be founded unless the decision was made (at least in part) on the basis of a protected ground.

This was the situation that arose when Mr. Ayangma was not awarded a position in the faculty of business administration at l'Université de Moncton. He subsequently filed a complaint with the New Brunswick Human Rights Commission, alleging discrimination on the basis of race, age and place of origin.

The complaint was investigated and ultimately dismissed by the Commission upon the recommendation of an investigator (i.e. without a hearing before the Human Rights Tribunal).

Mr. Ayangma unsuccessfully sought judicial review of the Commission's decision. The Court awarded costs to the university in the amount of $10,000. The New Brunswick Court of Appeal upheld the judicial review decision and awarded the university a further $3,000 in costs.

BACKGROUND

The Complainant, Noël Ayangma, was a lecturer in the faculty of business

[1] *Ayangma v. Université de Moncton*, 2019 NBCA 14

administration on the Moncton Campus of l'Université de Moncton since 2010.

Following the resignation of a professor within the faculty in June of 2013, the university hired Ms. S.M. to fill a one-year professor of management position starting on July 1, 2013. The collective agreement contained a provision for the hiring of a professor under urgent circumstances on a one-year temporary basis without the need to publicly advertise the position. Accordingly, this one-year contract was not publicly announced nor was it offered to Mr. Ayangma.

In January 2014, the university posted a vacancy for a professor of human resources management leading to a permanent position. The position was to begin July 1, 2014 and the job posting required applicants to hold a doctoral degree in business administration, industrial relations, or in a related field specializing in human resources. Mr. Ayangma was one of ten applicants for the position and, after an initial evaluation, was one of six who were eliminated on the basis they did not possess the required specialization in human resources management.

On July 6, 2015, Mr. Ayangma filed a human rights complaint in response to not being awarded the professor of human resources management position in January 2014, as well as various other allegations against the university related to discrimination based on race.

COMPLAINANT'S POSITION

Mr. Ayangma argued that he was more qualified than the successful applicant and was not awarded the position by reason of the fact that he is black, a native of Cameroon and in his sixties. He further alleged that he had heard about derogatory comments being made by other professors relating to the number of minorities employed by and attending the university, though he had not heard these comments himself.

Given parts of the complaint were beyond the one year time limit for filing a complaint under the *Human Rights Act*,[2] Mr. Ayangma was also required to file a request for an extension of the deadline.[3] He argued the time period should be extended on the basis of the "*discoverability rule*" often used in the interpretation of statutes of limitation legislation.

Mr. Ayangma argued that he was more qualified than the successful applicant and was not awarded the position by reason of the fact that he is black, a native of Cameroon and in his sixties.

COMMISSION'S DECISION

The Commission rejected Mr. Ayangma's argument regarding the "*discoverability rule*"; instead relying on the provisions of the *Human Rights Act* and the Commission's guidelines on time limit extensions. The key reason the Commission declined the request of an extension was that the complaint itself did not present a strong arguable case of discrimination.

With respect to the allegations surrounding racial comments, the Commission concluded there was no evidence that these comments had, in fact, been made. Once those allegations were rejected there was not much left to consider, except the obvious differences between Mr. Ayangma and the successful applicant: he was an older black person, and she was a younger white person. The Commission concluded that these differences were not sufficient to show an arguable case for discrimination based on a prohibited ground.

The Commission inquired into the complaint and concluded that the allegations were without merit, and dismissed the complaint in its entirety without the need to proceed to a hearing.

JUDICIAL REVIEW AND APPEAL

On judicial review, the Court determined that the Commission's decision was reasonable as it was transparent, intelligible, justified and well within the range of probable outcomes. In dismissing the application for judicial review, the Court awarded the university costs in the amount of $10,000 plus disbursements. This was a significant award, as costs awarded on judicial review are typically between $2,500 and $5,000.

This award of costs was reflective of the effort and cost incurred by the university in refuting the multiple submissions and allegations made by Mr. Ayangma.

[2] *Human Rights Act* (R.S.N.B. 2011, c.171)
[3] The Commission may extend the one year time limit where it is of the opinion the circumstances warrant it. The factors the Commission considers are outlined in its Guideline on Time Limit Extension for Complaint Initiation.

The application for judicial review took three days to hear, and the record on application was particularly voluminous containing close to 1500 pages.

Mr. Ayangma unsuccessfully appealed to the New Brunswick Court of Appeal. The Appellate Court reiterated that the Commission's decision was reasonable and that it was not for the Courts to reweigh the evidence considered by the Commission. On the merits of the case, the Court of Appeal held:

> *The Act does not require that l'Université retain the most qualified person to fill a position. It is entitled to choose the person who, in its view, best meets the needs of the institution, provided that the selection process and the selections made do not violate human rights.*
>
> *The minutes of the meeting of the departmental assembly where the ten applications were assessed state that the assembly discarded six applicants, including Mr. Ayangma, after it determined that these applicants did not have the required specialization in human resources management. Mr. Ayangma maintains that the departmental assembly did not properly assess his application; he argues that since he has a doctorate in business administration, he does have the required specialization in human resources management. The Act is not intended to provide potential employees with a forum to have their labour grievances heard. The Commission must ensure that there is an arguable case for establishing discrimination before referring a complaint to the next stage of the proceedings.*
>
> [*Emphasis Added*]

THE TAKEAWAY

This decision is a useful precedent for universities and colleges in dealing with human rights complaints in employment. As noted above, the Court of Appeal was explicit that employers are not required to hire the most qualified candidate to stay on-side with human rights law.

The question of qualifications of successful applicants in the unionized context is typically a matter best-suited for the grievance process. In this case, Mr. Ayangma filed a grievance in 2015 but it was later withdrawn by his union and he proceeded with his human rights complaint on a self-represented basis.

In order for a finding of discrimination in employment under human rights legislation, the Commission must conclude that a protected ground (race, religion, age, etc.) was a factor in the decision which was detrimental to the complainant. In this case Mr. Ayangma was eliminated from consideration for the position on the basis of his qualifications – not based on a protected ground.

As can sometimes occur with a self-represented litigant who is not familiar with legal processes, legal proceedings can become complicated as the Court of Queen's Bench indicated in this matter. Voluminous filings and lengthy hearings lead to increased legal expenses. The award of $10,000 in costs to the university in recognition of this will be a useful benchmark for educational institutions which find themselves in similar circumstances. ➤

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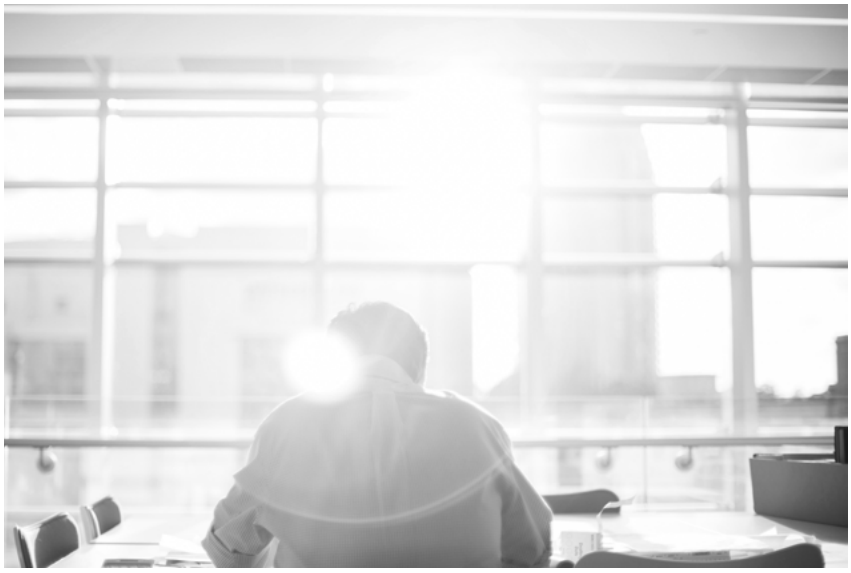
New legislation on workplace harassment and violence

New risk assessment and codes of practice policies required by post-secondary institutions in New Brunswick.



New Brunswick has recently introduced a new regulation under the *Occupational Health and Safety Act* on the topic of problematic workplace conduct. The change will bring New Brunswick in line with the other provinces, all of which already have some form of legislation in place on this topic. The amendments came into force on April 1, 2019.

Post-secondary institutions in New Brunswick are now required to:

1. **Harassment Code of Practice:** develop a code of practice to prevent workplace harassment;

2. **Assessment for Violence:** conduct a risk assessment for the likelihood of violence; and

3. **Violence Code of Practice:** develop a code of practice to prevent violence in the workplace.

The first two requirements are standard for all New Brunswick employers, but only certain employers must also prepare a code of practice to prevent violence. Any employer with more than 20 employees, or with employees who work in certain professions, fields or workplaces, including teaching services, must establish a violence code of practice. Therefore, universities and colleges are required to prepare a code of practice to prevent violence. The requirements for each of the above are outlined below:

CODE OF PRACTICE TO MANAGE WORKPLACE HARASSMENT

The code of practice to manage workplace harassment must include the following:

a) statement that every employee is entitled to work free of harassment;

b) the identity of the person responsible for implementing the code of practice;

c) a statement that an employee shall report an incident of harassment to the employer as soon as the circumstances permit;

d) the procedure the employer shall follow to investigate and document any incident of harassment of which the employer is aware;

e) the manner in which affected employees shall be informed of the results of an investigation;

f) the procedure the employer shall follow to implement any corrective measures identified as a result of the investigation;

g) the follow-up measures to be used with affected employees; and

h) the identification of training needs.

Post-secondary institutions will need to review their harassment policies to ensure they include the above requirements.

RISK ASSESSMENT FOR THE LIKELIHOOD OF VIOLENCE

Universities and colleges in New Brunswick must assess the risk of violence by considering:

a) the location and circumstances in which the work is carried out;

b) the risk that may arise out of, or in connection with:

i. an employee's work, or

ii. sexual violence, intimate partner violence or domestic violence occurring at the place of employment

c) the categories of employees at risk, or the types of work that place employees at risk of experiencing violence;

d) the possible effects on the health or safety of employees who are exposed to violence at the place of employment;

e) all previous incidents of violence at the place of employment; and

f) incidents of violence in similar places of employment.

CODE OF PRACTICE FOR PREVENTING WORKPLACE VIOLENCE

After conducting the assessment for violence, your institution will have to prepare a code of practice for preventing workplace violence which must include the following:

a) the methods and equipment to be used and the procedures to be followed;

b) the follow-up measures to be used with affected employees;

c) the means, including alternative means, by which an employee may secure emergency assistance;

d) the procedure the employer shall follow to investigate and document any incident of violence of which the employer is aware;

e) the manner in which affected employees shall be informed of the results of an investigation;

f) the procedure the employer shall follow to implement any corrective measures identified as a result of the investigation, and

g) the identification of training needs.

FOR MORE INFORMATION

WorkSafeNB has published a set of guidelines to help employers comply with the new regulations. The guidelines can be found on the WorkSafeNB website.[1] ➤

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Spotlight

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With a practice focused in the areas of immigration, education and labour and employment, Brittany provides and implements immigration strategies for both individual and corporate clients. She has experience with Labour Market Impact Applications, Work Permit applications, Business Visitor documentation and permanent residency options and requirements. Brittany guides employers on their responsibilities when hiring and employing foreign workers, and has acted as an immigration representative on various applications for temporary workers and prospective permanent residents.

[1] http://worksafenb.ca/media/59782/violence-and-harassment-guide.pdf

Current trends in converting pension plans: will Atlantic universities and colleges continue with defined benefit models?

As plan sponsors continue to create solutions to the unique, complex and dynamic issues they face, what can be expected for the future?

CURRENT TRENDS

The drawbacks of defined benefit ("DB") plans in the public sector are well-known: volatility of cost, effects on bottom line, efficiency for taxpayers and onerous accounting and funding requirements, to name a few. Traditionally, this list precedes prosaic statements about the inevitable movement to the defined contribution ("DC") model.

While conversions to DC are common among industrial employers, the recent public sector trend in North America is toward target benefits, shared risk and joint sponsorship – all forms of DB plans. The proportion of DB pensions remains high among Canadian public sector plans – 80%, according to a recent national study by pension researcher Robert L. Brown.[1]

A review of publicly available information[2] indicates these trends are reflected among local post-secondary institutions as well. Out of 17 post-secondary institutions in the Atlantic region which have offered a DB to some of their employees, it appears 15 (88%) continue to offer DB in some form. The plans associated with 14 of these 17 institutions have revised or are working on revisions to the benefit or plan structure. However, none have been converted to DC in the past 10 years.

Dr. Brown's research notes three features of recent Canadian DB plan reforms:[3]

- **Collective approach** – movement towards larger plans with diverse membership to carry longevity risk and share costs.

[1] R.L. Brown, "The Social Implications of Pensions", ACPM Webinar, February 25, 2019. Accessed March 16, 2019

[2] Information regarding university DB plans was gathered from the following URLs, accessed March 16, 2019:
https://hr.acadiau.ca/benefits/pension-plan.html
https://www.nspssp.ca/publicservice/news/2015/07/01/growing-pssp-membership-acadia-university
https://www.cbu.ca/faculty-staff/human-resources/pension-plan/
https://www.nspssp.ca/sites/default/files/inline/documents/special_bulletins/2017_April_Growing_the_PSSP_membeship_-_CBU/media_release_-_growing_the_pssp_-_cbu_-_apr._3_2017.pdf
https://www.cna.nl.ca/about/pdfs/irp/annual-report-2012-2013.pdf
https://provident10.ca/app/uploads/2018/03/PSPP-Booklet-2017.pdf
https://cdn.dal.ca/content/dam/dalhousie/pdf/dept/pension/Pension-Plan.pdf
https://www.dal.ca/dept/pension/getting-started/pension-plan-summary.html
http://www.hollandcollege.com/about/Office%20of%20the%20President/Holland-College-2018.pdf
https://www.mun.ca/hr/news.php?id=10153&type=features
https://www.mta.ca/uploadedFiles/Community/Administrative_departments/Human_Resources/Pension/DB_Pension/36CONSOL.MTA.pdf
http://nsgeu.ca/filemanager/pdf/Pensions/MSVUDCPlan.pdf
https://www2.gnb.ca/content/dam/gnb/Departments/ohr-brh/pdf/pensions/pension_plans/pssa/PSSRPplantext.pdf
https://www.nscc.ca/about_nscc/jobs_at_nscc/why-nscc/benefits-and-perks.asp
https://www.nstpp.ca/teachers/teachers-pension-plan
https://smu.ca/webfiles/ConsolidatedPlanTextfinalinclAmend1Feb222010.pdf
https://www2.mystfx.ca/hr/pension
https://www2.mystfx.ca/sites/mystfx.ca.hr/files/Defined%20Benefit%20Pension%20Plan.pdf
https://www.umoncton.ca/rppplb/node/6
https://www.nspssp.ca/publicservice/news/2016/07/06/growing-pssp-membership
https://www.unb.ca/hr/_resources/pdf/aesrpplantextjuly2015.pdf
http://www.upei.ca/communications/news/2017/11/upei-officially-signs-pension-agreement-unions
http://files.upei.ca/finance/financial_statements_2017-2018.pdf

[3] "The Social Implications of Pensions", *supra* note 1

- **Increased contributions** – plan members willing to pay more to maintain DB formula, with contribution rates moving up to the 9%–11% range.
- **Funding** – elimination of solvency funding, equal cost sharing, sometimes in conjunction with joint sponsorship regimes.

These too are reflected in the post-secondary educational sector in Atlantic Canada:

- **Collective approach** – since the Nova Scotia Public Service Superannuation Plan has opened up to new members, four Nova Scotia universities have transferred their members into this DB plan (including, in one university's case, some of its DC members).[4]
- **Increased contributions** – these are quite common; for example, some DB members employed by New Brunswick post-secondary institutions have seen their contributions elevated in recent years.[5]
- **Funding** – the joint sponsorship model was adopted in Prince Edward Island, where deficits are now funded on a 50/50 basis between the University of Prince Edward Island and its employees.[6]

LOOKING FORWARD

For an indication of what may be to come, we turn our attention south of the border, where reforms of DB plans in the public sector have occurred in larger numbers.

A survey paper published in December 2018 by the National Association for State Retirement Administrators[7] shows the number of plan conversions (by state) peaking in 2011 with 27 states and decreasing shortly thereafter as the large majority of states completed significant reform.

Recently there has been a resurgence of U.S. plan reforms, with a second wave peaking in 2017.

However, recently there has been a resurgence of U.S. plan reforms, with a second wave peaking in 2017.[8] For the majority of states in this second wave, this was the second (or third) significant reform to their DB benefits.[9] Other states changed the entire structure of their plans to a risk-sharing model, where automatic adjustments to contribution or benefit levels can be made based on funding levels.[10]

CONCLUSION

Unlike the U.S., most DB plans of Atlantic Canadian post-secondary institutions have yet to make a second significant reform; observers can only speculate as to why this may be.

It may be owing to the recentness of local plan reform; in some U.S. states there was a gap of six or seven years in between plan reforms.[11] It could also be that risk-sharing models adopted by some plans – such as the New Brunswick Public Service Pension Plan, where benefit adjustments are determined by funding levels[12] – have removed the need for further reform. That is not to mention the host of economic, demographic and political factors at play.

This makes the future of university pension plan conversions difficult to predict. The only likely indication is that there will be more changes of some sort, as plan sponsors continue to create solutions to the unique, complex and dynamic issues they face. ➤

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[4] This information is available in press releases available on the PSSP website, accessed March 16, 2019: https://www.nspssp.ca/sites/default/files/inline/documents/special_bulletins/2017_April_Growing_the_PSSP_membeship_-_CBU/media_release_-_growing_the_pssp_-_cbu_-_apr._3_2017.pdf
[5] Plan texts accessed March 16, 2019: https://www2.gnb.ca/content/dam/gnb/Departments/ohr-brh/pdf/pensions/pension_plans/pssa/PSSRPplantext.pdf https://www.unb.ca/hr/_resources/pdf/aesrpplantextjuly2015.pdf
[6] Information accessed March 16, 2019: http://files.upei.ca/finance/financial_statements_2017-2018.pdf http://www.upei.ca/communications/news/2017/11/upei-officially-signs-pension-agreement-unions
[7] K. Brainard, A. Brown, "Spotlight on Significant Reforms to State Retirement Systems", December 2018, accessed March 16, 2019
[8] *Ibid*
[9] *Ibid*
[10] Arizona, Iowa and Wisconsin, for example. *Ibid*
[11] Colorado, Connecticut, Florida and Maine, for example. *Ibid*
[12] https://www2.gnb.ca/content/gnb/en/departments/treasury_board/human_resources/content/pensions_and_benefits/pp/pssa/qa.html, accessed March 21, 2019

ADR is a recognition that in many cases, those best-suited to decide how to resolve a disagreement are the parties themselves.

The university as litigant –

alternative dispute resolution

Which of the three most common forms of alternative dispute resolution is right for you?

Litigation can be long, complicated and expensive. Alternative dispute resolution ("ADR") allows parties in a dispute to retain control of the process and outcome, before they relinquish both to a judge.

ADR is a recognition that, in many cases, those best-suited to decide how to resolve a disagreement are the parties themselves.

This article will focus on the three most common forms of ADR: (1) mediation; (2) arbitration; and (3) judicial settlement conference. There are others, and amongst those set out in this article there are many sub-categories and alternatives. However, as an introduction to the world of ADR for the litigant university, we focus on the "Big Three".

The types of alternative dispute resolution

MEDIATION

Mediation is a non-binding process in which the parties engage an independent third party (the mediator) to attempt to negotiate a resolution to the dispute. In many cases, a mediator will be a lawyer or former judge – however, the mediator can be chosen based on whatever professional experience or other criteria the parties deem relevant.

The mediator has no authority to order the parties to do anything. The mediator's role is to facilitate discussion of the issues and make suggestions to the parties with a view to encouraging settlement.

ADVANTAGES OF MEDIATION

- parties retain complete control over the process and result;
- may be convened far more quickly than any other ADR or judicial process;
- less costly (both externally in legal fees and internally in institutional resources) than other ADR or judicial process;
- outcomes may be flexible and tailored toward a specific dispute, anticipated future disputes, or a combination of both;
- the parties wish to preserve the relationship with the opposing party while also seeking assistance in negotiating a resolution; and
- confidential (though may be subject to access to information request).

DISADVANTAGES OF MEDIATION

- may not result in a binding outcome;
- less useful where issues of credibility or reputational damage are raised; and
- less useful where complex legal issues or significant evidence is required.

ARBITRATION

Arbitration is a binding process that is based in statute and contract law. In an arbitration, the parties usually agree on a single arbitrator, or otherwise each choose one arbitrator with those two selecting a third arbitrator. Like mediation, the parties can generally agree/choose subject matter experts to serve as arbitrators.

There are statutes in every province setting out the basis for arbitration procedures and enforcement. In general, these statutes determine how an arbitration can be convened, how the rules will be determined, how disputes about the arbitration will be resolved and what happens after the arbitrator makes a decision.

An arbitrator (or an arbitration panel) can hear evidence, make legal/factual findings, issue interim and final orders and reasons for decision, much like a court. Unlike a court, an arbitration can be flexible on process, procedure and timing.

Many modern commercial contracts include provisions setting out how an arbitration will be convened, including where the arbitration will be held and what law will apply. These provisions should be carefully reviewed.

ADVANTAGES OF ARBITRATION

- results in a final and binding decision that may be enforced like a court order;
- parties retain primary control over the process;
- allows parties to resolve complex or evidence-heavy cases without litigation;
- generally faster and less expensive than litigation; and
- confidential (though may be subject to access to information request).

DISADVANTAGES OF ARBITRATION

- due to developments in the law surrounding arbitration proceedings, arbitration has become more complicated and expensive;
- depending on complexity and conduct of other parties, may not be faster than litigation;
- parties lose control over the outcome; and
- very limited recourse if unsatisfied with the outcome.

JUDICIAL SETTLEMENT CONFERENCE

A judicial settlement conference is similar to mediation in that it is non-binding. Where a judicial settlement conference differs from a mediation, is the structure and the "feel". In most Canadian jurisdictions, where a lawsuit has been commenced the parties can ask the Court for a judicial settlement conference. Indeed, in many jurisdictions, such a judicial settlement conference is mandatory.

Like a mediator, the judge at a judicial settlement conference cannot force the parties to resolve their dispute. However, one advantage of a judicial settlement conference is that the input of a judge will often have a significant impact on a party to a lawsuit. Judges at judicial settlement conferences can also provide guidance and potentially make orders for the conduct of the trial if the parties cannot resolve the dispute.

ADVANTAGES OF JUDICIAL SETTLEMENT CONFERENCE

- insight from a trier of fact can be very persuasive;
- reduced costs compared to mediation; and
- may narrow trial issues even in the absence of a resolution.

DISADVANTAGES OF JUDICIAL SETTLEMENT CONFERENCE

- value of the experience will depend on judge assigned and his/her experience in the subject matter;
- constrained by availability of court resources;
- lack of control over process; and
- less timely than mediation.

Particular issues for universities as litigants

Universities are subject to a wide array of obligations and considerations that do not apply to many litigants. Among other things, universities are subject to laws regarding access to information, public procurement and human rights – factors that do not necessarily constrain other litigants.

As a hybrid public-private actor, a university must assess private litigation strategy in the context of its public functions and obligations.

Consider, for example, a university's access to information obligations. Where mediation and arbitration are ostensibly confidential processes, in the case of a university the particular requirements of access to information legislation across the country may mean that confidentiality is lost. ADR may be less palatable to a university as a result.

Consider also public procurement: universities will frequently find themselves in disputes over capital projects or services contracts. In many cases, those services are provided pursuant to a public tender process regulated by statute. A private litigant may see no difficulty in firing a general contractor or service provider and litigating the fallout. Universities subject to procurement legislation will have to consider the consequences of doing so. In particular, if a university must go out to public tender to replace an underperforming contractor, it may be preferable to maintain the existing relationship and attempt to mediate or arbitrate the dispute.

> Generally, it is best to explore ADR as early as possible.

Tips for resolving litigation without trial

ADR is about flexibility and choice. Including, in fact, whether to pursue ADR at all. The decision to pursue mediation, arbitration, and/or judicial settlement conference will depend on the circumstances of each case. Here are some tips to help a university determine when and how ADR might be of use:

WHAT IS THE PURPOSE OF THE DISPUTE?

Are you fighting about an unpaid invoice, a deficiency in construction work, or to force compliance with some requirement in a contract? For these simpler business disputes, where the main issue is money, mediation can often be helpful.

On the other hand, where the dispute is about complicated legal or factual issues, or the dispute relates to matters of significant importance for policy, financial, or other reasons, arbitration or judicial settlement conference may be preferable. In particular, if there is considerable evidence to be heard, finality is needed, or the matter has already moved further through the litigation process.

WHAT STAGE IS THE DISPUTE?

Generally, it is best to explore ADR as early as possible. Once a dispute moves into litigation, and the longer it moves through that process, the less flexibility the parties will have to seek an out-of-court settlement.

However, there are milestone steps in most lawsuits that present the opportunity to explore ADR. In most commercial litigation, these points are:

- after the claim and defence have been filed;
- when the relevant documents are exchanged between the parties;
- after the parties or their representatives have been questioned by the opposing parties (known as "examination for discovery"); and
- when the lawsuit has been assigned a date for trial.

CONCLUSION

ADR is a useful set of tools for the litigant university. But ADR is not appropriate in every case.

To decide if ADR is the right choice, consider the most favourable outcome and what risks and rewards you are prepared to accept to get there. If an out-of-court resolution is the favoured outcome, some form of ADR (or a combination of options) may be the best path forward. ➤

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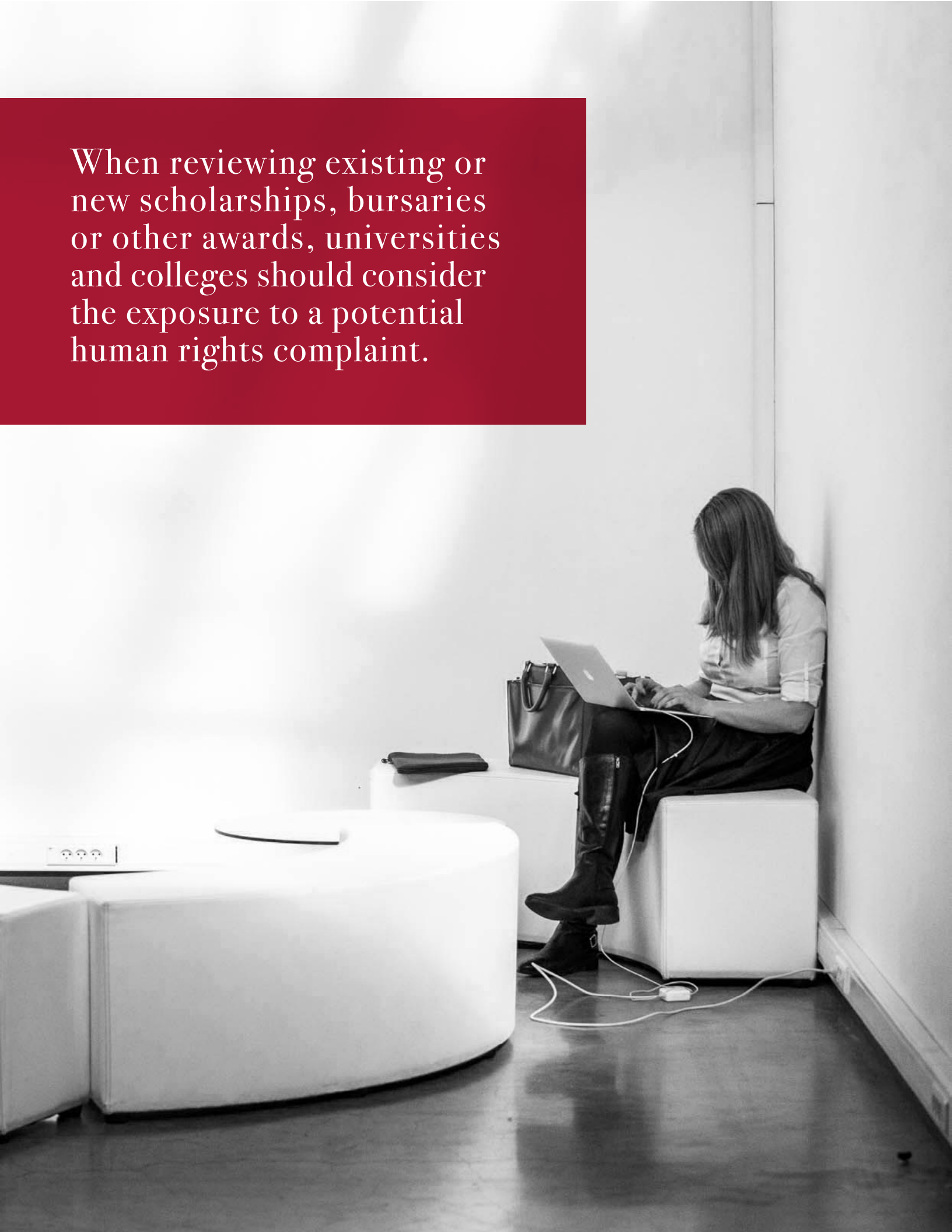
When reviewing existing or new scholarships, bursaries or other awards, universities and colleges should consider the exposure to a potential human rights complaint.



Can scholarships, awards and bursaries still target specific individuals as beneficiaries?

When reviewing existing or new scholarships, bursaries or other awards, universities and colleges should consider the exposure to a potential human rights complaint.

The ongoing college admissions scandal in the United States has received widespread media coverage, with commentators at all levels weighing in on the moral compass of parents and the "privilege" of wealth. Admittedly this seems (so far) to have little to do with scholarships, but it is a reminder of the microscopic lens that is being focused on post-secondary institutions and the importance of consistently reviewing and reconsidering existing policies, programs and processes to make sure they stand up to scrutiny.

Scholarships matter for the obvious reasons – money and prestige! A scholarship (or grant, bursary, award, etc.) provides a benefit to an individual seeking access to further education.

Scholarships are limited by nature to certain students: highest mark in engineering, leader in student government, etc. But sometimes scholarship criteria includes reference to criteria that fall within the protected characteristics of human rights legislation. Scholarships that restrict eligibility on such grounds are increasingly being scrutinized.

In the United States, a self-declared "*civil rights advocate for true gender equality*" has initiated complaints against several universities seeking to change eligibility requirements for several scholarships and programs that give preferential treatment to women.[1] Mark Perry, a Professor of Finance and Business Economics at the University of Michigan, has targeted major universities (including University of Michigan and University of Minnesota) complaining about externally-funded scholarships and programs available to female students at those institutions. He argues that women are no longer an underrepresented group.

Closer to home, the Nova Scotia government broadened access to a bursary which was meant to promote diversity in the communications field. The bursary was originally open to students who are indigenous, have disabilities, are black or part of a visible minority or who speak French. After complaints from students and professors, the scholarship was broadened to include LGBT students. [2]

[1] *Male professor fights 'gender apartheid' by targeting women-only programs*, The Washington Times – Friday, December 7, 2018.
[2] *LGBT students to get new access to bursary programs from province*, CBC Article, February 5, 2019

When reviewing existing or new scholarships, bursaries or other awards, universities and colleges should consider the exposure to a potential human rights complaint.

IS THERE A HUMAN RIGHTS ISSUE?

It goes without saying that universities and colleges across Canada are governed by human rights legislation and there is significant risk associated with using criteria that relates to protected characteristics under human rights legislation (race, sex, age, religion, etc.).

The Ontario Human Rights Commission Policy on Scholarship and Awards[3] notes:

> *These types of scholarships or awards are called 'exclusionary' because only certain individuals can apply for them, while others, who do not share the same characteristics are excluded.*

As a result, the Ontario Human Rights Commission takes the position that scholarships and awards should be based on factors such as:

- merit
- personal financial need
- core specialization
- recognition for special contributions to academic or extra-curricular life[4]

However, human rights legislation across Canada typically permits institutions to create an advantage for someone who has a protected characteristic *if* the goal of such a program is to assist or improve the conditions for an individual or group that has faced disadvantage.

By way of example, the Nova Scotia *Human Rights Code* protects: "*...a law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or classes of individuals including those who are disadvantaged*" because of protected characteristics.

A similar issue was examined by a Manitoba Court in *Esther G. Castanera Scholarship Fund*.[5] A former student of the University of Manitoba provided a gift in her will to the University of Manitoba for a scholarship restricted to females in a certain program. The University brought an application to the Court to seek to vary the terms of the fund so as to provide for scholarships available to both men and women. The University of Manitoba was concerned that limiting the eligibility of scholarship to women offended the *Human Rights Act* as being discriminatory. The University was also concerned that administering a gift which benefits women only may contravene public policy. The University pointed out that women, once a minority in the sciences, have far greater representation now if not in equal or greater numbers.

The Court disagreed, emphasizing the need to take both a broad and practical view in reviewing such issues:

> *38 To the extent that one might perceive that limiting eligibility to women offends s. 13 of the Code, the Code itself provides for its exception. Section 13 contains the words "unless bona fide and reasonable cause exists for the discrimination." [...]*
>
> *39 The prevailing attitude in today's world is that equal opportunities must exist for both men and women. That is a reasonable objective, but in society's desire to promote egalitarianism, there are a number of factors that should go into the assessment. Current enrollment numbers do not always tell the whole story. They certainly do not give consideration to what has happened in the past, or recognize a testator's experience which motivates her desire to make a gift. Additionally, enrollment numbers in undergraduate programs may give a false impression of equality within the discipline if there is a large exodus of women from the discipline after graduation or an underrepresentation in leadership positions within the discipline. ... [E]very situation needs individual assessment, and*

[3] Approved by the Commission: July 8, 1997, (updated December 2009) (the "OHRC Policy")
[4] OHRC Policy, page 5
[5] 2015 MBQB 28

factors such as the history or motivation of the giftor are factors which merit some examination. There should be some attempt to balance the wishes of the testator/testatrix with the fact of discrimination. In short, simple numbers do not tell the whole story and although they may be a good starting point, they should not necessarily be the definitive factor.

[*Emphasis Added*]

The Court concluded that limiting the eligibility of a scholarship to women remained appropriate.

WHAT IF THE SCHOLARSHIP WAS CREATED THROUGH A WILL OR TRUST?

The short answer is simply because a private donor creates a specific target group does not mean that the donor's wishes will automatically be protected, however, it goes without saying that the testator's wishes are an important consideration. In such cases, there must be a balancing of freedom of testamentary disposition against the desire to avoid breaches of human rights legislation.

The Courts have been very clear that not all testamentary wishes need to be respected. In *Canada Trust v. Ontario (Human Rights Commission*[6]*)*, the trustee in charge of administrating a trust brought an application to the Ontario Court for advice, opinion and direction of the Court as to whether the terms of the trust were contrary to public policy.

In 1923, the testator set up a trust directing that income from certain properties was to be used for educational scholarships. The criteria for the scholarships were racist and discriminatory in nature.[7] The Ontario Court of Appeal found that the trust was contrary to public policy relying in part upon the recitals to the will which spelled out the testator's beliefs. The Ontario Court of Appeal found that this was a public policy issue and did not need to be left to the Provincial Human Rights Commissions to address this kind of issue. Of note, the Court commented that charitable trusts aimed at the amelioration of an equality and whose restrictions could be justified under human rights legislation would likely not be void because they promote rather than impede public policy of equality.[8]

More recently, in *Royal Trust Corp of Canada v. University of Western Ontario*[9], the executor, the Royal Trust Corporation of Canada, applied to the Court for direction on the last will and testament of an individual who left a bursary for a "*Caucasian white single heterosexual male*" enrolled in certain studies and to a "*single, Caucasian white girl who is not a feminist or lesbian.*"

The Court had no hesitation in declaring such qualifications as being void contrary to public policy.

In contrast, in *University of Victoria Foundation v. British Columbia (Attorney General*[10]*)*, the University of Victoria made an application to the Court with respect to a will which provided for a bursary to a practicing Roman Catholic student.

The Court held that the *Human Rights Code* in British Columbia did not apply to the University as a trustee administering scholarships. This provides a certain degree of protection to institutions who are administrating scholarships from third party funds.

Further, the Court held that even if the relationship was one that was subject to the *Human Rights Code*, the limitation was a *bona fide* and reasonable justification. The Court held that the discriminatory language was "*relatively innocuous*", especially in comparison to the language in *Re Leonard* where the terms of the trust were based on blatant religious supremacy, racism and sexism.

THE BOTTOM LINE

Scholarships, awards and bursaries should be reviewed on a regular basis to determine:

1. Does the underlying criteria for receipt involve protected characteristics under today's human rights legislation (which will likely continue to evolve)?

2. If yes, is the award designed to make education more accessible to a group or individual who has been historically disadvantaged? If this is the purpose, then it is important to understand the special programs criteria in the human rights legislation in your jurisdiction and make sure that the award continues to adhere to such criteria.

3. If the answer to #2 is no, then universities should consider whether the award contravenes human rights legislation. If the award comes from third party funds (which may mean human rights legislation is not triggered) then your university / college should consider whether there are any public policy issues associated with the award and the appropriate way to respond. ➤

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[6] 1990 CarswellOnt 486
[7] White Christian students of whom 75% must be male.
[8] See paragraph 104
[9] 2016 ONSC 1143
[10] 2000 BCSC 445

Cannabis:

a reminder of your rights and responsibilities in managing employees in safety sensitive roles

With the many challenges associated with cannabis legalization, post-secondary institutions should not forget that one of the most important considerations is the obligation to ensure a safe work environment.

Universities and colleges employ numerous types of employees, many of whom hold safety sensitive positions. Like all employers, post-secondary institutions have an obligation, pursuant to occupational health and safety legislation, to ensure the health and safety of persons at or near the workplace. Cannabis legalization makes compliance with this obligation more challenging.

Members of the Stewart McKelvey Labour and Employment Group have written extensively on the complex workplace issues associated with cannabis legalization: *Canadian employers facing marijuana challenges in the workplace;*[1] *What major issues employers should think about in preparation for the legalization of marijuana;*[2] *TTC's Random Testing Decision: A Bright Light for Employers in the Haze of Marijuana Legalization.*[3]

POTENTIAL CRIMINAL LIABILITY

The case of *R v. Metron Construction* is a constant reminder of the serious impact that cannabis impairment can have on workplace safety.

In *Metron*, three workers and a site supervisor plunged to their deaths on Christmas Eve 2009. The employer plead guilty to one count of criminal negligence causing death and was sentenced to a fine of $750,000 and a supervisor was later sentenced to 3½ years in prison. Three of the deceased workers—including the site supervisor—had levels of cannabis in their systems consistent with recent consumption.

IF EMPLOYER CANNOT MEASURE IMPAIRMENT, IT CANNOT MANAGE RISK

A recent decision of the Supreme Court of Newfoundland and Labrador in *IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP* (*"Lower Churchill"*) confirms the reasonableness of an employer refusing to employ an employee in a safety sensitive position because the employee may be impaired by cannabis. The Court endorsed the arbitrator's conclusion that *"if the Employer cannot measure impairment, it cannot manage risk."*

In *Lower Churchill*, the employer refused to employ an employee in a safety sensitive position because the employee consumed prescribed cannabis to address pain associated with osteoarthritis and Crohn's Disease. The material issue was whether the employer had accommodated the employee to the point of undue hardship. There was no dispute that non-safety sensitive positions were unavailable.

As is often the case, the arbitrator considered various divergent medical opinions. One doctor considered that working within four hours of cannabis consumption the employee could work, but conceded there could be residual impairment. Another doctor testified that performing safety sensitive work following ingestion of cannabis should require a 24-hour waiting period, and that within this 24-hour period there would be probable impairment. Another medical witness testified that the timeframe for impairment varies according to numerous factors, but that individuals taking cannabis ought not to work in safety sensitive jobs until 24-hours following cannabis use.

[1] https://www.stewartmckelvey.com/thought-leadership/canadian-employers-facing-marijuana-challenges-in-the-workplace/
[2] https://www.stewartmckelvey.com/wp-content/uploads/2019/04/cannabis-article.pdf
[3] https://www.stewartmckelvey.com/thought-leadership/ttcs-random-testing-decision-a-bright-light-for-employers-in-the-haze-of-marijuana-legalization-3/

The arbitrator reasonably concluded that the employer "*was unable to readily measure impairment from cannabis, based on currently available technology and resources. Consequently the inability to measure and manage that risk of harm constitutes undue hardship for the employer.*"

However, as outlined in the above noted articles by the Stewart McKelvey Labour and Employment Group, courts and arbitrators now generally consider that oral swab tests with a certain cut-off level do indicate present impairment. For example, in the TTC decision, the Ontario Superior Court concluded that:

> *Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels [10 ng/ml] identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.*

Nevertheless, each case largely falls to be decided on the expert evidence presented.

CONCLUSION

Universities and colleges must be vigilant in ensuring employees working in safety sensitive positions (e.g. – maintenance personnel operating machinery, etc.) are not impaired at work. Turning a blind eye can result in criminal liability for both the institution and those supervising the workers.

Your institution should not be discouraged by the (sometimes) divergent medical opinions on proving impairment. The recent *Lower Churchill* decision provides compelling support for the reasonable proposition that employers, whose employees are operating in safety sensitive roles, can satisfy the undue hardship threshold even though there may be competing expert evidence on the issue of establishing impairment.

In short, employers who cannot precisely measure impairment are not expected, in the context of a safety sensitive workplace, to ignore the obvious risk associated with cannabis use. ➤

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Field trip frenzy:

liability for off-campus activities

What are the factors that should be considered when creating or updating a student travel policy to best protect from liability?

Extracurricular and off-campus events are essential to a student's post-secondary education. However, your institution should be aware of the potential liability associated with such activities.

Generally, universities and colleges have an implied duty to provide a safe learning environment, even to students who are over the age of majority[1] and are under an obligation not to expose students to unreasonable risk.[2] Of course, this does not remove the responsibility from students themselves to take due care and reasonable safety precautions.

The standard of care expected of universities and colleges (and its employees acting in a representative capacity) will depend on the following factors:

1. the nature and size of the event location;
2. the number of students;
3. the ages of the students; and
4. the nature of the activities.[3]

Employees would include instructors and faculty members directly in contact with the students, as well as other agents such as drivers transporting students to and from events.

UNDERAGE STUDENTS

The responsibilities of your institution to students who are minors will be more onerous.

If a professor or instructor has a student who is a minor in their course, the level of care may rise to that of a "*responsible and prudent parent*".[4] While the majority of your students are presumably over

[1] 18 or younger in Nova Scotia, New Brunswick and Newfoundland; 17 or younger in PEI.
[2] *Gallant v Fanshawe College of Applied Arts & Technology*, [2009] ONJ No 3977, 2009 CanLII 50755 (ON SC) at 37; and Lynn M. Kirwin, *Canadian Civil Remedies for Torts in Novel Situations and Special Circumstances* (Toronto: Thomson Reuters Canada, 2012) at 179 ["*Remedies in Torts*"].
[3] Lazar Sarna & Noah Sarna, The Law of Schools and Universities (Markham, Ont: LexisNexis Canada, 2007) at 126 ["*The Law of Schools and Universities*"].
[4] *The Law of Schools and Universities.*

the age of majority, this is a special circumstance which may require more attention depending on the demographics of a particular class or group of students.

REQUIRED AND PROMOTED EVENTS

Off-campus events which are mandatory (requiring students to attend, as part of a credit course), present the greatest exposure to potential liability for your institution.

Therefore, such events require the greatest degree of care and control from your employees (even if the event is not supervised by your institution).

If an event is not required, but students are told that a university or college employee (e.g. professor or instructor) will be present, and the students are informed the event is a "learning environment" or otherwise related to classroom enrichment, the institution will likely have the same responsibility and the same potential liability as a "required event".

In this situation, professors or instructors, by promoting and attending an event in their professional or personal capacity, are strongly encouraging (if not *de facto* requiring) student attendance. Therefore, in these situations, professors and instructors owe a duty to the students to ensure the environment they have promoted is safe, and all risks are understood.[5]

If students are encouraged to attend activities which are not required as part of a course, and for which there will be no supervision, it should be made clear to the students that: (1) attendance is optional and voluntary; (2) it is not a course requirement; and (3) there will be no supervision supplied by your institution.

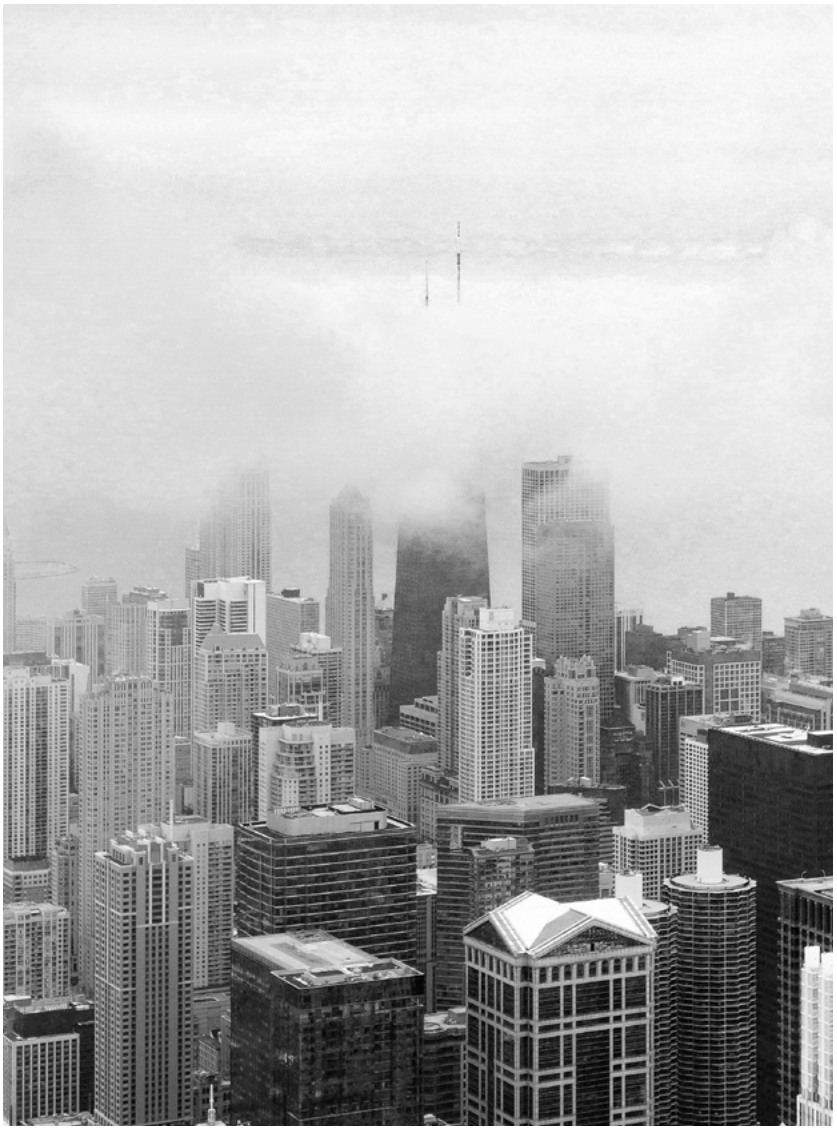
WHAT IS ADEQUATE SUPERVISION?

We recommend that employees be present at all required and promoted events to ensure at least a minimum level of supervision to meet the standard of care.

Further, your institution should clearly define within its student travel policy when students are under the purview of your institution, and what can be considered class time. You should be clear with your employees that if a student is expected to meet with an instructor for an off-campus event, the relationship of supervision and control will begin once the students have gathered at a predetermined meeting place.[6]

USE OF WAIVERS

Waivers can potentially limit liability, but do not guarantee protection. For example, any ambiguity in a waiver will be interpreted against the drafter (i.e. your institution).



[5] *Remedies in Torts*, at 249.
[6] A. Wayne MacKay & Lyle I. Sutherland, *Teachers and the Law: A Practical Guide for Educators* (Toronto: Emond Montgomery Publications Limited, 1992) at 12.

Further, a waiver must describe all foreseeable risks and dangers – tailored to the specific event at issue. Therefore, standard form waivers can be problematic as each trip will be different and each risk must be fully explained.

A waiver must be signed before an activity and you must ensure that the student fully understands the legal effects.[7] This should be done at the beginning of, or prior to, signing up for the course, to allow the student to accept the potential risks of staying in that course and attending the required event.

Again, if a student is a minor there is a risk the court may find the waiver unconscionable or exploitative and therefore "voidable".[8] The court may also find that even a waiver which has been signed by a parent or guardian is unenforceable.[9]

CONCLUSION

Your student travel policy should consider when a student is attending an event for the purposes of fulfilling course requirements, and when attendance is not a requirement.

In a "required event" or "promoted event" situation, your institution must provide adequate supervision. If attendance is not a requirement, you should make clear the times and places when supervision will be provided. At all other times, the policy should make clear that the student is acting of their own volition and the institution does not accept liability.

Keep these factors in mind in considering whether your institution is best protected from liability. ➤

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[7] *Remedies in Torts*, at 179.
[8] S.M. Waddams, "The Law of Contract", 7th ed. (Toronto: Thomson Reuters, 2017) ["Waddams"], Chapter 18.
[9] *Wong v. Lok's Martial Arts Centre Inc.*, 2009 BCSC 1385; Waddams, ¶575.

Striking a balance:

when academic freedom becomes discrimination

Tips for a collective agreement and harassment policy that will guide post-secondary institutions through discrimination claims.

With recent cases involving professors being disciplined or dismissed for conduct they claim falls within the protected scope of academic freedom (such as professor Rick Mehta at Acadia University[1]), post-secondary institutions need to be prepared to reconcile allegations of discrimination or harassment and academic freedom between students, professors and staff.

Having a collective agreement and harassment policy in place can provide guidance if such claims arise as will be discussed below.

BALANCING ACADEMIC FREEDOM AND DIVERSITY

Academic freedom is the foundation of democracy and is vital to society's commitment to critical inquiry. Without a strong guarantee of academic freedom, democracy would be diminished, and important social policy choices would lack reliable evidence and critical perspectives.[2] The primary goal of a university or college is the search for truth through the conflict of ideas. Accordingly, not only the faculty but also the students should be immune from being punished for holding opinions that are contrary to the norms of any particular topic.[3]

In 1990, the Supreme Court of Canada endorsed the importance of academic freedom in *McKinney v. University of Guelph*.[4] The Supreme Court of Canada in *McKinney* endorsed that professors: "*... must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas...*"[5]

McKinney also stated that academic freedom is not without limits and that its "focus is quite narrow. It protects only against the censorship of ideas."[6]

Issues of equity and diversity and the impacts of speech on marginalized groups are also equally important to society's evolution. Although free expression is important, students, professors and staff need to be mindful of the impact of words as they can lead to discrimination and harassment.[7] The trick is figuring out where the line is.

It is necessary for universities and colleges to acknowledge how intimately connected free speech is with questions of diversity and equity, as they are not separate. Both free speech and diversity and equity are of equal importance in a democratic society. Universities and colleges need to be equally committed to both, as open dialogue of ideas and diversity is key to a university's growth and innovation.[8]

HOW TO STRIKE THE BALANCE?

In *McKinney*, the Court ruled that universities and colleges are not agencies of the state, so the *Charter of Rights and Freedoms* and its constitutional guarantee of free expression do not apply. Therefore, what tools protect academic freedom?

Some human rights codes protect "political opinion" as an anti-discriminatory ground, but this has rarely been invoked. Furthermore, litigation to enforce university rules has traditionally been fought on procedural grounds, with no important legal precedents being set. Therefore, the strongest legal protections for academic freedom in Canada are not constitutional or statutory, but contractual. These protections are found in the collective agreements between universities and their unionized professors.[9]

Collective agreement provisions on academic freedom need to contain

[1] Mairin Prentiss, "Controversial professor Rick Mehta fired from Acadia University", CBC News, September 7, 2018, online: <https://www.cbc.ca/news/canada/nova-scotia/controversial-professor-rick-mehta-fired-from-acadia-university-1.4814950>.
[2] Michael Lynk, "What Does Academic Freedom Protect?", Law of Work, February 28, 2014, online: <http://lawofwork.ca/?p=7380>.
[3] John J. Furedy, "Free Speech and the Issue of Academic Freedom: Is the Canadian Velvet Totalitarian Disease Coming to Australian Campuses", 30 U. Queensland L.J. 279 (2011) at page 280.
[4] [1990] 3 SCR 229.
[5] *Ibid* at page 282.
[6] *Ibid* at page 326.
[7] "The politics of free speech", CAUT *Bulletin*, December 2018, online: <https://www.caut.ca/bulletin/2018/12/politics-free-speech>.
[8] *Ibid*
[9] *Supra* note 2.

rights and responsibilities. Academics fear that rights can be too narrow, and responsibilities can be too broad. However, academic rights and responsibilities are necessary for holding academics accountable to professional standards, both as teachers and as specialists.

A collective agreement containing an academic freedom clause is more enforceable than university statements, letters of appointment, or internal procedural rules that proclaim the concept. Furthermore, arbitrators are experienced in balancing academic freedom and diversity and equity.

LESSONS LEARNED

The Ontario Human Rights Tribunal heard a case regarding competing rights of academic freedom and the right to be free from harassment and discrimination based on creed. The applicant was the Roman Catholic Chaplain at Brock University. The respondent was a professor of sociology at Brock University. The applicant filed a complaint with the University's Office of Human Rights and Equity Service which alleged that the respondent had harassed and discriminated against him because of his Catholic religious beliefs contrary to the University's Respectful Work and Learning Environment Policy. He alleged that the main reason that the respondent was targeting him was because he was opposed to abortion and such beliefs were in accordance with his freedom of religion. After reviewing the allegations, it was determined that the allegations failed to demonstrate the required elements of discrimination or harassment and that the actions of the respondent were characterized as a legitimate expression of her academic freedom. The Human Rights Tribunal of Ontario upheld that decision stating "academic freedom is not a license to discriminate against another person."[10]

An arbitrator ruled that York University violated a professor's academic freedom by criticizing a controversial pamphlet he penned publicly. York University had to pay the professor $2,500 in damages for being in breach of its collective agreement. The matter arose in 2004 when the professor wrote and handed out flyers on campus accusing York University leaders of being biased in favour of Israel and clamping down more harshly on pro-Palestinian student groups. In response, York University issued a press release, together with Jewish and Palestinian student leaders, condemning the professor. The arbitrator stated that York University had breached its collective agreement and that "[the university] failed to extend Professor Noble even the most basic of courtesies that might reasonably be expected to be enjoyed by a faculty member. The University publicly vilified his work without first contacting him or YUFA to advise of its concerns, to investigate the matter, or to indicate what it was contemplating".[11]

The lessons to take is that universities and colleges should have a collective agreement outlining clear rights and obligations of academic freedom. Furthermore, universities and colleges need to thoroughly investigate claims to determine what is actionable. Academic freedom is not the freedom to speak or to teach just as one pleases: It is the freedom to pursue the scholarly profession, inside and outside the classroom, according to the norms and standards of that profession.[12] Universities and colleges are gatekeepers of ensuring those standards are met.

CONCLUSION

As outlined above, colleges and universities need to strike a balance to ensure there is a free and open exchange of ideas but that those ideas do not cross a line into discrimination and harassment. If your institution does not currently have a collective agreement and/or harassment policy in place, you should consider implementing these. Stewart McKelvey can assist with reviewing existing collective agreements and policies, developing and drafting new collective agreements and policies, advising on your institution's responsibilities and potential liabilities, providing in-house training for staff, legal advice and representation and ongoing support. ➤

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[10] *McKenzie v. Isla*, 2012 HRTO 1908 at para. 35.
[11] *York University v. York University Faculty Association*, 2007 CanLII 50108 (ON LA) at page 54.
[12] *University of Ottawa v Association of Professors of The University of Ottawa*, 2014 CanLII 100735 (ON LA).

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