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ATLANTIC EDUCATION AND THE LAW

INSIDE

Vicarious liability for cyber and privacy-related claims: is your organization protected against internal threats?

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When can students sue for breach of contract?



As a new school year is underway and universities and colleges are in full swing, we bring you Stewart McKelvey's fifth edition of Discovery Magazine.

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In this edition we cover several important legal issues impacting universities and colleges including cybersecurity, student evaluations, student lawsuits, workplace investigations, brand management, sexual harassment and human rights.

We sincerely hope you enjoy this publication. Please feel free to contact us directly to let us know of any topics that you would like to see covered in the future.

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.



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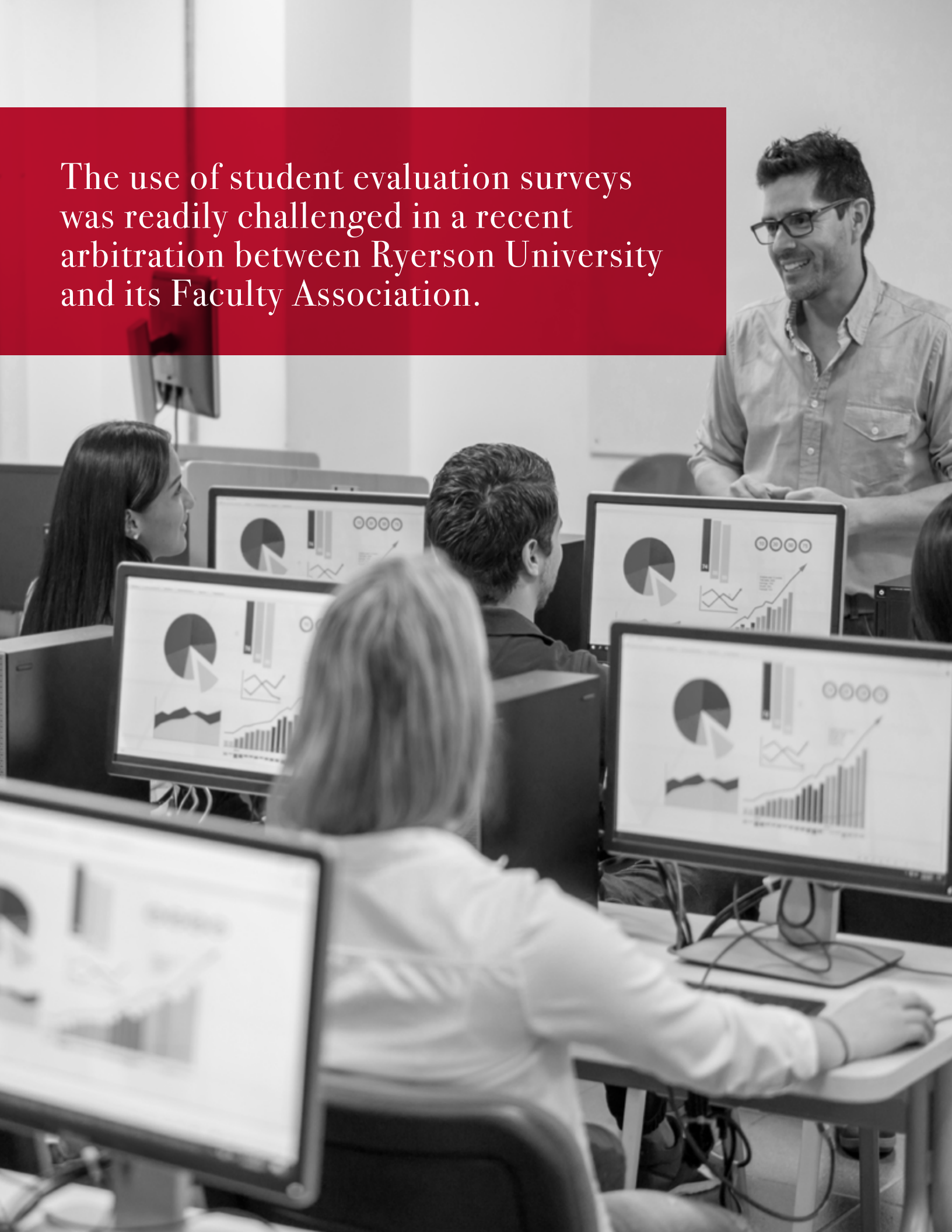
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Student evaluations in promotion and tenure

Tenure and promotion applications are most often concerned with two main criteria: scholarship and teaching effectiveness. This then begs the question of how something as subjective as “teaching effectiveness” can be accurately assessed. Student evaluation surveys have long been administered by post-secondary education institutions across Canada and are often considered as part of the assessment of an academic’s teaching. However, the use of student evaluation surveys was readily challenged in a recent arbitration between Ryerson University and its Faculty Association. That award resulted in Ryerson losing the ability to use student evaluations as evidence of a professor’s effectiveness (or lack thereof) in the classroom.

Arbitrator William Kaplan’s decision has called into question

both the reliability of student evaluations as well as whether they may be used in this context at all. Universities and colleges must therefore ensure that the language contained in their collective agreements explicitly allows for that data to be used if they intend to rely upon it when making promotion decisions.

THE RYERSON DECISION

Faculty members at Ryerson University (“University”) had been expressing concerns about the use of student survey data for at least 15 years prior to Kaplan issuing his decision. Several discussions took place over the years and an online pilot project was rolled out to replace the traditional survey system. Nonetheless, faculty continued to take issue with the University’s use of the data which resulted in grievances being filed in 2009 and 2015, the latter

of which led to a mediation-arbitration.

While the mediation resolved many of the issues, the practice of using student survey data to help measure teaching effectiveness remained outstanding. The dispute then proceeded to an interest arbitration, a process in which the parties agree to have an arbitrator decide terms of their collective agreement.

The Faculty’s position was that the use of scoring averages was ineffective and inaccurate because student surveys failed to provide reliable data. They alleged a significant bias in many of the surveys and even possible violations of the *Human Rights Code*. Ultimately, they believed that student evaluations had no place in the evaluation of teaching effectiveness.

Ryerson argued that although student surveys were not solely determinative of the teaching effectiveness of a faculty member, the questionnaires did allow common issues and concerns to be identified alongside the other methods of evaluation. In addition, Ryerson felt that changes to evaluative tools should be gradual and left to the internal workings of the University to figure out.

Kaplan weighed the strengths and weaknesses of Ryerson's student survey system in arriving at his conclusion. In doing so, he relied heavily on the expert evidence of Professors Philip Stark and Richard Freishtat of UC Berkeley. Stark and Freishtat's evidence was that student surveys were biased based on an array of immutable personal characteristics including race, gender, accent, age and even a professor's attractiveness. This evidence led Kaplan to conclude that Ryerson's student surveys were *"imperfect at best and downright biased and unreliable at worst."*¹

The most controversial use of the survey data was the practice of aggregating an average score which was then used to compare individual professors with other faculty as well as the University more broadly. Kaplan held that this practice was entirely inappropriate, stating, *"The evidence is clear, cogent, and compelling that averages establish nothing relevant or useful about*

*teaching effectiveness. Averages are blunt, easily distorted (by bias) and inordinately affected by outlier/extreme responses. Quite possibly their very presence results in inappropriate anchoring."*²

How, then, can teaching effectiveness be measured if not by the students who attend the classes week in and week out?

Kaplan ultimately determined that the evidence before him demonstrated that teaching effectiveness was more reliably evaluated through a combination of assessing the applicant's teaching dossier in conjunction with their in-class peer evaluations. However, he also recognized that measuring teaching effectiveness is a difficult process and that student surveys have some place in the broader context of faculty assessment. As a result, he found a compromise to be in order. Presently, Ryerson student surveys can continue to be administered, but the data has to be presented as frequency distributions and the relevant decision-makers have to be educated regarding the inherent limitations of student survey data in order to minimize any bias or unreliability. The compromise also came with a caveat attached: Ryerson student evaluations can no longer be used to determine the specific issue of teaching effectiveness.

ROLLAND AND THE EXCLUSION OF EXPERT EVIDENCE

In 2016, Memorial University of Newfoundland ("MUN") encountered this issue in an arbitration with their Faculty Association over a tenure denial. In that case, the collective agreement stated that a professor's application could include course evaluations should they choose to do so and the grievor had done so voluntarily. In addition, a sample teaching dossier guide from the Canadian Association of University Teachers was attached in the appendix of the collective agreement, which, while acknowledging the inherent limitations of student evaluations, went on to say that the data they produced was nonetheless capable of demonstrating impressions of the workload and the instructor's characteristics.

Dr. Philip Stark was also tendered as an expert witness in that arbitration. He was hired by the Faculty Association and produced a report very similar to the one he provided to Ryerson. However, due to the wording of the collective agreement and sample teaching dossier, MUN was able to demonstrate that Mr. Stark's evidence was neither relevant nor necessary. Consequently, the arbitration panel found it to be inadmissible and had it excluded. The panel specifically noted that both documents clearly allowed for

¹ *Ryerson University v Ryerson Faculty Association*, 2018 CanLII 58446 (ON LA) at page 5.

² *Ibid* at page 7.

the use of student evaluations in measuring teaching effectiveness. Ultimately, the arbitration panel upheld the denial of tenure.³

CONCLUSION

One thing is certain - unions will reference the *Ryerson* decision in an effort to exclude student survey data if it was not conducive to the success of their member's tenure application. While decisions of arbitrators are not binding on one another, Kaplan's reasoning may be influential on subsequent decisions should another arbitrator find his analysis to be persuasive. Consequently, it is imperative that universities and colleges take a close look at the wording of their collective agreements and consider whether they are at risk of being unable to use student evaluations as part of their assessment of a tenure applicant's teaching effectiveness. ➤



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When can students sue for breach of contract?

The law regarding a court's involvement in the student/university relationship has seen significant changes in the last decade, particularly with respect to the level of deference that is accorded to so-called academic matters.

What follows is a summary of this development and a brief discussion of resulting practical issues.

A. HISTORICAL APPROACH

Historically, the court would look at the plaintiff's case and ask a threshold question: "Is the claim being advanced academic in nature?" Irrespective of the remedy being sought, claims that were academic in nature were routinely dealt with by summary judgment, in favour of universities; the courts were

reluctant to take jurisdiction over such matters.

In *Gauthier v Saint Germain*,¹ however, the Court of Appeal for Ontario challenged this notion by emphasizing the importance of the remedy being sought by the plaintiff. The Court of Appeal wrote: "*when the desired legal remedy aims to modify an internal academic decision made by university authorities, the appropriate option remains judicial review... when an action alleges tort or a breach of contract for the purposes of claiming damages, it follows that the court has jurisdiction to hear the case.*"

Post-*Gauthier*, courts have considered the remedy being sought by the plaintiff as a driving factor in determining the court's jurisdiction over the

³ *Memorial University of Newfoundland v Memorial University of Newfoundland Faculty Association (Rolland)*, (2016) unpublished. Stewart McKelvey was counsel on this case.

¹ 2009 ONCA 309

matter. If a plaintiff's action is grounded in contract or tort and seeks damages, courts have been far more open to assuming jurisdiction, regardless of the academic nature of the claim.

B. RECENT CASE LAW

Post-*Gauthier*, courts seem to be moving further away from the historical approach. This can be seen in the following two decisions: *Topics v Dalhousie University*² and *Lam v University of Western Ontario*.³

The Court found that Ms. Topics' supervisor "knew or should have known" that the external collaborator "had two competing and conflicting interests in Tara Topics' research."

TAPICS V DALHOUSIE UNIVERSITY

The issues of deference and jurisdiction were put to the test in a case involving claims made by a Ph.D. candidate (Tara Topics) against Dalhousie University ("University") in the Supreme Court of Nova Scotia.

Ms. Topics began her Ph.D. studies in January 2011,

working on a leatherback turtle project in the Department of Oceanography. After a series of difficulties with the external collaborator and committee member, predominantly related to data access, the remainder of Ms. Topics' committee recommended that her work on the leatherback turtle project come to an end in June 2018.

Ms. Topics agreed, and she thereafter changed the focus of her studies to right whales under the guidance of her committee supervisor. By January 2013, however, the working relationship between Ms. Topics and her supervisor had become strained; he withdrew as her supervisor, and no other supervisor could be found for Ms. Topics within the University.

Engaging the internal academic appeals process at the University, Ms. Topics challenged the withdrawal of her supervisor and alleged that she had been *de facto* dismissed from the Ph.D. program. The *ad hoc* Faculty Graduate Studies Committee dismissed Ms. Topics' appeal. On further appeal to the Senate Appeals Committee, however, Ms. Topics was partially successful on the basis that the faculty had failed to comply with the procedural obligation to explore the possibility of an informal settlement with Ms. Topics.

The dean therefore wrote to Ms. Topics to invite the possibility of mediation. Ms. Topics did

not respond to this invitation and, instead, commenced suit against the University alleging breach of contract and breach of a duty of care.

The University moved for summary dismissal of the suit on the basis that all the issues were (or could have been) decided by the internal academic appeals process. Pointing to the position of historical deference, as well as the doctrine of abuse of process, the University argued that the suit should not be permitted to proceed.

The motion judge agreed and dismissed the entire suit.⁴ On appeal, however, the Nova Scotia Court of Appeal disagreed with the extent of the dismissal.⁵ Writing for the unanimous panel, Justice Fichaud concluded that Ms. Topics should be entitled to proceed in Court with her claims as they relate (but only as they relate) to the leatherback turtle project. To the Court of Appeal, this was because the internal appeals process had only been engaged to consider issues related to the right whale project (and could not award a remedy in damages in any event).

On this point, Justice Fichaud wrote:

[74] *The University's internal tribunals were suited for functional redress, but not structured to adjudicate a fault-based claim for damages against the University itself. A civil damages claim against the University would be outside*

² 2018 NSSC 53

³ 2019 ONCA 82

⁴ 2014 NSSC 379

⁵ 2015 NSCA 72



the mandate of an ad hoc faculty committee and would challenge an internal committee's institutional objectivity ...

[75] ... For the sea turtle project, the underlying controversy was not adjudicated by the university tribunal, was extraneous to Ms. Tapics' objective with her university appeal, and a damages claim against the University would lie outside the tribunal's mandate.

The matter proceeded to a six-day hearing on the merits in the fall of 2017. By decision released on March 9, 2018,⁶ Justice Hood concluded that the University was liable by virtue of certain issues arising under the University's "Conflict of Interest" policy. In particular, the Court was concerned by the close relationship between the external collaborator and those in control of the leatherback turtle data, all of which ultimately led to the downfall of that project. The Court found that Ms. Tapics' supervisor "knew or should

have known" that the external collaborator "had two competing and conflicting interests in Tara Tapics' research."

The Court went on to write: "But for that negligent action, the harm to Tara Tapics of not having the opportunity to continue with her research and possibly obtain her Ph.D. would not have occurred. I say 'possibly' because ... there are no guarantees that research will lead to the granting of a Ph.D."

The Court significantly decreased the amount of damages requested by Ms. Tapics, in order to account for a number of contingencies and the somewhat speculative nature of her loss. In total, and in order to compensate for lost opportunities and a delay of 18 months, the Court awarded Ms. Tapics \$48,750 plus pre-judgment interest and costs.

LAM V UNIVERSITY OF WESTERN ONTARIO

Mr. Lam began his Ph.D. studies in 2011 at the University of Western Ontario's ("University")

Faculty of Science, focusing on a highly specialized area of biochemistry. He had funding for his research through a grant obtained by his thesis supervisor. Mr. Lam's thesis supervisor died in 2012 and a new supervisory committee was formed to fill the role of thesis supervisor. However, after various meetings and discussions, Mr. Lam transferred out of the Ph.D. program into a Masters program.

In September 2014, Mr. Lam filed an action against the University in the Ontario Superior Court of Justice. He alleged that he was pressured by the new supervisory committee to transfer out of the program, in a manner involving breaches of the contractual obligations owed to him by the University. Mr. Lam further alleged that the committee members lacked, and were unwilling to acquire, the necessary expertise in his area of research, and knowingly misled and provided him incorrect information regarding the availability and security of his funding.

⁶ 2018 NSSC 53

The University moved for summary judgment, claiming that the action was based on decisions that were purely academic in nature, thus failing to disclose a reasonable cause of action within the Court's jurisdiction.

The motion judge held that Mr. Lam's complaints would be more appropriately resolved using the University's appeal process, noting: "as a matter of law the appellant's action should have been brought as a complaint to the University and should not be before the court to begin with." The motion judge granted summary judgment and dismissed the action.⁷

The Court of Appeal for Ontario, however, set aside the decision of the motion judge and directed that the matter proceed to trial, holding that there were genuine issues requiring a trial.⁸ Writing for the unanimous panel, Justice Zarnett wrote:

[31] The motion judge failed to approach the matter [in the correct way]. He did not treat the remedy sought as indicative of the court's jurisdiction even though damages, not reversal of an academic decision, were sought.

The Court of Appeal found that the motion judge failed to properly apply the law from *Gauthier and Jaffer*, previous cases dealing with similar issues. Justice Zarnett reiterated:

[32] The correct approach flowing from Gauthier and Jaffer is to ask whether the complaint is one for damages for breach of contract or tort, as opposed to an assertion that what the university did was something it had a discretion to do.

[29] If a plaintiff alleges the constituent elements of a cause of action based in tort or breach of contract, while claiming damages, the court will have jurisdiction even if the dispute stems from the scholastic or academic activities of the university in question.

The University sought leave to appeal the decision to the Supreme Court of Canada.⁹ However, the application was dismissed with costs on July 18, 2019.

C. PRACTICAL ISSUES

As is evident from the above, there is a growing tendency by the courts in Canada to abandon the policy of historical deference to universities on academic matters. It is unfortunate that the Supreme Court of Canada did not grant leave to appeal in *Lam*, particularly as this would have provided the highest court with the opportunity to assess these issues in a comprehensive fashion.

The present reality now provides little room for universities to obtain a summary dismissal of academic claims, so long as they are anchored in an alleged cause of action and seek damages as a remedy. That said, courts should

continue to stay away from cases where the plaintiff is seeking an academic remedy. In other words, courts should adhere to the historical approach and dismiss any claims where the plaintiff seeks, for example, the conferral of a degree, a passing grade, or an assessment regarding academic quality.

In this context, universities should pay close attention to the nature of the relief sought in a lawsuit before deciding whether to move for summary disposition. But one should also guard against attempts to cloak what is essentially an academic matter under the cover of a damages claim. ➤



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⁷ 2017 ONSC 6933

⁸ 2019 ONCA 82

⁹ 2019 CanLII 64826 (SCC)

10 tips for respectful workplace/harassment investigations

Workplace investigations are not only a best practice when addressing a respectful workplace and/or harassment investigation, but are also required by occupational health and safety legislation in many jurisdictions. Here are ten helpful tips when conducting workplace investigations:

1 Keep an open mind. Do not do or say anything which would appear to favour one side or the other.

2 Decide on whether you need to place the respondent on a leave of absence with pay, or whether you need to modify duties/schedules so the complainant and respondent are not working together during the investigation. If substantiated, would the allegations in the complaint lead to a termination for cause? If a termination is possible, then the respondent should be immediately placed on a paid leave of absence pending the results of an investigation. If a termination is unlikely, but the allegations are still serious, consider whether the individuals need to be reassigned so they are not working together during the investigation.

3 Consider whether a fact-finding investigation will actually resolve the substance of the complaint. Is the complaint about a particular person's conduct? If so, an investigation is likely appropriate. Or, is the complaint a disguise for some other problem (for example, a governance issue or about a lack of clarity in job roles)? Is the complaint more in the nature of interpersonal conflict, which would be better addressed through mediation?

4 Who decides whether a matter will go to a formal investigation? Does the policy contemplate this being a decision of the complainant or of management? What if the complainant disagrees with the decision? Ensure your policy is clear on who makes the decision.

5 Decide whether the investigation will be internal or external. If the complaint involves multiple complainants and/or the respondent is in a senior role within the organization, then consider whether an external investigator will be more appropriate. In order to obtain accurate cost estimates, ensure that you can advise the investigator how many witnesses are anticipated.

6 What will be investigated? Determine the mandate of the investigator and ensure the parties to the investigation clearly understand the mandate. Is the mandate of the investigator to only consider the original allegation? What if other complainants come forward during the investigation? Will the investigator decide whether or not the policy was breached? Will the investigator make recommendations? If so, will the mandate for recommendations include discipline, training, changes to the policy or procedures?

7 Ensure you understand the investigator's process and this is communicated to the parties. Will they be given copies of all statements? Who will be provided with a copy of the investigation report?

8 Keep time limits in mind. Does the policy have a time limit for complaints? Are there any applicable collective agreements which contain time limits for investigation and discipline?

9 Where will the investigation take place? Is there appropriate confidentiality at the workplace?

10 Whatever your policy and procedures state, follow them. Have audit policies/procedures for compliance. Maintain and report data so that you can be aware of trends. The laws are changing in this area, with many jurisdictions including harassment in their occupational health and safety legislation. Ensure your policy is reviewed and updated regularly to ensure compliance with all legislative requirements. ➤



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Privacy and data breaches
at universities and colleges
continue to rise.



Vicarious liability for cyber and privacy-related claims:

is your organization protected against internal threats?¹

Privacy and data breaches at universities and colleges continue to rise. In response to a Statistics Canada survey in 2017, universities reported the second highest number of cybersecurity incidents.² This is to be expected, given the volume and sensitivity of the information in the custody and control of higher-learning institutions, including personal information of students, faculty and staff, and research project data. All of this data in the possession of one institution makes an attractive target for external hackers, but what happens if the threat is closer to home? The long-standing doctrine of vicarious liability provides that an employer can be held liable for certain acts of an employee.

Recent case law in the context of civil liability for privacy breaches suggests that vicarious liability may apply not only where an employee has negligently carried out his or her duties, but also where a “rogue” employee intentionally commits a privacy breach.

In 2012, the Ontario Court of Appeal recognized the common law tort of intrusion upon seclusion, as a basis for civil liability for privacy breaches.³ The tort has since been acknowledged by courts at a preliminary stage as a possible cause of action in other Canadian jurisdictions, including Nova Scotia and Newfoundland and Labrador. In addition, four provinces, including

Newfoundland and Labrador, have a statutory tort of invasion of privacy. Depending on the type of breach, potential claims may also be framed in negligence, or breach of contract. Where the breach involves the personal information of many individuals, class action proceedings may be commenced.

Examples of civil cases arising from internal privacy breaches intentionally committed by employees include employee “snooping” cases, where personal information of others is improperly accessed, and cases where the employee has either stolen information for third parties, or maliciously released the information. Any organization

¹For an academic discussion of this issue, see “Direct and Vicarious Liability for Tort Claims Involving Violation of Privacy”, by von Tigerstrom, Barbara, The Canadian Bar Review, Vol. 96, 2018.

²StatsCan Canadian Survey of Cybersecurity and Cybercrime, 2017 (released Oct. 2018)

³ *Jones v Tsige*, 2012 ONCA 32



can be susceptible to this risk. There is a level of trust between the employer and the employee who is granted access to sensitive personal information, and if an employee is determined to use this access to act in an improper, malicious or criminal manner, this risk is difficult for the employer to guard against. However, the fact that the employee's actions were unauthorized does not necessarily free the employer from vicarious liability.

The classic test for vicarious liability provides that an employer is vicariously liable for:

- (i) employee acts authorized by the employer; and
- (ii) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act.⁴

In the case of an internal privacy breach, where an employee has intentionally and improperly accessed or disclosed personal information without proper authority, the question becomes whether these actions were sufficiently related to conduct that was authorized by the employer, and whether there is a significant connection between the creation or enhancement of a risk by the employer and the wrong that results, such that vicarious liability should be attributed to the employer. Factors identified as being relevant to this determination include:

- (i) the opportunity that the employer afforded the employee to abuse his or her power;
- (ii) the extent to which the wrongful act may have furthered the employer's aims;
- (iii) the extent to which the

wrongful act was related to friction, confrontation or intimacy inherent in the organization;

- (iv) the extent of power conferred on the employee in relation to the victim; and
- (v) the vulnerability of potential victims to wrongful exercise of the employee's power.⁵

In short, if the employer has created the situation allowing for the privacy breach, then vicarious liability provides that the employer should be held liable in order to compensate the victim(s) and to deter future breaches by motivating the employer to implement additional controls.

The vast majority of the Canadian case law on this topic is from class action certification proceedings which have not proceeded to trial, and no Canadian court has yet made a finding of vicarious liability against an employer for

⁴ *Bazley v Curry*, [1999] 2 SCR 534

⁵ *Bazley*, *supra* at para. 41.

a privacy breach arising from employee misconduct. However, there is sufficient case law to suggest a real risk that vicarious liability could be imposed. For example, in a case involving a bank employee who provided customer information to his girlfriend (which was then used to facilitate identity theft and fraud),

Create a culture
where cybersecurity
is a shared
responsibility.

the court found that it was not “plain and obvious” that a claim of vicarious liability would not succeed. The court highlighted that the bank had created the opportunity for the employee to abuse his power by allowing him unsupervised access to customers’ private information without installing any monitoring system, and that bank customers were entirely vulnerable to this risk.⁶

More recently, in an ongoing class action by customers against the Insurance Corporation of British Columbia (“ICBC”) for a privacy breach where vicarious liability is alleged, a claim for punitive damages against ICBC was certified. The breach occurred in 2012 when an ICBC employee improperly accessed the personal

information of dozens of ICBC customers and sold it to an acquaintance involved in the drug trade. The information was used to target some customers with violent attacks. The evidence supported that in the four years leading up to the 2012 breach, at least seven employees had been terminated by ICBC for other privacy breaches. This leaves open the possibility that when the matter proceeds to trial, punitive damages could be awarded against ICBC based on the history of privacy breaches that had occurred without ICBC making appropriate corrective changes to prevent future breaches.⁷

Another case of significant concern is currently proceeding through the courts in the United Kingdom. In *Various Claimants v W M Morrison Supermarket Plc*, the UK Court of Appeal concluded that an employer should be held vicariously liable for a privacy breach committed by one of its senior IT auditors as a retaliatory measure against the employer for disciplinary action he had faced.⁸ The employee had been disciplined by the employer for using the work mail room to mail packages for a private business he was operating out of his home re-packaging and re-selling weight loss powder. This was at no direct cost to the employer, but a package of the white powder came open in the mail room one day and caused a

disturbance, although the powder was ultimately revealed to be harmless. The employee received a formal warning on his record, which he thought was unjustified.

Part of this employee’s job was to copy and provide personal and payroll information of employees to their external auditor. In retaliation against his employer for the warning he received, and at times outside working hours, off-site and using personal computer equipment, the employee copied the personal and banking information of nearly 100,000 employees and posted it to the internet. The employee was subsequently arrested and jailed for fraud. In determining whether the employer should be found vicariously liable, the UK Court of Appeal held that there was a sufficient connection between the position of the employee, who was expected in the course of his employment to handle and disclose the personal and banking information, and the wrongdoing, to find the employer vicariously liable. This was notwithstanding the fact that the lower court had concluded that the employer had largely complied with the data protection obligations placed upon it by the applicable UK legislation. This case is currently being further appealed.

In light of the developing case law in this area, and the accompanying potential for vicarious liability to be

⁶ *Evans v The Bank of Nova Scotia*, 2014 ONSC 2135. See also *Hynes v Western Regional Integrated Health Authority*, 2014 NLTD (G) 137.

⁷ *Ari v Insurance Corporation of British Columbia*, 2019 BCCA 133.

⁸ *Various Claimants v W M Morrison Supermarket Plc*, [2018] EWCA Civ 2339, leave to appeal granted April 15, 2019.

attributed to an employer for privacy breaches caused by a rogue employee, what can an organization do to help protect itself?

- Create a culture where cybersecurity is a shared responsibility. Educate employees on the value of your organization's data, different types of data and what data can and cannot be shared;
- Review your organizational, technical and administrative security safeguards:
 - Is the information within

your custody and control adequately protected?

- Is access to personal information limited to those trusted employees who need access to the information in order to carry out their duties?
- Be prepared for and have an action plan ready to deal with cyber-attacks – whether internal or external;
- Monitor and respond to any disruptive employee behaviour and manage any negative workplace issues;

- Review your new hire and screening procedures as well as employee exit procedures; and
- Monitor and respond to any incidents and continue to test and update existing security procedures. ➤



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Spotlight

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Sarah's practice focuses on regulatory, cybersecurity, privacy and access to information matters. She provides advice to clients of all sizes on proper information collection, use and disclosure practices, and the development of privacy and cybersecurity policies, including best practices to prepare for and respond to a privacy breach. She drafts online privacy policies and terms of use for websites and mobile applications. Sarah also acts for universities, municipalities, health records custodians and private third parties with respect to their information practices and responding to access to information requests. In her regulatory practice, Sarah's clients include national and regional private sector companies looking to operate in various regulated industries in Atlantic Canada, including insurance, financial services, and consumer lending.

What's in a name?

New trademark legislation to impact branding

A brand name speaks beyond the name of a product or service, and represents the goodwill and reputation that is associated with a business. Since trademarks are the only form of intellectual property that can live on in perpetuity, brand promotion and strategy become critical, especially in this age of the internet, media and social networking.

Brand management today has acquired a meaning of its own, placing heavy reliance on the protection of trademarks, copyrights and licensing the use of these branding elements. Contracts of all types and forms now include a clause dedicated to the manner in which IP may be used, and often mandate that trademarks, corporate names and the like not be used or displayed without prior permission.

The trademark regime plays a crucial role in tapping into the potential in brand management. *The Trademarks Act* (“Act”) in Canada not merely allows for the protection of brand names

and associated logos and design features, but also provides mechanisms to enforce rights against those using identical or confusingly similar trademarks.

The Canadian trademarks regime recently underwent an overhaul and a new Act came to force on June 17, 2019. Many of the changes are also expected to impact how brands and trademark portfolios are structured and managed by Canadian entities.

INTRODUCTION OF NEW CATEGORIES OF MARKS

Trademarks traditionally include words, designs (logos) or a combination of the two. The earlier Act also allowed for 3D marks, colour as applied to surface of a 3D object, sound, holograms and moving image marks, although these are less commonly used.

The new Act has expanded these categories to include colours per se, taste, scent and texture marks as well as a combination of these.

In other words, the introduction of the new Act has expanded the realm of trademarks, so that marks are not only reflective of the impression that a mark's sight and sound leave, but can likely involve other human senses. It is very likely that brands using unique shades of colour (e.g. the Cadbury purple which has been a trademark registered in other countries), smells (such as perfumes), texture of goods and other inimitable attributes that are considered as “identifiers” of products will likely be trademark protected.

Having said that, these features must echo “brand recognition” as opposed to utility or other functionalities. It is also possible that some of these marks will have to establish higher than usual benchmarks in order to be registered. One of the standards that applicants may need to establish is “acquired distinctiveness” in the marketplace, i.e. show that the mark is reflective of the “average

consumer's association with the goods/services."

While the introduction of these new categories is exciting, it may also imply that brand owners will adopt renewed strategy to explore, use and market these unique selling attributes, so that consumers do in fact associate their products with these features. This may be an exciting opportunity for corporate branding and marketing executives, who can now go beyond the look of a mark, to incorporate the entire "look and feel" and beyond, in a branding exercise.

While this may seem like a very simple "check the box" criteria being eliminated, the ramifications on legal advice being rendered to marketing and design teams is impacted. Under the prior regime, the Use Criteria being disclosed allowed trademark practitioners to provide a better analysis of the marks available for registration and a more definitive insight to the possible obstacles in the registration of marks. However, this Use Criteria aspect now not being listed can make such an evaluation somewhat skewed.

is expected that companies will register any and all trademarks. It is expected that companies may consider applying for multiple variations, phonetic similars, marks to be used in allied industries and even marks that are similar but non-identical to their competition's mark.

One consideration that may offset this trend might be the significant increase in the filing fees. The new Act, amongst other critical changes, has also introduced bad faith as a ground in contentious proceedings, thus acting as a deterrent to trademark trolls and competitors from simply registering marks to block the register.



ELIMINATION OF THE "USE CRITERIA"

The trademarks regime in Canada, prior to the recent changes, required applicants of trademarks to designate whether their proposed mark was "in use" or "proposed to be used." Under the new regime, this designation ("Use Criteria") is not required at the time of filing the mark.

Although this criteria has been eliminated, a mark must still be used. Non-use can lead to the mark being expunged from the trademarks register, and in certain instances, on the Trademark Office's own accord.

The elimination of the Use Criteria is also expected to crowd the trademarks register since it

MADRID SYSTEM OF INTERNATIONAL FILING

The recent changes to the Canadian trademark system has also led to Canada's implementation of the Madrid System of International Filing. The Madrid System is a centralized process and an alternative method for trademark owners to secure registrations across various countries that are members of the Madrid System. After June 17, 2019, Canadian trademark right holders may be able to file applications across the world through a single window system, and international trademark applicants will be able to designate Canada in their Madrid International Registration applications.

While the Madrid System offers many advantages, certain

The elimination of the Use Criteria is also expected to crowd the trademarks register since it is expected that companies will register any and all trademarks.

considerations will still need to be factored in. One of the major considerations may be how local law in a designated country may apply as well as legal fees in each jurisdiction. However, since intellectual property is largely mandated by international treaties and convention, many countries implement a similar system, and some of the obvious hurdles can be avoided early on through due diligence in a jurisdiction of interest.

The Madrid System is expected to be particularly advantageous for brands, industries and corporations having a global presence.

IMPACT ON UNIVERSITIES AND EDUCATIONAL INSTITUTIONS

Under the Act, universities (as well as public authorities) may adopt and register their badge, crest, emblem or mark as an “Official Mark”. Official Marks

are considered to be different from trademarks. The unique feature of Official Marks is that they are registered across all 45 classes of goods and services, thus lending them extraordinary protection. These marks also need not be renewed.

Since Canadian universities are becoming more international than ever before, there may be interest in protecting their marks in foreign jurisdictions as well. However, since the concept of Official Marks is unique to Canada, it cannot be used as a basis for an international registration under the Madrid System. However, existing (and future) Official Marks, subject to local law, may be applied for trademark registration in various jurisdictions individually.

In order to take advantage of the Madrid System, educational institutions may consider applying to register their new marks as a “trademark” in Canada (as opposed to an Official Mark). Although this does not offer some of the unique advantages associated with Official Marks, the international reach of the Madrid System can bolster their global presence.

Having internationally registered trademarks may likely result in increased collaboration of Canadian educational institutions with foreign institutions, offering legitimately licensed courses and possibly enhanced exchange programs. In addition, foreign registrations potentially deter local

institutions from using confusingly similar names, or using advertising/marketing strategies that represent an affiliation with Canadian educational institutions, when none may exist.

The Canadian trademarks regime is likely to require brand owners as well as their legal counsel to look at branding and trademark strategy from a renewed lens. While many of the changes on the face of it may appear administrative, there is more than meets the eye. With the changes being so new and drastic, brand owners, marketing personnel and lawyers will have to work together to ensure that a brand does indeed last forever and a day. ➤



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“Sexual harassment” or “unwelcome sexual conduct”?

Universities and colleges should have policies broad enough to cover both

In July 2019, Claudine Gay, dean of Harvard’s Faculty of Arts and Sciences, advised that Professor of Economics, Roland G. Fryer Jr., had been placed on administrative leave for two years, to be followed by two years of supervised probationary return to academic engagements. This disciplinary action was imposed after an investigation by Harvard’s Office of Dispute Resolution concluded that Professor Fryer had “*engaged in unwelcome sexual conduct toward several*

individuals, resulting in the creation of a hostile work environment over the course of several years” within Professor Fryer’s Education Innovation Laboratory (“*EdLabs*”).¹ The Office of Dispute Resolution also documented behaviour that was not sexual harassment, but that was determined to violate the Faculty of Arts and Sciences’ Professional Conduct Policy.

CONSEQUENCES OF ACADEMIC SUSPENSION

Professor Fryer’s disciplinary

sanction will extend well beyond the two year administration leave, as when he returns to Harvard, he will not be permitted to teach graduate workshops, nor will he be permitted to have teaching fellows. As an accomplished African American economics researcher in a field without much racial diversity, Professor Fryer’s suspension has garnered media attention. In particular, attention has been drawn to the fact that Professor Fryer’s EdLabs will remain closed for

¹ John S. Rosenberg, “*Harvard Sanctions Professor Roland Fryer Severely*” (10 July 2019), online (accessed August 13, 2019): Harvard Magazine <<https://harvardmagazine.com/2019/07/harvard-sanctions-economist-roland-fryer>> [“*Harvard Sanctions Professor*”].

at least the next two years. EdLabs was focused on researching the cause of racial achievement gaps in education, and how these gaps could be closed.² In an e-mail to the New York Times, Harvard

Updated, official versions of all policies should be readily available in electronic and paper form, and accessible both online and on campus.

graduate student and former EdLabs employee, Tanaya Devi wrote “We devoted our lives passionately to the cause of racial differences and now that has forcefully been ceased by Harvard administrators,” and “My research with Prof. Fryer on criminal justice in America is halted for 4 years. I am trying hard to understand how Harvard deems this to be ‘just.’”³

HARVARD’S RESPONSE

The dean of the Faculty of Arts and Sciences, in her statement to the members of Harvard’s economics department regarding Professor Fryer’s discipline, stated that the sanctions on Professor Fryer were an appropriate response to documented behaviours. She did, however, acknowledge the loss of the important work of EdLabs, indicating that “research to inform policy decisions that combat educational inequality has never been more urgently needed” and that Harvard’s economics department will “continue to find ways to support this important work”.⁴

THE IMPORTANCE OF POLICIES

Harvard’s disciplinary action against Professor Fryer highlights the ever-increasing importance of having policies in place which address a wide range of unwanted behaviour and unprofessional conduct. Although Professor Fryer’s behaviour was not explicitly described as “sexual harassment”, Harvard recognized that his behaviours were nonetheless unwelcome in a professional working environment. Having a professional code of conduct in place allowed the Faculty of Arts and Sciences to respond to the allegations with a thorough investigation, and authorize discipline as a result.

FREEDOM OF EXPRESSION?

Where behaviour or expression does not constitute, or is not described as, “sexual harassment”, but is instead found to be “unwelcome sexual conduct” as in Professor Fryer’s case (or any behaviour that violates a code of conduct for that matter), questions may arise about whether the propagator of the behaviour may be protected by freedom of expression. Protecting and encouraging freedom of expression, while also ensuring a safe and effective learning environment, can be a difficult balance for universities and colleges to strike. The free speech guidelines in place at Harvard’s Faculty of Arts and Sciences are helpful in providing guidance on how this balance may be achieved:

*Speech is privileged in the University community. We are equally committed to the individual’s pursuit of inquiry and education. There are obligations of civility and respect for others that underlie rational discourse. Racial, sexual, and intense personal harassment not only show grave disrespect for the dignity of others, but also prevent rational discourse.*⁵

University harassment and sexual harassment policies should be forthright in acknowledging that the value of freedom of expression, and should, like Harvard’s Faculty of Arts and Sciences’ free speech

² The Education Innovation Laboratory at Harvard University, online (accessed August 13, 2019): <<https://edlabs.harvard.edu/>>

³ Ben Casselman and Jim Tankersley, “Harvard suspends Roland Fryer, Star Economist, After Sexual Harassment Claims” (10 July 2019), online (accessed August 13, 2019): The New York Times <<https://www.nytimes.com/2019/07/10/business/economy/roland-fryer-harvard.html>>

⁴ Harvard Sanctions Professor, *Ibid*, note 1.

⁵ Harvard University Faculty of Arts and Sciences Free Speech Guidelines (As adopted by the Faculty of Arts and Sciences on February 13 and May 15, 1990) online (accessed August 13, 2019): <https://www.fas.harvard.edu/files/fas/files/freespeech_guidelines_1990.pdf> & Harvard Sanctions Professor, *Ibid*, note 1.



guidelines, also recognize that expressions should be respectful and civil. Having a section within harassment policies dedicated to same, or alternatively, a separate freedom of expression guideline in place, may be the best defence if a university faces a challenge to disciplinary action which has been imposed on a faculty member for behaviours or expressions that do not quite reach the threshold of harassment or sexual harassment, but otherwise violate a university code of conduct.

CONCLUSION

Disciplinary actions which are imposed on university professors can be controversial. On the flip side, the reputational risks of failing to take corrective disciplinary action against professors that the public views as deserving of sanction, is at an all-time high. This recent

discipline of Professor Fryer highlights the seriousness with which universities are treating all allegations of unwelcome sexual conduct, and is a good reminder that universities should be consistently reviewing and updating their sexual harassment policies and professional and community codes of conduct on a regular basis.

Policies should also be written in clear, easy to understand language, so that faculty, students and staff not only understand what type of behaviour is unacceptable, but also how to report incidents of sexual harassment, and what to expect from the investigation and discipline processes. Updated, official versions of all policies should be readily available in electronic and paper form, and accessible both online and on campus.

If your institution does not have a current, well-drafted, respectful workplace, harassment and sexual harassment policy in place, these should be implemented. Stewart McKelvey can assist with reviewing 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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Fraudulent dealings:

why a mutual release may not be iron-clad

It has long been a routine part of the settlement of a matter or the severance of an employee to exchange mutual release agreements. These releases typically provide that both parties to a dispute agree to give up all legal claims, whether or not these claims are known at the time of signing, that they may have against each other.

From an employer perspective, obtaining a release from a departing employee allows you to close your file and know that should the employee come back later with a further claim, you have a shield. However, giving such a release to a departing

employee also significantly limits an employer's recourses when issues are discovered post-departure.

While the release might be upheld in some circumstances, recent case law, stemming from the Ontario Court of Appeal, *York University v Markicevic*, 2018 ONCA 893, indicates that a mutual release agreement can be set aside when a party makes a fraudulent misrepresentation, ultimately inducing the other party to enter into the agreement.

Educational institutions are not immune to instances of dishonest behavior, as the York University

case shows clearly. Therefore, colleges and universities should be aware of the law surrounding mutual releases and how to proceed if, after entering into a mutual release with a departing employee, it is discovered that the employee fraudulently misrepresented material facts.

THE CASE OF YORK UNIVERSITY

Michael Markicevic was employed as the Assistant Vice President of Campus Services and Building Operations at York University ("University"). Between 2007 and 2009, Mr. Markicevic misappropriated almost one million dollars from

the University. Mr. Markicevic falsely invoiced York University for work that was not actually done. He and his co-conspirators then pocketed the cash associated with these invoices. Furthermore, Mr. Markicevic inflated quotes for University repairs, and used the excess funds for improvements on his personal residence. York University employees performed work on Mr. Markicevic's personal residence and were paid by the University for this work. The court's decision describes elaborate schemes set up by Mr. Markicevic and accomplices in order to enrich themselves at the University's expense.

On February 1, 2010, prior to obtaining knowledge of the extent of his dishonest activity, York University terminated Mr. Markicevic's employment without cause. Complaints had been made and York University was in the process of investigating the claims. The termination was made due to the allegations, but before anything was proven. Mr. Markicevic "vehemently denied" any wrongdoing or fraudulent activity during the course of his employment. Consequently, the University negotiated and finalized a severance agreement, which contained a mutual release and a generous severance payment. This mutual release meant both York University and Mr. Markicevic agreed to give up all legal actions against one another.



When details of Mr. Markicevic's dishonest activities came to light, York University sought to set aside the mutual release, as well as to recover the money stolen and repayment for the employment severance package. Ultimately, York University was successful at both trial and an appeal.

Mr. Markicevic's fraudulent misrepresentation resulted in the setting aside of the mutual release agreement.

The court concluded that York University was induced to enter into the severance agreement through Mr. Markicevic's fraudulent misrepresentation that he had not engaged in financial dishonesty.

When faced with allegations of his participation in fraudulent activity, Mr. Markicevic wrote to both York University's Vice President of Finance and Administration, and General Counsel, describing

the allegations as “*unfounded, libelous, and slanderous*”. He reacted to the allegations with an “*attitude of absolute denial and almost outrage*”. The fraudulent misrepresentations were supported by the evidence and testimonies indicated that York University would not have entered into the severance and mutual release agreement, had it been aware of Mr. Markicevic’s dishonest activities.

This case suggests that there are instances where a mutual release agreement will not be honoured by the courts.

Representatives from York University testified that even after Mr. Markicevic’s termination was complete, they still believed him, mainly due to his vehement denials. They further testified that had they known of Mr. Markicevic’s actions, they would have approached the severance negotiations much differently. In fact, as York University believed Mr. Markicevic was not, in fact, acting dishonestly, the severance amounted to three years’ pay.

A general principle of contracts prescribes that “*a contracting party who is induced to enter into a contract as a result of a fraudulent misrepresentation is entitled to rescission, and restoration of the benefits conferred on the other party to the contract.*”¹ Given the misrepresentation and inducement, York University was entitled to have the mutual release set aside, and recover both the money stolen as well as the money given to Mr. Markicevic under the severance package.

The Court of Appeal further commented that it would be difficult to imagine circumstances in which an employer acting responsibly would pay such severance to an employee it knew had misappropriated large sums of money from it.

THE TAKE AWAY

This case suggests that there are instances where a mutual release agreement will not be honoured by the courts. If one party is induced to enter into a mutual release based on the fraudulent misrepresentations of the other party, then a judge has the ability to set aside the mutual release and allow the aggrieved party to recover its losses.

This provides a pathway for recourse for parties who have fallen victim to dishonest behaviour and have been misled in the process of agreeing to a mutual release.

The case also illustrates the dangers of entering into a mutual release before all facts are known. York University had received allegations of fraud and misappropriation of funds against Mr. Markicevic, yet it chose to provide him with a release before all the facts were known. Had York University waited until its investigation was complete to provide the release, it would have avoided at least part of the extensive litigation that followed, as well as considerable embarrassment.

Mutual releases may be routine, but they are not benign. They have a significant impact on your legal recourses against departing employees and should not be entered into blindfolded. While there are circumstances, such as those described here, in which a court would be prepared to set aside a release, they are the exception and not the rule. It remains easier to avoid entering into an improvident release than to have it set aside. ➤



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¹S.M Waddams, *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters, 2017), at para. 421; York University v Markicevic, 2018 ONCA 893 (CanLII), at para. 21.

What is “reasonable” in post-secondary religious accommodations?

The scope of religious freedom is an increasingly sensitive topic in today’s political (and secular) climate. From Quebec’s most recent “religious neutrality” law that prevents public servants from wearing religious symbols in the course of their employment, to the Supreme Court’s decision in *Trinity Western*, issues surrounding freedom of religion are at the forefront of lawmakers’ minds. Religious rights become even more contentious as they permeate the boundaries of largely secular organizations, such as post-secondary institutions.

Universities and colleges owe a duty to accommodate students and employees possessing characteristics that are protected under human rights legislation, which includes religious beliefs. How this duty to accommodate is realized (or challenged) and the extent to which it protects diverse religious beliefs and practices varies by policy but is always subject to the principles of undue hardship.

LEGISLATED PROTECTION FOR RELIGIOUS BELIEFS

A common avenue for the protection of religious liberties in

Canada is found in s. 2(a) of the *Charter*, which solidifies freedom of conscience and religion as a fundamental freedom under the Canadian Constitution. However, each province also has its own human rights legislation that protects individual liberties from being infringed by relevant government and private actors, including post-secondary institutions.

All provincial human rights legislation (with slight differences in wording amongst the provincial acts), generally prohibit discrimination in the provision of,

or access to, a service based on a number of enumerated grounds, including religion.

Post-secondary institutions aptly fall under the heading of “provision of a service”, meaning their policies and procedures must account for the diverse needs of student populations by ensuring they do not discriminate and by allowing for reasonable accommodation. While post-secondary institutions must accommodate employees as well as students, this article will focus on the provision of a service to students.

DUTY TO ACCOMMODATE

Post-secondary institutions are required to make reasonable efforts to accommodate students with characteristics that are protected under human rights legislation. The term “reasonable

accommodation” is not new, but what reasonable accommodation actually means is still evolving.

This duty to accommodate in post-secondary institutions seems most prevalent in situations where a student has either a physical or a learning disability that directly impacts their academic success. However, the duty to accommodate is not limited to students with disabilities, rather, it applies to all students experiencing obstacles based on a protected ground.

The duty to accommodate includes the obligation of service providers, such as universities and colleges, to adjust rules, policies or practices to remove barriers, thus promoting equal participation and eliminating discrimination. However, post-secondary institutions may use

the defence of undue hardship to deny certain accommodation requests. Much like the term “reasonable accommodation”, however, defining undue hardship is similarly an ongoing challenge.

ACCOMMODATION POLICIES IN ATLANTIC CANADA

What is interesting is that religious accommodation policies in post-secondary institutions appear to have been implemented prior to, or in the absence of, any sort of triggering event (i.e. they do not appear to result from a complaint; rather, they reflect the institutions’ proactive approach to recognizing and responding to the need to accommodate). These policies were likely designed to attract and accommodate the great influx of international students attending



Canadian post-secondary institutions, as well as to adapt to the needs of Canada's growing immigrant population. According to the Association of Atlantic Universities, international students now make up 22 per cent of all university enrolment in Atlantic Canada. Immigration is also on the rise. In 2016, the Atlantic provinces welcomed over 13,000 immigrants, nearly five times that recorded in 1999.

Mount Saint Vincent University has a policy entitled "Accommodation of Students' Religious and Spiritual Observances". This policy requires students with specific religious observances to inform the school within the first two weeks of classes if they wish to receive academic accommodations. This deadline may be extended in "extenuating circumstances". Instructors will confirm the accommodations in writing within

adopted proactive policies outlining their approach to religious accommodations, some schools appear to only articulate accommodation policies for students with disabilities.

HOW FAR WILL RELIGIOUS ACCOMMODATION GO?

In 2014, York University experienced significant public backlash after a religious accommodation request seemed to go beyond the bounds of "reasonable" accommodation. A male student enrolled in an online course requested to be exempted from group work with his female classmates based on unspecified religious grounds. The professor originally refused the accommodation, however, the Faculty of Arts later found that, because the student's request would not have a "substantial impact" on the rest of the class, it should have been accommodated.

In public commentary, the professor criticized the school's accommodation decision, arguing that it may allow students to seek accommodation based on potentially discriminatory grounds under the guise of religious freedoms and beliefs.

CASE LAW OVERVIEW

Religious accommodations can take many forms on post-secondary campuses, from spiritual observance accommodations, to modified course requirements, to extracurricular involvement. Freedom of expression is a common argument for student groups seeking accommodations



Many Atlantic Canadian universities and colleges have implemented comprehensive policies surrounding religious accommodations to better reflect the needs of their diverse student populations. Dalhousie University, for example, boasts a robust Student Accommodation Policy that is administered by the Student Accessibility Centre. This policy is used to manage students' requests for accommodation in an "appropriate and timely manner".

five days of receiving the initial request. There is also an appellate procedure if the student disagrees with the final accommodation decision. The academic accommodations listed in the policy include excused class absences, as well as the ability to reschedule an exam or change the due date for an assignment if it conflicts with a religious observance.

Although many Atlantic Canadian universities have

and/or permission from school administrators to advocate more controversial opinions using school forums and resources. When these groups also have religious undertones, there is an interesting dynamic at play between freedom of expression arguments and more subtle considerations of religious liberties.

Several Canadian cases have touched on the role of school administrators in accommodating students' freedom of expression on campus where religion appears to be at least one factor in such expression. *UAlberta Pro-Life v Governors of the University of Alberta* dealt with a pro-life student group that sought to hold a rally on campus. The University allowed the event to proceed, provided the group covered the costs of security at the event. The group challenged this condition, arguing the school violated their freedom of expression by imposing this condition. The court found the school's request reasonable and did not find the decision unreasonably infringed on the group's freedom of expression.

This case was similar to a 2014 Alberta Queen's Bench decision, *Wilson v University of Calgary*, where members of the campus pro-life group sought to set up a display with graphic images likening abortion to genocide. The school requested the group turn the images inward so only those that wanted to enter the display area could see them. The group refused and the school

proceeded with disciplinary action. The group argued against the action based on their right to freedom of expression. On judicial review, the court found the University's disciplinary decision unreasonable because it failed to adequately balance the group's *Charter* rights.

One of the most significant freedom of religion cases involving a post-secondary institution in recent times is the well-known decision by the Supreme Court of Canada in *Law Society of British Columbia v Trinity Western University*. In that case, the Court found the Law Society's decision not to accredit Trinity Western's proposed law school reasonable. The restrictive covenant imposed by Trinity Western was interpreted as being against the broader public interest mandate of the Law Society with potentially dire consequences to the LGBTQ community. This case showed how courts will balance the infringement on an individual or group's freedom of religion against other relevant statutory objectives, such as ensuring justice for all those that are affected by the standard – in this case, the discrimination concerns against LGBTQ students. This case is an excellent example of how, while freedom of religion is guaranteed under the *Charter*, such rights are not entitled to absolute protection.

In 2016, the Nova Scotia Court of Appeal also made a ruling on Trinity Western's proposed accreditation with the Nova Scotia

Barristers' Society; however, it differed significantly from the Supreme Court of Canada's decision outlined above. The Court of Appeal upheld the lower court's decision, finding that, as a private university, Trinity Western was not subject to *the Charter* and was outside the reach of Nova Scotia's human rights legislation.

This decision, especially when contrasted with that of the Supreme Court of Canada, suggests that there is still much uncertainty on the applicability of *the Charter* to private institutions and that balancing freedom of religion against other interests, such as preventing the discrimination of vulnerable minority groups, is still an evolving area. ➤



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