

# DISCOVERY

ATLANTIC EDUCATION AND THE LAW



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# Editor's Corner

We are pleased to offer another issue of Discovery, our legal publication specifically designed for universities and colleges. We heard from many of our readers who found the inaugural issue (September 2017) to be useful and informative. In that issue we discussed tenure, accommodation, cloud computing and cannabis. In this issue, we discuss student associations, sports-related concussions, and freedom of expression, and explore issues concerning human rights complaints and construction risk management.

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



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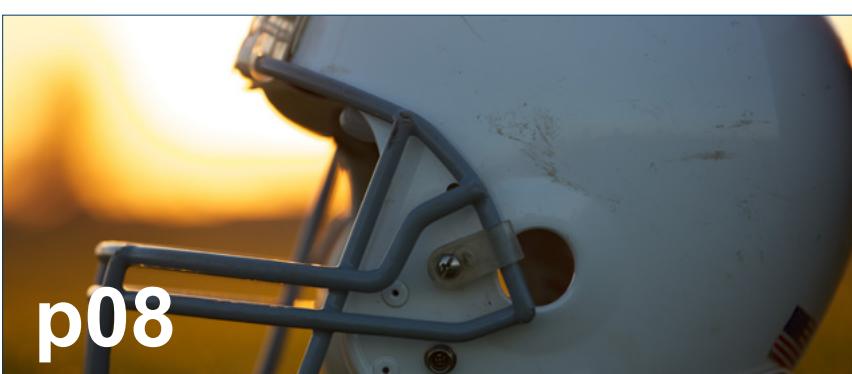
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**Your adversarial ally:**  
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Reverend William Sloane Coffin Jr. once articulated the relationship between the state and citizen as follows, “[t]here are three kinds of patriots: two bad, one good. The bad are the uncritical lovers and the loveless critics. Good patriots carry on a lover’s quarrel with their country.”

In my experience as a former student union president, I believe these categories speak equally to the kinds of relationships often encountered between student unions and their respective universities and colleges. An engaged relationship with a healthy dialogue between an institution and its student union can strengthen the academic experience and support both organizations’ goals. However, as many readers are likely aware, the relationship can experience strain and conflict. At those unenviable junctures, it’s helpful to take a step back and reflect on the nature of the relationship. Although there are many facets to the relationship that warrant discussion, this article is intended to address (at a high level) how student unions are constituted, the legal relationship between a student union and its academic institution, and how that legal relationship can be leveraged to accomplish a university’s or college’s objectives.

#### SO, WHAT EXACTLY ARE STUDENT UNIONS ANYWAY?

As a preliminary matter, I should raise a taxonomic point. The student associations at your respective institutions may identify themselves, among other names, as student unions, student federations, or student representative councils. While the choice of name and how each styles itself may lend to understanding its internal culture

and history, these distinctions have little relevance to the governing relationship each maintains with universities and colleges. Therefore, for brevity’s sake, I’ve adopted the term “student union” to encompass all forms of associations for the purposes of this article.

Importantly, student unions are often distinct legal entities. They can be legal persons which enjoy the power to make contracts, sue, and be sued. There are many paths to creating a legal personality and each path may result in different rights and remedies being available to the particular student union. In New Brunswick, for example, the University of New Brunswick Student Union is a statutory company established by a special act of the legislature

of contract that is not authorized by its constating documents? If that contract is not satisfied, an innocent third party such as a college or university may be without a remedy for breach of a contract. Issues such as these can be prevented by preliminary due diligence. The imperative is to appreciate the legal character of your respective student unions. Indeed, an ounce of prevention is worth a pound of cure.

#### ... AND WHAT'S THE LEGAL RELATIONSHIP?

Student unions would not exist but for universities and colleges. That alone does not define a legal relationship. Rather, a web of contracts (both written and unwritten) between academic institutions and their respective

## ■ Understanding the nature of the party with which you are dealing is critical. ■

in 1966. Conversely, la Fédération des étudiantes et étudiants du Campus universitaire de Moncton is a company created by way of letters patent in 1969. The constating documents of each sets out the rights and powers of each respective organization. What a company, including a student union, can and cannot do, is prescribed by its constating documents. Put another way, if a student union is not authorized for any given undertaking, it cannot do so in a legally binding fashion.

Understanding the nature of the party with which you are dealing is critical. For example, what happens if a student union enters into a type

student unions governs the rights and responsibilities of the parties’ relationship.

Arguably the most common contract between an academic institution and its student union is the agreement by which the institution will remit student fees. Depending on your institution, this may simply be a historical practice or policy that is written or unwritten.

Ideally, once collected from the population, student fees should be segregated from the academic institution’s finances and remitted to the student untouched. Spending any such funds may expose the university or college to liability.

Fee remittance practices may go unaltered for years until a student union requests an increase in student fees. Even then, an approach to altering student fees may be dealt with on an *ad hoc* basis.

In the dialogue between institutions and student unions, there are countless policy reasons why the independence of student unions should be respected. Deference to a student union does not eliminate a university's or college's obligations owed to the student body. When approached by a student union with a request for a fee increase, it is wholly appropriate to request disclosure with respect to how the student union justifies imposing additional fees on students.

In any event, fee remittance policies should be reviewed regularly to ensure they are consistent with best practices.

The second most common contract is the arrangement by which an academic institution allows a student union to use its property. These agreements may vary in their level of formality from leases of campus buildings to permission to hold social events on a college's or university's green space. Negotiating these agreements provides the institution with an opportunity to manage risk. Again, bearing in mind that a high degree of deference should be afforded to student unions to allow for the most productive relationship, a responsible university or college should view all use of its property through the lens of risk management.

#### RISK MANAGEMENT: TWO HYPOTHETICALS

Given this contractual matrix, let

us posit two hypothetical situations where an academic institution may wish to compel a student union to act in a certain manner.

First, the student union on your

campus wants to host a winter carnival. This year, you are advised the student union plans to hold a snowboarding competition, to include a half pipe constructed on your campus' quad.





## Sounds risky: what can you do?

An institution should always be aware of the limits of its general liability insurance coverage. An institution can impose an obligation

on a party using its property to obtain insurance to the benefit of the university or college. Independent of who is insuring against the risk, an academic institution's liability for injuries sustained at events held on its property will be assessed on a case by case basis. The extent to which a university or college provides oversight or security will impact any liability assessment.

## WINNING THE LOVERS' QUARREL

At the end of the day, academic institutions and student unions have more interests in common than not. Each strives to foster the optimal environment in which students can learn and succeed. Understanding the nature of your institution's student union and your legal relationship can

## " Sounds risky: What can you do? "

In short, an institution can compel the acquisition of insurance and, depending on the event, impose safety and security requirements.

Second, your phone rings. A staff member has just noticed a poster for an event hosted by a campus club, at which Milo Yiannopoulos is invited to a rally on free speech. You recall that, not so long ago at UC Berkeley, protests in response to Mr. Yiannopoulos' planned appearance caused \$100,000 of damage.

Can you shut it down?

Setting aside the issue of whether a Canadian academic institution should or can impede free speech, there are clearly risks associated with such controversy. If Mr. Yiannopoulos were to speak on leased premises, that lease establishes your rights as a landlord to intervene. If the rally is to be held on general university property, an institution's options are much broader. In both cases, this conflict should be viewed through the lens of relationship management and risk mitigation.

advance your objectives and mitigate risk. To finish Reverend Coffin's point, a healthy, respectful lover's quarrel between a college or university and its student union produces only winners. To that end, if there is anything Stewart McKelvey can do to assist you in navigating that quarrel, we are always happy to oblige.



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# **Concussions & varsity sports: What colleges and universities should know**

Sports-related concussions have been in the news a lot recently. Hockey star Sidney Crosby<sup>1</sup> made headlines after he suffered his fourth career concussion in 2017. Closer to home, a high school football team in New Brunswick forfeited a game after nine players sustained head injuries.<sup>2</sup> Stories like these highlight the fact that concussions are an ever-present risk in sports.

As awareness grows regarding the dangers (both short and long-term) of concussions, athletes should no longer just "shake it off" and go back into the game after a head injury. Colleges and universities should ensure that their student athletes and coaches know the signs of a concussion and ensure that proper procedures are in place to prevent athletes from returning to play before it is safe to do.

### WHAT IS A CONCUSSION?

A concussion is a traumatic brain injury which can result from a blow to the head or from the head or upper body being violently shaken so that the brain moves within the skull. Concussions can range from mild to severe.

Symptoms of concussion may include:

- Headache
- Nausea and vomiting
- Ringing in the ears
- Dizziness
- Blurred vision
- Light sensitivity
- Slurred speech
- Convulsions
- Loss of consciousness

- Drowsiness
- Confusion
- Fatigue
- Problems with concentration
- Memory problems
- Behavioural and mood changes
- Sleep problems

Some people recover from concussions in days, while others suffer symptoms for weeks, months or longer. The brain needs time to heal after a concussion and rest is key.

### SOMETIMES ATHLETES DON'T ADMIT THEY ARE INJURED

Quite often, athletes will not report that they are experiencing concussion-like symptoms because they do not want to miss out on competing. If an athlete remains in the game, he or she is at a higher risk of suffering another concussion because the brain is more vulnerable to damage when it is already injured. Repeated concussions can lead to long-term brain damage or in some cases, even death.

In 2013, a 17-year-old high school student died a few days after sustaining a head injury in a rugby game.<sup>3</sup> Rowan Stringer hit her head and neck on the ground after being tackled. A few days prior to that game, Rowan hit her head in another rugby game but she ignored her concussive symptoms. A coroner's inquest found that Rowan died from Second Impact Syndrome<sup>4</sup> which can be fatal after even a minor blow to the head, chest or back.<sup>5</sup> In the aftermath of Rowan Stringer's tragic death, Ontario

became the first and only province in Canada to enact concussion legislation aimed at preventing concussions in youth sports.<sup>6</sup>

### CONCUSSION LAWSUITS

Sport-related concussions have led to several lawsuits. In the United States, the National Football League reached a settlement with thousands of former players and their families for \$1 billion.<sup>7</sup> In their class action lawsuit, the former players alleged that the NFL knew of the harmful effects of concussions but concealed those dangers from coaches, trainers, players, and the public.<sup>8</sup> There are over 20,000 registered members of the class action and former players or their families will qualify for monetary awards based on varying degrees of brain or neurological problems.<sup>9</sup> Some former players are suffering from dementia, ALS, Parkinson's Disease, and CTE (chronic traumatic encephalopathy) which is a degenerative brain disease that can occur after repeated head trauma.<sup>10</sup>

In this country, a former CFL player suffering from post-concussive problems, Arland Bruce III, has been trying to sue the Canadian Football League for negligence, negligent misrepresentation, and failure to warn about the dangers of concussions. The British Columbia Supreme Court dismissed Bruce's lawsuit on the basis that the dispute arose out of the collective agreement which means the issue is outside of the jurisdiction of the courts.<sup>11</sup> The B.C. Court of Appeal agreed with the lower court's ruling and now Bruce is seeking to appeal to the Supreme Court of Canada. There is no word yet

<sup>1</sup> "A look at Sidney Crosby's NHL concussion history", <<http://www.sportsnet.ca/hockey/nhl/look-sidney-crosbys-nhl-concussion-history/>>

<sup>2</sup> "School board to examine concussion policies after 9 players suffer head injuries", <<http://www.cbc.ca/news/canada/new-brunswick/football-concussions-attendees-school-cancelled-1.4356835>>

<sup>3</sup> "Teen rugby player dies after suffering head injury in game", <<http://www.cbc.ca/news/canada/ottawa/teen-rugby-player-dies-after-suffering-head-injury-in-game-1.1361147>>

<sup>4</sup> "Rowan Stringer ignored concussion symptoms days before death", <<http://www.cbc.ca/news/canada/ottawa/rowan-stringer-ignored-concussion-symptoms-days-before-death-1.3077245>>

<sup>5</sup> "Second Impact Syndrome", <<http://www.sportsmd.com/concussions-head-injuries/second-impact-syndrome/>>

<sup>6</sup> "Rowan's Law Advisory Committee Act, 2016 S.O. 2016, c. 11.

<sup>7</sup> "Supreme Court leaves \$1B NFL concussion settlement in place", <<http://www.chicagotribune.com/sports/football/ct-nfl-concussion-settlement-supreme-court-20161212-story.html>>

<sup>8</sup> "Former Players Sue NFL For Hiding Concussion Dangers", <<https://www.athleticbusiness.com/former-players-sue-nfl-for-hiding-concussion-dangers.html>>

<sup>9</sup> "Official NFL Concussion Settlement Program Website", <<https://www.nflconcussionsettlement.com/>>

<sup>10</sup> "CTE found in 99% of studied brains from deceased NFL players", <<http://www.cnn.com/2017/07/25/health/cte-nfl-players-brains-study/index.html>>

<sup>11</sup> *Bruce v. Cohen*, 2016 BCSC 419, affirmed 2017 BCCA 186.

on whether the Supreme Court of Canada will hear Bruce's case.

There is a plethora of litigation south of the border involving lawsuits against colleges for the mishandling of students' concussions. In Illinois, Casey Conine filed an action against her alma mater, the University of Illinois, alleging that the university failed to follow the protocol when she suffered a concussion playing soccer.<sup>12</sup> After colliding with another player, Conine collapsed. When she got up, she was grabbing her head and stumbling but she was never checked for a head injury and she continued to play. Two days later, Conine was diagnosed with a concussion. Two weeks later, the team trainer cleared Conine to play but Conine alleged there was no follow-up examination by a physician. In her next soccer game, Conine made at least one header with the ball and she was hit in the back. After the game, she felt nauseous and felt pain in her head and neck. Her symptoms worsened and she was no longer medically permitted to play soccer. She eventually withdrew from university because she was unable to concentrate.

In Canada, Kevin Kwasny recently reached a settlement with Bishop's University after he suffered a brain hemorrhage during a football game. One of Kwasny's lawyers was quoted as saying that if the matter had proceeded to court, it would have been "one of the largest personal injury lawsuits . . . involving a Canadian university."<sup>13</sup> The lawsuit alleged that Kwasny's coaches forced him to continue playing despite showing signs of

a concussion. After he sustained a hit to the head, Kwasny alleged that they failed to assess him for signs of a head injury even though he told his coaches that he felt dizzy and had blurred vision.<sup>14</sup> After returning to play in the same game, Kwasny was hit again and suffered a brain hemorrhage which has left him permanently disabled.

This is just a small sampling of the concussion litigation involving North American athletes. The theme emerging from the various lawsuits is that those in charge (coaches, trainers, universities, athletic associations, leagues) failed to take action to protect athletes. In some cases, the failure involved a failure to warn of the long-term risks of repeated concussions. In other cases, the failure stemmed from coaches and trainers not following concussion protocols and keeping athletes in the game after a head injury.

### WHAT SHOULD COLLEGES AND UNIVERSITIES DO?

When a student athlete suffers a suspected concussion, coaches and trainers need to remove the injured player from the game immediately. Not only does this protect the athlete from further injury, it can help limit the educational institution's liability in the event that the athlete brings a lawsuit.

The question may arise: under what circumstances should a concussion be suspected? The *Canadian Guideline on Concussion in Sport*<sup>15</sup> suggests the following:

*A concussion should be suspected in any athlete who sustains a*

*significant impact to the head, face, neck, or body and reports ANY symptoms or demonstrates ANY visual signs of a concussion. A concussion should also be suspected if an athlete reports ANY concussion symptoms to one of their peers, parents, teachers, or coaches or if anyone witnesses an athlete exhibiting ANY of the visual signs of concussion.*

This means that coaches, trainers, medical officials and others employed by an educational institution should take a hands-on approach when evaluating a student athlete. As mentioned above, some athletes may try to hide their injury and thus it is not enough to ask the athlete how he or she feels or to rely on self-reporting. If in doubt, remove the player from the game. It should also be pointed out that in the event a player is seriously injured, the player should be taken to the hospital.

An athlete recovering from a concussion should not return to play or to practice until cleared by a medical professional. Any return to action should be gradual. If your institution does not yet have a concussion protocol, now would be a good time to implement one.

It is important to remember that student athletes are also students – this means they will need to rest physically from sports and also mentally from their course work after a concussion. Your institution should facilitate any necessary academic accommodations for your athletes while they recover.

You can help keep your student athletes safe by educating everyone

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"Former Illini soccer player sues school over concussion treatment" <<http://www.chicagotribune.com/sports/college/ct-illinois-soccer-concussion-met-0614-20150612-story.html>>

13

"Bishop's University reaches settlement with brain-damaged football player", <<http://www.cbc.ca/news/canada/montreal/bishops-university-football-settlement-kevin-kwasny-1.4339677>>

14

"Football player sues Bishop's University over severe head injury suffered during game", <<https://www.theglobeandmail.com/sports/football/football-player-sues-bishops-university-over-severe-head-injury-suffered-during-game/article14218664/>>

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Parachute. (2017). *Canadian Guideline on Concussion in Sport*. Toronto: Parachute, <<http://www.parachutecanada.org/injury-topics/item/canadian-guideline-on-concussion-in-sport>>



involved in campus sports about concussions. Start at the beginning of the academic year and make sure students know the signs of a concussion as well as the dangers that can occur if they do not rest

after suffering one. Make sure your athletics staff is aware of the potential liability your institution can face if staff members neglect their duties to keep athletes out of the game after a head injury.

You may wish to hold educational campaigns and seminars with students and staff on these issues.

### CONCLUSION

While it may not always be possible to prevent injuries, colleges and universities can help educate all those involved in campus athletics so that head injuries are taken seriously when they do occur. Furthermore, educational institutions should make sure that adequate policies, procedures and protocols are in place and are being strictly followed. Doing so will help to protect your student athletes and it can also help minimize your institution's exposure to liability.

For more information on what your educational institution can do, please contact Stewart McKelvey. We can assist with reviewing existing policies, procedures and protocols, and in drafting new ones. We can help you with planning in-house educational programs on liability issues for your athletics staff. We can also assist with legal representation in the event that your institution is sued following a student's injury.



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# An update on freedom of expression & *Charter* application to universities

## INTRODUCTION

Freedom of expression on campus is not a new issue, but it bubbled up as a hot topic in 2017.

Although the media may have moved on, the issue of freedom of expression on campus remains as complex and pressing as ever – and it's only a matter of time before the next controversy erupts. In the meantime, universities and colleges have the opportunity to reflect on how they should respond when confronted with situations where freedom of expression may be at issue. This article provides a high-level overview of freedom of expression as a constitutional right protected under the *Canadian Charter of Rights and Freedoms*, and what courts have said about the application of the *Charter* to universities.<sup>1</sup>

Of course, a one-size-fits-all article is impossible given the countless scenarios where freedom of expression—and alleged limits on freedom of expression—could arise in the university or college setting. The law reviewed here cannot be applied in a vacuum but must be analyzed in light of the nuances of each fact situation, and the institution's own policies and procedures. For that reason, readers are urged to contact Stewart McKelvey for assistance with applying the law to freedom of expression in specific situations.

## CHARTER PROTECTION FOR FREEDOM OF EXPRESSION

“Freedom of expression” is more than an abstract concept. In Canada, it is a constitutional right, protected under section 2(b) of the

*Charter of Rights and Freedoms*.

Where the *Charter* applies (which is discussed more below), the scope of section 2(b) protection is expansive. The Supreme Court of Canada has repeatedly said that any activity that conveys or attempts to convey meaning will be protected by section 2(b), except for violence or threats of violence, and subject to reasonable limits.

Section 2(b) can be used to challenge a particular law on the basis that the law infringes freedom of expression and should be struck down. For example, many *Criminal Code* offences related to obscenity, pornography, and hate speech have been challenged in this manner, sometimes successfully.

Section 2(b) arguments can also be made in more individualized ways. A student could allege that an administrative decision (e.g., to discipline them for a social media post) unjustifiably limited their freedom of expression so should be overturned. Courts in these cases sometimes refer to freedom of expression as a *Charter* “value” instead of a *Charter* “right” (even though this may not make a substantive difference), and focus on whether the university has properly balanced freedom of expression against other interests and concerns.

## APPLICATION OF THE CHARTER TO UNIVERSITIES

Section 32(1) says that the *Charter* applies to “government.” The cases have extensively debated what, exactly, “government” means for the purposes of *Charter* application. There is still no universal or

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A list of the secondary authorities consulted for this article is included at the end.

definitive answer to whether the *Charter* applies to universities.

The Supreme Court's 1990 decision in *McKinney v. University of Guelph* suggested it was unlikely the *Charter* would apply to universities as "government". Just because a university was created by legislation and received public funds did not mean it was itself government, or under government control. The autonomy of universities from government was a driving factor.

A few years later, the Court seemed to expand the scope of "government" in *Eldridge v. British Columbia (Attorney General)*, to include an entity that was "putting into place a government program or acting in a governmental capacity..."

There are two ways a university or college could be "government" under section 32(1) of the *Charter*: if it is under government control, or—perhaps the more common option—it is implementing a government program in making the decision or taking the action at issue.

But even if neither category applies, university decision-makers may still be obligated to consider *Charter* rights, including freedom of expression. This because of the Supreme Court decisions in *Doré v. Barreau du Québec* and *Loyola High School v. Quebec (Attorney General)*, which suggested that administrative actors making discretionary decisions pursuant to statutory authority—which will include many university administrators—have to determine whether their decisions could limit an individual's freedom of

expression and, if so, will have to be able to justify a decision that limits individual *Charter* rights.

The effect of *Doré* and *Loyola* is still a developing and contested area of the law, so administrators are advised to seek up-to-date and particularized legal advice on this issue.

### CASE LAW OVERVIEW

There are two main types of cases where courts have wrestled with freedom of expression issues in the university context. The first category involves cases where a student has been disciplined for 'offensive' comments, including comments made on social media. See, for example, the cases of *Pridgen v. University of Calgary*, *Telfer v. University of Western Ontario*, and *AlGhaithy v. University of Ottawa*.

Another subset of cases addresses access to, and use of, university property for expressive purposes. These cases often seem to involve a university's attempt to limit or prevent anti-abortion demonstrations on campus. This category includes cases like *Lobo v. Carleton University*, *Wilson v. University of Calgary*, *BC Civil Liberties Association v. University of Victoria*, and *Grant v. Ryerson Students' Union*.

The most principled court decisions examine whether the university has reasonably considered and proportionately balanced freedom of expression against competing interests, regardless of whether the university is technically "government" under section 32(1) of the *Charter*. A full analysis of the case law is beyond the scope

of this article, but administrators are advised to contact Stewart McKelvey if they are interested in how any of these cases might apply on their campuses.

### CONCLUSION

Courts across Canada have reached different conclusions on how, if at all, the *Charter* right to freedom of expression plays into university decision-making. The benchmarks of reasonableness, proportionality, and balance will hopefully help administrators deal with the next crop of freedom of expression cases. This hot-button issue is not going away any time soon.



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CanLII Connects <<http://canliiconnects.org/en/commentaries/47006>>

# How to manage human rights complaints

Being both employers and service providers, universities face exposure to human rights complaints on dual fronts. Universities must adhere to human rights legislation and be prepared to deal with accommodation requests from employees. However, universities are also prohibited from discriminating against students and must be prepared to respond to the increasing demand for accommodation from students.

The recent decision of *Dunkley v. UBC* (2015) required the University of British Columbia to provide non-discriminatory access to educational services beyond the classroom and into the realm of hybrid learning environments - residencies and practicum placements. The failure to accommodate the deaf complainant who required an interpreter in that case, resulted in an award of damages for injury to her dignity, feelings and self-respect in the amount of \$35,000 (in addition to various other costs and lost wages).

The range of remedies available to a human rights complainant are broader than those typically available through the civil litigation process. For example, human rights commissions have the power to reinstate employees and award back-pay to the date of their termination.

Given this potential exposure, human rights complaints are a reality which universities must be prepared to manage.

## PUT YOUR BEST FOOT FORWARD

It is not uncommon for the full processing and hearing of a complaint to last two or more years - having a complaint dismissed at an early stage can save significant time, stress and resources.

Human rights commissions have significant flexibility to dismiss a complaint during the investigation process and often, beyond that. The initial written response to a complaint is the first and best opportunity for a respondent

to run from the last alleged instance.

Some human rights commissions have the discretion to extend this filing deadline where they consider it reasonable to do so. Failing to file in time because a complainant is not aware of the right to do so is not grounds for an extension.

Consider whether the university will be prejudiced by the passage of this time limit – are there issues contacting witnesses who no longer work for the university? Have documents been lost over

## || Human rights complaints are a reality which universities must be prepared to manage. ||

to request the complaint be dismissed, so it is important to put your best foot forward and consider the following factors.

### 1) Limitation periods

Each Atlantic Province has a one year limitation period for filing a human rights complaint with respect to an act of discrimination. If a complainant has not adhered to this timeline, it should be highlighted in the initial response.

If the complaint is based on continuing discrimination (successive acts of discrimination of the same or similar character), the one year limitation clock will begin

time? Etc. Mapping a timeline of events and highlighting limitation period problems is a simple process which can effectively remove part or all of the allegations contained in a complaint.

### 2) Parallel proceedings

Where a human rights complaint has already been appropriately dealt with in another proceeding, this may justify its dismissal.

In *University of Saskatchewan v. Saskatchewan (Human Rights Commission)* (2014) a student advised the university that he had a learning disability and required accommodation. The student

failed to achieve and maintain the required academic standards and was forced to discontinue his studies. He unsuccessfully appealed this decision through the university's internal appeal board, where he alleged discrimination on the basis that he had not been accommodated. The student was represented by counsel and made written and oral submissions at the appeal board hearing.

The student also filed a human rights complaint and, following the internal appeal board's decision, the university applied to have the complaint dismissed on the basis it had been appropriately dealt with in another proceeding. While the Saskatchewan Human Rights Commission denied the application, on judicial review, the Court of Queen's Bench quashed that decision, finding the matter had been dealt with and noting, "Just because a legal matter bears a human rights aspect does not mean the Commission must deal with it in its entirety and to the exclusion of other properly constituted tribunals."

It is also common for human rights violation allegations to be dealt with in a grievance proceeding. It is well established that arbitrators have concurrent jurisdiction with human rights commissions in considering human rights legislation violations.

In such instances, reference to a parallel proceeding which has taken place (or a more appropriate avenue for appeal which *ought* to have taken place) should be highlighted in a response.

### 3) Frivolous, vexatious or made in bad faith

Human rights commissions may dismiss a complaint where it is frivolous, vexatious or made in

bad faith. Does the complaint contain clear mischaracterizations, exaggerations or easily disproved allegations? Has the complainant met the burden of identifying discrimination on the basis of a protected ground and adverse treatment? Does the complaint have no reasonable chance of success?

After receiving a complaint, it is important to speak to those involved and develop a clear narrative which addresses all allegations the complainant has made. Leaving allegations uncontested means the human rights commission only has the complainant's side of the story. This is the time to thoroughly canvas any supporting documentation which can be provided such as emails with the complainant, accommodation plans, performance evaluations, etc.

### IS MEDIATION APPROPRIATE?

Mediation is available throughout the complaint process and is generally encouraged by human rights commissions. This can be a good way for parties to learn about where the other stands and consider possible solutions and settlement.

When a complainant has unrealistic demands, human rights legislation in New Brunswick and Prince Edward Island allow for the dismissal of a complaint where the human rights commission determines that the complainant has declined a fair and reasonable settlement offer.

### WHAT CAN STEWART MCKELVEY DO FOR YOU?

Beyond the initial written response, a complaint may also require a more detailed investigation which can involve commission investigators interviewing university management

and other employees who are named in the complaint. Ultimately, the commission will decide whether to proceed to a formal hearing of the complaint which may involve multiple witnesses, evidence and the presentation of a legal argument. Stewart McKelvey can provide experienced representation throughout the investigation and the hearing process.

When dealing with accommodation requests, universities must accommodate both employees and students to the point of undue hardship. Determining whether that point has been reached can be a complicated analysis and Stewart McKelvey can provide you with the strategic legal advice required.

Ultimately, prevention is the best medicine. We can also help you to develop clear policies and guidelines to avoid human rights complaints in the first place, and put you in the best position possible to refute any complaints down the line.



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# Agreeing before you disagree: Entering into construction contracts and handling disputes arising from them

The construction industry has a reputation for being adversarial and, as a result, disputes are a common feature of the lifecycle of a project. In many cases, the causes of construction disputes are frequently the result of:

- The allocation of risk in the construction agreements;

- Incomplete or inadequate construction agreements or documentation;
- Unanticipated conditions or changes;
- Unrealistic expectations;
- A breakdown of communication between the parties; or

- Delays, both foreseeable and unforeseeable.

In the case of construction projects for universities and colleges, while the project may be a major undertaking to the organization, it is likely a one-off relationship for the contractors, design professionals and trades involved. This can

exacerbate the risk of disputes, as the parties involved in the project do not have longstanding relationships.

There are ways to mitigate the risk of disputes on your construction project. Set out below are some of the key elements for handling construction documentation and risk management.

#### AGREEMENT: WHAT TO LOOK FOR IN CONSTRUCTION DOCUMENTATION

Disputes arise as a result of risks which, if not properly dealt with, may mean increased costs for one or all parties, which in turn are likely to result in claims. In most cases a contract will be in place long before a dispute arises. That contract is instrumental in mitigating the risk of future disputes. In awarding and negotiating a construction agreement, prudent owners should consider the following steps to limit misunderstandings and the possibility of seeing a claim come across their desks:

- Identify the risk and your tolerance for it;
- Determine which party is in the most suitable position to manage, re-allocate or control the risk; and
- Consider if it is economical to obtain insurance or surety bonds for the project to mitigate the risk.

The construction industry has no shortage of project delivery models to choose from, including design-bid-build, design-build, and construction management to name only a few. No construction delivery model is one-size fits all, and each has its own benefits and limitations. A university or college, as an owner, through its various stakeholders and with appropriate legal advice, must identify its objectives and prioritize the key elements of the project to evaluate the best

possible construction delivery model to minimize its own risk.

For example, an owner will need to consider the scope of work; schedule; contractual methods to manage risk; indemnities; flow down provisions in contracts to subcontractors; surety bonding and insurance; how payment will be processed; how claims may be asserted; and how the parties will resolve claims when they are made. Many dispute resolution models in construction contracts are tiered, meaning that

supplementary conditions to help you tailor the contract to manage your project's specific risk profile.

Importantly, an owner must consider how to deal with gaps and interplay between various construction agreements. Often, if the contract documents are not clear, the owner may be exposed to liability, as the other party may argue that they did not contract with the owner for anything not clearly contained within the contract nor for items which could not reasonably have been anticipated.

## “No construction delivery model is one-size fits all, and each has its own benefits and limitations.”

disputes are first dealt with by the parties through negotiation or reference to a dispute resolution before submitting their dispute to mediation, arbitration, or litigation.

Once the owner has identified the objectives and priorities of the project, the next step is to consider the appropriate delivery model for the project. There are several organizations whose primary function is to develop standard industry forms of contracts. For example, the Canadian Construction Documents Committee, the Canadian Construction Association, and the Royal Architects' Institute of Canada each produce standard industry templates for a nominal fee. These standard forms, although a good starting point, will benefit from a review by technical and legal advisors to consider if any project specific issues need to be addressed. Even standard form contracts may benefit from amendments through

Timely legal advice will help an owner control the risk associated with the interplay of each contract. For example, legal advice at the outset of a construction project can help delineate the party who will be responsible for occupational health and safety issues, thereby reducing or eliminating the risk of a dispute in that area at a later stage of the project.

#### DISAGREEMENT: WHEN DISPUTES ARISE

Despite the best intentions of all involved, legitimate disputes on construction projects are often unavoidable. The best way to be in a strong position if a dispute does arise is to ensure that you have well-developed construction documentation including contracts, and also the design and project documents. It is critical that the team administering the project for you has the resources required to properly administer the contract.



This includes educating the project team to follow procedures and seeking legal and technical advice where needed. Often, advice sought at the appropriate time before a

dispute erupts can avoid costly litigation or arbitration proceedings.

Maintaining a complete and accurate record of the project is

the single most important tool that can be used to manage and resolve disputes arising out of the project. Being able to produce a contemporaneous record of the project will allow you to not only demonstrate what happened and when but how the parties reacted at the time and what was agreed to or, at least, the intentions of the parties. Keeping an organized and accurate record should be a high priority on any project, but in reality this can often fall to the wayside in favour of getting the job done. Unfortunately, when a dispute arises later, the lack of accurate records can lead to finger-pointing and costly fact-finding expeditions.

It is often said that the party with the most paper wins, but, as a rule of thumb, the party with not just the most paper, but the best documents, wins. This means creating a document structure for your project, which can often be done with technical consultants, keeping records of meetings, including hand written notes, and responding to joint records, such as minutes of meetings, if inaccuracies are found. Finally, professionalism and courtesy are relevant and important, particularly if you find yourself before a third party deciding your dispute. Consider that both external and internal communications are subject to disclosure during a dispute. If the writer would feel uncomfortable having the document read into a court record, then the content is not one that should be recorded in a permanent record.

#### HOW STEWART MCKELVEY CAN HELP

Stewart McKelvey can assist universities and colleges with all aspects of risk management on a construction project. Specifically, we are able to assist in drafting construction contracts, working

with designers to develop project documentation, and recommending appropriate insurance, surety bonding and experts, where appropriate. We can also provide advice in risk management throughout the entire life cycle of the project from the pre-tender stage to successful completion. In the event of a dispute, Stewart McKelvey's dispute resolution team has extensive experience in dealing with all forms of dispute resolution across the Atlantic region and beyond.



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# Case update

## NEW BRUNSWICK COURT OF APPEAL UPHOLDS 38 YEARS OF FIXED TERM CONTRACTS

On January 17, 2018 the New Brunswick Court of Appeal dismissed an appeal from the bench of a decision dismissing a wrongful dismissal action brought by an employee, Terry Burns, who worked for the University of New Brunswick ("UNB") for 38 years. His employment was dictated by a series of fixed-term contracts, each with a specific start and end date. In October 2015, he was offered a three-week module contract, which he declined. He was then told that the end date of his contract term would be December 2015. Burns brought forward an action for wrongful dismissal arguing that he was an indefinite employee of UNB and had management authority over students. UNB argued that it was clear that Burns' employment was for a fixed term, as his contracts did not reference further contracts or renewal, and were negotiated each time. Justice Judy Clendening of the Court of Queen's Bench of New Brunswick dismissed the action on June 7, 2017, holding that Burns was not entitled to reasonable notice because he was, in fact, a contract term employee. The Court of Appeal affirmed the trial judge's decision confirming that there was no dismissal because the contract ended in accordance with its terms.

# From plans to final project

Our lawyers have been at the forefront of many important infrastructure projects in the region including several P3 developments. We advise at every stage of a construction project, from planning, procurement and drafting and negotiating contract documents through construction and commissioning to final completion. We have experience in litigation, arbitration and mediation of claims of all types, including liens and contractual disputes.

For more information on our construction practice and a complete lawyer listing, visit [stewartmckelvey.com/construction](http://stewartmckelvey.com/construction).

