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Discovery

ATLANTIC EDUCATION AND THE LAW

INSIDE

Thank you for reading our Spring issue of Discovery Magazine. I am pleased to be the newest Editor, and look forward to collaborating with our team to provide you with meaningful and relevant content in future issues.

This year has brought us challenges that have been unprecedented in our time. The COVID-19 global pandemic has impacted us in ways that were unimaginable. However, this has caused us to rise to the occasion, like Atlantic Canadians do, and to innovate and think creatively to continue to move forward. Our academic institutions are quickly finding new ways to connect with students and offer a virtual learning community while they also continue to tackle internal challenges of changing workplaces.

I hope you enjoy this issue, and wish you health and happiness as we continue on this journey together.

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Freedom of expression on campus:

A new development from Alberta

There is a new development in the ongoing debate over whether the *Charter* applies to universities.[1] Once again, the issue arose in the context of anti-abortion demonstrations on campus.[2] In *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 ("*UAlberta*"),[3] a decision from January 2020, the Alberta Court of Appeal held that the University was engaged in a form of government action when it imposed conditions on a student group's anti-abortion demonstration, and that the University had not given sufficient weight to the students' *Charter*-protected right to freedom of expression.[4]

Justice Watson wrote the main opinion in *UAlberta*. Justices Crighton and Martin gave concurring reasons, but expressly agreed with Justice Watson's analysis and conclusion on the *Charter* issue.[5]

This article will review the decision in *UAlberta*, and then discuss two questions flowing from the case. First, what does it mean for universities in Atlantic Canada? Second, what does it mean for anti-abortion expression?

FACTS AND FINDINGS

The Court of Appeal was faced with two appeals brought by UAlberta Pro-Life ("UAPL"), an anti-abortion student group at the University of Alberta. In the court below, the Chambers Judge had refused UAPL's applications for judicial review of two University of Alberta decisions.[6]

The first decision related to an anti-abortion demonstration that UAPL held in 2015 on the campus "Quad", featuring "large photo displays" of fetuses. Counter-demonstrators held up signs and banners to create a "human barrier" that would block the displays. UAPL complained that the counter-demonstrators had breached the University Code of Student Behaviour, but university administrators refused to take disciplinary action against the counter-demonstrators. UAPL's appeal on this issue was unsuccessful.

The second matter is where the *Charter* issue arose. UAPL was challenging the University's decision, relying on its policy for student groups, that UAPL would have to pay $17,500 in security costs for a similar anti-abortion demonstration in 2016 (the "Security Costs Decision"). In particular, the issue was "whether the Security Costs Decision was exercised in a *Charter* compliant manner in the circumstances"[7] (not whether the policy itself complied with the *Charter*).

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[1] *Canadian Charter of Rights and Freedoms*
[2] See also Rory Rogers, QC & Jennifer Taylor, "An update on freedom of expression & Charter application to universities" in *Discovery* (Winter 2018: Issue 2, beginning at page 12).
[3] There has been no application for leave to appeal to the Supreme Court of Canada.
[4] *Charter,* section 2(b).
[5] *UAlberta* at para 222.
[6] *UAlberta Pro-Life v Governors of the University of Alberta*, 2017 ABQB 610.
[7] *RUAlberta* at para 35.

Based on the governing case law from the Supreme Court of Canada,[8] UAPL had to "show that the University was effectively engaged in a form of governmental action" when it imposed the costs requirement ahead of UAPL's 2016 demonstration.[9]

The Court decided that the University, in making the Security Costs Decision, was engaged in a form of governmental action, and that accordingly the Decision had to be made in a *Charter*-compliant manner. Unfortunately, the analysis contained in the decision was perhaps less rigorous than one would expect in a case like this.[10]

Justice Watson reached this conclusion primarily because "the education of students largely by means of free expression is the core purpose of the University…"[11] Education is the University's responsibility under its enabling statute, and it is an important societal role as well. Justice Watson also commented that "the grounds of the University are physically designed to ensure" that each student can "learn, debate and share ideas in a community space."[12]

Lawyer Teagan Markin has remarked upon the Court's "unusual reasoning", noting that: "It relied on the historical importance of free expression in university education to find that the University was constitutionally obligated to respect free expression. In doing so, the Court grounded *Charter* scrutiny in the effect of the university's activity on *Charter* rights, rather than the nature of the activity itself (e.g., administering campus spaces)."[13]

The fact that the University "is largely funded by government" was relevant, but not determinative, to the Court's conclusion.

Finding the University to be engaging in governmental action when it manages freedom of expression on campus would also serve the rule of law, Justice Watson found.

In the result, the Court of Appeal overturned the Chambers Judge, who had decided for the University and upheld the Security Costs Decision. The Court of Appeal found the Chambers Judge had applied the wrong justification test, and set aside her decision and the University's Security Costs Decision.[14] Unfortunately, however, Justice Watson did not clearly set out the analysis that should have been followed to assess whether the University's Security Costs Decision was justified.

More clarity comes from the concurring reasons of Justices Crighton and Martin, where they explained that "the chambers judge did not consider whether the University's decision minimally impaired [UAPL's] *Charter* right to freedom of expression and, therefore, her analysis fell short of what was required."[15]

QUESTION 1: WHAT DOES THE CASE MEAN FOR UNIVERSITIES IN ATLANTIC CANADA?

The scope of *UAlberta* may be limited. For one, the Court said its ruling was confined to the Security Costs Decision. As such, the Court did not have to determine whether the University of Alberta should be considered "government" under the *Charter*[16] for other purposes.[17]

UAlberta has not been cited in any other cases yet (as of mid-April), and it remains to be seen whether a court in Atlantic Canada would apply this decision to a case involving a local university, which would have a different statutory scheme, governance structure, and internal policy framework.

In any event, *UAlberta* may not make a big practical difference to university activities in Atlantic Canada. Even before *UAlberta*, it was possible the *Charter* could be found to apply to many university decisions, including those affecting students' freedom of expression on campus.

Particularly since the Supreme Court of Canada's decision in *Doré v Barreau du Quebec*, 2012 SCC 12, university administrators have been generally required to consider the impact of their decisions on the *Charter* rights of students, and to justify any decision that limits *Charter* rights. Only reasonable and proportionate limits will be considered justifiable if the matter proceeds to judicial review.

All of this holds true after *UAlberta*.

Notably, Ontario and Alberta have explicitly directed colleges and universities to adopt free speech policies.[18] Ontario institutions were required to do so as of January 2019,[19] and Alberta institutions by December 15, 2019.[20]

So far, governments in Atlantic Canada have not taken this step. As Atrisha Lewis and her colleagues have argued, "Doing so may make it more difficult to avoid *Charter* scrutiny of decisions concerning students' expressive activities, including organizing and participating in speaking events, and protesting those same events, on campus."[21]

QUESTION 2: WHAT DOES THE CASE MEAN FOR ANTI-ABORTION EXPRESSION?

While UAPL, an anti-abortion organization, was successful on its *Charter* appeal, there is not necessarily cause for concern for abortion rights advocates. Justice Watson acknowledged that the content of UAPL's displays "would be regarded as unsettling and disturbing to the majority of persons potentially exposed to it."[22] (The concurring judges accepted the University's argument that UAPL was purposely courting "public controversy", which "enhanced the security risk" for the 2016 event.)[23]

However, the Court took a content neutral approach to freedom of expression. This is consistent with the Supreme Court of Canada's jurisprudence on section 2(b) of the *Charter*, which strives to evaluate limits on expression without making value judgments about the content of that expression. That said, if the expression itself is violent, or involves threats of violence, it will not be protected under the *Charter*.

Content neutrality can be problematic when it comes to anti-abortion expression, which often uses distorted images that are designed to shock and shame viewers, leading to harmful consequences.[24] It is questionable whether such tactics advance the truth-seeking purpose of section 2(b).[25]

At one point in the *UAlberta* decision, Justice Watson examined the University's Latin motto, "*Quaecumque vera*", which was translated to "whatsoever things are true." He commented that: "A university campus…should be hospitable to a pursuit of the truth about all things without a prescribed pre-definition of truth before the pursuit begins."[26] But the Court did not interrogate the nature of the images in the UAPL demonstrations, and whether they presented true statements about abortion.

At least Justice Watson recognized that these images would be "unsettling and disturbing" for many viewers (although a fuller contextual analysis of how these images may impact the legal protection for abortion access would have been welcome). He called this the "involuntary audience" concept — the idea that other members of the University community might have "the right not to be subjected to" the kinds of images UAPL displayed. However, there was a "risk" that weighing this right against the UAPL students' freedom of expression could have the effect of "suppress[ing] unpopular speech."[27]

The Court left for another day whether anti-abortion expression could ever fall outside the scope of section 2(b) protection. Justice Watson found it "unnecessary to grapple with all of the nettles of the extent to which freedom of expression may be considered to be *definitionally* circumscribed by arguably countervailing social values."[28]

After *UAlberta*, it remains the case that reasonable limits may be placed on freedom of expression. Justice Watson suggested that the University could, in future,

[8] See, e.g., *McKinney v University of Guelph*, [1990] 3 SCR 229; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624; and *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.
[9] *UAlberta* at para 127.
[10] See also Teagan Markin, *"New Rules for School: UAlberta Pro-Life v Governors of the University of Alberta"* (Ontario Bar Association, March 10, 2020).
[11] *UAlberta* at para 148, point 1.
[12] *UAlberta* at para 148, point 3.
[13] Markin, above.
[14] *UAlberta* at para 159; see also paras 216 and 230.
[15] *UAlberta* at para 229.
[16] *Charter*, section 32.
[17] *UAlberta* at para 128.
[18] See also Atrisha Lewis, Adam Goldenberg & Marco Fimiani, "*Free speech on campus is subject to the Charter — but only in Alberta*" (McCarthy Tétrault, January 15, 2020).
[19] Ministry of Colleges and Universities, "*Ontario Protecting Free Speech on Campuses*" (Ontario Newsroom, November 4, 2019).
[20] Paul Heidenreich, "*Alberta post-secondary institutions complying with UCP request to establish free speech policies: minister*" (Global News, December 17, 2019).
[21] Lewis et al., above.
[22] *UAlberta* at para 171.
[23] *UAlberta* at para 229.
[24] Jennifer Taylor, "*Truth on the bus*" (CanLII Connects, October 16, 2018; originally published in The Lawyer's Daily).
[25] The Supreme Court of Canada has emphasized that one of the values underlying section 2(b) of the Charter is "finding the truth through the open exchange of ideas": *R v Sharpe*, 2001 SCC 2 at para 23.
[26] *UAlberta* at paras 113-115.
[27] *UAlberta* at paras 171-172, 174-175.
[28] *UAlberta* at para 190; emphasis in original.

"propose an alternative", whereby it would provide security if the anti-abortion demonstration was moved to an alternate location.[29] Such an alternative would be more likely to pass *Charter* muster.

University administrators faced with anti-abortion demonstrations should keep this in mind, and carefully consider whether any reasonable alternatives are available that would allow the expression without causing undue harm to other members of the school community.

CONCLUSION

As always, how to resolve issues of freedom of expression on campus will depend on the particular facts.

Institutions should ensure they have appropriate policies in place for the use of indoor and outdoor campus space for expressive activities, including displays and demonstrations. These policies should allow for as much freedom of expression as possible, but also set out when and why the institution will impose limits; such limits must be reasonable, justifiable, and proportionate. As well, administrators should provide "clear and cogent"[30] written reasons for a decision that may limit freedom of expression on campus, outlining the rationale for the decision.

Readers are encouraged to consult our education group for assistance with questions related to freedom of expression on campus. >

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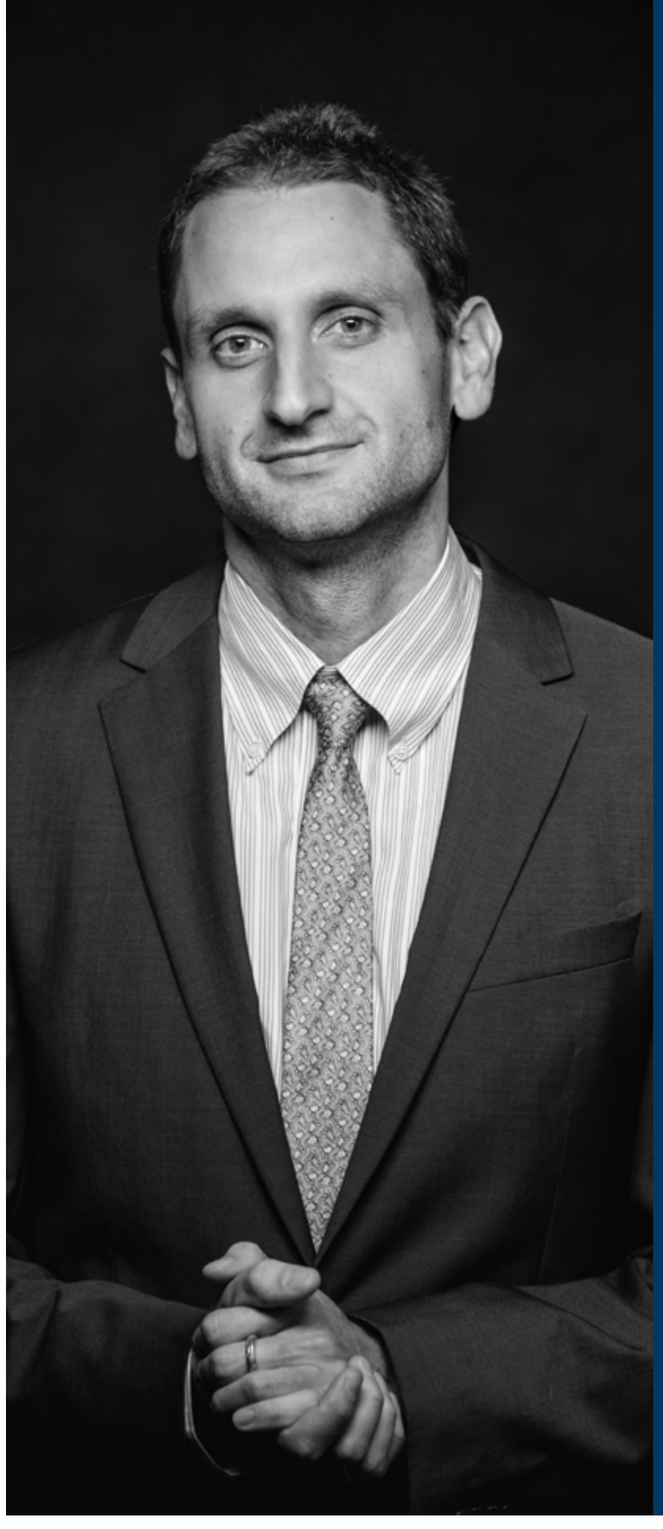
[29] *UAlberta* at para 186.
[30] See, e.g., *Pacheco v Dalhousie University*, 2005 NSSC 222 at para 37.



Spotlight

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Dante practices labour, employment, pensions and benefits law. Dante brings a multifaceted perspective to academic issues, as prior to his legal career he was a full-time mathematics researcher and lecturer. Following a Ph. D. in Mathematics (Tulane, 2006) he served as AARMS Director's Postdoctoral Fellow (Dalhousie, 2006-8), studying experimental mathematics. In 2010 he performed review of curricular reform at Virginia Wesleyan University (tenure-track assistant professor, 2008-11), before returning to the 'other side' of the classroom at Dalhousie for a J.D. (class of '14). He also received a 2017 Certificate in Pension Law from Osgoode.

Dante is leading practice innovation efforts for labour and employment practitioners at Stewart McKelvey, which includes evaluation of software products, knowledge management and automation of template forms. He has presented on Pensions and Benefits Law for the Canadian Pension Benefits Institute and Connex Benefits Breakfast Club and the Benefits and Private Healthcare Associate program.

Access denied:

York University successful on appeal against Access Copyright

On April 22, 2020 the Federal Court of Appeal delivered its long-anticipated decision in *Canadian Copyright Licensing Agency (Access Copyright) v. York University*, 2020 FCA 77, largely overturning the ruling of the Federal Court.

Justice Pelletier, writing for the Federal Court of Appeal, found that the Access Copyright interim tariff was not mandatory and therefore York University, having opted-out, was not bound by it. If York infringed copyright then it is up to copyright owners to prosecute such infringement. This was a blow to Access Copyright who are left with a tariff they cannot enforce.

Justice Pelletier also found that the Fair Dealing Guidelines used by York were unfair. This leaves universities with much uncertainty as to what constitutes a legal fair dealing.

It is anticipated that the matter will be appealed to the Supreme Court of Canada.

THE BACKGROUND

Access Copyright is a collective society that collects royalties for the copyright holders of published literary works. From 1994 to 2010 Access Copyright and York were parties to a licence agreement that permitted York to make copies of portions of literary works in Access Copyright's repertoire. In 2010 the annual royalty payment was $0.10 per page and $3.38 per full-time-equivalent student.

In March of 2010 the licence was being renegotiated and Access Copyright was seeking a flat annual royalty of $45 per full-time-equivalent student. When negotiations languished, Access Copyright filed a proposed tariff with the Copyright Board covering the years 2011-2013.

The Copyright Board issued an interim tariff which incorporated the licence rate of $0.10 per page and $3.38 per full-time-equivalent student.

In 2011 York opted out of the interim tariff. Many other Canadian universities followed suit.

In an attempt to manage legal copying within their institutions, universities developed and followed a set of Fair Dealing Guidelines. Fair dealing is an exception to copyright infringement, found at section 29 of the *Copyright Act* (the "Act"). In order for a copy to be a fair dealing the copy must be for the purpose of research, private study, education, parody or satire, criticism or review, or news reporting, and the dealing must be fair. Unfortunately, what is "fair" is not defined in the Act.

Universities developed the Fair Dealing Guidelines to make it easier for users to determine what amount of unlicensed copying was fair.

In reaction to all this, Access Copyright brought an action against York to enforce the interim tariff. In response, York filed a counterclaim seeking a declaration that any reproductions made in accordance with its Fair Dealing Guidelines constituted a legal fair dealing.

Access Copyright's Position:

(a) Tariffs are mandatory, the Copyright Board approved the tariffs, and allowing York to "opt-out" undermines the legislative intent of the Act; and,

(b) The Fair Dealing Guidelines are not "fair".

York's Position:

(a) The tariffs are not mandatory, York "opted out" of the collective licensing regime, and the tariffs should not be imposed on it non-consensually; and,

(b) York's copying completed pursuant to the Fair Dealing Guidelines constituted *air dealing*, the Guidelines approved by the Association of Universities and Colleges Canada strike the appropriate balance between user and creator rights, and York's copying was in turn fair.

FAIR DEALING IN CANADA

Fair dealing is at the heart of this matter. In a nutshell, fair dealing requires a copyright owner to allow people to make free copies of their works for certain purposes, in certain circumstances.

In 2004 the Supreme Court of Canada offered some much needed guidance on fair dealing in its CCH decision (see *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13). As a result of this decision users had more clarity regarding what copying constituted a fair dealing.

From the perspective of universities, it seemed more likely that some of the copies being made pursuant to the Access Copyright licence were actually fair dealings. The Access Copyright licence appeared to be diminished in value.

In *CCH* the Supreme Court of Canada described a two-part test to determine what constitutes a fair dealing:

1. The copying must be for one of the purposes enumerated in the Act: research, private study, criticism or review, or news reporting (education and parody or satire were added in 2012);

2. The use must be "fair".

The Court then provided a six-factor test to determine what is fair. The test requires courts to consider:

1. **the purpose of the dealing:** allowable purposes are enumerated under sections 29, 29.1 and 29.2 of the Act, i.e., research, private study, criticism, review, news reporting, education, parody or satire;

2. **the character of the dealing:** examine how the works are dealt with. Where multiple copies are widely distributed this will tend to be unfair, but limited circulation will tend to be fairer;

3. **the amount of the dealing:** consider how much of the work is being copied. The amount may also be more or less fair, depending on the purpose. For example, it may be essential to copy entire academic articles for informed discussion or criticism;

4. **alternatives to the dealing:** is the work available by a non-copyright protected alternative? For example, if the intended purpose could be met without copying, this would weigh against a finding of fairness;

5. **the nature of the work:** if the work is confidential this may tip the scales towards a finding of the copying being unfair; and,

6. **the effect of the dealing on the work:** if the copy creates competition in the market with the original work, then this leads towards a finding of unfairness.

As anyone can imagine, it is very difficult and time consuming for each user in the university context to apply this test to every unlicensed copy they plan to make.

The Fair Dealing Guidelines attempted to codify the *CCH* fair dealing test, to make it easier for users to follow the law of fair dealing. According to the Federal Court and the Federal Court of Appeal this was a failed effort.

THE TRIAL DECISION

At trial York argued:

(a) The Access Copyright tariffs are not mandatory and should not be enforceable against it; and,

(b) Its -copying constituted fair dealing, pursuant to the Fair Dealing Guidelines.

York was unsuccessful. The Federal Court found:

(a) The tariffs are mandatory. The Court reasoned that the tariffs are mandatory based on the legislative intent of the Act, and that the Copyright Board approved the tariffs; thus, they were binding. Further, in the Court's view, York's claim was a collateral attack on the jurisdiction of the Copyright Board; and,

(b) York's copying did not constitute fair dealing in accordance with the *CCH* fairness test:

1. **the purpose of the dealing:** there were two users: (1) the university, which is assembling, copying, and distributing the material, and (2) the student, who is the end-user of the material. York's copying may have been partially for the purpose of access to education, but the Court found that the primary purpose of the Guidelines and copying was to keep the school's overhead down. The copying was done by York for its benefit and not for students, thus it was **unfair**;

2. **the character of the dealing:** the copying was extensive, including large portions of books, texts, articles and collections, thus the aggregate copying was **unfair**;

3. **the amount of dealing:** the Guidelines permitted copying of "two chapters of a book or no more than 10%" which was **unfair** since it ignored qualitative considerations;

4. **alternatives to the dealing:** it was accepted that the days of one principal textbook for courses were over and that materials would necessarily be sourced from multiple publications and this necessitated compilations. This factor favored **fairness**. However, the Court did comment that York's efforts to find possible alternatives fell short; nevertheless, there were no reasonable free alternatives to copying given the practical necessity to create a compilation;

5. **nature of the work:** higher education publishing involves highly specialized publishing of very complex information. A textbook likely involves significant work, research, skill, and expense to bring to publication. Many creators are dependent on income from writing and publishing works and the Guidelines did nothing to prevent further dissemination of their works, tipping the scales towards **unfairness**.

6. **the effect of the dealing on the work:** the Court's view was that York's motive or intention was to avoid paying the tariffs because of a change in the tariff rate. Justice Phelan, writing for the Federal Court, held at para 272: "It is evident that York created the Guidelines and operated under them primarily to obtain for free that which they had previously paid for. One may legitimately ask how such 'works for free' could be fair if fairness encompasses more than one person's unilateral benefit". This tends towards **unfairness**.

The Court further critiqued the Guidelines at para 351:

- They made a material contribution to a drop in sales of Access Copyright's works;

- They caused a loss of licensing income for creators;

- Licensing revenue, on average, is about 20% of a publisher's revenue and thus the Guidelines have a negative impact on publishers;

- Loss of licensing income has a negative effect on creators;

- It was found to be likely that the Guidelines would have long-term implications on investment, content, and the quality of works.

After the judgment, Access Copyright issued a demand letter to institutions using its materials:

As specified in the payment terms of the tariffs, institutions are required to pay royalties, interest and applicable taxes and provide a report setting out the royalty calculations by no later than three months after the approval of the tariff (i.e. by March 9, 2020). For the current academic year (i.e. September 2019-August 2020), the royalties, applicable taxes and report are due no later than November 15, 2020. If payment is not received by the due dates, interest will be charged daily at a rate equal to 1 per cent above the Bank Rate effective on the last day of the previous month (as published by the Bank of Canada).

York appealed the Federal Court's decision, again arguing:

(a) The Access Copyright tariffs are not mandatory; and,

(b) The Fair Dealing Guidelines are "fair".

THE APPEAL DECISION

Are Tariffs Mandatory?

York's Position:

It would be unreasonable to conclude that the tariffs are mandatory. If they were, a single infringing act could attract excessive royalties as opposed to the value of the copying under a mandatory tariff regime i.e., a tariff is set at a million dollars, an instructor copies, in an infringing manner, a page of a book. Assume the value of the page of that book is one dollar. The result is that the user institution is charged a million-dollar tariff despite the value of the copying only being one dollar. York did not agree or assent to the Access Copyright licensing regime, and therefore it should not be bound by it. Only after consent to participation in a collective regime should the associated tariffs be mandatory.

Access Copyright's Position:

The legislative intent of the Act was to make tariffs mandatory to further collective proceedings and lower licensing costs. The meaning of the word tariff is straightforward: "a schedule or system of duties imposed by a government on goods". A copyright tariff is not a system that operates on an opt-in or opt-out basis.

The Federal Court of Appeal began its analysis by clarifying what is meant by the word "mandatory." The Court describes mandatory as follows, at para 37: "a user becomes liable for payment of the royalties stipulated in the tariff if it engages in any copying which constitutes infringement". The function of a mandatory tariff is that it objectively defines liabilities for infringement and gives the owner of the works a remedy in the enforcement of the tariff; in other words, a mandatory tariff is a form of "statutory damages".

In finding that Access Copyright's tariffs are not mandatory, the Court's decision includes a comprehensive review of the history of the Copyright Board and its enabling legislation. It finds that it is not divergent from the legislative intent of the Act to determine the tariffs are not mandatory.

Part of the rationale for holding that the tariffs are not mandatory is "user choice". Monetization of copyright requires an agreement between the parties as to the value of the works. The user cannot use works without the creator's permission and a creator cannot impose liabilities for use on a user who has not chosen to be a licensee. The distinction between liability for royalties and liability for damages for infringement is critical. In the Court's view you can only be liable for a mandatory tariff or royalty on the basis of a pre-existing agreement assented to between the user and copyright owner. Terms of an agreement (tariff or royalty) are not imposed on a user by the act of infringement. Instead a user is liable for damages for infringement as opposed to damages from a tariff. User choice allows individuals to be free to negotiate their value for use/copying of the works.

Was York's Copying Fair?

Despite the issue being moot since the tariff was found to be not mandatory, the Federal Court of Appeal provided its thoughts on York's assertion that its copying pursuant to the Guidelines was fair. The Federal Court of Appeal disagreed as follows:

1. **the purpose of the dealing: York's purposes for copying were clear and were unfair;**

2. **the character of the dealing: York did not justify the excess copying beyond suggesting it was for an allowable purpose;**

3. **the amount of the dealing: the trial court decision may have erred in the amount of weight it gave to aggregate of copying but this did not reach the level of a palpable and overriding error;**

4. **alternatives to the dealing: the Court agreed with the trial decision;**

5. **the nature of the work if a work is not published: the Court agreed with the trial decision; and,**

6. **the effect of the dealing on the work: the Court agreed with the trial decision.**

In summary, York was unsuccessful in arguing that copying done pursuant to its Fair Dealing Guidelines constituted fair dealing.

KEY TAKEAWAYS

- We will know soon whether the matter will be appealed to the Supreme Court of Canada;

- Unless or until we get a decision from the Supreme Court, Access Copyright's Copyright Board-approved tariffs are not mandatory and cannot be imposed on users who have not consented to them. Universities can opt out of such collective licensing;

- Universities that infringe copyright by using unlicensed works that do not constitute fair dealing are vulnerable to infringement actions (including class actions) brought by copyright owners;

- Universities should undertake risk management concerning their use of copyright protected works and conduct a review of their licensed resources; and

- Until the Supreme Court of Canada or Parliament says differently, universities must perform contextual analyses for each use of an unlicensed work to determine whether such use constitutes a fair dealing pursuant to the Act and the *CCH* fairness test. ➤

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Ever expanding claims of privacy breaches in labour & employment litigation

A recent arbitration decision in *Mount Allison Faculty Association v Mount Allison University* (unreported, February 10, 2020), is an example of how claims of breach of privacy are increasingly being tacked on to grievances (and other employment litigation) – requiring employers to justify their actions as not infringing upon privacy legislation and the tort of intrusion upon seclusion.

A group of students had submitted a letter to a dean at Mount Allison, complaining about their experiences with a professor. The complaints were investigated by the dean and later formed the basis of a warning letter sent to the employee, which was grieved by the union.

Several months later, the group of students requested a follow-up from the dean. In a brief email, the dean informed the students that the University took action to ensure the issues raised were addressed, and that the action was subject to a grievance and no further information could be disclosed until the grievance was resolved. This communication resulted in the union filing a second grievance, alleging that the dean's email to the students was a breach of privacy which violated New Brunswick's *Right to Information and Protection of Privacy Act ("RTIPPA")* and committed the tort of intrusion upon seclusion – both claims of which were dismissed.

Significantly, arbitrator Oakley held that he had jurisdiction to consider whether the dean's email infringed any of the provisions of *RTIPPA* (an issue typically reserved for privacy commissioners). However, he held that the dean did not disclose any personal information in the email and therefore found no breach of *RTIPPA*.

The tort of intrusion upon seclusion, which is legalese for "breach of privacy", was first introduced into Canadian jurisprudence in the Ontario Court of Appeal case of *Jones v Tsige*, 2012 ONCA 32 ("*Jones*"). In that case, a bank employee abused her privileges by accessing the banking records of her ex-husband's new partner a total of 174 times over a four year period. Justice Sharpe set out the three key criteria for establishing the tort of intrusion upon seclusion:

1. The conduct must be intentional and/or reckless;

2. There must be an invasion of a person's private affairs or concerns without lawful justification; and

3. A reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

Arbitrator Oakley, considering the elements from *Jones*, held that the actions of the employer did not intrude upon the private affairs of the employee, and the information provided to students was vague and did not disclose discipline. He did, however, find that an arbitrator has jurisdiction to apply the tort. This part of the decision is significant because despite *Jones* being decided in 2012 in Ontario, the tort of intrusion upon seclusion has yet to be widely adopted and applied by the courts in New Brunswick.

What is evident from the cases in which claims for intrusion upon seclusion have been successful is that the privacy breach must be significant, and typically for personal gain.

For instance:

- In *John Stevens v Glennis Walsh*, 2016 ONSC 2418, an Air Canada employee used her privileges to access the flight records of a pilot in order to pass on those records to the pilot's wife to be used in a divorce proceeding.

- In *Vanderveen v Waterbridge Media Inc.*, 2017 CanLII 77435 (ON SCSM), $4,000 in damages for intrusion were awarded after a production company filmed a woman jogging and used that footage in a promotional video without her consent.

- In *McIntosh v Legal Aid Ontario*, 2014 ONSC 6136, a legal aid employee pulled information from her boyfriend's ex-girlfriend's legal aid file and used it as leverage to threaten to have her children taken away.

Despite the high thresholds set out in the case law, claims of privacy breaches appear to be on the rise in many labour and employment cases – if only tacked on to the main issues. Accordingly, employers should be careful when investigating employment matters to avoid disclosing personal information whenever possible.

Further, as more arbitrators assume jurisdiction to apply privacy law (e.g. the tort of intrusion upon seclusion), this raises an interesting question of whether civil actions brought by employees based on such claims ought to be precluded on the basis that such claims must be adjudicated under the Collective Agreement. >

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Seeing Through the Cloud:

Considerations for cloud-based IT services

On May 4, 2020, an arbitrator dismissed a grievance by the Laurentian University Faculty Association (the "Faculty Association") challenging Laurentian University's (the "University") decision to move its faculty to a cloud-based email system, Gmail. Arbitrator Etherington found that the union had failed to establish any breach of its collective agreement and that the University's decision to switch to Gmail was reasonable in all of the circumstances.

This decision (*Grievance No. Grievance No 2017-18, regarding Google, Gmail and IT Code of Conduct Policy*) confirms that the adequacy of security measures implemented by an employer in providing cloud-based email services must be judged in light of all the circumstances. In the context of this particular collective agreement and the jurisprudence, Arbitrator Etherington found that the employer was only required to take reasonable measures, not all available measures, in reducing the overall risk to faculty members' privacy. In particular, he held that lawful access to email communications by a foreign government is a factor to consider but is not conclusive of a finding of a breach of employees' privacy.

This decision follows the logic of Arbitrator Outhouse in *Dalhousie University* (unreported, August 26, 2015) and Arbitrator Carrier in *Lakehead University*, 2009 CanLII 24632, in which grievances related to the university's decision to outsource email to a cloud-based service were dismissed.

As more employers look towards cloud-based IT services, the focus should be on overall risk reduction rather than complete privacy.

BACKGROUND

The University began discussions about the move to Gmail with the Faculty Association in 2014. The Faculty Association initially expressed concerns with the terms of the contract with Google and stated it did not support this move. The Faculty

Association's main concern with the contract was that it was with a US-based provider and the storage of the data for the system would be in the US. The Faculty Association argued that having the storage of the data in the US offered less protection for the privacy rights of its members than if the storage was located on Canadian servers, as it opened the data up to surveillance by US organizations.

After two and a half years of discussions with the Faculty Association, the University made the move to Gmail without the consent of the union.

THE GRIEVANCE

The grievance alleged that the University had breached the privacy and academic freedom of faculty members by exposing their email communications to US government surveillance.

The Faculty Association relied heavily on a report entitled "*Seeing Through the Cloud*", a research report based on the revelations of Edward Snowden regarding the extent of US domestic surveillance activities targeting non-US persons. The report concluded that "*Canadians and Canadian organizations have significantly better legal privacy protection from state surveillance when their data are processed, stored, routed or more generally kept exclusively within Canadian jurisdiction than elsewhere.*" The Faculty Association called one of the authors of the paper as an expert witness to support its contention that faculty members' privacy was best protected when data was stored in Canada.

The University argued that its decision to move to Gmail was an exercise of its management rights and emphasized that it had done so after lengthy discussions with the Faculty Association.

Further, the University argued that its duty was not to take all available steps but rather it had a duty to take reasonable steps to protect the privacy of its faculty members.

THE DECISION

To determine whether the University had taken reasonable steps to ensure the protection of privacy of its faculty members, Arbitrator Etherington held that assessing compliance must be based on a consideration of all the circumstances, including factors such as:

- the sensitivity of the personal information;
- the foreseeability of a privacy breach and resulting harm;
- the relevance of generally accepted or common practices in a particular sector or kind of activity;
- the medium and format of the records containing personal information;
- the prospect of criminal activity;
- the cost of additional security measures; and
- the extent to which employer changes to the provision of services can be said to improve or worsen the protection for privacy interests of its employees.

Based on all the circumstances in this case, Arbitrator Etherington found that the employer had taken all reasonable steps to ensure the privacy of its faculty members. First, he found there was no evidence to establish whether Gmail would provide higher or lower privacy protection for faculty members compared to the previous system. Therefore, the Faculty Association failed to prove that the overall risk to the privacy of faculty members was worsened by the move to Gmail.

He further highlighted that the inherent insecurity of email as a medium for sensitive communications is an important contextual factor in assessing the reasonableness of measures taken. The Faculty Association's expert conceded that faculty members should exercise caution in using email to communicate sensitive information at all times, even when data storage is in Canada. Further, the expert, in another report, had concluded that a significant proportion of Canadian email communications were being routed through the US and made subject to US surveillance programs, regardless of where the data was actually stored. Therefore, using an email provider with storage servers in Canada does not guarantee protection from US state surveillance.

Further, there was no evidence that the University compelled or required faculty members to use Gmail when communicating sensitive information, and no evidence given by a faculty member concerning interference with their academic freedom; therefore there was no evidence to suggest the University was violating faculty members' academic freedom.

KEY TAKEAWAYS

First and foremost, universities and colleges that are looking to make the switch to a cloud-based IT service should look to the reasonableness factors in this decision and at their collective agreements to determine whether there is a specific process they must follow prior to making such a change.

Further, universities and colleges should ensure that the cloud-based system does not provide any less privacy protection than their current system. The Faculty Association's grievance failed, in part, because it did not provide any evidence as to whether Gmail was more or less secure than the University's old system. It also did not provide any evidence from faculty members on how switching to Gmail violated their academic freedom.

Overall, the fact that the data is stored in the US does not, in and of itself, make the move to the cloud unreasonable. >

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Pension plans and global events:

The power of collective action

Groups acting in coordination exhibit undeniable, global-scale power. We see this often in nature:[1]

- A school of fish, each swimming in a direction and speed based on the movements of its neighbours, performs a complicated choreography to dodge a predator.

- A swarm of locusts, all marching tirelessly in an effort to avoid being cannibalized, decimates the crops of a nation, sending food prices soaring.

- Complex patterns in pedestrian crowds resembling fluid dynamics, such as formation of flows or emergence of turbulence in extreme density, emerge from repeated individual interactions based on unconscious human tendencies such as collision avoidance.

What each of these examples also shows is that there is a large-scale effect of an apparent coordination, which upon closer inspection is not deliberate, but the natural result of individual adherence to simple rules.

We have recently seen the large-scale power that changes to such rules can have, when individuals modify their behaviours. By changing our habits of interaction to incorporate the simple heuristics of social distancing, humans have mitigated the outbreak of a global pandemic, decreasing infected totals in the first wave of the COVID-19 virus from initial projections. This experience lends a greater understanding of the power of individual choices.

Similarly, the development of socially responsible investment principles is predicated on the positive effects that simple changes can have on the sustainability of our financial ecosystems, or the recovery process following a crisis or world event. We have also seen how these seemingly unrelated events have interacted and magnified the impacts on the other. No matter the size of the investor, collective risks can be powerfully addressed by changing individual behaviours, in accordance with simple rules. Our recent experience has elevated

[1] Max Planck Institute, "*Individuality drives collective behavior of schooling fish*", Sept. 7, 2017; Max Planck Institute, "*Actually, locusts don't really like each other*", Feb. 7, 2020; M. Moussaid, "*Social Influence and Collective Behaviors in Pedestrian Crowds*", Max Planck Institute for Human Development Summer Institute on Bounded Rationality, Jun. 16, 2014.

general awareness that responses to large-scale challenges must be coordinated with others, and informs us that adaptability of individual practices is a necessary skill for collective survival. Universities and other post-secondary educational institutions have been at the forefront in responding to both of these challenges.

MITIGATION OF CLIMATE CHANGE: RESPONSIBLE INVESTING

An article in our Fall 2018 issue of *Discovery* provided an overview of environmental, social and governance investing, including the United Nations Principles of Responsible Investment, to which a number of Canadian universities have subscribed.[2] Adopting such principles is consistent with an investment manager's fiduciary duty and in some jurisdictions such considerations are mandated within required reporting.

Prevailing thought on sustainability is constantly shifting, as is the landscape of available options and fund practices associated with responsible investing. One developing trend for pension funds is to voluntarily exceed the regulatory standards for transparency on their efforts to mitigate world events such as climate change. This is, in part, a response to growing demand from community and plan members for evidence that the manner in which funds are invested is generally aligned with the advancement of certain social or environmental causes.

We expect this trend to continue, particularly given the recent attention and exposure given to the concept of individuals as caretakers of the collective.

Case Study – Task Force on Climate-related Financial Disclosures

At the time of our 2018 publication, the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD") were still in their infancy but have since gained traction. These recommendations are notable, not only for having gained commitment for adoption by large funds (e.g., the Canada Pension Plan Investment Board ("CPPIB"), which has a fund value on the order of $400 billion), but for their scalability to mid-size funds of universities (e.g., the University of Toronto Asset Management Corporation, with assets under management on the order of $10 billion).

The TCFD was established in 2015 by the Financial Stability Board, an international body created following the 2008 global financial crisis to monitor financial system stability. Led by Michael Bloomberg, the TCFD has 32 international members from various sectors, including a CPPIB representative. Its goal is to provide a framework to investors for evaluating the risks and rewards related to climate change (see Figure 1), including voluntary consistent climate-related disclosures. The TCFD recommendations released in 2017 ("Recommendations") are structured around four pillars: governance, strategy, risk management, and metrics and targets.

TCFD Implementation

A university fund implementing TCFD-recommended disclosure would consider the following:[3]

- **Governance** – The Recommendations include disclosure of the board's oversight and management's role in assessing climate-related risks and opportunities. This prescribes a multi-tiered approach, with clearly defined roles and accountability structures at each level. The choice of levels below the board would be based on the governance structure of the fund, but could include the CEO, executive management committee(s), or counsel of external experts or expert boards.

- **Strategy** – According to the Recommendations, a fund should disclose the actual and potential impacts of climate-related risks and opportunities on the organization's businesses, strategy and financial planning where such information is material. Developing a strategy involves setting an ultimate objective in light of the risks and opportunities appropriate to the organization, identifying relevant data, and re-evaluating with respect to the framework when signposts are met. Categories of strategy for potential focus include engagement and advocacy, climate resilience, carbon mitigation and low carbon finance. The strategy can increase in complexity with increased experience.

- **Risk Management** – This pillar of disclosure relates to the organization's processes for identifying, assessing, and managing climate-related risks and how those processes are integrated into the organization's overall risk management. It is important to note that other, more traditional risks may still dominate the financial risks. Climate risks integrated at the enterprise level may be found to have only a minor substantive impact on the business, and at the portfolio level the focus is usually on measuring and reducing carbon exposure.

- **Metrics and Targets** – The Recommendations advocate disclosure of the metrics and targets to assess and manage relevant climate-related risks and opportunities where such information is material. Targets can be science-based (e.g., alignment with 2°C warming scenario or the Paris Agreement on climate change), climate-related investment-based, or carbon reduction-based. Initially, any short-term metrics and targets should be realistic and refinement can be achieved over time with research and consideration of data.

RESPONDING TO GLOBAL EVENTS: RELIEF MEASURES

Like climate change, the outbreak of a global pandemic is a financial risk that, as we have seen, is largely unavoidable in its financial and social impact on organizations. Revenues for many businesses immediately evaporated after the introduction of measures to control the spread of the COVID-19 virus. There were also cash flow issues with certain fixed income instruments becoming illiquid in the face of market volatility. These forces affected many pension plan sponsors' abilities to pay their pensions. In the wake of the pandemic-related financial crisis, pension regulators have responded to the needs of plan sponsors and administrators with various relief measures. These have been necessary to allow pension plans to respond to immediate challenges that could not be addressed through the application of their usual risk management practices.

Reporting and Fee Deadline Extensions

The most widespread change across pension regulators is the extension of current reporting, filing and fee deadlines for required documents. Select reporting deadlines within certain date ranges in 2020 have been extended by anywhere from one to three months in most Canadian jurisdictions (BC, AB, SK, ON, QC, NB, NS, NL, and Federal, including, in most jurisdictions, annual information returns). With the closure of many government offices, many jurisdictions are now accepting filing and payment via electronic means.

Defined Benefit Plans – Transfer Restrictions and Solvency Relief

Canadian pension legislation generally requires the consent of the regulating authorities for transfers out of the pension fund where, in the opinion of such authority, such transfers would impair solvency.[4] The governments of Saskatchewan[5] and Canada have declared that any transfer in the current market conditions would impair solvency, thus implementing a temporary full freeze on pension transfers. Atlantic Canadian regulators have yet to follow suit.

[2] See Level Chan, Paul Smith & Sarah Jackson, "Environmental, social and governance factors in pension and endowment fund investment" in ***Discovery*** (Fall 2018: Issue 3, beginning at page 12).
[3] *TCFD Overview; Investor Leadership Network practical guide to TCFD implementation.*

[4] See, e.g., s. 26.1 of the *Pension Benefits Standards Act, 1985* (Canada).
[5] Financial and Consumer Affairs Authority, "*NOTICE: Freeze on Transfers or Payments out of Defined Benefit Plans*", April 16, 2020.

Regarding the federal freeze on transfers (which is subject to provincial portability requirements for federal members in provincially registered and supervised multi-jurisdictional plans), the Office of the Superintendent of Financial Institutions ("OSFI") published an FAQ document stating that the pandemic resulted in "significant market volatility" and the "impact on the solvency ratios of defined benefit pension plans is currently uncertain".[6] Further, OSFI has determined that it would be unfair to the remaining members and beneficiaries if the benefits of some members were transferred from the fund.

The Government of Canada also announced temporary relief to sponsors of federally regulated defined benefit pension plans, in the form of a moratorium through the remainder of 2020 on solvency payment requirements, with a consultation on 2021 relief to follow.[7]

Defined Contribution Plans

Although not the subject of any official government announcement, there is no prohibition under applicable pension benefit standards legislation on an amendment to temporarily reduce employer and employee contributions, subject to minimum required employer contributions under the *Income Tax Act*.[8] Such amendment, however, would be considered adverse, and is generally prohibited from coming into force retroactively. Restrictions under collective agreements and labour and employment law should be considered before implementing a reduction.

LOOKING AHEAD

Every crisis presents some form of opportunity, and the response to one global event can provide insight on solutions to another. In a Zoom call hosted by the *National Observer* on April 16, 2020,[9] environmental activist David Suzuki remarked on the intersection of COVID-19 and climate change, in particular how the pause in human activity has temporarily reduced some human-induced stressors on nature.

From Suzuki's perspective, the coronavirus response showed that once sufficient political pressure is applied, our government has the ability to quickly institute restrictions and corresponding relief measures that were previously unimaginable. He opined that if 3.5% of the global population called for climate change action, a COVID-scale response was possible: "This is the existential crisis of our time. And once you commit to saying that this is the target … then get on with it."

The day after this interview, Prime Minister Trudeau announced a $1.7 billion initiative to clean up orphan wells in Alberta, Saskatchewan and British Columbia.[10] The measure, which received Conservative Party support, was accompanied by an announcement that the government, instead of re-evaluating its upcoming methane emission restrictions, would be providing financial support to the sector "to help them upgrade and update their measures so we can continue to fight climate change, reduce emissions, while keeping people at work."

This is further to Suzuki's point that economic forces should not be treated as static; they depend on human activity, which can be reshaped. Said Suzuki, "Let's change the damn thing so it makes some sense." The financial establishment largely withstood the most recent wave of youth climate strikes in September, 2019, but there are more waves to come, particularly given the opportunities for change presented by the current global economic slowdown. Meanwhile, individual players such as pension funds can be vigilant of emerging political and economic trends and begin making anticipatory changes to its strategy and risk management processes, in order to be well-positioned before the next seismic global event. As has been recommended for climate change, this may include consideration of governance, strategy and metrics through a new lens that takes into account the increasing inter-connectivity of the world and the global impact of collective action. ➤

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[6] Office of the Superintendent of Financial Institutions, "*COVID-19 Measures – FAQs for Federally Regulated Private Pension Plans*".
[7] Department of Finance Canada, "*Government announces relief for federally regulated pension plan sponsors*"; this is subject to required regulations: *ibid*.
[8] A money purchase (defined contribution) provision of a pension plan for which all benefits are provided on a money purchase basis must require the employer to contribute each year to at least 1% of the total pensionable earnings (i.e., the members' earnings on which contributions are based) of all active members participating under the provision: "*Pension Reform Update 91-AR – Registrations Rules for Money Purchase Provisions*", March 29, 1996. This rule was waived for the remainder of 2020 after May 5, 2020, if the amendment suspended accruals under the plan for the year (i.e., no employer or employee contributions made to the plan or provision following the plan amendment); Government of Canada, "*What's New*", May 5, 2020.
[9] Canada's National Observer, "*David Suzuki on applying COVID-19's lessons to climate change*", April 17, 2020.
[10] CBC News, "*Trudeau announces aid for struggling energy sector, including $1.7B to clean up orphan wells*", April 17, 2020.

Endowment funds:

Can terms be varied to address the unexpected?

Endowment funds provide a significant source of income for many universities and colleges. However, these funds are not immune to market forces like COVID-19 and the Great Lockdown, leaving many funds with overall returns less than target spending rates. While small to moderate return shortfalls are often covered using accumulated spending reserves, large shortfalls can present administrators with difficult decisions on whether to encroach on endowment fund capital to meet spending requirements. These decisions are often complicated by uncertainties around restrictions on encroachment, like those imposed by donors on donation.

Imagine a prestigious alumna donated $100,000 in 2015 to a university for the purpose of awarding one $4,000 scholarship annually to a graduate of a local high school. The alumna stipulated that the capital (i.e. initially the $100,000) be invested and that the income therefrom be used to award the scholarship. While this endowment fund has earned income, and scholarships have been successfully awarded since 2017, this fund now has less than $4,000 of available income due to market forces. Fiscal constraints mean that the university is unable to supplement this scholarship from other funds. Can the university encroach on the capital of this endowment to pay this year's $4,000 scholarship?

Fortunately, donors often specifically address shortfall situations when establishing endowment funds, or provide flexibility to allow an educational institution to make prudent choices in these circumstances. In this example, the alumna may have provided for a scholarship holiday until the fund recovers or given the university the flexibility to award a reduced scholarship. Unfortunately, in many cases, the donor's directions are far from clear.

ENCROACHING ON THE CAPITAL OF AN ENDOWMENT FUND: PRELIMINARY CONSIDERATIONS

When assessing whether it is permissible to encroach on the capital of an endowment fund, an important preliminary question is whether the donation establishing the endowment fund created a restricted charitable purpose trust or an unrestricted charitable purpose trust, or whether the donation was an outright gift, a conditional or determinable gift, a precatory trust (i.e. something akin to a donor-advised fund) or something else. The nature of the donation determines the educational institution's legal obligations. However, there are few bright-lines and limited guidance from case law demarcating these various arrangements. Outside of clear cases of outright gifts and absent legal analysis, an educational institution should be cautious in assessing whether to encroach on the capital of an endowment fund, as consequences may be significant. Legal obligations aside, any educational institution deviating or purporting to deviate from the intentions of a donor, whether legally-enforceable or not, is taking a reputational risk.[1]

ENCROACHING ON THE CAPITAL OF A RESTRICTED CHARITABLE PURPOSE TRUST

Many endowment funds are restricted charitable purpose trusts. Accordingly, I will focus the remainder of this article on the potential consequences of inappropriately encroaching on the capital of an endowment fund that is a restricted charitable purpose trust, and on possible methods of varying these trusts to permit encroachment.

Essentially, a restricted charitable purpose trust involves a donor making a donation to an educational institution in trust for use in furtherance of certain specific charitable purposes (like establishing a scholarship). The educational institution, as trustee, has many obligations, including a fiduciary duty to only use the endowment fund for the purposes outlined by the donor and to comply with the terms set out by the donor, which in the case of an endowment fund often involve limitations on the use of capital. If the educational institution breaches this fiduciary duty by, for example, inappropriately encroaching on capital, it can expose the educational institution and its governing individuals (e.g., the Board of Governors) to a lawsuit commenced by the Attorney General of the applicable province or by other interested parties. Case law suggests that courts[2] have wide latitude in crafting remedies in response to breaches of fiduciary duty,[3] meaning that an educational institution and its governing individuals could be, among other things, ordered to "repay" the capital or ordered to return the endowment fund to the donor. Again, any court-imposed sanctions would likely be accompanied by reputational damage.

So what can an educational institution do when it is unclear whether it can encroach on the capital of an endowment fund that is a restricted charitable purpose trust, but needs to do so in order to meet its financial obligations? While it is useful to consult with the donor (where possible) to clarify whether the donor intended to permit encroachment on capital, the donor's approval will not prevent an educational institution from being exposed to lawsuit, particularly where the terms of the donation otherwise conflict with this intention. In many cases, it will be necessary to seek direction from court. Courts have the ability to interpret and, in certain circumstances, vary the terms of a restricted charitable purpose trust.[4]

For example, in *Sprott Estate*, 2011 NSSC 327, the Supreme Court of Nova Scotia heard an application to vary the terms of a restricted charitable purpose trust created by a will. The testator made a donation to the University of Melbourne in trust for the purpose of awarding an academic fellowship each year. The University of Melbourne, as trustee, wished to vary the terms of the trust as set out in the will to, among other things, allow it to not award the fellowship in a particular year if there was not a suitable candidate. After considering the testator's intention that the fellowship be given to "outstanding scholars" as expressed in his will, the Court exercised its inherent jurisdiction to permit this variation, indicating that:

[1] For example, the lawsuit initiated by Professor Sylvia Nasar against Columbia University in 2013 alleging the misuse of certain endowed funds generated significant attention, despite the fact that this lawsuit appears to have been ultimately unsuccessful.
[2] Namely, courts of inherent jurisdiction like the Court of Queen's Bench in New Brunswick, the Supreme Court of Newfoundland and Labrador, the Supreme Court of Nova Scotia and the Supreme Court of Prince Edward Island.
[3] See, for example, *Victoria Order of Nurses for Canada v Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 at para 86.
[4] Aside from the exercise of a court's inherent jurisdiction, certain legislation in Atlantic Canada permits a court to vary certain trusts, including the *Variation of Trusts Act* (Nova Scotia), the *Variation of Trusts Act* (Prince Edward Island) and section 60 of the *Trustees Act* (New Brunswick).

> *It is probable that* [the testator] *would be distressed should his directions as to the awarding of the Fellowships result in a level of scholarship that was less than he clearly anticipated.*
>
> *I am convinced that this amendment would support the obvious intent central to the creation of the Fellowship and I direct that the Will be amended as suggested.*[5]

Variations to a restricted charitable purpose trust that do not reflect, or that run counter to, a donor's intentions are possible, albeit they may be more difficult to obtain than the aforementioned variation permitted in *Sprott Estate*. In particular, the *cy-près* doctrine permits courts to vary the terms of a restricted charitable purpose trust where the terms have become "impracticable or impossible to carry out".[6] In *Toronto Aged Men's and Women's Homes v Loyal True Blue and Orange Home*, 2003 CanLII 32923 (ONSC), the Ontario Superior Court of Justice heard an application to vary the terms of a restricted charitable purpose trust. The testatrix established a trust in her will for the purpose of donating income from the trust fund to various charities. The terms of the trust, as set out in the will, did not permit the trustee to encroach on capital.

This trust was itself a registered charity, and therefore, subject to the "disbursement quota" requirements imposed on charities by the *Income Tax Act* (Canada). Due to the investment strategy required by the will, which focused on protecting and growing the capital of the trust, the trust had insufficient income to meet its disbursement quota in the taxation years at issue. The trustee applied to the Court to, among other things, vary the terms of the trust to allow the trustee to adopt a "total return" investment policy and, where necessary, to encroach on capital to meet the trust's disbursement quota. If the trust was unable to meet its disbursement quota, it could continue to make donations to other charities as intended by the testatrix, but it risked the loss of charitable status and incurring resultant penalties from the Canada Revenue Agency. Despite this ability to continue to carry out the terms of the will, the Court applied the *cy-près* doctrine to grant the trustee's request to permit these variations, albeit with some modifications, noting that:

> *… "Impracticability" for* [the purpose of the *cy-près* doctrine] *does not mean "absolute impracticability" …*[7]

Although a court has the discretion to exercise its inherent jurisdiction or to apply the *cy-près* doctrine to vary the terms of an endowment fund that is a restricted charitable purpose trust, it is obviously preferable to avoid the costs and the potential uncertainties, delays and difficulties associated with seeking judicial input. Where possible, it is better to work with potential donors to ensure that an endowment fund will accomplish the donor's objectives, while providing sufficient flexibility to allow the educational institution to reasonably adapt to changing circumstances, like income shortfalls. >

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[5] *Ibid*. at paras 36-37.
[6] A. H. Oosterhoff, Robert Chambers & Mitchell McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. (Toronto: Carswell, 2014) at p 479.
[7] *Ibid*. at para 15.

Policy considerations in light of the "new normal" remote workplace

In response to widespread workplace disruption caused by the COVID-19 pandemic, organizations should look to proactively implement a business continuity strategy focusing on the remote workplace. For those organizations with existing policies geared towards remote work arrangements, it may be time to revisit these policies to ensure they can withstand future demands.

The general aim of a work-from-home ("WFH") policy is to clearly identify an organization's expectations with respect to the provision of services, employee conduct, and protection of the organization's property and confidential information. This is achieved through the collective incorporation of numerous subject matter policies; some examples include policies in respect of technology, cloud computing security, confidential information, privacy, expense reimbursement, and access to facilities.

TECHNOLOGICAL CONSIDERATIONS

Given the essential nature of technology in terms of effectively deploying a WFH arrangement, organizations need to ensure that their technology policies cover the following:

- that employees are equipped with, and have been sufficiently trained on, the use of devices and software necessary to carry out the functions of their employment;
- that the expectations regarding acceptable use of the devices are applicable to both the devices and any data stored on them; and
- that there is an approved list of secure apps that can be used for sharing information and working collaboratively with others (e.g., Microsoft teams, WebEx, and Zoom).

Further to outlining the acceptable use of devices, organizations may want to explore limiting or restricting personal use of devices that contain or have access to confidential or proprietary information (such as laptops or tablets). Limiting or restricting personal use of these devices may reduce the likelihood that an employee inadvertently falls victim to malicious cyber-attacks.

Effective use of technology is critical in maintaining operational continuity in a WFH scenario. In addition to the effective use of technology, consideration should be given to ensuring employees are sufficiently trained in information technology security, with knowledge of how to avoid and report malicious cyber-attacks by third parties. During the COVID-19 pandemic, many organizations have seen an increase in the amount of attempts to gain access to their networks through malicious phishing attacks targeting employees working remotely. This apparent increase further emphasizes the importance of technology policies providing a procedure for effective training on how to recognize and report potential malicious cyber-attacks.

PRIVACY AND THE TREATMENT OF CONFIDENTIAL OR PROPRIETARY INFORMATION

Transitioning to a WFH arrangement likely will result in a reduction in centralized control over document storage and access to confidential or proprietary information. Depending on each employee's need to access this type of information, there could be a significant amount of this information generated by printing, photocopying, and the saving of digital copies on employee devices that otherwise would have remained under the control and supervision of the organization. Through privacy and confidentiality policies, it is imperative that organizations establish rules and procedures for the ongoing protection of confidential or proprietary information.[1] In establishing these rules and procedures, consideration should be given to the following:

- secure storage requirements of both physical and digital materials, and, in particular, of records in the possession of employees that are confidential or proprietary in nature;
- whether limitations or restrictions should be placed on certain types of materials with respect to making physical or digital copies;
- password and encryption requirements on all devices that may house confidential or proprietary information of the organization; and
- reporting procedures in the event of a security breach with respect to confidential or proprietary information.

[1] For a more in-depth discussion on privacy and data breaches, and the resulting potential vicarious liability of organizations, see Sarah Dever Letson, "Vicarious liability for cyber and privacy-related claims" in ***Discovery*** (Fall 2019: Issue 5, beginning at page 13).

EXPENSE REIMBURSEMENT

Transitioning to a WFH arrangement has the potential to raise a number of questions by employees regarding what expenses, in relation to their employment, that otherwise would not be incurred, may be subject to reimbursement by the organization.

It is important that organizations give consideration to the various ongoing expenses such as internet or mobile phone bills, or one-off purchases of necessary equipment or software that may be incurred by employees to effectively work from home.

Clear policy language prepared in consideration of these expenses may help to strike the appropriate balance between ensuring that employees have access to the necessary tools to thrive while working from home, and protecting the organization's interests in ensuring that allowable expense claims are reasonably limited.

ACCESS TO FACILITIES

Depending upon the circumstances necessitating WFH arrangements, access to the organization's facilities may be limited or restricted, as recently seen in the COVID-19 pandemic and subsequent government state of emergency declarations. Organizations should be prepared to take the necessary steps to comply with government-mandated access limitations, including the establishment of policies to protect the health and safety of employees if attending facilities becomes necessary.

CONCLUSION

Proactive implementation (or revision) of relevant policies with respect to transitioning to the remote workplace is a crucial step in an organization's effort to mitigate against any external factors that may otherwise be disruptive to the organization's operations. It should be noted that a plan is only as good as its implementation. In addition to codifying points of policy and procedures, in order to be successful, appropriate investment and consistent application is key.

In drafting or amending policies, organizations must also be cognizant of any government directives, or other legislative enactments/amendments in respect of transitioning to or from the remote workplace.

Policies should be clearly written using easy to understand language and be readily available to all members of the organization in both electronic and paper format. Readers are encouraged to consult our *education group* for assistance with questions related to drafting or reviewing existing policies. >

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Flexibility for international students due to COVID-19

Educational institutions in Canada are facing various disruptions and repercussions due to the COVID-19 pandemic. The challenging move from in-person teaching to a remote, online environment, and concerns about impacts on enrolment (and therefore on revenue) are only a few examples.

Similarly, students have also had to adapt, and a number of questions have arisen in relation to international students in particular. The Government of Canada introduced a number of measures to provide flexibility for current and prospective international students, including the following:

1. **Study permit applications:** COVID-19 has created barriers to the study permit application process, such as by making it more difficult for applicants to provide all necessary information and documentation required to process applications. Immigration, Refugees and Citizenship Canada ("IRCC") has indicated it will not refuse applications that are incomplete due to COVID-19, so long as a suitable explanation is provided. Additionally, IRCC will provide extensions to certain deadlines, including, for example, to the requirement to provide biometrics, as collection points are impacted by the pandemic.
2. **Travel exemptions:** Those who hold valid study permits or an official approval letter that was issued on or before March 18, 2020 are exempt from current travel restrictions when travelling to Canada from overseas. This is helpful for international students who may have been abroad only temporarily for vacation, for example. Those who had study permits approved after March 18, 2020 will not fall under this travel exemption and therefore may be temporarily stuck outside Canada. IRCC has indicated these individuals will receive push notifications with up-to-date instructions on when they can travel to Canada.
3. **PGWP Eligibility:** The Post-Graduation Work Permit Program provides students who have graduated from certain Canadian educational institutions with a route to obtain an open work permit, known as a Post-Graduation Work Permit ("PGWP"). For students whose in-class courses were moved online due to COVID-19, IRCC has confirmed their eligibility for a PGWP will not be affected. This includes both students already holding a study permit and those approved for a study permit for a program starting in May or June, but who are unable to travel to Canada on time due to travel restrictions. Such international students can begin their courses while outside Canada using the online format and can complete up to 50% of their program while outside Canada if they are not able to travel to Canada earlier.

Available measures may change, and new measures may be introduced, depending on the progression of the COVID-19 pandemic.

Our *immigration law team* would be pleased to provide up-to-date advice on COVID-19 issues impacting educational institutions and international students alike. >

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A shifting landscape:

Managing construction, maintenance and infrastructure projects

The impact of COVID-19 is being felt across every industry. Notwithstanding the current situation, maintenance of infrastructure and investment in capital projects will continue; however, it is unlikely to be business as usual for some time to come. Infrastructure owners and service providers will need to work collaboratively in the coming months to make adjustments for their projects.

In most jurisdictions, construction and maintenance have been deemed an essential service and as such are permitted to continue on a limited basis. In most of the Atlantic Provinces, although construction projects are permitted to continue, the industry has been directed to reduce activity to critical functions and to follow COVID-19 health and safety recommendations, including physical distancing requirements.

In contrast, Ontario has particularized a list of essential projects that may continue. The list includes projects in the health care sector, critical industries, and some residential projects. Ontario took the extraordinary step of suspending all time periods prescribed by legislation including limitation periods, time for registry of construction or builders' liens, and release of statutory holdbacks. Although these measures are now being loosened in Ontario, New Brunswick recently took the step of retroactively suspending limitation periods to March 19.

As a result of the mandated restrictions in each of the provinces, it is likely that many infrastructure and maintenance projects will suffer significant delays, and that start dates for new projects will be postponed, in what is typically the beginning of the industry's busy period.

CURRENT ISSUES

Contracts often address the possibility of events that are outside the control of the parties, typically through what is known as a *force majeure* clause. These clauses tend to list specific events that apply. Due to the unprecedented nature of this global pandemic, however, it is unlikely that a contract for services will have specifically contemplated the possibility of these events. Parties involved in ongoing or recently suspended projects should carefully review their contracts to consider what the appropriate options are in the circumstances.

Various projects are likely now, and will continue to, experience unusual challenges in the near future. Necessary maintenance of facilities will become troublesome as a result of anticipated issues with labour challenges, including higher than usual absenteeism due to isolation and government-prescribed quarantines. As the manufacturing industry shifts its focus to supplying necessary materials to front line workers, it is also anticipated that there will be difficulties with receiving materials due to late or cancelled deliveries.

These unparalleled circumstances mean it is not clear how additional time and costs will be dealt with between contracting parties. In any event, the best approach is to proactively manage and document all related issues with an ongoing or suspended project.

If a project has been suspended there are likely to be certain direct costs that will need to be considered, such as costs to secure projects, store materials and demobilize workers. There is potential for an increased risk of vandalism due to abandoned projects, so appropriate steps should be taken for security, signage and protection from the elements.

When COVID-19 restrictions eventually begin to be lifted, the landscape will have changed significantly. As a result, there will be increased costs which owners will need to manage, including: costs of remobilization, adapting to the new physical distancing requirements and resequencing of work, escalation of labour and material costs, and the possible scarce availability of materials due to shifts in the manufacturing and trucking industries. The financial health of many contractors and suppliers will have been damaged, and some contracting parties will not be able to complete projects or continue operating at all.

FORWARD LOOKING MEASURES

The new normal for the foreseeable future will mean that approaches to construction, maintenance and procurement will change. Work on essential projects will continue and infrastructure will need to be maintained, but processes will be much different going forward. In addition, once restrictions are lifted it is likely that stimulus spending will result in an increased demand for services in the short term.

Although there is a lull in services now, owners should consider what forward-looking steps they can take for their projects. For example, as to procurement of future services, standard tender documents should be reviewed and amended to consider procurement exclusively by electronic tendering. There are a variety of available subscription-based services that can facilitate procurement without the need for in-person or physical delivery of bids.

In the case of university or college operations, there is the additional concern of how students and staff need to be protected from unnecessary interactions. Large in-person meetings to develop and manage new or existing projects are likely a thing of the past for the foreseeable future. As a result, administrators should consider alternative tools for scheduling, the review of invoicing, and other services or project documentation.

Prior to the COVID-19 downturn, the construction industry across the country was moving towards a legislative push to adopt adjudication and prompt payment measures in an attempt to address some of the systemic dispute and payment issues in the industry. The adjudication model has been presented as an interim binding dispute resolution process to keep projects moving. Prompt payment has been presented in parallel with adjudication to mandate time for payment on construction and infrastructure projects.

Nova Scotia and the Government of Canada have already taken steps to introduce legislation which contemplates prompt payment and adjudication; however, both have elected to leave much of the process to regulations which are not yet in force. Ontario was the first Canadian jurisdiction to bring into law prompt payment and adjudication measures for the construction industry. Those changes came into force on October 1, 2019, for contracts entered into after that date. It remains to be seen how these measures may help the construction industry with early dispute resolution and issues with respect to cash flow on projects.

Other jurisdictions could see a renewed clamour for prompt payment and adjudication initiatives, given the likely cash flow problems that many in the industry will be working through, even after the current restrictions are lifted.

HOW STEWART MCKELVEY CAN HELP

Our *construction law team* can assist universities and colleges with reviewing and drafting contracts for construction, procurement, maintenance and supply of services to best manage the risk in these uncertain times. In the event of a dispute, our *dispute resolution team* has extensive experience in dealing with all forms of dispute resolution across the Atlantic region and beyond. >

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