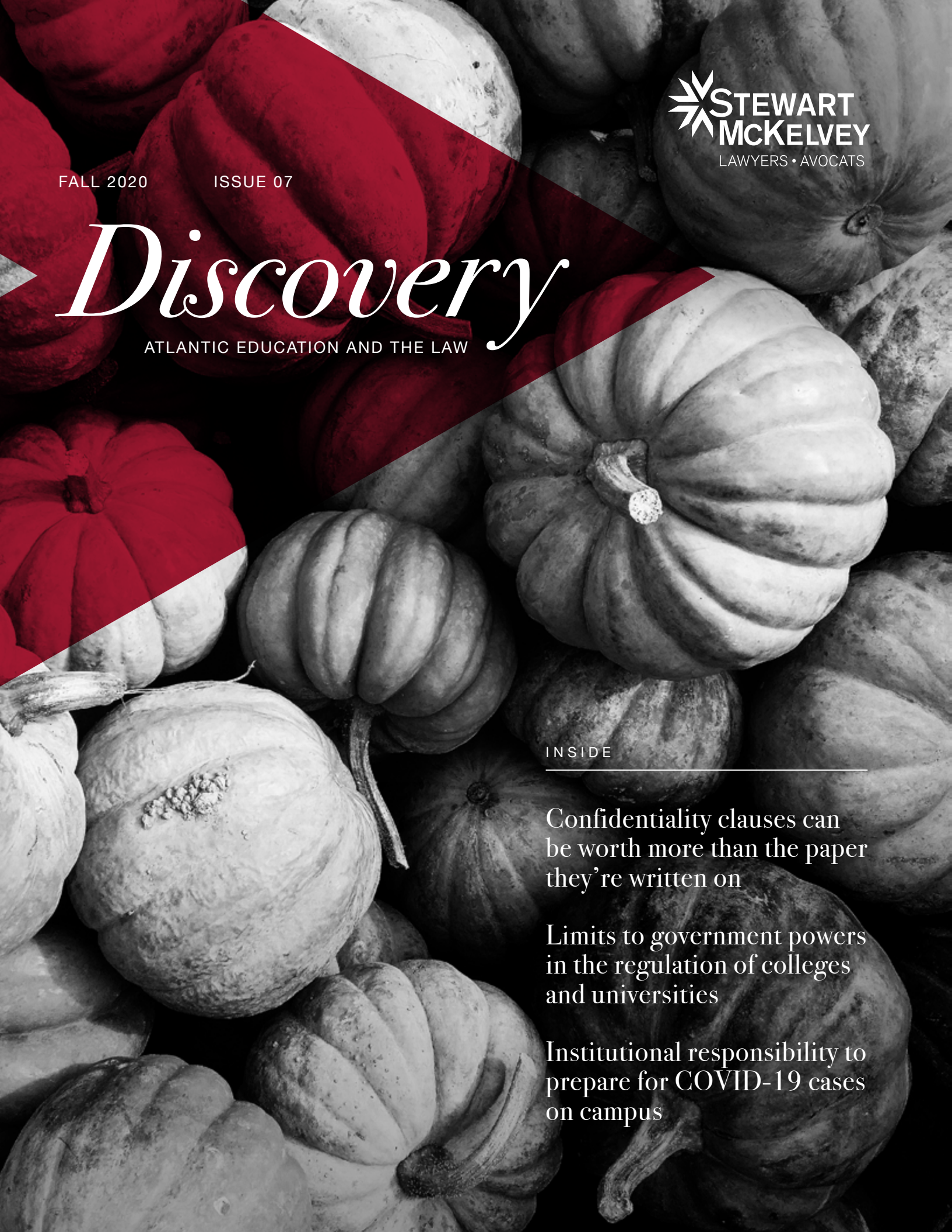

STEWART McKELVEY
LAWYERS • AVOCATS

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# Discovery

ATLANTIC EDUCATION AND THE LAW

INSIDE

In a year where time has seemed to both stand still and fly by, it's hard to believe that fall is here again. While 'back to school' may look a little different this year, Stewart McKelvey is ready to help with the issues academic institutions face in today's environment.

This seventh edition of Discovery Magazine addresses a range of topics relevant to colleges and universities in the region. While we update you on ongoing COVID-19 related issues including campus policies and impacts to international students, we are also turning your attention to confidentiality clauses, government powers and union advocacy for temporary faculty.

As we aim to always provide you with a wide range of topics for each issue, please feel free to contact us with subjects you would like this publication to cover in the future.

We hope you enjoy this issue, and wish you continued health and happiness.

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# *Contents*


# *Confidentiality clauses can be worth more than the paper they're written on*

Confidentiality regarding the terms of the settlement of a legal dispute is a key consideration for many parties. Most accept that the fact that a settlement has been reached will likely become known, yet still do not want the details of the settlement to be known. Some parties want a confidential settlement to discourage potential claims from other parties in the future. Others may also want to avoid the perception of liability or wrongdoing that could be created by disclosure of the details of the settlement, including the amounts being paid, finding insufficient comfort in the obligatory "no admission of liability clause".

Thousands of legal disputes are resolved without a hearing. It is not known with certainty how many cases are settled as opposed to how many are adjudicated by a tribunal, but various estimates indicate that at least 90% of legal disputes are resolved privately by the parties. It is also safe to assume that the majority of settlement agreements contain some form of a confidentiality clause. But how effective are they?

There are a number of reported cases regarding the validity of confidentiality clauses and the available remedies in the event of a breach, including a recent arbitration case in the world of academia.

One better known case on the enforceability of confidentiality clauses is *Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372, a 2014 decision by the Ontario Superior Court. Ms. Wong had been a journalist at The Globe and Mail for over 20 years. She was directed to return to work from a lengthy medical leave, The Globe and Mail disputing her assertions that she remained medically disabled from working. Wong's employment was terminated and she, through her union, grieved.

A settlement was reached following mediation and its terms put in writing in a settlement agreement. It provided for the payment of significant sums to be paid to Wong for unpaid sick leave in addition to two years of salary.

It was known that Wong was working on a book regarding her experiences of dealing with depression in the workplace. The settlement agreement therefore included confidentiality and non-disparagement provisions, and indicated that the arbitrator who had been mandated to hear the grievance would retain authority to consider the matter in the event of a need to determine whether Wong was in breach of the provisions. If the arbitrator was to rule that a breach had occurred, the agreement stated that Wong would have to repay the lump sum received for the two years of salary.

Wong completed and published her book and The Globe and Mail immediately brought an application for the arbitrator to determine if a number of sections in the book violated the confidentiality provisions. Following a hearing, the arbitrator concluded that some of the sections in Wong's book did breach the settlement agreement and, accordingly, ordered Wong to repay the amount received representing two years of salary.

On judicial review, the Ontario Superior Court upheld the arbitrator's decision and rejected Wong's argument that she understood that she was only prohibited from disclosing the actual amounts paid under the settlement and could therefore disclose all other terms. The Court ruled that Wong's subjective understanding of what the agreement meant was not admissible in light of a comprehensive settlement, negotiated over a long period of time, drafted in clear, unambiguous and objective language. The Court also rejected Wong's argument that the repayment provision should nonetheless be set aside as an "oppressively punitive forfeiture provision". The Court highlighted that the settlement agreement did not require Wong to repay all of the money she had received, as she would keep the amount received for unpaid sick leave. The Court found that the repayment provision was reasonable to enforce the requirement that Wong maintain confidentiality. While in the end a breach occurred, the provision, when drafted, reasonably offered the employer greater insurance that Wong would honour her obligation of confidentiality although it could not guarantee it.

The Court's decision in this case highlights key elements that favour the enforceability of confidentiality clauses in settlement agreements, clear and unambiguous language being one. The decision also suggests that setting out the consequences for a breach of the confidentiality clause serves to highlight the relative importance that maintaining confidentiality has to the party who sought that term. However, Wong's failed argument of an oppressive penalty should not be viewed as impossible to make out in all cases. The consequences for breach should be serious, yet may in some circumstances cross a line into punitive territory.

The absence of specific consequences in the event a confidentiality clause is breached is not fatal to its enforceability, but makes available remedies subject to the discretion of the arbitrator or the court. For example, *Tremblay v. 1168531 Ontario Inc.*, 2012 HRTO 1939 (CanLII), the Human Rights Tribunal of Ontario reduced the amount a complainant was to receive under a settlement agreement by $1,000 after finding that the confidentiality provision had been breached via her Facebook posts. While the tribunal recognized that a breach of confidentiality is impossible to fully remedy, since it is impossible to reinstate confidentiality once breached, it declined the employer's request that it not be required to pay the full amount of the settlement. The tribunal maintained as much confidentiality as possible by not disclosing the original amount of settlement in its decision. Therefore, it is difficult to assess whether the reduction of the amount was, in those circumstances, a severe consequence.

The recent case of *Acadia University v. Acadia University Faculty Association*, 2019 CanLII 47957 (ON LA) shows that tribunals may exercise their discretion to impose very severe consequences for breaches of confidentiality terms in a settlement agreement even if the agreement is silent on consequences for breaches. In this case, the Acadia University Faculty Association ("Association") filed grievances contesting Acadia University's ("University") termination of a tenured professor. The grievances were referred to arbitration and dates were scheduled for a hearing. However, a voluntary mediation prior to the hearing resulted in a full and final settlement of the dispute. The parties executed Minutes of Settlement ("Minutes") confirming the negotiated terms of settlement, including the following language:

- The grievance was resolved "without any admission of liability or culpability by any of the parties";

- The parties agreed "to keep the terms of these Minutes strictly confidential except as required by law or to receive legal or financial advice"; and

- "If asked, the parties will indicate that the matters in dispute proceeded to mediation and were resolved, and they will confine their remarks to this statement. Stated somewhat differently, it is an absolute condition of these Minutes that no terms of these Minutes will be publicly disclosed".

Within days of the settlement, the professor took to Twitter and tweeted that he was a "vindicated former professor". One of his followers tweeted back congratulating the professor and expressing his hope that he had received a "nice sum", to which the professor responded that all he would say was that he had "left with a big grin on [his] face."

A few days later, the professor tweeted again that he had been vindicated and had left the University on his terms and not those of the University or the Association. His tweet referenced that he had been required to sign a Non-Disclosure Agreement "by law" but that it was not for his protection.

Upon becoming aware of these tweets, the Association's legal counsel contacted the professor and advised him to immediately take them down. The professor did not follow the advice.

The University and the Association then convened a hearing before the arbitrator. Prior to the hearing, the matter proceeded to an interim conference call hearing and the arbitrator issued a direction that the professor immediately delete from his Twitter account the above discussed tweets and to strictly comply with confidentiality terms.

Following the issue of the direction, the professor further tweeted accusing the University of attacking his "rights to academic freedom & dissent" and alleging that he had been dismissed without cause for exercising those rights. Other tweets made reference to "severance pay". While the professor apparently deleted some of his prior tweets, his tweet referencing "severance pay" remained and he also wrote a letter to the University's president threatening to release the Minutes to the media unless his conditions were met.

In his written decision following the hearing, the arbitrator concluded that the tweets not only breached the confidentiality provisions in the Minutes, but were also "wildly inaccurate" and "untrue". The arbitrator concluded that the Minutes "were categorical that there was no admission of liability or culpability by any of the parties" and that no basis existed from the Minutes to claim vindication, or that the termination resulted from the exercise of academic freedom and was without cause or that the professor was owed severance pay. The arbitrator pointed out that "none of these issues were ever determined one way or the other" but that what was clear was that the parties had "agreed to say nothing about the contents of the Minutes other than that the matters in dispute were resolved" and had promised to limit their remarks about the matter to that statement.

The arbitrator further ruled that, in light of the multiple and repeated breaches of the confidentiality provisions, the University was no longer required to honour its payment provisions to the professor, thereby giving teeth to confidentiality clauses that did not specify consequences for breaches. The arbitrator's decision should prove useful in arguing for the non-payment of all settlement funds as an appropriate remedy, for breach of confidentiality provisions explicitly recognizing that "settlements in labour law are sacrosanct".

The cases discussed above reaffirm the importance of confidentiality in the settlement of legal disputes and the willingness of tribunals and courts to enforce those obligations. Of course, circumstances may be such that a breach has occurred but the aggrieved party lacks sufficient evidence to prove the breach and obtain redress. Not all parties to a confidentiality agreement publish books or take to social media.

Nonetheless, confidentiality agreements are crucial in most settlements. To strengthen their effectiveness, parties should consider including a provision setting out the consequences for a breach that will serve as a reasonable deterrent and also a clear enforcement mechanism.

Having the party consenting to a confidentiality agreement obtain independent legal advice (or advice from his or her union) also serves to demonstrate that the party understands the terms of the settlement, including the importance of maintaining confidentiality.

Finally, consideration should be given to specifying what might be said publicly about a legal dispute and its resolution, especially if the dispute has already received some public attention. For example, the parties might agree that they are at liberty to say that the parties have found a mutually satisfactory resolution, which may alleviate the feeling of a party being completely muzzled, while refraining from disclosing any information that would be construed as an acknowledgment of liability or wrongdoing. >

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# *The precariat, bargaining and union advocacy*

Universities continue to work creatively to meet market demands despite consistent declines in public funding. Consequently, untenured term appointments and sessional lecturers have come to play an integral role in academia. Accordingly, universities should anticipate more grievances related to temporary faculty. However, university administrators should remain vigilant. Faculty unions are being more creative in their attempts to use the grievance process to make gains that they failed to obtain at the bargaining table. A recent decision from an arbitration between Memorial University of Newfoundland ("Memorial") and the Memorial University of Newfoundland Faculty Association ("Faculty Association") illustrates how universities can use bargaining history and past practices to overcome this type of union advocacy.

## THE PRECARIAT

The academic "precariat" are faculty members who work on a temporary contractual basis. Precariat faculty hold titles which vary by institution. Common designations include "sessional", "adjunct", or "limited-term appointments."[1] Recent studies indicate that over half of all university courses are now taught by these individuals.[2]

The precariat are the subject of increasing advocacy by unions and membership associations.[3] Advocates describe the precariat as "highly qualified academics who are underpaid, overworked, and under-resourced, and who feel excluded [in] Canadian post-secondary institutions."[4] The Canadian Association of University Teachers ("CAUT") argues that the increase of precariat workers is the result of shifting priorities of universities rather than fiscal restraints. For example, the CAUT points to greater administrative and development budgets which outstrip increases in academic salary spending.[5]

In response, universities emphasize the need to maintain flexibility. Market demands are not easily met by full-time faculty alone. It is often necessary to use short-term contracts to account for fluctuations in course offerings and enrolment. Moreover, full-time faculty regularly take temporary leaves of absence for a multitude of reasons (and which

[1] Karen Foster, *Precarious U: Contract Faculty in Nova Scotia Universities* (Halifax: Association of Nova Scotia University Teachers, 2016) at 3.
[2] Foster, above.
[3] See, for example, Karen Foster & Louise Birdsell Bauer, *Out of the Shadows: Experiences of Contract Academic Staff* (Ottawa: Canadian Association of University Teachers, 2018).
[4] Foster and Bauer, above at 4.
[5] Foster and Bauer, above at 8.

their unions have bargained for the tenured faculty) including parenting, sabbaticals, and administrative duties. Short-term contracts are an effective tool to cover those gaps.[6] Term appointments allow universities to remain competitive while ensuring that full-time faculty are able to fulfil their non-teaching duties, and avail of generous leaves.

### *MUN V. MUNFA*

The dispute in *Memorial University of Newfoundland v. Memorial University of Newfoundland Faculty Association (2020),* 2020 CanLII 45582 (ON LA) centred on the length of term teaching contracts. Typically, individuals selected for term appointments are contracted in the spring to start September 1st until the end of the academic year on April 30th. Contracts are based on 15 weeks of work – 13 weeks for lectures and 2 weeks for grading final examinations per semester. The aggrieved members felt that 15 weeks did not reflect the amount of work required to fulfil the position. Specifically, they felt that the duration of the contract did not account for the time needed to prepare for the courses they were hired to teach prior to their starting dates.

The Faculty Association's core argument was that Memorial violated the management rights clause of the collective agreement. A management rights clause is a standard provision which typically states that an employer maintains the right to unilaterally exercise powers not within the scope of the collective agreement. The management rights clause in this instance stated that any exercise of management rights power had to be performed in a manner that was fair, equitable, and reasonable. Therefore, the Faculty Association argued that Memorial's practice of assigning 15-week contracts to term appointees failed to meet that standard.

The Faculty Association also argued that the work done by term appointees prior to the start of the semester unjustly enriched Memorial. Unjust enrichment is a legal concept which allows for compensation when one party receives some benefit at the expense of another party without legal justification.

Memorial responded with three arguments. First, Memorial contended that it had acted within its contractual rights because the collective agreement provided a complete framework regarding the duties and responsibilities of term appointees. "Teaching" was a broadly defined term. The university stressed that the collective agreement as a whole did not require unpaid work, and term appointees are contracted to teach particular courses, not on an hourly basis.

Second, Memorial pointed out that the remedy being sought would extend the term contract period and require amendments to the collective agreement. A remedy of this nature is typically outside the scope of "rights" arbitrations which are limited to providing interpretations of a contract's provisions. The resolution of a bargaining dispute would require an "interest" arbitration, which is a separate and distinct process usually reserved for relatively rare situations where an arbitrator is asked to adjudicate the terms of a collective agreement between the parties. In other words, Memorial argued that the Union was attempting to get through arbitration what it could not achieve at the bargaining table.

Lastly, Memorial asserted that the Faculty Association was estopped from grieving the longstanding practices related to term appointed contracts. Estoppel is a legal principle which holds one party to a past promise after a second party has relied on that promise to their detriment. Evidence was led to demonstrate that hundreds of term appointments had been made in the decade prior, yet the Faculty Association had never before grieved the length of the contracts. Moreover, the Faculty Association had unsuccessfully tried to negotiate longer contracts for term-appointed faculty in two prior bargaining sessions.

### THE ARBITRATOR'S DECISION

The arbitrator held that the Faculty Association could not demonstrate unjust enrichment because the collective agreement read as a whole demonstrated that the benefits Memorial received from pre-semester preparation were justified. Teaching duties as defined in the agreement indicated that it was reasonable for Memorial to expect adequate preparation, especially since term appointees were paid for 15 weeks to teach a semester that was only 13 weeks long. Evidently, preparation was contemplated by the compensation scheme.

Further, the decision stated that fairness in the labour context is informed by evidence of past negotiations. Several rounds of collective bargaining had passed in which the parties agreed to the 15 week contracts, indicating that both sides considered the terms to be fair. Although evidence was led by the Faculty Association to demonstrate that some term appointees start and end on different dates, the arbitrator held that those instances were generally distinguishable because they applied in unique and unusual circumstances and were often undertaken to accommodate the appointee. Therefore, it did not amount to a common practice of the university.

The arbitrator also determined that the grievance was mostly barred by estoppel. The evidence led by Memorial regarding past negotiations demonstrated a "longstanding and fairly consistent pattern of term appointments dating back as far as 2011" which spanned at least three collective agreements without being grieved. Further, the Faculty Association was estopped because their past bargaining conduct had led Memorial to believe that it was compliant with the terms of the collective agreement. There had been no mention of a compliance issue when the Faculty Association had previously bargained for longer term-appointed contracts. In short, the objective of the grievance was "precisely what [the Faculty Association] sought in collective bargaining." Allowing the Faculty Association to succeed would imply that parties can forfeit goals at the bargaining table only to pursue them at a later date under the guise of a grievance.

Ultimately, the grievance was allowed in part. The arbitrator ordered that Memorial must ensure its term appointees have adequate access to university resources prior to their start date in order to prepare and that the marking of a deferred examination past the contract's expiry date must be compensated (there had been some mixed evidence on these two points). However, the crux of the grievance – that term appointed contracts should be extended – was unsuccessful.

### CONCLUSION

This case is an example of the sort of advocacy that institutions may see on behalf of the precariat. There will likely be more creative grievances filed seeking additional compensation, benefits, or job security for temporary contractual staff.

Moreover, this case demonstrates that you bargain what you bargain. When a party walks away from the table with a ratified agreement, it serves as an indication to the other party that they consider the terms to be fair and reasonable. Therefore, it is important to ensure your organization has diligent recordkeeping during the bargaining process. This information may prove invaluable should your institution face these sorts of grievances. >

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[6] Karen Foster & Louise Birdsell Bauer, *Out of the Shadows: Experiences of Contract Academic Staff* (Ottawa: Canadian Association of University Teachers, 2018) at 7.

# *Limits to government powers in the regulation of colleges and universities*

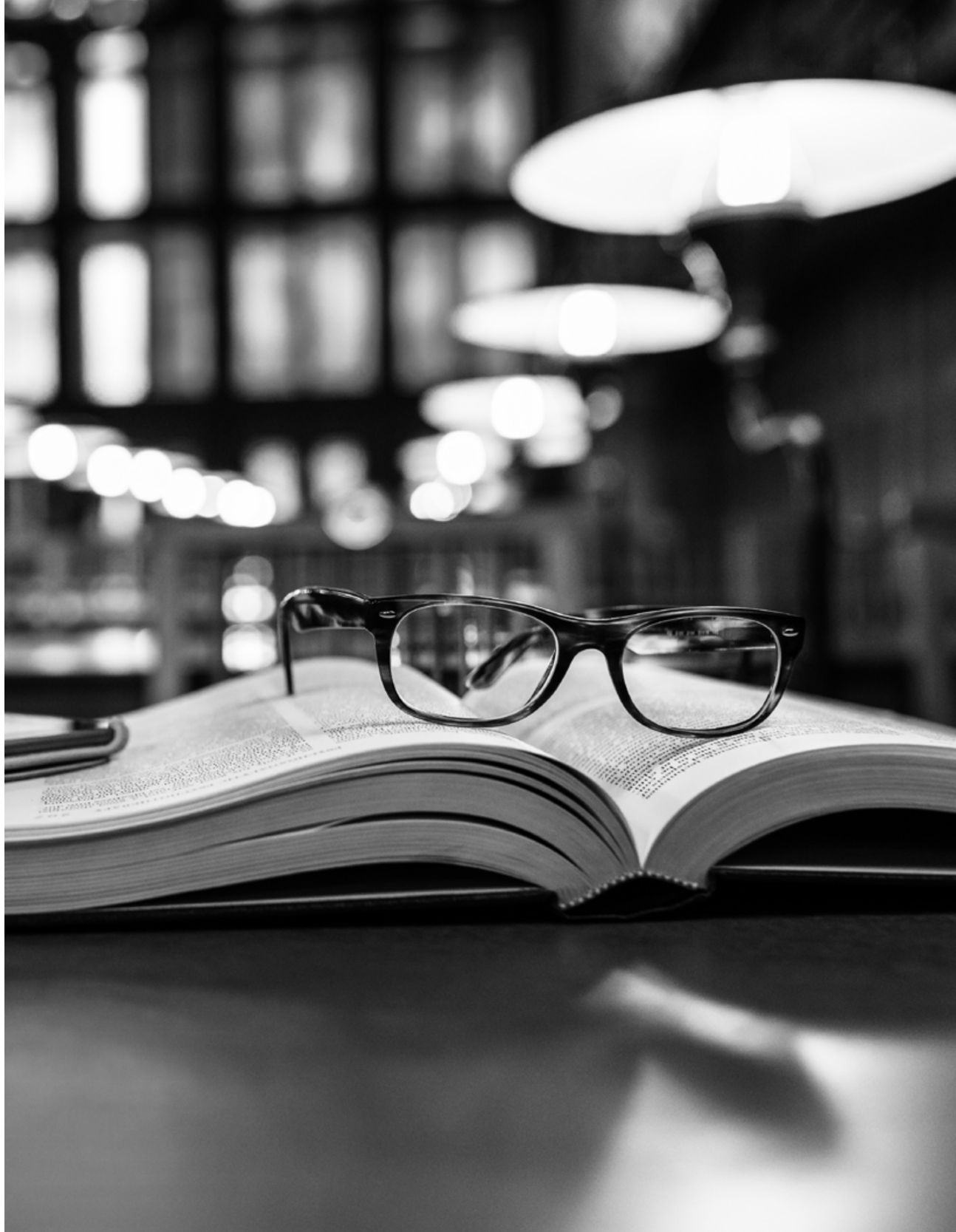
In December 2018, the Ontario Cabinet approved a direction for the Minister of Training, Colleges and Universities ("Minister") to implement three new initiatives purportedly aimed at improving affordability and access to post-secondary education. One of these initiatives, known as the "Student Choice Initiative" ("SCI"), required colleges and universities to give students the choice to opt out of certain fees Ontario had deemed "non-essential". If a college or university failed to comply, the SCI gave the Minister the option to reduce provincial funding to the institution.

Less than a year later, in November 2019, the Ontario Divisional Court quashed the SCI, finding that it was beyond the scope of Ontario's executive authority.[1] The Divisional Court's decision affirmed the autonomy of universities and confirmed the statutory limits on the Minister's authority over colleges. Ontario was granted leave to appeal this decision.[2]

Now, the highest court in Ontario will have a chance to weigh in on the limits of that provincial government's authority to issue mandatory policy directives to post-secondary institutions and the limits on the justiciability of the government's decision-making powers.

[1] *Canadian Federation of Students v. Ontario*, 2019 ONSC 6658 [*CFS*].
[2] *The Canadian Federation of Students et al v Ontario* (M51125), March 20, 2020 (Ont CA).





## THE REGULATION OF COLLEGES AND UNIVERSITIES IN ONTARIO

In Ontario, like most provinces, universities are incorporated by unique private statutes. The Divisional Court held that the purpose of incorporating universities under private statutes is to protect the university from political interference and ensure the university is an autonomous, self-governing entity.[3] While universities receive government funding, they are not part of government. Rather, they are private, not-for-profit corporations that are granted the authority to govern their affairs through their unique statutes.[4] Generally, this authority includes the authority to collect tuition fees and to, "collect other fees and charges, as approved by the Board, on behalf of any entity, organization or element of the University."[5]

Colleges in Ontario, on the other hand, are governed by the *Ontario Colleges of Applied Arts and Technology Act*[6] *("OCAAT")*, which provides the Minister with the power to "issue policy directives in relation to the manner in which colleges carry out their objects or conduct their affairs."[7] This power conferred on the Minister differentiates the regulation of colleges from that of universities. However, this authority is not without limits – the Minister must exercise his or her authority in accordance with the rest of the *OCAAT*. Of particular importance in this case is section 7 of the *OCAAT*, which provides:

*Nothing in this Act restricts a student governing body of a college elected by the students of the college from carrying out its normal activities and no college shall prevent a student governing body from doing so.*

It is the later part of this section, regarding the "normal activities" of a student governing body, that was challenged in this case.

## THE IMPUGNED DIRECTIVES

As stated above, the SCI was introduced in December 2018 and was set to take effect in the 2019-20 academic year. The SCI was part of a three-part initiative, the stated purpose of which was to "improve affordability and access to publicly-assisted universities and colleges."[8]

The SCI introduced a new condition with respect to ancillary fees (non-tuition related fees) charged to students. The SCI required ancillary fees to be categorized as either "essential" or "non-essential"; essential fees would be mandatory while non-essential fees would be optional (i.e. students must be given a choice to opt-out). If a college or university did not comply with the directives, the SCI gave the Minister the authority to withhold funding from the institution. Of particular importance to the application for judicial review was that student government fees were among those fees that were deemed non-essential. No evidence was filed with respect to how Ontario determined which fees were deemed essential.[9]

## THE APPLICATION FOR JUDICIAL REVIEW

The applicants, two student associations, sought judicial review to quash the impugned directives on three bases:

- the directives were inconsistent with statutory schemes regulating colleges and universities;
- the directives were made for an improper purpose and in bad faith; and
- the Minister's failure to consult the student associations prior to issuing the directives breached a duty of procedural fairness.

Ontario defended the application for judicial review on two bases: (1) the issue was not reviewable by a court and (2) the SCI was within its power to enact. The Divisional Court rejected both arguments.

### (1) Justiciability

Ontario first argued that the application was not justiciable (i.e. within the authority of the Court to rule on) because the impugned directives reflected a "core policy choice" and were therefore not subject to review, and that the impugned directives were exercises of the Crown's prerogative spending power. The Divisional Court disagreed and held that neither argument justifies exempting Cabinet directives from judicial review for legality.

The Court affirmed the principle that "core policy decisions", i.e. decisions as to a course of action that are based on public policy considerations, are not justiciable if they are neither irrational nor taken in bad faith.[10] However, if the subject matter of the decision has a sufficient legal component, judicial intervention can be sought.[11] In this case, the Court held that the subject matter was whether the SCI conflicts with the statutory schemes governing the regulation of colleges, universities and student associations – a subject matter that has a "sufficient legal component to warrant the intervention of the judicial branch."[12]

Ontario also argued that the impugned directives involved the government's exercise of a prerogative power. The Court agreed that prerogative spending power does exist and that it includes the power to decide how it will spend public funds and includes the power to impose conditions on the use of such funds. The Court found, however, that whether the SCI fell within the limits of Ontario's prerogative spending power was a justiciable issue.

While the Court found a few flaws in Ontario's arguments, the Court ultimately found that the SCI was not a legitimate use of Ontario's prerogative spending power because it was contrary to the legislation governing colleges and universities, as discussed further below, rendering the SCI an impermissible use of this power.

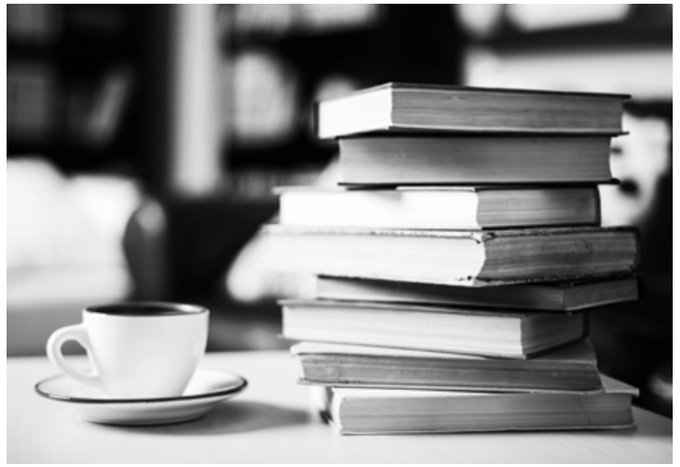
### (2) Legality

The Court found that directives in the SCI aimed at colleges were beyond the legislative authority of the Minister because of section 7 of the *OCAAT*, which provides:

*Nothing in this Act restricts a student governing body of a college elected by the students of the college from carrying out its normal activities and no college shall prevent a student governing body from doing so.*

The Court held that section 7 operates as a restriction on the Minister's power under section 4 of the *OCAAT* to issue directives. As the SCI required colleges to enforce the directives, the effect of the SCI was to limit the normal activities of a student governing body thus rendering the SCI impermissible under the *OCAAT* and beyond the scope of the Minister's legislative authority.

With respect to the aspect of the SCI aimed at universities, the Court found that the impugned directives were an impermissible incursion into the autonomy of universities. While the Court noted that there were no statutory provisions preventing the Minister from issuing the directives to universities, there also was no statutory provision giving the Minister such authority. The Court found that universities "occupy the field" of university governance, including student activities, and that requiring universities to allow students to opt out of certain fees is inconsistent with universities' autonomous governance.



[3] *CFS* at para 40.
[4] *CFS* at para 43-33.
[5] *CFS* at para 43.
[6] 2002, SO 2002, c 8 Sch F [OCAAT].
[7] *OCAAT*, s. 4(1).
[8] *CFS* at para 65.
[9] *CFS* at para 67.
[10] *CFS* at paras 77-78.
[11] *CFS* at para 80.
[12] *CFS* at para 81.

In reaching this conclusion, the Court relied on the Supreme Court of Canada's decision in *McKinney v University of Guelph*, [1990] 3 SCR 229 ["*McKinney*"], which emphasized the autonomy of universities. In particular, the Court relied on the Supreme Court's ruling that "the government thus has no legal power to control the universities even if it wished to do so."[13] The Court found that the SCI had the effect of interfering with how universities control and associate with student governments, an effect inconsistent with the autonomy of universities.

## KEY TAKEAWAYS

This decision affirms university autonomy and the limits on government authority to regulate the affairs of post-secondary institutions. The Court's reasoning should be instructive in dealing with colleges and universities across Canada.

Nevertheless, post-secondary institutions should carefully assess their individual statutes to determine whether they contain provisions that could affect a government's ability to issue directives similar to the SCI. >

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[13] *McKinney*, at para 41.



# Spotlight

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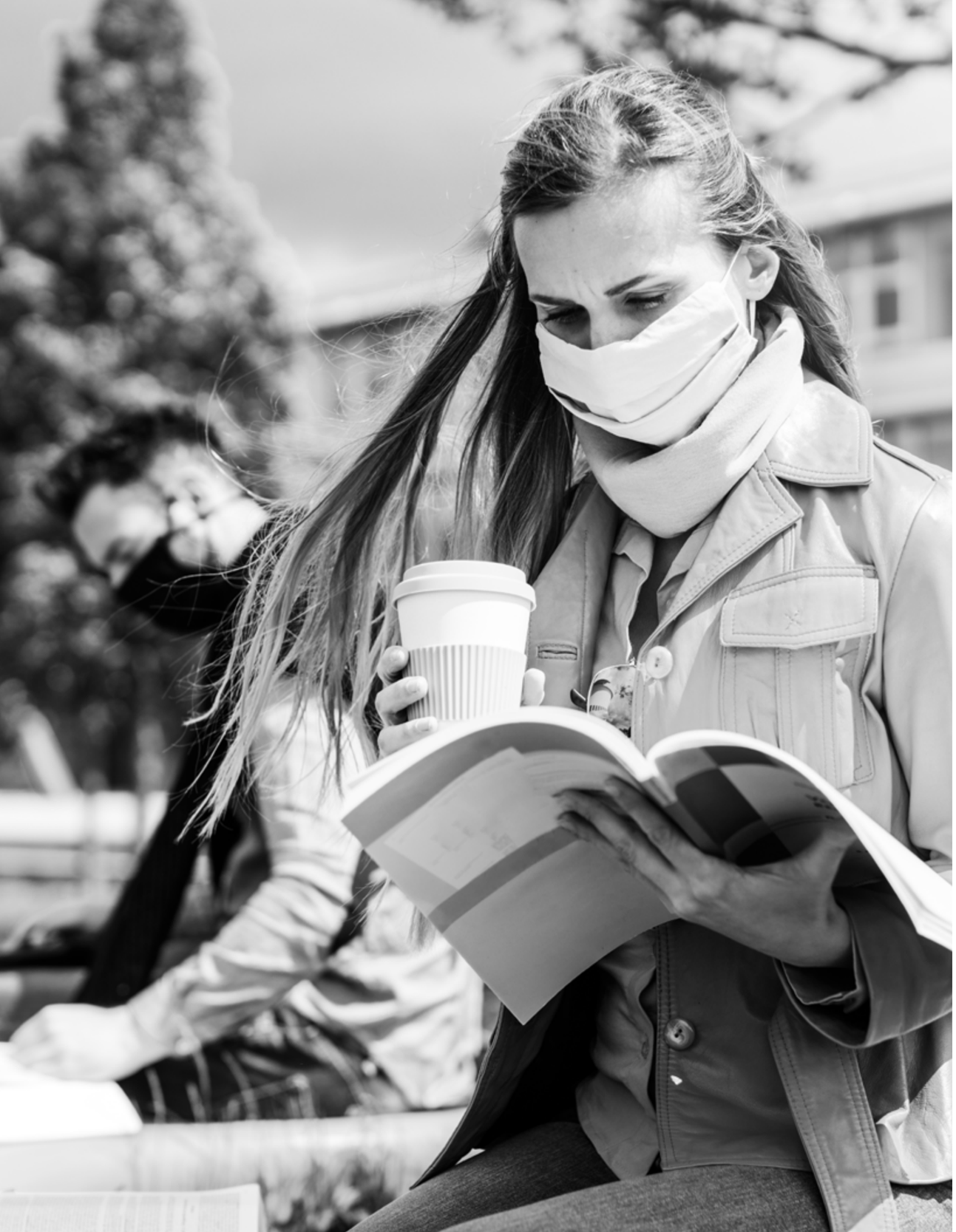
Nick's practice focuses on corporate and commercial law, with an emphasis on corporate formation/reorganization and commercial transactions. He works with government agencies, construction firms, owner managed businesses and start-up ventures and others to provide them with quality legal advice delivered to meet their needs, on their own timeline.

A registered trademark agent, Nick received an Osgoode Certificate in Intellectual Property Licensing in 2018, which helps him provide clients with legal support in trademark prosecution and licensing. Over his career he has represented provincial governments and acted as counsel for a variety of businesses, public authorities and academic institutions.



# *Institutional responsibility to prepare for COVID-19 cases on campus*

Since returning to class in September amidst the uncertainty of the COVID-19 global pandemic, students and faculty alike in classrooms, on campus, in residence, and in the workplace have learned to adapt to what has become the "new norm."

It is not enough for institutions to rely on provincial health directives and provincial contact tracing measures. If and when a student, staff, or faculty member tests positive for the virus, the university must be prepared to take action. Arguably, the only way to efficiently respond is to have a policy prepared and in place when this occurs. Provincial guidance invites institutional response. In light of this, institutions should take it upon themselves to implement policies addressing how to handle positive COVID-19 tests so that, if and when positive tests arise on campus, swift action is taken to isolate those affected. This will allow institutions to remain open for the duration of the COVID-19 pandemic while also ensuring minimal spread.

As we know, a key requirement for reducing the likelihood of COVID-19 transmission is reducing the number of close contact encounters. Reductions can be achieved through social distancing, campus density reductions, and wearing non-medical masks when social distancing cannot be achieved. While this will lead to a reduction in case numbers, positive COVID-19 tests amongst student populations are inevitable. In light of this, how can educational institutions aim to ensure the safety of staff and students while also attempting to remain open for business?

## ENSURING THE SAFETY OF STUDENTS AND STAFF

While government guidance invites institutional response to suspected cases, many institutions have not implemented policies governing what will happen in the event that a member of their community tests positive. Provincial guidelines[1] encourage or require (depending on the province) close contacts of those who have tested positive to self-isolate before public health becomes involved in contact tracing. If a teacher or professor reports COVID-19 symptoms, there is an immediate and cogent risk to all students in their classes. Given provincial guidance, waiting for public health to contact those who may have been exposed if and when there is a diagnosis is problematic.

These idiosyncrasies have not been addressed by many institutions. Instead of creating policies to further the objectives of public health officials, institutions are deferring to public health in reliance of their services for contact tracing as appropriate.

Implementing such policies will lead to swift, institution-specific reactions that will help to curb the spread of COVID-19 and allow such institutions to remain open for the remainder of the pandemic whilst at the same time ensuring the safety of the campus population.

## STUDENTS MUST PLAY A LEADING ROLE IN PROTECTING THEIR HEALTH

Student codes of conduct are another important way to curb the spread of COVID-19. In recent months we have seen many institutions implement or adapt student codes of conduct dealing directly with COVID-19 from the student perspective. These codes act to monitor and control student behaviour and in doing so create a contractual relationship between students and the institution outlining what constitutes acceptable behaviour.

In an effort to reduce the number of COVID-19 cases on campus and to maintain a safe environment for students, these institutions, through student codes of conduct and other COVID-19 related policies, can make clear that students share in the responsibility of keeping their community (and beyond) safe.

Failure to abide by the various provincial COVID-19 community health and safety requirements may be a violation of the code of conduct. For example, if students choose to have a party which violates the limits on social gatherings or they choose not to wear a mask in violation of provincial guidelines, the code of conduct can be used in order to discipline the students, through suspension or otherwise.

Violations can be investigated and adjudicated, resulting in residence dismissal, suspension, or financial penalties. Further, incidents and behavioural breaches can be forwarded to the RCMP for possible charges under the provincial health protection legislation.

## COMMITMENT TO COMMUNITY WELLNESS

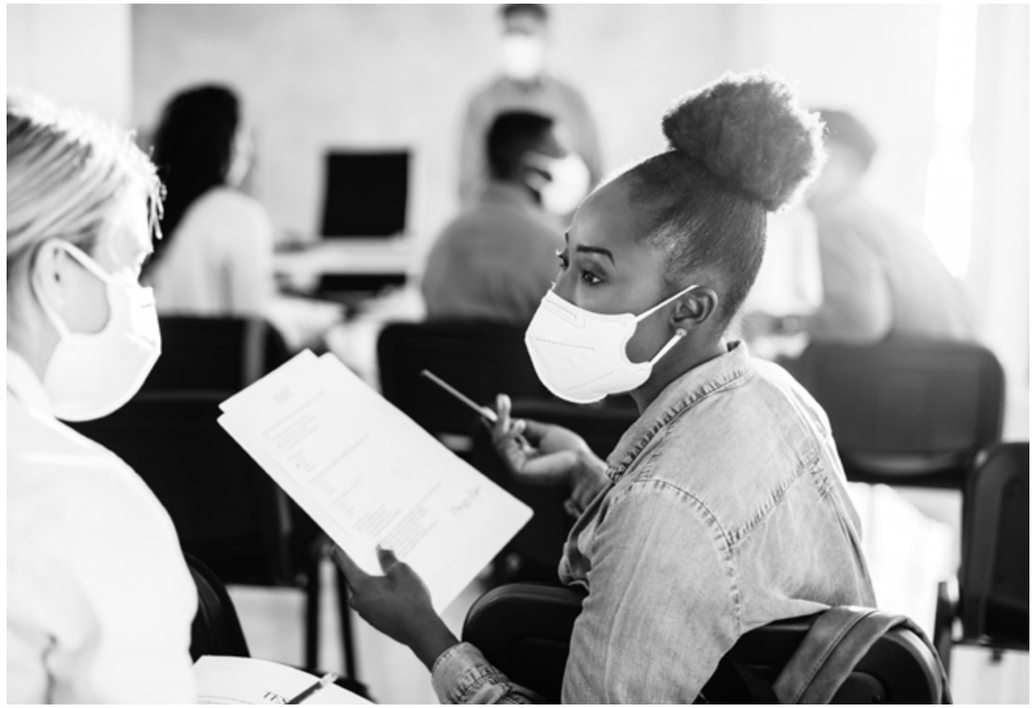
Several Canadian universities have implemented student codes of conduct specific to COVID-19 or have created addendums to their existing codes of conduct in recent months. One notable feature that these policies seem to have in common is their commitment to community wellness. In general, students on and off campus are asked to review campus procedures daily and to take all necessary steps to protect others by following the directives based on self-assessment. As we are all aware, daily check-ins are crucially important during this pandemic, as COVID-related public health requirements seem to change on an almost daily basis.

Community wellness checklists often contain some combination of the following points:

1. Monitor your health daily
2. Ensure you are symptom-free prior to accessing campus
3. Practise proper hygiene
4. Maintain proper social distancing
5. Wear a non-medical mask (depending on the jurisdiction and institution)
6. Limit interactions on and off campus

[1] Nova Scotia
Prince Edward Island
New Brunswick
Newfoundland and Labrador





## CONCLUSION

It is not enough for institutions to rely on provincial health directives and provincial contact tracing measures. If and when a student, staff, or faculty member tests positive for COVID-19, the institution must be prepared to take action. Arguably, the only way to efficiently respond is to have an institution-specific policy prepared and in place when this occurs.

Waiting for public health to contact those who may have been exposed if and when there is a diagnosis is problematic.

Institutions should take it upon themselves to implement policies addressing how to handle positive COVID-19 tests. This will ultimately allow such institutions to remain operational while the COVID-19 pandemic remains present in our lives, while also ensuring minimal spread.

Although burdensome, implementing policies that align with public health measures focusing on contact tracing, self-reporting, self-isolating and testing if and when a student shows symptoms of COVID-19 is something that all educational institutions should seriously consider as we move into the winter months. >

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# *Ongoing flexibility for international students due to COVID-19*

Educational institutions and their students continue to face challenges as a result of the COVID-19 pandemic, and international students are particularly impacted due to travel restrictions and study permit application processing delays. In our Spring 2020 issue, we discussed some of the measures the Government of Canada introduced to provide flexibility for current and prospective international students during these difficult and uncertain times. The government has since introduced additional measures to provide ongoing support:

**1.Two-stage assessment process:** A new temporary two-stage assessment process for study permit applicants was introduced. Immigration, Refugees and Citizenship Canada ("IRCC") would notify applicants once they had passed stage one of this process. This was beneficial for applicants who were facing delays in providing biometrics, attending a medical examination, or providing a police certificate (where required), since stage one could be passed before these requirements were met.

This measure applied to initial study permit applications, but not to in-Canada study permit extensions. Additionally, only applicants who submitted their new study permit application electronically before September 15, 2020, and whose program of study began in fall 2020 or earlier, were eligible for this two-stage assessment process.

There was no guarantee the study permit application would be approved simply because stage one was passed; however, this measure assisted international students who were unable to provide all of the required documents or information needed to finalize the assessment of their study permit application.

While the September 15, 2020 deadline is now passed, anyone who still has a study permit application in processing from before this date who otherwise meets the eligibility requirements will continue to benefit from this measure.

**2. Greater PGWP eligibility flexibility:** In our Spring 2020 issue, we discussed new measures introduced by IRCC to preserve students' eligibility for Post-Graduation Work Permits ("PGWPs") despite their in-class courses being moved online as a result of the pandemic. As a refresher, students can apply for a PGWP once they have graduated from certain Canadian educational institutions, but the assumption is that they would have completed their studies in Canada.

Due to travel restrictions and application processing delays, many international students will be unable to travel to Canada during this time, and instead will be looking to begin their Canadian study program online from their home country. Now, students who enrolled in a program that is 8 to 12 months in duration and that started between May and September 2020 can complete their entire program online from abroad, and still be eligible for a PGWP on graduation. Time spent studying outside of Canada after April 30, 2021 will however be deducted from the length of the PGWP.

For those taking a program that is 12 months or longer, or those in a program that is 8 to 12 months in duration but that started before May 2020, IRCC is now allowing these students to study online from their home country until April 30, 2021 without having time deducted from the length of their future PGWP, as long as 50% of their program of study is eventually completed in Canada. In general, PGWPs are usually valid for the same length as the study permit, up to a maximum of three years.

Finally, students who enrolled in a program with a start date between May and September 2020 and study online up to April 30, 2021 may be able to combine the length of their programs of study (if they graduated from more than one eligible program of study) when they apply for their PGWP on graduation, so long as 50% of their total studies (i.e. of the combined programs) were completed in Canada.

Where students will begin their program online from their home country due to travel restrictions and public health guidelines, they must have submitted a study permit application before they started their program of study in the spring, summer, or fall 2020 semester, or the January 2021 semester, and must eventually be approved for their study permit in order to qualify for the above measures.

**3. In-Canada biometrics exemptions:** Biometrics (i.e. fingerprinting and photographs) are generally a requirement of study permit applications. During the pandemic, Service Canada closed its biometrics collection centres, which caused delays in the processing of study permits and other applications. Biometrics collection services in Canada remain largely unavailable at this time. However, in recognition of the ensuing disruption, IRCC put a temporary public policy in place that exempts temporary residence applicants in Canada from biometrics requirements.

This policy includes initial in-Canada study permit applications (where the applicant is eligible to apply for a first-time study permit in the country), as well as in-Canada study permit extensions. The policy applies to new applications and those already in processing at the time the policy was introduced, and it will allow IRCC to finalize processing of study permit applications more expediently going forward. The policy will remain in effect until it is revoked by the Minister of Immigration, Refugees and Citizenship.

**4. Restoration period extension:** Normally study permit holders in Canada have 90 days after their temporary residence status (i.e. study permit) expires to apply to IRCC to "restore" their status as a student. As the pandemic has impacted the ability of temporary residents, including international students, to provide complete applications to IRCC and their ability to find flights to their home country, IRCC has temporarily extended the restoration period. Now, former students whose status expired on January 31, 2020 or later and who remained in Canada can apply to restore their status until December 31, 2020. They will of course still be required to meet the requirements of the study permit application.

It is possible some of these measures may be further extended or revised as the government continues to monitor the impacts of COVID-19.

Conversely, the government has also introduced additional requirements for international students looking to come to Canada. Specifically, international students now must show they are coming to attend a Designated Learning Institution ("DLI") that has a COVID-19 readiness plan approved by the relevant province or territory. DLIs with an approved readiness plan are listed on IRCC's website and will be updated periodically as readiness plans are approved. Similarly, students must be travelling for a non-optional, non-discretionary purpose, must undergo the necessary health checks, and must follow quarantine requirements upon arrival to Canada.

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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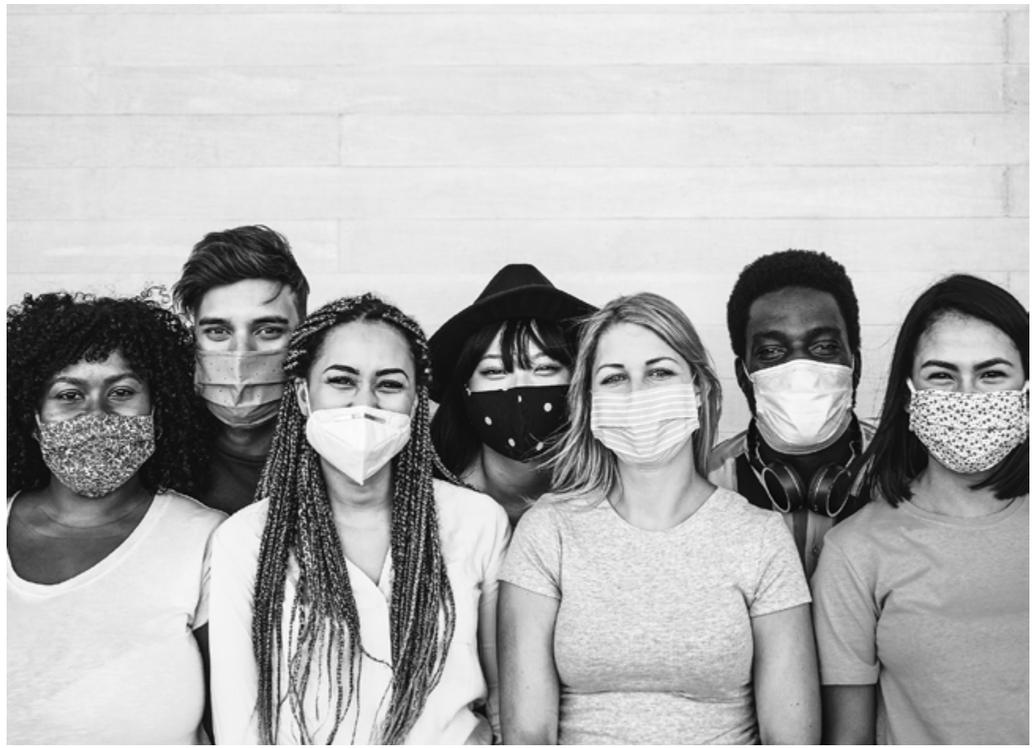

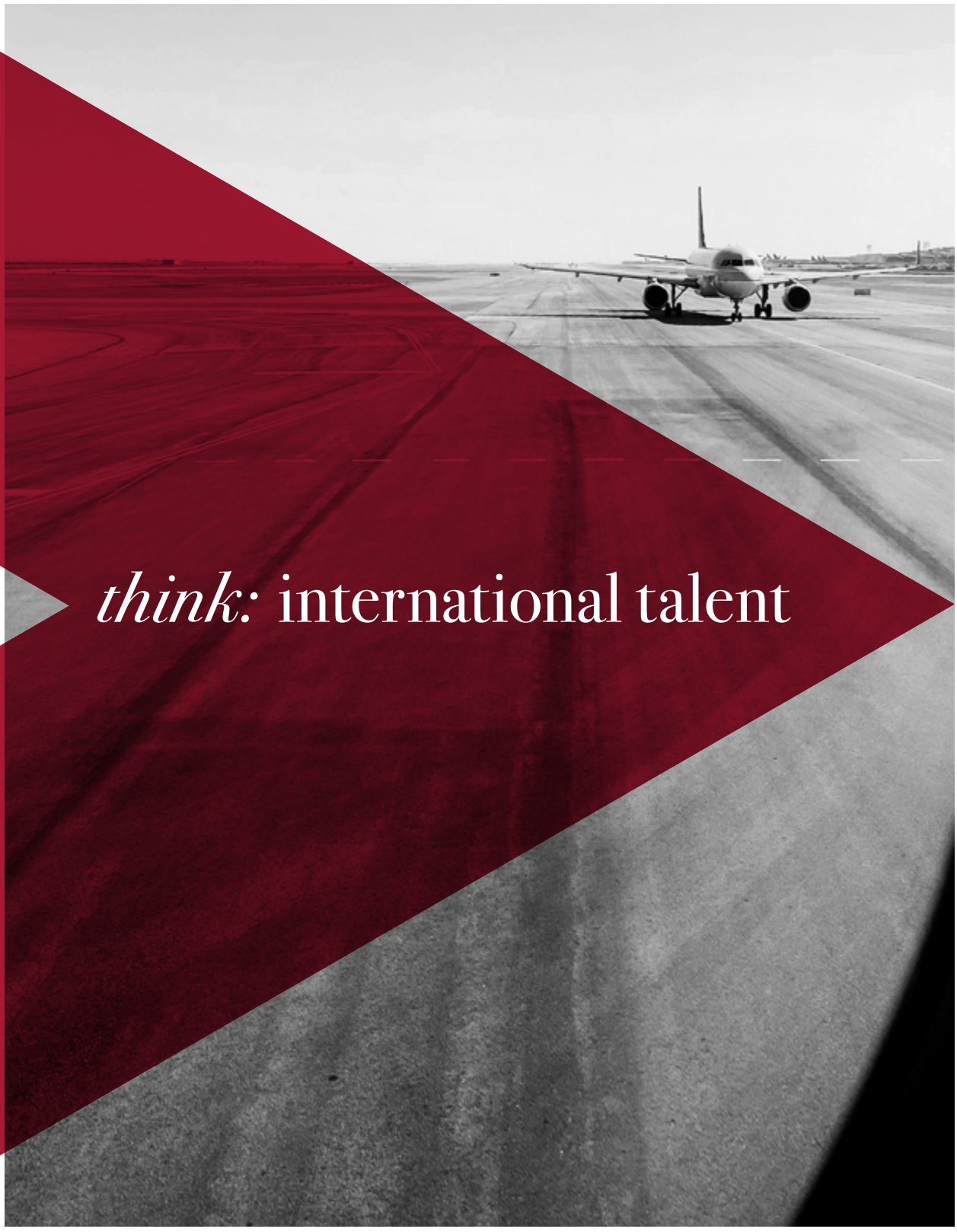


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