STEWART McKELVEY
LAWYERS • AVOCATS

SUMMER 2022 ISSUE 10

Discovery

ATLANTIC EDUCATION AND THE LAW

INSIDE

As we settle into a summer having rounded out the end of another academic year, the pandemic continues to occupy the attention of academic institutions around the Atlantic region. However, as students, faculty and administrators look forward to the fall semester, a range of other topics are on the horizon.

In our tenth issue of Discovery Magazine, Stewart McKelvey lawyers provide insight into a variety of timely issues including: COVID-19 misinformation, universities and access to information requests, trends in tenure and promotions at universities, and public sector pension plans.

In publishing Discovery, Stewart McKelvey aims to cover issues of relevance to universities and colleges in Atlantic Canada. As such, we welcome any suggestions on topics to cover in future publications.

We hope you enjoy this issue, and we wish you a safe and happy summer.

- Brittany, Editor

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Does academic freedom protect professors who spread COVID-19 misinformation on social media?

As the COVID-19 pandemic surges on, so does the flow of misinformation online. Academia has not been immune, with professors around the world spreading misinformation about the virus — and raising questions about how far their academic freedom goes.

Dolores Cahill was a professor at University College ("UCD") in Dublin, Ireland, and an expert in proteomics, the study of proteins and their functions. After the COVID-19 pandemic began in March 2020, Dr. Cahill made "a number of staggeringly erroneous claims" about COVID-19, which she and others spread on social media. Before Irish media reported in September 2021 that Dr. Cahill's position had been terminated, the President of UCD had cited academic freedom as one reason why the institution had not done more.

Dr. Cahill is far from the only academic who has made headlines for promoting misinformation about COVID-19 on social media (and in mainstream media).

In the United States, Professor Scott Atlas took a leave of absence from his position at Stanford University to work as a "coronavirus adviser" to former President Donald Trump. Within three months of his appointment, the Stanford University Faculty Senate passed a resolution with 85% approval accusing Atlas of spreading disinformation that not only contradicted the science on protective measures like masks, but also damaged Stanford's "reputation and academic standing." Dr. Atlas resigned from his position two weeks later.

Dr. Michael Levitt, another professor at Stanford and a former Nobel Prize winner, has been challenged for the "dangerous" and "clueless" views about the pandemic that he had posted on social media.

Here in Canada, a faculty member at the University of Saskatchewan, who also works for the Saskatchewan Health Authority, posted a video describing COVID-19 vaccines as an "experimental injection." And Professor Donald Welsh, a professor of vascular biology at the University of Western Ontario, posted tweets in April 2021 that compared the COVID-19 advice given to Ontario by its scientific advisers to something out of the Holocaust, calling those experts "public health extremists." One of his colleagues accused him of "hiding behind the protections of academic freedom to spread misinformation", while the University told CBC News that academic freedom prevented them from taking action.

So what options does a university have to respond to a faculty member who is spreading false or misleading information about COVID-19 on social media? Do faculty members have academic freedom to post whatever they want on social media without any recourse, or are there circumstances in which faculty members could — and maybe should — be disciplined for such conduct?

WHAT IS ACADEMIC FREEDOM AND HOW IS IT PROTECTED?

Academic freedom can be a nebulous concept, but a useful definition comes from the Canadian Association of University Teachers ("CAUT"). CAUT describes academic freedom as including "the freedom of teachers, without restriction by prescribed doctrine and free from institutional censorship, to carry out research and publish the results thereof, to teach and discuss, and to criticize the university."[1]

Collective agreements should be consulted for more specific applications of this general principle. A recent report, prepared by the Honourable Michel Bastarache for the University of Ottawa, found that academic freedom is referenced in 85% of collective agreements between faculty unions and universities in Canada.[2]

One Atlantic Canadian example is the current Collective Agreement between the Board of Governors of Dalhousie University and the Dalhousie Faculty Association. Article 3 recognizes the essential nature of academic freedom "in the search for knowledge and the communication of knowledge to students, colleagues and the society at large."

Notably, the parties also acknowledge "that academic freedom carries with it a corresponding responsibility on the part of Members to use their freedom responsibly, with due concern for the rights of others,

[1] CAUT Policy Statement on Academic Freedom, as summarized by the Honourable Michel Bastarache, CC, QC in Report of the Committee on Academic Freedom for the University of Ottawa (2021) at 13.
[2] Report of the Committee on Academic Freedom at 15.

for the duties appropriate to the Member's university appointment, and for the welfare of society."

The reference to "duties appropriate to the Member's university appointment" in a definition of academic freedom indicates that the concept may be confined to the subject areas of the educator's teaching and research.

DOES ACADEMIC FREEDOM EXTEND TO SOCIAL MEDIA?

Depending on the terms of the applicable collective agreement, whether academic freedom extends to social media will have to be determined on a case-by-case basis.[3]

In 2019, CAUT published a policy statement on Academic Freedom, Electronic Communications and Social Media, insisting that "the rights of academic staff to exercise their academic freedom do not vary according to the medium in which they are exercised."

With regard to 'extramural' expression, CAUT suggests that this falls within the scope of academic freedom: that in "expressing in electronic fora and social media their views on topics of public interest, whether or not those topics fall within their area of professional expertise, academic staff have the same rights of academic freedom as when they engage in any other form of public discourse."

In contrast, nothing in Universities Canada's policy statement on academic freedom suggests that the right of a professor to make extramural comments lies within the scope of academic freedom.

Take the hypothetical example of an astrophysics professor who posts on social media that COVID-19 is a hoax. That statement is not only demonstrably false, but pronouncements about infectious diseases are also outside the astrophysicist's area of expertise.

The more challenging case is where there is a connection between the faculty member's academic work and COVID-19. For example, statements made about COVID-19 vaccines by a professor associated with a faculty of medicine at a Canadian university may be more likely to be protected by academic freedom (even if wrong or misleading). But what about a historian who studies pandemics, or a literature professor who teaches about Shakespeare and the plague — are they protected by academic freedom, and therefore protected from disciplinary action, when talking about COVID-19? The line is blurry.

Interestingly, some professors have written on their Facebook or Twitter accounts that their "opinions are my own" and do not include the name of their employer. On the one hand, if the faculty member expressly states that their social media posts only represent their personal views, then those posts should not be protected by academic freedom. On the other hand, simply writing a disclaimer that "these opinions are my own" on social media platforms should not be enough to shield a faculty member from disciplinary consequences from the university. Many social media users would be aware of, or could easily figure out, a prominent academic's university affiliation, notwithstanding their use of a disclaimer.

WHAT OPTIONS DO UNIVERSITIES HAVE IN RESPONSE TO FACULTY MEMBERS WHO DISSEMINATE COVID-19 MISINFORMATION ON SOCIAL MEDIA?

Faculty members who are disseminating COVID-19 misinformation online may end up falling on their own swords, by harming their reputations, losing research credibility among their peers, dissuading students from signing up for their classes, and depriving themselves of opportunities in their field. But that doesn't justify inaction by their university employers.

Universities have several tools to deal with the dissemination of false and misleading information on social media about COVID-19. These include:

- proactively designing social media policies, and incorporating the principles into new collective agreements to make it clearer where the university intends to draw the line between protected and unprotected expression on social media;

- disciplining faculty members who have spread harmful comments on social media, in accordance with the applicable collective agreement (although we are not aware of any US or Canadian cases where a university has disciplined a faculty member for spreading COVID-19 misinformation on social media);[4] and / or

- issuing statements and social media posts of their own, to counter misinformation coming from faculty members. This seems to be the most common action that universities have taken in tackling COVID-19 misinformation.

Other stakeholders may act, too. Faculty members within or outside the university will often speak out against or publish open letters to refute the false and misleading information, and to dissociate themselves – and their institution – from their colleague. Students may write open letters of their own, and refuse to register in classes offered by the faculty member.

CONCLUSION

Many universities have been hesitant to act against faculty members who peddle COVID-19 myths, on the mistaken assumption that academic freedom ties their hands. While academic freedom is of paramount importance for any university, it is not unlimited. Especially in the context of an ongoing pandemic, universities can consider taking disciplinary action against faculty who promote harmful disinformation, where that would be a proportionate response and consistent with the governing collective agreement.

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[3] It is an open question whether the Canadian Charter of Rights and Freedoms would apply where a university purports to limit a faculty member's online expression. For more on the issue of Charter application in the university context, see Jennifer Taylor, "Freedom of expression on campus: A new development from Alberta" in Discovery, Issue 6 (Spring 2020).
[4] See, for example, Article 28 of the Dalhousie Collective Agreement discussed above.

Bornfreund v. Mount Allison University: a call for a more balanced approach to disputes under access to information legislation

OVERVIEW

In Marcus Bornfreund v. Mount Allison University, 2022 NBQB 50, the New Brunswick Court of Queen's Bench firmly rejected a decision by the Ombud regarding a request for information under the New Brunswick Right to Information and Protection of Privacy Act ("*RTIPPA*").

Mr. Bornfreund, a lawyer based in Toronto, sought all correspondence involving Mount Allison's Provost and Vice President, Academic and Research for a one-month period – without regard to any specific subject matter.

Mount Allison denied the request on the basis that it did not comply with the requirements of *RTIPPA* – in that the request did not identify the subject matter Mr. Bornfreund was interested in.

Specifically, New Brunswick legislation provides:

8(2) *A request for access to a record shall*

(a) *specify the record requested or where the record in which the relevant information may be contained is not known to the applicant, provide enough particularity as to time, place and event to enable a person familiar with the subject matter to identify the relevant record*

Mr. Bornfreund filed a complaint with the New Brunswick Ombud (the entity currently tasked with *RTIPPA* matters in New Brunswick).

The Ombud sided with Mr. Bornfreund throughout the complaint process and issued a decision setting out the Ombud's view as to why Mr. Bornfreund did not need to identify a particular subject matter.

This would have required Mount Allison to retrieve and review approximately 9,400 emails and text messages – without regard to subject matter.

As individuals responsible for processing *RTIPPA* matters are well aware, gathering the documents would have been a small part of the work involved. Each document must be

reviewed to determine whether the document or certain portions would need to be withheld in accordance with the statutory exceptions to disclosure.

Despite the Ombud's decision, Mount Allison stood its ground and insisted that Mr. Bornfreund had not complied with the legislation.

Mr. Bornfreund therefore appealed the matter to the New Brunswick Court of Queen's Bench.

The Court disagreed with the Ombud and upheld Mount Allison's decision to deny the request.

The Court made certain findings that may also assist public bodies as they navigate access to information requests, including:

1. For the Ombud to take the position that Mr. Bornfreund satisfied the requirements of *RTIPPA* by stating he was interested in "any events" was "incomprehensible."

2. *RTIPPA* is not meant for individuals to make needlessly broad requests in order to go on a "fishing expedition."

3. The Ombud erred in relying upon decisions from other provinces that have different legislation (something which the New Brunswick Court of Queen's Bench has commented on previously: see Hans v. St. Thomas University, 2016 NBQB 49 at para. 19).

4. The Ombud erred in failing to give due consideration for the potential privacy rights impacted by the Provost and third parties with whom he had correspondence.

5. Access to information legislation does not only have the goal of ensuring accountability of government and quasi-government bodies – but also has other competing interests that would be defeated by unbridled disclosure of information. The Ombud's undue emphasis on access to information while ignoring all other important considerations led to an erroneous interpretation of *RTIPPA*.

6. Further, whereas one of the purposes of *RTIPPA* is to ensure access to public information, a corollary to that right is ensuring a system that is workable, not one where the applicants are permitted to be intentionally and unnecessarily broad and needlessly tying up resources.

TAKEAWAYS

Often public bodies find themselves faced with unreasonable demands from applicants under access to information legislation.

This is especially so in provinces like New Brunswick where there is no cost associated with making access to information requests.

In this case, the request was unreasonable in scope (and it was simply not a significant request of the applicant to identify the subject matter he was actually interested in).

More often, applicants can be unreasonable in terms of their reluctance to accept the exceptions claimed by a public body.

It can be discouraging when these disputes are reviewed by a statuary entity (in most provinces – the privacy commissioner) only to have that entity, which is tasked solely with enforcing the legislation, support an unreasonable position taken by an applicant – often at the expense of other legitimate interests at stake.

Further, public bodies are often faced with balancing: (1) complying with the request / findings of the statutory entity; with (2) the costs associated with litigating the matter in court. This may explain why there are so few decisions from the New Brunswick Court of Queen's Bench providing much needed guidance for these disputes under the New Brunswick legislation (there are only around 25 reported decisions).

This case is one of those decisions setting out some much-needed guidance.

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Keep your hands off my records: solicitor-client privilege & access to information

INTRODUCTION

In the wake of the Supreme Court of Canada's decision in *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 *("University of Calgary")* an article appeared in the Fall 2018 issue of this publication addressing privileged records and access to information reviews. That article considered the potential implications of the decision on Atlantic Canadian educational institutions and concluded that the Supreme Court of Canada's decision may provide a means by which to have the Privacy Commissioner resolve a claim of privilege without requiring production.

Since then, there have been differing reactions to the *University of Calgary* case across Atlantic Canada, each with the same implication.

RECENT DEVELOPMENTS

In Newfoundland and Labrador, the Supreme Court recently considered section 97(1)(d) of the *Access to Information and Protection of Privacy Act*, 2015 (*"ATIPPA"*) in *Newfoundland and Labrador (Justice and Public Safety) v. Newfoundland and Labrador (Information and Privacy Commissioner)*, 2022 NLSC 59 *("Justice and Public Safety")*.

The legislative and judicial history of *ATIPPA* plays a key role in understanding this decision. In 2011, the Newfoundland and Labrador Court of Appeal found that "a privilege under the law of evidence" did include solicitor-client privilege. As a result, the Information and Privacy Commissioner

was empowered to compel production of documents over which the privilege was claimed.[1] In response, the provincial government amended the legislation in 2012 to remove the Commissioner's power of production over solicitor-client privileged records. Several years later, the Wells Committee was established by the provincial government to review *ATIPPA* and explicitly recommended that the Commissioner's ability to review a claim of privilege should be restored. This recommendation was adopted by the Legislature, which reintroduced the language endorsed by the Court of Appeal, that production could be compelled notwithstanding "a privilege under the law of evidence". The amendment was soon followed by the Supreme Court of Canada's decision in *University of Calgary,* in which the Court held that a privilege under the law of evidence does not include solicitor-client privilege.

The NL Commissioner and public bodies have butted heads regarding the implication of the decision ever since.

Finally, in March 2022, the Supreme Court of Newfoundland and Labrador released a decision that grappled with the issue. In *Justice and Public Safety,* the court ultimately concluded that the current provisions of *ATIPPA* regarding production of privileged records were "substantially similar" to the Alberta provisions considered in *University of Calgary.* Therefore, since the Supreme Court of Canada had determined that solicitor-client privilege is more than a "law of evidence" – it is a law of substance – the Commissioner could not compel the production of records over which solicitor-client privilege is claimed.

The Court came to this conclusion despite the Commissioner arguing that *University of Calgary* had little precedential value on the basis of the legislative history in Newfoundland and Labrador, and two statutory provisions in *ATIPPA* that were not in the Alberta legislation.[2] However, the Court found that it "could not infer an intent to abrogate solicitor-client privilege from the nature of the statutory scheme or legislative history unless the language is *already sufficiently clear."*[3] It also concluded that where there are two possible interpretations of a statute, one that requires an abrogation of solicitor-client privilege, and one that does not, the latter must be favoured.[4] As a result, the Commissioner does not currently have the power to compel production of solicitor-client privileged records in Newfoundland and Labrador.

This appears to be the same for the remainder of Atlantic Canada.

Despite several amendments since *University of Calgary,* the legislation in New Brunswick remains explicit, with the *Right to Information and Protection of Privacy Act* at s 70(1) specifically precluding the Commissioner from compelling production of solicitor-client material from public bodies. Similarly, the *Freedom of Information and Protection of Privacy Act* of Prince Edward Island has undergone several amendments since the decision came out. However, the PEI Commissioner's powers of production continue to extend only to records despite "any privilege under the law of evidence" (at s 53(3)). This signals a clear intention by the Legislature of Prince Edward Island that the PEI Commissioner does not have the power to compel production of solicitor-client privileged records in that jurisdiction.

Unlike New Brunswick and Prince Edward Island, s 38(1) of Nova Scotia's *Freedom of Information and Protection of Privacy Act* allows the Review Officer to compel production notwithstanding "any privilege that is available at law". As such, the Nova Scotia legislation appears to grant broad powers of production to the Review Officer. However, it remains doubtful that the language is explicit enough to abrogate privilege. This is reinforced, albeit tangentially, by the Nova Scotia Supreme Court's decision in *Denike v Dalhousie University,* 2018 NSSC 111 where it cited *University of Calgary* in support of the proposition that "access and privacy legislation does not create unfettered access to all documents."[5]

IMPLICATIONS

Courts have repeatedly decided that solicitor-client privilege belongs to a client, and is a cornerstone of our legal system that has evolved into a special legal right with "quasi-constitutional" status.[6] Accordingly, in the absence of clear and unequivocal statutory language ousting solicitor-client privilege, it cannot be assumed that a Commissioner can compel disclosure of documents over which solicitor-client privilege is claimed.

However, in an ever-changing democracy that increasingly values transparency, legislatures may be interested in making amendments that use clear and unequivocal language to abrogate solicitor-client privilege in favour of disclosure, particularly in situations where production is determined to be absolutely necessary, or to assess the claim for privilege. The provincial government of Newfoundland and Labrador has recommendations before it to do so, but at this time has not taken steps to implement those recommendations.

This is an avidly contested issue with significant legal and political implications. The *Justice and Public Safety* decision has already been appealed. The Newfoundland and Labrador Court of Appeal will again have to consider whether *ATIPPA* permits the Commissioner to compel production of records over which solicitor-client privilege is claimed. This time, the Court will have the benefit of the Supreme Court of Canada's analysis in *University of Calgary.* Until that decision is rendered, or the legislation is amended, public bodies can continue to resist requests for production of records over which solicitor-client privilege is claimed in each of the four Atlantic Provinces.

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[1] *Newfoundland and Labrador (Information and Privacy Commissioner) v. Newfoundland and Labrador (Attorney General),* 2011 NLCA 69 (CanLII).
[2] *ATIPPA* ss. 97(5)(a) which provides *"The head of a public body may require the commissioner to examine the original record at a site determined by the head where (a) the head of the public body has a reasonable basis for concern about the security of a record that is subject to solicitor and client privilege or litigation privilege"* and ss. 100 which provides "(2) *The solicitor and client privilege or litigation privilege of the records shall not be affected by production to the commissioner."*
[3] *Justice and Public Safety* at para 48.
[4] *Ibid, at para 49.*
[5] *Denike v Dalhousie University* at para 29.
[6] *University of Calgary* at para 38.

Spotlight

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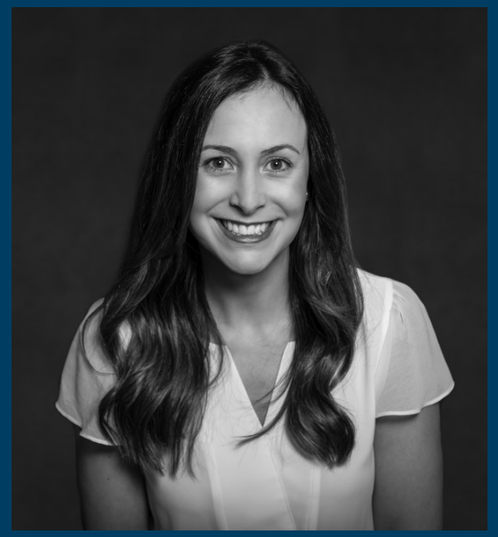

Koren graduated from Mount Allison University in 2004 with a degree in International Relations (Honours), and holds a law degree from the University of New Brunswick (2010). Admitted to the Newfoundland and Labrador bar in 2011, Koren is the Chair of the NL Privacy Law Section of the Canadian Bar Association, a member of the International Association of Privacy Professionals, and is the former Co-Chair of the NL Branch of the Canadian Bar Association's Women's Law Forum. Koren has appeared at all levels of court in Newfoundland and Labrador, as well as the Supreme Court of Canada.

A senior member of our St. John's office, Koren practises health and cybersecurity law. She represents regional health authorities in respect of medical malpractice claims and adult protection matters, and regularly advises public bodies and commercial organizations with respect to privacy best practices and policies, access to information requests, and cybersecurity breach responses.

Trends in tenure and promotion for unionized employers

Tenure is a well known and often discussed topic amongst academics. Viewed by unions as a cornerstone of modern universities, academics rely on tenure as a procedural safeguard of academic freedom.

Tenure is considered to be a make or break decision in an academic's life. What happens if their tenure application is rejected? Is it the end of their career? How do you find another job if denied tenure?

One criterion utilized by universities in evaluating tenure and promotion applications is student evaluations. These evaluations are designed to measure faculty performance from the student perspective. However, to unions, this raises significant concern.

THE TENURE PROCESS

Generally speaking, arbitration decisions regarding tenure and promotion are limited to procedural matters, rather than disputing the merits of the decision. When reviewing compliance with those procedures set out under the collective agreement it is clear – perfection is not required.

Academic leadership and those entrusted on review committees are best suited to make the discretionary decision to review tenure applications and make the decision to grant or deny it. An arbitrator's jurisdiction will therefore focus on whether the process outlined by the parties in the collective agreement has been followed and whether the decision was ultimately arrived at in good faith.

Essentially, this amounts to a peer review system. Courts have found that this should not be undermined by arbitrators who are not experts in that area of

academia unless material errors have occurred.

This view was confirmed in a recent decision, *University of Ontario Institute of Technology v University of Ontario Institute of Technology Faculty Association*, 2021 CanLII 138052. In this case, Arbitrator Davie set out that arbitrators must ensure procedural fairness is met, and the collective agreement has been properly interpreted and applied. From there, arbitrators should overturn the decision of a tenure or promotion committee "only where errors made are material to the result of the committee".

Provided that procedures in the collective agreement are complied with, perfection is not required.

ARE STUDENT EVALUATIONS ACCURATE INDICATORS?

The narrative advanced by many unions in recent times is that student evaluations are not accurate predictors of performance. Like many other areas of labour law, this problem was brought to the forefront during the COVID-19 pandemic and the rise of remote and hybrid learning.

The switch from in-person teaching to remote and hybrid models raised concerns as to how this would affect student evaluations. Do faculty need to change their teaching methods during remote learning to keep students engaged? How should these problems be navigated to ensure student evaluations are not impacted?

Unions have focused heavily on these questions. The general narrative advanced by unions is that faculty receive lower scores when classes are taught remotely and that fewer students ultimately complete student evaluations. This shift has caused unions to advance grievances alleging that student evaluations should not form part of the tenure and promotion processes due to their unreliability.

A potential pitfall of student evaluations is the criteria by which faculty are measured. What makes a good professor? While students might think that a funny or charismatic professor earns high scores on teaching evaluations, amongst the university administration and faculty, a professor who encourages critical thinking may be preferred. Several studies have also been conducted to show that not only are student evaluations inaccurate measures of teaching effectiveness, but they also show bias. These potential pitfalls are certainly something to bear in mind, however, in most cases are not lost on university administrators. It is for this reason that student evaluations form one criterion amongst many considered during tenure and promotion decisions.

THE COLLECTIVE AGREEMENT

Despite pushback from unions, the reality is that student evaluations are mandatory under most collective agreements. It is a required process both in terms of administering student evaluations and in later utilizing those evaluations for tenure and promotion decisions.

Unless successfully challenged by a union through the grievance process, or unless the requirement is removed from the collective agreement through the bargaining process, student evaluations must be utilized in tenure and promotion decisions.

WHILE IMPERFECT, STUDENT EVALUATIONS HAVE MERIT

In *Ryerson University v Ryerson Faculty Association*, 2018 CanLII 58446, Arbitrator Kaplan determined that student evaluations were poor indicators of teaching effectiveness and as such should not be considered for the purpose of tenure and promotion decisions.

In rendering his decision, he agreed with the union, classifying student evaluations as "imperfect at best and downright biased and unreliable at worst" when providing feedback in the context of tenure and promotion. However, in doing so he acknowledged that student evaluations have value in providing students with a voice about their educational experience, which both faculty and the university need to be aware of. While imperfect, they have merit.

Arbitrator Kaplan's decision has been cited several times. Notably, in *Association of Part-time Professors of the University of Ottawa v University of Ottawa*, 2020 CanLII 97980, where Arbitrator O'Neil rendered a decision concerning student evaluations in the process of awarding seniority points to part-time professors and in assigning teaching work at the University of Ottawa. In this case the board addressed the process for awarding seniority points to part-time professors based on the outcome of student course evaluations. Despite noting these issues, it was determined that the collective agreement had appropriate safeguards to ensure procedural fairness such that the grievance was dismissed.

KEY TAKEAWAY

Unions have been increasingly pushing the position that student evaluations are not a reliable means by which to measure teaching effectiveness and should not be used for tenure and promotion decisions. Universities should expect the issue of student evaluations to arise during upcoming rounds of collective bargaining.

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Recent trends in defined benefits pension plans - a review of public sector plans

Increased financial volatility caused by recent global events has caused public sector defined benefit ("DB") pension plans to reflect on their liquidity and vulnerability to sharp market downturns.[1] Along with financial markets, job markets have also been volatile of late, with employers facing recruitment challenges and increasing turnover as workers adjust their priorities, which they may not see as aligned with their DB pension benefits.

In turn, many employers and plan sponsors are now confronting their long-term fiscal challenges, as well as employee retention considerations, and reviewing their plans for potential changes. Such review requires balancing sustainability and the evolving needs and interests of members and other beneficiaries, considering differences in plan demographics, including:

- active, deferred, or retired status;
- age, gender, or other protected human rights grounds;
- part-time, full-time or other employment status; and
- different family structures and marriage or relationship breakdown circumstances.

To better understand how such considerations are balanced in practice, in January and February of this year, we undertook a comprehensive study of 20 Canadian public and quasi-public sector DB plans ("Public Sector Plans"),[2] which were comparatively reviewed for 14 different characteristics.[3] We also reviewed relevant provisions in pension benefits legislation in each Canadian jurisdiction (collectively referred to as "PBSA") for further context.

Our review has revealed a number of areas in which public sector plans may change or have changed to support plan sustainability and the evolving needs of members.

[1] Jean-Pierre Aubry, "2020 Public Plan Investment Update and COVID-19 Market Volatility", Center for Retirement Research at Boston College, Number 73, September 2020.
[2] The public sector plans included in our study were: Nova Scotia Teachers' Pension Plan ("NS Teachers"); Nova Scotia Health Employees' Pension Plan ("NSHEPP"); (Federal) Public Service Pension Plan ("Fed PSPP"); Halifax Regional Municipality Pension Plan ("HRM PP"); (Alberta) Local Authorities Pension Plan ("AB LAPP"); Saskatchewan Healthcare Employees' Pension Plan ("SHEPP"); Manitoba Civil Service Superannuation Plan ("MB CSSB PP"); Ontario Teachers' Pension Plan ("ON Teachers"); Ontario Municipal Employees' Retirement System ("OMERS"); College of Applied Arts and Technology Pension Plan ("CAAT"); Healthcare of Ontario Pension Plan ("HOOPP"); Ontario Public Service Pension Plan ("OPB"); Ontario Public Service Employees' Union Pension Plan ("OP Trust"); New Brunswick Public Service Pension Plan ("NB PSPP"); Prince Edward Island Public Sector Pension Plan ("PEI PSPP"); Newfoundland and Labrador Public Service Pension Plan ("NL PSPP"); British Columbia Public Service Pension Plan ("BC PSPP"); British Columbia Municipal Pension Plan ("BC MPP"); Alberta Public Service Pension Plan ("AB PSPP"); Régime de retraite des employés du gouvernement et des organismes publics du Québec ("QC RREGOP").
[3] The plans were reviewed for the following characteristics: Plan Demographics; Board Structure and Governance; Treatment of Various Member Classes; Practices for Admitting Employers; Optional Forms of Pension; Early Retirement Options; Termination Benefits; Death Benefits; Integration of Canada Pension Plan ("CPP"); Pension Division; Funding; Investments; Pension Benefits Standards Legislation ("PBSA") Exemptions; and Member Communications and Information.

SELECTED DB PLAN TRENDS

Our findings with respect to trends on five issues of note are briefly discussed below. We invite readers to contact us for more details, or for our findings on other issues

1. Membership eligibility for non-full-time employees

There are a host of reasons why an individual may need, or elect, to work in other than full-time employment, whether it be unavailability of full-time positions, childcare obligations, personal preference, or the pursuit of further education. Statistics Canada data provides that in 2017, nearly one in five employed Canadians (3.5 million people) were working less than 30 hours per week and in 2021 (although this is a long-standing trend) women were almost twice as likely as men to work part time (24.4% compared to 13%[4]).

While full-time workers are generally required to participate in their pension plans once the applicable eligibility requirements have been satisfied, part-time workers must satisfy minimum specified thresholds to access membership eligibility, that is either optional[5] or mandatory[6], depending on the public sector plan.

The approach taken by most public sector plans is to allow or require a part-time employee to join the plan if they earn a specified percentage of the year's maximum pensionable earnings ("YMPE") (25-50%) and/or they work a specified fixed number of hours (typically 700) in two consecutive calendar years. PBSA legislation similarly imposes minimum thresholds for part-time employees: two years of continuous service, earnings of at least 35% of the YMPE, and/or 700 hours of employment.

Public pension plans have taken different approaches to extending membership eligibility to casual, seasonal, or other non-full-time employees. Some plans have established unique threshold criteria for these employees; other plans apply the same earnings and hourly thresholds to all non-full-time employees, whether part-time, casual or seasonal.

Equity considerations include:

- Disproportionate use of non-full-time employment by women or other protected groups
- Projected impact of new membership eligibility criteria on ability to fund current member benefits

2. Designated beneficiaries of pre-retirement death benefits

Pre-retirement death benefits are triggered if a member passes away prior to retirement. The majority of public sector plans reviewed provide some version of the following distribution of benefits upon the pre-retirement death of a member:

(1) the surviving "spouse" (includes married or common-law spouse) receives all or some proportion of the commuted value of the member's pension;

(2) if there is no surviving spouse, designated beneficiaries (or dependent children) receive all or some proportion of the commuted value of the member's pension; and

(3) if there is no surviving spouse or designated beneficiary, the commuted value of the member's pension is refunded to the member's estate.

This approach is consistent with PBSA pre-retirement death benefits.

Equity considerations include potential inequities between married and unmarried plan

[4] Martha Patterson, "Who Works Part Time and Why?", November 6, 2018. Information accessed April 14,2022; Statistics Canada, "Proportion of worker in full-time and part time jobs by sex, annual" January 7, 2022.
[5] For example, OMERS, HOOPP, ON UPP, and NB PSPP.
[6] For example, BC PSPP, SHEPP, MB CSSB PP, and OP Trust.

members, and how that may be affected by providing equivalent entitlements to designated beneficiaries as is provided to surviving spouses.

3. Increased options for survivor benefits and single life pensions

Most public sector plans, as well as most PBSA provisions, provide survivor benefits to a spouse upon the death of a retired plan member. Recent changes to such provisions include evolving definitions of spouse; apportionment of the benefits between a pre- and post-retirement spouse; and form of pension options.

a. *Definitions of "spouse"*

Public sector plans have moved toward increasingly broad definitions of "spouse" for purposes of survivor benefit eligibility, with the most inclusive definitions capturing:

(1) married spouses (provided they are not living separate and apart);

(2) common-law partners (in a conjugal cohabitation relationship for not less than one year); and

(3) common-law partner "of some permanence" if the member and common-law partner have a child together.[7]

Other plans are more restrictive in their treatment of common-law partners, often requiring cohabitation for a minimum of three years[8] in all instances or if one partner is married.[9]

b. *Apportionment of benefits between multiple "spouses"*

The most common approach taken by public pension plans is to deem the spouse at the time of retirement the "surviving spouse" entitled to receive survivor benefits. However, other plans are more flexible, allowing members to designate a new post-retirement spouse to receive survivor benefits, which may be subject to one or more of the following conditions:

(1) the member elected a single life pension with a guarantee; or

(2) the member elected a joint-and-survivor benefit and either

(i) did not have a spouse or beneficiary at the date of retirement[10]; or

(ii) was predeceased by their retirement-date spouse.

Spousal waivers are also commonly permitted or required for an eligible spouse to waive their portion of a survivor benefit in favour of a former or more recent spouse.

c. *Form of pension*

Public pension plans are increasingly offering single life pensions as an option for members without eligible spouses or whose eligible spouses waive[11]. The majority of public pension plans offer members a choice of joint-and-survivor pension and/or guarantee options. The amount of survivor benefits provided, varies from 60% to 100% of the deceased member's pension (although 100% is rare – the maximal option is often 75% or 80%)[12]. Guarantee options, when offered, typically include 5, 10 and 15 years.

Equity considerations include:

- a pension plan's ability to reflect modern family dynamics, and how that may be affected by an expanded definition of "spouse", or increased ability for post-retirement spouses to become eligible for survivor benefits
- the potential inequities between single plan members and plan members with a spouse, and how that may be affected by an enhanced guarantee and/or single life pension option

4. Changes to indexation

Faced with increasing inflation, a plan's ability to deliver indexing in retirement is a key focus of retirees and those contemplating retirement.

In light of the associated costs, many public pension plans have eliminated guaranteed indexing in favour of discretionary indexing that is based on an articulated metric (e.g., the plan's funded ratio in relation to a predetermined threshold). Public pension plans that review indexation periodically typically do so annually.

Equity considerations include:

- the effects of variable indexation on retired members versus increased contributions on active members
- the effects of any non-discretionary thresholds for suspension and reinstatement of indexation on the volatility of the plan's funded ratio
- the projected effects of prescribed indexing on the long-term sustainability of the plan, in light of current inflation rates

5. Integrating CPP enhancements into the benefit

Recent enhancements to the Canada Pension Plan expanded CPP retirement benefits with the ultimate goals of replacing one-third of average work earnings received, as opposed to one-quarter, and increasing the maximum limit of average work earnings by 14%.

As of yet, no public sector plans have announced plans to further integrate the CPP enhancements by introducing corresponding reductions in the plan's defined benefits; however, this will be something to watch moving forward.

Equity considerations include:

- the effects on an employee's personal finances of enhanced employee CPP contributions plus any employee pension contributions required under the plan
- equities related to the timing of increased integration and corresponding decreases in plan member contributions

CONCLUSION

Adjusting DB pension benefits in light of the developing landscape in the public sector and PBSA minimum standards is paramount in order to attract and retain talent and ensure the sustainability of the plan. As shown by the trends discussed above, there are a variety of potential approaches. As is recommended, we expect each DB plan will be amended based on the needs of its members, an actuarial projection of short- and long-term effects on funding status, and a legal assessment and advice on implementation.

Nevertheless, we hope the preceding discussion will lend some insight and motivate conversation – *How does your plan measure up to the trends noted above?* We are always happy to participate in that conversation or provide additional information based on our research – please contact us for more details.

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[7] See for example, HOOPP's definition of "qualifying spouse".
[8] For example, ON Teachers' definition of "eligible spouse"; ON UPP's definition of "spouse"; and AB PSPP's definition of "pension partner."
[9] For example, NL PSPP's definition of "principal beneficiary"; NS PSSP's definition of "spouse"; and MB CSSB PP's definition of "common law partner".
[10] BC PSPP contemplates a "new spouse" receiving benefits if the material plan is a single life pension plan with a guarantee; SHEPP provides that a new spouse can be designated as a beneficiary that, under the hierarchical distribution, is only entitled to receive survivor benefits if there is no spouse or the spouse predeceases the member; similarly, ON Teachers provides that a new spouse can receive benefits if the former spouse pre-deceases the member; however, the new spouse cannot receive benefits if there is a dependent child; and, OP Trust stipulates that the post-retirement spouse can only receive benefits if there is no eligible spouse or child.
[11] For example, BC PSPP, AB PSPP, SHEPP, ON UPP, and NB PSPP.
[12] PBSA legislation consistently mandates a minimum joint-and-survivor benefit of not less than 60% of the member's pension benefit.

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