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Discovery

ATLANTIC EDUCATION AND THE LAW

STEWART McKELVEY
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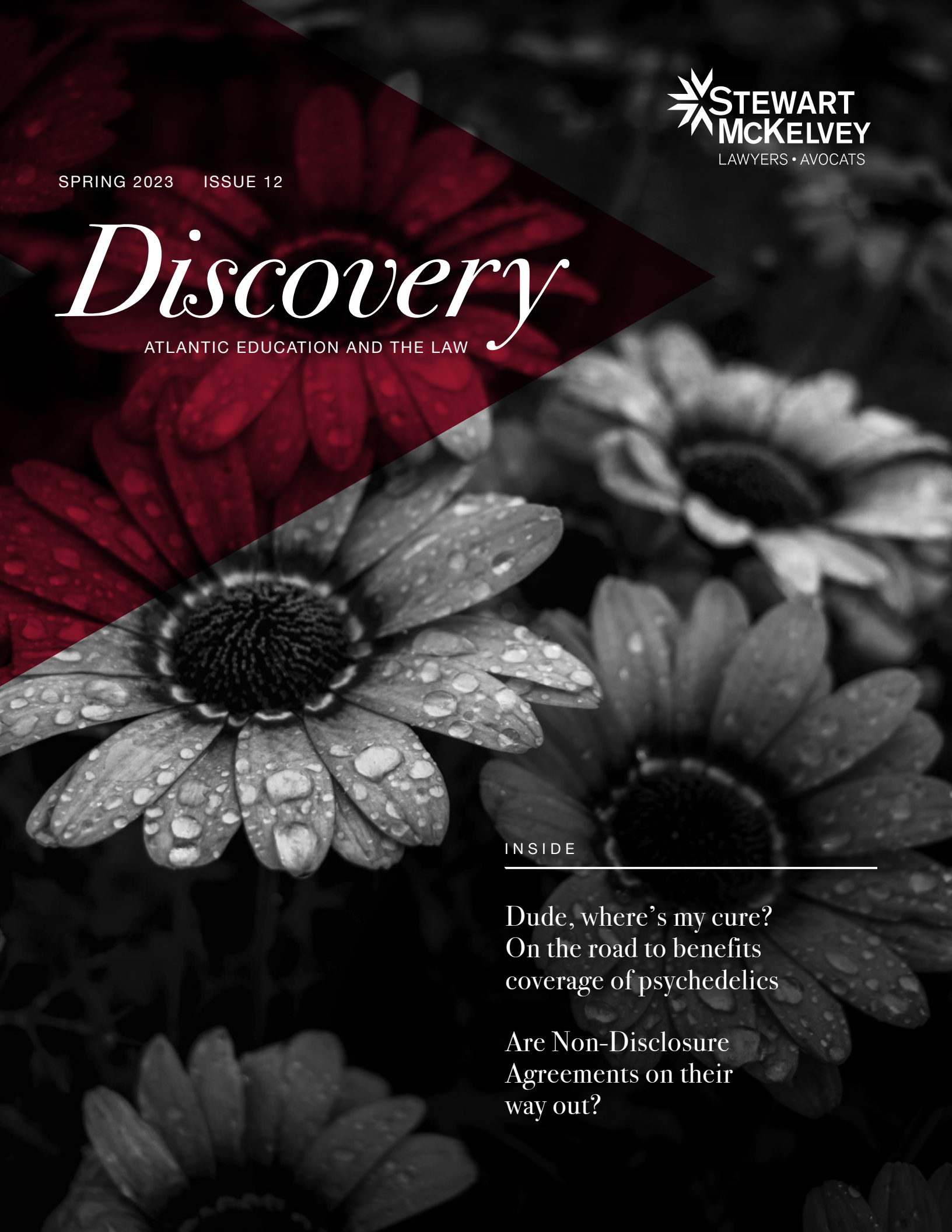

INSIDE

As they evolve and grow, academic institutions in Atlantic Canada continue to show resilience and lead progress in our communities. With the closing out of another successful academic term, these institutions have the opportunity to reflect on past challenges and the lessons that can be applied to evolving issues facing students, faculty, and administrators.

In our twelfth issue of Discovery Magazine, Stewart McKelvey lawyers provide insight into a variety of topics facing universities and colleges including: the use of non-disclosure agreements, privacy and confidentiality obligations, governance practices and navigating the social media landscape.

This publication aims to cover issues of relevance to universities and colleges in Atlantic Canada including recent decisions and changes in the legal landscape. We welcome any suggestions on topics to cover in future publications and encourage you to reach out.

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

- Brittany, Editor

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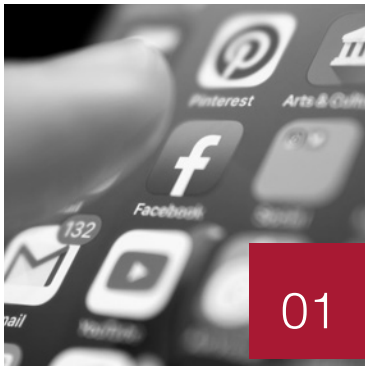

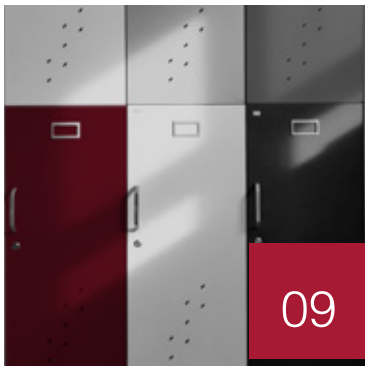

When Facebook goes faceless: unmasking anonymous online defamation

These days it seems no one is immune from the threat of anonymous keyboard warriors posting untrue and problematic content online. Social media and other platforms can attract a particularly bothersome breed of bad actors, empowered by their perceived anonymity to write salacious content for the purposes of their own entertainment.

We're certain you can picture the situation.

Imagine your university posts an optimistic scholarship announcement on Facebook and, despite the carefully curated messaging developed by your communications department, someone comments beneath the post complaining and, in doing so, misrepresents the cost of tuition or the availability of financial aid.

Or, equally as frustrating, imagine one of your most esteemed professors being wrongly disparaged by an anonymous student on ratemyprofessors.com.

These examples may seem benign; however, what if the content is worse? What would and could

you do if an anonymous poster wrongly accused someone at your university of committing a crime such as fraud or assault?

It would be discouraging to feel like you are left without recourse. Online "trolls", disguised by their cloak of anonymity, can make defamatory comments and seemingly evade detection. However, courts are adapting with the times and repurposing longstanding equitable doctrines from other contexts to find modern solutions to online problems.

SOLUTION: A NORWICH ORDER

A defamation lawsuit is the legal mechanism through which a court is required to consider whether or not a statement is truthful and, if it determines that someone has published falsehoods to your detriment, it can award damages. In the case of online defamation, though, parties are often met with the practical roadblock of being unable to identity the defaming poster. How can you possibly sue someone if you do not know who they are?

Bring on the Norwich Order! A Norwich Order is a decades-old equitable doctrine designed to compel someone to disclose the identity of another party a plaintiff seeks to sue. The namesake of the doctrine is the UK House of Lords decision in *Norwich Pharmacal Co. v Customs and Excise Commissioners* (1973), [1974] AC 133, which considered a patent infringement claim against an anonymous party whose identity was only known by the respondent government entity. The House of Lords agreed that it would be inequitable to allow someone to evade liability purely by reason of anonymity, and ordered the respondent to provide information to the claimant so that it could sue its intended defendant.

Though originating in the setting of intellectual property infringement, a Norwich Order is a flexible mechanism that can be applied to compel the production of identifying information of any anonymous wrongdoer, so long as the following criteria are met:

(a) the applicant has shown a valid, *bona fide* or reasonable claim (such as a claim in defamation) against the anonymous individual;

(b) the applicant has established that the third party from whom information is sought is somehow involved in the acts complained of;

(c) the third party is the only practicable source of the information; and

(d) the interests of justice favour the obtaining of disclosure from the third party.

We note that in some jurisdictions, like New Brunswick, legislatures have codified similar mechanisms in their rules of civil procedure.

In the context of anonymous online defamation, a Norwich Order can compel innocent third parties (such as the owner of a social media website) to provide the relevant information (such as an individual's identity or IP address) so the applicant can commence a lawsuit against the defamatory poster. These respondent online platforms are not, themselves, under scrutiny for the wrongdoing; rather, they are merely necessary participants in an effort to retrieve identifying information. Without disclosure, an applicant may never learn the identity of the wrongdoer behind the defamatory statement – effectively extinguishing one's ability to bring an action and curtailing the truth-seeking function of a trial.

NORWICH ORDERS IN ACTION

To highlight how this plays out in real-life situations, we note two recent Atlantic Canadian cases where courts issued Norwich Orders for the disclosure of identifying information to plaintiffs seeking to bring actions for defamatory statements made online.

In *Olsen v Facebook Inc.*, 2016 NSSC 155, a councillor and employee of a municipality discovered statements made on Facebook alleging that the municipal council was involved in fraudulent behaviour and conspiracy. These statements had been cleverly posted under pseudonyms, and the plaintiffs were determined to hunt down the true identities of those behind these harmful statements. Facebook was the only source of such information. As such, the plaintiffs turned to the courts. Thanks to a Norwich Order, the Nova Scotia Supreme Court ordered that Facebook release identifying information. At paragraph 25, the Court stated:

[...] internet anonymity cannot be used to shield people who unfairly damage another's reputation from being held accountable.

More recently, in *Losier v RateMDs,* 2021 NBQB 264, it was brought to a physician's attention that there were anonymous comments made on the website RateMDs.com, alleging that he was abusing Medicare and running a fraudulent charitable foundation. To clear his name, the physician had no other option but to retain a lawyer and seek disclosure of the anonymous author's identity. In ordering disclosure, the New Brunswick Court of Queen's Bench stated at paragraph 31:

In today's world of social media and the ability of individuals to post comments anonymously on websites of every description it is important that authors of such commentary be held accountable when their posts cause harm to others. Individuals who would seek to cause harm by potentially defaming others under the guise of anonymity should not be able to do so with impunity.

AN OLD TOOL WITH MODERN USES

In the age of social media, you are bound to encounter potentially defamatory content online that can harm your institution's reputation. Depending on the egregiousness of the defamation, inaction may not be a practical option for you. Sometimes there will be no choice but to set the record straight.

In university settings, Norwich Orders have the potential to be a valuable tool, as the mechanism provides you the ability to fight back against anonymous online trolls and take back power over your reputation. Should you ever find yourself in such an unenviable situation, please do not hesitate to contact us to discuss your options.

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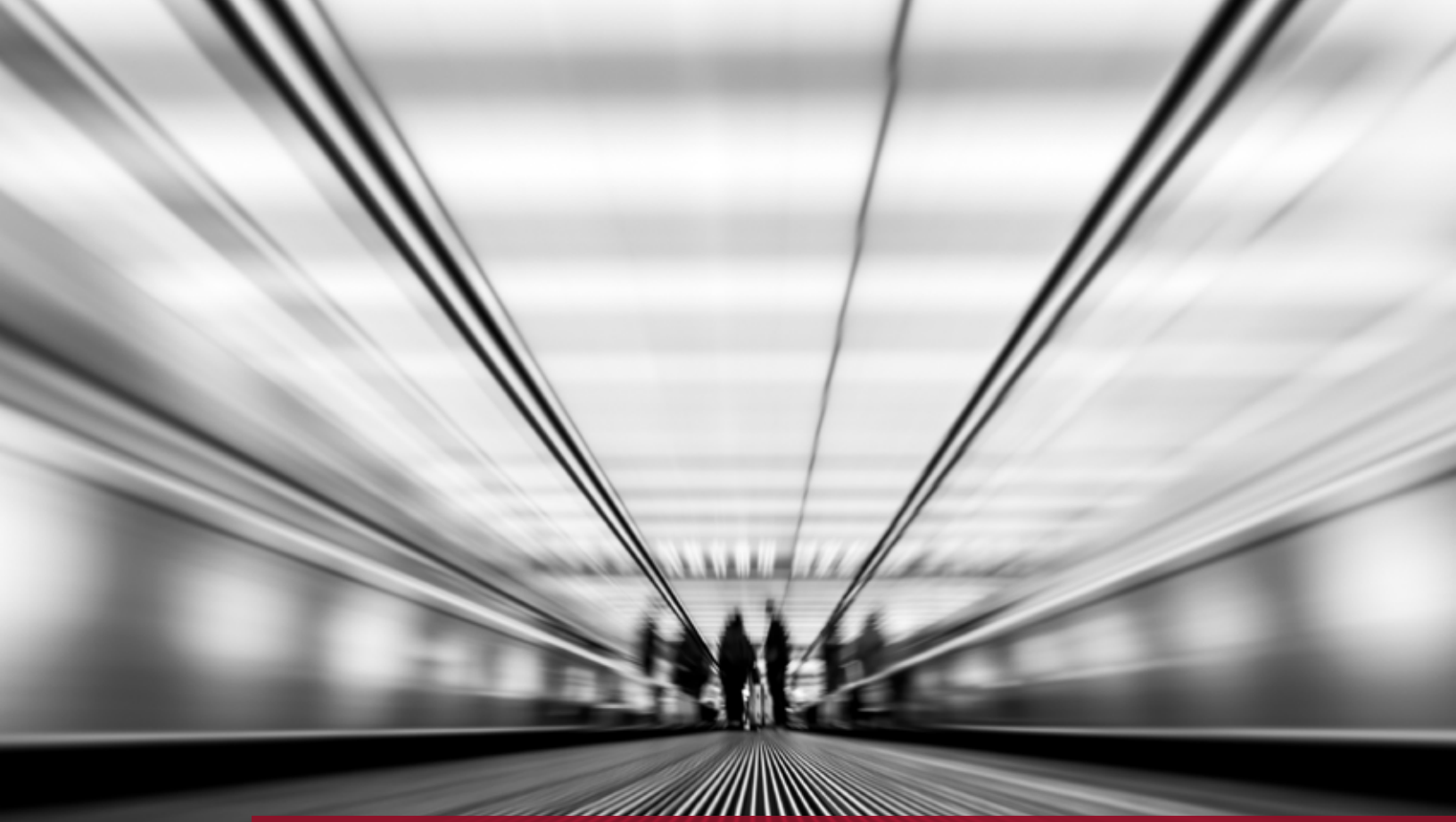
Dude, where's my cure? On the road to benefits coverage of psychedelics

Once known for recreational use, psychedelics are slowly gaining medical legitimacy as research emerges on possible therapeutic benefits for mental health issues and addiction. Recent global events have had a marked effect on people's mental health, and coupled with new research showing potential to treat illness such as depression, anxiety, and PTSD, it is not surprising that employers are beginning to consider coverage of psychedelic treatments through workplace benefits.[1] With American insurance providers beginning to offer psychedelic therapy benefits,[2] and the recent introduction of regulated use in Alberta,[3] these drugs are slowly entering the mainstream.

CHANGING OUR MINDS ON PSYCHEDELICS

"Psychedelics" is a blanket term for a class of psychoactive drugs that can elicit changes to human perception, mood, and cognitive processes. It includes a variety of substances such as LSD, MDMA, and psilocybin (the psychoactive compound in "magic mushrooms"). These are compounds that often occur naturally in plants or fungi, or can be isolated or manufactured in laboratories. For purposes of this article, we will distinguish cannabis from psychedelics, despite the aptness of the above description.

[1] Sophia Smith and Janina Conboye, Psychedelics are the latest employee health benefit, Financial Times. (10 August 2022)
[2] A.J. Herrington, Insurance Provider Enthea Offering Psychedelic Therapy Coverage As An Employee Benefit, Forbes. (6 December 2022)
[3] Government of Alberta, Psychedelic drug treatment service provider licensing.



Once known for recreational use, psychedelics are slowly gaining medical legitimacy as research emerges on possible therapeutic benefits for mental health issues and addiction.

In modern Western history, the proliferation of recreational use of such drugs, LSD in particular, is linked to 1960s "counterculture" and similar social movements. It is thought the neuroplasticity afforded by psychedelic substances helped some embrace alternative lifestyles. Unfortunately, this history has also led to some negative associations of recreational drugs such as hedonism, promiscuity, illicit activity and other anti-social behaviour.[4] It is also known that psychedelics can lead to addiction; even in therapy, use must be carefully monitored for occurrence of side effects.[5]

Recently, traditional stigmas surrounding these substances have been giving way to recognition of their most redeeming qualities: unlocking the ability to change one's mind. The need for this is readily apparent: the WHO estimated nearly a billion people (14% of adolescents) were living with a mental disorder as of 2019,[6] and prevalence of anxiety and depressive disorders rose an estimated 25% during the first year of the pandemic.[7] This has led the health community to return to studies of psychedelic treatments as a way to tighten the treatment gap.

A recent clinical trial on psilocybin therapy, at the time the world's largest to date, with participation from the Canadian Centre for Addiction and Mental Health (CAMH), showed psilocybin therapy to have a rapid and sustained response in patients suffering with treatment-resistant depression. With the assistance of a federal grant, CAMH is now studying the question of whether therapeutic effects of psilocybin can be de-coupled from their psychoactive properties.[8]

These positive early results promise that the use of such substances may soon proliferate and possibly even supplant the use of traditional psychiatric medications, which must be taken daily for months or years to be effective, and have their own potential side effects to consider. For example, selective serotonin reuptake inhibitors ("SSRIs"), one of today's most common anti-depressants, are linked to weight gain, lack of libido, and sleep problems.[9]

ACCESS THROUGH EMPLOYMENT BENEFITS?

Renewed interest and research vigour in the treatment of psychiatric disorders have provided limited access to psychedelic drugs for eligible patients with the resources and determination. However, there are several barriers standing between psychedelics and mainstream benefits coverage.

1. Legal restrictions and regulations

Drugs of this type are highly regulated and their legal use is very limited. Until they are more widely permitted, the discussion of health benefits coverage may be moot.

Most psychedelics are considered "controlled substances" under the *Controlled Drugs and Substances Act* and "restricted drugs" under the *Food and Drug Regulations,* meaning that possession and sale are generally prohibited outside of licensed dealers, clinical or laboratory researchers, or individuals pursuant to exemptions at ministerial discretion. In short, as compared to cannabis, psychedelics are relatively far from being decriminalized for recreational use – despite the appearance of the odd legal challenge[10] or illegal dispensary.[11]

The exception is ketamine, a psychedelic substance which is currently classified as a narcotic under the *Narcotic Control Regulations,*[12] and as such is already available for use in a clinical or therapeutic setting, subject to medical regulations. Ketamine had been approved for use as a sedative and anesthetic, but also has uses in treating depression and anxiety. In the past few years, small ketamine clinics have sprung up in metro areas around the Atlantic Provinces.

Other psychedelics such as psilocybin and MDMA

[4] Erika Dyck, LSD: a new treatment emerging from the past, Canadian Medical Association Journal. (6 October 2015)
[5] National Institute on Drug Abuse, Hallucinogens DrugFacts.
[6] World Health Organization, WHO highlights urgent need to transform mental health and mental health care. (17 June 2022)
[7] World Health Organization, World mental health report: Transforming mental health for all - executive summary. (16 June 2022)
[8] Centre for Addiction and Mental Health (CAMH), CAMH receives first Canadian federal (CIHR) grant to study psilocybin. (27 July 2022)
[9] Bethany Halford, Drug companies are investing big in psychedelics, but can they engineer out the trip?, Chemical and Engineering News 100(9). (6 March 2022)
[10] The current regime for accessing medical psilocybin has been challenged in Federal Court on the basis of s. 7 of the Charter of Rights and Freedoms in *Hartle et al. v. Canada,* T-1560-22.
[11] Sara Jabakhanji, Police will keep raiding Toronto magic mushroom dispensary if city doesn't step up, says expert, CBC News. (27 November 2022)
[12] *Narcotic Control Regulations*, C.R.C., c. 1041.

are less readily available, though they can now be legally accessed by eligible patients who are approved by the Federal government. On January 5, 2022, Health Canada made significant amendments to the Special Access Program ("SAP") that now allows doctors to request access to psychedelics for eligible patients.[13] This broadens the prior approval regime under which access was mostly limited to participants in approved clinical trials.[14]

Medical regulations may not be the only controls over the use of any psychoactive drugs. Alberta has introduced new health protection regulations, effective January 16, 2023,[15] that further regulate psychedelic-assisted therapy in the province. Psychedelic drug treatment service providers (except no-cost services provided under approved clinical research) will be required to hold a licence.[16]

The related standards that will apply to service providers as a condition of maintaining their licences include specific assessment and clinical oversight measures, specific qualifications for the medical professionals involved, and other requirements including safety and security policies.[17] As psychedelic therapy services become more prevalent, it is expected other provinces will follow suit and enact similar regulation.

2. Cost

Because of the resource-intensive nature of the current model of treatment, the sheer cost is anticipated to make psychedelics inaccessible without benefits coverage, and an expensive option to cover. As noted above, the drugs themselves are not widely available, and their use is expected to be heavily regulated, which also drives up the cost.

As a category of drugs that impacts users in drastic and irreversible ways – both positively and negatively – psychedelics are only available for treatment of mental health conditions in conjunction with psychotherapy in a controlled environment. Medical staff must be present to supervise while an individual is experiencing the drug and provide medical care as necessary to respond to any adverse reaction.

There is also the associated time cost of a day spent under the influence – time that a person receiving treatment will not be able to work – not to mention the travel that may also be required to reach a therapy provider.

Will naturally occurring compounds like psilocybin eventually be produced by large pharmaceutical companies under patents, such as may later give way to lower cost, generic versions? The possibility still seems rather far away. One issue is that psilocybin itself, along with other compounds that have been in use for centuries, are generally considered to lack the "novelty" required to obtain a patent.[18] On the other hand, there are currently active patents in Canada for related technologies, such as methods to extract psychoactive compounds from the fungus.[19] Related compounds with similar effects may also be patentable, and the race for intellectual property is underway.

Many investors are optimistic manufactured psychedelics will become the next billion-dollar business. With this, many companies have emerged wanting to take advantage of what could become a lucrative market.[20] However, concerns over legality continue to loom over this emergent sector.

3. Provider Choice

Cost and the regulatory status of drugs can both be difference makers affecting coverage under employee health benefits plans. Many plans require Health Canada approval and/or a drug identification number ("DIN") as a precondition for a particular drug to be covered. Cost is also relevant, as not every benefits plan will cover every available drug.

Such limits to coverage may be legally viable, even for health and welfare trustee boards that owe

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[13] Health Canada, Regulations Amending Certain Regulations Relating to Restricted Drugs (Special Access Program): SOR/2021-271.
[14] Amanda Siebert, Why Canada Could Be Next To Allow Psychedelic Therapy (And How It's Already Changing Lives), Forbes. (30 December 2020)
[15] A. Reg, 202/2022, amendment to *Mental Health Services Protection Regulations*, A. Reg. 114/2021.
[16] Ibid. at s. 34.
[17] Government of Alberta, Psychedelic Drug Treatment Services Standards (16 January 2023)
[18] Luis Millan, The New Cannabis?, The Canadian Bar Association. (27 September 2021)
[19] See, for example, CA 3124367, "Aqueous Extraction of Psychoactive Compounds from Psilocybin Fungus".
[20] Sandy LaMatte, How Psilocybin, the Psychedelic in Mushrooms May Rewire the Brain to Ease Depression, Anxiety and More, CTV News. (11 June 2022)

fiduciary duties to plan beneficiaries. Provider choice was recognized by a Nova Scotia court in *Canadian Elevator Trust Fund v Skinner*.[21] In that case, the employee's doctor had authorized his use of medical cannabis after conventional drugs were shown ineffective in treating his chronic pain. The employee applied for coverage through his employment benefits plan and was denied on the basis that the plan excluded drugs, including cannabis, that Health Canada had not approved.

The same employee later attempted to claim WCB coverage of medical cannabis (his pain condition resulted from a workplace injury), but was again denied on the basis that lack of Health Canada approval meant that his required treatment "would be inconsistent with Canadian healthcare standards".[22]

Though the Nova Scotia Court of Appeal recognized the benefits of medical cannabis in connection with the employee, they upheld the denial of benefits in both cases – thus supporting the choice of the welfare trust, and WCB policy, to limit reimbursement of these benefits. Importantly, the trust's choice to exclude reimbursement of medical cannabis was found non-discriminatory; it did, after all, provide coverage for other pain treatment options.

Similarly, it is anticipated that access to psychedelics may be categorically excluded from benefit plans at least until government-approved for safe use. Meanwhile, traditional psychiatric medications will continue to be an option.

It is also expected that employers and employees alike would make choices on coverage based on cost. A higher cost option therefore may not be as widely marketable.

EVERYTHING OLD IS NEW

It is expected that calls for legalized psychedelics will increase over time, particularly as research results about the efficacy of treatments, and innovations in the drugs themselves, continue to materialize. The Boomer generation may yet live out their former dreams of a kinder, gentler, more open-minded society – though likely through different means than they once would have imagined. "Nothing behind me, everything in front of me, as is ever so on the road."[23]

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[21] *Canadian Elevator Trust Fund v Skinner*, 2018 NSCA 31
[22] *Skinner v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2018 NSCA 23
[23] Quoting from Jack Kerouac, On the Road (New York: Viking Press, 1957).
[24] Acknowledgments to Mamie McGinn, Articled Clerk, for assisting with this article.

When closed doors make sense: Court dismisses challenge to university board's procedure for in camera discussions

A long-standing dispute over governance practices at the Cape Breton University Board of Governors was recently resolved in the Board's favour. Calvin Howley (the "**Applicant**"), a faculty representative on the Board, had been excluded from an *in camera* portion of a Board meeting on October 22, 2021. The Applicant sought judicial review of this decision.

In *Howley v Cape Breton University Board of Governors*, Justice Ann E. Smith dismissed the application for judicial review. Justice Smith found that the Board acted reasonably and fairly in following its established policy for *in camera* meetings, which excluded "internal members" — faculty, staff, and students — from discussions of certain personnel and labour issues.

This decision underscores the importance of having well-considered policies in place for *in camera* discussions. Such policies help to navigate the "structural conflicts" that may often arise on university boards given the diverse stakeholder groups involved.

BACKGROUND FACTS

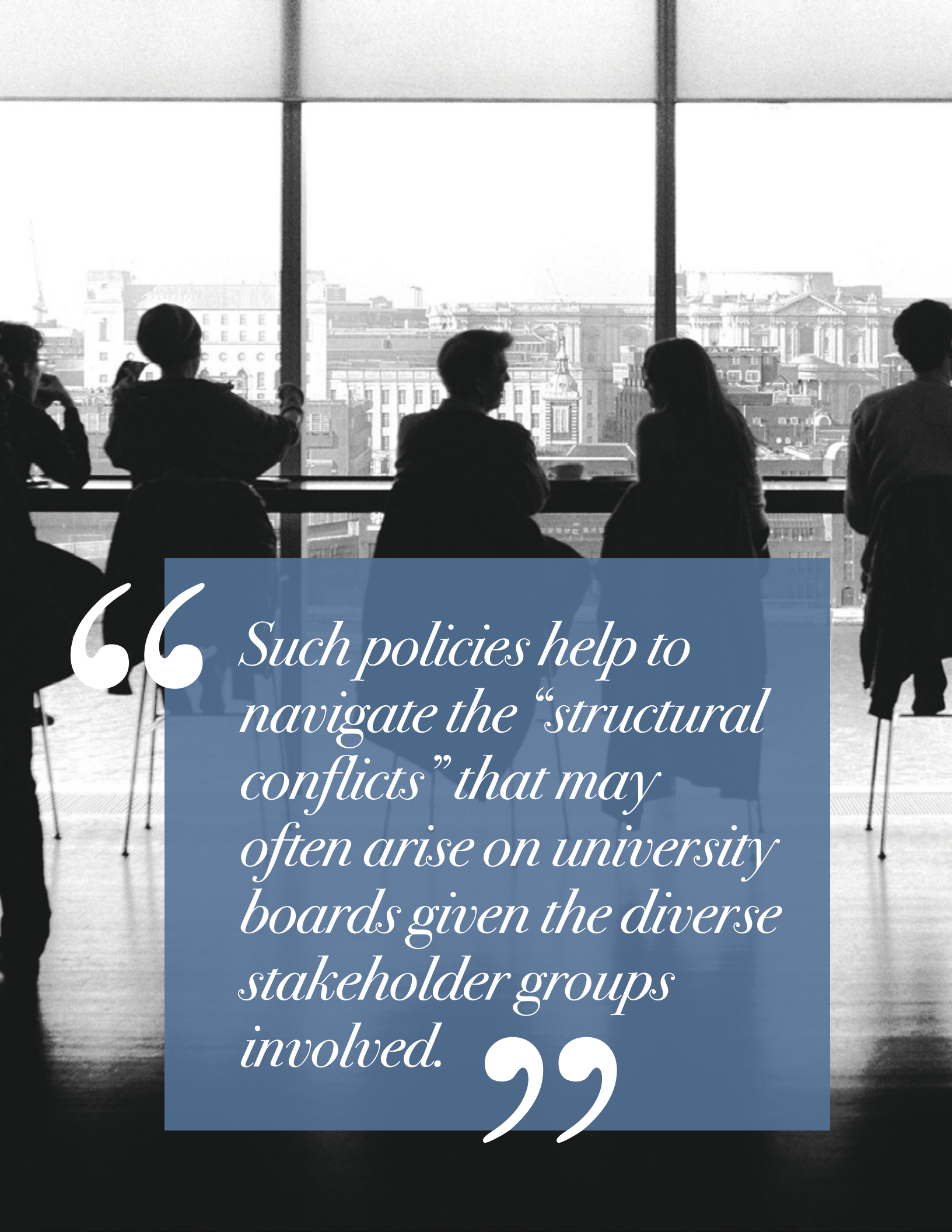
The CBU Board of Governors was created by the *Cape Breton University Act* to manage the affairs of the University. Board membership is set out in the *Act*: it includes the CBU President; a senior administrator; 12 members appointed by the Minister of Education; four faculty representatives; four students; and two members appointed by the Cape Breton Development Corporation. Those members can then appoint up to 12 additional people.

While the *Act* includes some procedural requirements, the Board is generally empowered to regulate its own meetings and procedures. Of particular relevance to *Howley* was Bylaw 9 on meeting procedures, which provided that Board meetings would be generally open to the public, but certain topics (including personnel matters, labour negotiations, and legal advice) would be discussed *in camera*, and the content and minutes of *in camera* meetings would be kept confidential.

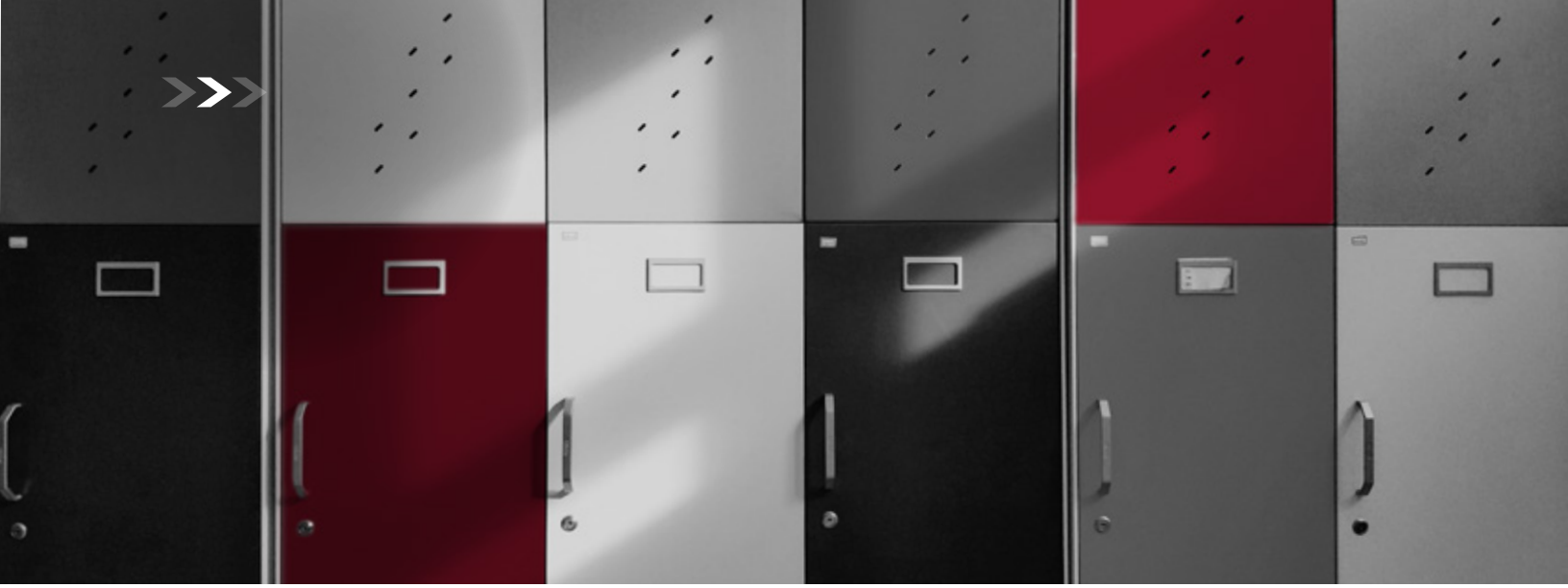
Board members must also abide by a Code of Ethics, requiring them to "carry out their functions with integrity and good faith in the best interests of the University…" and to avoid "situations in which there may be a real, apparent or potential conflict between their personal interest and their duties as Members…"[1]

Over time, the Board developed a practice by which "internal members" (faculty, staff, and students) would be asked to excuse themselves from certain

[1] Howley at para 23



> *Such policies help to navigate the "structural conflicts" that may often arise on university boards given the diverse stakeholder groups involved.*



discussions. The Applicant raised concerns about this practice in late 2020. In doing so, he was backed by the Association of Nova Scotia University Teachers and the Canadian Association of University Teachers.

The Board's Ethics Committee then took up the issue, conducting "extensive research" on *in camera* sessions and engaging an external consultant for advice. From there, the Committee reported to the Board in February 2021, providing a cross-country survey of university governance policies.[2]

Ultimately, the Committee recommended that the Board revise its policy to specify that only the President and external Board members would be present for *in camera* discussions of "human resources, personnel and labour issues, which present a real conflict of interest for faculty/staff and students" (referred to as a "structural conflict"). The Committee also recommended that these presumptive *in camera* sessions be limited to "information and discussion", with no motions at stake.[3] Should the need for a Board decision arise, the Board would then follow its more general process regarding conflicts of interest and recusal.

The Board adopted the Committee's recommendations on March 5, 2021, by majority vote.

Over the next several months, the Applicant expressed concerns about the new policy, and at one point said he would not comply. In June 2021, a written warning was issued to the Applicant, advising that his "failure to abide by the Board's procedure" for *in camera* discussions "would be considered a violation of the Code of Ethics."[4]

Matters culminated on October 22, 2021, when the Board, and its Executive Committee, met in person. The Applicant again objected to the *in camera* process being followed. On November 25, 2021, he applied for judicial review. The hearing took place on September 12, 2022.

LEGAL FINDINGS

There was an initial issue regarding what "decision" the Court was actually being asked to review. Because the proceeding was not commenced until November 25, 2021, the Applicant was out of time to seek judicial review of the Board's March 2021 decision to implement the *in camera* policy. Instead, Justice Smith found that "the Board's October 22, 2021 decision was to follow a procedure it had adopted at its March 5, 2021 meeting."[5] The "true nature of the Board's action," Justice Smith noted, "was to follow its own procedure."[6]

[2] Ibid. at paras 66-68, 73.
[3] Ibid. at paras 29, 69 (see also para 70).
[4] Ibid.at para 119.
[5] Ibid.at para 104 (see also para 98).
[6] Ibid.at para 102.

Having identified the "decision" at issue, Justice Smith applied the reasonableness standard of review, in accordance with *Canada (Minister of Citizenship and Immigration v Vavilov*. Justice Smith concluded that the Board "made an entirely reasonable decision" when internal members of the Board were excluded from the *in camera* discussion on October 22, 2021: "When it did so, the Board was following its duly voted upon and adopted procedure for such discussion sessions."[7] Similarly, the Board did not violate the *Cape Breton University Act*, or its own Bylaws, in following a procedure that it was "expressly empowered" to adopt.[8]

Justice Smith also upheld the decision on procedural fairness grounds, applying the factors from *Baker v Canada (Minister of Citizenship and Immigration)*.

Justice Smith agreed that the Applicant, "as a Board Member, was owed a duty of fairness." However, the Applicant had only "rudimentary procedural rights" in the context of the October 2021 meeting: namely, he "was entitled to be afforded the opportunity to voice his concerns."

Justice Smith pointed out that the Applicant also had the "opportunity to express his concerns about the process" when it was debated at the March meeting — and to vote on the Ethics Committee's recommendation. As Justice Smith noted, there was "no suggestion that the voting process was flawed or invalid in any way."[9]

KEY TAKEAWAYS

Although it was not the Court's role to determine "best practices" for *in camera* meetings,[10] *Howley* is still a good reminder that university boards will benefit from detailed policies for holding *in camera* sessions.

In developing and reviewing these policies with an eye to effective governance, university boards should consider:

- the provisions of their governing statute, and their bylaws;
- comparable policies at other post-secondary institutions; and
- whether to have a board committee conduct a review and offer recommendations.

Clear policies on *in camera* discussions can help maximize the contributions of every board member, while minimizing the potential for conflicts.

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[7] Ibid.at para 113.
[8] Ibid.at para 118 (see also para 146).
[9] Ibid.at para 142.
[10] Ibid.at para 116.

Are Non-Disclosure Agreements on their way out?

A non-disclosure agreement, or "NDA", is a legal contract in which two or more persons agree to keep the information outlined in the agreement strictly confidential. NDAs are routinely used in the employment context – where an employee agrees not to disclose confidential employer information. However, they may also be used when an employer settles a legal claim with a complainant, including in situations where the complainant alleges they have been harassed by another employee. In the normal course, the employer will provide the complainant with a settlement payout, and in exchange, the complainant signs an NDA to keep quiet on the circumstances of the alleged harassment. A complainant who breaches an NDA by speaking out about the alleged harassment may be required to pay back the settlement payout to the employer.

In the summer of 2022, Hockey Canada came under fire for using an NDA when settling a lawsuit with a woman who claimed she had been sexually assaulted by eight unnamed Canadian Hockey League players.[1] Publicity surrounding the details

[1] Ashley Burke, "Crisis on ice: What you need to know about the Hockey Canada scandal", CBC Politics (29 July 2022)

of the lawsuit, and the fact that Hockey Canada had settled sexual abuse claims with a National Equity Fund, added fuel to the public debate about whether NDAs are being misused by employers and organizations to protect harassers at the expense of complainants. Of course, the public discourse surrounding the misuse of NDAs is not new. Public criticism of NDAs was heightened by the Harvey Weinstein revelations which sparked the #MeToo movement. Campaigns such as "can't buy my silence" have since been instituted for the purpose of ending "the misuse of NDAs to buy victim's silence".[2] The critics of NDAs argue that preventing complainants from speaking out about the alleged harassment may allow the harasser to repeat their behaviour.[3]

Before news of the Hockey Canada scandal broke, Prince Edward Island became the first jurisdiction in Canada to enact a law regulating the content and use of NDAs. The *Non-Disclosure Agreements Act*[4] (the "*Act*") came into force on May 17, 2022. It prohibits persons alleged to have committed harassment from asking a complainant to enter into an NDA for the purpose of concealing the details of the complaint[5] – except in cases where the complainant wishes to have an NDA.[6] Persons who enter into an NDA that is not the "expressed wish and preference" of the complainant are guilty of an offence and liable to a fine between $2,000 and $10,000.[7]

Although the *Act* became law on May 17, 2022 – making it applicable to settlements on or after that date, it is important to note that the *Act* also contains a retroactive provision that applies to NDAs entered into before May 17, 2022. This retroactive provision permits complainants bound by an NDA before May 17, 2022 to communicate the circumstances of the alleged harassment with an enumerated list of persons, including medical practitioners, psychologists, nurses, and social workers.[8]

Prince Edward Island is not the only province to consider regulating NDAs. Bills that are almost identical to the *Act* were introduced in the spring of 2022 in Nova Scotia and Manitoba, but have yet to become law. The Nova Scotia bill passed first reading on April 7, 2022 and has yet to pass second reading.[9] Manitoba's bill passed first reading on November 29, 2022. It also has not yet passed second reading.[10] In August of 2022, Senator Marilou McPhedran stated she planned to table a federal bill regulating NDAs.[11] More recently, the largest professional association for lawyers in Canada – the Canadian Bar Association ("CBA") – entered into the discussion on NDAs. At its annual general meeting on February 9, 2023, the CBA passed a resolution to:

1. *promote the fair and proper use of NDAs as a method to protect intellectual property and discourage their use to silence victims and whistleblowers who report experiences of abuse, discrimination and harassment in Canada;*

2. *advocate and lobby the federal, provincial and territorial governments to enact changes to legislation and policies to ensure NDAs are not misused for the purpose of silencing victims and whistleblowers.*[12]

This resolution is a formal expression of the CBA's intention. Given the important perspective the CBA brings to law reform in Canada, this resolution supports the message that action needs to be taken to reconsider the circumstances where NDAs should be used.

Those against the outright ban of the NDA in settling harassment claims argue that NDAs play a vital role in settlement negotiations. Organizations and employers are of course concerned with reputational risks associated with a complainant speaking out – and often the complainant's allegations are disputed. Therefore, in return for

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[2] Zelda Perkins and Julie MacFarlane, Can't Buy My Silence. (September 2021)
[3] Shane Ross, "Victims no longer silenced as landmark legislation takes effect on P.E.I.", CBC News. (17 May 2022)
[4] *Non-Disclosure Agreements Act, RSPEI 1988, c N-3.02*.
[5] Ibid at s. 4(1).
[6] Ibid at s. 4(2).
[7] Ibid at s. 6.
[8] Ibid at s. 5.
[9] *Non-disclosure Agreements Act - Bill 144*, Nova Scotia Legislature.
[10] Bill status, Legislative Assembly of Manitoba.
[11] Ashley Burke, "Hockey Canada scandal shows the need to ban non-disclosure agreements, advocates say", CBC News. (10 August 2022)
[12] Resolution 23-05-A, Principles to Prevent Misuse of Non-Disclosure Agreements in Cases of Abuse and Harassment, Canadian Bar Association. (9 February 2023)

the complainant's silence about the allegations, the organization or employer gives the complainant a settlement payout and does not require the complainant to prove their allegations in court (something the complainant may or may not be able and/or willing to do).

While parties have traditionally been at liberty to negotiate the terms of an NDA, the current social movement to regulate the content and use of NDAs may limit this option in the future. Universities as employers should therefore exercise caution when settling discrimination or harassment claims and follow legislative developments in their province. Even in the absence of legislation regulating the content of NDAs, universities should be aware of the potential that a future law regulating NDAs may contain retroactive provisions. Such provisions may permit complainants to disclose details of the alleged harassment to certain persons. Universities should also consider whether an NDA prohibiting the complainant from disclosing the settlement amount should be negotiated separate and apart from an NDA that prohibits the complainant from speaking about the circumstances of the alleged harassment. Finally, it may be wise to stipulate in the NDA what is permitted to be communicated to the public about the settlement, especially if the allegations have already received public attention.

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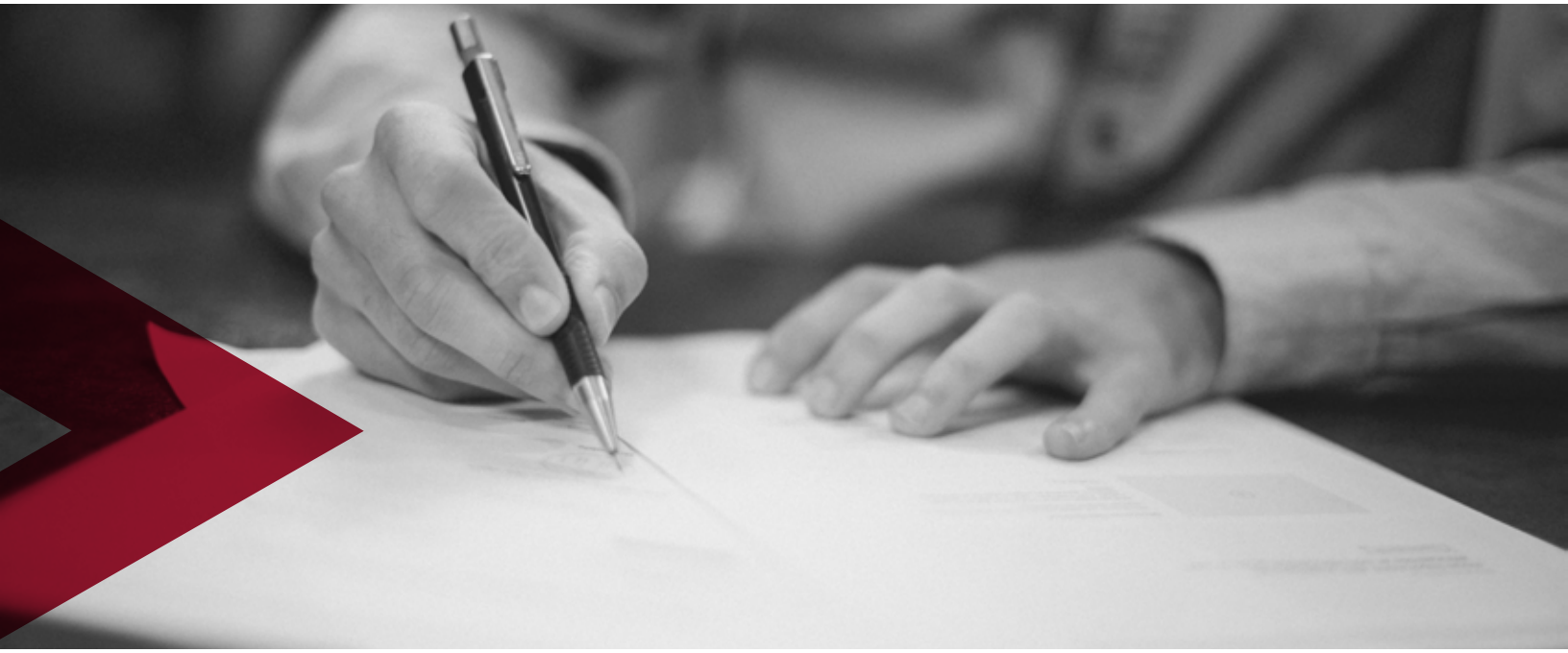

Whose information is it anyway? Implications of the York University decision on public and private sector privacy and confidentiality

Privacy and confidentiality requirements are some of the most important responsibilities of organizations today. An organization's ability to properly manage information, regardless of its type, is critical for legal and contractual compliance, the avoidance of monetary penalties, and reputation.

Compliance, however, is rarely as straightforward as it seems, and knowing the obligations of your organization with respect to information is an increasingly difficult and complex task. This is particularly true for information that straddles the line between public and private, namely information that is shared between private entities and their affiliated public institutions.

BACKGROUND

The privacy and confidentiality obligations of private entities (i.e. organizations that engage in commercial activity, such as for-profit companies) and public institutions (i.e. government departments and public sector entities, such as universities) are significantly different, except for personal information.[1] While private entities enjoy a largely unregulated regime that allows them to go about their business as they see fit subject only to the scrutiny of shareholders, public institutions are heavily regulated and are accountable to the public at large.

[1] Office of the Privacy Commissioner of Canada, "PIPEDA in Brief."

This public sector accountability derives from freedom of information legislation (sometimes also known as access to information legislation). Under this legislation, public institutions are required to divulge recorded information that is in their custody or control when requested pursuant to freedom of information or access to information requests. This requirement is incredibly broad and includes all information in the custody or control of the public institution that is not subject to one of the very limited disclosure exceptions, such as for personal information or information that could bring harm to a specific person, entity, or group.

Since private entities are not directly subject to freedom of information legislation, they rarely consider it, or its implications, in the day-to-day management of their information. Public institutions, meanwhile, regularly grapple with the implications of this legislation on their information. What is rarely considered, however, is what happens when a public institution obtains information owned by a private entity, and when, if ever, that information may need to be disclosed.

THE YORK UNIVERSITY DECISION [2]

The question at the centre of public institution information disclosure rests on the definition of "custody or control." That is, if a public institution is only required to disclose information in its custody or control, at what point does information held by a private entity and shared with a public institution fall under the custody or control of that public institution? Thanks to the recent decision in *YUDC v IPC*, the answer to this is becoming clearer.

By way of background, York University Development Corporation ("YUDC") is a wholly-owned subsidiary of York University that was created to assist with, among other things, renovations of the University book store and pharmacy. Over the course of these renovations, several documents were created by and shared between YUDC, which is not subject to freedom of information legislation, and York University, which is.

In 2019, two professors requested that the University disclose certain records relating to the bookstore and pharmacy renovations. The University refused on account of the records being confidential YUDC information (confidential third-party information is one of the exceptions to disclosure under Ontario freedom of information legislation) but this refusal was overturned by the Ontario Information and Privacy Commissioner ("IPC")[3]. York University then claimed that the records in question were not under its custody or control, but this too was unsuccessful.[4] The University then requested a judicial review with the Ontario Divisional Court (the "Court").

Upon review, the Court determined that the records in question were in the custody or control of York University, upholding the decision of the IPC and mandating that York University disclose the requested records to the two professors. Its decision was grounded in the Supreme Court of Canada's decision in *Canada (Information Commissioner) v Canada (Minister of National Defence)* ("*IC v MND*"),[5] which set out the two-part test for custody or control:

1. Do the contents of the document relate to a department matter; and

2. Could the [public] institution reasonably expect to obtain a copy of the document on request? [6]

The Court determined that the records related to the renovation project, which formed part of York University's mandate, and that the University would have no difficulty obtaining the documents. Therefore, the test for custody or control was easily met and disclosure was obligated.

In making this decision, the Court spent much of its time discussing the second step of the test – that is, whether York University could reasonably expect to obtain a copy of the requested records. While the content of those records is important, there was never any debate as to whether their contents related to the mandate of the University.

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[2] *YUDC v Information and Privacy Commissioner*, 2022 ONSC 1755 ["YUDC v IPC"]
[3] Information and Privacy Commissioner, Ontario, Canada. "Order PO-3922." York University. (30 January 2019)
[4] Information and Privacy Commissioner, Ontario, Canada. "Reconsideration Order PO-4029-R." York University. (14 February 2020)
[5] *Canada (Information Commissioner) v Canada (Minister of National Defence)*, 2011 SCC 25.
[6] Ibid at 6.

In *IC v MND*, the Supreme Court of Canada stated that the reasonable ability of a public institution to obtain a copy of the requested documents needed to be considered in light of "[t]he substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder."[7] The Court in *YUDC v IPC* found several pieces of evidence to support its analysis on this step two.

First, the records in question were in possession of an individual who was both an officer of the University and a member of the board of directors of YUDC. Even if the individual had been holding the documents in their role as director of YUDC, the context made it impossible to separate them from their other role with the University for the purpose of the custody or control of the records in question. On this basis, it was concluded that so long as this individual was in possession of the documents, the University had custody or control.

On the possession piece alone, the Court could have likely concluded that the test had been met; however, it went further and also found compelling evidence that York University could have undertook to complete the renovations without creating the YUDC, in which case the records would have been within the University's control all along. In the words of the Court, it would not be appropriate to permit a public institution like York University to "divest itself of its responsibility and accountability for records directly related to its statutory mandate by choosing to create a corporate entity to discharge its mandate […] in aid of achieving its objects and purposes."[8]

In other words, while a public entity can work with affiliates to achieve its mandate, it cannot create or enlist non-arm's length entities to assist with the expectation or assumption that this non-public entity's involvement will free the public institution of its accountability obligations under the relevant freedom of information legislation.

While the Court heavily focused its step two analysis on the fact that the individual who was in possession of the requested documents was both an officer of the University and a director of YUDC, it is clear from the test that the connection between the entities can be far more remote, yet result in the same determination by a court.

CONCLUSIONS

With public institutions becoming increasingly reliant on the support of private entities – and in particular, private, wholly-owned subsidiaries – to deliver on the public institution's legislated mandates, understanding one's information privacy obligations and risks is critical.

While the *YUDC v IPC* decision is from Ontario, the same analysis and principles apply to freedom of information legislation across the country. A similar fact scenario in Atlantic Canada would almost certainly meet with the same result. With that knowledge, however, comes the opportunity to prevent a similar fact scenario from materializing within your organization. Not only do both public institutions and private entities need to turn their

[7] Ibid at 56.
[8] *YUDC v IPC*, supra note 2 at 48.

minds to the realities of the current information privacy regime, they also need to begin to work with each other to identify processes, policies, and procedures to keep their information, and their relationships, safe.

From *YUDC v IPC* we have learned that it is prudent for public institutions to ensure that the control of an affiliated private entity is as separate and distinct as possible from the management of the public institution, and certainly to avoid having the majority of a wholly-owned subsidiary's directors be officers of the public institution. We also learned that organizations must carefully consider the necessity and extent of their relationships, particularly in relation to matters under the public institution's mandate, and whether the same result could be achieved by the public institution alone or with less involvement from the private entity.

How each organization chooses to address these risks and obligations will necessarily differ, but in all cases determining the level of custody or control the public body has over the private entity's information is central to pre-empting, restricting and preventing disclosure, and ensuring that any disclosure that does occur has the least potential for harm to those involved.

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Scott Campbell is a litigation partner in our Halifax office. He has a Bachelor of Laws from Dalhousie University and a Bachelor of Civil Law from the University of Oxford. From 2011 – 2015, he taught Conflict of Laws at the Schulich School of Law (Dalhousie University).

In his practice, Scott routinely advises and represents clients on matters of procedural and appellate strategy, class actions, governance, jurisdiction, education law, private international law, administrative law, and constitutional law. He has argued cases before all levels of court in Nova Scotia and Ontario, in addition to the Federal Court, the Federal Court of Appeal, and the Supreme Court of Canada.

Scott is currently Chair of the Access to Justice & Law Reform Institute of Nova Scotia, Chair of the Complaints Investigation Committee of the Nova Scotia Barristers' Society, and Vice-Chair of Stewart McKelvey's Diversity, Equity & Inclusion Committee.

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