

**Shanahan, T., Nilson, M., & Broshko, L. J. (Eds.).
(2016). *Handbook of Canadian higher education law*.
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The history of Canadian higher education law reflects the story of Canada, one marked by: complexity in the relationship among federal, provincial, and institutional forms of governance; an attempt to balance rights and freedoms; growing commercialization and corporatization; and increasing importance of the court of law. Shanahan, Nilson, and Broshko capture this story well.

This edited book is a welcome read to researchers of Canadian higher education administration, to university administrators, and to anyone connected to Canada's post-secondary system. Some of the chapters offer indirect and even direct advice on how to avoid law suits from faculty or students, create robust contracts, purchase land, or better understand the legal framework around Intellectual Property (IP); tellingly, the Preface was contributed by a President of a small US liberal arts college (Peter Mercer) writing from an administrator's perspective. At the same time, other chapters lay out the current and historical legal terrain of Canadian higher education at the various levels of governance.

Over 12 chapters spread across four sections, *The Handbook of Canadian Higher Education Law* brings a legal lens to examining higher education systems, institutions, and practices in Canada. The four sections comprise:

1. Overview of Postsecondary Education in Canada.
2. Institutional Governance.
3. Faculty and Students.
4. Postsecondary Institutions and the Community.

Following this, a conclusion ties together the disparate themes raised over the previous 284 pages. An appendix supplied by Shanahan lays out the different legislation, management, quality assurance mechanisms, and coordinating bodies in higher education in each province and territory. While this appendix provides some sense of the differences across Canadian higher education law, the book would have benefited from a section or chapter comparing provincial/territorial systems in greater depth. Unable to cover Canadian higher education law in its entirety, the book still fills a gap in the literature—notwithstanding its focus on universities over colleges or other postsecondary institutions.

Five things stand out about this book: (a) *Contributors* to the book; (b) *Canadian Complexity* in the interplay among federal, provincial, and institutional laws; (c) The importance of *Contracts* and issues of *Discrimination*; (d) *Legal Cases*; and (e) The move towards *Corporatisation and commercialization*.

Contributors

One unique characteristic of this book is in authorship: 27 out of 31 contributors are lawyers, with one large chapter on “land development” coauthored by 17 legal practitioners from McCarthy Tetrault LLP. This composition provides a different perspective for those of us embedded in the discipline and culture of education; at times, I felt like an anthropologist entering the land of lawyers with its cultural norms, practices, behaviours, and nomenclature. The reader thus becomes privy to a legal way of thinking—thankfully with a minimum of “legalese.” Overall, the book did well in bridging the two worlds of higher

education and the law; this was likely due in part to the lead editor, Theresa Shanahan, who, as a lawyer and leading scholar on Canadian higher education, inhabits both worlds. Li-Jeen Broshko, the third editor, is legal counsel for Simon Fraser University (SFU), and Michelle Nilson, the remaining editor, is an established scholar in North American Higher Education who acts as a translator in communicating legal themes and ideas. The three remaining non-lawyer authors include a former Associate Vice-President of Student Affairs of the University of Saskatchewan and two Education faculty members from St Francis Xavier University. A vast majority of the authors appear to be based in Vancouver (McCarthy Tetrault is a Vancouver law company), the others include two from Ontario (including Shanahan, who wrote the first three chapters), two from Nova Scotia, and two from Saskatchewan. One glaring absence in the book is Quebec; this was a bit disappointing given some of the major differences in the legal systems between QC and the rest of the country.

Canadian Complexity

As Legal Counsel for McMaster University, Brent Davis states “the framework of university governance law in Canada is extremely complex” (p. 58). For starters, most of Canadian law falls under Common Law, wherein judicial cases are regarded as the most important source of law; however, Quebec employs Civil Law for all non-criminal matters, which relies on codes and statutes instead of prior cases in making legal decisions. Furthermore, confederation set on course a highly decentralized and fragmented legal system. As Shanahan explains, the Constitution Act of 1867 delegated power to the provinces to make educational laws, while restricting provinces from raising revenue through taxation (p. 11). The federal government transfers block funding to the provinces for health and education with earmarked or suggested amounts for Postsecondary Education but provinces can really do what they want with the money—so when the federal government has reduced amounts, provincial Ministries have responded by increasing tuition and cutting per student funding. Most Canadian higher education is public but while universities are dependent on government “it by no means follows that the universities are organs of government” (p. 15). As “quasi-public institutions” (p. 61) they have mostly not been subject to the Canadian Charter, the bill of rights enshrined in the constitution and developed in 1982, which pertains only to government action. This is, however, not the same for colleges, which are considered more as an arm of government with specific government mandates. For the most part, while the government finances postsecondary education, they cannot regulate it. But even here, the authors note exceptions, such as military colleges, prison education, scholarships, and research funding.

One issue that is covered briefly in Shanahan’s section, but deserved more coverage, is with regard to the funding, management, and legal landscape of higher education for Canada’s Indigenous peoples. We learn about specific programs funded by the federal government, such as the Postsecondary Partnership Program and the University and College Preparation Program, which provide per student allowances given to band councils who then determine which students receive funding; in addition, non-registered First Nations and Metis students are by-and-large ineligible for government funding, and Inuit eligible only for certain programs. As Shanahan keenly notes, contrary to popular belief, not every Aboriginal person in Canada gets a “free ride” to higher education. Indigenous groups thus argue that amendments made to Section 35 of the Canadian constitution in 1996, which extends cultural, social, political, and economic rights to Indigenous Canadians, require the government to provide free education at all levels.

The diversity across provinces in higher education law is quite mind-boggling, and both Shanahan (Chapters 1-3) and Davis (Chapter 4) do a fine job providing the reader with a lay of the land. For example, although universities are ostensibly autonomous from government, Alberta’s Post-Secondary Learning Act gives powers to the minister to “restrict, prohibit, and impose conditions on university power and rights” (p. 60). In contrast, British Columbia provides greater support for academic freedoms than most other provinces. In some provinces, like Ontario, each university has its own act of legislature or royal charter, while in others all universities fall under a single act. While BC has a robust transfer system between colleges and universities, Ontario has no real credit transfer system. Notwithstanding the diversity among Canada’s provinces and territories, Section 1 and Chapter 6 of the book point us to national bodies of importance, such as Universities Canada (formerly AUCC), which includes 96 registered members, and the Association of Canadian Community Colleges—both support quality assurance. The lobby group of U15 (comprising 15 research-intensive universities), and other alliances, such as the Group of 20 Canadian comprehensive research universities and the Council of Ministers of Education (CMEC), though weak,

represent a vehicle for sharing information among provinces.

The book articulates the diversity and complexity in institutional types of post-secondary institutions: e.g., degree and non-degree, recognized and authorized, registered or licensed. We learn about Quebec's unique system of CEGEPs (general and vocational colleges), and the province's eponymous university system with its 6 campuses making it the largest university in Canada. Likewise, we gain greater insight into the complexity of university management, such as through the creation of bicameral governance, first enacted through the Flavelle Commission in Ontario in 1906, which divides the roles and responsibilities in a university between the Senate and the Board of Governors. Chapter 4 discusses how the creation of the bicameral system has led to jurisdictional confusion and growing ineffectiveness of senates across Canadian universities. In this chapter, we gain insight into the messiness in this division, where business and other forms of non-academic governance (e.g., budgets, IP, contracts, disciplining) falls to the Board and educational matters to Senate—though these roles can be in conflict with each other. In addition, institutional and provincial laws lay out different rules for such bodies (e.g., in BC, the board must consult the senate on all matters of appointments).

Contracts and Discrimination

Chapters 5, 7, and 8 focus on implicit and explicit contracts between institutions and students and faculty. Chapter 8 looks at the relationship between university management and faculty unions and associations. Here, again, the diversity across institutions is of note: e.g., while most faculty across Canada are unionized, the province of Alberta outlaws faculty unionization. In these chapters and elsewhere we are introduced to legal concepts of “procedural fairness,” “natural justice,” and “duty to act fairly,” which loosely all refer to the right to a fair hearing and freedom from bias, and must be applied when any panel, hearing, or tribunal is created to make major decisions affecting rights of an individual, e.g., in a tenure denial case. In their contract with faculty members, institutions are obliged to communicate standards and follow clear rules and procedures, e.g., tenure denial can be reversed if it is shown that standards were not communicated clearly or that the candidate in fact met standards laid out in their contract.

In these three chapters, the authors appear to offer free legal advice to university administration on the duty to provide “reasonable accommodations” to students: institutions are obliged to explore options to accommodate students (e.g., in terms of disabilities, religious accommodations), but students are also expected to communicate their need for accommodation. Students may litigate but there is “no absolute right to counsel in academic and non-academic decision-making processes” (p.153), and while “educational malpractice” suits are becoming more common, most academic decision cases (e.g., relating to curriculum, grading, claims of instructor incompetence, etc.) are thrown out of court. Chapter 5, by Poskitt and Wojda, provides some interesting legal insight into human rights law as applied to higher education; however, the chapter is overall quite uneven, long-winded, and some of it seems rather irrelevant to higher education. For example, the authors spend 14 pages listing different forms of discrimination, and only on page 99 do they mention “concerns most relevant to post-secondary institutions.” Furthermore, the authors discuss a discrimination case of a professor denied promotion to full professor and then follow this with a sentence stating that her qualifications were not “comparable to those of the other candidates competing for tenure” (p. 100). This shows a fundamental misunderstanding of the university tenure and promotion system—i.e., (a) Promotion to full-professor is not about obtaining tenure; and (b) Tenure is not generally considered a “competition”, like applying for grant where there is a limited good.

Cases

As most Canadian law is common-law, cases are of utmost importance. The *Handbook*, thus, repeatedly discusses some of Canada's precedent-setting cases in higher education which present great little stories. For example, in *McKinney v. University of Guelph*, 5/7 Supreme Court justices concluded the University Human Resources' policy requiring mandatory retirement was not governmental and therefore not subject to the Canadian Charter (which prevents discrimination based on age). In contrast, in *Pridgen v. University of Calgary*, a case of two brothers suspended for posting negative comments on Facebook about their professor, the Alberta Court found in favour of the grieving students because the university fell under Alberta's Post-Secondary Learning Act and thus had to comply with the Charter (which concluded that the suspension interfered with students' freedom of expression). In *Agduma-Silongan v. UBC*, a student

applicant claimed UBC discriminated against her based on the origin of foreign credential; the court decided in favour of the university finding that treating students unfairly is legally permissible unless “such unfairness is related to a protected ground” (p.105) (e.g., age, sex, sexual orientation, etc.). In other cases, we learn how university calendars have been treated as contractual documents. In *Bell v. St Thomas*, a university student prevented from taking a course referred to a statement in the university’s calendar that stated such a course could be taken without special permission; the courts found in his favour. Finally, in the conclusion, Nilson introduces a pivotal and ongoing case where BC, ON, and NS’ respective law societies decided to block accreditation to a government approved law program at BC’s Christian Trinity Western University (TWU). The three law societies took exception to TWU’s “community covenant agreement” which requires community members abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman” (TWU, n.d., p. 3). The societies claimed it discriminates against LGBT individuals wishing to pursue a law degree at the university. The case is a fascinating one in that it pits religious and equality rights against one another. Since the *Handbook* was written, courts have found in favour of the Law Society of Upper Canada in ON and against BC and NS law societies. The BC Law Society has now taken their case to Canada’s Supreme Court of Appeal.

Corporatisation and Commercialization

Overall, the book highlights how universities are becoming more like companies, with a student “consumer base,” a pressure to raise money, and a need to foster smooth relations between management and employees. In particular, Chapters 9-11, written by lawyers working on behalf of university administrations, draw attention to the move in Canadian higher education towards increased corporatisation and commercialization. Davis (Ch.9) outlines how faculty are considered authors of their inventions but not owners, and that most institutions allow faculty to control commercialization processes though revenue sharing between faculty members and their employers. This differs across universities: e.g., some offer 50-50 sharing, others require more be given to the institution when revenue exceeds a certain amount, etc. Chapter 10 explores the development of University-Industry Liaison Offices, which have gone from being rare and focused on protecting institution-owned IP to ubiquitous and pursuing “aggressive marketing and sales roles” (p. 214). The chapter discusses obligations of disclosure and ownership discoveries and inventions, decision-making authority, issues of sponsored and collaborative research, licensing, and spin-off ventures. Chapter 11, by McCarthy Tetrault LLP, thoroughly examines land development issues, offering advice on how to get property tax exemptions in different provinces depending on land transfer tax laws, and the roles and responsibilities involved with setting up trusts or joint ventures in order to purchase land.

As Hannah and Stack point out, universities spent most of their history with “little awareness of, or concern for, the law and how it affected them” (p. 126). They no longer have the luxury of such ignorance. For those of us who are faculty, students, or higher education administrators we can no longer afford to ignore the legal implications involved in our place of work and study. *The Handbook of Canadian Higher Education Law* gives us a robust introduction to some of the most important legal issues we all should know.

References

Trinity Western University (TWU). (n.d.). Community covenant agreement. Retrieved from <https://www.twu.ca/sites/default/files/twu-community-covenant-agreement.pdf>