

8-1-2003

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### Recommended Citation

Milot, Anna Christine (2003) "Student Protector, Internet Provider, or Contractual Party? An Examination of the Legal Relationship Between a University and its Students," *Canadian Journal of Law and Technology*: Vol. 2 : No. 3 , Article 3.  
Available at: <https://digitalcommons.schulichlaw.dal.ca/cjlt/vol2/iss3/3>

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# Student Protector, Internet Provider, or Contractual Party? An Examination of the Legal Relationship Between a University and its Students

Anna Christine Milot<sup>†</sup>

## Introduction

A student, behind the closed door of a private single-occupancy residence room, uses his or her personal computer connected to the university's residence network to view online pornographic materials. The activities of this student are known to other students in the residence.<sup>1</sup> The situation makes others in the residence uncomfortable. Should the student involved be sanctioned? If yes, under what authority, and by whom? Does the university have a role in preventing and prohibiting this type of behaviour?

The legal relationship between a university and its students is becoming increasingly complex as the use of technology spreads.<sup>2</sup> Accordingly, it is important to define a university's responsibilities and legal boundaries in order to understand the liability universities can potentially incur when dealing with students. Each Canadian university is unique in its founding and enacting legislation, as will be discussed further later. The individuality of Canada's universities means that the questions raised in this paper cannot be given answers that can necessarily be generalized across universities. The approach to analysis in this paper, however, is applicable to any of the Canadian universities. Therefore, this paper will demonstrate the analysis appropriate to any university's legal relationship between itself and its students with respect to the use of the Internet by students in residence, occasionally using the specific example of the legislative and regulating environment surrounding the University of Western Ontario.

More specifically, this paper will ask: does the private viewing of online pornography by a student in his or her residence room constitute an act of sexual harassment, and if it does, is a university legally obliged to protect the other residential students from this harass-

ment? Or, on the other hand, is the university legally obliged to protect the rights to freedom of expression and to privacy of the student viewing the online pornography?

In order to respond to these questions, three separate issues will be examined:

(1) What is the relationship between a university and Student A — the viewer of the pornography? Can a university regulate a student's online conduct, and if so, which, if any, of the student's rights are affected?

(2) If a university can regulate a student's online conduct, but does not do so, can it incur liability? Does a university as an Internet Service Provider (ISP) have a responsibility to control e-mail use, access to Web sites, and the contents of files publicly available through file sharing programs?

(3) Thirdly, what different legal obligations exist — under contract law, tort law, the Canadian *Criminal Code*,<sup>3</sup> or other statutes — on a university with respect to its relationship with Student B — the student claiming sexual harassment? Should a university, on any of these grounds, take responsibility for Internet content regulation in residences?

## The Relationship Between a University and Student A (the viewer)

### Can a University Regulate a Student's Online Conduct?

In keeping with the historic tradition of universities being founded by royal charter, and consistent with the lack of provincial and federal statutes with applica-

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<sup>†</sup>The author is a third-year law student at the University of Western Ontario, although this paper is in no way representative of the views of the University of Western Ontario and is not intended as legal advice. This article is the result of an analysis written under the guidance of Professor Margaret Ann Wilkinson of the Faculty of Law at the University of Western Ontario from a problem suggested by Mark Walma and Jennifer Schroeder of the Office of Equity Services at the University of Western Ontario. The author would like to thank Dr. Wilkinson, Mr. Walma, Mr. John Wilkinson and Ms. Kate Dewhirst of WeirFoulds LLP, and Mrs. Jim Dunkin and Patrick Kissoon of the U.W.O. Housing and Ancillary Services Department for their assistance. A version of this paper was presented at the Canadian Association of University Solicitors' (CAUS) Conference, 19-20 September 2003, in Winnipeg, Manitoba. The author would like to thank all of the members of CAUS for their insightful comments and advice regarding this paper. The author would also like to thank the reviewers of this journal for their helpful comments and suggestions.

tion to universities, every university in Canada,<sup>4</sup> except those in British Columbia,<sup>5</sup> operates under its own private provincial or territorial statute that specifies internal rules and regulations. Provinces have constitutional authority under section 93 of the *Constitution Act, 1867*<sup>6</sup> to approve the creation of a university statute. Case law<sup>7</sup> confirms provincial authority over university statutes under sections 92(13),<sup>8</sup> 92(14),<sup>9</sup> and 92(16)<sup>10</sup> of the *Constitution Act, 1867* as well.

The enacting statute of each university stipulates the responsibilities of various university bodies, including the Board of Governors and the Senate. The role of the Board of Governors and the Senate of each university in Canada varies. For example, under the *U.W.O. Act, 1982*,<sup>11</sup> the control of the University of Western Ontario and its property and affairs are vested in the 28-member Board of Governors, and academic policy is the responsibility of the 103-member Senate. Authority over student residences, in particular, is given to both the Board of Governors and to the Senate under three different sections of the Act.<sup>12</sup>

Similarly, Parts 6 and 7 of the *University of British Columbia Act* stipulate the role and responsibilities of the Board of Governors and the Senate, respectively. With respect to students in residence, the Board of Governors is given the authority, upon consultation with and approval of the Senate, to:

... maintain and keep in proper order and condition the real property of the university, to erect and maintain the buildings and structures on it that in the opinion of the board are necessary and advisable, and to make rules respecting the management, government and control of the real property, buildings and structures<sup>13</sup>

and to:

... determine the number of students that may in the opinion of the board, having regard to the resources available, be accommodated in the university or in any faculty of it, and to make rules considered advisable for limiting the admission or accommodation of students to the number so determined<sup>14</sup>

As per their statutory obligations, the Board of Governors and the Senates,<sup>15</sup> or other governing authorities of Canadian universities, enact internal university documents that are enforced by committees which are delegated that power.<sup>16</sup> These internal documents dictate policies and procedures that are meant, by the administration of the universities involved, to be adhered to by all members of the university community, including the students.<sup>17</sup>

However, upon close examination, it may be revealed that there is no direct link between such internal policies of a university and its students. This is the case, for example, at the University of Western Ontario, where section 2 of the *U.W.O. Act, 1982* enumerates to whom the Act applies:

The University, commonly known as "Western", the Board and Senate and the statutes and regulations of, appointments in and affiliation of colleges with, the University,

existing at the time this Act comes into force, are and each of them is hereby continued, subject to this Act.

The university, the Board of Governors, the Senate, the employees of the university and its colleges, and the statutes and regulations of the university must all comply with the *U.W.O. Act, 1982*. Interpreting the statute strictly, however, students are not part of the university since they are not mentioned specifically under section 2 of the Act. Therefore, under the authority of the Act, as strictly interpreted, it would appear that students are not specifically bound by any policies created by a university body pursuant to its power under the *U.W.O. Act, 1982*.

This problem has been overcome by the courts, which have decided that a university can regulate students and their activities in both academic and non-academic matters,<sup>18</sup> and that, in particular, for the purposes of this discussion, universities can regulate student residences. For example, in *Morgan v. Acadia University*,<sup>19</sup> the Court held that the Board of Governors is the "vehicle to administer internal university discipline."<sup>20</sup> *Morgan* involved a provision under paragraph 8(a) of the *Act of Incorporation of Acadia University*<sup>21</sup> that gave the Board of Governors the:

control and management of the property and funds of the said corporation, and [...] the power to adopt and carry into effect by-laws, resolutions and regulations touching and concerning the instruction, care, government and discipline of the students of said university [...].

In that case, Acadia University had a Student Handbook that dealt with drugs and alcohol. Specifically, this Handbook stated that "The consumption of alcoholic beverages in residence is governed by the *Liquor Control Act of Nova Scotia*. Students under the age of 19 are not permitted to consume alcohol. Open liquor in any area of the residences other than students' rooms is illegal."<sup>22</sup> While the Court held that the university had no jurisdiction to administer the *Liquor Control Act*, Grant J. also stated that:

The University has the right and the duty to maintain discipline on campus and in residence. Public and private funds are involved in building and maintaining residences. Discipline, with regulations, must be in place and enforced. Property must be protected and students must have the right to study and live under the residence rules. Those who choose to break the rules must be disciplined.<sup>23</sup>

Therefore, the university was within its power to punish the plaintiff who had been caught with an open bottle of beer in a residence hallway. Although this case specifically concerned an illegal activity, the Court spoke generally of a university's power to dictate and enforce rules regarding students' non-academic behaviour in residence.

More specifically related to this article, in *Glynn v. Keele University*,<sup>24</sup> a British court held that a university had the power to sanction students for non-academic behaviour that harassed other students and members of the university community. In this case, the plaintiff had appeared naked on campus. Section 6, paragraph 3 of the

statutes of the University of Keele provided: “The Vice-Chancellor shall have the general responsibility to the Council for maintaining and promoting the efficiency and good order of the University.” More specifically, under section 6, paragraph 4, the Vice-Chancellor had the authority to “suspend any Student from any class or classes and [to] exclude any Student from any part of the University or its precincts...”. Accordingly, the Chancellor fined the student and forbade him residency on-campus because of behaviour that had “offended many members and employees of the University and residences on campus. It ha[d] also offended many people outside the University both locally and nationally.”<sup>25</sup> Although the Court, under Pennycuik V-C, held that the vice-chancellor did not comply with the requirements of natural justice because he did not give the plaintiff an opportunity to be heard, in the end the Court held that “there is no doubt that the offence was one of a kind which merited a severe penalty according to any standards current even today. I have no doubt that the sentence of exclusion of residence in the campus was a proper penalty in respect of that offence.”<sup>26</sup> The university, therefore, was justified in administering punishment for behaviour that was indirectly harassing others, including other students.

In support of the position that universities have the power to govern student conduct is the fact that courts have determined that university legislation must be interpreted broadly. For example, in *Healey v. Memorial University of Newfoundland*,<sup>27</sup> Justice L.D. Barry held that:

... the University has the legal authority to protect persons and property. I accept that I should avoid interpreting the University regulations in a fashion which would unduly hamper the University in exercising that authority ... the courts should respect the intention of the Legislature that internal problems be resolved by the University itself. The courts should respect the traditional autonomy of Universities and not impose unnecessary legal formalism and trappings of courts which might mean that the University's internal regulation is less effective and more costly. The cases make it clear that the courts should exercise restraint and be slow to intervene in University affairs whenever it is still possible for the University to correct its errors with its own institutional means.<sup>28</sup>

And, lastly, courts have repeatedly affirmed a university's jurisdiction over its own affairs by stating that the judiciary should rarely interfere with internal university regulations. In *Dickason v. The University of Alberta*,<sup>29</sup> Justice Cory (for the majority of the Supreme Court of Canada) stated at paragraph 35 that “the role of universities in our society as self-governing centres of learning, research and teaching safeguarded by academic freedom is unique. The courts have respected this and over the years have been very cautious in intervening in university affairs.” Various earlier cases also demonstrate that courts are reluctant to interfere in internal university matters unless there have been serious breaches of natural justice and, even then, the courts have attempted to keep such interventions restricted to procedural rather

than substantive matters. In most cases, the reason cited by the courts for not interfering with university matters was that an adequate internal review and appeals structure was already in place.<sup>30</sup>

Under statutory power provided by the provinces, and with an affirmation by the courts that a university can regulate students' academic and non-academic behaviour in residences, it can be concluded that Canadian universities have the authority to create and enforce internal university policies and procedures that must be adhered to by students.<sup>31</sup>

On the other hand, it is important to note that a university has the potential to violate a student's rights by asserting its authority over particular academic and non-academic behaviour. In other words, if a university decides to regulate Student A's online behaviour in the situation outlined in this article, could Student A have a claim against the university for a violation of his or her rights under the *Canadian Charter of Rights and Freedoms*<sup>32</sup> or under the general rubric of privacy law?

## If a University Regulates Student A's Behaviour, What Rights Might It Violate?

### Section 2(b) of the *Canadian Charter of Rights and Freedoms*

One might ask the question, if a university limits a student's ability to access online pornography in residence, could this be argued to be in violation of the fundamental right to freedom of expression found under section 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>33</sup> (Charter)? However, it is not necessary to resolve this issue here because, according to *McKinney v. University of Guelph*<sup>34</sup> and *Harrison v. University of British Columbia*,<sup>35</sup> a university's conduct does not fall under Charter scrutiny. It is not a “government actor” and therefore does not have to comply with Charter standards.<sup>36</sup>

Even if a Charter standard were to be applied, a university could argue, under section 1 of the *Charter*, that Student B's right to be free from sexual harassment should reasonably place limits on the right of Student A to freedom of expression.<sup>37</sup> For example, Ryerson University's recognition of the principle of legitimate limitations on Charter rights is apparent in its *Discrimination and Harassment Prevention Policies and Procedures*:

Freedom of expression is the cornerstone of education at Ryerson University, but like other Charter rights, it is not an absolute right. The *Canadian Charter of Rights and Freedoms* guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The rights and freedoms guaranteed in the Charter are [under section 1] “... subject only to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>38</sup>

In addition, as stated previously, the Board of Governors and the Senate of each university in Canada have statutory authority to create rules and regulations that

will ensure the well-being of the university community, and it could be argued that, in themselves, these rules could be a proper limitation on Charter rights. The Nova Scotia Supreme Court (Trial Division) held in *Morgan*<sup>39</sup> that a “university has the right and the duty to maintain discipline on campus and in residence.”<sup>40</sup> Thus, in this respect, it would appear that a university has the power under Canadian legislation and jurisprudence to regulate the reception of information, including pornography, in its residences.<sup>41</sup>

At the moment, no university in Canada has a monitor system set up to detect the existence of pornography in the students’ rooms. Universities have currently adopted a reactive position; however, if a university decides to become proactive and set up a surveillance system to monitor the contents of a student’s room, is it possible that although the student would be unsuccessful with a challenge based on the Charter, the university would alternatively be in violation of Student A’s rights in terms of privacy?

### Does Student A in Residence Have Privacy Rights?

The privacy rights of a student may arrive in three separate ways: by contract, under tort law, or by statute.

#### *What Right to Privacy Does a Residence Student Have Under Contract With the University of Western Ontario?*

The analysis in this area depends upon the contracts each university has created and entered into with its students in residence, and therefore the following discussion will focus on the University of Western Ontario as an example. The actual residence contract between a student and the University of Western Ontario does not deal with privacy. In fact, the only internal university document of relevance to a student in residence at the University of Western Ontario that mentions privacy at all is the *Residents’ Handbook and Understandings*<sup>42</sup> (*Residents’ Handbook*). The *Residents’ Handbook*, which lays out the residence rules and regulations that a student agrees to abide by when signing the residence contract, explained more fully below, ambiguously states that “each resident will show the utmost respect for fellow residents’ privacy and property.” According to the *Residents’ Handbook*, every area of each residence is designated as public, private, or semi-private, and damage charges are billed accordingly. While it is not specified how a residence room is classified, it can be assumed that it is regarded as being private or at least semi-private. However, as will be expanded upon below, a requirement for two parties to be in a licensor/licensee relationship is for the licensee to not have exclusivity or control over the property. And, as demonstrated below, a university and its students in residence are in a licensor/licensee relationship. Therefore, the privacy a student has in his or her room is not absolute. As a result,

Student A, if at the University of Western Ontario, has no contractual right to privacy.

#### *Does Student A Have an Entitlement to Privacy Through Tort Law?*

Traditionally, the common-law courts have relied on well-established torts to indirectly provide a protection of privacy interests, rather than creating a specific tort of privacy.<sup>43</sup> This has more recently been challenged by cases such as *Hunter v. Southam*<sup>44</sup> and *Corlett-Lockyer v. Stephens*,<sup>45</sup> which can be argued to demonstrate that every Canadian has a reasonable expectation to privacy.

Specifically, in Ontario, which arguably has the most well-developed tort of invasion of privacy at common law in Canada, courts have begun to say that they will enforce a common-law tort of invasion of privacy, even in the absence of legislative support.<sup>46</sup> However, according to the Ontario Court (General Division) in *Roth v. Roth*,<sup>47</sup> “whether the invasion of privacy of an individual will be actionable will depend on the circumstances of the particular case and the conflicting rights involved”.

Overall, while jurisprudence surrounding the tort of invasion of privacy is expanding, privacy law in Canada is still uncertain. Therefore, any claim that Student A may have against a university for violating his or her right to privacy under tort law would be tenuous.

#### *Can Student A Claim a Statutory Right to Privacy?*

The Federal *Privacy Act*<sup>48</sup> only deals with protection of privacy in respect to personal information. However, the provinces of British Columbia, Manitoba, Newfoundland and Labrador, and Saskatchewan have recognized a statutory tort of invasion of privacy. Section 1 of the British Columbia *Privacy Act*<sup>49</sup> states:

(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another’s privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

Similarly, the Newfoundland *Privacy Act*<sup>50</sup> claims:

3. (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of an individual.

(2) The nature and degree of privacy to which an individual is entitled in a situation or in relation to a matter is

that which is reasonable in the circumstances, regard being given to the lawful interests of others; and in determining whether the act or conduct of a person constitutes a violation of the privacy of an individual, regard shall be given to the nature, incidence, and occasion of the act or conduct and to the relationship, whether domestic or other, between the parties.

The Saskatchewan *Privacy Act*<sup>51</sup> simply states under section 2 that “It is a tort, actionable without proof of damage, for a person willfully and without claim of right, to violate the privacy of another person.” Similarly, the Manitoba *Privacy Act*<sup>52</sup> states under subsection 2(1) that “A person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that person.” Finally, in Quebec, there is a general right to privacy in the Quebec *Charter of Human Rights and Freedoms*<sup>53</sup> and the Quebec *Civil Code*.<sup>54</sup> Article 5 of the Charter guarantees every person the right to respect of his or her private life.

On the other hand, the provinces of Alberta, New Brunswick, Nova Scotia, Ontario, and Prince Edward Island do not have a statutory tort of invasion of privacy.<sup>55</sup> Therefore, a student viewing online pornography in his or her private university residence room in one of these provinces would not have any privacy statute to which to appeal, should a university attempt to stop him or her.

In summation, Student A would not have a possible avenue of recourse against a university when being stopped from viewing online pornography under contract if the contracts in existence at his or her university are similar to those in place at the University of Western Ontario. However, Student A may have a possible claim under tort law, and a stronger claim under statute, depending on his or her province of residence.

On the other hand, although a university has the authority from its province and the courts to regulate a student’s academic and non-academic behaviour, it can be argued that it is nowhere directly compelled to use this power. If a university does not regulate a student’s online behaviour, could it be liable for not doing so?

## Does a University Have a Public Responsibility to Regulate a Student’s Online Conduct?

The scenario presented earlier between Student A and Student B deals with pornography. Pornography, which is not defined in the *Criminal Code*, and the possession of pornography, is therefore *prima facie* legal. However, there are degrees of pornography and different activities involving particular types of pornography that have been criminalized in Canada. Therefore, one must examine the responsibilities of a university with respect to child pornography and obscenity, which have been criminalized, in order to determine the full extent of

liability a university may incur through the activities of Student A.

## The Canadian *Criminal Code*

Section 163 of the Canadian *Criminal Code* reads:

- (1) Every one commits an offence who
  - (a) makes, prints, *publishes, distributes, circulates*, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever [emphasis added]; ...

The motives of the accused are not relevant (subsection 63(5)),<sup>56</sup> and “obscenity” is defined as “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence” (section 163(8)). In addition, section 163.1 states that:

- (2) Every person who *makes, prints, publishes or possesses* for the purpose of publication any child pornography is guilty of [emphasis added]
  - (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) an offence punishable on summary conviction.
- (3) Every person who *imports, distributes, sells or possesses* for the purpose of distribution or sale any child pornography is guilty of [...] [emphasis added].
- (4) Every person who *possesses* any child pornography is guilty of [...] [emphasis added].

Child pornography is defined under section 163.1 as:

- (a) a photographic, film, video or *other visual representation*, whether or not it was made by electronic or mechanical means [emphasis added],
  - (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
  - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
- (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.

While no definition of “every one” or “person” is provided in any of the sections mentioned above, section 2 of the *Criminal Code* states that these expressions, and those similar, include:

Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively; [...].

A university, therefore, as an incorporated body, falls under the category of “every one” and/or “person” under section 2, and consequently may fall under the ambit of sections 163 and 163.1 of the Canadian *Criminal Code*.

## Is a University, in Permitting the Activities of Student A to Occur, Doing Anything That is Prohibited Under These *Criminal Code* Sections?

Is a University “publishing”, “distributing”, or “circulating” within the meaning of section 163; “publishing” or “possessing” under subsection 163.1(3); or “possessing” under subsection 163.1(4)?<sup>57</sup> What is a university’s role in the information dissemination chain of transfer that culminates in Student A’s accessing of the pornography in question here?

Universities are widely regarded as being Internet Service Providers (ISPs). As stated on the University of Central Arkansas’ Web site,<sup>58</sup> “since the University of Central Arkansas provides Internet connections and has the capability to place materials online to students, faculty and staff, it is an ISP under the law.” Similarly, the University of Texas states on its Web site<sup>59</sup> that “a university is an ISP for its own community of students, faculty and staff”. According to Allan A. Ryan, Jr., Harvard University’s in-house counsel, “Colleges and universities are just Internet Service Providers that charge tuition”.<sup>60</sup>

## Can a University, as an ISP, Fall Under Sections 163 and 163.1, Thereby, in Permitting Student A’s Conduct to Occur, Violating the Canadian *Criminal Code*?

As stated recently in *Irwin Toy Ltd. v. Doe*,<sup>61</sup> “the law in Ontario respecting the liability of an Internet Service Provider for the actions of its customer is not clear”. However, the Federal Court of Appeal has recently attempted to add clarification to the legal status of ISPs in Canada. Tariff 22,<sup>62</sup> created to deal with the “Transmission of musical works to subscribers via a telecommunications service . . .”, was submitted, as required, for approval to the Copyright Board of Canada by the Society of Composers, Authors, and Music Publishers of Canada (SOCAN) in 1995. The Board’s conclusions regarding the proposed tariff were released on October 27, 1999.<sup>63</sup> The Federal Court of Appeal’s subsequent decision was released on May 1, 2002.<sup>64</sup> The matter is now pending before the Supreme Court of Canada.<sup>65</sup> The question considered by the Federal Court of Appeal most relevant to this paper was:

When material is transmitted on the Internet, do the operator of the server on which it is stored, and the entity supplying the ultimate recipient with access to the Internet, only provide “the means of telecommunication necessary for another person to so communicate the work” within the meaning of paragraph 2.4(1)(b) [as enacted by S.C. 1997, c. 24, s. 2] of the *Copyright Act*? If they do, then operating a host server and providing Internet access do not constitute the communication by telecommunication of transmitted material and, hence, do not attract liability to pay a royalty.<sup>66</sup>

Paragraph 2.4(1)(b) of the Canadian *Copyright Act*<sup>67</sup> reads:

A person whose only act in respect of the communications of a work or other subject-matter to the public consists of providing the means of telecommunication necessary for

another person to so communicate the work or other subject-matter does not communicate that work or other subject-matter to the public [ . . . ].

The Federal Court of Appeal concluded that pursuant to paragraph 2.4(1)(b) of the Canadian *Copyright Act*, an ISP is not liable for infringing copyright by communicating a work to the public by telecommunication if the ISP’s only act with respect to the communication was to provide the means of telecommunication necessary for another person to communicate the material to the public. In other words, such ISPs are mere intermediaries within the meaning of paragraph 2.4(1)(b) of the *Copyright Act*. Therefore, by analogy, it would seem that a university, in acting as an ISP, would never be publishing, distributing, circulating, or possessing within the meaning of the *Criminal Code* sections 163 and 163.1, as long as it only provided the means necessary for the transmission of the material.

However, the Federal Court of Appeal in the SOCAN decision went on to conclude that an ISP would be liable for copyright infringement should it cache material, thereby falling outside the exception provided in paragraph 2.4(1)(b) of the *Copyright Act*, by providing means of telecommunication that was unnecessary to another person to communicate the work to the public. As stated in paragraph 135 of the decision, “the fact that the cache enhances the speed of transmission and reduces the cost to the Internet access provider does not render the cache a practical necessity for communication.” It is further held that the operator of a cache commits copyright infringement “. . . because the cache operator selects which material will be cached, and programmes the computer to transmit it from the cache when it is requested. The operator of a cache is thus not merely a passive transmitter of data.”<sup>68</sup> Therefore, should a university be caching, it would not be protected under paragraph 2.4(1)(b) of the *Copyright Act* from copyright liability.

Other than with respect to caching material, there is no other way, under the SOCAN decision, for an ISP to be found liable for copyright infringement, even if its users are infringing. According to the Federal Court of Appeal, “operators of host servers and Internet access providers do not effectively control the content of what is transmitted, . . . their role is passive and . . . their activities usually consist only of the provision of the means of telecommunication for the purpose of paragraph 2.4(1)(b) . . .”.<sup>69</sup> The Court further states that unless an ISP has a contractual relationship with a host server operator or a content provider,<sup>70</sup> it has no control over the material posted on its server,<sup>71</sup> and therefore does not authorize the communication of material that is infringing.<sup>72</sup> Furthermore, found the Court, it is not practical, economically efficient, or feasible for an ISP to screen all material being transmitted over its routers to an end user.<sup>73</sup> Other jurisdictions, including the United Kingdom,<sup>74</sup> Australia, the European Union,<sup>75</sup> Japan, and

the United States,<sup>76</sup> have jurisprudence or legislation that shields ISPs from copyright infringement “in respect of material stored on their servers, unless, after receiving notice of infringing material, the operator fails to take appropriate action. Failure to remove the material may expose the host server operator to liability.” In Canada, however, no such jurisprudence or legislation exists yet. If the Federal Court of Appeal’s reasoning in this regard is upheld, and unless court decisions or rules such as those in jurisdictions outside Canada are enacted, ISPs in Canada will not be found liable for copyright infringement unless they cache the infringing material.

Overall, the Federal Court of Appeal concluded that:

Whether conduct amounts to authorization is . . . largely a factual question and, since the [Copyright] Board did not misdirect itself in law by adopting an erroneous test, its conclusion that the normal activities of the operators of host servers and of Internet access providers do not “authorize” the communication of material to the end user, including infringing material, can only be set aside on the ground of unreasonableness. In my opinion, [because] there was sufficient evidence before the Board, it was not unreasonable for it to conclude that the normal activities of host server operators [and Internet access providers] do not implicitly authorize content providers to communicate the material that they have posted on the server.

Using this approach, by analogy to copyright law, a university would not be liable under the *Criminal Code* even if Student A was violating sections 163 or 163.1 because the university would have no relationship with the pornography sites (content providers) being accessed by its student, and therefore could not be said to have authorized the possession or transmission of the material. Nor could it be said to be itself publishing, circulating, distributing, or possessing because it would be acting merely as the provider of the means of telecommunication. Under the Federal Court of Appeal’s interpretation, the only way a university as an ISP would be liable under the *Criminal Code* would be if it cached material including that which is banned under sections 163 and 163.1. In addition, a Canadian university is not under a duty to take action against Student A merely because it is aware of Student A’s activity, as has been legislated for ISPs in other jurisdictions in certain cases.

Moreover, it is important to note again that the situation provided in the introduction to this paper involves the viewing of pornography, rather than explicitly involving the viewing of material that is obscene or involves child pornography. Should a university be caching pornography that is neither obscene nor involving child pornography, neither the university nor Student A would be in violation of the *Criminal Code* because the Code does not deal with the wider class of

pornography — only with the narrower classes of obscene material and child pornography.

However, if a university is caching material and the law therefore considers the university to be an active participant in the transmission of content to its students, including Student A, then this would further support the argument, presented more fully later, that the university may be liable for creating a poisoned environment contrary to human rights legislation.

In summation, any claim that Student A — the viewer of online pornography in a residence room — might have against a university, if the university decides to regulate the student’s online behaviour, would be tenuous at best. A university has statutory authority, affirmed by the courts, to regulate a student’s academic and non-academic behaviour. Due to the fact that a university is not under the purview of the Charter, a student would not be able to claim a violation of his or her right to freedom of expression under section 2(b) should a university decide to regulate his or her online conduct. With respect to a privacy claim outside the Charter, a student in residence at the University of Western Ontario, for example, does not have any contractual right to privacy. It is unlikely that a claim to privacy based in tort would succeed. Finally, only certain provinces have privacy statutes to date that offer protection to a student from being monitored in a university residence. Therefore, any claim a student would have under privacy legislation would be based on his or her province of residence.

However, depending on the Supreme Court of Canada’s interpretation of the *SOCAN* decision, and its consequent definition of an ISP and an ISP’s role in the provisions of information, if a university decides not to monitor Student A’s behaviour, and Student A deals with online child pornography or obscene material contrary to the *Criminal Code*, the university may incur liability under the *Criminal Code*. If the Supreme Court of Canada adopts the distinctions made by the Federal Court of Canada, this situation would occur only if the university’s technology worked in such a way that the university was caching material.

Thus, not only must a university be conscious of its relationship with Student A — the viewer — it must also be conscious of its potential responsibilities to the public for the activities of Student A. As well as its potential responsibilities to the public, the university in this situation must consider its responsibilities, if any, towards Student B — the neighbour of Student A — who is alleging sexual harassment.

## The Relationship Between a University and Student B (the Neighbour)

### Is a University Obligated to Protect Its Students From Sexual Harassment?

#### The Example of the Ontario *Human Rights Code*<sup>77</sup>

In Ontario, a university does not fall under the purview of the Ontario *Human Rights Code*, regardless of whether it has made any statements to the contrary in its internal university documents,<sup>78</sup> because the Ontario *Human Rights Code* only applies to landlord/tenant relationships.<sup>79</sup> Subsection 7(1) of the Ontario *Human Rights Code* states that “every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.” No definition of “accommodation” is provided. However, research demonstrates that there is no contract of tenancy between a university in Ontario and its students in residence. First, the Ontario *Tenant Protection Act*<sup>80</sup> states under paragraph 3(g) that it does not apply

... with respect to, living accommodation provided by an educational institution to its students or staff [where]

- (i) the living accommodation is provided primarily to persons under the age of majority, or all major questions related to the living accommodation are decided after consultation with a council or association representing the residents, and
- (ii) the living accommodation does not have its own self-contained bathroom and kitchen facilities or is not intended for year-round occupancy by full-time students or staff and members of their households.

Therefore, according to the Ontario *Tenant Protection Act*, a university and its students in residence are not in a tenancy relationship.

Second, case law establishes that the relationship of a residence student and a university is one created through a licence, rather than a tenancy lease.<sup>81</sup> In order to determine whether two parties are in a landlord/tenant or in a licensor/licensee relationship, it is necessary to decide whether there is a lease or whether there is a licence between them. This is determined by examining the possession and control of the property.<sup>82</sup> In order to have a lease, a tenant must have exclusivity and control over the property. In the case of a residence student and a university, while there is exclusivity,<sup>83</sup> the university still maintains control over the residence room (i.e., it dictates what can and cannot be kept in the room, hung on the walls, etc.). Therefore, a university and its students must be characterized as licensor and licensees, rather than as parties to a relationship of tenancy.

However, despite the fact that students in residence are not tenants, and therefore are not strictly protected under provisions such as subsection 7(1) of the Ontario *Human Rights Code*, protection may still be available under human rights legislation because courts have widened the application of human rights legislation to cover university students in some circumstances.

The New Brunswick Court of Appeal recently held in *Mpega*<sup>84</sup> that universities as creatures legislated by the provinces have the power to adopt policies dealing with sexual harassment inflicted on or by students.<sup>85</sup> On the strength of this authority, Canadian universities, therefore, appear to be able to legally create sexual harassment policies. However, it was not determined in *Mpega* what legal recourse a student would have should his or her university fail to enact or fail to uphold its policies concerning sexual harassment.

In *The University of British Columbia v. Berg*,<sup>86</sup> the Supreme Court of Canada decided that human rights legislation dealing with discrimination can apply to university students. In this case, the disagreement revolved around the application of the British Columbia *Human Rights Act*<sup>87</sup> to the “services and facilities” of the university. The main issue in *Berg*, and in several other cases involving the application of human rights legislation to universities, has been the interpretation of the wording of the legislation. Section 3 of the British Columbia *Human Rights Act*<sup>88</sup> stated that the services and facilities covered by the Act are those “customarily available to the public.”<sup>89</sup> Past case law had decided that a university’s services and facilities were not “customarily available to the public” and therefore were not covered by human rights legislation.<sup>90</sup> However, Chief Justice Lamer in *Berg* for the majority, held that “every service has its own public, and once that ‘public’ has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public.”<sup>91</sup> In the case of a university, its students are its “public”. So, if human rights legislation does apply to the particular sphere of activity of students at university, then a university has the obligation to protect students in its “public” from discrimination, despite the fact that they are not in the general public.<sup>92</sup>

Moreover, the Supreme Court of Canada in *Berg* concluded that human rights legislation must apply to university students because no other protection from discrimination is available to them. Chief Justice Lamer first reiterated that the Charter does not apply to universities.<sup>93</sup> Secondly, in accordance with the Supreme Court of Canada’s decision in *Seneca College of Applied Arts and Technology v. Bhadauria*,<sup>94</sup> the Supreme Court of Canada in *Berg* refused to create a tort of discrimination because its existence would be redundant — human rights legislation already exists to protect individuals from discrimination. In paragraphs 50-51, Lamer C.J.

stated that without the Charter or a tort of discrimination, “students enrolled in the university would be denied any protection from discrimination. This cannot be maintained . . . such a distinction would allow such institutions to frustrate the purpose of the legislation . . .”. Therefore, according to the Supreme Court of Canada, it is necessary for human rights legislation to apply to university students in order to protect them from discrimination because no other protection is available to them under the law.

Under this authority, it is arguable that all universities in Canada fall under the purview of their provincial human rights legislation, even with respect to residence relationships precisely because no other protection has been available to them under law. However, it is important to realize that while the Supreme Court of Canada in *Berg* found that university students must be protected from discrimination, no mention was made of a requirement to protect students from harassment. This may not have been due, however, to a belief that students should not be protected from harassment. Rather, the question did not arise in the case because the *British Columbia Human Rights Act*, involved in the case, did not cover harassment at all; it only mentioned discrimination.<sup>95</sup> The Ontario *Human Rights Code*, on the other hand, includes harassment as a form of discrimination and therefore, using the reasoning in *Berg* with respect to protection from discrimination, a court would probably extend the protection of the Ontario Code from harassment to encompass students as well. Similarly, although the Ontario *Human Rights Code* specifies its application to accommodation only in a landlord/tenant context, and the authorities indicate that a university in Ontario and its residence students are not in that context, it may well be argued that the Supreme Court of Canada’s reasoning in *Berg* should be extended to apply the Ontario *Human Rights Code* to the context of residence students’ licence relationships, in addition to tenancy relationships in the general population. If, as stated in *Berg*, the services and facilities of a university must comply with human rights legislation in order to protect students from discrimination, then it may arguably be said that the accommodation provided by a university under licence must also comply with human rights legislation in order to protect students from harassment.

In addition to the arguments presented above that show that human rights legislation may protect university students, the Ontario Human Rights Commission (OHRC)<sup>96</sup> itself interprets the definition of “accommodation” under the Ontario *Human Rights Code* broadly. Although the interpretation of the Commission may be found by a Court to be overbroad, paragraph 29(b) of the Code states that it is the job of the OHRC to “promote an understanding and acceptance of and compliance with the Act.” In response to questions posed to the OHRC regarding the application of the Ontario *Human Rights Code* to university residences,<sup>97</sup> the OHRC verified that it interprets the Code as applying to university

residences simply because, in its view, they are a type of accommodation. In its view, the relationship of licensor/licensee between a university and its students is irrelevant. In other words, the OHRC takes an expansive interpretation of the definition of “accommodation”, from the provision of a living space by a landlord to a tenant to the provision of a living space in general.

Thus, if the reasoning in *Berg* is correctly applied to university students, every university in Canada probably has a duty under public law to protect its students from discrimination and harassment as described under its provincial human rights legislation, despite the fact that it is not in a tenancy relationship with its students in residence.<sup>98</sup>

### Is the Creation of a “Poisoned Environment” an Act of Sexual Harassment?

Harassment is defined in section 10(1) of the Ontario *Human Rights Code* as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.”<sup>99</sup> It is questionable whether the viewing of online pornography in a residence room by Student A fits into this definition because it is not the behaviour itself that is directly harmful to Student B. Rather, the viewing could only possibly fit under the definition of harassment if it can be said to create an intimidating, demeaning, or hostile work, study, or living environment — a “poisoned” environment. While nothing is specifically mentioned in the Ontario *Human Rights Code* about the creation of a “poisoned environment”, in June 1993,<sup>100</sup> the OHRC published a *Policy Statement on Sexual Harassment and Inappropriate Gender-Related Comment and Conduct*<sup>101</sup> to clarify the definition of sexual harassment in the Code. Specifically, under section 6 of the *Policy*, the OHRC explains the concept of a “poisoned environment”:

A specific instance of sexual harassment or inappropriate gender-related comments or conduct might not meet the literal definition of harassment under the *Code*. However, there could be circumstances in which a single incident of inappropriate behavior may be significant or substantial enough to constitute a breach of the Code, by creating a poisoned environment for some individuals because of their sex. In other words, there could be circumstances in which unequal treatment does not have to occur continually or repeatedly for there to be a violation of the *Code*.<sup>102</sup>

According to the *Policy*, sections 1, 2, 3, 5, and 6 of the Code, which provide protection from sexual harassment in general, can be the basis for a claim of sexual harassment created by a “poisoned environment”. The creation of a poisoned environment is serious enough to fall under the ambit of sexual harassment because of the “impact of the comments or conduct on an individual because of her or his sex.” The *Policy* also states that the number of times the behavior occurs, or the number of people the behavior hurts or is aimed at, does not matter. A victim of a poisoned environment does not have to have been the target of the behaviour. In addition,

“intent is not a prerequisite to establishing that treatment is discriminatory. Rather, the Commission, as stated in its *Policy*, looks to the effect or result of the comments or actions on the recipient.”<sup>103</sup> So, a poisoned environment can be created by someone who is unintentionally behaving in a manner that indirectly impacts another negatively.

The OHRC has also created a *Guide to the Human Rights Code*<sup>104</sup> that provides a further explanation of a “poisoned environment”:

You might feel that your housing is hostile or unwelcoming to you because of insulting or degrading comments or actions that have been made about others based on a ground in the Code. When comments or conduct of this kind have an influence on others and how they are treated, this is known as a “poisoned environment”. A poisoned environment cannot, however, be based only on your personal views. You must have facts to show that most people would see the comments or conduct resulting in unequal or unfair terms and conditions.

Although the addition of the term “poisoned environment” to the Code’s definition of sexual harassment is purely an interpretation of the OHRC’s own making, and has only recently been acknowledged by the courts,<sup>105</sup> the Supreme Court of Canada has repeatedly stated that a broad, liberal and purposive approach must be applied to human rights legislation.<sup>106</sup> For example, in *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*,<sup>107</sup> Justice McIntyre observed that “legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary — and it is for the courts to seek out its purpose and give it effect.”<sup>108</sup> Similarly, in *Robichaud v. Canada (Treasury Board)*,<sup>109</sup> Justice LaForest held that human rights legislation “must be so interpreted as to advance the broad policy considerations underlying it.” Because prohibition against the creation of a poisoned environment is based on the legislated human rights provisions against harassment and discrimination, it may not be too far an extension for a court to “read in” the term “poisoned environment” under the Code’s examples of sexual harassment. In fact, a number of decisions in the employment context deal with the creation of a poisoned environment.<sup>110</sup> In *O.H.R.C. and Matsuinch Abdolipour and Raed Murad v. Allied Chemical Canada Ltd.*,<sup>111</sup> where the creation of a poisoned environment was considered in the specific context of sexual harassment, the Board of Inquiry held that “the display or tolerance of pornography in the workplace is a likely indication of a male dominated culture where it is acceptable to view women as primarily sexualized beings. . . . Ms. Abdolipour experienced a poisoned work environment.”

Overall, because a university in Canada may well be obliged under human rights legislation to protect its students from sexual harassment, it may also be obliged to shield its students from a poisoned environment, although this latter obligation is a relatively unexplored concept in this context.<sup>112</sup>

## Does the Viewing of Pornography By a Student in a Residence Room Create a Poisoned Environment?

Even if the concept of creating a poisoned environment is viable under Canadian law in connection with university residence life, does the viewing of online pornography by Student A, in his or her own residence room, create such an environment?

In Ontario, if the viewing of pornography by one person is known to others, and is creating an environment that would reasonably be classified as being uncomfortable for others, it seems that it may fall within the Ontario Human Rights Commission’s own definition of an act that creates a poisoned environment (see above).

Decisions in the context of employment scenarios have demonstrated that the viewing of pornography at work during working hours in a private office may be capable of leading to termination as punishment for the disruption it causes to other workers. For example, in *London (City) and C.U.P.E. 101 (D.M.) (Re)*,<sup>113</sup> the arbitrator held that although the employer in this case should not have fired the employee for viewing pornography on work computers during work time, this was because of his mental disability (obsessive-compulsive disorder). According to the arbitrator, the employer should have just ordered a suspension from work. However, the arbitrator did acknowledge the employer’s argument that:

... the grievor’s extensive use of the Internet for non work-related purposes adversely affected Ontario Works clients through inattention to them, and the sort of material he was viewing was such that his co-workers, in the close environment of the workplace, ought not to have to be put in the position of learning to live with the sorts of sites he was viewing.<sup>114</sup>

The arbitrator held that “the Employer had proper cause to discipline the grievor on the grounds of its policy prohibition against employees viewing pornography in the workplace as an inappropriate use of the Internet and which policy was not challenged as being unreasonable.”<sup>115</sup> Part of the policy that the arbitrator upheld prohibited the viewing of pornography because of the potential negative effect it could have had on fellow employees, regardless of whether they saw the pornography or not. Indeed, the testimony of a co-worker, L.K., emphasized the point that even though she had only viewed the pornography once, the knowledge of its existence in the grievor’s office was enough to disrupt her working environment.

Similarly, in *Greater Toronto Airports Authority and P.S.A.C. (Gorski) (Re)*,<sup>116</sup> the arbitrator held that a poisoned environment was created by the grievor’s viewing of pornography on the work computer because one co-worker had observed the behavior one time. According to the arbitrator, “The employer’s obligations

under law are clear in this area: it must enforce a prohibition against the display of sexually explicit photo images and strive to maintain a non-toxic work environment.”<sup>117</sup>

By analogy to the reasoning of these arbitrators in employment grievance decisions, it may be argued that the viewing of pornography by Student A in his or her own residence room could reasonably cause Student B harm by disrupting his or her work, study, or living environment. The viewing might be considered to be behaviour creating a poisoned environment, and therefore Student A's act might be interpreted to fall under the ambit of the Ontario *Human Rights Code*, and the university may therefore be responsible for eradicating such behaviour.

It is important to recall, however, that should Student A be found to have created a poisoned environment, and therefore Student B be found to have a claim of sexual harassment under the Ontario *Human Rights Code*, the victimized student, Student B, would not be able to take court action directly against Student A or against his or her university for failing to protect him or her. Rather, to pursue such a charge, Student B would have to go through the Ontario Human Rights Commission to launch a complaint against the university.<sup>118</sup>

Thus, it is possible that a Canadian university may fall afoul of human rights legislation for permitting the creation of a poisoned environment if Student B lays a complaint based on the conduct of Student A in viewing pornography in the residence. There is jurisprudence to the effect that a university must protect its students in accordance with human rights legislation. The extension of human rights legislation to a prohibition of a poisoned environment, however, could go beyond current jurisprudence.

If Student B cannot get satisfaction through a complaint under human rights legislation, can Student B successfully sue the university in tort for failing to control Student A's behaviour?

## Legal Obligations Upon a University Under Tort Law

Case law has shown that a university can be found liable if it does not uphold its general responsibility to protect students from certain hazards. For example, in *Boudreau v. Lin*,<sup>119</sup> an Ontario Court (General Division) judge stated that a university is obliged in certain circumstances to protect its students from copyright infringement. Boudreau was a part-time student in the University of Ottawa's MBA program. He submitted a paper to Professor Lin, who then presented the paper, with another professor, as his own. The paper was subsequently copied and sold to MBA students as a case note without crediting Boudreau, and showing Lin as an author. Lin also used the paper to support his application to the university for a promotion and claimed that he was its principal researcher. Boudreau complained to the

university about Lin's behaviour. The university, through the Dean of the Faculty of Business Administration, accepted Professor Lin's apology and cautioned him to be more prudent in the future. However, the university did not sanction him for his conduct, stop the infringement, or compensate Boudreau, the student. Speaking for the Ontario Court (General Division), Justice Metivier stated that:

... the University cannot stand idly by while its professors blatantly breach copyright laws. At the very least, the University is a passive participant. As employer of the professor — it is the duty of the University to set policies for the conduct of its employees and to accept responsibility for monitoring, or failing to monitor, the strict observation of these policies and, in this case, of copyright laws. If the University had no direct knowledge, they are deemed to have had it, or they should have had it ... The University is the organization which offers courses, which awards marks in these courses, and to which the student pays tuition for these courses ... It is clear that the University owes a duty to the student to oversee and regulate the acts done by Professor Lin in the course of his employment.<sup>120</sup>

However, the duty of protection in this case related specifically to statutory copyright infringement. In asking whether a university may be liable for a tort directly related to a residence student's behaviour concerning online pornography, there are three torts that must be explored: the tort of statutory breach, the tort of general negligence, and the tort of negligent misrepresentation.

## The Tort of Statutory Breach

The tort of statutory breach imposes liability on any party that negligently fails to abide by the standard of care set by a statute. Prior to 1983, Canadian tort law had mixed views concerning the tort of statutory breach. However, the decision of the Supreme Court of Canada in *Saskatchewan Wheat Pool v. Canada*<sup>121</sup> brought clarity to the definition and position of this tort in Canadian law. First, according to the Supreme Court of Canada, there is no tort of breach of statutory duty in Canada. Contrary to the view of most American courts, the Supreme Court of Canada held that a breach of the standard set by a statute is not negligence *per se*. However, if the statute at issue (i.e., the *Criminal Code*) has created a recognized common law duty of care, then breach of the statutory duty would be relevant to the claim of negligence. In these situations, the ultimate issue would be whether or not the defendant failed to act with reasonable care. Liability would depend on fault and the application of negligence principles.

As stated earlier, sections 163 and 163.1 of the Canadian *Criminal Code* create a duty to not commit any of the enumerated actions with obscene material or child pornography found therein, and this duty is placed on every member of Canadian society. As discussed, the only way a university would have any role in the possession or distribution of obscenity or child pornography in this scenario would be in its role as an ISP. As already concluded, absent further legislation and assuming the

Supreme Court of Canada upholds the Federal Court of Appeal's decision on this point in *SOCAN*, an ISP is only possibly linked to the material on its server in this context if it is caching it. Therefore, a university could only be liable for a breach of its duty under the *Criminal Code* if it had a role in caching content that included obscenity or child pornography. If the university can be said to have breached its duty under the *Criminal Code*, this breach can then be used by the plaintiff to support a claim of general negligence or negligent misrepresentation, as discussed below, although in and of itself, such a breach is not actionable in a civil law suit, as discussed above.

## The Tort of General Negligence

For any claim under the tort of negligence to succeed, it is necessary to demonstrate five elements: a duty of care, a failure to live up to a standard of care, causation, remoteness, and damages.

### *Duty of Care*

In order to establish the existence of a duty between parties, the test laid out in *Cooper v. Hobart*<sup>122</sup> must be fulfilled. First, it must be established that the circumstances disclose reasonably foreseeable harm to the plaintiff and proximity sufficient to establish a *prima facie* duty of care. It is necessary to look at whether the parties fall into a category of relationships in which a duty of care has been recognized, or if this is a situation in which, because of proximity and policy reasons, a new duty of care should be reasonably recognized.

Secondly, it is necessary to look at whether there are residual policy concerns, apart from those considered in determining a relationship of proximity, which would negate a *prima facie* duty of care.

Is the situation described within or analogous to a category of cases in which a duty of care has previously been recognized?

Several cases have been decided in Canada in which the Board of Governors of a university has been found liable for not protecting a student from harm.<sup>123</sup> Thus, a duty of care has previously been placed upon a university and its governing bodies by Canadian courts. However, in the alternative, should these cases not establish a duty of care, it can be argued that the relationship between a university and its students raises policy issues that would support the creation of a new duty of care. The proximity between the two parties — due to the quasi-fiduciary relationship of trust and the inequality of power — suggests that a university should have the responsibility to oversee the well-being of its students.<sup>124</sup>

If there is a duty between the two parties, are there any residual policy considerations, apart from those considered in determining a relationship of proximity, that would negate a *prima facie* duty of care?

Examples of questions to ask in order to make this determination are “Would the new duty create indeterminate liability?”; “Have public and private interests been balanced?”; and “Would it involve great cost to the taxpaying public?”<sup>125</sup>

First, in order to avoid the creation of indeterminate liability, it would be necessary to specify the duty (i.e., the duty to protect students from sexual harassment, rather than the duty to protect the general health, safety, and well-being of students). Without specification, a university could be indeterminately liable for any sort of harm done to a student (i.e., the mental anguish caused by a bad relationship with another student while living in residence).

Second, by stipulating that a university has a duty to protect students from sexual harassment, for example, public and private interests would be balanced. The university would not be liable for every harm inflicted on its students, and the students would be protected against harm that has been statutorily recognized in human rights legislation.

Last, because universities are theoretically private and not public entities, it might be argued that it would not cost the taxpayers additional money to hold universities liable under this new duty.<sup>126</sup>

As stated previously, Canadian courts have imposed a duty of care on a university, through its Board of Governors, in respect to its relationships with its students. However, should a duty of care need to be re-established, although policy reasons supporting the creation of a duty between a university and its students are tenuous, there are no policy reasons *against* imposing a duty of care upon a university with respect to safeguarding its students from sexual harassment. Therefore, should a duty between a university and its students exist or be created, it would then be necessary to establish whether the failure of a university to protect its students from sexual harassment in the circumstances described herein is contrary to the standard of care it is obliged to maintain.

### *Standard of Care*

The law requires each person to act as a reasonable and prudent person would in the same circumstances.<sup>127</sup> Factors to consider in order to find a breach of the standard of care are the probability and severity of harm<sup>128</sup> and the cost of risk avoidance.<sup>129</sup>

First, though, before assessing harm and risk avoidance, it is important to determine how a university could protect a student from sexual harassment caused by the creation of a poisoned environment through the viewing of pornography, as discussed here. Potential methods of protection would be the monitoring of students' activities, blocking access to particular types of Web sites or

disabling the ability to use file-sharing programs for certain materials, or creating reactive measures (i.e., a “tattle-tale” system in residence and subsequent punishment) that would aim to deter this behaviour by Student A. At this moment, universities have already given themselves permission to assume the passive and reactive role of acting once the notice of this conduct has been given.<sup>130</sup> Thus, universities have the capacity to avoid the harm involved here. The cost, of course, would be to the free flow of information in the university environment.

What, then, would a “reasonable” university do to protect its students from a poisoned environment? A very useful factor in determining whether a party’s conduct is reasonable or not is to examine the general practice of those engaged in a similar activity. Every university in Canada has the same lack of a hands-on approach to monitoring students’ activities in residence. In addition, proactive measures such as surveillance are probably not economically viable and may violate the student’s privacy rights (as discussed above). So, only reactive measures such as reacting to complaints or deterrent measures such as blocking online pornography sites would be reasonable, despite the fact that these measures do not always protect students from the harm under discussion.

It may be argued therefore that Canadian universities are already acting as any reasonable university would to protect its students from sexual harassment caused by the creation of a poisoned environment, and it would not be economically efficient for universities to implement further risk-avoidance measures. The probability and severity of harm caused by the creation of a poisoned environment could be argued to be minimal, as demonstrated by the lack of direct protection against poisoned environments under Canadian human rights legislation, and therefore does not warrant an increase of economic cost imposed upon the universities.

Under this argument, universities can reasonably do no more to protect their students than what they are already doing and therefore, any harm caused to a student from a poisoned environment cannot be due to a university’s failure to fulfill its duty and standard of care. If this argument is persuasive, should a residence student such as Student B seek redress for damage incurred from the creation of a poisoned environment, he or she would not be able to claim compensation from his or her university under the tort of general negligence.

### The Tort of Negligent Misrepresentation

Should a victimized student such as Student B state that a university had promised to protect him or her from a poisoned environment and had subsequently failed to do so, and that pure economic loss resulted from this failure, would he or she have a claim against the university for negligent misrepresentation? Once again, the University of Western Ontario and its internal

documents will be used as a case example; the analysis, however, is applicable to any university.

Historically, a defendant would not be found liable for negligent misrepresentation unless the parties were in a fiduciary relationship or the misrepresentation was fraudulent. However, in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*,<sup>131</sup> the House of Lords held that in certain circumstances, when the parties are in a “special relationship”, a duty of care may arise in providing “information, opinion, or advice.”<sup>132</sup> To have a special relationship, it was necessary under *Hedley Byrne* to meet the following factors: (1) a voluntary assumption of responsibility for the information, opinion, or advice, (2) foreseeable and detrimental reliance, and (3) reasonable reliance. If all three elements were met, then it was possible for one of the parties to be found liable for negligent misrepresentation.

*Queen v. Cognos Inc.*<sup>133</sup> brought the concept of negligent misrepresentation into the Canadian courts. Justice Iacobucci, for the majority, held that the liability under *Hedley Byrne* is not limited to professionals or to those who are in the business of giving advice, and that the new test for negligent misrepresentation involves five general requirements: (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

*There must be a duty of care based on a “special relationship” between the representor and the representee.*<sup>134</sup>

The Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*<sup>135</sup> clarified this duty by stating that in order to have a special relationship and find a *prima facie* duty of care, the plaintiff must establish that the representor “ought reasonably to have foreseen that the plaintiff would rely on his representation and that reliance by the plaintiff, in the circumstances, would be reasonable.”<sup>136</sup>

### Foreseeable Reliance/Reasonable Reliance

Certain factors should be examined in order to conclude whether a situation of foreseeable and reasonable reliance existed: the expertise and knowledge of the defendant, the seriousness of the occasion, the initial request for information by the plaintiff, the pecuniary interest of the defendant, the nature of the statement on which the plaintiff relied, and the existence of disclaimers.<sup>137</sup>

*The Expertise and Knowledge of the Defendant* — The expertise and knowledge of a university regarding the environment that it strives to create can be argued to be evident in its policy documents and its brochures. For example, the *University of Western Ontario Health and Safety Policy*<sup>138</sup> states that the university has “an ethical as well as a legal responsibility to provide a safe environment in which to study and to work.” Staff and faculty are responsible for complying with the safety requirements and standards set out under this *Health and Safety Policy*. The *Residents’ Handbook*<sup>139</sup> maintains that it is the purpose of the *Residents’ Handbook* “to provide for the safety of persons and property, and to maintain an atmosphere conducive to community living in an academic environment.”<sup>140</sup> It would be reasonable for a student to conclude that if the purpose of the *Residents’ Handbook* is to maintain a certain environment, then it is also the purpose of the university, which created the *Residents’ Handbook*, to maintain a certain environment.

In addition, publications created by University of Western Ontario employees also seem designed to educate and inform the university community about creating a certain environment at the university. *The University of Western Ontario’s Students’ Services Statement on Human Rights*,<sup>141</sup> for example, was created by the University of Western Ontario’s Equity Services department, in conjunction with the Student Development Centre, to affirm the University of Western Ontario’s “wish to ensure the full and fair implementation of the principles of the Ontario *Human Rights Code*.”<sup>142</sup> The *UWO Equity Services Info Sheet — Harassment and Discrimination*<sup>143</sup> also appears to be stating a belief of the university’s community that “every member of the University community has the right to study and work in an environment free of discrimination and harassment.”<sup>144</sup> The university community therefore may be argued to be educated and knowledgeable about creating conditions that would avoid the creation of a poisoned environment and avoid acts of sexual harassment that would have the potential to violate a student’s perceptions of safety.

*The Seriousness of the Occasion* — Reliance on information given is increasingly considered foreseeable and reasonable when the circumstances surrounding the giving of the information are more formal.<sup>145</sup> For example, at the University of Western Ontario, the *Residents’ Handbook* is given to potential students of the University of Western Ontario as well as to those who have accepted a place at the university. Other university documents mentioned above that deal with safety issues are not provided to students or applicants, but are publicly accessible online. Still others are only accessible in paper format from various university departments but are available to any member of the public at those locations. Although the information is not presented for a particular reason, it does bear the formal imprint of the university.

*The Initial Request for Information by the Plaintiff* — As discussed, for the most part, the plaintiff, Student B, would not have requested the information provided by the university’s documents. Rather, as discussed, at the University of Western Ontario, the *Residents’ Handbook and Understandings* is provided by the university to a potential student within a package of complete information on the university. While the other university documents must be located personally by the student, the information is not provided at the student’s request, but rather is already available for the general public’s perusal.

*The Pecuniary Interest of the Defendant* — While the University of Western Ontario, as an example, receives no direct financial gain for its provision of information, it can be argued that any future indirect pecuniary benefit received by the university should have a bearing on whether a duty exists. The university has the potential to receive a financial benefit if a potential student relies on the information provided in its documents, believes that the university is safe and free from sexual harassment or any poisoned environment, and decides to attend the university. Tuition and other ancillary fees are mandatory upon acceptance of a place at the university. Student B in this scenario, as a plaintiff, would necessarily be a student at the university and therefore would have provided the university with a financial benefit.

*The Nature of the Statement on Which the Plaintiff Relied* — The tort of negligent misrepresentation relates to the provision of “information, opinion, or advice.” It can be argued that the University of Western Ontario in this scenario is not providing “information, opinion, or advice.” Rather, through its internal documents, as demonstrated above, the university expresses its wishes, beliefs, and intentions regarding sexual harassment, but does not directly inform students that it will ensure a harassment-free or poison-free environment. At most, it might be argued, the university makes quasi-promises to its students to protect them from sexual harassment.<sup>146</sup>

*The Existence of Disclaimers* — Using the example of the University of Western Ontario, few internal university documents provide a disclaimer that each student is responsible for his or her own protection. For example, the *Code of Student Conduct* states specifically that “the University does not stand *in loco parentis* to its student members.”<sup>147</sup>

Overall, despite the expertise and knowledge of the University of Western Ontario regarding safety, the danger of sexual harassment, and the need to avoid a poisoned environment, and despite the fact that the university indirectly receives a financial benefit from the potential student when that student enrolls, possibly as a result of reading the information provided by the university, the fact that there is a lack of formality surrounding the delivery of the information, the fact that in this scenario the plaintiff Student B did not request the information, and the fact that it is questionable whether the

university even provides “information, opinion, or advice” in this area, a student such as Student B would have a very difficult task of satisfying this first part of the duty of care test when seeking to establish any tort liability against the university for behaviour such as that involved in this scenario.

*Policy Concerns: Indeterminacy*— Should a *prima facie* duty of care be found in certain circumstances, it can be negated based on public policy consideration where a problem of indeterminacy arises.<sup>148</sup> The “special relationship” necessarily requires some degree of proximity so as to avoid liability to an indeterminate audience.<sup>149</sup> In *Hercules*, for example, the information was initially prepared for a client under contract but was subsequently circulated to a broad range of non-privy third parties who used it for a variety of purposes. It is necessary, therefore, to ask in establishing tort liability whether the defendant had knowledge of the identity of the plaintiff or class of plaintiffs, and whether the information was used in the precise situation for which it was prepared. If the answer to both questions is affirmative, then the liability cannot be indeterminate.

For the most part, university documents like the University of Western Ontario’s documents described above regarding safety are accessible to the general public in both electronic and paper format. In addition, universities often send documents like the University of Western Ontario *Residents’ Handbook*<sup>150</sup> in paper format to many potential students. However, while potential students may read this type of information provided by universities, it is only those who have read the information, accepted the offers of education and residence, and subsequently been sexually harassed while living in residence that can potentially fall into the category of plaintiffs. Therefore, since a university has knowledge of the identity of its students living in residence, it has knowledge of the identity of any potential plaintiff or class of plaintiffs in this situation. In addition, the information provided in these types of university documents regarding safety can be said to have been created precisely for the purpose of reassuring potential and actual students as to their well-being during their time spent at a particular university and in its residences. A student’s reading of the documents to determine a university’s environment is the precise situation for which the documents were prepared. As a result of a university’s knowledge of the plaintiff’s identity, and the fact that the information was used in the precise situation for which it was prepared, there appears to be no problem of indeterminacy with respect to this type of action.

#### *The Representation in Question Must Be Untrue, Inaccurate, or Misleading*

If a university represents that it will create and maintain a certain environment in order to protect its students in residence, and then fails to do so, its represen-

tation will have ultimately been untrue, inaccurate, and misleading. However, as mentioned earlier, the University of Western Ontario, for example, does not actually state that it provides, or will provide, a safe environment. It states that it wishes to do so and will strive to achieve this goal. And in fact, the university does have several measures in place to decrease the possibilities for the creation or maintenance of a poisoned environment in residence, such as the provision and enforcement of the Regulations as laid out in the *Residents’ Handbook*. In addition, by setting up a complaint-based system that is intended to give Residence and Information Technology Services staff the authority to investigate complaints and reprimand accordingly, the university is attempting to maintain a protective environment, albeit not one with complete barriers from harm.

#### *The Representor Must Have Acted Negligently in Making the Said Misrepresentation*

If a university does not intend to create and maintain a protective environment, then its act of establishing university policy documents and publications that state otherwise could be seen as negligent. However, as mentioned above, the University of Western Ontario, for example, does not state that it has, or will have, a protective environment and would probably not be seen to have been negligent in making the statements that it has made (described above).

#### *The Representee Must Have Relied, in a Reasonable Manner, On Said Negligent Misrepresentation*

In addition to establishing a duty of care, the plaintiff Student B would also have to demonstrate causation — that he or she relied on the misrepresentation that subsequently caused the harm. In order to demonstrate reliance, the plaintiff Student B would have to show that he or she would have acted differently had he or she not relied on the university’s documents. The only way a student would be able to satisfy this burden of proof — that he or she relied on the statements of protection made by the university — would be to prove that, had the university not made the statements, he or she would not have entered residence, or would have entered residence but taken more precautions to protect himself or herself from sexual harassment.<sup>151</sup>

#### *The Reliance Must Have Been Detrimental to the Representee in the Sense That Damages Resulted*

The duty of care in the tort of negligent misrepresentation is considered in relationship to the plaintiff’s economic interests. In order to satisfy a claim of negligent misrepresentation, pure economic loss must have resulted from the misrepresentation. Pure economic loss differs from regular damages in other tort claims in that the loss does not result from damage to person or property. Rather, pure economic loss cases deal with plaintiffs whose loss was solely economic or financial. In the case

of a student in residence who had been victimized through the creation of a poisoned environment, such as Student B here, it seems most probable that the type of harm received would be psychological rather than financial.<sup>152</sup>

Overall, it seems that the University of Western Ontario, as an example, would probably not be found liable under the tort of negligent misrepresentation if a student like Student B had been sexually harassed from the creation of a poisoned environment through the actions of Student A and was seeking redress from the university. The analysis set out above based upon the example of the University of Western Ontario can of course be replicated in the particular circumstances of any other university and its internal documents. It seems probable, however, that no Canadian university would be found liable in tort to Student B in the circumstances of this problem. However, is it possible that a university may be liable under the terms of its contracts with its residence students?

## Contractual Obligations on a University and its Residence Students

There are three typical contracts (relevant to this paper) that exist between a university and its students in residence: the tuition contract, the use of computing resources contract, and the residence contract. Each contract can give rise to liability for breach of contract. In order to determine what exactly constitutes a breach of contract between a university and its students, it is necessary to define the obligations existing under each contract. Once again, the University of Western Ontario will serve as a case example; of course, again, the analysis used will be applicable to any university. Internal U.W.O. university documents may clarify the University's obligations by defining acceptable student behaviour in the University residences.

### The Tuition Contract

The tuition contract is of general application to every student at any university and must be renewed each year. According to *Sutcliffe v. Governors of Acadia University*,<sup>153</sup> once a student registers with a university through a tuition contract, he or she has agreed to be bound by the provisions of the university, and the university and the student are in a contractual relationship. According to the University of Western Ontario's *Code of Student Conduct*, mentioned above, upon registration a student assumes responsibilities that must be fulfilled in order to continually receive "academic and social privileges." Additionally, the *Code of Student Conduct* dictates in its introduction that:

All members of the University community are responsible for ensuring that their conduct does not jeopardize the good order and proper functioning of the academic and non-academic programs and activities of the University or its faculties, schools or departments, nor endanger the health,

safety, rights or property of the University or its members or visitors.

Lastly, the *Code of Student Conduct* states specifically that "the University does not stand *in loco parentis* to its student members",<sup>154</sup> and therefore the students are free to act as they please until they fail to comply with a university regulation. These responsibilities under the *Code of Student Conduct* incorporate by reference the duties stipulated under the *Sexual Harassment Policy and Procedures*, discussed above, as well.<sup>155</sup>

In return for receiving a student's tuition fee, a university contracts to provide education to the student. The extent of this obligation is being clarified through litigation. Cases involving students suing post-secondary institutions for various infractions<sup>156</sup> are increasing both nationally and internationally.<sup>157</sup> However, most claims against universities have been unsuccessful.<sup>158</sup> As stated previously, courts have generally been wary of interfering with a university's jurisdiction over the control of academics in relation to its students.<sup>159</sup>

### The Computing Resources Contract

Another typical contract is the contract for use of computing resources. Students in residence at the University of Western Ontario, for example, have several options regarding obtaining Internet access. With the provision of the tuition fee, they can use the general computing resources that are provided by the University of Western Ontario and are available at various locations on-campus (but not in residence). The problem being considered here does not concern this mode of access. In residence, at the University of Western Ontario, students can access the Internet in two ways:<sup>160</sup> through an independent Internet Service Provider of their choice,<sup>161</sup> or through RezNet. RezNet is U.W.O.'s Residence Network, extending campus-wide network connectivity and Internet access to students in residence. Through RezNet, students can exchange e-mail, browse and publish information on the World Wide Web, and have easy access to course material and the U.W.O. Library System.<sup>162</sup> The use of RezNet is the most popular option chosen by residence students due to its convenience and economic feasibility.<sup>163</sup>

The use of RezNet involves the provision of a fee from the student to the university and the agreement of the student to abide by the *Acceptable Use Agreement: University's Code of Behavior for Use of Computing Resources and Corporate Data*.<sup>164</sup> This *Acceptable Use Agreement* applies to "all users of the university's computing resources",<sup>165</sup> and dictates what acts are acceptable and which shall be subject to disciplinary procedures by the Information and Technology Services Department of the university. The *Acceptable Use Agreement*, which appears online when a residence student is setting up a RezNet account,<sup>166</sup> states that "no user account is enabled until the user agrees to this *Code of*

*Behaviour.*” Under the *Acceptable Use Agreement*, subscribers agree to use the university’s computing resources in an “effective, ethical and lawful manner . . . [and to] conduct themselves according to the high standards of professional ethics and behavior appropriate in an institution of higher learning.” In return, a user receives access to the Internet and to the university’s computing resources. In addition, the RezNet Hotline is available for technical support, as are RezNet Consultants and the Information Technology Services Help Desk.

The *Residence Hall Network Connection Guidelines*,<sup>167</sup> which have not been approved by the Board of Governors nor by the Senate, and therefore are not legally binding on ITS users,<sup>168</sup> were created to assist in the interpretation of the *Acceptable Use Agreement*. Under *Section III: Responsibilities* of the *Connection Guidelines*, it is stated that “using University resources to solicit or harass another individual is forbidden.” Examples of harassing behaviour that are set out in the *Acceptable Use Agreement* include sending unsolicited e-mail and harassing and obscene messages that contravene the *Sexual Harassment Policy*.<sup>169</sup> The *Connection Guidelines* also state under *Section III: Responsibilities* that it is not necessary for a student to have subjective knowledge of the offensiveness of his or her behaviour in order to be found liable for the misuse of the university’s computing resources. Rather, “users are responsible for all traffic originating from their machine, including user activity, regardless of: (a) whether or not they generate it, (b) whether or not they know what they are doing, or (c) whether or not they realize that they have violated any specific policies.”

Section VI of the *Guidelines* further explains that any infractions of the *Agreement* that involve e-mail are required to be directed to a certain e-mail address, while all other infractions are directed to another. Alternately, infractions can also be reported to Residence Managers or to the University’s Equity Services. According to Section 8.00 of the *Agreement*, it is the responsibility of the Senior Director of ITS, an academic official, or the Head of a local computing facility to deal with any allegation of misconduct involving a breach of the *Agreement*.<sup>170</sup>

For its part, the University of Western Ontario, through the *Acceptance Use Agreement*, contracts to provide its students with access to the Internet and to other technological resources. Student B, therefore, would not be able to sue the university on any grounds involving this contract.

The only other contractual obligation imposed on the university in relation to its computing resources is the obligation it has under its software licensing agreements. Section 5(i) of the *Acceptable Use Agreement* states that “breaching the terms and conditions of a software licensing agreement to which the University is a party” is an unauthorized use of the computing resources of the university. If a student such as Student A does anything that violates the conditions of such a

software licence, the university might have a remedy under the *Acceptable Use Agreement* against the student.

However, this may be problematic because it is not possible for a student to access these agreements and therefore, due to lack of notice, this provision is probably unenforceable. The *Acceptable Use Agreement* states that it “applies to all users of the University’s computing resources.” Under it, users have the responsibility of ensuring that they use the resources “in an effective, ethical and lawful manner . . . according to the high standards of professional ethics and behaviour appropriate in an institution of higher learning.” Moreover, under the *Acceptable Use Agreement*, it is stated that “the intentional use of the computing resources for any purpose other than academic, administrative, and/or incidental, non-commercial personal use, will be considered to be unauthorized.” However, while the university might have a remedy against Student A under the *Acceptable Use Agreement*, this would not provide a defence for the university against either the software licensor<sup>171</sup> or Student B, on these grounds.

So, it would seem that in relation to contracts for computing resources, the University of Western Ontario, for example, effectively limits its contractual obligations towards its students to the provision of service and also uses the *Acceptable Use Agreement* to require that students take responsibility for their conduct.

## The Residence Contract

After accepting an offer of education from a university, a student can typically apply for a spot in one of the on-campus residences. At the University of Western Ontario, the student applies to the University’s Division of Housing and Ancillary Services.<sup>172</sup> In order to ensure that the student’s space in residence is reserved, the University of Western Ontario, for example, requires that the official Residence Contract attached to the Residence Fee Invoice be signed and returned to the Residence Admissions Office prior to moving in. At the bottom of the Residence Contract is the statement: “I understand that my residence accommodation is contingent upon my acceptance of all University regulations, fee regulations and conditions as outlined in the 2002-03 *Residents’ Handbook and Understandings*<sup>173</sup> and on this contract/invoice, all of which are accepted accordingly.” By signing the residence contract and paying the accommodation fee, the student therefore agrees to abide by all of the regulations and university policies laid out in the *Residents’ Handbook*, discussed above.<sup>174</sup>

The purpose of the *Residents’ Handbook* is “to provide for the safety of persons and property, and to maintain an atmosphere conducive to community living in an academic environment.”<sup>175</sup> It states that various sanctions will be imposed following a breach of the *Residents’ Handbook*, including the possibility of the termination of the residence contract. As stated on

page 52, “The University reserves the right to terminate the Residence Contract, reassign residences or rooms, and to effect other steps for the safety, security, and conduct of the residence program.” According to the *Residents’ Handbook*, any behaviour that “erodes the spirit of diversity within the residence community will not be tolerated.”<sup>176</sup> Specifically, having pornographic materials in residence that may be offensive to others is stated to be a contravention of the *Residents’ Handbook*.<sup>177</sup> In accordance with *Morgan*,<sup>178</sup> which held that a student must abide by university regulations regarding alcohol, it can be argued by analogy that Student A here would be obliged to uphold university rules such as these in relation to pornography and, again, could be sanctioned by the university.

For its part, with the acceptance of the Residence Contract, the university simply contracts to provide residence accommodation. The *Residents’ Handbook* makes no mention of any other obligation (such as a promise to protect its students in any way) which could be imposed upon the university by its residence students as a result of this contractual relationship with the university. In fact, the university deliberately attempts to limit its liability. As mentioned earlier, the university states in its *Code of Student Conduct*, which is incorporated by reference into the Residence Contract, that it is not in a position of being *in loco parentis* with its students.<sup>179</sup> In the *Residents’ Handbook*, which is also incorporated into this contract for residence by reference, the university states in two places that a student is individually responsible for “what takes place in [his or her] room”.<sup>180</sup> Again, the University of Western Ontario would not be able to be held contractually liable to Student B in this scenario under the provisions of the residence contract.

Thus, the University of Western Ontario, through the wording of its three contracts with students for tuition, computing resources, and residence, appears to have distanced itself from any contractual responsibility towards any of its students beyond the provision of education, technological resources and support, and accommodation.

## Conclusion

As stated in the introduction to this paper, the analysis demonstrated in this paper is appropriate to any university’s legal relationship between itself and its students with regard to its students’ Internet use in residence. Although this paper’s conclusions in certain parts are specifically limited to the University of Western Ontario, or to any university in Ontario, firm conclusions about the liability of any other Canadian university may be reached using the same approach of interpreting and applying all internal and external primary sources connected to that university.

The first question examined in this paper was about the nature of the relationship between a university and Student A — the student viewer of online pornography in a university residence room. Through an interpretation of a university’s statutory power, and with an examination of the common-law assertion of a university’s authority over a student’s academic and non-academic conduct, it was concluded that a university does *prima facie* have the ability to regulate Student A’s online conduct in this regard.

The paper went on to further examine whether any of Student A’s rights would be affected should a university decide to assert this *prima facie* authority. First, it was concluded that a university is not under the purview of the *Canadian Charter of Rights and Freedoms*, and therefore does not have any legal obligations imposed by the Charter regarding its actions with respect to students. Secondly, a student’s possible rights to privacy in his or her residence room were examined. It was found specifically in the context of contractual rights, that a student in residence at the University of Western Ontario does not have any contractual right to privacy. In no university in Canada, at the moment, can a student make a strong claim under tort law for a violation of privacy in these circumstances. Finally, only certain provinces have privacy statutes that extend protection to a student in a university residence. Overall, any claims that Student A might have against a university should it decide to regulate his or her online conduct in these circumstances would be tenuous.

The second issue raised in the introduction to this paper dealt with a university’s responsibility to the public as an Internet Service Provider. It was found that if Student A only views pornography, which is legal, his or her university as an ISP would not be liable for any misconduct. However, if Student A receives online child pornography or obscene material as part of the viewing of pornography discussed here, his or her university might have a legal responsibility to control Student A’s online conduct. The Supreme Court of Canada’s decision regarding the Federal Court of Appeal’s interpretation of *Tariff 22* will thus have future implications for every Canadian university. Currently, the Federal Court of Appeal’s interpretation of the Copyright Board’s decision regarding *Tariff 22*<sup>181</sup> indicates that a university might not be found culpable under the *Criminal Code* provisions prohibiting distribution of obscene material or child pornography in these circumstances, even if its students violate sections 163 or 163.1, because the university has no relationship with the sites (content providers) being accessed by its students, and therefore cannot be said to have authorized the possession or transmission of the material from them. However, according to the Federal Court of Appeal’s decision regarding *Tariff 22*, a university would be found liable for copyright infringement if it was found to be caching

certain material. If upheld, this imposition on universities of liability for caching, for which they would be characterized as ISPs, might be extended beyond the area of copyright law, even so far as to impose criminal responsibility on universities in a scenario such as this one, if Student A were found to be viewing obscene material or child pornography.

The last issue raised at the beginning of this paper dealt with the different legal obligations that exist upon a university in its relationship with Student B — a student claiming sexual harassment as a result of Student A's actions. A university's potential liability under public law, tort law, and contract law was examined.

First, it became clear that certain human rights legislation, such as the Ontario *Human Rights Code*, may not be applicable to universities in this situation because universities are not strictly in tenancy relationships with their students in residence. However, every university in Canada must be aware of the extending ambit of their respective provincial human rights statutes. An examination of Canadian cases revealed that human rights legislation has been interpreted broadly to cover university students in some circumstances. Such broad judicial interpretation supports the broad interpretation of the Ontario *Human Rights Code*, for example, articulated by the Ontario Human Rights Commission itself. Thus, despite the fact that a strict interpretation of subsection 7(1) of the Ontario *Human Rights Code* leads to the conclusion that the Code only applies to those in a tenancy relationship, and therefore does not apply to a university and its residence students, it is probable that a university in Ontario, and in fact, any university throughout Canada, does have a duty under public law to protect its students from discrimination and harassment as described under human rights legislation.

Given a university's probable responsibility under human rights legislation, this paper went on to examine whether the creation of a poisoned environment can constitute an act of sexual harassment sufficient to bring it within the purview of provincial human rights statutes, and if so, whether the private viewing of online pornography in a residence room is sufficient to create a poisoned environment. With respect to the question of whether the creation of a poisoned environment is an act of sexual harassment, the Ontario Human Rights Commission's own interpretation, as well as recent employment decisions, equates the creation of a poisoned environment with sexual harassment. However, with respect to the subsequent question of whether a student's solitary act of viewing online pornography in a residence room is enough to create a poisoned environment, should prohibiting poisoned environments be part of a province's human rights environment, it was established that if the viewing of pornography by a residence student reasonably causes another student harm by disrupting his or her work, study, or living environment, the position of the Ontario Human Rights Com-

mission, at least, is that this behaviour does create a poisoned environment and is therefore an act that might be interpreted to fall under the ambit of the Ontario *Human Rights Code*. Therefore, because a university is probably obliged under public law to protect its students from sexual harassment, and sexual harassment has been equated with a poisoned environment in some circumstances by some tribunals and courts, a Canadian university may well have an obligation to shield its students from a poisoned environment. As a result, every university should be aware of the evolving definition of sexual harassment under its respective human rights legislation. Human rights legislation throughout Canada is constantly changing, requiring consistent vigilance both by those to whom it applies and by those in institutions to which it has not been traditionally applied.

Secondly, the claims a student such as Student B described here might have against his or her university under tort law for not protecting him or her from a poisoned environment created through the actions of another student, here Student A, were examined. Using the interpretation of the University of Western Ontario's internal documents as an example, it was concluded that, should a residence student seek redress for damage incurred from the creation of a poisoned environment, he or she would probably not be able to claim compensation from a university such as the University of Western Ontario under either the tort of general negligence or the tort of negligent misrepresentation. It is advisable, however, that every Canadian university analyze its own internal documents to determine whether proceeding from its own individual circumstances it could be found liable under the tort of general negligence or the tort of negligent misrepresentation for failing to protect its students from sexual harassment even though this analysis, based on the case of the University of Western Ontario, would suggest otherwise.

Finally, a university's obligations towards its students in residence under contract were analyzed to see whether a student such as Student B might be able to recover from a university for damages sustained through the activities of another student such as Student A. Every Canadian university and its students are contractually bound to each other, with different obligations existing under each contract. As a result, a university must be aware of the legal obligations placed upon itself and upon its students by the agreements existing between itself and its students.

Again referring to the example of the University of Western Ontario, in return for receiving monetary fees from students, the university only contracts to provide education, access to computing resources and technological support, and residence accommodation. No other contractual obligations appear to be placed on the university. In fact, the University of Western Ontario deliberately attempts to limit its liability through university policy documents that are incorporated by reference into

its contracts with students. The students, on the other hand, are contractually obliged, through the incorporation of these same university policies into the contracts, to fulfil responsibilities under university policy documents. Therefore, although these contracts appear to give the university authority to stop a student such as Student A from viewing online pornography in his or her residence room, this relationship does not compel the university to do so and there appears to be no way that another student, like Student B, can hold the university contractually liable should it fail to prevent Student A's actions.

In summation, under its contracts and its enabling legislation, a university can *prima facie* prohibit students from viewing pornography in residence. However, the only real possible avenue for a student in Ontario claiming to be harmed if his or her university does not stop students in residence from viewing pornography appears to be through the applicable human rights legislation, although the avenue of recourse may not be successful. Indeed, whether the viewing of online pornography in a residence room can even constitute the creation of a poisoned environment, or otherwise constitute harassment, remains uncertain.

On the other hand, if a university decides to enforce its statutory and contractual powers and regulate a student's online behaviour, the student viewing the pornography might claim that his or her rights were violated. Analysis reveals that this claim against a university would also be tenuous. For example, no privacy rights exist for

students under the University of Western Ontario's contracts. However, such rights do exist in a majority of provinces under statute for a student in residence. And there is a slim possibility that a university could incur tortious liability for regulating a student in these circumstances.

In summation, a university must analyze its contracts with its students, its founding and enacting legislation, its internal documents, and the applicable provincial human rights legislation and jurisprudence to determine whether it has a legal obligation under contract law, public law, criminal law, or tort law to protect its students from the conduct of a student in residence who views online pornography. In addition, a university should be aware of any privacy legislation existing in its province to determine whether a student in residence could have cause to claim a violation of privacy should the university attempt to regulate that student's online behaviour. Each university should realize that it must balance a potential liability for not protecting its residence students from the effects of another student's accessing pornography in residence against a potential liability for infringing a residence student's rights by regulating online behaviour. Therefore, every university must examine its legal roles as a contractual party, as an Internet Service Provider, and as a statutory body to determine what actions it should take, or refrain from taking, in its policies and in its published literature, even before an incident such as the one posited here arises, in order to avoid liability.

## Notes:

<sup>1</sup> Various reasons might be imagined to explain this fictitious circumstance. For example, the sound on the computer may be at high volume and the auditory effects of the material may be heard by others, the student may tell other students, there may be guests who witnessed the material and then told others, etc.

<sup>2</sup> Vanessa Gruben, a student at the University of Ottawa law school, created a paper entitled "Online Harassment & Cyberstalking: Regulating Communication at Canadian Universities" for the *Innovation Law Forum: Working Paper Series 2001*. Gruben states that Canadian universities should regulate "cyberstalking" or "online harassment" to ensure equal access to the Internet and the protection of students. Gruben concludes that current regulation does not satisfy either objective efficiently. For more information, see: Vanessa Gruben, "Online Harassment & Cyberstalking: Regulating Communication at Canadian Universities" (2001), online: Centre for Innovation Law and Policy [http://www.innovationlaw.org/lawforum/pages/workingpaper\\_series.htm#student](http://www.innovationlaw.org/lawforum/pages/workingpaper_series.htm#student).

<sup>3</sup> Canadian *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

<sup>4</sup> A university in Ontario is defined by the *Education Act* (R.R.O. 1990, Reg. 309, s. 1(a)) as "an Ontario university or post-secondary institution that is an ordinary member of the Association of Universities and Colleges of Canada." According to the *Post-Secondary Educational Choice and Excellence Act, 2000* (S.O. 2000, c. 36, Sched., s. 3), the Minister of Training, Colleges, and Universities must consent to the establishment of a university and to its power to create internal regulations. Once established, a university has no further guidance from provincial statutes. Similarly, only two federal statutes deal with the topic of post-secondary education, the *Canada Student Financial Assistance Act* (1994, c. 28, s. 2(1)) and the *Canada Student Loans Act* (R.S. 1985, c. S-23, s. 2(1)) and neither statute defines "universities", but simply refers to "designated" or "specified educational institutions".

<sup>5</sup> Universities in British Columbia instead operate under the *University of British Columbia Act*, R.S.B.C. 1996, c. 468 [hereinafter *UBC Act*]. The *UBC Act* encompasses the University of British Columbia, the University of Victoria, Simon Fraser University, and the University of Northern British Columbia. In Alberta, Manitoba, Newfoundland and Labrador, New Brunswick, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the Yukon, universities are regulated by their own individual Acts.

<sup>6</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s.93, reprinted in R.S.C. 1985, App. II, No. 5. [hereinafter *Constitution Act, 1867*]. "In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions . . .".

<sup>7</sup> *Mpega v. Université de Moncton* (2001), 240 N.B.R. (2d) 349 (N.B.C.A.) at 21 [hereinafter *Mpega*]: "the said policy adopted by the University is not in doubt because it is a matter clearly within the legislative power of the Government of New Brunswick under one or several provisions of the *Constitution Act, 1867*, i.e. subsections 92(13), (14), or (16)."

<sup>8</sup> *Constitution Act, 1867*, *supra* note 7.

<sup>9</sup> *Ibid.* "The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

<sup>10</sup> *Ibid.* "Generally all Matters of a merely local or private Nature in the Province."

<sup>11</sup> The current private legislation governing the University of Western Ontario is *An Act respecting The University of Western Ontario*, referred to as the *U.W.O. Act, 1982* (*An Act respecting The University of Western Ontario*, S.O. 1982, c. 92 [hereinafter *U.W.O. Act, 1982*], as am. by S.O. 1988, c. Pr26). The first *University of Western Ontario Act* was given Royal Assent on March 7, 1878 (*An Act respecting the University of*

*Western Ontario*, 41 Vic., c. 70). The *U.W.O. Act, 1982* was created, as stated in its preamble, to provide for the organization, government, and administration of the University. The *U.W.O. Act, 1982* details the power and composition of the Board of Governors and the Senate, as well as the duties of the Chancellor, Vice-Chancellor, and Visitor (the Lieutenant Governor of the Province of Ontario) of the University. For further history on the University of Western Ontario, see James J. Talman & Ruth Davis Talman, "Western" — 1878-1953 (London: University of Western Ontario, 1953), William Ferguson Tamblin, *These Sixty Year* (London: University of Western Ontario, 1938), and John R.W. Gwynne-Timothy, *Western's First Century* (London: University of Western Ontario, 1978).

<sup>12</sup> Section 18 provides that the "government, conduct, management and control of the University and of its property and affairs are vested in the Board, and the Board may do such things as it considers to be for the good of the University and consistent with the public interest." More specifically, under section 20(e), the Act gives the Board of Governors the ability to "provide for the government and control of residences operated and maintained by the University." In addition to this mandate given to the Board, section 29 provides the Senate with broad power over the academic policy of the University. As a result, the Senate has the authority to make recommendations to the Board of Governors on various matters, including the governance and control of the university residences (section 29(j)).

<sup>13</sup> The *UBC Act*, *supra* note 5 at section 27(2)(d).

<sup>14</sup> *Ibid.* at section 27(2)(r).

<sup>15</sup> The *UWO Act, 1982*, *supra* note 12 at s. 19(g): The Board may "... create committees to exercise any of its powers and delegate authority to such committees or to individuals as necessary, including an executive committee that may act in the name of and on behalf of the Board between regular meetings of the Board." Examples of Board of Governors committees dealing with residences are the Campus and Community Affairs Committee, the Property and Finance Committee, and the University Discipline Appeal Committee.

Section 29(a): The Senate shall "create, modify, and dissolve faculty councils or committees and committees generally to exercise any of its powers, and approve of their form and method of operation."

Section 30(d): The Senate may "establish such committees as the Senate considers necessary, including an executive committee that may act in the name and on behalf of the Senate between regular meetings of the Senate". Examples of Senate committees dealing with residences are the Senate Committee on Housing Policy (SCOHP), the Senate Committee on Information Technology and Services (SCITS), and the Senate Committee on Student Housing (UCOSH).

<sup>16</sup> The following documents define acceptable on-campus behaviour at the University of Western Ontario that must be complied with by any member of the university community when interacting with other members of the community. These documents fall under the Board of Governors' broad power under section 18 of the *U.W.O. Act, 1982*, *supra* note 12, to oversee the "government, conduct, management and control of the University and of its property and affairs ... [and to] do such things as it considers to be for the good of the University and consistent with the public interest."

(A) *The University of Western Ontario Code of Student Conduct*, online: UWO Governance and Institutional Information <http://www.uwo.ca/univsec/board/newcode.html> [hereinafter *Code of Student Conduct*]. The purpose of the *Code of Student Conduct*, enacted by the Board of Governors on May 3, 2001, is to (1) define the general standard of conduct expected of students, (2) to provide examples of conduct that may be subject to disciplinary action by the University, (3) to provide examples of sanctions that may be imposed, and (4) to set out the disciplinary procedures that the University will follow upon violation of the Code. As stated in Part V of the *Code of Student Conduct — Rules*, "any conduct on the part of a student that has, or might reasonably be seen to have, an adverse effect on the reputation or the proper functioning of the University, or the health, safety, rights or property of the University, its members or visitors, is subject to discipline under this Code." The Board of Governors is mandated to review the Code within three years of initial implementation.

(B) *The University of Western Ontario Health and Safety Policy*, online: The University of Western Ontario Policies and Procedures — Section 3, <http://www.uwo.ca/univsec/mapp/section1/mapp31.pdf> [hereinafter *Health and Safety Policy*]. As stated under Section 1.00 of this *Health and Safety Policy*, the university has "an ethical as well as a legal responsibility to provide a safe

environment in which to study and to work." Students, staff, and faculty are responsible for complying with the safety requirements and standards set out under this *Policy*.

(C) *The University of Western Ontario Sexual Harassment Policy and Procedures*, online: The University of Western Ontario Policies and Procedures Section — 1.11, <http://www.uwo.ca/univsec/mapp/section1/mapp111.pdf> [hereinafter *Sexual Harassment Policy*]. According to this *Sexual Harassment Policy*, the University of Western Ontario affirms the right of every member of its community to study and work in an environment free of sexual harassment. The Human Relations Tribunal, online: The University of Western Ontario Policies and Procedures — Section 1.20 <http://www.uwo.ca/univsec/mapp/section1/mapp120.pdf> is authorized by the Board of Governors to hear and adjudicate complaints of sexual harassment under the *Sexual Harassment Policy*. It is the responsibility of the President to initiate a review of this *Policy* and its procedures within five years of its adoption, and to report to the Board of Governors, through the Campus and Community Affairs Committee, providing recommendations as may be appropriate.

<sup>17</sup> As stated by Owen-Flood J. in *Blaber v. University of Victoria* (1995), 123 D.L.R. (4th) 255 at 38 (B.C.S.C.) [hereinafter *Blaber*], internal university policies are "best characterized as a set of rules establishing the boundaries of acceptable behaviour for all members of the University community."

<sup>18</sup> *York University v. Bloxam* (1984), 15 Admin. L.R. 51 (Ont. Sm. Cl. Ct.). In this case, the defendant was a student in residence who was found to have damaged some door knobs and an intercommunications device of the residence. The Court determined at paragraph 7 that, pursuant to the *York University Act, 1965*, 13-14 Elizabeth II, 1965, the university had the authority to "regulate students and student activities". In addition, a study by J. Wood & C. Shearing, "Securing Safety on Campus: A Case Study" (1998) 40 Can. J. Crim. 81, found that universities have been disciplining the non-academic conduct of their students for years in order to prohibit activities that are a threat to the integrity of, and the freedom to participate in, the forms of life that are central to the universities.

<sup>19</sup> *Morgan v. Acadia University* (1985), 69 N.S.R. (2d) 109 at 78 (N.S.S.C. (T.D.)) [hereinafter *Morgan*].

<sup>20</sup> *Ibid.* at 76.

<sup>21</sup> *Act of Incorporation of Acadia University*, N.S. Laws 1891, c. 134.

<sup>22</sup> *Morgan*, *supra* note 19 at 20.

<sup>23</sup> *Morgan*, *ibid.* at 78.

<sup>24</sup> *Glynn v. Keele University*, [1971] 2 All E.R. 89 (Ch. Div.) [hereinafter *Glynn*].

<sup>25</sup> *Ibid.* at 91.

<sup>26</sup> *Glynn*, *supra* note 24 at 97.

<sup>27</sup> *Healey v. Memorial University of Newfoundland* (1992), 106 Nfld. & P.E.I.R. 304 (Nfld. S.C. (T.D.)) [*Healey*].

<sup>28</sup> *Ibid.* at 16.

<sup>29</sup> *Dickason v. The University of Alberta*, [1992] 2 S.C.R. 1103 at 113 [hereinafter *Dickason*].

<sup>30</sup> See *Re Harelkin and University of Regina*, [1979] 2 S.C.R. 561, *Kane v. Board of Governors of U.B.C.*, [1980] 1 S.C.R. 1105, *B.(Y.) v. W. (R.)* (1985), 52 O.R. (2d) 738 (Ont. H.C.J.), *Blasser v. Royal Institution for the Advancement of Learning et al.* (1985), 24 D.L.R. 507 (Que. C.A.), *Paine v. University of Toronto* (1981), 34 O.R. (2d) 770 (Ont. C.A.), *King v. University of Saskatchewan*, [1969] S.C.R. 678, and *Blaber v. University of Victoria*, *supra* note 17.

<sup>31</sup> In addition, internal university documents at the University of Western Ontario, for example, would appear to create appropriate authority under which the university could insist the adherence to of certain rules. For example, under the *2002/2003 Residents' Handbook and Understandings* (available in print or online: Housing Services <http://www.uwo.ca/hfs/housing/residences/index?safety.htm-mainframe> [hereinafter *Residents' Handbook*]), which is incorporated by reference into the residence contract signed by every student in residence (discussed more fully later) states at page 52:

Behaviours that erode the spirit of diversity within the residence community will not be tolerated. Examples of these behaviours include communicating racist or sexist jokes, hate literature, *pornographic material*, as well as other material that may be offensive to others. This policy includes verbal communication or the posting or publishing of material, written or electronic, within the residence, *including in your residence room*, or via the University's network,

including RezNet. If you contravene this policy, you will face disciplinary sanctions [emphasis added].

However, this policy is not part of any document passed by the University Senate or Board of Governors. Also, it does not speak directly to the behaviour under discussion, the viewing of online pornography by Student A, nor communicating the pornography. Finally, as described below, other considerations may make the policy *ultra vires* the university.

<sup>32</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

<sup>33</sup> *Ibid.*

<sup>34</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [hereinafter *McKinney*] and affirmed in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 [hereinafter *Harrison*].

<sup>35</sup> *Ibid.*

<sup>36</sup> In *Blaber*, *supra* note 18, the Court held, at paragraph 31, that while the decision in *McKinney*, *supra* note 34, dealt with a mandatory retirement policy, in *Blaber* *ibid.*, there was no reason to come to a different result when dealing with the discipline of a student.

<sup>37</sup> At the University of Western Ontario, in addition to internal university documents created to apply to students, the University Students' Council (U.S.C.) also created a policy that is meant to be adhered to by its members — every undergraduate student affiliated with the main campus and the colleges. The U.S.C. is a corporation created in 1962 as a service owned and operated by the students of the University of Western Ontario. The mandate of the U.S.C. is to enhance the educational experience for every student at U.W.O. As such, it has created a policy dealing with student behavior and sexual harassment. The *Declaration of the Canadian Student*, online: U.S.C. [http://www.usc.uwo.ca/documents/policies\\_procedures/statement\\_policies.htm](http://www.usc.uwo.ca/documents/policies_procedures/statement_policies.htm) [hereinafter *Declaration of the Canadian Student*], addresses issues to ensure that “the Canadian Student has the right to be free to continue her education without any material, economic, social, or psychological barriers created by the absence of real equality or essential conditions.” A specific section in this *Declaration* deals with the creation of poisoned environments as a significant and unreasonable interference in a person's environment. In addition, under *Part V Exceptions*, the *Declaration* states that:

... freedom of expression is the cornerstone of education at U.W.O., but, like other rights under the *Canadian Charter of Rights and Freedoms*, it is not an absolute right. The Charter guarantees: freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The rights and freedoms guaranteed by the Charter are “... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Human rights, for example, may place limits on those freedoms. The implementation of this *Policy* shall adhere to the Charter. However, the U.S.C. has no statutory authority over the regulation of students. The only possible means by which the U.S.C. could enforce its policy is to prohibit access to U.S.C.-owned operations (i.e., the campus bars or the campus movie theatre). This U.S.C. document has not been approved by either the Board of Governors or the Senate.

<sup>38</sup> *Discrimination and Harassment Prevention Policies and Procedures*, online: Ryerson University <http://www.ryerson.ca/equity/dhp-policy.htm#Poisoned%20Environment>.

<sup>39</sup> *Morgan*, *supra* note 19 at 78.

<sup>40</sup> *Ibid.* at 78.

<sup>41</sup> It may be noted that on the evidence of an internal university document, the University of Western Ontario has assumed the responsibility of regulating the possession of pornography in residence. The *Residents' Handbook*, *supra* note 31, currently states at page 51 that:

in accordance with those sections of the *Criminal Code of Canada* (e.g., section 163), *pornography, any obscene material, or child pornography cannot be possessed in residence*. Please note that we consider the file share function of RezNet to be a public domain, therefore you will not use this area for file sharing of pornographic materials. [emphasis added].

Although, as will be discussed further below, under the *Criminal Code*, it is illegal to possess *obscene material* or *child pornography* in particular, the *Handbook* states that it is against Residence Policy for any pornography “that erodes the spirit of diversity” to be found in the residence, including in the private rooms. However, after talking with the Computing Resources Unit of the Housing and Ancillary Services

Department, the author has been assured that the *Residents' Handbook* at the University of Western Ontario will be changed for 2003-04 to reflect the specific prohibitions on obscenity and child pornography, in compliance with sections 163(1) and 163.1 of the *Criminal Code*.

<sup>42</sup> The only other internal university document dealing with the protection of a student's privacy is *The University of Western Ontario Guidelines on Access to Information and Protection of Privacy*, online: University of Western Ontario <http://www.uwo.ca/univsec/mapp/section1/mapp123.pdf> [hereinafter *UWO Guidelines on Access to Information and Privacy*], which regulates the distribution of a student's personal records, but does not specify a student's right to either personal or private space.

<sup>43</sup> See: Philip H. Osborne, *The Law of Torts* (Toronto: Irwin Law, 2000) [Osborne, *The Law of Torts*] at 231.

<sup>44</sup> *Hunter v. Southam*, [1984] 2 S.C.R.145.

<sup>45</sup> *Corlett-Lockyer v. Stephens*, [1996] B.C.J. No. 857 (B.C. Prov. Ct. (Civ. Div.)). In addition, in *Aubry v. Les Editions Vice-Versa*, [1998] 1 S.C.R. 591 at 64 [hereinafter *Aubry*], the Supreme Court of Canada stated in *obiter*, “... it is important to bear in mind that our law is characterized by recognition of interrelated rights whose purpose is to strengthen the democratic ideal. Individual freedom is at the heart of that ideal.” See also *Motherwell v. Motherwell* 1976, 1 A.R. 47 (Alta. S.C. (A.D.)) for an extension of the common law right to privacy.

<sup>46</sup> *Lipiec v. Borsa* (1996), 31 C.C.L.T. (2d) 294 (Ont. Ct. Gen. Div.), *Burnett v. The Queen* (1979), 23 O.R. (2d) 109 (Ont. H.C.J.), *F.(P.) v. Ontario* (1989), 47 C.C.L.T. 231 (Ont. Dist. Ct.).

<sup>47</sup> *Roth v. Roth* (1991), 4 O.R. (3d) 740 at 21 (Ont. Ct. Gen. Div.).

<sup>48</sup> *Federal Privacy Act*, R.S. 1985, c. P-21. In addition, although the concept of privacy is an integral part of many of the fundamental freedoms in section 2 and the legal rights in sections 7 to 15 of the Charter, the term “privacy” does not actually appear in the Charter and no claim for privacy protection *per se* can be made on the basis of the Charter. In any case, as stated previously, a university is not under the ambit of the Charter. Even if it was, as argued above, and if privacy were protected by the Charter, the protection of the right to be free from sexual harassment may justify under section 1 of the Charter certain privacy infringements.

<sup>49</sup> *British Columbia Privacy Act*, R.S.B.C. 1996, c. 373.

<sup>50</sup> *Newfoundland Privacy Act*, R.S.N.L. 1990, c. P-22.

<sup>51</sup> *Saskatchewan Privacy Act*, R.S.S. 1978, c. P-24.

<sup>52</sup> *Manitoba Privacy Act*, R.S.M. 1987, c. P-125.

<sup>53</sup> *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c-12. See *Aubry*, *supra* note 45, for an application of this right to privacy in Quebec.

<sup>54</sup> *Quebec Civil Code*, S.Q. 1991, c. 64.

<sup>55</sup> See John D.R. Craig, “Invasion of Privacy and Charter Values: The Common-Law Tort Awakens” (1997) 42 McGill L.J. 355 for arguments as to why the common-law provinces should recognize a tort of invasion of privacy throughout Canada.

<sup>56</sup> Subsection 163(5) states: “For the purposes of this section, the motives of an accused are irrelevant.” However, should intent be relevant, it can be said that because an ISP can choose whether or not to cache information sent to and/or from its users (which will be mentioned later), it has the intent to commit an offence under the *Criminal Code* when it does cache illegal material.

<sup>57</sup> No definition of any of these terms is available in the *Criminal Code*.

<sup>58</sup> Available at <http://www.uca.edu/divisions/general/genccounsel/copy-right/dmca.asp>.

<sup>59</sup> Available at <http://www.utsystem.edu/ogc/intellectualproperty/dmcaisp.htm>.

<sup>60</sup> Available at [http://www.sce.cornell.edu/exec/cpl\\_sessions.php#SPLiable](http://www.sce.cornell.edu/exec/cpl_sessions.php#SPLiable).

<sup>61</sup> *Irwin Toy Ltd. v. Doe* (2000), 12 C.P.C. (5th) 103 at 19 (Ont. Sup. Ct. J.). In this case, a motion was allowed to the plaintiffs, pursuant to the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rules 30.10 and 31.10, to require an Internet Service Provider to identify the sender of an e-mail message. The plaintiffs had commenced an action against an anonymous e-mail user who had sent a defamatory message to approximately 75 employees of Irwin Toy. The plaintiffs knew the e-mail address and thus the Internet Service Provider of the sender of the message. However, the Internet Service Provider would not disclose the identity of the sender without a court order. The Court ordered the Internet service provider to disclose the identity of the sender of the message. While the anonymous transmission of Internet messages ensures some degree of anonymity, the

Court held that in this situation, where a *prima facie* case against an anonymous user had been established, disclosure of the user's identity was appropriate.

The uncertainty surrounding the law of Ontario with respect to Internet Service Providers is supported by the memorandum "Internet Service Provider Liability for Online Defamation" (7 February 2000), online: Torys LLP <http://www.torys.com>.

One theory on the relationship between an Internet Service Provider and its users is provided by Professor Ian Kerr of the University of Ottawa. He states in his paper "The Legal Relationship Between Online Service Providers and Users" (2001) 35 Can. Bus. L.J. 1, that some provider-user relationships display all of the elements of a fiduciary relationship.

<sup>62</sup> *Tariff 22*, online: Copyright Board of Canada <http://www.cb-cda.gc.ca/tariffs/proposed/m12012002-b.pdf> [hereinafter *Tariff 22*].

<sup>63</sup> *SOCAN Statement of Royalties, Public Performance of Musical Works 1996, 1997, 1998 (Tariff 22, Internet) (Re)* (1999), 1 C.P.R. (4th) 417 (Copyright Bd.).

<sup>64</sup> *SOCAN v. Canadian Association of Internet Providers*, [2002] 4 F.C. 3 (F.C.A.) [hereinafter *SOCAN*].

<sup>65</sup> Leave to appeal to the Supreme Court of Canada has been granted; see *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2002] S.C.C.A. No. 289 [hereinafter *SOCAN Leave to Appeal*].

<sup>66</sup> *SOCAN*, *ibid.* at 5.

<sup>67</sup> Canadian *Copyright Act*, R.S. 1985, c. C-42 [hereinafter *Copyright Act*].

<sup>68</sup> *SOCAN*, *supra* note 64 at 138.

<sup>69</sup> *SOCAN*, *supra* note 64 at 144.

<sup>70</sup> The *SOCAN* decision, *ibid.* does not specifically cover the situation of students using the Internet service provided through a university. The students in the problem under discussion here are not content providers. Under the circumstances of the *SOCAN* case, a content provider is an organization that creates and maintains databases containing information supplied by an information provider. Student A here is simply an end user who is receiving information.

<sup>71</sup> *Ibid.* at 145.

<sup>72</sup> *Ibid.* at 144.

<sup>73</sup> *Ibid.* at 146.

<sup>74</sup> In the United Kingdom, the courts have not been lenient on those charged with the publication of defamatory material. In the past, any party involved in the dissemination of illegal material has been charged with distribution. For example, in *Day v. Bream* (1837), 174 E.R. 212 (W. Circ.), a printer was found liable for publication of libel on a printed handbill. Similar cases include *Pullman v. Hill & Co.*, [1891] 1 Q.B. 524 (C.A.), *Emmens v. Pottle* (1885), 16 Q.B.D. 354 (C.A.), and *Byrne v. Deane*, [1937] 2 All ER 204 (C.A.). This rigidity has been transferred to ISPs. In *Godfrey v. Demon Internet Ltd.*, [1999] 4 All ER 342 (Q.B. Div.), although the defendants were not publishers within the meaning of the U.K.'s *Defamation Act 1996*, 1996 c. 31, they were, however, publishers at common law as soon as they become aware of the defamatory content and failed to remove it. Therefore, in the United Kingdom, once an ISP becomes aware of an illegal activity occurring through its technological resources, it has the duty to stop this activity. If it fails to do so, it could be found to be contributorily liable for its users' illegal activities.

<sup>75</sup> For example, it is stated in *The Electronic Commerce Directive, 2000/31/EC, Article 13 — Caching*, online: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, Internal Market [http://europa.eu.int/ISPO/ecommerce/legal/documents/2000\\_31ec/2000\\_31ec\\_en.pdf](http://europa.eu.int/ISPO/ecommerce/legal/documents/2000_31ec/2000_31ec_en.pdf), that an ISP would not be liable for the automatic, intermediate and temporary storage of harmful information, provided that it didn't modify the information, it complied with conditions and rules concerning the information, it didn't interfere with the lawful use of the technology, and it acted expeditiously to remove or to disable access to the information it had stored upon obtaining actual knowledge of the fact that the information is illegal or infringing.

<sup>76</sup> In the United States, if an ISP has been unaware of the behavior of its customers, most American courts have been reluctant to hold the ISP liable for that behavior. For example, the court held in *Cubby Inc. v. CompuServe Inc.*, 776 F Supp 135 (1991) at 135 that "a computer service company that provided its subscribers with access to electronic library of news publications put together by independent third party and loaded onto company's computer banks was a mere 'distributor' of information,

which could not be held liable for defamatory statements made in news publications absent showing that it knew or had reason to know of defamation." This case has been followed by others such as *Stratton Oakmont v. Prodigy*, NY Misc Lexis 229 (1995) and *Zeran v. America Online Inc.*, (1997) 129 F 3d 327 (1997). However, once the ISP has become aware of the customer's activity, or should have become aware of the activity with reasonable diligence, American courts have been much more likely to hold the ISP liable for its customer's actions. According to *Sega Enterprises Ltd. v. Maphia*, 857 F.Supp. 679 (U.S. Dist. Ct. N.D. California 1994) at 11, in reliance on *Gershwin Publishing Corp. v. Columbia Artists Management Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971), "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer." Similarly, the court held in *RTC v. Netcom*, 923 F.Supp. 1231 (1995) that "where a defendant had knowledge of the primary infringer's infringing activities, it will be held liable if it induced, caused or materially contributed to the infringing conduct of the primary infringer."

The United States' *Digital Millennium Copyright Act*, Pub. L. No. 105-304, 1998 HR 2281 [hereinafter *DMCA*] deals with online situations in a way which has no parallel in Canadian legislation. The *DMCA* limits the potential liability of an ISP, but states that ISPs must respond to notices of alleged infringement in order to avoid contributory liability. In addition, in the United States, an ISP can also be charged with vicarious liability if it (1) had the right and ability to control the infringer's acts and (2) received a direct financial benefit from the infringement. See *RCA/Ariola Int'l, Inc. v. Thomas & Grayson Co.*, 845 F.2d 773, 781 (8th Cir. 1988).

<sup>77</sup> Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 [hereinafter Ontario *Human Rights Code*].

<sup>78</sup> For example, despite the apparent attempt by the University of Western Ontario in its contractual documents to negate any responsibility towards its students beyond the provision of education, technology, and accommodation, the University of Western Ontario does appear to agree to abide by the Ontario *Human Rights Code*: the *Residents' Handbook*, *supra* note 31, states in bold that "... the *Human Rights Codes* for Canada and Ontario, and the regulations of The University of Western Ontario will be respected and observed."

<sup>79</sup> Similarly, the Alberta *Human Rights, Citizenship, and Multiculturalism Act* (RSA 2000, c. H-14) and the British Columbia *Human Rights Code* (RSBC 1996, c. 210) refer to a "landlord" under the section regarding accommodation, indicating that they too apply only to tenancy relationships. However, the Saskatchewan *Human Rights Code* (c. S-24.1), the Nova Scotia *Human Rights Act* (c. 214), and the Newfoundland *Human Rights Code, 1988* do not use the word "landlord". Rather, in Saskatchewan, the word "owner" is used rather than "landlord" (s. 11(2)). The Nova Scotia *Human Rights Act* simply states under subsection 5(1) that "no person shall in respect of (b) accommodation discriminate against an individual or class of individuals ..." [emphasis added]. Similarly, under subsection 6(1) of the Newfoundland *Human Rights Code, 1988*, "A person shall not deny to or discriminate against any person or class of persons with respect to accommodation ..." [emphasis added]. The Northwest Territories *Human Rights Act*, the Yukon *Human Rights Act*, and the Nunavut *Human Rights Act Bill* have all recently been enacted and were not available for viewing at the time of writing.

<sup>80</sup> Ontario *Tenant Protection Act*, S.O. 1997, c. 24 [Ontario *Tenant Protection Act*]. The Act came into effect on June 17, 1998, replacing the *Rent Control Act 1992*, S.O. 1992, c. 11, the *Landlord and Tenant Act*, R.S.O. 1990, c. L7, and the *Rental Housing Protection Act*, R.S.O. 1990, c. R.24.

<sup>81</sup> In *The University of Western Ontario (Board of Governors) v. Yanush* (1989), 67 O.R. (2d) 525 (Ont. H. C.J.), it was concluded that students were considered licensees under the *Residential Tenancies Act*, R.S.O. 1980, c. 452, s. 4(h), and not tenants. Despite this ruling, the University of Western Ontario *Residents' Handbook* advises students to get a standard tenant's insurance policy — perhaps indicating an acceptance of a tenancy relationship.

<sup>82</sup> *Re British American Oil Co. v. DePass*, [1960] O.R. 71 (Ont. C.A.).

<sup>83</sup> *Re Canadian Pacific Hotels Ltd. v. Hodges* (1978), 23 O.R. (2d) 577 (Ont. Co. Ct.).

<sup>84</sup> *Mpega*, *supra* note 7.

<sup>85</sup> *Ibid.* at 59. This case involved a student who had sexually assaulted a fellow student. The issue was whether the Université de Moncton had jurisdiction to hear and rule on a complaint by a female student against a male student under a policy entitled "Sexual and Sexist Harassment Policy" which the university duly adopted in 1991. While the Court

unanimously held that the university could regulate sexual harassment issues, sexual assault was outside the jurisdiction of the university.

<sup>86</sup> *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353 [hereinafter *Berg*].

<sup>87</sup> British Columbia *Human Rights Act*, S.B.C. 1984, c. 22, s. 3. On December 31, 1996, the British Columbia *Human Rights Act* became the British Columbia *Human Rights Code*, *supra* note 79.

<sup>88</sup> The Ontario *Human Rights Code*, *supra* note 80, does not state that the services and facilities must be those customarily available to the public. Rather, the Ontario *Human Rights Code* broadly states in *Part I, Section I*, that “Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap.”

<sup>89</sup> British Columbia *Human Rights Act*, *supra* note 87:

3. No person, without a *bona fide* and reasonable justification, shall  
(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.

<sup>90</sup> Examples of cases that followed this reasoning include *Beattie v. Governors of Acadia University* (1976), 18 N.S.R. (2d) 466 (N.S.S.C. (A.D.)) and *Gay Alliance Toward Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435.

<sup>91</sup> *Berg*, *supra* note 86 at 55.

<sup>92</sup> The human rights legislation of the provinces of Alberta (*Human Rights, Citizenship, and Multiculturalism Act*, *supra* note 79), Prince Edward Island (*Human Rights Act* c. H-12), Manitoba (*Human Rights Code*, c. H-175), Quebec (*Charter of Human Rights and Freedoms*, *supra* note 50), and New Brunswick (*Human Rights Act* c. H-11) also refer to “services customarily available to the public”, and therefore the reasoning in *Berg*, *supra* note 86, would have direct application.

<sup>93</sup> As mentioned above, this conclusion was first stated in *McKinney*, *supra* note 34, and affirmed in *Harrison*, *supra* note 34.

<sup>94</sup> *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 [hereinafter *Bhadauria*]. In this case, Ms. Bhadauria was an employee of Seneca College, and therefore was protected by the Ontario *Human Rights Code*, *supra* note 77, which applies to employees. Chief Justice Lamer’s point is that, unlike Ms. Bhadauria, students are not able to rely on the Code for protection, and because it has already been determined that the Charter does not apply to universities, and the courts are reluctant to create new torts, then the only available recourse is to ensure that the British Columbia *Human Rights Act*, *supra* note 87, will protect students from discrimination.

<sup>95</sup> The British Columbia *Human Rights Code*, *supra* note 79, which as mentioned above replaced the British Columbia *Human Rights Act*, *supra* note 87, in 1996, does not mention harassment either.

<sup>96</sup> The Ontario Human Rights Commission was established in 1961 to administer the Code. The Commission is an agency of the Ontario government accountable to the Minister of Citizenship.

<sup>97</sup> Two e-mails were directed to Rosarina\_Tassone/OHRC.ON.CA@OHRC.ON.CA, the e-mail address available on the OHRC home page for inquiries. The first e-mail, sent on November 7, 2002, asked: “Does the Ontario *Human Rights Code* apply to university residences? In other words, is a university residence a type of ‘accommodation’ that is covered by the Code?” The response received stated: “Yes, the Code applies to residences and all other locations.” The second e-mail, sent on November 12, 2002, asked: “Does the Code apply to a university residence because the Code sees residences and students in a landlord/tenant relationship, or because the Code applies to every single type of accommodation available?” The response was: “The Code applies to every type of accommodation.”

<sup>98</sup> In addition, as stated by the Supreme Court of Canada in *Dickason*, *supra* note 29 at 36 and 113, a party cannot contract out of its obligations under human rights legislation. This is supported by *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202 at 213-214, and *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 at 158 [hereinafter *Heerspink*].

<sup>99</sup> Ontario *Human Rights Code*, *supra* note 77 at s. 10(1). The definition of “sexual harassment” is quite similar in various other provincial human rights statutes. For example, in the *Newfoundland Human Rights Code*,

1988, *supra* note 79, “harass” is defined under subsection 2(g) as “to engage in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.” In the *Manitoba Human Rights Code*, *supra* note 92, “harassment” is defined under section 19(2) as

(a) a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or

(b) a series of objectionable and unwelcome sexual solicitations or advances; or

(c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

In the Nova Scotia *Human Rights Act*, *supra* note 79, paragraph 3(o) defines “sexual harassment” as

(a) a course of abusive and unwelcome conduct or comment undertaken or made on the basis of any characteristic referred to in subsection 9(2); or

(b) a series of objectionable and unwelcome sexual solicitations or advances; or

(c) a sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome; or

(d) a reprisal or threat of reprisal for rejecting a sexual solicitation or advance.

The human rights statutes in the other Canadian provinces, *supra* notes 79 and 92, all use similar language in their definitions of “harassment” or “sexual harassment”.

<sup>100</sup> Updated and re-approved by the Commission on September 10, 1996.

<sup>101</sup> *Policy Statement on Sexual Harassment and Inappropriate Gender-Related Comment and Conduct*, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/english/publications/sexual-harassment-policy.shtml> [hereinafter *OHRC Policy Statement*].

<sup>102</sup> *Ibid.* The Ontario Court of Appeal, in *Bannister v. General Motors of Canada Ltd.* (1998), 40 O.R. (3d) 577 (Ont. C.A.) [hereinafter *Bannister*] relied on the Ontario Human Rights Commission’s definition of a “poisoned environment” as possibly being a single instance of inappropriate conduct that may be a violation of the *Ontario Human Rights Code* if it creates a poisoned environment.

<sup>103</sup> This is backed up by other definitions given of a poisoned environment, including the one posted on the Peel District School Board Web site online: [http://www.gobeyondwords.org/policy\\_1.htm](http://www.gobeyondwords.org/policy_1.htm), which states that “... comments or actions can still poison the environment for someone even if they are not made directly to that person or another employee or student.” It is important to note, however, that in *Canadian Union of Postal Workers and Canada Post Corp. (Perchaluk Grievance)*, [1997] C.L.A.D. No. 208 (Freedman), the arbitrator considered whether a corporation is required to “take its victim as it finds her” (i.e., ultra-sensitive), or if there are “degrees of offensiveness” from which a corporation is required to protect an employee. The Board never answered these questions, but did acknowledge that one of the actions in the case that allegedly created the poisoned environment was not something that “any employer could reasonably expect or anticipate.” Nevertheless, when taking all of the discriminatory events and actions together, the Board found that a poisoned environment had been created.

<sup>104</sup> *Guide to the Human Rights Code*, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/english/publications/hr-code-guide/pdf> at 8.

<sup>105</sup> See *Bannister*, *supra* note 102 and *Ford Motor Company of Canada Ltd. v. Ontario (Human Rights Commission)* (2001), 209 D.L.R. (4th) 465 (Ont. C.A.).

<sup>106</sup> See *Heerspink*, *supra* note 98 and *Berg*, *supra* note 86.

<sup>107</sup> *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

<sup>108</sup> *Ibid.* at 547.

- <sup>109</sup> *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84 at 89.
- <sup>110</sup> Various decisions also demonstrate that a poisoned environment can also be linked to discrimination based on race in certain circumstances. See for example, *Chiswell v. Valdi Foods 1987 Inc.* (1994), 25 C.H.R.R. D/400 (Ont. Bd. of Inquiry).
- <sup>111</sup> *OHRC. and Matsuinch Abdolalipour and Raed Murad v. Allied Chemical Canada Ltd.* (18 September 1996), Ontario (Ont. Bd. of Inquiry), online: OHRC <http://www.ohrc.on.ca/english/cases/summary-1996.shtml>. In addition, librarians have been increasingly complaining about the pornography viewed by patrons. In fact, in Ottawa, librarians have filed grievances through CUPE arguing that the patrons' public viewing of pornography has created a poisoned environment, an act of harassment. For more information, see Ian Gillespie "Libraries struggle with porn dilemma" *The London Free Press* (12 February 2003) B1. Unfortunately, the rising number of employees viewing online pornography at City Hall in London, Ontario, for example, would indicate that aggressive measures in certain circumstances to decrease the creation of poisoned environments through the public viewing of pornography are not adequate or effective. See Mary-Jane Egan & Joe Belanger, "City workers disciplined for viewing porn at work" *The London Free Press* (1 May 2003) A1.
- <sup>112</sup> The University of Western Ontario, for example, has explicitly indicated that it is concerned with protecting its students from poisoned environments. While the *UWO Sexual Harassment Policy & Procedures*, *supra* note 17, does not mention a "poisoned environment" specifically, two other internal university documents do. First, the *2002-03 Residents' Handbook & Understandings*, *supra* note 31, states that:
- we [the university] do not condone the posting of any material that can be deemed to contribute to a *poisonous environment* — an environment that promotes unwanted comments and/or conduct contributing to a negative community atmosphere, including the posting of discipline letters [emphasis added].
- In addition, the *University of Western Ontario's Students' Services Statement on Human Rights*, online: Student Services [http://www.registrar.uwo.ca/accals/2002/sec\\_14.htm](http://www.registrar.uwo.ca/accals/2002/sec_14.htm) [hereinafter *Statement on Human Rights*] was created by the University of Western Ontario's Equity Services department, in conjunction with the Student Development Centre, to affirm the University of Western Ontario's "wish to ensure the full and fair implementation of the principles of the Ontario Human Rights Code" (as stated in the introduction) The *UWO Equity Services: Info Sheet — Harassment and Discrimination*, online: Equity Services <http://www.uwo.ca/equity/docs/harassment.pdf> [hereinafter *Equity Services: Harassment and Discrimination*] confirms and supports the University's belief that every member of the university community has the right to a work and study environment that is free from harassment and discrimination. In addition, Equity Services states that the creation of a poisoned environment is an example of an act of sexual harassment that has the potential to violate every student's right to feel safe and comfortable (For further information, see *UWO Equity Services: Definitions*, online: Equity Services <http://www.uwo.ca/equity/definitions.htm> [hereinafter *Equity Services: Definitions*]). However, it must be remembered that because this latter document has not been approved by the Board of Governors or the Senate, it may not be binding.
- <sup>113</sup> *London (City) and C.U.P.E. 101 (D.M.) (Re)* (2001), 101 L.A.C. (4th) 411 (Marcotte) [hereinafter *D.M. Re.*].
- <sup>114</sup> *D.M. Re.*, *supra* note 113 at 426.
- <sup>115</sup> *Ibid.* at 435.
- <sup>116</sup> *Greater Toronto Airports Authority and P.S.A.C. (Gorski) (Re)* (2001), 101 L.A.C. (4th) 129 (Murray).
- <sup>117</sup> *Ibid.* at 143.
- <sup>118</sup> Ontario *Human Rights Code*, *supra* note 77 at s. 32(1). The OHRC has the discretion to effect a settlement (s. 33(1)) or to refer the matter to the Board of Inquiry (s. 36(1)). A party, if unsatisfied with the Commission's decision regarding a settlement, can request reconsideration of the decision. Once the decision of the Commission is reconsidered, the decision is final (s. 37(3)). However, if the matter is sent to the Board of Inquiry, and a reconsideration of the Board's decision does not satisfy a party to the proceedings, the matter can be filed in the Divisional Court (s. 42(2)).
- <sup>119</sup> *Boudreau v. Lin.* [1997] 150 D.L.R. (4th) 324 (Ont. Ct. J. (Gen. Div.)) [hereinafter *Boudreau*], affirmed by *Rothery v. Grinnell* (2000), 81 Alta. L.R. (3d) 270 (Alta. Q.B.).
- <sup>120</sup> *Boudreau*, *ibid.* at 52.
- <sup>121</sup> *Saskatchewan Wheat Pool v. Canada*, [1983] 1 S.C.R. 205.
- <sup>122</sup> *Cooper v. Hobart*, [2001] 3 S.C.R. 537 [hereinafter *Cooper*].
- <sup>123</sup> See: *Powlett and Powlett v. University of Alberta et al.* (1934), Alta. S.C. (Ap. Div.); *Kevin Kooy v. The University of Lethbridge, Governors of the University of Lethbridge and Seamus F. O'Shea* (1993), A.C.Q.B.; *Pratt v. University of Lethbridge* (2001), A.B.C.A. 134; *Ramsaroop v. University of Toronto* (unreported, June 28, 2001, Ont. C.A.); and *Canadian Universities' Reciprocal Insurance v. Halwell Mutual Insurance Company* (2002), 61 O.R. (3d) 113.
- In the American case of *Rupp v. Bryan*, 417 So. 2d 685 (Fla. 1982), the Court established that the extent of the duty a school owes to its students should be limited by the amount of control the school has over the student's conduct. However, in another American case, *Nova Southeastern University Inc. v. Gross*, 25 Fla. L. Weekly S243 (Fla. Mar. 30, 2000) [hereinafter *Gross*], it was stated that a university may not act without regard to the consequences of its actions because every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances. For example, as stated in *Gross*, universities have the duty to make some effort to avoid placing students with an employer likely to harm them.
- <sup>124</sup> In addition, should there be a situation where there was a high probability of risk of sexual harassment for students in residence (i.e., if there had been previous incidents of sexual harassment), it may be possible through an analogy to *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Ont. Gen. Div.) to state that there is a special relationship of proximity between the university and its students in residence that places a duty upon the university to protect its students from sexual harassment. In *Jane Doe*, the Toronto Commissioners of Police were found to have failed their duty to protect Jane Doe from sexual assault. This duty was placed upon them once they became aware of the high probability of Ms. Doe being a victim of sexual assault from a local serial rapist.
- <sup>125</sup> See *Ann's v. Merton London Borough Council*, [1978] A.C. 728 (H.L.).
- <sup>126</sup> However, because universities would want to ensure their coverage should liability occur, they would probably raise the cost of tuition or set aside most of their government funding for these exigencies.
- <sup>127</sup> *Arland v. Taylor*, [1955] O.R. 131 (Ont. C.A.).
- <sup>128</sup> *U.S. v. Carroll Towing Co.*, 159 F. (2d) 169 (2nd Circ. 1947), *Bolton v. Stone*, [1951] 1 All E.R. 1078 (H.L.), *Miller v. Jackson*, [1977] 3 All E.R. 338 (C.A.), *Paris v. Stepney Borough Council*, [1951] 1 All E.R. 42 (H.L.).
- <sup>129</sup> *Vaughn v. Halifax-Dartmouth Bridge Comm.* (1961), 29 D.L.R. (2d) 523 (N.S.S.C.), *Law Estate v. Simice* (1994), 21 C.C.L.T. (2d) 228 (B.C.S.C.), *Watt v. Hertfordshire County Council*, [1954] 2 All E.R. 368 (C.A.).
- <sup>130</sup> For example, the University of Western Ontario, through its Information Technology Services, already assumes the right to act once it has received notice of a violation of the *Acceptable Use Agreement: University's Code of Behavior for Use of Computing Resources and Corporate Data*, online: The University of Western Ontario Policies and Procedures — Section 1.12 <http://www.uwo.ca/univsec/mapp/section1/mapp113.pdf> [hereinafter *Acceptable Use Agreement*]. As well, the *Residents' Handbook*, *supra* note 32, states that RezNet can not be used for file sharing of pornographic materials and, again, ITS will react if given notice of a violation. The student against whom notice has been given will be cut off and denied service through the University's system. Of course, in this case, this might precipitate the litigation which would raise the issues before the Ontario courts which are being discussed in this paper.
- <sup>131</sup> *Hedley Byrne & Co.Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.) [hereinafter *Hedley Byrne*].
- <sup>132</sup> *Ibid.* at 482.
- <sup>133</sup> *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 [hereinafter *Cognos*]. The plaintiff was an accountant for a Calgary firm. When recruited by a firm in Ottawa, he was told during the interview that the project he would be hired for would last two years. However, the Ottawa firm didn't have adequate funding, and the plaintiff was let go eighteen months after he was hired.
- <sup>134</sup> Two dominant approaches to discovering a duty of care exist in Commonwealth case law: the first asks whether the defendant voluntarily assumed responsibility for the information provided; the second considers whether the defendant ought to have known that the plaintiff would have reasonably relied on the advice. In *Cognos*, *ibid.*, the Court refused to determine which approach is better, and instead relied on finding a "special relationship".
- <sup>135</sup> *Hercules Management Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165 [hereinafter *Hercules*].

- <sup>136</sup> *Ibid.* at 200.
- <sup>137</sup> *Ibid.*
- <sup>138</sup> *Health and Safety Policy*, *supra* note 16.
- <sup>139</sup> *Residents' Handbook*, *supra* note 31.
- <sup>140</sup> *Ibid.*
- <sup>141</sup> *Statement on Human Rights*, *supra* note 112.
- <sup>142</sup> *Ibid.*
- <sup>143</sup> *Equity Services: Harassment and Discrimination*, *supra* note 112.
- <sup>144</sup> *Ibid.*
- <sup>145</sup> Osborne, *The Law of Torts*, *supra* note 43 at 162.
- <sup>146</sup> A promise is only enforceable in law through a valid contract. Contracts existing between the University of Western Ontario and its students in residence will be dealt with later.
- <sup>147</sup> *Code of Student Conduct*, *supra* note 16.
- <sup>148</sup> Osborne, *The Law of Torts*, *supra* note 43 at 165.
- <sup>149</sup> For more on this subject, see Bruce Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (Toronto: Carswell, 2000).
- <sup>150</sup> *Residents' Handbook*, *supra* note 31.
- <sup>151</sup> As already mentioned, it is the plaintiff's onus to prove that he or she would have acted differently had the statements not been made. Nevertheless, it is interesting to note that to date, according to the Associate Vice-President, Housing & Ancillary Services of the University of Western Ontario, no survey has been conducted by the University of Western Ontario, for example, to determine the factors influential to students when choosing which university to attend, and whether or not to live in residence.
- <sup>152</sup> However, it could be argued by Student B that if he or she left the residence because of the existence of a poisoned environment, and was not able to recover the residence fees, or had to pay more to live in off-campus accommodation, a pure economic loss resulted indirectly from the negligent misrepresentation. This claim, however, might fail.
- <sup>153</sup> *Sutcliffe v. Governors of Acadia University* (1978), 930 N.S.R. (2d) 423 (N.S.S.C. (A.D.)).
- <sup>154</sup> *Code of Student Conduct*, *supra* note 16 at s. I(3).
- <sup>155</sup> *Code of Student Conduct*, *supra* note 16 at s. IV(2).
- <sup>156</sup> Breach of contract has been claimed by students, especially the claim of non-compliance with printed material in catalogues, as has the tort of education malpractice, breach of due process, breach of principles of natural justice, breach of "legitimate or reasonable expectations", breach of a fiduciary duty, and breach of a statutory duty.
- <sup>157</sup> For example, at the University of British Columbia, incoming MBA students filed two lawsuits in September 2002 over a 400% fee increase. One writ alleged breach of contract on the part of U.B.C. The other asked for an injunction to halt the increase, claiming that it was "unfair, unreasonable and unconscionable". For further information, see: *Monday Magazine*, online: Monday Publications [http://www.mondaymag.com/Monday/editorial/39\\_2002/features.htm](http://www.mondaymag.com/Monday/editorial/39_2002/features.htm).
- In addition, a U.K. university student sued her university college for breach of contract, stating that she had to quit her studies because of bad teaching and poor supervision. She settled out of court for £30,000 for future loss of earnings. For more information, see: Natalie Shaw *The World Today* (6 August 1999), online: ABC News Online <http://www.abc.net.au/worldtoday/s42093.htm>.
- <sup>158</sup> Examples of unsuccessful American cases include: *Susan M. v. New York Law School*, 76 N.Y. 2d 241 (N.Y.Ct. App. 1990), *Morales v. New York University*, 83 A.D. 2d 811 (1981), *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), *Morpurgo v. United States*, 437 F. Supp. 1135 (1977), *Connely v. University of Vermont*, 244 F. Supp. 156 (1965), *Maas v. Corporation of Gonzaga University*, 618 P.2d 106 (Wash. Ct. App. 1980).
- <sup>159</sup> For more information, see S. Schollum, Education Litigation: Students Suing Institutions And Supervisors: The New Dimension in "Education Malpractice", online: Auckland University of Technology Conferences <http://www.aut.ac.nz/conferences/innovation/papersthemtwo/schollumpapertwo.pdf>.
- <sup>160</sup> In the problem being addressed, the computer is assumed to be the property of the student rather than the property of the University of Western Ontario.
- <sup>161</sup> According to the Computer Resources Unit for the UWO Housing and Ancillary Services Department, during the 2003/2003 school year, 96% of students in residence on main campus used RezNet. The remaining four per cent includes students who did not acquire Internet access at all, along with those who used independent ISPs.
- <sup>162</sup> In addition, through the use of various file sharing programs, such as Kazaa and the Windows™ File Sharing tool, students in residence at the University of Western Ontario can make information available for public file sharing. Specifically, with regards to the Windows™ File Sharing tool, due to the protocol of the program, users can only access files provided by others in their specific networks or sub-networks. A university residence, for example, would have its own network and possibly sub-networks depending on the number of computers using RezNet. In order for someone to access another's files, it is necessary to search and open the file. In other words, the possibility of viewing unwanted material is slim. If someone does have an issue with the content of another's files, the administrators of RezNet act on a complaint basis. Once a complaint is received, RezNet investigates and sends e-mails requesting that the material be removed. RezNet does not proactively monitor the files on RezNet users' computers, although it occasionally conducts audits and surveys on hard drives to ensure that they are sufficiently protected from hackers.
- <sup>163</sup> See footnote 164.
- <sup>164</sup> *Acceptable Use Agreement*, *supra* note 133.
- <sup>165</sup> *Acceptable Use Agreement*, *ibid.* at section 1.00.
- <sup>166</sup> The *Acceptable Use Agreement*, *ibid.*, is always available on the U.W.O. Residence Network Web page (<http://www.uwo.ca/hfs/reznet/policy.htm#>) for perusal.
- <sup>167</sup> *Residence Hall Network Connection Guidelines*, online: RezNet Policies <http://www.uwo.ca/its/reznet/policy.htm#> [hereinafter *Connection Guidelines*].
- <sup>168</sup> The *Acceptable Use Agreement*, *supra* note 133, does not mention the *Connection Guidelines*, *ibid.* and therefore does not incorporate the *Connection Guidelines* by reference. If the *Acceptable Use Agreement* did mention the *Connection Guidelines*, it would be possible to argue that the *Connection Guidelines* have been approved by the Board of Governors along with the *Acceptable Use Agreement* and would therefore also be binding on ITS users.
- <sup>169</sup> *Sexual Harassment Policy*, *supra* note 16.
- <sup>170</sup> For example, in *Blaber*, *supra* note 17, a student was found to have infringed his university's policy on computer use responsibilities by harassing another user through e-mail. As a result, the Court held that the university's withdrawal of the student's computer account was within its powers, and that there was no remedy for the student under subsection 24(1) of the Charter because the Charter was inapplicable to (1) the actions of the university's anti-harassment officer and the Chair of computing science, and (2) the university's *Sexual Harassment Policy*, *supra* note 16.
- <sup>171</sup> There is, however, no evidence available that any software licence between the University of Western Ontario and the vendors specifically mentions sexual harassment.
- <sup>172</sup> A small number of upper-year students can live in residence, but the majority of residents are in their first year of university.
- <sup>173</sup> *Residents' Handbook*, *supra* note 31.
- <sup>174</sup> This obligation was upheld by the Court in *Morgan*, *supra* note 20, and reinforced by cases such as *University of Ceylon v. Fernando*, [1960] 1 All E.R. 631 (P.C.) and *Re Polten and University of Toronto Governing Council* 1 (1975), 8 O.R. (2d) 749 (Ont. Div. Ct.).
- <sup>175</sup> *Residents' Handbook*, *supra* note 31 at 50.
- <sup>176</sup> *Ibid.* at 51.
- <sup>177</sup> *Ibid.*
- <sup>178</sup> *Morgan*, *supra* note 19.
- <sup>179</sup> *Code of Student Conduct*, *supra* note 16 at section 13.
- <sup>180</sup> *Residents' Handbook*, *supra* note 31 at 40 and 46.
- <sup>181</sup> *SOCAN*, *supra* note 64.