

Memorandum

Office of the Provost and VP (Academic)
Room 504, James Administration Bldg.
Tel: 514-398-4177 | Fax: 514-398-4768

TO: Senate
FROM: Professor Christopher Manfredi, Provost and Vice-Principal (Academic)
SUBJECT: Report on the McGill Context
DATE: November 23, 2017
DOCUMENT #: D17-25
ACTION REQUIRED: INFORMATION APPROVAL/DECISION

ISSUE The Report on the McGill Context is presented for information.

BACKGROUND & RATIONALE Professor Angela Campbell, Associate Provost (Equity and Academic Policies) and Professor Christopher Buddle, Dean of Students, were mandated by the Provost and Vice-Principal (Academic) to conduct a review of best practices related to the definition of the “university context”.
More specifically, they reviewed approaches to defining the scope of institutional authority and responsibility with respect to events involving members of university communities occurring in private settings over which an institution exercises no direction or control.
The goal of the review was to help arrive at a clearer, implementable definition of the “McGill Context” and the scope of McGill’s authority and responsibility when faced with knowledge of incidents:

- involving acts by McGill community members that may have constituted misconduct under our policies and regulations;
- that occurred, or were alleged to have occurred, off-campus at events not organized or sponsored by McGill;
- involving members of the University community; and
- that may compromise the well-being or success of any member of our University community.

PRIOR CONSULTATION Members of the senior administration

SUSTAINABILITY CONSIDERATIONS Provide a sustainable framework to address situations that involve members of the community.

IMPACT OF DECISION AND The results of the review will serve to inform revisions to the *Code of Student Conduct and Disciplinary Procedures*.

NEXT STEPS

**MOTION OR
RESOLUTION
FOR APPROVAL**

APPENDICES Appendix A: Review and Report on Defining the “University Context”



REVIEW AND REPORT ON DEFINING THE “UNIVERSITY CONTEXT”

Submitted to McGill University's Provost and Vice-Principal (Academic),
Professor Christopher Manfredi

by Professors Christopher Buddle & Angela Campbell

September 2017

This report responds to our mandate to review and report on issues and best practices related to the definition of the “university context”, specifically regarding allegations of misconduct involving members of the McGill community occurring off-campus in private settings. We hope the analysis herein will provide guidance and inform policy and procedures on this complex matter of defining a university’s disciplinary authority over allegations of misconduct, which may have occurred in settings over which the institution exercised no authority or control.

At the outset, we acknowledge and express profound thanks to Dominic Bell (B.C.L./LL.B. ‘17) for his excellent research, analysis and drafting, on which this document draws, particularly in the “Findings” discussion below.

Background

The issue at the heart of this report typically arises in connection with allegations of assault (physical or sexual), threats, or harassment between two students, as captured and described in section 10 of McGill’s *Code of Student Conduct and Disciplinary Procedures* (“Code”):

10 Physical Abuses, Harassment and Dangerous Activity

No student shall, on property owned or occupied by the University, or in a University context.

- (a) Assault another person, threaten another person or persons with bodily harm or damage to such person’s property; or
- (b) Knowingly create a condition that unnecessarily endangers or threatens or undermines the health, safety, well-being, or dignity of another person or persons, threatens to cause humiliation or threatens the damage or destruction of property; or
- (c) Harass, sexually or otherwise, another person or persons (see “Policy on Harassment, Sexual Harassment and Discrimination Prohibited by Law” for definition and procedures). [emphasis added]

Section 15(a) of the Code establishes a broadened scope of University disciplinary authority where the act in question is a legal offence that can be reasonably said to adversely affect the University’s functioning:

15 Relationship with Civil Law and Authority

- (a) Notwithstanding Article 4 of this Code, any offence described in federal or provincial laws and regulations that occurs in the University context and is not specifically described by another article in this Code is to be considered an offence under this Code, but only if it can reasonably be said to adversely affect the functioning of the University. Disciplinary proceedings taken against a student under this Article must specifically describe the offence with which the student is charged and the description of this offence in the law.

The Code does not explicitly define “University context.” This has left open to interpretation questions about whether the University can or should act in the face of an allegation of “physical abuse, harassment or dangerous activity” by a student that has occurred off university-owned or occupied premises. McGill has conventionally understood its disciplinary jurisdiction in such cases as limited to allegations occurring either in the context of events that the University has organized, sponsored or in some way controlled (e.g., varsity events outside of McGill, field research led by McGill faculty, etc.). In contrast, the University has not understood its jurisdiction as extending to allow for investigation or discipline for misconduct occurring in private settings, such as private homes, restaurants or bars, or events organized by student associations (which are private legal entities separate from the University).

Over the last few years McGill has been confronted with many incidents that have challenged our conventional interpretation of the “McGill context”. These incidents have typically involved allegations of misconduct occurring as between two or more of our students at a private event. A student harmed in such a situation (the “complainant”) who brings an allegation forward to a University administrator may claim that

the incident has compromised their security, well-being and academic success at McGill, especially where they continue to encounter the alleged perpetrator on campus. They may seek the adoption of protective measures and may wish that a disciplinary process be initiated. Or, a complainant may never bring forward an allegation because they understand the University would not define the incident as falling under a narrow definition of McGill context.

Faced with allegations among students, McGill may institute protective, voluntary measures through consent and cooperation of both parties, for example, through assessing the schedules of the parties and ascertaining that the two will not be in the same place at the same time. Such measures are challenging to manage and maintain, especially if there are shifting expectations over time. Some voluntary measures are effective, but disciplinary proceedings are a greater challenge, especially since McGill has not seen itself as having authority to investigate and sanction acts occurring beyond the current definition of University context, regardless of who is involved and the impact of the allegation on the parties or the University community more broadly. By and large, Disciplinary Officers and the Committee on Student Discipline have retained a perspective of the University context that is narrow in scope. This has caused distress for some students who have been intensely critical of the University for refraining from action in the case of allegations of severe harm, notably in relation to allegations of sexual or gender-based violence.

Given this background, and the extensive attention and debate about the “McGill context” during the 2016-2017 academic year, Provost and Vice-Principal (Academic), Professor Christopher Manfredi, asked us to pursue research on best practices with respect to defining the scope of institutional jurisdiction when faced with knowledge of incidents:

- *involving acts by McGill community members that may constitute misconduct under our policies and regulations;*
- *that have occurred, or that are alleged to have occurred, off-campus at events not organized or sponsored by McGill;*
- *involving members of the University community; and*
- *that may compromise the well-being or success of any member of our University community.*

In pursuing this mandate, we worked with a recently-graduated student from McGill’s Faculty of Law, who conducted research on how this matter is addressed at other Canadian universities. Given the distinctive landscape in the United States (particularly related to requirements under Title IX legislation), we did not examine American approaches to this question. To ascertain that our analysis accounted for applicable legal parameters, we included relevant Canadian judicial decisions that have expounded upon the scope of universities’ disciplinary jurisdiction over misconduct by a member of the University in the context of incidents that occurred off-campus, in private settings. We also provide recommendations which call for a broadened, clearer understanding of our disciplinary jurisdiction. We articulate a definition of the “McGill context” that may be adopted in revisions to the Code, which is set for review in the coming academic year.

Findings

A comprehensive review of student codes of conduct and sexual violence policies across Québec and Canada reveals two dominant approaches to defining and understanding “university context” for the purposes delineating institutional disciplinary jurisdiction over student misconduct: (1) an approach that focuses on the parties’ connection or link to the university; (2) an approach that focuses on the impact of the alleged misconduct on the campus or its community.

i) Focus on "Connection"

The first category of regulations, codes and policies focuses on the connection between the university and the parties to the misconduct. The language used to describe this connection or link varies but includes terms such as: *nexus; clear nexus; real & substantive link; real & substantial connection; clear connection; identifiable & substantial link*. These descriptions convey that misconduct occurring off-campus must be clearly related to the university for the institution to exercise jurisdiction. They afford flexibility in allowing the university to determine, on a case-by-case basis, if the off-campus misconduct falls within the "university context". While each of these approaches differs in scope, the "connectedness" approach generally highlights the link between the parties to the misconduct and the university with varying degrees of precision and differing points of emphasis depending on the institution.

1.	<u>Concordia University's Code of Rights and Responsibilities (2017)</u>
	"22. An alleged violation set forth in a Complainant's complaint must have taken place: - (a) on University premises, either rented or owned, - (b) on other premises in the course of any University-sponsored activity or event, or - (c) in the context where activities or events have a real and substantive link to the University" (emphasis added).
2.	<u>Queen's University's Student Code of Conduct (2016)</u>
	"[1] This Code applies to non-academic misconduct by a Student or group of Students that takes place: [a] on University Property; [b] off University Property, in circumstances where: [i] a Student is participating in a Sanctioned Activity, regardless of where that activity takes place; [ii] a Student's conduct has a real and substantial connection to the legitimate interests of the University, which include, but are not limited to, its reputation or goodwill in the community; or, [iii] a Student represents, claims to represent or would reasonably be perceived to be representing, the University or an organization affiliated with the University; and, [c] through electronic media, regardless of where it originates, where there is a clear connection to the University community" (emphasis added).

ii. Focus on "Adverse Effects"

A second main approach hinges on the adverse effects of the misconduct on the complainant and the campus community. The key question within this approach is whether the alleged misconduct bears potential negative effects for a university. In responding to this query, *the complainant* may be considered but so too may *the interests of other members of the university, the university's reputation, university programs or activities, the learning environment, campus safety, residential living, and activity enjoyment*. These direct and collateral repercussions are framed as gauges which allow the university to assess potential ramifications and, subsequently, afford it jurisdiction where the off-campus student misconduct will likely have adverse impacts on its interests. Consequently, the same degree of flexibility as the first ("connection"-based) category is afforded to allow the university to determine, on a case-by-case basis, if the off-campus misconduct falls within the "university context". Each of the university policies considered articulates consequences of concern somewhat differently. All things considered, though, the "adverse effects" approach broadens university jurisdiction or scope to cover incidents of off-campus misconduct where said misconduct is likely to negatively impact the complainant or any legitimate interest of the university; these interests are framed differently depending on the institution in question.

1.	<u>University of British Columbia's Student Code of Conduct (2017)</u>
	<p>"3.1 This Code applies to conduct that:</p> <p>(a) occurs on or near the premises of the University; (b) occurs elsewhere in the course of activities sponsored by the University, <u>or where the conduct is alleged to adversely affect, disrupt, or interfere with another person's reasonable participation in University programs or activities</u>; or (c) occurs in the context of a relationship between the student and a third party that involves the student's standing, status, or academic record at the University" (emphasis added).</p>
2.	<u>Bishop's University' Code of Student Conduct (2005)</u>
	<p>"2.3 For adjudication under this Code, the alleged violation will normally have taken place on University premises, either rented or owned, or elsewhere in the course of a University-sponsored activity or event. However, the notion of a Bishop's Community and the association of a student or students with the University is not necessarily restricted to the campus proper. The jurisdiction of the DSA and the CSC may include the larger community including the borough of Lennoxville and other locations <u>where the reputation and legitimate interests of the University may be seen to be negatively affected by the conduct of the student or students concerned</u>" (emphasis added).</p>
3.	<u>McMaster University's Code of Student Rights and Responsibilities (2016)</u>
	<p>"Behaviour dealt with under this Code includes any action that violates the Responsibilities of Students or negatively effects any member of the University community, and arises; a) on University premises, or at a University authorized event occurring on or off University premises, or when representing the University; b) at a non-authorized event off University premises and where there is a clear connection to the University community. Incidents without a clear connection (nexus), <u>but where the student(s) in question potentially pose a significant risk to community or workplace safety or where the University has reasonable grounds to be concerned with a risk of future violence</u>, also fall within the scope. c) occurs elsewhere in the course of activities sponsored by the University, <u>or where the conduct is alleged to adversely affect, disrupt or interfere with another person's reasonable participation in University programs or activities</u>; [c1] through electronic media, where there is a clear connection to the University community; and/or [c2] occurs in the context of a relationship between the student and a third party and involves the student's standing, status or academic record at the University" (emphasis added).</p>
4.	<u>Western University's Code of Conduct (2015)</u>
	<p>"1. This Code applies to: (a) conduct that occurs on the premises of the University or its Affiliated University Colleges; (b) conduct that occurs at a University sponsored program, event, or activity, whether the program, event, or activity is on campus or off-campus; and (c) other off-campus conduct, (i) when the individual is acting as a designated representative of the University or a student organization or when the individual holds out that he or she is a representative of the University or a representative or member of a student group, team, or organization at the University; or (ii) <u>that has, or might reasonably be seen to have an adverse effect on, interfere with, or threaten the proper functioning of the University, its mission, the rights of a member of the University community to use and enjoy the University's learning and working environments, or that raises concerns for the safety or security of an individual or individuals while on campus or while participating in University programs, events or activities</u>" (emphasis added).</p>

iii) Codes and Policies that offer limited Disciplinary Scope

Various institutions possess codes, policies, and regulations that do not explicitly define the scope of their disciplinary jurisdiction over incidents arising off campus. In Québec, these include: *École de technologie supérieure*, *Université du Québec à Montréal*, and *Université de Sherbrooke*. In the rest of Canada, these include the University of Calgary, the University of Manitoba, and the University of Toronto. While the University of Toronto's *Code of Conduct* (2002) adopts a geographical approach to misconduct that is silent regarding off-campus incidents, its *Policy on Sexual Violence and Sexual Harassment* (2017) does not delimit its application if the misconduct occurs off-campus.

iv) Legal Approaches

The jurisprudence addressing the scope of “university context” is limited. Some cases suggest that a university may have jurisdiction to discipline students for incidents of misconduct that occur off-campus. For example, in *Zhang v. University of Western Ontario*,¹ the Ontario Superior Court of Justice found, referencing *Pacheco v. Dalhousie University*,² that a university has the right to impose discipline for their students’ non-academic misconduct occurring off-campus given that it has a duty to protect members of the university community. In *Zhang*, the applicant sought a judicial review of the decision by the University of Western Ontario Discipline Appeal Committee to expel him from law school for a threatening message made off-campus to another student on Facebook. The *Code of Conduct* applied to Zhang’s posting even though it took place off-campus given its effect on the campus environment and students. As a result, the application was dismissed and the disciplinary measure affirmed.

Recommendations

Based on the foregoing analysis, we propose that the following definition may be considered in McGill’s revised Code³, recognizing that the wording is subject to change, and meant here as one possible approach to consider:

- “University context” means circumstances occurring:***
- (a) on University premises;***
 - (b) within a University-sponsored program, event or activity whether on-campus or off-campus; or***
 - (c) off-campus, where the conduct has consequences that may be reasonably seen to adversely affect:***
 - (i) the security of students, faculty or staff while on campus or while participating in University programs, events or activities; or,***
 - (ii) the right of a member of the University community to use and enjoy the University’s learning or working environment***

This would clarify McGill’s understanding of the “University context,” while seeking to avoid unbridled institutional disciplinary authority or discretion.

Responding appropriately in such instances will require the University to remain mindful of the limits of its disciplinary jurisdiction. As such, policies and procedures should be clear that only those offences defined by University regulations or policies may be subject to disciplinary investigation or measures. An institution would err were it to subject a community member to a disciplinary process for an act that is not defined as an offence under its regulations and policies, or where it concludes that an act is a defined offence but the facts do not align with the definition of that offence in their own internal regulations or policies. (eg *Mpega*)

We stress that the review of McGill’s Code requires close attention to the University’s procedures for investigating and adjudicating student disciplinary matters. We recommend that the review of the Code ensure diligent and robust adherence to the requirements of due process, and that the University commit to the careful selection and training of disciplinary officers and members of the Committee on Student Discipline and the Appeal Committee, to ensure that they have capacity to carry out their roles equitably and effectively.

¹ 2010 ONSC 6489.

² 2005 NSSC 222

³ This recommendation was drafted with input from McGill’s legal counsel

Our proposed definition is intended for consideration within the Code, whereas a different, more limited definition of “McGill context” has been proposed within the *Charter of Students’ Rights (Charter)*⁴. The latter defines the McGill context as:

activities or events organized and supported by the University, whether or not on University properties.

We maintain that it is sound to include different definitions of this term in the Charter and in the Code. The Charter defines the scope over which the University must afford rights to students, and can only operate to protect students’ rights in contexts over which the University exercises control. In other words, the University can and must take steps to preserve the rights of students on campus or within McGill-sponsored events, but it lacks the capacity to do so beyond those settings. In contrast, the Code sets out the requirements of student conduct and defines acts of misconduct that may be subject to disciplinary investigation and sanction.

Finally, we acknowledge that our findings and recommendations pertain primarily to allegations of misconduct that involve students. While our analysis may be relevant to informing institutional responses to allegations of misconduct by McGill faculty or staff, it would be inappropriate to extrapolate bluntly from this document to such situations without a fuller and more nuanced appreciation of the distinct issues that arise in employment (as distinct from university-student) relationships and contexts.

⁴ A revised Charter of Students’ Rights, with the proposed definition of the University Context, is scheduled to be presented for approval, to Senate, in the Fall 2017 term.