


# Erosion

CAAT-A DivEx  
Lynn Dee Eason

March 26/26  
2015



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## Threats To Our Work

- Multi-pronged
- Slow, but Steady
- Quick and Dirty
- Vary Provincially



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## Within Our Faculty Ranks

- Increased Use of:
  - Part-Time Rather Than Partial-Load
  - OTFT Faculty as Coordinators
  - OTFT Faculty Developing Curriculum
  - Two Contracts – Support/Academic
  - Instructors (2005-2014 CBIS data)
    - Overall Faculty Increased by Factor of 1.3
    - Instructors Increased by 5 – High of 12%

*Other than Full Time*

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**Outside Our Bargaining Unit**

- Support Staff
  - Setting Up/Supervising Placements
  - Teaching – Through LoA /After “Normal” Hours
  - Technologists – Teaching or Support?
- Managers
  - Teaching
- Non-Unionized Part-Time/Sessional

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**Delivery**

- Online/Blended/Hybrid
- Unsupervised Hours
- Larger Class Sizes
- International Campuses
- Private Partnerships




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**Evaluation**

- Adjusted Factors to “fit” the SWF maximum
  - Decreased Use of Essay Factor
  - Increased Use of Combined Factors
- Increased Grade Pressures
  - Grade Appeals Favouring Student
  - Grades Adjusted by College

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**Volunteer Activities**

- Support Staff “Requesting Assistance”
- Marketing Activities
  - Open House
  - Annual School Tours
  - Prospective Student Tours
  - Calling Prospective Students
  - Visiting High Schools
  - Career Fairs

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**What To Do?**

- Keep Our Support Colleagues Informed of the Issues
- Educate Faculty to Oppose Erosions as They Develop
- Follow the 27.12 Lists and Bring Forward Trends Through AUCC and Grievance (32.09)  
**What are your best strategies?**

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**VOLUNTEERISM**

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EQUITABLE PRINCIPLES OF PROMISSORY ESTOPPEL AND LACHES

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**VOLUNTEERISM**

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- Volunteering in the context of a unionized environment can have very negative consequences on the bargained rights of our members that may be irreversible
- In our Collective Agreement (C.A.) article 11 specifically provides for how a professor's "total workload" must be reflected on a SWF
- Volunteering rather than properly reflected workload on a SWF could give rise to promissory estoppel or laches

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**Promissory Estoppel**

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A shield, not a sword...



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## Promissory estoppel



- ☞ Promissory estoppel (P.E.) is an equitable principle (meaning that it is based on principles of fairness and equity rather than legal principles)
- ☞ P.E. is described as an instance where the union has represented, by words or conduct, action or inaction, that legal rights under the C.A. will not be enforced
- ☞ The College would use a P.E. argument as a defence to a union grievance
- ☞ Importantly, such P.E. defences have been successful

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## Laches



- ☞ Laches is a sub-category of P.E. and is an equitable remedy
- ☞ Two factors must exist to argue Laches:
  - 1) An unreasonable delay in the enforcement of the right; and
  - 2) Resulting in tangible prejudice to the other party

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## Limitations on Use



- ☞ Neither P.E. nor Laches can be used against the application of a statute
- ☞ Thus, the fact that a party has not previously relied on legislation would not prevent the party from doing so at a later date
- ☞ **BUT**, P.E. and Laches can be used against the enforcement of entitlements under the collective agreement

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## Open House



- ☞ Many Colleges have been operating so-called "Open Houses" as a student recruitment tool
- ☞ Most of our members who attend at an Open House do so on a Saturday and do not have that time reflected on a SWF
- ☞ Fanshawe College challenged this a number of years ago and was successful in resolving the grievance
- ☞ The result was that Fanshawe was able to get .03 hours per week as a complementary function on the SWF

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## Article 11



- ☞ Consider the wording of article 11.02 A2:

**The SWF shall include all details of the total workload including teaching contact hours, accumulated contact days, accumulated teaching contact hours, number of sections, type and number of preparations, type of evaluation/feedback required by the curriculum, class size, attributed hours, contact days, language of instructions and complementary functions**

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## P.E. and Laches



- ☞ If the union were to allow faculty to engage in work that otherwise should be captured on the SWF, P.E. and/or Laches will constitute a viable defence by the College that we are now estopped from enforcing article 11.02A 2
- ☞ This could significantly undermine the operation of article 11.02A 2 and the intention that our total workload be reflected on our SWF

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## WMG and P.E

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- ☞ WMG is a recognized committee in our C.A.
- ☞ At article 11.02 B the C.A. establishes the requirement that each College have a WMG
- ☞ WMG has an important function at each College in protecting the sanctity of the SWF and ensuring that the SWF properly reflects the workload of every faculty member
- ☞ If our WMG allows a practice by management that is contrary to the provisions in article 11, we are at risk of a P.E. defence by the College

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## Lieu Time and P.E

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- ☞ One can imagine how the union's acceptance of payment to faculty by way of lieu time would give rise to the potential for a P.E. or Laches defence by the College
- ☞ Recall the test for Laches - the failure of the union to protect a right in a timely fashion and a corresponding tangible prejudice to the College
- ☞ Payment of lieu time for attendance at Open House jeopardizes article 11.01 L 3 (time and a half on a weekend) and article 11.02A 2
- ☞ The College will argue prejudice in having to pay for what was previously free

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## What would result?

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- ☞ If the union does not actively pursue obvious breaches of the C.A. - even breaches that appear benign - the College can successfully raise the defences of P.E. or Laches
- ☞ The result is that we would lose the operation of a particular article in our C.A. and would have to bargain for it again during bargaining
- ☞ Essentially, we will move backwards in bargaining rights

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**Conestoga College v OPSEU, 1998  
CanLII 19050 (ON LA)**



☞ "Local Union officials knew of the College's interpretation and application of the collective agreement and did nothing to alert the College to the fact that it did not agree with the interpretation and application. If it had an objection, then the local Union was under an obligation to notify the College of that objection within a reasonable period of time so that the College could take steps to protect itself. The local Union's silence allows the College to conclude that there has been acquiescence in its position. The College then cannot be penalized for continuing to act in accordance with its original interpretation and the Union is estopped from bringing the grievance forward *ex post facto*.

☞ For all of the reasons set out above, the grievance is dismissed."

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**Case Law**



☞ Ottawa Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 12, 2008 CanLII 45539 (ON LA),

<<http://canlii.ca/t/20p14>>

☞ Conestoga College v OPSEU, 1998 CanLII 19050 (ON LA), <<http://canlii.ca/t/g2qpz>>

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ARTICLE 6 AND THE RIGHT TO MANAGE

Turning the management rights clause on its head

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### Article 6

- Typically this clause is viewed by management as the trump card *for* management
- It is often used as the final phrase in any dispute "Management has the right to manage"
- Counsel to management has an overused phrase – "Management has the right to manage, even badly"

**Is that what article 6 really means?**

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### Article 6.02 – The Wording

Here's how Article 6.02 reads:

***Article 6.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.***

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## The Caveat to Article 6

Management **must** manage in a manner that does not constitute:

- 1) Bad faith
- 2) Discrimination
- 3) Arbitrariness



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## Where does that language come from?

Our Collective Agreement is a contract that does not supersede the College's responsibilities as an Employer under various legislation including the Ontario Human Rights Code and Colleges Collective Bargaining Act

In addition, in a unionized workplace case law has established that an employer must make decisions in a manner that is consistently applied (i.e. not arbitrary) and that is in good faith in respect of the Collective Agreement

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## Real Examples of Article 6 Use

### 1) **Bad Faith/Arbitrariness**

- Long time faculty member applied for PD Leave
- She was denied Leave and given reasons for the denial
- She found that some of her colleagues whose PD Leave applications were approved in the same cohort had been approached by management and asked for clarification and if the faculty would vary his/her PD Leave proposal

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### Example of Bad Faith cont'd

- We went to management and argued that management had inconsistently applied the PD Leave applications and had therefore acted arbitrarily in respect of the faculty whose application was rejected

The Result? Management allowed the faculty member to rectify the concern they had with her application and she was approved for PD Leave.

**No grievance was necessary.**

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### Example of Discrimination

- A member applied for an internal posting as a full-time professor in the member's area of expertise
- The member had been with the College a number of years
- The member had a documented learning disability
- Was denied an interview on the basis of typographical errors in the application
- Such errors directly related to the member's LD

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### Discrimination

- The member brought a grievance and cited discrimination on the basis of disability
- The grievance settled with the counsellor moving into the full-time professor position

**Successful settlement prior to arbitration**

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### Key Arbitral Award

In the arbitral award brought by Algonquin College on behalf of faculty member B. Sumitro, Arbitrator Knopf held that a probationary employee is entitled to be treated in good faith by the College

Despite the very clear wording of article 32 preventing probationary employees from grieving dismissal, the overarching obligation on the College to dismiss in good faith provided B. Sumitro with the basis to grieve

<http://www.casfil.com/en/on/online/doc/2006/2006casfil26398/26398casfil26398.html?searchUrlHash=AAAAAQA2C1Wxnb25sdWluENv6SxIz2UjgU3VlaXRybwAAAAAB&resultIndex=1>

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### Arbitral Award Finding

- Arbitrator Paula Knopf found that the College had acted in a manner that was in bad faith and arbitrary
- However, the grievor was not reinstated as there had been valid performance concerns
- In recognition of the College's failure to act in good faith the grievor was awarded damages.

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### Here is what the Arbitrator Said...

The question of the Board's jurisdiction to hear the grievance brings into play two competing principles. The first principle is that, generally, arbitrators cannot review the merits of an employer's decision to dismiss a probationary employee. The second principle, a qualification on the first, is that arbitrators may be entitled to review an employer's decision to dismiss a probationary employee if the decision is made in bad faith or is based on an illegal or invalid consideration. Both principles are reflected in this collective agreement and the governing statute, the [Colleges Collective Bargaining Act](#). . . . [para. 57]

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### Arbitral Awards Cited

- Algonquin College v. OPSEU, Local 415, 2006 CanLII 26396 (ON LA),
- <http://canlii.ca/t/1p239>

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## BUILDING A BETTER CYBER UNION

ONE LINK TO RULE THEM ALL

NICOLE ZWIERS  
LYNN DEE EASON

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## WHAT DO WE HAVE?

Google Groups	Social Media
Presidents	<b>Website:</b> Direct link - collegefaculty.org
Chief Stewards	<b>Facebook:</b> Ontario College Faculty (1100 likes)
Employment Stability Committee	<b>Twitter:</b> @CAATfaculty (494 followers)
Health & Safety Committee	
Union/College Committee	
Workload Monitoring Group	
Editors, Librarians, Counsellors	
Others?	

*Just let Lynn Dee know which group you want to get on Pres. needs to send names of members on c*

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## ONLINE RESOURCES

- Awards DataBases
  - OPSEU
  - L110
  - Can Lii *→ free*
- Legislation
  - Colleges Collective Bargaining Act
  - Ontario Colleges of Applied Arts and Technology Act

CAAT-A Resource List  
emailed with live links

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## OUR COLLABORATORS

- Labour
  - CLC, NUPGE, OFL, OPSEU
- Faculty
  - CAUT, OCUFA, OSSTF, ETFO
- Students
  - CFS, CSA



Quality Education

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## EMPLOYER RESOURCES

- College Employer Council - "The Council"
- Colleges Ontario
- Association of Universities and Colleges of Canada
- Colleges and Institutes Canada
- Council of Ontario Universities
- Hicks Morley

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## OTHER SOURCES

- Government - MTCU
- Research - HEQCO, Academica
- Education Media - Huffington Post,
- Local sites




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## WHAT DO WE NEED?

- Our employer is organized; we need to be as well
- Social media and member communications are in hand
- Tracking issues, grievances, and decisions provincially is more difficult
  - Software options being explored

Now, we need input from you

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## NOW WHAT?

- Feedback will be collated and incorporated into decision-making process re software/formats
- Best practices will be shared

We will be ready!

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**Who owns our  
Intellectual Property?**

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**Legislative Context**

- Section 13(3) of the **Copyright Act** gives copyright to the employer of works produced in the course of employment.
- University faculty have what is known as the “**academic exception**”—or an “implied agreement to the contrary”—of Section 13(3).
- University faculty also have this outlined in their collective agreements.

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**Does the “academic exception” to  
copyright apply to college faculty?**

- Likely not, because we have accepted Article 13 as our custom and practice.
- Nonetheless, we need to keep asserting that the “academic exception” applies to us so as to change this custom and practice.

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### 4 Main Lines of Defense

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**1. Intellectual Property vs Copyright: What Article 13 doesn't cover**

**1. Article 13 "Copyright": Interpretation**

**1. Article 13 "Copyright": Moral Rights**

**1. Article 6 "Management Functions"**

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### Lines of Defense

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**1. Intellectual Property vs Copyright: What Article 13 doesn't cover**

- Article 13 covers copyright, *not intellectual property*.
- However, there are 6 types of IP: copyrights; industrial designs; integrated circuit topographies; patents; trademarks; and, trade secrets.
- In the absence of any reference to these 5 other types of IP in the CA, we must assert our rights as creators.
- This is not yet tested, but it is a strong defense.

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### Copyrightable Materials

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- Nonetheless, copyrightable materials describe most of our work.
- Copyrightable works include: creative or expressive works, learning materials, documents, educational software, multimedia or audiovisual materials, etc.

*How can we protect these works?*

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## Lines of Defense

### 2. Article 13 "Copyright": Interpretation

Except by mutual agreement, Article 13 assigns copyright to the college of works:

- "commissioned by the college"
- "produced pursuant to the employee's normal administrative or professional duties with the College"
- "Other works produced by an employee shall be and remain the property of the employee"

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### What can we exclude from "normal duties"?

Article 13 *explicitly allows* for some works to be owned by the employee if it falls outside normal administrative or professional duties.

*designing software*  
*writing a textbook*  
*animations, films*  
*hold back on posting your own PPT slides*  
*prof. dev. lead time -> not normal work Art 20*

### Exclusions to college ownership

#### 1. Creations that would reasonably be expected to receive additional SWF time are beyond normal duties.

- Unless it has been assigned on a SWF, normal duties do not include the development of research, articles, textbooks, websites, learning kits, software, animations, films, etc.
- For their own protection, faculty should clearly identify to the college that they are not undertaking this work on college time or with college resources.

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**Exclusions to college ownership**

**2. Work created under Article 20 Professional Development Leave does not constitute normal duties.**

- Salary is reduced on PD leave.
- Article 20 pursuits are not assigned.
- Article 20 activities are designed to “enhance the ability of the employee.”
- This is not tested.

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**Exclusions to college ownership**

**3. Article 11.08?**

- Work created under Article 11.08 poses a challenge because it is undertaken by “mutual consent and agreement” and “may be documented.”
- If they want to protect their IP, it may be in faculty interests to not agree or ask to do the work under Article 11.08.
- *Are there work arounds?*

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**Lines of Defense**

**3. Article 13 “Copyright”: Moral Rights**

- The creator of a work has moral rights (separate from economic rights) which they retain *even if the IP belongs to the employer.*

*untested*

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**Moral rights include:**

1. The right to have your name associated or not associated with the creation.
2. The right to “object to the distortion, mutilation or modification” of the work in a way that prejudices the honour or reputation of the creator.
3. The right to prevent someone from using the work “in association with a product, service or institution” that prejudices your reputation.

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**Moral Rights and Quality Education**

Moral rights are largely untested, but how might we use them to prevent Management from *mutilating, distorting or modifying* our curriculum in ways undermine quality education and our reputation as professors?

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**Lines of Defense**

**4. Article 6 “Management Functions”**

- The College cannot *arbitrarily* violate its own Intellectual Property Policy.
- There is wide variation among college IP policies in the rights assigned to faculty.
- The better IP policies include: Centennial, George Brown, Humber, Georgian, Sault.
- Read and use what is available in your IP policy.
- Lobby on the local level to improve your IP policy.

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**Questions**

- 1. How are faculty IP rights being attacked and undermined at your college?
- 1. How can you use these (or other) strategies to protect IP rights at your college?

Ontario Learn;  
 Online learning

Humber;  
 PhD's; trying to negotiate  
 time on their (W)Fs to do  
 research for the College  
 Continuing ed using  
 previous recordings for  
 other courses without  
 faculty consent

**Article 13 "Copyright"**

"Except as may be otherwise mutually agreed between the employee and the College, a work commissioned by the College, or produced pursuant to the employee's normal administrative or professional duties with the College, shall be and remain the property of the College. Other works produced by an employee shall be and remain the property of the employee. Nothing contained herein shall adversely affect any rights an employee may have under the Copyright Act (Canada) and in particular the subsection addressing "work made in the course of employment."