

CAUT LegalUpdate

Academic Freedom

Academic Freedom Protects Custody or Control of Faculty Teaching Notes

The Canadian Military Colleges Faculty Association (CMCFA) successfully contested an Access to Information request for the grievor's course notes as a violation of the Collective Agreement. The Adjudicator agreed the notes were not in the control of Royal Military College (RMC) and the demand to produce the notes violated both the Past Practice and Academic Freedom articles of the Collective Agreement.

Lukits v. Treasury Board (Department of National Defence)
2019 FPSLRB 32 (CanLii)

Facts & Argument

Dr. Steven Lukits is a full-time associate professor of English at the RMC in Kingston, Ontario. In responding to a request under the Federal *Access to Information Act*, RMC directed Dr. Lukits to produce his course materials, lecture slides, handouts, course packages and handwritten course notes. Dr. Lukits agreed to provide all materials that had been provided to the students, but this excluded his course notes.

When RMC insisted he also provide the course notes on threat of discipline, the Faculty Association filed a grievance and sought a declaration that the RMC demand was in breach of both the *Access to Information Act* and the Collective Agreement, including the article on Academic Freedom. A copy of the course notes was sealed and held by RMC pending the outcome of the grievance and adjudication (arbitration) process.

The Department of National Defence, representing RMC, took the position that the adjudicator did not have jurisdiction to hear the grievance as it was a matter requiring interpretation of the *Access to Information Act*. The objection was dismissed in a preliminary award of Adjudicator John Jaworski in September 2017 and that led to the hearing on the merits and a subsequent decision allowing the grievance on March 13, 2019.

The four academic witnesses at the hearing testified that past practice supported the grievor's claim that course notes had never been considered to be in the control of RMC. This was not only confirmed by an internal memo written by the Principal of the College, but the Principal also expressed concern that complying to the access request would call into question academic freedom at RMC.

The CMCFA took the position that the course notes were the property of Dr. Lukits and not within the control of RMC and thus not subject to the *Access to Information Act*. As such, it would not be necessary to consider whether the production of the notes would fall within any exemptions under the *Act*, given the *Act* does not apply in the first place.

The CMCFA then argued that the academic staff control of the notes is consistent with both past practice and the principles of academic freedom protected under the Collective Agreement. The Association argued that the Collective Agreement past practice preservation article established that such records were within the control of academic staff. However, even in the absence of such past practice, the Faculty Association argued that the

course notes were prepared in the exercise of academic freedom and thus outside the reach of RMC.

The RMC position as argued by the Department was that the course notes were prepared in the context of Dr. Lukits' professorial duties that he is paid to perform. As such, the notes are a by-product of his teaching and within the control of the employer.

Decision

The Adjudicator upheld the grievance. He first agreed that the course notes were not subject to the *Access to Information Act* because RMC professors maintain control over their own course notes and the *Act* only provided for the production of records under the control of a government institution. The adjudicator next held that the matter is linked to the Collective Agreement on two grounds. First, the RMC demand was in breach of the existing past practice providing for academic staff control of their own notes that was maintained under the Collective Agreement. Second, the common law concepts of academic freedom incorporated in the Collective Agreement protected an academic's control over their course notes.

Significance

The significance of this case is the adjudicator's finding that teaching materials developed by an academic that are not otherwise available to the institution are protected by academic freedom.

The *CAUT Policy Statement on Academic Freedom* (see below) is reflected in the definition of academic freedom in Article 5 of the CMCFA Collective Agreement. As the CAUT policy statement is also the template for other academic freedom articles in collective agreements across the country, this decision is of national interest. Collective agreement protection for teaching materials not otherwise shared or available is an important component of academic freedom.

Lukits is not just an important endorsement of the protections academic freedom provides in teaching and pedagogy. The case also reinforces the crossover between determination of custody or control for the purposes of a collective agreement with that of determination of custody and control of records in access to information cases. Further, the decision and similar cases have significant implications for other institutional claims in respect to academic generated materials, such as email and research located on university servers.

As the CMCFA noted in its argument, in the decision of the Information and Privacy Commissioner (*Final Order PO-3009-F, University of Ottawa*, November 7, 2011) an access to information adjudicator applied academic freedom in concluding that academic staff email and other records at issue were not within the custody or control of the University. That case mirrored an earlier arbitration decision in the same dispute where the Faculty Association successfully argued that the records were under the custody or control of the academic staff through application of the academic freedom article of the Collective Agreement: *Association of Professors of the University of Ottawa v. University of Ottawa*, unreported, September 29, 2008 (Chodos).

In *Lukits*, the Adjudicator made the finding that the control of the records remained with the professors at RMC regardless of the fact that the records were stored on the employer's premises. This reflects a similar finding in the two University of Ottawa cases where physical possession of the email records and other records stored on the university server did not establish employer custody or control.

While the two Ottawa cases and the respective analyses reflected the two different jurisdictions of access to information and arbitration, the role of academic freedom in both was crucial to the outcome. The application of academic freedom was consistent between the two decision-makers and thus academic freedom protection crossed over between the two forums.

In respect to email, in the *City of Ottawa* (2010 ONSC 6835 CanLii) the Ontario Divisional Court held that email on an employer's server did not establish employer custody or control in the same way as storing personal documents in a filing cabinet provided by the employer did not impart custody or control to the employer. The *City of Ottawa* reasoning and conclusion was subsequently adopted by the Alberta Court of Queen's Bench in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247. The Alberta court overturned a decision of the Commissioner and found that the University did not have possession or custody of research records of the academic despite the records being stored on the University owned electronic system.

This last element, supported by the *Lukits* decision, is becoming more important as some universities have maintained that the use or storage of academic email and other materials on university owned and managed

electronic systems provides control or custody of those records to the institution.

In summary, academic freedom is applied in determining whether a record, including email, is within the custody or control of the institution under both access legislation and collective agreements.¹ As such, the employer does not have access to those records without permission of the academic. Finally, the location of academic staff records such as on institutional electronic systems is not determinative of a claim of institutional custody or control in the face of the exercise of academic freedom.

CAUT's position is that the consideration of academic freedom cannot be separated from access cases, not just in applying collective agreement provisions but also in assessing any claimed managerial or proprietary right to academic staff records simply based on their location and storage on institutional servers or other employer electronic data storage systems. Institutional claims of proprietorship over academic staff email and other records on institutional systems should be challenged accordingly.

Academic Freedom in External Communications

An arbitration award recognizes the use of university letterhead by a professor in a letter to BC Government ministries and a municipality raising concerns in a community matter is an exercise of academic freedom.

University of Northern British Columbia Faculty Association v. University of Northern British Columbia (Grievance of Heather Peters), unreported May 2, 2019 (Kinzie)

Facts & Argument

A UNBC professor wrote a letter to certain British Columbia Government ministers raising concerns over a plan by the City of Quesnel to initiate an open bidding process at the expiry of an agreement with a local non-for-profit group running a homeless shelter. The letter was written on UNBC letterhead and included the professor's academic title and position.

The City of Quesnel was copied on the letter and objected, requesting that the University take measures

given the writer's identification with UNBC. The professor did not state that the University supported her views, but rather that these were her personal views, and the University initially pushed back with the City citing academic freedom. Nonetheless, the University subsequently issued a letter of expectation to the professor in which she was instructed not to use university letterhead and her affiliation to the University in any communication to outside parties.

The University of Northern British Columbia Faculty Association filed a grievance that the letter of expectation violated the academic freedom of the professor under the Collective Agreement. The Association took the position that the exercise of extramural freedom of expression is protected as a component of academic freedom. The University insisted that identification with the University in outside communication should require the approval of the University.

CAUT legal counsel were counsel for the UNBCFA at the arbitration hearing.

Decision

The matter was resolved at arbitration and a Consent Award issued by the arbitrator, John Kinzie. The award included the following:

1. Faculty are entitled to use UNBC letterhead, and/or their academic designations, for their expressions of their personal views, if they choose to do so.
2. Faculty can express their personal views on topics that are related, or unrelated, to their areas of expertise or academic qualification.
3. Faculty who express their personal views on matter over which they wish to claim academic freedom will include an explicit statement to the following effect:

The views expressed here are mine, and not necessarily those of UNBC.

Significance

Academic freedom is composed of four essential elements: freedom of teaching; freedom in scholarship and research; intramural freedom of expression; and

1. Note there are also other access to information decisions finding that academic records are not in control or custody of universities and while those decisions did not expressly base that conclusion on academic freedom, the control or custody test applied includes consideration of whether the records are in the possession of the institution, which requires consideration of

academic staff custody or control. See, for example, *Report A-2017-021 Memorial University*, Office of the Information and Privacy Commissioner Newfoundland and Labrador (August 15, 2017) where the Commissioner upheld the University position refusing to produce records that it maintained were in the possession of the academic and not the University.

extramural freedom of expression (see *CAUT Policy Statement on Academic Freedom* below). These elements are reflected in the UNBCFA Collective Agreement, as they are in most academic freedom provisions in academic collective agreements across the country. While these elements are modelled on historical development and international consensus, there are not many arbitration cases in Canada where the parameters of academic freedom have been considered in the context of the two “expression” components – intramural and extramural freedom of expression.

The *UNBC* case is significant in recognizing the protection afforded by academic freedom under a collective agreement in the context of an extramural communication – a communication in respect to a public issue or concern. Expression within the realm of university affairs is protected by academic freedom in intramural freedom of expression.

The settlement in this case affirms that the exercise of extramural freedom of expression requires identification of the academic as a member of the university community. The professor was declaring her connection to the university through letterhead and academic designation, and it would have been difficult to claim academic freedom if she had not done so. Academic staff are protected in their expression by making that expression in the context of academic freedom.

Unlike freedom in teaching and freedom of scholarship and research, the Consent Award confirms that extramural expression is not restricted to expression within an academic’s own expertise or academic qualification. Rather, academic freedom of expression will only be limited by the *legal* (not policy) constraints such as defamation, hate speech or discrimination, for example, to which all speech is subject.

The *UNBC* case illustrates the CAUT position on academic freedom, not the Universities Canada approach. The latter not only fails to expressly recognize intramural or extramural freedom of expression, but makes the exercise of academic freedom conditional on institutional mission of the university.

Academic Freedom in Teaching & Pedagogy

An arbitration award recognizes the employer’s removal of a professor from a classroom failed to consider the professor’s academic freedom.

Laurentian University Faculty Association v. Laurentian University (Grievance of Michael Persinger), unreported, November 6, 2019 (Burkett)

Facts & Argument

A Laurentian professor was summarily removed from the classroom by the administration over the professor’s distribution of a document alerting students to his use of potentially unsettling language in the classroom. The University then wrote to the students in the class advising of its decision and through media interviews invited any who might have had concerns over the professor’s teaching to contact the administration through a dedicated telephone number.

The Laurentian University Faculty Association grieved the professor’s removal from the classroom and subsequent administration actions on a number of grounds, including violation of his academic freedom.

During hearing, expert evidence was led by former CAUT Executive Director, James Turk, on the origins, nature and scope of academic freedom with specific emphasis on academic freedom in teaching and pedagogy.

CAUT legal counsel were co-counsel for LUFA at the arbitration hearing.

Decision

Tragically, the grievor passed away before the hearing could be concluded, but a consent award was subsequently issued by the arbitrator, Kevin Burkett. The award includes the following:

1. It was improper and contrary to the Collective Agreement for the University to have removed Dr. Persinger from teaching the class in December 2015 and to have issued the related email to students in that course and, in doing so, to have failed to consider his academic freedom.
2. In future, prior to the removal of a professor from a classroom, the parties will engage in a consultative process which shall include full consideration of Collective Agreement principles including academic

freedom, health and safety of the University community, the rights, responsibilities and duties of academics, and the right to a full and proper investigation.

3. Other than publicizing the general complaints processes pursuant to the University's policies and procedures, the University agrees that it will not publicly invite complaints against faculty members and will never again utilize a stand-alone telephone number for complaints.²

Significance

The *CAUT Policy Statement on Academic Freedom* is reflected in the Laurentian Collective Agreement and incorporates the four components of academic freedom: freedom and teaching; freedom of scholarship and research; intramural freedom of expression; and extramural freedom of expression.

As per the expert evidence in this case, academic freedom in teaching includes pedagogy and, in the absence of immediate threat or other legal requirement, the process for removing a professor from the classroom where there are issues of teaching content or methodology requires peer review and assessment by those within the discipline. This is an important protection from *ad hoc* or arbitrary decision-making by administrators over academic matters.

Academic Freedom CAUT Policy Statement

1
The institution³ serves the common good of society, through searching for, and disseminating, knowledge, and understanding and through fostering independent thinking and expression in academic staff and students. These ends cannot be achieved without academic freedom. All academic staff members have the right to academic freedom.

2
Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service⁴;

freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

3
Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible. All academic staff members have the right to fulfil their functions without reprisal or suppression by the employer, the state, or any other source. Institutions have a positive obligation to defend the academic freedom rights of members.

4
All academic staff members have the right to freedom of thought, conscience, religion, expression, assembly, and association and the right to liberty and security of the person and freedom of movement. Academic staff members must not be hindered or impeded in exercising their civil rights as individuals, including the right to contribute to social change through free expression of opinion on matters of public interest. Academic staff members must not suffer any institutional penalties because of the exercise of such rights.

5
Academic staff members are entitled to have representatives on and to participate in collegial governing bodies in accordance with their role in the fulfilment of the institution's academic and educational mission. Academic staff members shall constitute at least a majority on committees or collegial governing bodies responsible for academic matters including but not limited to curriculum, assessment procedures and standards, appointment, tenure and promotion.

6
Academic freedom is a right of members of the academic staff, not of the institution. The employer shall not abridge academic freedom on any grounds, including claims of institutional autonomy.

Approved by the CAUT Council, November 2018.

2. Note that one of the other terms of the Award is the creation of a ten-year scholarship in the grievor's name to be awarded to a student in neurosciences (or, the alternative, psychology).

3. The term "institution" is meant to include universities and colleges. Replace the term with the appropriate term for your institution.
4. See Policy Statement on Service.