



Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

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Submission to the Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique dans le milieu universitaire [Independent Scientific and Technical Commission on the Recognition of Academic Freedom]

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Executive Summary

The Canadian Association of University Teachers (CAUT) is pleased to submit this brief to the Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique dans le milieu universitaire [Independent Scientific and Technical Commission on the Recognition of Academic Freedom]. The CAUT represents more than 72,000 faculty members across all of the provinces, including members in Quebec at the Université de Montréal, Université Laval, Bishop's University, Concordia University and McGill University. We work in close collaboration with the Fédération québécoise des professeures et professeurs d'université (FQPPU), and fully support the bill proposed by the FQPPU aimed at protecting academic freedom.

The Commission is seeking advice on the significance and scope of academic freedom, the responsibility of the various actors involved in the defence and promotion of this freedom, as well as the legal and procedural protections surrounding it. The CAUT has acquired considerable experience in dealing with such matters. Indeed, since 1958, it has conducted more than fifty investigations and has developed an exhaustive policy as well as interpretative guidelines, and has intervened in many trials and judicial deliberations concerning issues of academic freedom.

This submission addresses the historical origins of academic freedom in Canada and in Quebec, its contemporary significance and importance, as well as its current legal status. It is argued that a broad and liberal interpretation should be given to academic freedom, as this enables universities to serve the common good of society by fostering independent thinking and expression. It can be seen that, in Quebec and in the rest of Canada, academic freedom is unique in that the strongest legal protections do not fall within the purview of the law, but are contractual, that is, they are embedded in the collective agreements between universities and their faculty associations. Consequently, labour relations arbitrators have rendered a wide array of decisions pertaining to

academic freedom that, taken as a whole, have become comprehensive and strong protections. However, these protections also have limits. The wording used for matters of academic freedom may vary from one institution to another, and faculty members who are not covered by a collective agreement have limited legal protection, if any. For these reasons, we recommend giving consideration to developing legislation that would provide broader protection of academic freedom to supplement the current contractual measures.

A. The origins of academic freedom in Canada and in Quebec

Academic freedom ensures that in their teaching, research, scholarship, publication, participation in the affairs of the university, and exercise of their broader rights as citizens, academic staff are not curtailed or censured by the administration, by colleagues, or by outside bodies or individuals. It includes the freedom of scholars to inquire into and challenge prevailing orthodoxies or systems, without being subjected to reprisal, such as being denied appointment or being deprived of their employment status, institutional rights, or privileges.

Historically, this contemporary interpretation of academic freedom is derived from two primary sources. First, it comes from the ancient European traditions of freedom of expression and self-governance enjoyed by faculty, illustrated, for example, by the efforts of Isaac Newton and his colleagues from Cambridge to resist the interference by King James II in academic decision-making in 1687. Secondly, this interpretation stems from the development of *Lehrfreiheit* (freedom to teach and do research) and from the institutional autonomy at German universities of the post-Napoleonic period, two concepts that were then exported to North America starting in the late 19th century.ⁱ

Until the end of the 1800s, most North American universities were, like their European counterparts, predominantly influenced by the Church or the State. However, with the expanding economy at the end of the 19th century, wealthy business leaders began to make large donations to institutions of higher learning. Donations of several million dollars from the railroad magnate Leland Stanford to Stanford University, and from the founder of the Standard Oil Company, John D. Rockefeller, to the University of Chicago are two very telling examples. Some donors thought that the higher the amounts that they gave, the more they could expect substantial subjugation, in particular that the Board of Directors or the President of the relevant university would silence or dismiss professors who met with the donors' disapproval. Economists who called into question the current business practices in force or unjust social conditions were especially threatened, and some of them were also discharged from their positions at private and public universities in the United States. This was the case, for instance, with the following: George M. Steele, President of Lawrence College, who was fired in 1892 for promoting free trade and hard cash; Edward W. Bemis, dismissed from the University of Chicago in 1895 for defending anti-monopoly stances; and Edward A. Ross, who was forced to resign from Stanford University in 1900 because of his opinions on labour policy, immigration, and ownership of public utilities.ⁱⁱ

In Canada, a number of Canadian academics whose political and social views were considered to be "not very orthodox" were also the target of politicians and other powerful interests. In 1931, the President of the University of Toronto, Robert Falconer, sent Professor Frank Underhill a warning letter following his public criticism of the Bennett Government. In 1932, Frank Underhill's political activities were explicitly restricted by Falconer's successor, President Henry J. Cody, who ordered him to stop sitting on the Executive Committee of the Ontario wing of the Cooperative Commonwealth Federation (CCF).ⁱⁱⁱ At McGill University, Professor Frank Scott was denied the right to hold the office of Dean in 1947, after the Board of Directors had adopted a resolution aimed at preventing representatives of political parties to occupy this position. Like Frank Underhill, Frank Scott played an active role within the CCF.^{iv}

During the cold war period, many professors were unfairly laid off and included on blacklists because of their political points of view. As a general rule, academics were targeted and dismissed not because of what they were teaching in their classroom or publishing in specialized journals, but because of their political or social activism. In Quebec, the Université de Montréal a faculty position to Pierre Elliot Trudeau, whom the Duplessis Government described as a “notorious dissident.”^v The artist Paul-Émile Borduas was dismissed from Université Laval in 1948 because of his role in the production of *Refus global*, a polemical manifesto against religion. In 1956, Université Laval Professors Gérard Dion and Louis O’Neill were placed under surveillance by detectives hired by representatives of the provincial government after the former published documents about corruption in Quebec politics. Queen’s University mathematician Israel Halperin was among the people who were arrested and charged by the RCMP during the Gouzenko Affair, in 1946. Even though he was acquitted by the court, some members of the Board [of Governors] of Queen’s University called for his dismissal.^{vi}

Despite these cases, among others, no concerted effort was made in Canada to defend academic freedom until 1958, when the newly created Canadian Association of University Teachers (CAUT) agreed to form an investigating committee regarding the case of Professor Harry Crowe. Professor Crowe was a permanent Assistant Professor in the Department of History and an active member of the Faculty Association of United College (now the University of Winnipeg, the institution was affiliated at the time with the United Church of Canada). In March 1958, while at Queen’s University as a visiting professor, Harry Crowe sent a private letter to one of his colleagues at United College, Professor William Packer. This letter was mysteriously intercepted and sent to the Principal of the College, Reverend Wilfred C. Lockhart. While Crowe’s letter pertained to the upcoming federal elections, it began with two short paragraphs in which Crowe criticized present and past administrators of the College, including Principal Lockhart, implying that they were hypocrites and could not be trusted, before adding that religion was a powerful corrosive element at the College.^{vii}

Because of the contents of this letter, the Board of Regents of United College dismissed Harry Crowe in July 1958. Two weeks later, the Queen’s University Faculty Association officially asked the CAUT to open an investigation because of the possibility that issues of academic tenure may be involved.^{viii} The CAUT formed an investigating committee comprising Professor Vernon Fowke (Faculty of Economics, Saskatchewan) and Professor Bora Laskin (Faculty of Law, Toronto).

The Fowke-Laskin Committee completed its report in November 1958 and stated that even the most basic understanding of security of tenure did not take into account arbitrary dismissal without just cause and without any real possibility of finding out and contesting the charges upon which the dismissal was purportedly based, and [stated moreover] that there were no possible valid grounds for dismissal in the event of a violation of academic freedom.^{ix} Fowke and Laskin found that, both with regard to substance and to procedure, Crowe’s dismissal was unjust and unreasonable, and contrary to the fundamental definition of academic freedom:

The privilege of a teacher in a university or college to utter and publish opinions in the course of teaching and research and to exchange opinions with faculty colleagues without liability to official censure or discipline is the commonly understood substance of academic freedom. [...]. Academic freedom would be vulnerable indeed if its limits depended on the interpretation placed by a college administration on the remarks of a member of the academic staff.^x

The Crowe affair and the Fowke-Laskin report had an enormous influence, as they propelled discussions on academic freedom in the public sphere. They also induced the CAUT to focus its work on developing a formal definition of academic freedom whereby the lessons drawn from past cases could be put into practice. The development of policies on academic freedom, tenure, non-discrimination and professional responsibilities comprised the main components of this activity.

B. The current significance and importance of academic freedom

In 1977, the CAUT Council adopted a comprehensive policy statement on academic freedom^{xi} that defines academic freedom as the right of academic staff, "without restriction by prescribed doctrine," to exercise the following freedoms:

- 1) Freedom to teach and discuss;
- 2) Freedom to carry out research and disseminate and publish the results thereof, including the freedom to produce and perform creative work and to acquire, preserve, and provide access to documentary material in all formats;
- 3) Freedom to engage in service to the institution, to participate in its academic governance, and to express one's opinion about the institution, its administration, and the system in which one works; and
- 4) Freedom to exercise one's rights as a citizen (restricted only by law), including the right to contribute to social change through free expression of opinion on matters of public interest.

These four broad principal components of academic freedom—in teaching, research, intramural expression and extramural expression—also form the core definition of academic freedom set out in the 1997 UNESCO "Recommendation Concerning the Status of Higher-Education Teaching Personnel"^{xii}:

26. *"Higher-education teaching personnel, like all other groups and individuals, should enjoy those internationally recognized civil, political, social and cultural rights applicable to all citizens. Therefore, all higher-education teaching personnel should enjoy freedom of thought, conscience, religion, expression, assembly and association as well as the right to liberty and security of the person and liberty of movement. They should not be hindered or impeded in exercising their civil rights as citizens, including the right to contribute to social change through freely expressing their opinion of state policies and of policies affecting higher education."*

28. *"Higher-education teaching personnel have the right to teach without any interference, subject to accepted professional principles including professional responsibility and intellectual rigour with regard to standards and methods of teaching. Higher-education teaching personnel should not be forced to instruct against their own best knowledge and conscience or be forced to use curricula and methods contrary to national and international human rights standards. Higher education teaching personnel should play a significant role in determining the curriculum."*

29. *"Higher-education teaching personnel have a right to carry out research work without any interference, or any suppression, in accordance with their professional responsibility and subject to nationally and internationally recognized professional principles of intellectual rigour, scientific inquiry and research ethics. They should also have the right to publish and communicate the conclusions of the research of which they are authors or co-authors."*

31. *"Higher-education teaching personnel should have the right and opportunity, without discrimination of any kind, according to their abilities, to take part in the governing bodies and to criticize the functioning of higher education institutions, including their own, while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution."*

This broad interpretation of academic freedom and its importance has been widely accepted in Canada, in particular by the members of university senior administrations. In 1995, in addressing senior administrators of his university, the former President of York University, Harry W. Arthurs, declared:

Academic freedom is a central, arguably *the* central value, of university life. Anything which interferes with it has to be justified by reference to prior or higher values. I can think of very few, other than perhaps the protection of human life: certainly not institutional solidarity; certainly not institutional reputation.^{xiii}

Arthurs further noted that university administrators also have the express obligation to promote academic freedom:

[...] what then does it mean to say that the university should always respect academic freedom whenever and wherever? It means this: that the university will not punish people for exercising their intellectual freedom, and will shield them, if it can, from attacks by others which might put an individual's academic status in jeopardy. [...] It is essential that we make the point that people can be profoundly wrong, even offensively wrong, but still be protected in their right to persist in error. That isn't an easy position to grasp or to sell, but it lies at the heart of academic freedom.^{xiv}

It should also be noted that academic freedom is subject to legitimate restrictions. Academic freedom does not confer immunity against defamation or against legislation relating to hate speech, or any other unlawful conduct. Similarly, although academic freedom grants faculty members a wide latitude in their teaching and research, their classes and studies are carried out within disciplinary standards as well as professional and ethical responsibilities.

C. The legal status of academic freedom in Quebec and in Canada

In Canada, academic freedom occupies a unique legal space. Contrary to the situation in the United States and in most European countries, academic freedom has only limited constitutional and legislative recognition. Canadian courts have made only occasional remarks on the subject, and these carry little legal weight. Human rights tribunals have rarely heard academic freedom complaints. Surprisingly, most of the laws that govern universities and colleges say nothing about academic freedom.

It is only in rare cases when a Canadian court has considered academic freedom that the latter has been given a broad and liberal interpretation. In 1990, Justice La Forest wrote for the majority, in his *obiter dictum* in the judgment in *McKinney v. University of Guelph* (a case pertaining to mandatory retirement), that "the preservation of academic freedom is an objective of pressing and substantial importance,"^{xv} as it is necessary "to allow free and fearless search for knowledge and the propagation of ideas"^{xvi} "that is essential to our continuance as a lively democracy."^{xvii}

In *Maughan v. The University of British Columbia*, the court ruled that academic freedom, understood to mean the freedom to express and explore ideas to advance both knowledge and understanding,^{xviii} takes on a value similar to that of a *Charter* to the extent that it is a critically important value in a free and democratic society.^{xix} In *Pridgen v. University of Calgary*, Justice Paperny wrote that, in her point of view, "there is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals: the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge."^{xx} In *Parent v. R*, the court ruled that "academic freedom and the importance of institutions of higher learning and academic research are key components of a democracy that values freedom of thought and expression."^{xxi}

Currently, the strongest academic freedom protections are contractual; they are embedded in collective agreements, under which they are applied, during collective bargaining by faculty unions.^{xxii} In this sense, academic freedom in Canada today is a part of labour law. For example, the collective agreement between Concordia University and the Concordia University Faculty Association reflects the CAUT's policy statement whereby academic freedom has a broad scope:

6.01

The purpose of academic freedom is to provide security for fundamental academic values.

A university environment characterized by freedom of speech and of inquiry is required by the members to carry out the University's purpose. Freedom of speech guarantees the University as an open forum for the exchange of ideas; freedom of inquiry guarantees the University's commitment to the open investigation and interpretation of ideas.

Within the unique university context, the most crucial of human rights is the right to academic freedom. We affirm that this right is meaningless unless it entails the right to raise probing questions and challenges to the beliefs of society at large.

The parties agree to respect the right of all members of the academic community to exercise their academic freedom.

The commitments, rights, and responsibilities of members involve three major related roles: to participate in the search for basic truths, and to communicate openly the results of this search; to develop creative scholarship in specific disciplines, within which the students participate in the process of rational inquiry; to encourage where feasible the generalized application of scholarship and research to the benefit of the university community and the common good of society.

Members are entitled to freedom, without any form of institutional censorship, to disseminate their knowledge both inside and outside the classroom, to conduct research which they believe will enhance knowledge and to communicate the results of such research.

6.02

Members are entitled to exercise their political rights provided they respect their obligations to the Employer specified in the Collective Agreement.^{xxiii}

In the context of a number of important decisions, labour relations arbitrators have established that academic freedom plays an essential role in a democratic society and requires a broad interpretation. Arbitrator Sims, in *University of Saskatchewan*, held that "academic freedom and its protections are concepts to be interpreted liberally in ways that allow them to achieve their purpose."^{xxiv} For the University of Manitoba Faculty Association, "The principle of academic freedom is of fundamental importance not only to the university and professors, but to the whole community."^{xxv} Arbitrator Goodfellow, in *York University*, wrote:

There are few concepts or principles more important to the healthy and vibrant functioning of a university than academic freedom. The academy is and must be a bulwark against conventional thought and received opinion not just for the benefit of its members but for society at large. It is through free thought, investigation, and the development and dissemination of ideas that society advances and progress is made. Today's accepted practices and beliefs become tomorrow's discredited notions and outmoded ideas when exposed to the freedom of public debate and scientific scrutiny.

The university has an essential role to play in this process—a role that can only be fulfilled if academic freedom is broadly defined and jealously guarded.^{xxvi}

While the contractual nature of academic freedom in Canada has provided strong protection in many cases, certain shortcomings should be noted. The scope and significance of academic freedom in contractual language can vary from one institution to another such that certain academic environments will enjoy stronger procedural protections than others. Furthermore, in some cases, faculty members are not covered by a collective agreement that stipulates their right to academic freedom. Thus, they find themselves without any formal legal protection.

This is the situation for university administrators, who are often excluded from bargaining units. The CAUT specifically addressed the issue of academic freedom of university administrators during an investigation into the decision made in 2001 not to reappoint George Nader to the position of Principal of Peter Robinson College at Trent University. This event followed a period of controversy about the administration's decision to close the College. As Principal, Professor Nader had publicly protested against this closure, working in collaboration with the students, the faculty association and members of the community. At the end of 2000, University President Bonnie Patterson and Vice-President Graham Taylor had reprimanded Principal Nader for criticizing the administration. Not long afterwards, the administration denied his reappointment, which was widely viewed as an act of reprisal.

The CAUT Ad Hoc Investigatory Committee found that Professor Nader's remarks and actions should have been protected under academic freedom, specifically "[intramural] freedom to express one's opinion about the institution, its administration and the system in which one works."^{xxvii} The Committee wrote the following:

It is an uncontroversial proposition that academic administrators enjoy the rights and protections of academic freedom in their creative, scientific and teaching work (understanding "science" to mean "organized knowledge"). It is sometimes thought that an academic doing administrative work does not and cannot enjoy those same rights. By contrast, we argue the demarcation between academic and administrative work in universities is a moveable one, and that it is not possible to divide academic and administrative activities into spheres that are protected by academic freedom rights and those that are not.^{xxviii}

Finally, it is important to point out that labour relations arbitrators can sometimes have difficulty appreciating the specific characteristics of the academic work environment. While they have clearly understood that, in universities, labour relations are unique because of the existence of academic freedom and collegial governance, arbitrators are also influenced by general labour relations laws. In Quebec and in the rest of Canada, an employee's duty of loyalty to their employer is deeply embedded in labour law. This can, however, lead to competing claims in arbitration cases related to academic freedom between the right of faculty members to criticize their institution and its administration, and an employee's duty of loyalty to their employer.

Conclusion: legal protections for academic freedom must be strengthened in Quebec

This submission began with a short historical presentation of the origins of academic freedom in Canada. Academic freedom has evolved over time and today comprises four principal components: 1) freedom to teach and discuss; 2) freedom to carry out research and disseminate and publish the results thereof; 3) intramural freedom to criticize the institution and the system in which one

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works; 4) freedom to exercise one's rights as a citizen. Academic freedom always entails freedom from institutional censorship.

It has also been shown that academic freedom has been interpreted in a broad and liberal manner. Those who work in academic environments, including members of the senior administration, are in agreement that academic freedom constitutes part of an institution's core values. The courts and arbitration boards have also underscored the importance of a broad understanding of academic freedom for ensuring the health and strength of democratic societies.

Currently, the most effective protections for academic freedom are contractual in nature, and they were developed within the framework of a workplace-based arbitration system. However, as this pertains to a contractual right, this means that certain gaps exist in the legal protections for academic freedom, in particular when faculty members are not covered by a collective agreement. In addition, the principles of duty of loyalty embedded in labour law may come into conflict with academic freedom to criticize one's institution. For this reason, the CAUT supports the FQPPU's proposal that the fundamental principles of academic freedom be entrenched in the law. Academic freedom must be given a broad and liberal interpretation under the law, in order for it to be defined as a right that is free of censorship and enshrined in the law, and that entitles faculty members to enjoy the freedom:

- 1) to teach and discuss;
- 2) to carry out research and disseminate and publish the results thereof, including the freedom to produce and perform creative work and to acquire, preserve, and provide access to documentary material in all formats;
- 3) to engage in service to the institution, to participate in its academic governance, and to express one's opinion about the institution, its administration, and the system in which one works;
- 4) to exercise one's rights as a citizen (restricted only by law), including the right to contribute to social change through free expression of opinion on matters of public interest.

It should also be stipulated in the law that universities have the express obligation to protect academic freedom. Institutions must not only renounce all interference with academic freedom, but must also actively defend the academic freedom of its faculty from any outside influences.

It is our firm belief that this submission will be of assistance to the Commission in its work. The CAUT would be very pleased to provide you with more specific information and to answer your questions, where applicable.

Thank you for giving this matter your consideration.

Respectfully submitted,



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NOTES DE FIN DE TEXTE

- i. Horn Michiel, *Academic Freedom in Canada: A History*. Toronto: University of Toronto Press, p. 7.
- ii. *ibid.*, Chapter 4.
- iii. *ibid.*, Chapters 5 and 7.
- iv. *ibid.*, pp. 191–192.
- v. Horn, *op. cit.*, p.193.
- vi. Horn, *op. cit.*, pp. 203–205.
- vii. *ibid.*, p. 224 (where the relevant paragraphs of the letter of Harry Crowe are cited).
- viii. Fowke V.C. and B. Laskin. "Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of Professor H.S. Crowe by United College, Winnipeg, Manitoba". *CAUT Bulletin*, 7, 3, January 1959, pp. 2–90 (citation starting on p. 2).
- ix. *ibid.*, p. 35.
- x. *ibid.*, pp. 38–39.
- xi. CAUT Policy Statement on Academic Freedom. <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>.
- xii. UNESCO, Recommendation concerning the Status of Higher-Education Teaching Personnel. <http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html>.]
- xiii. Arthurs H.W., "Academic Freedom: When and Where." Discussion group notes, AUCC Annual Meeting, Halifax, N.S., on October 5, 1995, p. 1.
- xiv. *ibid.*, pp. 3–4.
- xv. *McKinney v. University of Guelph* 1990 CanLII 60 (SCC), [1990] 3 SCR 229, on page 281.
- xvi. *McKinney* (SCC), on page 282.
- xvii. *McKinney* (SCC), on pages 286–287.
- xviii. *Maughan v. UBC*, 2008 BCSC 14, in para. 2.
- xix. *Maughan* (BCSC) *ibid* in para. 2.
- xx. *Pridgen v. University of Calgary*, 2012 ABCA 139, in para. 117.
- xxi. *Parent c. R.*, 2014 QCCS 132, in para. 123.
- xxii. Michael Lynk, "Academic Freedom, Canadian Labour Law and the Scope of Intra-mural Expression." *Constitutional Forum*, Vol. 29, No. 2 (2020), pp. 45–64.
- xxiii. *Collective agreement between Concordia University and the Concordia University Faculty Association, 2018–2021*. <<https://www.concordia.ca/content/dam/concordia/services/hr/docs/agreements/20190415%20FR%20CUFA%202018-2021%20C.A.%20Avec%20signatures.pdf>>.
- xxiv. *University of Saskatchewan v. University of Saskatchewan Faculty Association*, 2015 CanLII 27479 (SK LA), <<https://canlii.ca/t/gj429>>.
- xxv. *University of Manitoba Faculty Association and University of Manitoba*, 1991 CanLII 13023 (MB LA), <<https://canlii.ca/t/jbgl2>>.
- xxvi. *York University and York University Faculty Association*, 2007 CanLII 50108 (ON LA), <<https://canlii.ca/t/1ts19>>, pp. 14–15.
- xxvii. CAUT Policy Statement on Academic Freedom. <<https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>>.
- xxviii. Canadian Association of University Teachers, *Trent University and the Denial of Professor George Nader's Reappointment*, (2007), p. 7. <<https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-trent-university-and-the-denial-of-professor-george-nader%27s-reappointment-%282007%29.pdf?sfvrsn=4>>.