

# The Legal Protections of Academic Freedom in Canada: A Practitioner's Perspective



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Presented by Adriel Weaver and Mary-Elizabeth Dill

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# Academic Freedom in Canada

- Although the importance of the principle of academic freedom has been recognized repeatedly by Canadian adjudicators, and linked to human rights and *Charter* values, Canadian legislatures have not enshrined academic freedom in legislation
- Nevertheless, Canadian adjudicators have recognized academic freedom as an important legal principle that exists independently of collective agreements

# Academic Freedom in Canada

- For example:
  - In ***McKenzie v. Isla*, 2012 HRTO 1908**, the HRTO specifically linked academic freedom to the fundamental democratic values of freedom of thought, belief, opinion and expression, which are protected under s. 2(b) of the *Charter of Rights and Freedoms*
  - In ***Re University of Ottawa*, 2011 CanLII 74312 (ON IPC)**, Ontario's Information and Privacy Commissioner recognized academic freedom as a "historic principle practiced in university communities" that "exists independently of, and pre-dates, the collective agreement" and that is, more generally, an "important principle in a democracy"

# Protection of Academic Freedom

- While Canadian adjudicators have repeatedly recognized the importance of academic freedom, because it hasn't been enshrined in legislation, the strongest source of protection for academic freedom in Canada remains contractual, through faculty collective agreements and memoranda of agreement
- Faculty Associations must look to their CA or MOAs - or relevant university policies - to determine the precise scope and limit of academic freedom protections at their institution

# Relying on Contract Language: Advantages

- Vast majority of Faculty Association collective agreements in Canada expressly protect academic freedom
- It is within the power of individual Faculty Associations, together with the University, to negotiate and expand academic freedom protections for their members (e.g., it is within the power of the parties to negotiate more precise protections or contract language that clarifies about how academic freedom operates in specific contexts)
- Contract language can be more nimble and/or responsive to live issues between the parties and/or member concerns
- Because labour arbitration is a consensual process, the parties can select an arbitrator with expertise/experience in the university sector who is keenly aware of the unique features of an academic workplace

# Relying on Contract Language: Challenges

- Ability to negotiate or improve academic freedom provisions will be subject to the same forces – and difficulties – that can shape any round of collective bargaining, e.g.:
  - Ability to negotiate improvements will depend on parties' respective bargaining power and leverage
  - More immediate bargaining priorities, as identified by the bargaining team and/or the membership, may take precedence – trade-offs always involved

# Relying on Contract Language: Challenges

- Likewise, enforcement of academic freedom provisions at arbitration will be subject to same principles/limitations governing enforcement of any contract clause
  - Collective agreement protections only protect bargaining unit members (consider the Dr. Azarova case at UofT)
  - Same interpretive principles that govern contract interpretation will apply, e.g.:
    - Words to be read in their grammatical and ordinary sense, harmoniously with the scheme of the collective agreement and the intention of the parties
    - Arbitrators are entitled to consider the "surrounding circumstances" at the time the contract was negotiated: see **Sattva, 2014 SCC 53**
    - Interpretation must be consistent with the contract as a whole

# Relying on Contract Language: Challenges

- Cont'd
  - Possibility that the arbitrator seized with the dispute may not have sector-specific experience/expertise and may lack an appreciation for some of the unique features of the academic workplace
  - Many academic freedom disputes (like most labour disputes) get mediated and resolved through confidential, without prejudice settlement agreements
    - Means a more limited body of case law addressing some of the more challenging or nuanced academic freedom cases that arise



# Relying on Contract Language: Advantages

- Some features of strong academic freedom clauses:
  - Agreement that academic freedom is *essential* to the functions and purposes of a university
  - Agreement not only to not infringe/abridge academic freedom, but also to *protect, defend, uphold* and/or *promote* it
  - Express recognition that academic freedom in teaching includes, for example, freedom to determine course content, teaching method, teaching materials, etc. (e.g., Queens CA) and freedom to "conduct frank discussion of potentially controversial matters related to their subjects" (e.g. Capilano CA, Simon Fraser CA)

# Relying on Contract Language: Challenges

- Limits on academic freedom recognized in some FA collective agreements:
  - Duty to use academic freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge
  - Duty to use academic freedom in a "responsible" way
  - Duty to respect the academic freedom of others
  - Academic freedom does not diminish the obligations of members to meet their duties and responsibilities
  - In exercising academic freedom, members should not purport to speak on behalf of the University

# Lessons from the Case Law

- **(1) Academic freedom protects statements made outside a member's academic expertise and outside of the academic arena**
- **(2) Discipline is not required to show a breach of academic freedom**
  - **"The test, at a minimum, is whether the action or actions of the University are such as would tend to discourage the average employee of reasonable fortitude and conviction from engaging in a particular academic pursuit....It is enough if the step or steps taken by the University could reasonably be seen as having that effect even if they did not actually do so in the circumstances of a given case." (*Noble*)**
    - ***York University and YUFA (Noble, 2007)***

# Lessons from the Case Law

- **(3) Academic freedom and teaching**
  - Tension between responsibilities of university to offer educational content, and academic freedom of faculty:
    - Contract faculty member at University of Concordia who was terminated for refusing to use the assigned text (2014) [*no violation of academic freedom*]
    - Faculty member at University of Ottawa disciplined for not following Senate-approved course descriptions on his personal website (2008) [*academic freedom violated*]
    - Faculty member at University of Ottawa terminated for giving all of his upper-level students an A+ [*no violation of academic freedom*]
  
- **(4) Academic freedom and harmful speech**

# Lessons from the Case Law

- **(5) Institutional autonomy of the University**
  - Institutional autonomy and commercialization of universities:
    - Dr. Nancy Olivieri
    - Osgoode Hall Faculty of Law agreement with Centre for International Governance Innovation in 2011
    - Faculty of Law, University of Toronto, termination of the hire of Dr. Valentina Azarova as Director of the International Human Rights Program



# Questions?