



Academic Freedom and the Law in Canada: *An Introduction*

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Academic Freedom in Comparative Law

- In the US, academic freedom is primarily protected by the First Amendment of the *Constitution*
- In the European Union, AF grounded in the *Charter of Fundamental Rights*
- Individual countries – i.e, Greece, Germany, South Africa, Philippines – protect AF in their national constitutions

Academic Freedom in International Law

UNESCO issued a Recommendation in 1997 on the status of higher-education teaching personnel:

“Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.”

Academic Freedom in Canadian Law

- In Canada, AF is not found in the *Charter of Rights and Freedoms* or in human rights legislation. It is occasionally found in legislation, but without elaboration.
- It is entirely a negotiated right, found in collective agreements at virtually every university and many colleges
- Consequently, it is litigated almost entirely before labour arbitrators as a labour law right.
- Occasionally, it reaches the Canadian courts, invariably on judicial review of an arbitrator's ruling, rather than as original litigation.

What are the primarily legal features of Academic Freedom in Canada?

- Canada has adopted its main features from the US, particularly the AAUP's 1915 *Declaration* and the 1940 *Statement on Academic Freedom*
 1. Freedom of Research and Publication
 2. Freedom of Teaching
 3. Freedom of Intramural Expression
 4. Freedom of Extramural Expression

Before Academic Freedom Became a Legal Right in Canada

Wheeldon v Simon Fraser University **(BCSC, 1970)**

- Before unionization, professors had few actionable rights. Litigation in the courts was often unsuccessful
- In *Wheeldon*, a voluntary faculty association had submitted a statement on AF to the Board of Governors, who accepted it on the express basis that it did not curb their powers to hire and fire
- An assistant professor protested department procedures, joined a departmental strike and was fired.
- At the BCSC, she argued that the AF statement formed part of her employment contract.
- The BC Supreme Court disagreed:
 - “...the Board of Governors did not intend that any legal consequences should flow from such approval.”

Academic Freedom
has become
recognized by the
Canadian courts

Supreme Court of Canada (McKinney, 1990):

“Academic freedom and excellence is essential to our continuance as a lively democracy”

Alberta Court of Appeal (Pridgen, 2012):

“Academic freedom...is the freedom to put forth new ideas and unpopular opinions without placing him or her in jeopardy within the institution.”

British Columbia Court of Appeal (Connell, 1988):

“The essence of a university is academic freedom”

1. Freedom of Research & Publication

“The basic claim is that researchers cannot develop new knowledge unless they are free to inquire and to speculate. They cannot advance knowledge unless they are free to share the results of their research with peers and with the general public.”

-Finkin & Post, **For the Common Good**

1. Freedom of Research & Publication

It has not protected:

- The presentation of academic work at a symposium, because the keynote speaker was vetoed by a senior member of the Board of Governors:

First Nations University (SKCA, 2008)

2. Freedom to Teach

“Important aspects of freedom of teaching derive directly from freedom of research and publication. Insofar as scholars are free to disseminate the results of their research to the general public and to disciplinary peers, they must also be free to disseminate these results to their students.”

-Finkin & Post, **For the Common Good**

2. Freedom to Teach

It has protected:

- Professors where claims of discrimination were brought by students on lecture content and assignment of topics:
- It has protected:
“...expression and communication made in the context of exploration of ideas, no matter how controversial or provocative those ideas may be.”
Smyth v U of Ottawa (OHRT, 2020)

2. Freedom to Teach

It has not protected:

- A tenured professor who refused academic direction:
- “...*the academic freedom concept is not so wide as to shield a professor from actions of behaviour that cannot be construed as a reasonable exercise of his [sic] responsibilities in an academic setting.*”

APUO v U of Ottawa (2014, ON LA)

3. Freedom of Intramural Expression

“Principles of academic freedom ...presuppose that institutions of higher education serve the public interest and that they promote the common good...The common good is made visible only through open debate and discussion in which all are free to participate...[through] the protection of robust debate.”

-Finkin & Post, **For the Common Good**

3. Freedom of Intramural Expression

It has protected:

- A professor who publicly criticized his institution over corporate governance:
- “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...”
YUFA v York University (2007, ON LA).

3. Freedom of Intramural Expression

It has not protected:

- University library staff who verbally criticized a manager when she was defending staff layoffs at a staff meeting:
- *“There is a subtle but important distinction between exercising one’s right and freedom to criticize and ‘calling someone to account.’”*
USFA v University of Saskatchewan (2015, SK LA).

4. Freedom of Extramural Expression

“Freedom of extramural expression refers...to speech made by faculty in their capacity as citizens, speech that is typically about matters of public concern that that is unrelated to either scholarly expertise or institutional affiliation.”

-Finkin & Post, **For the Common Good**

4. Freedom of Extramural Expression

It has protected:

- A professor who identified her university affiliation when writing a letter on social matters to a local newspaper and was rebuked for it by her administration.

4. Freedom of Extramural Expression

It has not protected:

- A professor who criticized a company (which hosted a reception at the faculty club) and received a letter from his dean rebuking him for his critical remarks:
- *“I find that [the professor’s] conduct was unreasonable in relation to time, place, subject matter and tone. I find that he exceeded the acceptable limits of academic freedom.”*

UMFA v University of Manitoba (1991, Man LA).

Conclusion

1. The University is a workplace, but a workplace of a special nature. This is not yet well-understood by labour arbitrators.
2. Notwithstanding the inconsistent approach towards academic freedom taken by arbitrators, litigating academic freedom issues before arbitrators is the preferable legal forum. More control, more flexibility, more opportunity to educate
3. More needs to be written by scholars on academic freedom – its scope, its role, its relationship to a vibrant democracy – in Canada. Educating legal and political decision-makers on academic freedom enhances its protection.



Thank You