

A LABOUR
LAWYER'S
PERSPECTIVE

LITIGATING
ACADEMIC
FREEDOM:
THE UPCOMING
BATTLES

OVERVIEW

- Academic unions can best protect academic freedom by inclusion into collective agreements
- Post secondary institutes seek to exert more control over courses and teaching assignment
- Justifications: Covid-19, elimination of mandatory retirement, distributed learning, competitiveness
- Unions face views that academic freedoms are earned through trade offs in collective bargaining
- Unions grieving teaching conditions and course organization as aspects of academic freedom

Litigating
Academic
Freedom:
*Upcoming
Battles*

LABOUR ARBITRATION: THE PREFERRED FORUM

JUDICIAL DEFERENCE TO UNIVERSITIES

- SCC finds Universities autonomous institutions
- Deference needed to keep academic freedom
- Universities not govt actors, *Charter* not directly applicable
- Colleges are subject to *Charter* and policies can be considered law
- Rules and practices arising from a collective bargaining relationship will be given deference
- Court endorses arbitral jurisdiction to hear charter cases

HARELKIN V. UNIVERSITY OF REGINA **[1979] 2 S.C.R. 561**

While a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens, ...its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity.

ARBITRAL SOURCES OF ACADEMIC FREEDOM PRINCIPLES

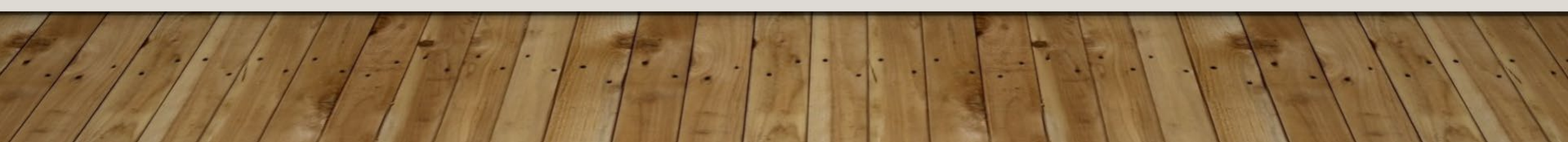
Academic freedom rights may be set out in

- Statutes
- Collective agreements
- Government policy
- Judicial decisions
- Arbitral decisions
- Academic Journals

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NO QUID PRO QUO: SOURCE OF ACADEMIC FREEDOMS

MCKINNEY V. UNIVERSITY OF GUELPH [1990] 3 S.C.R. 229

- Despite claimed deference to post secondary institutions to self regulate, the SCC considers the role of mandatory retirement
 - Court finds that academic freedom justifies mandatory retirement
 - Tenure and the associated academic freedom is a trade off for mandatory retirement
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MCKINNEY AT 64

Mandatory retirement not only supports the tenure system which undergirds the specific and necessary ambience of university life. It ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new people. In a closed system with limited resources, this can only be achieved by departures of other people.



MCKINNEY AT 69

Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us.... Faculty renewal is required if universities are to stay on the cutting edge of research and knowledge. ...mandatory retirement contributes significantly to an enriched working life for its members. It ensures that faculty members have a large measure of academic freedom with a minimum of supervision and performance review throughout their period at university.

ACADEMIC FREEDOM AS QUID PRO QUO

- If academic freedom is the product of bargaining trade offs, the justification for academic freedom and tenure system depends on other rights
- PSIs use end of mandatory retirement to
 - justify greater scrutiny of tenured academics
 - increase use of non-tenured instructors
 - exert greater control over course offerings

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ACADEMIC
FREEDOM
PROTECTS
TEACHING
CONDITIONS

NEW CHALLENGES

- In BC, many PSIs used Covid-19 to switch to distributed learning and assign courses
- PSIs required instructors to use prescribed technology, teach from home, restricted ability to use on campus resources
- Current wave of grievances and litigation
- *Dalhousie Faculty Association v Dalhousie University*, 2021 CanLII 16001 (NS LA),

BCTF (LEBOURDAIS) 2020 CANLII 89915

- teacher taught distributed learning courses
- administrator transferred students out of her classes, assigned final grades, and allowed students to write exams without consultation
- administrator directed teacher to allow students to write online exams at private tutoring centers
- Teacher claimed actions violated professional autonomy

BCTF (LEBOURDAIS)

Issue 1: Did the District infringe the professional autonomy of the Grievor when Principal Brar provided students enrolled in her classes with passwords to write summative assessments without consulting her?

BCTF (LEBOURDAIS) AT 69

In my view, the appropriate reconciliation of responsibility for determining when a student should receive a password to write a summative assessment... in first instance should be based on the DL teacher's professional judgment. Before a principal reaches a contrary determination, there should be a genuine and respectful discussion about whether the student has satisfied the prerequisites for the examination.

BCTF (LEBOURDAIS)

Issue 2: Did the District infringe the professional autonomy of the Grievor when Principal Brar directed the Grievor to allow students to write examinations at the centres where they purchased tutoring services?

BCTF (LEBOURDAIS) AT 75

I find the Grievor was fully entitled to raise perceived concerns over whether summative assessments were being properly administered and invigilated by the testing centres. I include within this category the Grievor's practice of only entrusting passwords to professional and independent invigilators. Those concerns do fall within "methods of assessment" and, in at least one unfortunate instance, her challenge was substantiated.

BCTF (LEBOURDAIS)

Issue 3: Did the District infringe the professional autonomy of the Grievor when Principal Brar changed the grades of students enrolled in the Grievor's classes without consulting her?

BCTF (LEBOURDAIS) AT 176

If an administrator wants to issue a new grade to a student, the Union maintains that the student must be moved into a class with a different teacher so that the grade is not perceived as the first teacher's grade. Further, if an administrator wishes to pass a student that a teacher has failed, the administrator may do so through one of the reporting indicators authorized by the Handbook of Graduation Procedures.

BCTF (LEBOURDAIS)

Issue 4: Did the District infringe the professional autonomy of the Grievor when Principal Brar reassigned students who raised concerns about the Grievor's classes into other classes without consulting her?

BCTF (LEBOURDAIS) AT 82

I accordingly uphold the Union's position that, while Mr. Brar was entitled to move students out of the Grievor's classes, this should have occurred in a manner which respected her professional autonomy. But I equally endorse the Employer's response that teachers have a commensurate obligation to engage collaboratively and professionally with their principals in order to resolve outstanding differences, and that they should not be "hypersensitive" to legitimate inquires from their principals: Hunter and Clark, at p. 171



THANK
YOU