What does Academic Freedom Protect in Canada?

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Although we don’t often think of it like this, academic freedom in Canada is, in many ways, a labour law right. Those of us who toil in the Ivy Tower maintain that academic freedom is the very cornerstone not only of the modern university, but also of our society’s commitment to critical inquiry and the freedoms of expression and speech. Without a strong guarantee of academic freedom, my university colleagues argue, democracy would be diminished, and important social policy choices would lack reliable evidence and critical perspectives.

But where does academic freedom actually secure its legal foundation, and what does it actually protect?

The Legal Basis of Academic Freedom

In 1990, the Supreme Court of Canada endorsed the importance of academic freedom as a democratic imperative, while also suggesting that its actual scope is rather confined. In McKinney v. University of Guelph, a case dealing with the mandatory retirement of university professors, Mr. Justice Gerard LaForest (himself a former law professor) wrote that:

“Academic freedom and excellence is essential to our continuance as a lively democracy…[But] while I believe that the principle of academic freedom serves an absolutely vital role in the life of the university, I think its focus is quite narrow. It protects only against the censorship of ideas.”

This comment by the Supreme Court is indicative of the rather fragile legal grounding that supports academic freedom in Canada. In the McKinney decision, the Court ruled that universities are not agencies of the state, so the Charter of Rights and Freedoms and its constitutional guarantee of free expression do not apply to them. Some human rights codes protect “political opinion” as an anti-discriminatory ground, but this has rarely been invoked to defend dissenting academics. Litigation to enforce university rules in the courts, when a dissident academic has been fired or free speech on campus has been attacked, has traditionally been fought on procedural grounds, with no important legal precedents being set. Canadian judges, unlike their American counterparts, have been reluctant to establish a grounded commitment to academic freedom in the law. (For a readable and insightful review of academic freedom in the American context by two law professors, see For The Common Good, by Matthew Finkin and Robert Post, Yale University Press, 2009. Some countries – such as Germany, the Philippines
and South Africa – have actually inserted the protection of academic freedom into their constitutions.

As a consequence, the strongest legal protections for academic freedom in Canada are not constitutional or statutory, but contractual. These protections are found in the collective agreements between universities and their unionized professors. (Most, but not all, university faculties in Canada are unionized.) Virtually every university collective agreement in the country contains a robust provision on academic freedom. At the University of Ottawa, the faculty association’s collective agreement provision on academic freedom begins with this statement:

The parties agree neither to infringe nor abridge the academic freedom of the members. Academic Freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting. As such, it protects each member’s freedom to disseminate her opinions both inside and outside the classroom, to protect her profession as teacher and scholar…to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner…without interference from the employer, its agents, or any outside bodies.

Interestingly, many of the leading recent cases in Canada where academic freedom has been argued in labour arbitration forums have dealt not with high and noble issues of free expression or protection against academic persecution, but with the more prosaic issues of teaching competence or ungovernable professors. An arbitral ruling issued in late January involving the firing of a tenured professor at the University of Ottawa illustrates the mixed nature of these cases: Association of Professors of the University of Ottawa (APUO) v. University of Ottawa (Rancourt) (27 January 2014, Claude Foisey) (found at: https://ia700208.us.archive.org/1/items/UNIVERSITYOFOTTAWARANCOURTJan2714/UNIVERSITY%20OF%20OTTAWA%20-%20RANCOURT%20Jan%202014.pdf)

The case of Denis Rancourt

Denis Rancourt had taught physics since 1986 at Ottawa, and was granted tenure by the University in the mid-1990s. Tenure is the Holy Grail of the academic world. Junior professors apply for tenure sometime between their fifth and seventh year of teaching, and they are judged by their peers on their teaching, publication and service records. If a professor is granted tenure, she or he has won job security for the remainder of their academic career, subject only to censure or removal should they commit a significant academic or employment offence. Tenure is consisted to be one of the bedrocks of academic freedom, allowing a professor to fearlessly investigate challenging issues within the scholarly and public domains, free from institutional repercussions or adverse public reaction.

The Supreme Court of Canada in McKinney endorsed this view. Mr. Justice LaForest stated that professors: “must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark
of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas…”

The University’s dismissal of Professor Rancourt attracted a considerable amount of media coverage. Not only is the firing of a tenured professor a rare event in Canada, but the particular reasons for his termination was headline-grabbing.

Around 2007, Professor Rancourt decided to grade his physics students with what he called a “student-centered evaluation” method. He did away with the traditional forms of grading through competitive testing, and instead told his students on their first day of class that all of them would be awarded an A+, based only on attendance. Rancourt testified at the labour arbitration into his dismissal that he was dissatisfied with the University’s regular grading method because he thought it caused stress for his students, and because it discouraged critical student inquiry and engagement with the course content.

The University strenuously objected to Rancourt’s decision to move away from the traditional approach to student grading. It first warned him through a series of letters to revert to the objective grading procedure, before finally firing him in March 2009 for his failure to comply. In his defense, Rancourt argued that his testing method was protected by academic freedom. In a letter that he sent to his Dean several months before he was dismissed, he wrote:

As long as the same grading method is applied to all students and is stated on the first day of class and as long as A+ means “exceptional”…then the basic requirements of the Collective Agreement are satisfied. The rest is of the domain of academic freedom. The choice and design of the pedagogical and grading method is the responsibility of the professor.

The collective agreement between the University and the faculty union required all professors to evaluate the performance of their students “objectively in a manner appropriate to the course, consistent with relevant academic standards and marking scales approved by Senate.” The University considered Rancourt’s student-centered grading methods – with the promise of a virtually automatic A+ -- to constitute a form of academic fraud, and that his failure to follow repeated directions to return to a more objective testing approach was insubordinate.

Arbitration Claude Foisey had little trouble in finding that Rancourt’s defense of his testing methods was not protected by the collective agreement. As well, he ruled that Rancourt’s failure to apply an objective evaluation method to test his students constituted academic fraud. Rancourt’s refusal to heed the increasingly sharp directions coming from his Dean to revert to an objective grading scheme, wrote Foisey, was a “very serious breach of his obligations as a university professor.” These actions were not protected by academic freedom, however broad that right might be:

[T]he academic freedom concept is not so wide as to shield a professor from actions or behaviour that cannot be construed as a reasonable exercise of his responsibilities in an academic setting…The University is not disciplining Professor Rancourt for his ideas or beliefs in regards
to his teaching method based on self-centered motivation and evaluation. Dean Lalonde made it very clear that Professor Rancourt could openly promote his convictions as to teaching in his classroom, on campus and elsewhere. The research aspect and the promotion of ideas is one thing, the implementation is quite another.

Throughout, Rancourt was represented by his faculty union – the Association of Professors at the University of Ottawa (APUO) – at the labour arbitration reviewing his three grievances against the University’s decision to first discipline and subsequent dismiss him. These hearings took 28 days over two years, and the ruling was issued seven months after the final hearing day. Curiously, a visit to the APUO website four weeks after the ruling did not find any mention of the Rancourt case, or a link to the arbitration ruling.

*Academic Freedom: Rights and Responsibilities*

What does the Rancourt decision tell us about the rights and responsibilities of a tenured university professor? What does it say about what academic freedom actually protects?

The American book that I mentioned earlier – *For The Common Good* – discusses a variety of academic freedom cases in the United States where professors had been disciplined or fired because they wrote about, or participated in, controversial social issues, such as the peace movement, racial integration or radical economics. In Canada, academic freedom cases range from the near-firing of Professor Frank Underhill from the University of Toronto in 1940 for his involvement with left-wing organizations that arose in response to the Depression to the public and political furor that erupted around a 2009 conference at York University on the Middle East conflict. (On the York University affair, see two intriguing books on the topic: Jon Thompson, *No Debate* (Lorimer); and Susan Drummond, *Unthinkable Thoughts* (UBC Press)).

Many major statements and collective agreement provisions on academic freedom mention both *rights* and *responsibilities*. The fear always among academics is that rights can be read too narrowly, and responsibilities can be read too broadly. The trick is figuring out the right balance between the two. The closing paragraphs of *For The Common Good* emphasize the point that academic responsibility and restraint are necessary ingredients of academic freedom, because holding academics accountable to professional standards – both as teachers and as specialists – is a necessary component of academic life. However, as Finkin and Post maintain, these responsibilities cannot be subject to the pieties of public opinion, and they cannot be interpreted so widely as to negate, rather than complement, the higher purposes of academic freedom.

In Professor Rancourt’s case, the University of Ottawa argued that his insubordination and his promise of an A+ to all students with high attendance risked turning the University’s science program into an academic laughing-stock. The arbitrator agreed. While Professor Rancourt enjoyed the rights that came with academic freedom – the right to teach one’s courses in a relatively unrestrained manner – the accompanying responsibility was to teach the course within certain general parameters, including the application of an evaluation grading system which
ensured that an A or a B awarded in his course was comparable to the same grades in other courses and disciplines at the University.

I take three lessons on academic freedom and labour law from the Rancourt case.

First, academic freedom is not unrestrained. As Finkin and Post argue in For the Common Good, “Academic freedom is not the freedom to speak or to teach just as one pleases. It is the freedom to pursue the scholarly profession, inside and outside the classroom, according to the norms and standards of that profession.” Some of the toughest cases involve academics who, while advocating the kinds of unpopular views that academic freedom is sworn to protect, have crossed a decipherable line and disregarded their minimal obligations to the university community.

Second, the Wagner Act model of labour law as applied to the university community has been an important bulwark in enhancing the status of academic freedom in Canada. Legally, a collective agreement commitment to academic freedom provides much stronger teeth than university statements, letters of appointment, or internal procedural rules that proclaim the concept. Practically, only a faculty union could afford to litigate a lengthy academic freedom case; individual professors would rarely have the financial resources to challenge a termination or censure in the courts. And in terms of legal forums, arbitrators have demonstrated over the past thirty years that they can quite capable of writing measured rulings entrenching academic freedom in the law, while giving it context, weight and depth.

And third, while I can applaud the fact that labour law plays such an influential role in protecting academic freedom, I regret that the Canadian courts and legislatures have played such a minimalist role in developing solid support for academic freedom. The rare comments by the Supreme Court of Canada on the topic, while encouraging, have carried no legal weight. Human rights tribunals have only occasionally adjudicated a complaint that involves academic freedom. Legislatures have not generally enshrined academic freedom in their statutory regulation of universities. And the Charter – because it applies only to government action – will remain unavailable in most cases involving a threat to academic freedom. This legal abstinence speaks poorly to our social commitment to a vital freedom.