On the Legal Status of Academic Freedom in Canada

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HISTORY AND FOUNDATIONAL PRINCIPLE:

(1) The following are key policy documents that provide a relevant academic work-environment and that position academic freedom in the present context.

- The UNESCO *Recommendation concerning the Status of Higher-Education Teaching Personnel* adopted by Canada
- The AUCC *Statement on Academic Freedom and Institutional Autonomy*
- The CAUT *Policy Statement on Academic Freedom*
- *The Tri-Council Policy Statement – Ethical Conduct for Research Involving Humans*, 2005. (esp. pages i.8 and i.9)

These documents and precedent-setting arbitrations and court rulings show and imply that academic freedom of individual members of the academic community includes:

- freedom of expression both inside and outside the classroom without reprisal or interference
- independence in research and in professional communication
- professional independence in teaching methods
- guaranteed right to participation in collegial governance of the institution
- right to political expression and agency without interference
- right to full community and societal participation without interference

(2) The statement of institutional purpose (1992) of arguably Canada's pre-eminent university (University of Toronto) gives a particularly trenchant statement of academic freedom in Canadian society as:

> "*Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom and freedom of research. And we affirm that these rights are meaningless*

unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit."
– Statement of Institutional Purpose (extract), University of Toronto.

(3) The great twentieth century intellectual and renowned French university professor Michel Foucault practiced academic freedom and expressed it this way:

"One knows … that the university and in a general way, all teaching systems, which appear simply to disseminate knowledge, are made to maintain a certain social class in power; and to exclude the instruments of power of another social class. … It seems to me that the real political task in a society such as ours is to criticise the workings of institutions, which appear to be both neutral and independent; to criticise and attack them in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked, so that one can fight against them."
– Foucault, debating/agreeing Chomsky, 1971.

EXAMPLE, UNIVERSITY OF OTTAWA:

The *University of Ottawa* Collective Agreement (between its full-time professors and the university corporation) contains a section entitled "Academic Freedom" (Article 9) and contains other sections (e.g., Article 21 "Rights and Responsibilities") about professional independence and responsibility, collegial governance, etc.

Article 9 reads in part:

"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 practice her profession as teacher and scholar, librarian, or counsellor, 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, to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies. [...] Academic freedom does not require neutrality on the part of the member, but rather makes commitment possible. However, academic freedom does not confer legal immunity, nor does it diminish the obligations of members to meet their duties and responsibilities." (emphasis added)

UNFORTUNATE MISCONCEPTIONS THAT OCCUR:

Regarding the relation between institutional independence (sometimes incorrectly called institutional academic freedom) and academic freedom, the history of academic freedom in North America shows that universities were given institutional independence (upheld by the Supreme Court of Canada) ***in order to*** protect the individual academic freedoms of professors and students needed for advancement.

Universities, professors' unions, and arbitrators too often incorrectly consider institutional independence to be the "institutional form of academic freedom." They then go on to talk about a "balance" between "institutional academic freedom" and the academic freedom of an individual professor, as though there were two such concepts which have competing aims. This is an invention and an aberration. In Canada, institutional independence of universities was granted in order to best enable the institution to protect the academic freedoms of its individual professors and students. Academic freedom does not diminish institutional independence. On the contrary, academic freedom is a safeguard which infuses transparency and public accountability into the university (and into all of society's structures) without requiring government or corporate oversight (e.g., the above-cited *UNESCO Recommendations* is clear on this distinction). It can also be said that, in designing legal agreements and frameworks, the players will too often conflate legalistic sophisms designed to provide unwarranted professional immunity or relative class advantage to professors with authentic academic freedom (see *No Ivory Tower*, 1986, by researcher Ellen W. Schrecker for a historical account of these matters).

EXAMPLES OF LABOUR LAW PRECEDENTS:

<u>Arbitrator Ross L. Kennedy ruling, 2001</u>

As one example of a precedent-setting case regarding academic freedom, the arbitration award in the case of Prof. Stanley Lipshitz, University of Waterloo, 2001 Award,

(Arbitrator Ross L. Kennedy) affirmed the established practice that, barring any specific restrictions in the particular collective agreement, the term "academic freedom" used in a collective agreement is a ***legal term*** that must be taken to have its broad academic work-environment and historically established (via legal precedents and academic practice in North America) meaning.

The Kennedy 2001 ruling re-affirmed that a professor's (or academic community member's) individual academic freedom can only be interfered with by the university in the case where there is a relevant policy that has been developed through a full and proper collegial governance process and that any ambiguity in such policy must be interpreted to the benefit of the individual professor's academic freedom. (As examples, a professors' union collective agreement should be an example of terms arrived at by collegial governance, as should all University Senate decisions on academic matters to the extent that proper collegial governance was followed.)

This important ruling also established that if there are any ambiguities of interpretation in any collegially developed restrictions to academic freedom then any ruling must side in favour of protecting the academic freedom of the individual academic.

Arbitrator Russell Goodfellow, 2007

Another legal-precedent-setting case illustrates the extent to which a university must guard from even appearing to limit a professor's academic freedom. This is the case of Prof. David F. Noble, York University, 2007 Award, (Arbitrator Russell Goodfellow) (see pages 15-19 and 53-56). Here the university put out a press release, in which Prof. Noble was not named, expressing the university's position on an issue that Prof. Noble was studying. The Arbitrator found that in so-doing the university had violated Prof. Noble's academic freedom and ordered the York University to both remove its media release and pay Prof. Noble damages of $2,500.00.

Arbitrator Michel G. Picher, 2008

Finally, another recent labour law arbitration case illustrates the extent of a professor's professional independence and his freedom to be political in the classroom. This is the case of Prof. Denis G. Rancourt, University of Ottawa, 2008 Award (Arbitrator Michel G. Picher), where the university had disciplined Rancourt for "subverting" a course and not following the official university-senate-approved course description. The Arbitrator sided with Rancourt and an independent legal analysis of the arbitration award was entitled "Teaching Science through Social Activism is Protected by Academic Freedom, Arbitrator Rules." [*College and University Employment Law E-Bulletin*, Issue No.23. February 17, 2009.]