

CENTRE FOR
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Understanding Academic Freedom in Canada

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About the Centre for Free Expression

The Centre for Free Expression at Ryerson University focuses on issues related to freedom of expression and the public's right to know. This includes campus free expression, academic freedom, hate speech, censorship, disinformation, access-to-information, whistleblower protection, anti-SLAPP legislation, corporate and government surveillance, and freedom of the press. The Centre sponsors public educational events, does research, provides advice and engages in advocacy on these issues. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

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I. The Origin of Academic Freedom

While the term “academic freedom” first appeared in late eighteenth-century Germany, the struggle for freedom in teaching goes back to ancient Greece and continues forward to modern times. The story typically begins with the sentencing of Socrates to death for “subverting the young men of the city”.ⁱ Along the way, the travails of Galileoⁱⁱ are appropriately cited. But there are many others that poignantly raise the issue. In 1600, Giordano Bruno, an Italian mathematician, philosopher, and cosmological theorist who proposed an expansion of the Copernican model, had his jaws sealed by iron spikes lest he give public voice to yet more heresy before being burned to death in Rome’s Campo de’ Fiori. Prior to his death, he published a book whose dedication to the Emperor Rudolph II reflected the spirit of what was to become academic freedom:

Now as all this concerns the freedom to teach, may I keep arm’s length not only the habit of belief, instilled in me through the teachings of tutors and parents, but also that the ‘common sense’ which – in many circumstances and places (as far as I have been able to judge for myself!) – seems to engender deceit and distortion; may I keep them so at arm’s length that I never assert anything, in the field of philosophy, without reflection or without grounds; and, for me, may all things remain equally open to doubt whenever they come up for discussion, whether they are things generally acknowledged to be abstruse and absurd, or whether they are things considered to be among the most certain and the most evident. Indeed, when debating ideas, it is harmful to define something without first weighing well its meaning; it is wicked to nod agreement out of an exaggerated respect for others; it is mercenary, servile, and contrary to the dignity of the freedom of Man to bend the knee to another in unquestioning devotion; it is rank stupidity to believe out of habit; it is irrational to echo the opinion of the majority, as if the number of wise men must necessarily exceed or equal or approximate the infinite (even if they all blindly accepted the authority of Aristotle, or another leader of the same sort), could, while stumbling and lumbering forward in the darkness, understand or be worth more than or even as much as, someone who has chosen to decide for himself.ⁱⁱⁱ

While convicted on eight counts of heresy, he was likely killed less for heresy than for “his wanton *curiositas*, for his belief in the limitless capacity of man to know—to know, eventually, what God knows.”^{iv}

The rise of *curiositas* through the sixteenth century and into the Enlightenment period changed the intellectual environment dramatically. These developments were necessary conditions for the emergence of what we now know as academic freedom.

A turning point was when Prussian King, Frederick William I, in 1723, ordered the exile of Christian Wolff, one of Europe’s most important philosophers of natural law and ethics and a professor of mathematics and physics at the University of Halle. On the pain of death, Wolff was banished and no longer permitted to teach. The response was massive and transformative. Hundreds of tracts were written addressing the case, with most defending Wolff in terms of the “freedom of philosophy.” The *Societas Alethophilorum* (Society of the Friends of Truth) was

founded in 1736 in honour of Wolff, and a medal was struck bearing the legend from Horace – “dare to know.” In 1740, the new King of Prussia, Frederick II (Frederick the Great) restored Wolff to his position at Halle. He was made professor of public law and mathematics, Prussian Gheimeh Rat (Privy Councillor) and vice-chancellor of the university. In 1745, Wolff was made Reichsfreiherr, Imperial Baron of the Holy Roman Empire.^v

By the end of the century, philosopher Johann Gottlieb Fichte was able to proclaim that “free investigation of every possible object of thought is without a doubt a human right”^{vi} and in 1811, as rector of the University of Berlin, he addressed the subject of “*akademische Freiheit*” [academic freedom].

The emergence of academic freedom as a concept first in German universities in the latter eighteenth and early nineteenth centuries and subsequently in the United States and Canada must be understood in the context of the development of European universities since the thirteenth century – especially those whose traditions were shaped by the constitutional forms at the University of Paris where the teachers’ (masters’) guilds were the units of the university structure. At the time, both masters and students were clerics (or so regarded), and theology was the dominant subject. The other subjects were medicine, law (the focus was on canon law, not civil law), and philosophy.^{vii}

European universities were centres of power and prestige in the Middle Ages, primarily because of the importance attached to learning. They also played a key role in providing training for functionaries of the church and the state. Former students and masters, in positions of power, felt great loyalty to the universities which were integrated into the ecclesiastical system and were the site of a significant portion of intellectual work during that period.^{viii}

Inquiry was limited because of accepted doctrine which was defined, enforced, and made obligatory for all thinkers. But while medieval scholars submitted themselves to the authority of the Church and the broad principles of the faith, as Hofstadter notes, “some of them did not feel obliged to accept the idea that the hierarchy accepted the true Church. It was of the utmost importance that the outline of the Church’s authority was never precisely drawn.”^{ix}

In the period up to the Reformation, universities and their scholars were subject to the vicissitudes of ecclesiastical fervour and Church politics which ebbed and flowed through time and with location.^x The Reformation in the sixteenth century worsened intellectual freedom in universities, despite its challenge to religious authority, creation of religious diversity, and focus on the rights of the individual conscience. The Protestant reformers ended “the inconsistent but highly valuable indulgence for critical thinking” that the Roman Church had allowed and were far more severe in their efforts to use their power to impose their views.^{xi}

While there were emerging arguments for tolerance in the sixteenth century, they made little headway in the universities which remained dedicated confessional institutions in a more rigid way than during the medieval period. There were some exceptions (e.g., Leiden and Helmstedt), but not many.

In England, whose universities were to become important for the development of universities in North America, the situation was difficult. Henry VIII issued broad Royal Injunctions in 1535, acts of unprecedented political interference in universities, that called for oaths of loyalty, set conditions on lecturing, required all divinity lectures be given directly on Scripture, and banned the study of canon law.

Protestants left in large numbers under Edward VI, Henry VIII's successor, while Catholics left in the difficult period of Elizabeth I's early years. This moderated through the Elizabethan period, and as Calvinism took root, Puritanism emerged among theologians particularly at Cambridge. In the early part of the seventeenth century, James I imposed on all candidates for university degrees an oath of loyalty to the Church of England's episcopal form of governance and to its liturgical practices, and denied degrees to Puritans.^{xii} With the defeat of the royalists and the execution of Charles I in 1649, the situation of English universities declined as there was little sympathy for the Anglican dons who had governed Oxford and Cambridge. Anglican orthodoxy was reinstated with the Restoration.^{xiii}

The climate within British universities in the seventeenth and early eighteenth centuries was such that much of the creative intellectual work was done outside the universities in some of the dissenting academies and in scientific societies.^{xiv} By the early eighteenth century, scholars wanting to free themselves from the confessional constraints of the university had either to leave for regions where their religion of choice predominated, go to the dissenting academies, or work outside the universities altogether.^{xv}

In England and France, the Enlightenment seemed to bypass the moribund universities, but not so in Scotland, Holland and Italy.^{xvi} The developments in Germany were most important as enlightened rulers and their ministers gave universities a key role in their religious policies and supported the modernization of universities with the aims of creating a loyal class of bureaucratic officials, weakening the power of the aristocracy^{xvii} and other obstacles to strong government, and subordinating the church to the interests of the state.^{xviii}

One of the most important developments was the founding of the University of Göttingen in 1737 by the Elector of Hanover^{xix} and his Minister, Gerlach von Münchhausen, with the support of the noble estates. Münchhausen sought to attract top faculty from all over Germany with the promise of intellectual freedom, status, and top salaries. Professors were free from close religious supervision. Their prime responsibility was to advance knowledge and carry out original research.^{xx}

Other German rulers – both Protestant and Catholic – noticed these innovations. Arguably it helped persuade Frederick II to reinstate Christian Wolff at Halle, and led to radical overhauls at universities in Mainz, Würzburg, and the founding of the University of Bonn. It also inspired similar reforms by Maria Theresa and Joseph II throughout the Habsburg Empire in the latter half of the eighteenth century^{xxi} and helped shape Wilhelm von Humboldt's ideas which influenced the creation of the University of Berlin in 1810.^{xxii}

At the core of these changes was an ideal of scholarship in which teaching and research were essential to each other; in which education was the search for truth and understanding, not professional training or the routine absorption of knowledge; and in which there was a set of practices guaranteeing academic freedom: *Lehrfreiheit* (freedom of teaching, inquiry and publishing) for the professors and *Lernfreiheit* (freedom of learning) for the students.^{xxiii} In his address as rector of the new University of Berlin in 1811 Fichte asserted that “the true living breath of the university, the heavenly air in which all its fruits can most happily develop and thrive, is without a doubt academic freedom.”^{xxiv}

The intellectual liveliness of German academy at this period was in marked contrast to the centrally controlled Napoleonic model in France with its centralized control and emphasis on professional education (general literary and scientific education were relegated to secondary schools)^{xxv} and the traditionalism of Oxford and Cambridge with their deep roots in the political and religious establishments.^{xxvi} Walter Metzger summarizes the impact of these differences as follows:

Whereas French Encyclopedism and the English Enlightenment flourished outside the universities, their German counterparts were well ensconced at Göttingen from the year of its founding (1737), at Halle after the reinstatement of Christian Wolff by Frederick the Great in 1740, at Königsbrg during the glorious reign of Immanuel Kant (1755-1797). Long before romantic idealism infiltrated the French and English universities, it prospered under Fichte and Schelling at Jena, and under Fichte, Hegel, and Schelling at Berlin. It is worth noting that whereas the great philosophers of England, from Bacon to John Stuart Mill, were men of affairs, the great figures in the heroic age of German philosophy were academic men. From this circumstance may be traced both the glory of English philosophy and the grandeur of the German university.^{xxvii}

North American universities founded in the seventeenth, eighteenth and early nineteenth centuries were typically colleges that reflected the ecclesiastical and civil politics of their localities and the largely British educational traditions at the time of their founding. Their focus typically was training clergy and civil functionaries, with the larger institutions later adding medicine and law. It was not until 1876, with the founding of Johns Hopkins University in Baltimore, that North America had a university embodying the German model. The university’s first president described its aims as “the encouragement of research, the promotion of young men, and the advancement of individual scholars, who by their excellence will advance the sciences they pursue and the society where they dwell.”^{xxviii} Described as the Göttingen at Baltimore, Johns Hopkins not only attracted an impressive group of faculty and of graduate students (including Josiah Royce, Thorsten Veblen, Woodrow Wilson, Herbert B. Adams and John Dewey), it also inspired the expansion of the German model to other American graduate faculties and departments by the end of the decade.^{xxix}

In an important difference in North America, universities were under the control of a lay board appointed by the sponsoring private proprietor, religious denomination, or state authority. The lay board originated in the sixteenth century Geneva Academy and spread to those universities in

Europe and North America founded in the Calvinist Reformed tradition, with this becoming the norm across North America.^{xxx} In Germany, professors were highly regarded civil servants who had academic freedom with respect to teaching and research – a situation “in which the state left scholars to their *wissenschaftlich* (scholarly work) so long as otherwise they acted as obedient civil servants.”^{xxxi}

In both Canada and the United States, there was an irregular but persistent tension between governance by lay boards and professors’ notions of academic autonomy and rights to free speech.^{xxxii} Several dramatic expressions of this tension led, in 1915, to the formation of the American Association of University Professors and to their issuance of the first, and arguably, the foundational articulation of academic freedom in North America, the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*.^{xxxiii}

No case leading up to the *1915 Declaration* was more important than that of Edward A. Ross, a prominent economist at Stanford University. Trained at the University of Berlin and Johns Hopkins, Ross had been secretary of the American Economic Association. When David Starr Jordan left the presidency of the University of Indiana to assume the presidency of Stanford, he persuaded Ross, who taught at Indiana, to come with him to Stanford. Ross was an advocate for free silver and a harsh critic of the use of cheap Asian labour. Trouble soon developed at Stanford as the University’s founder, Leland Stanford, was a railway magnate whose fortune was partially the result of dependence on cheap Asian labour. After his death, his wife, Jane Lothrop Stanford, had become essentially the proprietor of the university. She took great umbrage at Ross’s views and, despite both Ross’s appeals to her and Jordan’s efforts to protect Ross, she directed President Jordan to fire him:

All that I have to say regarding Professor Ross, however brilliant and talented he may be, is that a man cannot entertain such rabid ideas without inculcating them in the minds of the students under his charge ... Professor Ross cannot be trusted, and he should go.^{xxxiv}

Despite being troubled by the demand, Jordan complied and forced Ross to resign.

For the first time in its history and in what later became the model for the not yet created American Association of University Professors, the American Economic Association created a committee to investigate the Ross case. For a variety of reasons, the inquiry had little immediate impact.^{xxxv} But the case loomed large in the subsequent drafting of the *1915 Declaration of Principles on Academic Freedom and Academic Tenure*. The chief drafters of that report were Edwin R. A. Seligman, one of the United States’ most respected economists of his generation and the leader of the fight for Ross within the American Economic Association, and philosopher Arthur O. Lovejoy, who had been so outraged about the treatment of Ross that he had resigned his position at Stanford. Of the thirteen members of the drafting committee, eight had studied in Germany.

The *1915 Declaration* identified what are now recognized in Canada and the United States as the four elements of academic freedom: freedom in teaching, freedom in research and publication, freedom of intramural expression, and freedom of extramural expression.

In 1997, the General Conference of UNESCO, with delegates from more than 150 countries, adopted the *Recommendation concerning the Status of Higher-Education Teaching Personnel*, the first international recognition of the importance of academic freedom. The UNESCO statement explicitly identified these same four components of academic freedom.^{xxxvi}

II. The History of Academic Freedom in Canada

Unlike in Germany, from the latter part of the nineteenth century, and in the United States, in the early twentieth century, academic freedom was not a concept dealt with seriously in Canada until the 1950's. This is despite the fact that for many years before there had been numerous instances of tension between faculty and boards resulting in discipline and dismissals.^{xxxvii} Some of these controversies contributed to the ongoing debates about the purpose and governance of Canadian universities that came to a head in Ontario in 1905. This resulted in the Government of Ontario appointing a royal commission on the University of Toronto named after its chair, Joseph Flavelle, a self-made millionaire in the meatpacking industry who was considered an expert in industrial organization. The 1906 Report of the Flavelle Commission set the pattern of university governance in Canada from that time forward.^{xxxviii}

Canadian academics were aware of what was happening in Germany and the United States, and occasionally made specific reference to the principle of academic freedom. The first such reference appears to have been in a speech Queen's University Principal Bruce Taylor gave to the graduating class of the University of Manitoba in 1919 expressing his concern that the government's increasing financing of university education would result in its control of teaching thereby compromising professors' control of their teaching, scholarly work, and publications.^{xxxix}

Two years later, University of Toronto President Robert Falconer, under pressure from a university board member's opposition to the teaching of one of the faculty, wrote to the board member: "The most treasured privilege of the University is freedom of thought." A few weeks later, speaking to alumni in the University's large Convocation Hall, Falconer praised academic freedom as "the freedom which gives its distinction to the ancient English academic life." He continued that professors' academic freedom was "one of the most sacred privileges of the university." Although Falconer had studied at the German universities in Berlin and Marburg and was clearly talking about *Lehrfreiheit*, it was not surprising in the post-World War I atmosphere of antipathy in English Canada to all things German that he chose not to reference academic freedom's German heritage.^{xl}

In the first half of the twentieth century these instances were the exception. As Carleton Stanley, President of Dalhousie University and the National Conference of Canadian Universities (NCCU),^{xli} said in 1937, "Academic freedom is not ... a burning question in Canadian universities." Stanley had been trying to organize a session on academic freedom at the NCCU's annual meeting that year. There was so little interest that he had to abandon his plans for a panel and simply say a few words about it in his presidential address.

Nor was there any equivalent to the American Association of University Professors until the Canadian Association of University Teachers (CAUT) was formed in 1951. Unlike the AAUP, which was created in the maelstrom of academic freedom issues, CAUT was born of faculty members' concerns about inadequate compensation and benefits. Academic freedom was mentioned in the discussions leading to the formation of CAUT but was a secondary issue.^{xlii}

That all changed in 1958, despite the fact that the actions of the delegates to the CAUT annual meeting in June indicated, once again, that academic freedom was still not a primary issue for them.

The transformative event was the firing of Harry Crowe, an associate professor of history at United College in Winnipeg. Despite awareness of the beginnings of the tumult over the Crowe case that would shake the Canadian academic world and make academic freedom the centrepiece of the Association's work, delegates to the June meeting defeated a motion to create a standing committee on academic freedom and tenure. They did, however, agree to create a committee to prepare a report on CAUT's role with respect to protecting tenure and academic freedom. The motion included an amendment affirming that these were of concern to the Association.^{xliii} It was a widespread view within the Canadian academy at the time that there was virtually no restriction on the freedom of Canadian university teachers to teach their classes as they saw fit or to conduct and publish the results of their research as they chose.^{xliv}

The Crowe case made academic freedom a public issue in Canada and a focus of discussion within the Canadian academic world. Although it was not at the time described in these terms, the dispute focused on whether Crowe's academic freedom included freedom of intramural expression.

On leave for a year to teach at Queen's University, Crowe wrote a letter to one of his United College colleagues in March 1958. Much of it was about his concerns with the prospective victory of the Conservatives in the upcoming federal election on March 31. But part expressed his dismay about the administration of the College and about the "corrosive" role of religion in the life of the College. (United College was a United Church institution.) The colleague never received the letter, but a "brown envelope" (in this case it was actually a blue envelope) was delivered to the College Principal with an anonymous note saying "Found in College Hall. We think you should read it. Some staff loyalty??"^{xlv}

After a complicated series of events,^{xlvi} the College Board dismissed Crowe, with sixteen of his colleagues then resigning in solidarity.^{xlvii} Crowe's dismissal was front page news in the *Toronto Telegram* and the *Winnipeg Free Press*. The dispute was so much a matter of public controversy that the Premier of Manitoba offered to mediate, as did a member of Prime Minister John Diefenbaker's Cabinet. In response to a request from the Queen's University Faculty Association, CAUT launched its first inquiry, which was undertaken by Vernon Fowke, Professor of Economics at the University of Saskatchewan, and Bora Laskin, Professor of Law at the University of Toronto (and later Chief Justice of the Supreme Court of Canada).

The Fowke-Laskin Report, received in November 1958, found that the dismissal of Crowe involved “a trespass on academic freedom.”^{xlviii} Subsequently Crowe was offered reinstatement. Because a similar offer was not made to the colleagues who had resigned in solidarity with him, Crowe declined.

The longer-term importance of this case and of the Fowke-Laskin Report was substantial. First, the report articulated both the professional nature and key elements of academic freedom that would come to shape the understanding of academic freedom in Canada, the CAUT policy, and the eventual translation of that policy into collective agreement language that today covers almost all university academic staff in Canada.

The Fowke-Laskin Report stated that academic freedom was a professional right, not a privilege – a right necessary for academics to be able to fulfill their societal obligations:

The Committee is convinced that the following basic postulates are not open to serious question: that academic freedom and security of tenure are neither ends in themselves nor the exactions of special privilege but merely conditions indispensable for the performance of the purposes of higher education; that the search for truth which is the central purpose of institutions of higher learning cannot prosper without freedom of inquiry and expression; and finally, that security of tenure is prerequisite to academic freedom.^{xlix}

In its characterization of academic freedom, the report emphasized freedom of teaching, freedom of research and publication, and freedom of intramural expression:

The privilege of a teacher in a university or college to utter and publish opinions in the course of teaching and research and to exchange opinions with faculty colleagues without liability to official censure or discipline is the commonly understood substance of academic freedom.¹

The Crowe case led to CAUT establishing its first permanent office, the appointment of its first general secretary^{li}, and the creation of a permanent committee on academic freedom and tenure. The Fowke-Laskin inquiry became the model for how CAUT would deal with future cases involving allegations of violations of academic freedom. Finally, the Crowe case reaffirmed the vulnerability of professors’ academic freedom so long as their jobs were at the pleasure of lay boards that had final authority in university governance. This propelled CAUT to make academic freedom and governance key priorities. This led, among other things, to major national inquiries into university governance^{lii}, policy statements on academic freedom, and the eventual unionization of virtually the entire professoriate in Canada^{liii}, with collective agreements that turned academic freedom policies into enforceable collective agreement language.

III. The Components of Academic Freedom

A. *Freedom in Teaching*

Academic freedom in teaching includes not only the freedom to rely on one's best professional judgment as to course content, but also protects the professor's freedom to decide on appropriate teaching and assessment methods and practices.

The purpose of teaching in the university is not simply to transmit information nor to provide ready-made conclusions. It is to help enable students to think for themselves and have the tools and abilities to think critically and intelligently in all aspects of their lives. As AAUP's 1915 *Declaration* put it:

the claim to freedom of teaching is made in the interest of the integrity and of the progress of scientific inquiry; it is, therefore, only those who carry on their work in the temper of the scientific inquirer who may justly assert this claim ... [The teacher's] business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.^{liv}

While individual universities state this in their various ways, they share this common vision of their educational role. For example, the University of Toronto declares that it "will strive to ensure that its graduates are educated in the broadest sense of the term, with the ability to think clearly, judge objectively, and contribute constructively to society."^{lv}

Other universities in Canada have similar statements.

It is precisely because of this broader purpose of university teaching that academic freedom is necessary. University teachers cannot achieve this goal unless they have the freedom to use their best professional judgment about how and what to teach. They must be free to model in their classrooms the freedom of mind and critical thought that are the purpose of the university. Finkin and Post summarize the point nicely: "Independence of mind is an active virtue, not a passive one. It cannot be drilled into students; it must be drawn out of them. It is a virtue that is acquired primarily through emulation."^{lvi}

Teaching is an interactive process between teacher and student, and each university teacher has to find their best way to engage and inspire their students. Some find they can do this effectively in more performative ways through traditional lectures and tutorials. Others succeed best, more interactively, in seminar/discussion formats. Some find it more educative to rely on formalized testing formats – whether multiple-choice or essay – while others disdain tests for papers or group projects. Some rely heavily on class participation while others do not. Some are formal, maintaining a more authoritative relationship with students; others emphasize informality and collegiality with students.

A faculty member's pedagogical choices are shaped not only by what they know about themselves, but also what they know of their students, the nature of the subject they are teaching,

and their view of what engages and motivates students to learn. All these matters are discussed and debated endlessly within the academic world. There is general consensus, occasionally to the dismay of some in education faculties, that best practice is to respect difference in approach based on the professional judgment of each university teacher; that it is unwise, if not counterproductive, to lay down restrictive rules because the quality of any teacher's relationship with their students depends significantly on their personality, educational philosophy, place of training, and individual style. Academic freedom of teaching protects and ensures this pedagogical diversity.

The right to academic freedom in teaching is recognized in the CAUT Policy *Statement on Academic Freedom*^{lvii} and in the UNESCO *Recommendation*.^{lviii}

That said, there are some constraints on this freedom. As with course content, however, the constraints on pedagogy are limited to collegially determined policies consistent with academic freedom and other provisions in the collective agreements. . All universities have collegially developed policies on grading and procedures for students to appeal their grades. Quite commonly, collegial decisions at the departmental or faculty level set out provisions for forms of assessment, primarily for multi-sectioned, lower-level courses. But these are the exceptions to the generally extensive and essential academic freedom of university teachers with respect to content and pedagogy.

Some examples of important cases involving academic freedom in teaching are those of Michael Mason at Queen's University,^{lix} Michael Persinger at Laurentian University,^{lx} Laurent Leduc at the University of Toronto,^{lxi} George Ferguson at the Alberta College of Art and Design,^{lxii} Stanley Lipshitz at the University of Waterloo,^{lxiii} and Denis Rancourt at the University of Ottawa.^{lxiv}

B. Freedom of Research, Scholarship, and Creative Work

Academic freedom in research, scholarship, and creative work is based on the premise that advancement of knowledge depends on academics having the freedom to rely on their best professional judgment as to issues to address, perspectives to be pursued, methods to be used, and freedom to share their findings with colleagues, the academic and scientific community, and the public.

The 1915 AAUP *Declaration* identified freedom of inquiry and research as a core aspect of academic freedom. In its 1940 *Statement on the Principles of Academic Freedom and Tenure* went further by saying that "teachers are entitled to full freedom in research and in the publication of the results." The AAUP *Statement* did not use the word "full" to describe any other component of academic freedom, and it added the right to publish as an additional aspect to be protected.^{lxv} A similar position with respect to the right to publish has also been incorporated by UNESCO^{lxvi} and by CAUT.^{lxvii}

Universities often affirm the right to freedom of intellectual inquiry. For example, the University of Toronto's Statement of Purpose asserts:

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.^{lxviii}

Many feel, along with the drafters of the AAUP's 1915 *Declaration*, that there is little to discuss regarding this component of academic freedom as "[freedom of inquiry and research] is almost everywhere so safeguarded that the dangers of its infringement are slight. It may therefore be disregarded in this report."^{lxix}

Regrettably, that was not the case then, nor is it now, as there were and continue to be efforts to control the work of academics along lines others want pursued, as well as not infrequent efforts to restrict publication of research results.

In his 1918 book *The Higher Learning in America*, Thorsten Veblen noted, "It appears, then, that the intrusion of business principles in the universities goes to weaken and retard the pursuit of learning, and therefore to defeat the ends for which a university is maintained."^{lxx} There is a considerable literature, especially in the past 30 years, exploring the impact of external pressures to direct academic research, which are often embraced by the university administration, and to restrict academics' freedom to publish the results of their research.^{lxxi} In the past several decades this has been most prominent in third party-university collaboration agreements. Rather than rejecting industry, government or donor demands to control research and publication decisions, many universities, particularly in the face of underfunding, accede to them. Research by the Center for American Progress and by the Canadian Association of University Teachers has documented this practice.^{lxxii}

The best known, continuing, and important case involving academic freedom in research, scholarship, and creative work in Canada is that of Nancy Olivieri at the University of Toronto, the Hospital for Sick Children, and the University Health Network.^{lxxiii}

C. Freedom of Intramural Expression

Freedom of intramural expression is the right of academic staff to comment on any aspect of policy, practice, or issue related to the institutions where they work. "Intramural" does not refer

to where the expression takes place, but rather to its subject – the academic staff member’s own institution’s issues, policies and practices.

The origin and rationale for intramural academic freedom are related to academic staff self-governance of universities which has been a consistent thread, albeit sometimes more formal than real, in the history of universities beginning with the initial conception of the constitutional role of the masters’ guilds in the thirteenth century universities, such as Paris, Oxford, and Cambridge.^{lxxiv} Academic staff self-governance continues at Oxford and Cambridge to this day where the final governance authority at Oxford (the “Congregation”) and at Cambridge (“Regent House”) is the collectivity of academic staff.^{lxxv} At German universities, too, despite their being dependent on the state for financing and faculty selection, academic staff were essentially self-governing.

The 1915 *Declaration* addressed the reality of American universities, which were corporations governed by lay boards and in which academic staff were employees. The drafters put forward an organizationally unique status for academic staff:

A university is a great and indispensable organ of the higher life of a civilized community, in the work of which the trustees hold an essential and highly honorable place, but in which the faculties hold an independent place, with quite equal responsibilities—and in relation to purely scientific and educational questions, the primary responsibility.^{lxxvi}

Finkin notes, “The dispute between the upstart profession and entrenched regental authority in the matter of academic freedom was seen, correctly, as a confrontation over the status of the faculty within the institution. In the ensuing debate, the very terms of mastery and service used to justify administrative control took on a pejorative meaning at the hands of progressive reformers: the professor was not to be made a “hireling,” a “servant,” a “mere employee,” a ‘hired-man,’ a ‘place-holder’ (John Dewey’s phrase), or, more colorfully, a ‘subservient coward.’”^{lxxvii}

Although the 1915 *Declaration* never used the term nor discussed intramural speech as such, its formulation implied the right of academic staff to be engaged in institutional governance and, necessarily, to speak freely in relation to these matters.

In Canada, following the traditions of McGill in the 1850s^{lxxviii} and the recommendations of the 1906 Flavelle Commission^{lxxix}, statutes constituting universities have recognized collegial governance by investing authority for academic decision-making in a senior academic body, in most provinces called the senate^{lxxx} and provided the basis for the development and recognition of a clearly articulated right of academic staff to freedom of intramural expression – a right that is a necessary component for meaningful participation in the governance and operation of the university in which they work.

This aspect of academic freedom – intramural academic freedom in relation to collegial governance – has been recognized in Canada for more than 60 years. As previously noted, the foundational Fowke-Laskin Report on the case of Harry Crowe in 1958 put the matter clearly:

The privilege of a teacher in a university or college to utter and publish opinions in the course of teaching and research and to exchange opinions with faculty colleagues without liability to official censure or discipline is the commonly understood substance of academic freedom.^{lxxxix}

Intramural academic freedom has been explicitly spelled out subsequently in both the *CAUT Policy Statement on Academic Freedom*^{lxxxiii} and the *UNESCO Recommendation*.^{lxxxiii}

It is important to note intramural academic freedom both authorizes and restricts. It authorizes robust faculty interaction regarding all aspects of the academic life of the university, whether in departmental or faculty meetings, university committees, informal discussions, exchanges with university administrators, or faculty listservs. The functioning of every university depends heavily on faculty engagement in difficult and often contentious academic decision-making in many forums including hiring committees, searches for senior administrations, departmental and faculty curriculum committees, and academic policy-setting bodies. The success of all these occasions for interaction depends on freedom of intramural expression.

At the same time, intramural academic freedom restricts some forms of faculty interaction – specifically in its obligation not to limit the academic freedom of colleagues. It is a violation of academic freedom when a departmental curriculum committee is captured by academic staff within one of a discipline’s intellectual traditions who then use the committee to ensure some of their colleagues’ competing traditions are not reflected in the curriculum, or that they are not given the option of teaching courses related to their own work. Similarly, academic freedom is violated when, in relation to seemingly mundane matters such as allocation of lab or office space, decisions are used to make academic work difficult for colleagues who are seen to have different intellectual, pedagogical, theoretical or scholarly orientations, interests and priorities.

Some important examples of the many cases involving intramural academic freedom are those of Ana Isla at Brock University,^{lxxxiv} George Rammell at Capilano University,^{lxxxv} Ken Luckhardt at King’s University College at Western University,^{lxxxvi} George Nader at Trent University,^{lxxxvii} Robert Buckingham at the University of Saskatchewan,^{lxxxviii} and Mort ShirkHzadeh at Queen’s University.^{lxxxix}

D. Freedom of Extramural Expression

Like freedom of intramural expression, freedom of extramural expression does not refer to the location in which the person is speaking, but rather to the subject of their speech: the expression of academic staff made in relation to matters of public interest or concern, whether or not related to their area of scholarly expertise.^{xc}

The *1915 Declaration* addressed this issue and provided the basis for how this aspect is recognized today. While concerned that faculty “avoid hasty or unverified or exaggerated

statements” and “refrain from intemperate or sensational modes of expression”, the drafters wrote:

... it is not, in this committee’s opinion, desirable that scholars should be debarred from giving expression to their judgments upon controversial questions, or that their freedom of speech, outside the university, should be limited to questions falling within their own specialties. It is clearly not proper that they should be prohibited from lending their active support to organized movements which they believe to be in the public interest. And, speaking broadly, it may be said in the words of a nonacademic body already once quoted in a publication of this Association, that ‘it is neither possible nor desirable to deprive a college professor of the political rights vouchsafed to every citizen.’^{xcii}

CAUT makes extramural academic freedom an explicit aspect of its *Policy Statement on Academic Freedom*:

Academic staff members must not be hindered or impeded in exercising their civil rights as individuals, including the right to contribute to social change through free expression of opinion on matters of public interest. Academic staff members must not suffer any institutional penalties because of the exercise of such rights.^{xciii}

The UNESCO *Recommendation* also puts the matter even more clearly:

Higher-education teaching personnel, like all other groups and individuals, should enjoy those internationally recognized civil, political, social and cultural rights applicable to all citizens. Therefore, all higher-education teaching personnel should enjoy freedom of thought, conscience, religion, expression, assembly and association as well as the right to liberty and security of the person and liberty of movement. They should not be hindered or impeded in exercising their civil rights as citizens, including the right to contribute to social change through freely expressing their opinion of state policies and of policies affecting higher education. They should not suffer any penalties simply because of the exercise of such rights.^{xciiii}

The reason that faculty extramural expression rights are a component of academic freedom, is, as Finkin and Post explain, “that faculty can promote knowledge or model independent thought in the classroom only if they are *actively and imaginatively* engaged in their work. If faculty experience their institutions as repressive, they will be vulnerable to forms of self-censorship and self-restraint that are inconsistent with the confidence necessary for research and teaching. The harm would be enhanced if faculty were confused about which communications were protected by freedom of research and which communications would be exposed to punishment if freedom of extramural speech were not a recognized dimension of academic freedom.”^{xciv}

Extramural expression has proven an aspect of academic freedom very susceptible to attack, especially when faculty members’ public statements challenge conventional wisdom, dominant

public values and beliefs, or powerful interests. As noted above (p. 7), it was the firing of E. A. Ross at Stanford and other faculty for their extramural utterances in the early years of the twentieth century that led John Dewey, Arthur O. Lovejoy, and other prominent American intellectuals and academics to found the American Association of University and make the right of extramural expression a key element in the *1915 Declaration*. Some of the AAUP's earliest cases, such as that of Scott Nearing^{xcv} at the University of Pennsylvania, focused on extramural expression.

The handful of Canadian university presidents who championed academic freedom in the early years of the twentieth century faced (and resisted) pressure to remove faculty who offended university board members and wealthy donors, such as the attempt to dislodge the eminent political economist O.D. Skelton at Queen's^{xcvi} and the University of Toronto distinguished political economist Robert M. MacIver.^{xcvii}

Challenges to extramural academic freedom continue to be some of the most prominent academic freedom cases, as, for example, that of Steve Salaita at the University of Illinois at Urbana-Champaign,^{xcviii} Andrew Potter at McGill,^{xcix} Joe Arvai at the University of Calgary,^c and David Healy at the University of Toronto.^{ci}

IV. Limits to Academic Freedom

As with any freedom, there are limits to academic freedom. To understand the nature of the limits, it is most useful to begin with the distinction between freedom of expression and academic freedom.

Freedom of expression is a general right of everyone in Canada: it is one of the four fundamental freedoms specified by the *Canadian Charter of Rights and Freedoms*.^{cii} Academic freedom, on the other hand, is a narrower professional right of academic staff, necessary for them to fulfill their professional obligations as teachers and scholars within the university and society.

To illustrate the difference: while any member of the public has the freedom of expression to make the creationist claim that the world was created in six days 6,000 years ago, and that dinosaurs and humans cohabited the earth, a university biologist or paleontologist making such a claim in their teaching or publications would face adverse academic consequences because the assertion has no recognized scientific or scholarly basis whatsoever.

As Van Alstyne elaborates:

Specifically, that which sets academic freedom apart as a distinct freedom is its vocational claim of special and limited accountability in respect to all academically related pursuits of the teacher-scholar: an accountability not to any institutional or societal standard of economic benefit, acceptable interest, right thinking, or socially constructive theory, but solely to a fiduciary standard of professional integrity. To condition the employment or personal freedom of the teacher-scholar upon the institutional or societal approval of his academic investigations or utterances, or to

qualify either even by the immediate impact of his professional endeavors upon the economic well-being or good will of the very institution which employs him, is to abridge his academic freedom. The maintenance of academic freedom contemplates an accountability in respect to academic investigations and utterances solely in respect of their professional integrity, a matter usually determined by reference to professional ethical standards of truthful disclosure and reasonable care.^{ciii}

The arbiter of standards for academic work (and hence for academic freedom) is not the corporate institution, but the collective academic staff in the institution and in the collectivity that constitutes the academic disciplines within which scholars work. As Finkin and Post note, “Universities ... hire, promote, grant tenure to, and support faculty on the basis of criteria of academic merit that purport to apply professional standards. Individual faculty have no right of immunity from such judgments.”^{civ}

Decisions about curriculum and course offerings are seen to be legitimate matters for collegial decision-making within the university. Academic journals’ decisions whether to accept or reject articles for publication are recognized as matters for peer-review processes, as are research funding decisions by granting agencies.

On the other hand, control over what and how they teach within the institution’s broad curriculum guidelines and decisions about the subject and conduct of research and scholarship are matters determined by individual academic staff under the protection of academic freedom grounded in professional standards and disciplinary norms. Academic disciplines have been long been seen as academic freedom’s protection against “incompetent outside authorities.”

But reliance on academic disciplines as arbiters also creates a problem. The disciplines that protect the academic freedom of individuals can also be used to deny some of them that freedom. As Joan Scott elaborates, “... discipline is at once productive – it permits the organization of knowledge and it authorizes knowledge producers – and confining – it installs explicit and tacit normative standards which, when they are understood to be provisional, can serve important mediating functions, but which, when they are taken as dogmatic precepts, become instruments of punishment. The two aspects cannot be disentangled.”^{cv}

Scott identifies not only the problem but a prospective solution:

If we think of [academic] communities and disciplines not as common essences, not as bodies of people who are the same ... but as provisional entities called into being to organize relations of difference, then standards and rules become heuristic practices around which argument is expected and change anticipated. ... Disciplinary communities ... share a common commitment to the autonomous pursuit of understanding, which they both limit and make possible by articulating, contesting, and revising the rules of such pursuits and the standards by which outcomes will be judged ... The problem of exclusion doesn’t disappear from this more provisional notion of disciplinary community, but its functional and arbitrary nature are clearly recognized. This recognition insists on a

place for criticism and critical transformation at the very heart of the conception of a discipline and so guarantees the existence of that scholarly critical function that discipline is meant to legitimate and that academic freedom is designed to protect.”^{cvi}

In other words, academic freedom to be meaningful must simultaneously recognize the importance of disciplinary norms while not reifying the always contested boundaries of any discipline in such a way that academic freedom is smothered. This makes disputes about academic freedom at the boundaries of disciplinary norms difficult to define and argues for tolerance for difference being the default position in such circumstances. In the end, as Finkin and Post write, “The ultimate constraint...is whether peer reviewers apply disciplinary norms that over time produce credible forms of knowledge.”^{cvi}

Although seemingly too obvious to mention but nevertheless important, academic freedom does not licence breaking the law^{cvi}, or authorize violation of terms of the collective agreement, such as articles on sexual harassment, professional duties and responsibilities, or non-discrimination. It does not give permission to treat students or others in the academic community in a discriminatory manner. It does not permit unethical conduct of research or falsification of data or plagiarism.

While the law, as well as professional obligations of ethical behaviour, imposes limits on academic freedom, a *claim* that a member of the academic staff has transgressed the law or an obligation under university policy or a professional code does not vitiate one’s academic freedom unless and until that claim is found to be warranted through procedures consistent with academic freedom. Similarly, a *claim* by a member of the academic staff that their academic freedom has been violated must be dealt with by the university through procedures consistent with its commitment to academic freedom. The phrase “through procedures consistent with its commitment to academic freedom” is vital and needs to be unpacked.

As discussed previously, the purpose of academic freedom is to ensure that teaching, research, scholarship and publication, participation in the life of one’s university, and broader rights as a citizen are not inappropriately curtailed or abrogated by the university itself, by colleagues, or by outside bodies or individuals. The standard the university must use in examining any claim is a professional one. That means the university’s determination as to whether any contested behaviour falls within or outside the bounds protected by academic freedom must be made *both* in reference to professional academic norms (with all the nuance discussed above) *and* by academic colleagues who have the competence and understanding to interpret those norms. To do otherwise is itself to violate academic freedom. Any consideration of disciplinary action must be undertaken in a manner consistent with the applicable collective agreement, or, in the absence of a collective agreement, in a manner that ensures procedural fairness and natural justice.^{cix}

Where the matter is brought forward outside the university – in a court, before a human rights tribunal, or in the court of public opinion – the university’s obligation to protect academic freedom means that it must immediately do its own internal assessment, consistent with the procedures noted above, to determine if the academic staff member’s academic freedom is at

risk. If it is, the university must do one of two things depending on whether the matter arose as part of the academic staff member's academic work. When it does so arise, the university is obligated to provide the academic staff member with financial and other support to obtain independent legal advice or to ensure that such support is provided for the defence of the individual in the external proceeding.^{cx} Some examples (all based on actual cases in Canada) might help clarify:

A criminologist is studying assisted suicide, and their research project has been approved by the university's research ethics board. Subsequently, the criminologist is charged under Section 241(1)(a) of Canada's *Criminal Code* for abetting a person in dying by suicide. Having previously determined that the research is legal and ethical through its research ethics board approval process, the university's commitment to defending academic freedom would require it to fund the legal defence of its criminologist whose defence would be based on the argument that observing and documenting an assisted suicide for scientific purposes under the terms approved by the research ethics board is not abetting a suicide.^{cx}

A political scientist, expert in corporate malfeasance, is interviewed by a journalist about alleged corruption in the award of a municipal contract. The journalist found the professor's name on the university's website of academic experts. While telling the journalist in the interview that they have no knowledge of facts of the particular case, the political scientist agreed to answer generally about principles and normal practices in awarding of public contracts. The newspaper accurately quotes the political scientist in its story. One of the politicians implicated in the case sues the newspaper and the political scientist for defamation. If it determines that the faculty member's actions were not defamatory, the university has an obligation to fund the faculty member's legal defence.^{cxii}

A sociologist is troubled by a university program in partnership with the local Roman Catholic diocese sends students to work in South America with a right-wing religious order. She speaks out and lobbies within the university to discontinue this program. One of the university chaplains who runs the program files a complaint with the provincial human rights commission claiming religious discrimination. To protect the sociologist's freedom of intramural speech, the university has an obligation to fund her defence in the human rights proceedings.^{cxiii}

Consistent with extramural academic freedom, where an academic staff member faces an external proceeding that does not arise in relation to their academic work but nevertheless would curtail their academic freedom, the university commitment to academic freedom does not obligate it to aid in the individual's defence. However, it does mean the university must not normally take any action, itself, against the individual. An example would be an academic staff member being arrested because of participation in a protest against government military policy.

If it is to act in accordance with academic freedom principles, the only circumstances in which a university may take action against an academic staff member for their external behaviour is when that behaviour results in the staff member being unable to fulfill their employment obligations or when the external behaviour indicates unfitness for their position within the university.

In relation to the latter, as Finkin and Post correctly put the point, universities cannot discipline

“unless [the academic staff member’s behaviour] bears on professional competence, and judgments of professional competence, for reasons we have discussed, are primarily reserved for faculty determination.”^{cxiv}

Finally, confusion between institutional autonomy and academic freedom often results in attempts to invoke the former as a justification for limiting the latter. Institutional autonomy is important for universities as recognition that there must be insulation of the university and its academic work from the control of governments and other non-university forces in society. Meeting universities’ twin missions of advancing knowledge and educating students depends on universities’ freedom to determine academic matters – from hiring and promotion of academic staff to decisions about programs, curriculum and assessment, standards for admission, program completion, and scholarly priorities for the institution. In that sense, institutional autonomy helps provide the conditions supportive of collegial governance and the academic freedom of academic staff individually and collectively so as not to be undermined by inappropriate external pressures.

The claim of institutional autonomy can, however, undermine academic freedom when it is invoked by the university board or senior administration to restrict or override the academic freedom rights of academic staff. As Len Findlay has written, university autonomy can become a threat to academic freedom rather than a means to ensure it. With the university becoming increasingly a corporation managed by its senior administration rather than a collegium of its academic staff, institutional autonomy is often invoked not to protect professional self-regulation by academic colleagues within the university but to intrude on the academic staff’s academic freedom rights.^{cxv}

In surveying the landscape in the United States, David Rabban notes that “institutional academic freedom” has developed as a concept in American constitutional law, and the result is some judicial decisions and academic commentary now maintain that academic freedom and freedom of expression rights should be understood as a grant of institutional autonomy. He argues that the concept of institutional academic freedom has evolved in ways that threaten the academic freedom rights of academic staff.^{cxvi}

The American concept of institutional academic freedom has had little impact in Canada, with one notable exception, in an arbitration decision at the University of Waterloo in 1998. The matter concerned whether the Dean of Mathematics had the right to change Professor Stanley Lipshitz’s grades in the advanced section of a first-year course for gifted mathematics students (1) without any evidence that the grades were other than a fair reflection of the students’ performance; (2) when the university’s own investigation found no evidence that the course or the assignments had been inappropriate in substance or that the professor had set unfairly hard tests or assignments, or had unfairly assessed the students’ knowledge of the material of the course; and (3) when the professor had neither been advised of nor consented to the changes. The University argued, drawing on American jurisprudence, “that apart from freedom of the Faculty member, there is also an institutional academic freedom whereby the institution can take steps in its own interests.” In ruling in favour of the University, Arbitrator Ross Kennedy wrote, “I have concluded that the change of grades by Dean George was a decision falling

within his jurisdiction and authority as the Dean of the Faculty within the provisions of the University's policies and procedures ... That [high grades for students in the gifted section] is a matter falling within the academic freedom of the University and at the end of the day, its implementation is a matter for the University", adding "Implementation, however, must be achieved while recognizing, to the maximum extent possible, the academic freedom interests of all other members of the University community."^{cxvii}

The CAUT Policy Statement on Academic Freedom addresses this issue directly:

Academic freedom is a right of members of the academic staff, not of the institution. The employer shall not abridge academic freedom on any grounds, including claims of institutional autonomy.^{cxviii}

V. Social Media and Academic Freedom

With the advent of social media, there is no question they are roiling society and the university, with no shortage of attention paid to this issue.^{cxix} Social media (Facebook, Twitter, YouTube, blogs) make it possible for the writing, lectures and views of faculty to be disseminated on an unprecedented scale. As John K. Wilson notes, social media have another effect: "... the immediacy limits editing and careful thought, the ease of personal expression makes it tempting to reveal everything you think, and the potentially 'viral' nature of postings on the Internet makes it easy for critics to transmit a foolish tweet to a far bigger audience. Social media create a 'paper trail' more permanent than paper."^{cxx}

On the other hand, social media change none of the fundamental principles of academic freedom. The rights and limits of academic freedom have nothing to do with the medium of expression – whether in teaching, research, intramural expression or extramural expression. Social media may amplify the voice of faculty, but the rights of academic freedom and the limits to those rights are the same regardless of how the voice is conveyed.

The 2017 CAUT *Policy Statement on Academic Freedom, Electronic Communication and Social Media* makes this same point:

The rights of academic staff to exercise their academic freedom do not vary according to the medium in which they are exercised. These rights are as essential to academic activities undertaken electronically as to those undertaken in speech, writing, and/or other media. The right to exercise academic freedom is the same regardless of whether that exercise takes place within or outside the bounds of any particular institution.^{cxxi}

Wilson puts the matter more colourfully:

So why are social media considered so dangerous? Unlike other media, Twitter and blogs allow professors to reach the public directly, without having their voices mediated by an editor. In the uncensored realm of the Internet, faculty can say anything they want ... If a professor engages in misconduct deserving punishment, then the medium shouldn't

matter. A professor who threatens to kill people should be punished, whether that threat is made in a letter to the editor or in a Facebook post.”^{cxxii}

VI. Respectful Workplace Policies and Academic Freedom

Respectful workplace policies and civil discourse policies are common in Canadian universities. Usually born of a well-intentioned desire for civil and respectful interaction, an aspiration with which few disagree, these policies set up regulatory regimes that treat incivility and disrespect in the same or similar manner as the university rightly deals with illegal behaviours of discrimination, harassment and violence. Commonly, these policies also provide for investigations to be undertaken and findings to be made, often by people who lack the academic background, knowledge, and experience to evaluate whether behaviour is consistent with professional academic and disciplinary norms.

Given the subjectivity of what constitutes “disrespect” and “incivility” as well as their ubiquity, any regulatory policy directed to punishing disrespect and incivility will necessarily result in selective regulation of speech in which even-handed application is impossible. Beyond how these policies may be enforced, their mere existence, as Jamie Cameron notes, “inhibit and chill frank discussion and candid exchange.” She adds that “when enforced, they pose an even greater danger to the mission of the university” because such institutional regulation of incivility and disrespect “fall[s] well outside the boundaries of regulation [of expression] carefully mapped by [the Supreme Court in] *Saskatchewan (Human Rights Commission) v. Whatcott*.”^{cxxiii}

In his famous *On Liberty*, John Stuart Mill decried as risky and hypocritical the notion that society should allow “the free expression of all opinions on condition that the manner be temperate and does not pass the bounds of fair discussion.”

Much might be said about the impossibility of fixing where these supposed bounds are to be placed: for if the test be offense to those whose opinion is attacked, I think experience testified that this offense is given whenever the attack is telling and powerful, and that every opponent who pushes them hard, and whom they find it difficult to answer, appears to them...an intemperate opponent.^{cxxiv}

The act of turning what should be aspirational statements in favour of respectful and civil behaviour into regulatory policies and procedures has inappropriately restricted academic freedom, and, where challenged as violations of academic freedom, has not just embarrassed those who imposed the policies but resulted in adverse consequences for them. Examples of such episodes include the cases of Professor Ana Isla and her colleagues at Brock University,^{cxxv} Professor Ken Luckhardt at King’s University College,^{cxxvi} Professor Steven Salaita at the University of Illinois,^{cxxvii} and Professor Thomas Docherty at the University of Warwick.^{cxxviii}

The case of Ana Isla and her colleagues is important for the decision it elicited from the Ontario Human Rights Tribunal. Those challenging Isla’s opposition to their university program not only

filed a respectful workplace complaint under Brock University's policy, they also filed a complaint under Ontario Human Rights Act. It took the Ontario Human Rights Tribunal to make a firm declaration in favour of academic freedom:

With respect to academic freedom, it is well-established that courts and tribunals should be restrained in intervening in the affairs of a university in any circumstance where what is at issue is expression and communication made in the context of an exploration of ideas, no matter how controversial or provocative those ideas may be. See *Maughan v. UBC*, 2008 BCSC 14, aff'd 2009 BCCA 447, leave to appeal ref'd [2009] S.C.C.A. No. 526, at para. 493. However, the principle of academic freedom does not override an organization or person's obligations under the *Code*. In other words, academic freedom is not a license to discriminate against another person because of his or her religious beliefs. See *Ketenci v. Ryerson University*, 2012 HRTO 994, at para. 42. That said, in my view, given the importance of academic freedom and freedom of expression in a university setting, it will be rare for this Tribunal to intervene where there are allegations of discrimination in relation to what another person has said during a public debate on social, political, and/or religious issues in a university.^{cxxix}

That said, the ubiquity of university respectful workplace policies undoubtedly serves to chill academic freedom and universities have been less willing than the Ontario Human Rights Tribunal to recognize the issue of academic freedom.

VII. Academic Freedom and the Question of Who Is the Employer – the Board or the University

In the final section of this paper, I want not to make a further comment on academic freedom but to draw attention to a worrisome decision by the British Columbia Court of Appeal that could allow academic freedom and other provisions of university collective agreements to be overridden. The implications of the decision are important as the only enforceable protection for academic freedom in Canada is the academic freedom language in post-secondary collective agreements.

The story of the BCCA decision began shortly after the negotiation of the 2006-2010 collective agreement between the University of British Columbia and the UBC Faculty Association. The agreement included a clause concerning the evaluation of teaching.^{cxxx} Subsequently the UBC Senate passed a policy on student evaluation of teaching which the UBC Faculty Association saw as contrary to the language of the collective agreement. The UBCFA filed a grievance asserting that the Senate policy was in violation of the collective agreement. Unable to resolve the matter internally, the UBCFA proceeded to arbitration. In response, the University of British Columbia raised a preliminary objection to the jurisdiction of the arbitrator to review the Senate policy on the basis that an arbitrator appointed under the Collective Agreement does not have jurisdiction to address a grievance with respect to this policy of the University Senate even

though it is agreed that it will affect members of the bargaining unit. In his preliminary award, Arbitrator David McPhillips ruled in favour of the University:

There is no doubt that this bicameral model of university governance causes practical problems and potentially place various components of the university structure at odds... the Senate is an administrative decision-maker and is exercising statutory authority when dealing with matters of academic governance; therefore, appeals to its policies in that area are by way of judicial review to the courts ... That result derives from the organizational structure of the University in the legislation and it is the University Act passed by the British Columbia legislature.^{cxxxii}

The UBC Faculty Association filed an appeal to the British Columbia Court of Appeal asking that the arbitrator's decision be set aside. "Because of the importance of the issue raised on this appeal to university communities", Mr. Justice Lowry made an order granting intervenor status to the Canadian Association of University Teachers, the Canadian Union of Public Employees, Local 2278, and the Association of Universities and Colleges of Canada (now Universities Canada).^{cxxxiii}

The BC Court of Appeal dismissed the appeal, rejecting the appellant's position that:

- (1) UBC is the employer under the Collective Agreement and, as such, all of its constituent parts, including the Senate, are bound by the terms of the Collective Agreement;
- (2) the Arbitrator should have interpreted the powers of the Senate under the Act in a manner consistent with the Board's statutory exercise of its powers in entering into the Collective Agreement. Further, that since there is no express power in the Act which requires the Senate to enact a student evaluation policy, the power to do so must be regarded as permissive and, as such, subject to being harmonized with the terms of a Collective Agreement lawfully entered into by the Board pursuant to its powers under the Act.

The Association argued that the bicameral system of governance common to many Canadian universities, with governance divided between a Board and a Senate, cannot be used as a justification for UBC, as employer, to renege on its obligations under the Collective Agreement.

In dismissing the appeal, however, Justice Prose wrote:

the Arbitrator was correct ... that he did not have jurisdiction to make an award which detracted from or altered the [Senate] Policy. Thus, to the extent that provisions of the Policy conflicted with terms of the Collective Agreement, he had no power to grant relief through harmonization of the Policy with the Collective Agreement, or any other remedy which effectively gave paramountcy or priority to the terms of the Collective Agreement.^{cxxxiii}

The Supreme Court of Canada denied the UBC Faculty Association's application, supported by CAUT, for leave to appeal the B.C. Court of Appeal decision.^{cxxxiv}

There have been no subsequent cases in which a postsecondary employer has claimed either that a provision of the collective agreement may be overridden by a Senate policy or that it cannot negotiate a provision that is inconsistent with a Senate policy. Nevertheless, the BC Court of Appeal decision is of potentially grave concern. In light of the Supreme Court denial of leave to appeal, if the matter occurs again, the issue can only be addressed through litigation. It will be essential, should that happen, that the academic staff association consult with CAUT immediately so that any grievance is framed and argued in a manner that will properly set the stage for taking the matter through the courts.

The Wilfrid Laurier University Faculty Association responded to the BC Court of Appeal decision by negotiating the following clause in its collective agreement:

11.1.2 The Parties acknowledge the rights, powers and responsibilities of the Senate as established by statute, by-law, and practice, except as such rights, powers and responsibilities may have been specifically abridged, delegated, or modified, by the Certification Order or this Agreement. The Senate shall exercise those rights, powers, and responsibilities in a manner which is fair, reasonable and consistent with the provisions of this Agreement.^{cxxxv}

Although presumably premised on the view that the Wilfrid Laurier University Act^{cxxxvi} differs University Act^{cxxxvii} in British Columbia, the clause has not been tested in arbitration or in the courts.

VIII. Conclusion

The objective of this paper is to provide background on the concept of academic freedom – its origin, history in Canada, components, and limits — so as to foster broader discussion to help ensure academic freedom is more fully and properly understood by academic staff, academic staff associations, labour lawyers, arbitrators, and judges; better reflected in collective agreement language, arbitration awards, and court decisions; and better understood by the public at large. Without this understanding and recognition within the academy, amongst arbitrators and judges, and beyond, academic freedom cannot survive in any meaningful way. It is not a perk, a luxury, a bonus, or an option. Academic freedom is an essential right so that academic staff can fulfil their societal mission to educate students and advance knowledge. That means, as I have written elsewhere,^{cxxxviii} the right to question the unquestionable, to explore new territory, to advance new ideas, to subject conventional wisdom – whether scholarly or popular – to rigorous critique, to challenge the status quo in the name of advancing our understanding of the world, and to share one's views with students, colleagues, and the public at large. These are not easy things to do. They make people, often powerful people, uncomfortable. Without academic freedom, these societally vital tasks mostly will not be done, and society will be the worse for it.

Endnotes

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- ⁱ To better understand the story of Socrates, see Robin Waterfield, *Why Socrates Died: Dispelling the Myths*. New York: W.W. Norton, 2009 and I.F. Stone, *The Trial of Socrates*. New York: Beacon, 1988. As Matthew W. Finkin and Robert C. Post note: “That the Athens of the fifth century B.B. could drive Socrates, Phidias and Protagoras to their deaths and drive away Anaxagoras, Alcibiades, and Diagoras proved rather early in the history of the West that religion, when supported by the state, can be hostile to enlightenment and personal liberty. [Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom*. New Haven: Yale University Press, 2009, p. 195.]
- ⁱⁱ For background on Galileo, see John L. Heilbron, *Galileo*. Oxford: Oxford University Press, 2010.
- ⁱⁱⁱ Finkin and Post, supra note i, p. 13-15. Translation by Susan Mackenzie and William Levitan.
- ^{iv} Wade Roland, *Galileo’s Mistake*. New York: Arcade Publishing, 2001, p. 116. Cited in Finkin and Post, supra note i, p. 14. See also Hiliary Gatti, *Giordano Bruno and Renaissance Science: Broken Lives and Organizational Power*. Ithaca, New York: Cornell University Press, 2002.
- ^v Wolfgang Drechsler, “Christian Wolff (1679-1744): A Biographical Essay” *European Journal of Law and Economics*, 4:111–128 (1997), p. 114-117; Finkin and Post, supra note i, p. 18-19. See also R. D. Anderson, *European Universities from the Enlightenment to 1914*. Oxford: Oxford University Press, 2004, pp. 24 – 25.
- ^{vi} Hans Thieme, *Die Geschichtlichen Voraussetzungen für Artikle 5,3 des Grundgesetzes der Bundesrepublik Deutschland, in Die Freiheit der Künste und Wissenschaften 7, 16 (1967)*. Translated and cited by Finkin and Post, supra note i, p. 19.
- ^{vii} Richard Hofstadter, “The European Heritage” in Richard Hofstadter and Walter P. Metzger, *The Development of Academic Freedom in the United States*. New York: Columbia University Press, 1955, pp 3-4. The University of Bologna, which more influenced the development of universities in southern Europe, emerged as a centre for the study of civil law, and later canon law, with the students, primarily sons of wealthy or noble families, who were both laypersons and clergy. The teachers were usually laypersons not under ecclesiastical supervision or jurisdiction. As wealthy and mature scholars, the students’ organizations or guilds were the university, with the teachers (masters’) little more than hired hands whom the students held to rigid academic discipline. The university focus was on civil law and medicine and were somewhat secular in their orientation.
- ^{viii} *Ibid.*, p. 44.
- ^{ix} *Ibid.*, pp. 17-18
- ^x A detailed and comprehensive history of the university and freedom of expression during this period is Hofstadter, supra note vii., pp. 3-77.
- ^{xi} *Ibid.*, p. 62.
- ^{xii} *Ibid.*, pp. 72-74.
- ^{xiii} V.H.H. Green, *The Universities*. London, Penguin, 1969, p. 40-43.
- ^{xiv} Matthew Mercer, “Dissenting Academies and the Education of the Laity.” *History of Education* 30(1): 35-58 (2001); Hofstadter, pp. 75-76.
- ^{xv} Hofstadter, supra note vii, p. 77.
- ^{xvi} Anderson, supra note v, p.20.
- ^{xvii} Or at least turning the nobility into a more loyal and efficient group by requiring serious educational qualifications and attracting them back to domestic universities.
- ^{xviii} Anderson, supra note v, pp. 20-22.
- ^{xix} The Elector of Hanover, Georg Ludwig, was also George II, King of Great Britain. The fact that the uniqueness of the University of Göttingen was largely the work of his minister is suggested by the fact he pursued no equivalent reforming initiatives with respect to British universities.
- ^{xx} Anderson, supra note v, p. 24.
- ^{xxi} *Ibid.*, pp 25-26.
- ^{xxii} In 1949, it was renamed Humboldt University.
- ^{xxiii} Walter Metzger, “The Age of the University” in Hofstadter and Metzger, supra note vii, p. 386-7.
- ^{xxiv} Anderson, supra note v, p. 58.
- ^{xxv} *Ibid.*, p. 39.

^{xxvi} Ibid., p. 191.

^{xxvii} Metzger, *supra* note xxiii, p. 371.

^{xxviii} Quoted in Metzger, *supra* note xxiii, p. 377.

^{xxix} Ibid., p. 377.

^{xxx} Alan Karp, "John Calvin and the Geneva Academy: Roots of the Board of Trustees," *History of Higher Education Annual* 5 (1985); John S. Brubacher and Willis Rudy, *Higher Education in Transition: A History of American Colleges and Universities*, 4th ed. New York: Routledge, 2017, p. 28; Michiel Horn, *Academic Freedom in Canada: A History*. Toronto: University of Toronto Press, 1999, p. 37.

^{xxxi} Finkin and Post, *supra* note i, p. 29.

^{xxxii} See Horn, *supra* note xxx, pp. 15-39 for examples of such conflicts in Canada up to World War I.

^{xxxiii} American Association of University Professors, "Appendix I: 1915 Declaration of Principles on Academic Freedom and Academic Tenure", *Policy Documents and Reports* (Eleventh Ed.), p. 297. a <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> (Accessed March 8, 2019)

^{xxxiv} Quoted in Metzger, *supra* note xxiii, p. 439

^{xxxv} Metzger, *supra* note xxiii, pp. 442-445; Thomas L. Haskell, "Justifying the Rights of Academic Freedom in the Era of 'Power/Knowledge'". In Louis Menand (ed.), *The Future of Academic Freedom*. Chicago: University of Chicago Press, 1996, p. 51-2.

^{xxxvi} UNESCO, *Recommendation concerning the Status of Higher-Education Teaching Personnel*. Paris, 1997. Para 25-30. http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html (Accessed February 15, 2020)

^{xxxvii} See Horn *supra* note xxx, pp. 15-39.

^{xxxviii} Joseph W. Flavelle, *Report of the Royal Commission on the University of Toronto, 1905-1906*. Toronto: Government of Ontario, 1906. See also Michael Andrew Boggs, "Ontario's Royal Commission on the University of Toronto, 1905-06: Political and Historical Factors that Influenced the Final Report of the Flavelle Commission." Unpublished M.S. Thesis, Department of Theory & Policy Studies in Education, Ontario Institute for Studies in Education of the University of Toronto, 2007.

^{xxxix} Horn, *supra* note xxx, 66-67.

^{xl} Ibid., 68-69.

^{xli} The National Conference of Canadian Universities (NCCU) and the Association of Universities and Colleges of Canada (AUCC) were the forerunners to Universities Canada – the organization of presidents of Canadian universities.

^{xlii} Donald C. Savage and Christopher Holmes, "The CAUT, the Crowe Case and the Development of the Idea of Academic Freedom in Canada", *CAUT Bulletin*, December 1975, p. 22; Horn, pp. 3-4, 12-13, 221-222

^{xliii} Canadian Association of University Teachers, "A History of CAUT", n.d. <https://www.caut.ca/about-us/history-of-caut> (Accessed March 9, 2019); Horn, p. 222.

^{xliv} See, for example, the Report to the CAUT Executive of the Ad Hoc Committee on Academic Freedom and Tenure (the Turner Committee), May 1959, quoted in Horn *supra* note xxx, p. 249.

^{xlv} Horn, *supra* note xxx, p. 224.

^{xlvi} See Kenneth McNaught, *Conscience and History: A Memoir*, Toronto: University of Toronto Press, 1999, pp. 110-132; Horn, pp. 220-245. Savage and Holmes, pp. 22-27.

^{xlvii} Horn, *supra* note xxx, p. 238-239; McNaught, *supra* note xlvi, p. 128-129.

^{xlviii} Vernon C. Fowke and Bora Laskin, *Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of Professor H.S. Crowe by United College, Winnipeg, Manitoba*. Ottawa: CAUT, November 21, 1958. [Published as a special issue of the CAUT Bulletin Volume 7, Number 3, January 1959], p. 38. <https://www.crowefoundation.ca/sites/default/files/crowereport.pdf> (Accessed March 8, 2019)

^{xlix} Ibid., p. 40.

^l Ibid., p. 38.

^{li} Stewart Reid, a historian at United College and one of Crowe's colleagues who resigned in solidarity, was appointed the first secretary. Reid's decision to resign, thereby losing both his job and his pension, had been a difficult one as, shortly before, he had been diagnosed with terminal cancer. See McNaught, p. 100.

^{lii} In the immediate aftermath of the Crowe case, CAUT appointed a committee on university governance and, in 1962, the National Conference of Canadian Universities and Colleges (later known as the Associations of Universities and Colleges of Canada and now as Universities Canada) accepted the CAUT's recommendation to create a commission to study Canadian university governance. Funded by the Ford Foundation, the CAUT and NCCUC appointed James Duff and Robert Berdahl to undertake a multi-year review. Their subsequent report [James Duff and Robert Berdahl, *University Government in Canada*. Toronto: University of Toronto Press, 1966] led to changes in governance practices in universities across the country. When, in the early 1990s, CAUT determined that these changes had not resolved key problems for academic staff in university governance, CAUT created the Independent Study Group on University Governance (ISGUG) composed of three respected academics who undertook a multi-year study of current university governance practices and made a long list of recommended changes, many of which were implemented across Canada [Ernst Benjamin, Ken McGovern and Guy Bourgeault, *Governance and Accountability: The Independent Study Group on University Governance*. Ottawa: CAUT, 1993].

^{liii} Academic staff are unionized at every public university in the Atlantic provinces except the University of King's College, at every public university in Quebec except McGill, at every public university in Ontario except Toronto, McMaster, Waterloo and two small federated colleges at Western (King's and Huron), and at every public university in Manitoba, Saskatchewan, Alberta and British Columbia.

^{liv} AAUP, *supra* note xxxiii, 298.

^{lv} University of Toronto, "Objectives of the University of Toronto – Teaching"

<http://www.governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/mission.pdf>

(Accessed March 8, 2019)

^{lvi} Finkin and Post, *supra* note i, p. 81.

^{lvii} Canadian Association of University Teachers, "Policy Statement on Academic Freedom", paragraph 2: "Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss..."

<https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>

(Accessed February 8, 2020)

^{lviii} UNESCO, 1997, *supra* note xxxvi, para 27 : "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..."

^{lix} See Bernie Hammond and Johannes Wolfart, *CAUT Ad Hoc Investigatory Committee Report on the situation and treatment of Dr. Michael Mason in the Department of History at Queen's University*, 2012.

<https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-the-situation-and-treatment-of-dr-michael-mason-at-queen%27s-university-%282012%29.pdf?sfvrsn=4> (Accessed February 2020);

"Open Letter to Michael Mason: We (Queen's University) Apologize (19 November 2012)"

<https://realacademicplanning.wordpress.com/2012/11/19/open-letter-to-michael-mason-we-queens-university-apologize-19-november-2012/>.

^{lx} Marina von Stackelberg. "Laurentian University professor removed for asking students to agree to profane language", *CBC*, January 4, 2016. https://www.cbc.ca/news/canada/sudbury/persinger-psychology-class-1.3389410?_vfz=tc%3DbVzCH-kTGjI (Accessed February 15, 2020); Ben Spurr, "Students rally in defence of controversial Laurentian University professor," *The Star*, January 6, 2016.

<https://www.thestar.com/news/canada/2016/01/06/students-rally-in-defence-of-controversial-laurentian-university-professor.html> (Accessed February 15, 2020); "Laurentian University administration violated academic freedom, arbitrator finds", *CBC*, Nov. 22, 2019. <https://www.cbc.ca/news/canada/sudbury/michael-persinger-laurentian-university-academic-freedom-violation-1.5370216> (Accessed February 15, 2020).

^{lxi} Esam Hussein and Robert MacDermid, *CAUT Ad Hoc Investigatory Committee Report into the termination of Dr. Laurent Leduc's participation in the continuing education division program on corporate social responsibility at the University of St. Michael's College, the University of Toronto*, December 2015. <https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-the-discontinuance-of-dr-laurent-leduc-at-the-university-of-st-michael%27s-college-university-of-toronto-%282006%29.pdf?sfvrsn=4> (Accessed February 16, 2020). "CAUT Committee Recommends Clarification of Rules for Continuing Education Positions," *CAUT Bulletin*, January 2006 <https://bulletin-archives.caut.ca/bulletin/articles/2006/01/caut-committee-recommends-clarification-of-rules-for-continuing-education-positions> (Accessed February 16, 2020).

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- ^{lxii} Sherri Zickefoose and erika stark, “ACAD instructor fired three weeks after student kills chicken in cafeteria for class project,” *Calgary Herald* May 9, 2013. <https://www.calgaryherald.com/news/calgary/acad+instructor+fired+three+weeks+after+student+kills+chicken+cafeteria+class+project/8357334/story.html> (Accessed February 16, 2020); Sherri Zickefoose, “Teachers lobby demands ACAD reinstate prof fired over chicken slaughter,” *Calgary Herald*, May 13, 2013 <https://bit.ly/37zOpyq> (Accessed February 16, 2020); “Instructor of chicken-killing art student reinstated,” *CBC*, May 15, 2013. <https://www.cbc.ca/news/canada/calgary/instructor-of-chicken-killing-art-student-reinstated-1.1319118> (Accessed February 16, 2020); “ACAD's full statement regarding reinstatement of teacher,” *CBC*, May 15, 2013 <https://www.cbc.ca/news/canada/calgary/acad-s-full-statement-regarding-reinstatement-of-teacher-1.1319117> (Accessed February 16, 2020).
- ^{lxiii} “Grade Changing and ‘Institutional Academic Freedom’: Disturbing Interpretations”, *FAUW Forum*, Number 106, March 2001. <https://uwaterloo.ca/faculty-association/sites/ca.faculty-association/files/uploads/files/Forum106.pdf> (Accessed February 16, 2020). For more discussion of this case, see p. 21 below.
- ^{lxiv} Victor M. Catano, *Report of the Independent Committee of Inquiry into the Situation of Dr. Denis Rancourt at the University of Ottawa*, December 2017. https://www.caut.ca/sites/default/files/final-independent-committee-of-inquiry-rancourt-university-of-ottawa-2017-12_0.pdf (Accessed February 16, 2020).
- ^{lxv} <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> (Accessed February 8, 2020)
- ^{lxvi} UNESCO, 1997, *supra* note xxxvi, para 27: “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 in carrying out research and disseminating and publishing the results thereof.”
- ^{lxvii} Canadian Association of University Teachers, *supra* note lvii, para 2: “Academic freedom includes the right, without restriction by prescribed doctrine, to ... freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works;”
- ^{lxviii} <https://governingcouncil.utoronto.ca/sites/default/files/import-files/mission4023.pdf> (Accessed February 8, 2020).
- ^{lxix} *Ibid.*, p. 292.
- ^{lxx} Thorsten Veblen, *The Higher Learning in America*. New York: Sagamore Press, 1957 (originally published 1918), p 165.
- ^{lxxi} See, for example, Janice Newson and Howard Buchbinder, *Universities Mean Business*. Toronto: Garamond Press, 1988; Sheila Slaughter & Larry L. Leslie, *Academic Capitalism*. Baltimore: Johns Hopkins University Press, 1999; James L. Turk (ed.), *The Corporate Campus*. Toronto: James Lorimer & Co., 2000. Derek Bok, *Universities in the Marketplace*. Princeton: Princeton University Press, 2003. Sheila Slaughter and Gary Rhoades, *Academic Capitalism and the New Economy*. Baltimore: Johns Hopkins University Press, 2004; Jennifer Washburn, *University Inc.* New York: Basic Books, 2005; Howard Woodhouse, *Selling Out*. Montreal and Kingston: McGill-Queens University Press, 2009; John Polanyi, “Why our scientific discoveries need to surprise us.” *The Globe and Mail*. October 1 2011 <https://www.theglobeandmail.com/opinion/why-our-scientific-discoveries-need-to-surprise-us/article4199194/> (Accessed February 8, 2020).
- ^{lxxii} Jennifer Washburn, *Big Oil Goes to College: An Analysis of 10 Research Collaboration Contracts Between Leading Energy Companies and Major U.S. Universities*. Washington. D.C.: Center for American Progress, 2010 <https://www.americanprogress.org/issues/green/reports/2010/10/14/8484/big-oil-goes-to-college/> (Accessed February 8, 2020) and CAUT, *Open for Business-On Whose Terms? An Analysis of 12 Collaborations between Canadian Universities, Donors and Governments*. Ottawa: CAUT, 2013. <https://www.caut.ca/sites/default/files/open-for-business-nov-2013.pdf> (Accessed February 8, 2020). See also Sheldon Krinsky, “Academic Freedom, Conflicts of Interest, and the Growth of University-Industry Collaborations.” Pp. 231-249 in James L. Turk (ed.), *Academic Freedom in Conflict: The Struggle over Speech Rights in the University*. Toronto: James Lorimer & Co., 2014; Risa L. Lieberwitz, “University-Industry Relations in the United States: Serving Private interests.” Pp. 250-271 in Turk (2014); James L. Turk, “Protecting the Integrity of Academic Work in Corporate Collaborations.” Pp. 272-283 in Turk (2014).

- ^{lxxiii} Jon Thompson, Patricia Baird, and Jocelyn Downie, *The Olivieri Report: The Complete Text of the Report of the Independent Inquiry Commissioned by the Canadian Association of University Teachers*. Toronto: James Lorimer & Co., 2001 – Available online at <https://www.caut.ca/docs/af-reports-independent-committees-of-inquiry/the-olivieri-report.pdf?sfvrsn=0> (Accessed February 16, 2020); Jon Thompson, Patricia Baird, and Jocelyn Downie, “Supplement to the Report of the Committee of Inquiry on the Case Involving Dr. Nancy Olivieri, the Hospital for Sick Children, the University of Toronto, and Apotex Inc.” January 30, 2002 <https://www.caut.ca/docs/academic-freedom/supplement-to-the-report-of-the-committee-of-inquiry.pdf?sfvrsn=0> (Accessed February 20, 2020). Elaine Gibson, Françoise Baylis, and Steven Lewis, “Dances with the pharmaceutical industry,” *CMAJ* 166(4): 448–450 (Feb 19, 2002) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC99354/> (Accessed February 16, 2020); F Baylis, “The Olivieri debacle: where were the heroes of bioethics?” *J Med Ethics* 30:44–49 (2004). <https://jme.bmj.com/content/medethics/30/1/44.full.pdf> (Accessed February 16, 2020); Arthur Schafer, “Institutional conflict of interest: attempting to crack the deferiprone mystery,” *J Med Ethics* Epub ahead of print: [7 February, 2020]. doi:10.1136/medethics-2019-105498. <https://inthepatientsinterest.org/wp-content/uploads/2020/01/2019-12-22-Schafer-Med-Ethics.pdf> (Accessed February 16, 2020).
- ^{lxxiv} Green, supra note xiii, p. 148.
- ^{lxxv} For a historical overview of governance at Oxford and Cambridge, see Green, supra note xiii, pp. 148–161.
- ^{lxxvi} Ibid., p. 295.
- ^{lxxvii} Matthew Finkin, “Intramural Speech, Academic Freedom, and the First Amendment” *Texas Law Review* 66: 1323, 1335 (1988).
- ^{lxxviii} Peter McNally, “1801 - 1855 James McGill and a vision of learning”, *McGill Reporter* special issue - October 14, 2011, p. 3. <https://reporter.mcgill.ca/wp-content/uploads/2011/10/HISTORY-ISSUE.pdf> (Accessed February 16, 2020).
- ^{lxxix} See references supra note xxxviii.
- ^{lxxx} In Saskatchewan universities, this senior academic body is known as the university council and in Alberta universities it is the general faculties council.
- ^{lxxxi} Fowke and Laskin, supra note xlvi, p. 38.
- ^{lxxxii} Canadian Association of University Teachers, supra note lvii “Policy Statement on Academic Freedom.” Para 2: “Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to ... express one’s opinion about the institution, its administration, and the system in which one works.”
- ^{lxxxiii} UNESCO, supra note xxxvi, para. 27: “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 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.”
- ^{lxxxiv} John Baker, Mark Gabbert and Penni Stewart, *Report of the Ad Hoc Investigatory Committee to Examine the Situations of Drs. Isla, Van Ingen & Corman, & Messrs. Wood & Fowler at Brock University*. Ottawa: CAUT, November 2015. <https://www.caut.ca/sites/default/files/caut-ahic-report-brock-isla-van-ingen-corman-wood-fowler-2015-11.pdf> (Accessed February 13, 2020).
- ^{lxxxv} Jason Brown and Terri Van Steinburg, *Report of the Ad Hoc Investigatory Committee on the Seizure & Dismantling of Blathering On in Krisendom, a Satirical Sculpture by George Rammell, Department of Studio Art, Capilano University*, June 2015 [https://www.caut.ca/docs/default-source/reports/caut-ahic-report-capilano-rammell-sculpture-studio-art-\(2015-06\).pdf?sfvrsn=2](https://www.caut.ca/docs/default-source/reports/caut-ahic-report-capilano-rammell-sculpture-studio-art-(2015-06).pdf?sfvrsn=2) (Accessed February 16, 2020).
- ^{lxxxvi} Albert Katz and Jonathan Haxell, *Report of the CAUT Ad Hoc Investigatory Committee on King’s University College and Professor Ken Luckhardt*, September 24, 2013. <https://www.caut.ca/docs/default-source/reports/report-of-kings-luckhardt-inquiry---final.pdf?sfvrsn=6> (Accessed February 16, 2020).
- ^{lxxxvii} William Bruneau and Timothy Quigley, *Trent University & the Denial of Professor George Nader’s Reappointment*, March 2007. <https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-trent-university-and-the-denial-of-professor-george-nader%27s-reappointment-%282007%29.pdf?sfvrsn=4> (Accessed February 16, 2020).

^{lxxxviii} CBC News, “Prof. Robert Buckingham fired after criticizing Saskatchewan university plan,” May 14, 2014. <https://www.cbc.ca/news/canada/saskatoon/prof-robert-buckingham-fired-after-criticizing-saskatchewan-university-plan-1.2642637> (Accessed February 16, 2020); Canadian Press, “University of Saskatchewan returns fired prof’s tenure”, *Macleans*, May 15, 2014. <https://www.macleans.ca/education/university/saskatoon-university-returns-tenure-to-fired-professor/> (Accessed February 16, 2020); “‘No excuse for what happened’: University of Saskatchewan concedes it ‘blundered’ when it fired prof Robert Buckingham”, *National Post*, May 15, 2014 <https://nationalpost.com/news/canada/no-excuse-for-what-happened-university-of-saskatchewan-concedes-it-blundered-when-it-fired-prof-robert-buckingham> (Accessed February 16, 2020); Allan Maki, “Saskatchewan dean who spoke out gets kudos from around the world”, *Globe and Mail*, May 16, 2014. <https://www.theglobeandmail.com/news/national/saskatchewan-dean-who-spoke-out-gets-kudos-from-around-world/article18737419/> (Accessed February 16, 2020); CBC News, “Returned U of S Prof. Robert Buckingham gets hero’s welcome”, May 21, 2014. <https://www.cbc.ca/news/canada/saskatoon/returned-u-of-s-prof-robert-buckingham-gets-hero-s-welcome-1.2650317> (Accessed February 16, 2020); Simona Chiose, “University of Saskatchewan ends TransformUS”, *Globe and Mail*, September 9, 2014. <https://www.theglobeandmail.com/news/national/education/university-of-saskatchewan-ends-transformus/article20498278/> (Accessed February 16, 2020).

^{lxxxix} Victor M. Catano and Toni Samek, *Report of the Ad Hoc Investigatory Committee to Examine the Situation of Dr. Morteza Shirkhanzadeh in the Faculty of Engineering & Applied Science at Queen’s University*, May 2015 [https://www.caut.ca/docs/default-source/reports/caut-ahic-report---queen's-dr-shirkhanzadeh-engineering-applied-science-\(2015-05\).pdf?sfvrsn=2](https://www.caut.ca/docs/default-source/reports/caut-ahic-report---queen's-dr-shirkhanzadeh-engineering-applied-science-(2015-05).pdf?sfvrsn=2) (Accessed February 16, 2020).

^{xc} As the right has come to be recognized, the only constraint of relevance to the university is whether the expression indicates a specific unwillingness or incapacity to carry out one’s teaching and/or scholarly responsibilities.

^{xcⁱ} AAUP *Declaration*, supra note xxxiii, p. 299.

^{xcⁱⁱ} Canadian Association of University Teachers, *Policy on Academic Freedom*, para 4.

^{xcⁱⁱⁱ} UNESCO, supra note xxxvi, para 26.

^{xc^{iv}} Finkin and Post, supra note i, p. 139.

^{xc^v} See Stephen J. Whitfield, Scott Nearing: Apostle of American Radicalism. New York: Columbia University Press, 1974.

^{xc^{vi}} Horn, supra note xxx, p. 67.

^{xc^{vii}} *Ibid.*, pp. 68-69.

^{xc^{viii}} American Association of University Professors, *Academic Freedom and Tenure: The University of Illinois at Urbana-Champaign*. April 2015. https://www.aaup.org/file/UIUC%20Report_0.pdf (Accessed March 16, 2019). See also John K. Wilson, “Academic Freedom and Extramural Utterances: The Leo Koch and Steven Salaita Cases at the University of Illinois.” *Journal of Academic Freedom* 6. <https://www.aaup.org/sites/default/files/Wilson.pdf> (Accessed March 16, 2019).

^{xc^{ix}} *Report on the Implications for Academic Freedom in the Case of Andrew Potter at McGill University*, CAUT, November 2018 https://www.caut.ca/sites/default/files/caut_report_andrew_potter_mcgill_university_2018-11.pdf (Accessed February 12, 2020); CBC As It Happens, “McGill ‘blatantly failed’ to protect Andrew Potter’s academic freedom, prof says”, March 23, 2017 <https://www.cbc.ca/radio/asithappens/as-it-happens-thursday-edition-1.4037885/mcgill-blatantly-failed-to-protect-andrew-potter-s-academic-freedom-prof-says-1.4037892> (Accessed February 12, 2020); Simona Chiose and Ingrid Peritz, “McGill under fire after Andrew Potter resigns over Quebec column flap”, *The Globe and Mail*, March 23, 2017 <https://www.theglobeandmail.com/news/national/mcgill-under-fire-after-andrew-potter-resigns-over-quebec-column-flap/article34394368/> (Accessed February 12, 2020)

^c *Report of the CAUT Ad Hoc Investigatory Committee into the Enbridge Centre for Corporate Sustainability at the University of Calgary*, October 2017 https://www.caut.ca/sites/default/files/caut-ahic-report-calgary-enbridge-centre-for-corporate-sustainability_2017-10.pdf (Accessed February 12, 2020).

^{ci} Sarah Boseley, “Bitter Pill”, *The Guardian*, May 21, 2002

<https://www.theguardian.com/education/2002/may/21/internationaleducationnews.mentalhealth> (Accessed February 12, 2020). The principal documents regarding the University of Toronto cancelling Dr. Healy’s

appointment for his extramural speech are available at <https://www.pharmapolitics.com/> (Accessed February 12, 2020). See also David Healy, *Let Them Eat Prozac*. Toronto: James Lorimer & Co., 2003, pp. 311-322.

^{cii} <http://laws-lois.justice.gc.ca/eng/Const/page-15.html> (Accessed March 12, 2019)

^{ciii} William W. Van Alstyne, “The Specific Theory of Academic Freedom and the General Issue of Civil Liberty” *Annals of the American Academy of Political and Social Science*, 404 (1), 1972, pp. 146-147. William & Mary Law School Legal Studies Research Paper No. 09-185. <https://bit.ly/2uPDrHN> (Accessed February 16, 2020).

^{civ} Finkin and Post, *supra* note i, p. 59.

^{cv} Joan W. Scott, “Academic Freedom as Ethical Practice” in Louis Menand (ed.), *The Future of Academic Freedom*. Chicago: University of Chicago Press, 1996, p. 170.

^{cvi} *Ibid.*, p. 175.

^{cvii} Finkin and Post, *supra* note i, p. 61.

^{cviii} See Leslie Green, “Civil Disobedience and Academic Freedom” *Osgoode Hall Law Journal* 41.2/3 (2003) : 381-405. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol41/iss2/12> (Accessed February 12, 2020). Green argues that academic freedom does not give academic staff a right to engage in civil disobedience, not even on campus. But he adds that academic freedom does protect them in studying, discussing, assessing, and even recommending civil disobedience—even when their opinions and recommendations are misguided or wrong. He cites relevant cases.

^{cix} For descriptions of procedural fairness and natural justice, see CMPA, “Understanding your rights—The rules of natural justice”, November 2018, <https://www.cmpa-acpm.ca/en/advice-publications/browse-articles/2018/understanding-your-rights-the-rules-of-natural-justice> (Accessed February 13, 2020); Office of the Ombudsperson, Lakehead University, “Principles of Fairness”, n.d., <https://www.lakeheadu.ca/faculty-and-staff/departments/services/ombuds-office/natural-justice> (Accessed February 13, 2020); Government of Canada, “Natural Justice and Procedural Fairness”, March 7, 2015, <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/administration/decisions/natural-justice-procedural-fairness.html> (Accessed February 13, 2020).

^{cx} While there has been precedent for universities assuming this obligation, there is no assurance unless the obligation is included in the collective agreement. There is a similar obligation on universities imposed by the *Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans* – TCPS 2 (2018), Section 5.1 in any case where a researcher faces an attempt by legal means (e.g., warrant, subpoena) to compel disclosure of confidential participant information https://ethics.gc.ca/eng/tcps2-eptc2_2018_chapter5-chapitre5.html# (Accessed February 13, 2020).

^{cxii} For background, see Russel D. Ogden, “Observing a Self-Chosen Death.” Pp. 15-37 in Jennifer M. Kilty, Sheryl C. Fabian, Maritza Felices-Luna (eds.), *Demarginalizing Voices: Commitment, Emotion, and Action in Qualitative Research*. Vancouver: UBC Press, 2014. In the face of the university’s

^{cxiii} “York University Draws Criticism” *CAUT Bulletin*, May 2004. <https://bulletin-archives.caut.ca/bulletin/articles/2004/05/york-university-draws-criticism> (Accessed March 25, 2022)

^{cxiiii} For background on this case, see Baker, Gabbert & Stewart, *supra* note lxxxiv.

^{cxv} *Ibid.*, p. 148

^{cxvi} Len Findlay, “Institutional Autonomy and Academic Freedom in the Managed University.” Pp. 49-61 in Turk (2014) *supra* note lxxii.

^{cxvii} David Rabban, “Professors Beware: The Evolving Threat of ‘Institutional’ Academic Freedom.” Pp. 23-48 in Turk, 2014, *supra* note cii.

^{cxviii} University of Waterloo v. University of Waterloo Faculty Association, 2001 n.r. (Kennedy) <https://uwaterloo.ca/faculty-association/sites/ca.faculty-association/files/uploads/files/UWaterlooLipshitz.pdf>

^{cxix} CAUT <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom> (Accessed March 25, 2022)

^{cxix} See, for example, Siva Vaidhyanathan, *Antisocial Media*. Oxford: Oxford University Press, 2018; Eli Pariser, *The Filter Bubble*. New York: Penguin, 2011; Tom Nichols, *The Death of Expertise*. New York, Oxford University Press, 2017. Andrew Marantz, “How Social-Media Trolls Turned U.C. Berkeley Into a Free-Speech Circus.” *The New Yorker*. July 2, 2018. <https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus> (Accessed March 16, 2019);

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- ^{cxx} John K. Wilson, "The Changing Media and Academic Freedom: *The impact of social media on the faculty*" *Academe*. January-February 2016. <https://www.aaup.org/article/changing-media-and-academic-freedom#.XI755yhKg2w> (Accessed February 16, 2020).
- ^{cxxi} Canadian Association of University Teachers, "Policy Statement: Academic Freedom, Electronic Communications and Social Media." November 2017. <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom-and-electronic-communications> (Accessed March 16, 2019).
- ^{cxxii} Wilson, "Changing Media and Academic Freedom." *Supra* note cxx.
- ^{cxxiii} See Jamie Cameron, "Giving and Taking Offense: Civility, Respect, and Academic Freedom. Pp. 287-304 in Turk (2014) *supra* note lxxii.
- ^{cxxiv} J.S. Mill, *On Liberty*. London: Crofts Classics, 1947 (1859), 53. Quoted in Walter P. Metzger, "Professional and Legal Limits to Academic Freedom", *Journal of College and University Law* 20(1), 1993, pp. 3-4.
- ^{cxxv} Baker, Gabbert & Stewart, *supra* note lxxiv.
- ^{cxxvi} Albert Katz and Jonathan Haxell, Report of the CAUT Ad Hoc Investigatory Committee on King's University College and Professor Ken Luckhardt. September 24, 2013. <https://www.caut.ca/docs/default-source/reports/report-of-kings-luckhardt-inquiry---final.pdf?sfvrsn=6> (Accessed March 16, 2019)
- ^{cxxvii} Marjorie Heins, "Untangling the Steven Salaita Case" *Academe Blog*, September, 2014. <http://academeblog.org/2014/09/07/untangling-the-steven-salaita-case/> (Accessed March 16, 2019); AAUP, "Academic Freedom and Tenure: The University of Illinois at Urbana-Champaign." https://www.aaup.org/file/UIUC%20Report_0.pdf (Accessed March 17, 2019);
- ^{cxxviii} Scott Jascek, "Suspended for Irony and Sighing" *Inside Higher Ed*, October 31, 2014 <https://www.insidehighered.com/news/2014/10/27/british-university-backs-down-suspension-sighing-and-irony> (Accessed March 8, 2019); David Matthews, "Thomas Docherty to face insubordination charges in tribunal" *Times Higher Education*, July 24, 2014, <http://www.timeshighereducation.co.uk/news/thomas-docherty-to-face-insubordination-charge-in-tribunal/2014711.article>; (Accessed February 16, 2020); John Morgan, "Thomas Docherty 'to be cleared of all charges' by Warwick", *Times Higher Education*, October 21, 2014. <http://www.timeshighereducation.co.uk/news/thomas-docherty-to-be-cleared-of-all-charges-by-warwick/2016510.article> (Accessed March 8, 2019).
- ^{cxxix} *McKenzie v. Isla*, 2012 HRTO 1908 <https://www.canlii.org/en/on/onhrt/doc/2012/2012hrto1908/2012hrto1908.html?autocompleteStr=%202012%20HRTO%201908&autocompletePos=1> (Accessed March 14, 2019). For details about this case, see Baker, Gabbert & Stewart, *supra* note c.
- ^{cxxx} Collective Agreement between the University of British Columbia and the Faculty Association of the University of British Columbia, July 1, 2006 to June 30, 2010, article 4.02. https://www.facultyassociation.ubc.ca/assets/media/UBC-UBCFA_Collective_Agreement_2006.pdf (Accessed February 15, 2020).
- ^{cxxxi} University of British Columbia and the University of British Columbia Faculty Association, Preliminary Award, March 12, 2008. (David C. McPhillips). https://www.facultyassociation.ubc.ca/assets/media/arb_teachingevaluations2008.pdf (Accessed February 15, 2020).
- ^{cxxxii} *Faculty Association of the University of British Columbia v. University of British Columbia*, 2008 BCCA 376. <http://canlii.ca/t/20vnn> (Accessed February 15, 2020).
- ^{cxxxiii} *Faculty Association of the University of British Columbia v. University of British Columbia*, 2010 BCCA 189, <http://canlii.ca/t/29c75> (Accessed February 15, 2020).
- ^{cxxxiv} "Supreme Court Denies UBCFA Appeal Request" CAUT Bulletin. December 2010 <https://bulletin-archives.caut.ca/bulletin/articles/2010/12/supreme-court-denies-ubcfa-appeal-request> (Accessed February 2020).
- ^{cxxxv} Collective Agreement between Wilfrid Laurier University and Wilfrid Laurier University Faculty Association for Full-Time Faculty and Professional Librarians, July 1, 2017 to June 30, 2020, article 11.1.2 <https://www.wlufa.ca/wp-content/uploads/2014/06/wlufa-collective-agreement-full-time-with-tabs.pdf> (Accessed February 16, 2020).
- ^{cxxxvi} <https://www.wlu.ca/about/governance/assets/resources/wilfrid-laurier-university-act.html>

^{cxxxvii} <https://www.canlii.org/en/bc/laws/stat/rsbc-1996-c-468/latest/rsbc-1996-c-468.html>

^{cxxxviii} James L. Turk, "Introduction" pp 19-20 in James L. Turk (ed.), *Academic Freedom in Conflict: The Struggle over Speech Rights in the University*. Toronto: James Lorimer & Co., 2014.