

**PROTECTING ACADEMIC FREEDOM AND FREEDOM OF
EXPRESSION ON CAMPUS : A SUBMISSION TO THE QUEBEC
GOVERNMENT ON BILL 32, AN ACT RESPECTING ACADEMIC
FREEDOM IN THE UNIVERSITY SECTOR**

May 23, 2022

Brief of the **Justice Centre for Constitutional Freedoms** (JCCF.ca) to the
Honourable Danielle McCann, Ministre de l'Enseignement supérieur

By
Lindsay Shepherd, MA, Campus Free Speech Fellow, JCCF
and
Samuel Bachand, avocat, LIS s.a.

Madame la ministre de l'Enseignement supérieur,

The Justice Centre for Constitutional Freedoms supports the principle stated at section 3 *in limine* of the current version of Bill 32, *An Act respecting academic freedom in the university sector*, i.e. that “[...] *academic freedom is the right [...] to engage freely and without doctrinal, ideological or moral constraint in an activity through which the person contributes, in their field of activity, to carrying out the mission of an educational institution.*”

A climate of self-censorship and ideological conformity is unfortunately defining the university experience for today’s faculty, staff, and students. A bill on academic freedom will reiterate that universities exist to promote truth-seeking and open inquiry – a reminder that many on campus are desperately in need of. The Québec *Charter* and the *Canadian Charter* do not cease to exist when one steps onto a university campus: laws regarding defamation, harassment, hate speech and discrimination still apply. It is counter to the spirit of higher education for a professor or student to be subject to more limitations on academic expression in a university building than they would be if they were on the sidewalk across the street.

Bill 32 would help to restore the proper hierarchy of rights and values in Québec universities, with academic freedom and free speech at the very top, far above social justice activism in management.

1) BACKGROUND

Freedom of expression is a core component of intellectual inquiry and the basis for academic freedom. In the words of Justice Paperny of the Court of Appeal of Alberta:

“ Academic freedom and freedom of expression are inextricably linked. There is an obvious element of free expression in the protection of academic freedom, whether limited to the traditional conception of academic freedom as protecting the individual academic professional, or applied more broadly to promote discussion in the university community as a whole. Interestingly, the protection of free speech on campus is not universally seen as a threat to academic freedom. The United States Supreme Court has linked the two concepts, noting that:

... state colleges and universities are not enclaves immune from the sweep of the First Amendment. ... the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. ... The college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas', and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.: Healy v James, 408 U.S. 169 (1972) at 180.

The United Kingdom has also recognized the obligation of universities to promote freedom of speech on campus. The Education (No. 2) Act 1986 imposes an obligation on universities and colleges to take the steps that “are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers”: section 43(1), quoted in Barendt, 2005, at 501.

In my view, there is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in the Charter are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist. [...]”

Western institutions of higher education have been built upon freedom of inquiry, freedom of thought, and the freedom to criticize. Because of their position as places of discovery, research, knowledge, intellectual exploration, and discussion, universities can never be “safe spaces” where some topics, words, or ideas are off limits for fear of offending or upsetting others. The right to express oneself in a peaceful manner necessarily constitutes a right to offend.

Although universities should be champions of free expression and academic freedom, these values have been in serious decline for at least the last decade. This is a complex problem with no simple solution, except possibly this one: to inform universities that they will not receive taxpayer funding unless they meet specific conditions of upholding academic freedom and freedom of expression on campus.

¹ *Pridgen v. University of Calgary*, 2012 ABCA 139, paras. 115 to 117.

Philosopher and public servant John Stuart Mill's 1859 seminal text *On Liberty* is almost always evoked in academic discussions of free speech. Mill's discussion of freedom of speech analyzed how the "tyranny of the majority" in democratic societies could lead to the stifling of public opinion. The tyranny of the majority refers to how minority groups can be oppressed under a "majority rules" system where the majority's interests are imposed on others. Mill states that if "*all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.*" Indeed, even if only one person in some eight billion held a certain opinion, society would still not be justified in suppressing the opinion of the one dissident, as the opinion of that sole individual may possibly be correct.

As professors and authors Richard Reeves and Jonathan Haidt explain, "Mill's main concern was not government censorship. It was the stultifying consequences of social conformity, of a culture where deviation from a prescribed set of opinions is punished through peer pressure and the fear of ostracism."² Mill considered it an act of evil to stifle or silence someone's expression. According to Mill, "all silencing of discussion is an assumption of infallibility," as censoring others implies that the absolute truth is already known. This is anything but humble on the part of the person who is silencing someone else in favour of their own opinion.

Fundamentally, Mill was simply asking us to be open-minded and listen to others. He also urged that when holding an opinion, one should know how to argue against the opposing view, for only then could one have complete confidence in their own opinion³. Mill famously and vividly explained that if a certain idea is not "fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth." Ultimately, one of the most important reasons why we mustn't suppress speech is because "true" and "false" opinions might actually share the truth between them. Mill concedes that popular opinions are often true, but "seldom or never the whole truth." Often, opinions which are deemed heretical contain some suppressed or neglected truth, which is precisely why they should not be censored or stifled. Societies that do not tolerate dissent, heresy and the questioning of conventional wisdom are not true democracies, after all.

² Richard V. Reeves, Jonathan Haidt, Dave Cicirelli (2018), "All minus one." 1st ed.
<https://heterodoxacademy.org/library/all-minus-one/>

³ Mill again (in *On Liberty*): "*He who knows only his own side of the case knows little of that.*"

Professor Jonathan Haidt observes a generational and cultural gap in who most values freedom of expression: members of the general public over age 40 tend to be overwhelmingly supportive of freedom of expression and disagree with the view that college students ought to be shielded from certain ideas. It is professors under the age of 35 and university students who are more likely to endorse a culture of “coddling” on campus – a culture where the priority is not students’ intellectual engagement, but their perceived “safety” and mental wellness.

It is crucial that Canadian university campuses allow professors, lecturers, students and visiting speakers to participate in free and robust discussions about any topic they feel is worth questioning, as this will result in an intellectually engaged society where people are willing to work out their differences and find common ground. These worthwhile values start in the classroom. After all, many students and professors are currently scared to speak up not because they fear the government, but because they fear each other – they are scared of social ostracism.

We need to be able to understand and properly repudiate objectionable ideas, not censor them, and in the spirit of viewpoint diversity also realize that some people may hold ideas that we vehemently disagree with. If our universities place limits on freedom of expression, they are signaling to society that they are not, in fact, allowing the unhindered and open-minded pursuit of knowledge and truth; rather, they are only permitting (and often promoting) particular ideological narratives.

In a 2021 study on political discrimination in academia, University of London professor Eric Kaufmann found “a significant portion of academics discriminate against conservatives in hiring, promotion, grants and publications.”⁴ Forty-five percent of Canadian academics would not hire a Trump supporter, and 73% of American and Canadian academics would not feel comfortable dining with someone who opposes the idea of trans women (biological males) accessing women’s shelters.

Seventy-three percent of Canadian social science and humanities academics sampled from the 40 top-ranked universities identify as left-wing, with just 4% identifying as right-wing. Seeing as right-wing academics are such a minority, 6 in 10 conservative Canadian academics in the social sciences and humanities say there is a hostile climate for their beliefs in their department. In the

⁴ Eric Kaufmann (2021), “Academic freedom in crisis: Punishment, political discrimination, and self-censorship.” <https://cspicenter.org/reports/academicfreedom/>

US, over a third of conservative academics and PhD students have been threatened with disciplinary action for their views. Because right-leaning or conservative students feel censored and discriminated against in the university environment, they self-select out of academia and the imbalance of political representation at the university reproduces itself. This imbalance contributes to the climate of self-censorship and stifled discussion and research on campus.

2) A BRIEF TOUR THROUGH RECENT ACADEMIC FREEDOM ISSUES

In December 2021, associate professor Dr. Frances Widdowson was fired by Mount Royal University (MRU), despite having tenure. Dr. Widdowson, an accomplished academic known for challenging the prevailing narratives and policies surrounding Indigenous peoples, had been employed at MRU since 2008. However, she was accused by MRU president Tim Rahilly of contributing to a “toxic workplace environment,” thereby “negatively impacting the mission and reputation of the University.”⁵

Dr. Widdowson has argued that Indigenous policy development over the past thirty-plus years has been manipulated by elite non-aboriginal lawyers and consultants – she has pointed out that the hundreds of millions of dollars made off of the continued legal battles of Indigenous peoples never seem to address or solve the high rates of substance abuse, poverty or violence in Indigenous communities.

She has also published many pieces critiquing university indigenization initiatives, land acknowledgments, and the hyperbolic narrative that the “unmarked graves” and soil disturbances uncovered this past spring are indicative of “genocide.” In Dr. Widdowson’s view, initiatives to “indigenize” university curricula dishonour the scientific method. Because of her views and her willingness to engage with politically incorrect perspectives, Dr. Widdowson has been targeted by ideologues for years, many of whom are relentless in trying to smear her as “racist” and “anti-Indigenous.”

⁵ Lindsay Shepherd (3 January 2022), “Professor who criticized indigenization agenda fired by university.” True North. <https://tnc.news/2022/01/03/professor-who-criticized-indigenization-agenda-fired-by-university/>

The case is going to arbitration – but for now, Dr. Widdowson is out of a job, after 13 years of academic research and scholarship and teaching, because she dared to think critically.

In February 2021, Mount Allison University professor Rima Azar was suspended without pay for over six months because she wrote on her personal blog that systemic racism in Canada and New Brunswick isn't real and Black Lives Matter is a radical movement. She was banned from the university campus for the duration of her suspension. Dr. Azar had to resort to taking legal action, and she and her university reached a confidential settlement in early 2022.

At the University of Ottawa in the fall of 2020, professor Verushka Lieutenant-Duval was suspended for using, for the purpose of teaching, the full “n-word” while discussing how certain social groups have reclaimed slurs. Dr. Lieutenant-Duval was making the point that just as black people have reclaimed the “n-word,” the LGBT community has reclaimed “queer” and disabled people have taken on “crip.” Lieutenant-Duval invoked the word with absolutely no racist intent. She was eventually reinstated at her teaching position after suffering from very public reputational damage.

In March 2020, University of Alberta professor of anthropology Kathleen Lowrey, who describes herself as a gender-critical feminist, learned that an unspecified number of informal complaints had been made against her by students claiming she has made the classroom learning environment “unsafe.” Dr. Lowrey, who was serving as the anthropology department’s Associate Chair of Undergraduate Programs, was subsequently asked to resign from her role. Dr. Lowrey refused, and stated that if the University wanted to fire her from her position as chair, they could provide her with a letter laying out the reasons for her dismissal. She then received a letter from Dean of Arts Lesley Cormack, which informed her that “your appointment to the position of Associate Chair, Undergraduate Studies in the Department of Anthropology will conclude effective July 1, 2020. You are unfortunately not able to be as effective in this administrative role as the Department and Faculty require, and it is not in the best interests of the students or the University for you to carry on.”⁶ Cormack offered no concrete reasons as to why Dr. Lowrey was being dismissed. Neither Dean of Students André Costopoulos nor the UAlberta department of

⁶ Lindsay Shepherd (10 June 2020), “Gender-critical feminist professor removed from service role for making students feel ‘unsafe.’” True North. <https://tnc.news/2020/06/10/gender-critical-feminist-professor-removed-for-making-students-feel-unsafe/>

Equity, Diversity, and Inclusion and Human Resources Services would speak to the question of how many individuals complained about Dr. Lowrey and what the complaints alleged.

A University of Victoria adjunct professor, zoologist Dr. Susan Crockford, had been teaching at the university for 15 years before she was advised in May 2019 that her time as an adjunct professor had ended, as an internal committee had voted against the renewal of her status. Dr. Crockford, an accomplished scholar who specializes in animal bone identification and polar bears, had argued against the contemporary climate change narrative by stating that polar bears are not threatened with extinction, and that their populations are in fact thriving. No reasons were provided for her non-renewal, leading Dr. Crockford to conclude her contract was terminated “in order to suppress views on polar bears and related climate change issues.” There was an earlier sign that the university was uncomfortable with Dr. Crockford’s research. She had been part of the UVic Speakers Bureau for several years, delivering lectures to schools and community groups. One of her presentations was about the origins of domestic dogs, and the other was titled “Polar Bears: Outstanding Survivors of Climate Change.” But in 2017, she was banned from the Speakers Bureau for not confirming she could properly “represent the university.” Dr. Crockford told the *Financial Post* the revocation of her position was “an academic hanging without a trial, conducted behind closed doors.”⁷

Mark Hecht, an instructor at Mount Royal University’s (MRU) Department of Earth and Environmental Sciences, published an op-ed in the Vancouver Sun in September 2019 titled “Ethnic diversity harms a country's social trust, economic well-being, argues professor.” The article reviewed current research on the topic of social trust in multiethnic societies and posited that immigration policy ought to be based on norms of cultural compatibility and cohesion. After immediate backlash from politicians, activists, and journalists, the Vancouver Sun deleted the piece from their website. Some of Mr. Hecht’s colleagues sent a letter to MRU President Tim Rahilly expressing that they were upset the university didn’t publicly condemn Mr. Hecht’s “blatantly Islamophobic and xenophobic” op-ed. Though the university publicly affirmed Mr. Hecht’s right to freedom of expression, the field school Mr. Hecht was set to lead in the Spring 2020 semester was cancelled sans explanation.

⁷ Donna Laframboise (16 October 2019), “Was this zoologist punished for telling school kids politically incorrect facts about polar bears?” *Financial Post*. <https://financialpost.com/opinion/was-this-zoologist-punished-for-telling-school-kids-politically-incorrect-facts-about-polar-bears>

These are only some higher-profile examples that make their way into the media: there are countless more stories from academics who do not go public.

3) CASE LAW AND POLICY DEVELOPMENT

In *McKinney*⁸, a case from 1990, the Supreme Court of Canada stated that “*academic freedom and excellence is essential to our continuance as a lively democracy.*” The Court acknowledged that the protections afforded by the **Canadian Charter of Rights and Freedoms**⁹ extended to the academic setting insofar as state action (federal or provincial) was involved, but stopped short of extending *Charter* protections to all university activities. While universities are performing a public service, this does not in itself make them part of government, and their actions do not fall within the ambit of the Charter unless they are implementing government policy and forming an integral part of the government apparatus with respect to the disputed issue¹⁰.

That does not mean that university administrators are completely shielded from judicial scrutiny, namely on Charter grounds, of those of their policies or decisions that impinge upon the academia’s fundamental freedoms. The **Québec Charter of Human Rights and Freedoms**¹¹, which enjoys a quasi-constitutional status, provides some protection where provincial state action¹² or actions between individuals, corporations or other private entities¹³, purport to limit a protected right such as freedom of expression¹⁴. However, unlike their Albertan counterparts¹⁵, Québec courts have generally been reluctant to intervene in the internal affairs of CEGEPS and universities¹⁶, despite the fact that the Québec *Charter* expressly applies to private law issues. In the context of student demonstrations, Québec case law has often skipped any serious

⁸ *McKinney v. University of Guelph*, [1990] 3 SCR 229; for a more recent example, see *Morin v. Regional Administration Unit #3 (P.E.I.)*, 2002 PESCAD 9.

⁹ Namely freedom of expression: “[...] 2. Everyone has the following fundamental freedoms: [...] (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [...]”

¹⁰ See *McKinney*, supra, at pp. 272 and 273.

¹¹ *Charter of Human Rights and Freedoms*, CQLR c. C-12.

¹² *Id.*, s. 54.

¹³ *Id.*, s. 55.

¹⁴ See s. 3 of the Québec *Charter*: “[...] 3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.”

¹⁵ For a thorough review of the case law, see *UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1, at paras. 103 *et seq.*

¹⁶ E.g. *Chokki c. HEC Montréal*, 2011 QCCA 175, at paras. 9 and 10; see also *Barreau du Québec c. Boyer*, 1993 CanLII 4401 (CA); *Friesen c. Université du Québec à Montréal*, 1996 CanLII 6188 (CA).

consideration of the freedoms of expression and peaceful assembly, or applied precedents dating back to the pre-*Canadian Charter* era¹⁷. In light of the tepid judicial treatment given to freedom of expression in Québec universities, it comes as no surprise that most cases dealing with academic freedom are labour law cases presided by arbitration panels called to interpret collective agreements¹⁸.

Academic freedom should not be construed as *just another* private right which may be waived – through general language, or even implicitly – by entering into a contract for teaching or studying at a given university. The Québec *Charter* and the *Canadian Charter* do not become nullified when one steps onto a university campus. So why, then, do some university administrators (particularly from the diversity and inclusion bureaus) insist on placing extra limitations on the expression of students, staff, and faculty? Why do some insist that students may have open and free academic discussions on the sidewalk outside the university, but once they step onto the campus they are suddenly subject to more limitations on their expression?

Queen’s University law professor Bruce Pardy suggests campus freedom of expression policies should simply read, “*The speech of professors, students and visiting speakers at this university is subject to the laws of the province and of Canada, which automatically apply. The university imposes no other limits on the content of their expression.*”¹⁹ According to professor Pardy, “No more is needed. Wordy policies about the content of speech threaten to narrow, not broaden, what may be expressed.” He explains, “Universities are automatically subject to the same laws that apply everywhere else. Laws about defamation, harassment, hate speech and discrimination apply in exactly the same way to speech in the classroom as they do to speech on the sidewalk.” Professor Pardy suggests universities need only establish rules regarding time, place, and manner that prohibit disrupting or interfering with the rights of others to speak and to listen; and undertake not to impose security fees on any lecture or visiting speaker.

¹⁷ E.g. *Lessard c. Cégep de Sherbrooke*, 2012 QCCS 1669, paras. 44 to 4; see also *Roy Grenier c. Université de Sherbrooke*, 2015 QCCS 1873 (overturned in 2016 QCCA 86 on other grounds), and *Carrier c. Université de Sherbrooke*, 2012 QCCS 1612

¹⁸ E.g. *Syndicat des professeures et professeurs de l’université du Québec en Outaouais c. Université du Québec en Outaouais*, 2018 CanLII 28752 (QC SAT); *Syndicat des professeures et professeurs de l’Université du Québec en Outaouais et Université du Québec en Outaouais*, 2016 CanLII 153557 (QC SAT); *Association of Professors of Bishop’s University c. Bishop’s University*, 2007 CanLII 68089 (QC SAT)

¹⁹ Bruce Pardy (2020), “Public universities, speech policies, and the law: Fourteen maxims.” *Education and Law Journal*, vol 29. <https://ssrn.com/abstract=3678365>

It is unacceptable that academic freedom issues internal to universities, in Québec, continue to be construed a strictly private or contractual matter, virtually free from judicial oversight. Waiver of any component of academic freedom should not flow automatically from the terms of a collective agreement or of university by-laws or so-called policies; it should rather meet the high threshold established by the Supreme Court of Canada in *Amselem*²⁰.

Section 3 of Bill 32 thus corrects jurisprudential shortcomings by confirming the paramountcy of academic freedom. Any limitation – contractual, disciplinary or otherwise – to the latter must be minimal, proportionate and justified by serious, legitimate, and overriding concerns, in compliance with section 9.1 of the Québec *Charter*: “[i]n exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, State laicity, public order and the general well-being of the citizens of Québec; [t]he scope of the freedoms and rights, and limits to their exercise, may be fixed by law.”

4) CONCLUSION

Some may question why a bill on academic freedom is necessary, but Quebec's leadership on this front is laudable. Governments entrenching a bill supporting academic freedom is symbolic in a time where the cultural and political climate on campus is one of self-censorship and ideological conformity. A bill on academic freedom will reiterate that universities should not be training or mobilization centres for activists who have embraced variations of a “diversity and equity” ideology.

The Supreme Court of Canada has stated time and again that the principles and values underlying the vigilant protection of free expression in a society such as ours are i) truth-seeking, ii) participation in social and political decision-making, and iii) individual self-fulfillment and human flourishing²¹. We believe that universities exist to promote truth-seeking and open inquiry, and today’s students, future students, staff, and faculty need to be reminded of that. The clear and simple rule stated at section 3 of Bill 32 is the guiding light that was lacking until now in Québec case law: it signals the end of ideological conformity and the recommencement of free inquiry in respect to over research, teaching and other academic activities in universities. If implemented in accordance with due process requirements, Bill 32 would contribute greatly to the restoration of

²⁰ *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551.

²¹ *Irwin Toy Ltd. v. Québec (Procureur général)*, [1989] 1 SCR 927.

a diversity of opinions and viewpoints among students and faculty. It will also act as a guiding beacon for other Canadian, American and European jurisdictions where professors and students face similar concerns.

* * *

Nous sommes à la disposition de l'Assemblée nationale pour tout témoignage en commission et pour fournir tout complément documentaire à la présente.

Veillez agréer, Madame la ministre de l'Enseignement supérieur, l'expression de nos sentiments distingués.

Montréal, May 23, 2022

For the JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS²²:



Lindsay Shepherd²³



Samuel Bachand²⁴

²² Founded in 2010 as a voice for freedom in Canada’s courtrooms, the Justice Centre for Constitutional Freedoms (JCCF.ca) defends the constitutional freedoms of Canadians through litigation and education. The Justice Centre’s vision is for a Canada where i) each and every Canadian is treated equally by governments and by the courts, regardless of race, ancestry, ethnicity, age, gender, beliefs, or other personal characteristics; ii) all Canadians are free to express peacefully their thoughts, opinions and beliefs without fear of persecution or oppression; iii) every person has the knowledge and the perseverance to control his or her own destiny as a free and responsible member of our society; iv) every Canadian has the understanding and determination to recognize, protect and preserve their human rights and constitutional freedoms; and v) people can enjoy individual freedom as responsible members of a free society.

²³ Lindsay Shepherd is the author of “Diversity and Exclusion: Confronting the Campus Free Speech Crisis” and Campus Free Speech Fellow with the Justice Centre for Constitutional Freedoms. In 2019 she testified at the House of Commons Standing Committee on Justice and Human Rights for their study on online hate. She holds a Master’s degree in Cultural Analysis and Social Theory from Wilfrid Laurier University.

²⁴ Samuel Bachand is a member of the Québec Bar. His legal practice focuses on constitutional and administrative litigation. He is the primary counsel of the Justice Centre for Constitutional Freedoms in the Province of Québec. He taught public and private law, and oral and written advocacy at the Faculté de droit of Université de Montréal from 2012 to 2020.