



Proposal for

*An Act to Protect Free Expression
at Ontario's Publicly-Funded Colleges and Universities*

Submitted to:

Submitted to Doug Ford, Premier
Merrilee Fullerton, Minister of Training, Colleges and Universities
Caroline Mulroney, Attorney General

By the Justice Centre for Constitutional Freedoms

July 20, 2018

WHEREAS there should be no greater celebration of freedom of expression than at Ontario's publicly-funded colleges and universities, and whereas the advancement of knowledge, the pursuit of truth, and freedom of expression necessarily include the freedom to study, disseminate, and advocate for diverse ideas, opinions and beliefs;

WHEREAS the *Canadian Charter of Rights and Freedoms* protects the rights of freedom of conscience and religion, freedom of thought, belief, opinion, and expression, freedom of peaceful assembly, and the freedom of association for everyone in Canada;

WHEREAS freedom of expression is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society, and whereas freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, is the essence of a free society;

WHEREAS the Legislative Assembly of Ontario has determined the exercise of the freedoms of conscience, religion, thought, belief, opinion, expression, peaceful assembly, and association to be critical components of the education experience for students, and requires that each publicly-funded college and university in this Province ensure free, robust, and uninhibited discourse and debate by students and others on campus;

WHEREAS the Legislative Assembly of Ontario has determined that publicly-funded colleges and universities in this Province are failing to adequately protect freedom of expression, and are contributing to the suppression of diverse opinions on campus;

WHEREAS freedom of expression does not include any right to disrupt, obstruct or interfere with the right of other people to express their opinions;

WHEREAS the Legislative Assembly of Ontario has determined that publicly-funded colleges and universities in this Province are responsible for upholding the rule of law and free expression on campus, and must not abdicate that responsibility by imposing the costs of providing adequate security on students who seek to exercise their legal rights to express their opinions in a peaceful manner, through events, debates, displays or otherwise;

WHEREAS the Legislative Assembly of Ontario has determined that a substantial amount of taxpayer dollars is appropriated to publicly-funded colleges and universities each year and as such, the Legislative Assembly of Ontario must ensure that all publicly-funded colleges and universities uphold freedom of expression as a fundamental right for all;

Definitions

1. In this Act,

“College or university” means every college of applied arts and technology and every university in the Province of Ontario that receives regular and ongoing operating funds from the Government of Ontario for the purposes of post-secondary education.

“Common areas of campus” means the generally accessible areas of campus where members of the university community and the public are commonly allowed, such as, but not limited to, grassy areas, treed areas, quadrangles, walkways, hallways, lobbies,

cafeterias, lounges or other similar common areas. “Common areas of campus” does not include areas where access is typically restricted for regular university use, such as offices, libraries, dormitories, study rooms and classrooms when in use for the teaching of scheduled courses.

“Disruptive activities” include, but are not limited to, disruption, interruption, obstruction, blockading, shouting, theft, vandalism, violence, threats, the activation of a fire alarm in the absence of fire, the production or creation of loud or disruptive noise, and all other forms of interference that diminish the ability of students, student organizations and faculty members to exercise their legal rights to assemble, and to express and listen to opinions and ideas. For greater clarity, peaceful protest and peaceful counter-protest are not “disruptive activities” provided that they do not prevent or impede others from exercising their legal rights to associate, speak, hear and listen.

“Freedom of expression” means the freedom to express oneself through any lawful verbal or written means by which individuals may communicate ideas to one another, including but not limited to the production and utilization of art and visual media such as signs, pictures, and motion picture, the spoken word, including speeches, and the written word, without the imposition of costs as a condition for exercising this right, and without restrictions except those that accord with the rule of law. Freedom of expression also includes the right to peacefully assemble, peacefully protest, and the right to receive expressive material, be it written, spoken, or visual. For further clarity, freedom of expression is a right held by all members of the university community, including students, and includes the right to think and express ideas, opinions, facts, beliefs, theories, and political philosophies that others consider to be wrong or offensive. Only criminal hate speech as defined by the *Criminal Code of Canada* is excluded from this definition of freedom of expression.

“Rule of law” means the maintenance of order through the stable, equal and predictable enforcement of policies and procedures, for the benefit of all individuals and all groups, including but not limited to campus clubs and other student organizations. The rule of law means the absence of chaos and the absence of the arbitrary or unauthorized exercise of power, achieved by the fair and equal application of clearly defined rules and policies. The rule of law means that all individuals are equally subject to the policies and procedures governing the community, and that no person or group is to be treated in a differential manner, regardless of individual or group identity and regardless of the content of their opinions, ideas or beliefs that are expressed or that are sought to be expressed. For further clarity, the rule of law requires that colleges and universities enforce their respective policies and procedures in a consistent and predictable manner, including intervening to protect freedom of expression, which includes taking disciplinary action against those who act in contravention of relevant policies and procedures.

Protection of Free Expression and Academic Freedom

2. All common areas of campus shall be deemed public forums where everyone is permitted to exercise their right to freedom of expression and academic freedom. Any person, student

or otherwise, who wishes to engage in non-commercial expressive activity in the common areas of campus at colleges and universities shall be permitted to do so freely, subject only to reasonable restrictions on the time, place and manner of the expression, with such restrictions narrowly tailored in service of a significant institutional interest, and only when such restrictions employ clear, published criteria that do not discriminate in regard to the content of the expression or proposed expression.

3. No college or university shall deny a student, student organization or faculty member any benefit, right or privilege available to any other student, student organization or faculty member on the basis of political, conscientious, religious or other beliefs, or the content of expression or proposed expression, except in accordance with the rule of law.
4. No college or university shall deny a student, student organization or faculty member the ability to use classrooms and auditoriums for non-commercial expressive purposes, such as, but not limited to, holding meetings, viewing films, giving speeches, participating in debates, and listening to invited speakers, except in accordance with reasonable, written regulations, such as prioritizing regular class time, that do not discriminate based on the content of the expression or proposed expression
5. No college or university shall deny a student, student organization or faculty member the ability to invite individuals to speak on campus, and to use classrooms and auditoriums for such purposes, except in accordance with reasonable regulations that respects the rule of law.
6. Colleges and universities shall not impose any security costs on students, student organizations or faculty member as a condition for exercising their right to peacefully assemble and peacefully express and listen to opinions and ideas. For greater clarity, this includes the right to invite speakers, and to listen to invited speakers.
7. Colleges and universities may impose security costs on individuals who engage in disruptive activities, and on individuals who encourage, incite, promote, plan or advocate for the use of disruptive activities, or who threaten their deployment.
8. Colleges and universities shall uphold the rule of law on campus, including the free expression rights of students, student organizations and faculty members, by adequately protecting the lawful expression of students, faculty members and invited speakers against disruptive activities.

Penalties

9. If a college or university is found by the Higher Education Quality Council to have contravened any or all of sections 2 through 7, the college or university shall pay a fine of \$100,000 for a first offense, and a fine of \$250,000 for any and all subsequent offenses.

Amendments

10. The *Ombudsman Act*, RSO 1990, c O.6 is amended.
11. Section 30 is amended by adding “and the freedom of expression of students” before “within”.
- Section 30 presently reads:
- In exercising his or her authority under this Act with respect to universities, the Ombudsman shall consider the application of the principles of academic freedom within universities.
- As amended, section 30 will read:
- In exercising his or her authority under this Act with respect to universities, the Ombudsman shall consider the application of the principles of academic freedom and the freedom of expression of students within universities.
12. The *Higher Education Quality Council of Ontario Act*, 2005, SO 2005, c 28 is amended.
13. Section 5 is amended by adding “the protections for freedom of expression” before “access”.
- Section 5 currently reads:
- The object of the Council is to assist the Minister in improving all aspects of the post-secondary education sector, including improving the quality of education provided in the sector, access to post-secondary education and accountability of post-secondary educational institutions.
- As amended, section 5 will read:
- The object of the Council is to assist the Minister in improving all aspects of the post-secondary education sector, including improving the quality of education provided in the sector, protections for freedom of expression, access to post-secondary education and accountability of post-secondary educational institutions
14. Section 6 is amended
- a. by renumbering subsection (d) as subsection (e);
 - b. by adding subsection (d), which will read:
to receive, investigate and make findings regarding complaints from students in respect of a suspected or alleged contravention of *An Act to Protect Free Expression at Ontario’s Publicly-Funded Colleges and Universities* or any of the amended provisions contained therein.
- Section 6(d) will read:
- The functions of the Council are to receive, investigate and make findings regarding complaints from students in respect of a suspected or alleged contravention of *An Act to Protect Free Expression at Ontario’s Publicly-Funded Colleges and Universities* or any the amended provisions contained therein.
15. Section 6(a)(ii) is amended by adding “including the degree to which the freedom of expression of students is protected” after “sector”.
- Section 6(a)(ii) currently reads:

The functions of the Council are to develop and make recommendations to the Minister on performance measures to be used to evaluate the post-secondary education sector.

As amended, section 6(a)(ii) will read:

The functions of the Council are to develop and make recommendations to the Minister on performance measures to be used to evaluate the post-secondary education sector, including the degree to which the freedom of expression of students is protected.

16. Section 6(b) is amended by adding “including evaluating how successfully post-secondary educational institutions are upholding freedom of expression and the rule of law” after “sector”.

Section 6(b) currently reads:

The functions of the Council are to evaluate the post-secondary education sector, report to the Minister on the results of the evaluation and make the report available to the public.

As amended, Section 6(b) will read:

The functions of the Council are to evaluate the post-secondary education sector, including evaluating how successfully post-secondary educational institutions are upholding freedom of expression and the rule of law, report to the Minister on the results of the evaluation and make the report available to the public.

17. Section 6(c) is amended

- a. by renumbering clause (iii) as clause (iv);
- b. by adding clause (iii), which will read:

on the degree to which post-secondary educational institutions uphold freedom of expression and the rule of law on their respective campuses

Section 6(c)(iii) will read:

The functions of the Council are to conduct research on all aspects of post-secondary education with a view to helping the Council achieve its object, including research on the degree to which post-secondary educational institutions uphold freedom of expression and the rule of law on their respective campuses.

18. The *Ministry of Training, Colleges and Universities Act*, RSO 1990, c M.19 is amended.

19. Section 18, “Freedom of Expression” is added.

Section 18(1) “Definition” is added and will read:

“Freedom of expression” means the freedom to express oneself through any oral or written means by which individuals may communicate ideas to one another, including but not limited to the production and utilization of art and visual media such as signs, pictures, and motion picture, the spoken word, including speeches, and the written word, without the imposition of costs as a condition for exercising this right, and without restrictions except those that accord with the rule of law. Freedom of expression also includes the right to peacefully assemble, peacefully protest, and the right to receive expressive material, be it written, spoken, or visual. For further clarity, freedom of expression is a right held by all members of the

university community, including students, and includes the right to think and express ideas, opinions, facts, beliefs, theories, and political philosophies that others consider to be wrong or offensive. Only criminal hate speech as defined by the *Criminal Code of Canada* is excluded from this definition of freedom of expression.

Section 18(2) “Application” is added and will read:

This section applies to every college of applied arts and technology and to every university that receives regular and ongoing operating funds from the government for the purposes of post-secondary education.

Section 18(3) “Freedom of Expression Policy” is added and will read:

Every college or university described in subsection (2) shall develop and implement a freedom of expression policy that

- (a) includes a statement that it is not the proper role of the college or university to shield individuals from lawful expression including, without limitation, ideas, opinions, and beliefs they find unwelcome or offensive, or consider to be wrong;
- (b) provides that the common areas of campus will be open to any speaker to exercise their rights to engage in lawful, non-commercial expression within the limits of reasonable time, place and manner restrictions and only when such restrictions employ clear, published criteria that do not discriminate in regard to the content of the expression or proposed expression;
- (c) prohibits the university from censoring or otherwise restricting the lawful expression of students except in accordance with reasonable time, place and manner restrictions and only when such restrictions employ clear, published criteria that do not discriminate in regard to the content of the expression or proposed expression;
- (d) prohibits the university from denying a student, student organization or faculty member any benefit or privilege available to any other student, student organization or faculty member on the basis of political, conscientious or religious beliefs and viewpoints, or based on the content of the expression or proposed expression;
- (e) permits students, student organizations and faculty members to book, for no more than a nominal fee, the use of classrooms and auditoriums for expressive purposes, such as, but not limited to, holding meetings, viewing films, giving speeches, listening to invited speakers, and participating in debates, subject only to reasonable restrictions which employ clear, published criteria that do not discriminate in regard to the content of the expression or proposed expression;
- (f) permits students, student organizations, and faculty members to invite speakers to the college or university and to use, for no more than a nominal fee, classrooms and auditoriums for the purpose of hosting the speaker, subject only to reasonable restrictions which employ clear, published criteria that do not discriminate in regard to the content of the expression or proposed expression;

- (g) defines disruptive activities in accordance with this Act, and prohibits disruptive activities;
- (h) permits students, student organizations, and faculty member to engage in peaceful protests and counter-protests which do not constitute disruptive activities
- (i) prohibits the university from imposing security costs on students, student organizations or faculty members in respect of their right to peacefully assemble or peacefully express themselves, including the right to invite and listen to speakers;
- (j) provides that the college or university will enforce the rule of law on campus by intervening to protect freedom of expression from disruptive activities, and specifies that those who engage in disruptive activities will be disciplined, with penalties imposed on those found guilty of disruptive activities;
- (k) sets out the process for how the college or university will respond to incidents of non-compliance with this policy by students and the disciplinary measures that will be utilized;
- (l) addresses any other topics and includes any other elements required by the regulations; and otherwise complies with the requirements set out in the regulations.

Section 18(4) “Publication” is added and will read:

Every college or university described in subsection (2) shall publish its freedom of expression policy on its website, and shall make a copy of the policy available to anyone who requests it.

Section 198(5) “Training” is added and will read:

Every college or university described in subsection (2) shall provide training on its Freedom of Expression Policy to the following persons:

- (a) Members of the college’s or university’s governing board or council, and other senior or executive administrators;
- (b) Faculty members;
- (c) Security staff;
- (d) All staff in the areas of student relations and student advocacy;
- (e) All students holding elected positions with the college or university’s student association, if any student association exists; and
- (f) All new students upon enrolling at the college or university.

Section 18(6) “Enforcement and Compliance” is added and will read:

Implementation of a Freedom of Expression Policy as prescribed in subsection 18(3) will be a requirement as part of all future agreements between the colleges and universities and the Government of Ontario. For further clarity, failure to implement and enforce a Freedom of Expression Policy as prescribed in subsection 18(3) will result in the college or university receiving no Government of Ontario funds upon the expiry of the applicable College and University Strategic Mandate Agreements.

Section 18(7) “Regulations” is added and will read:

The Lieutenant Governor in Council may make regulations relating to freedom of expression at colleges and universities described in subsections (1) and (3), and

governing freedom of expression policies required under this section, and without limiting the generality of this power, may make regulations,

- (a) governing processes that shall be followed and persons who shall be consulted in the development and approval of freedom of expression policies, and in their review and amendment, and governing how student input shall be provided and considered in such development, review and amendment;
- (b) governing topics that shall be addressed or elements that shall be included in freedom of expression policies;
- (c) governing the provision of training to faculty member, staff, students and other persons about freedom of expression;
- (d) respecting the publication of freedom of expression policies and the promotion of awareness of the policies;
- (e) governing any other matter that the Lieutenant Governor in Council determines is necessary or advisable relating to freedom of expression on college and university campuses, including,
 - (i) governing all matters relating to freedom of expression policies and their implementation, and
 - (ii) governing other measures that colleges and universities shall implement, or other things that colleges and universities shall do, to address the freedom of expression of students.