



Tenure and academic freedom in Canada

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ABSTRACT: In Canada, a persistent myth of academic life is that tenure was initiated and developed in order to protect academic freedom. However, an examination of the historical record shows that in both its forms — viz. tenure during pleasure, whereby professors could be stripped of their employment if it suited a president and governing board, and tenure during good behavior, whereby professors were secure in their employment unless gross incompetence, neglect of duty, or moral turpitude could be proven against them — the institution took shape as the main defense of academic employment. In this paper, I explore the development of tenure since the middle of the 19th century, and the concepts of academic freedom with which tenure has become closely associated. I also make the case that tenure during good behavior has become a major support of the academic freedom of professors even as that freedom is undergoing new challenges.

KEY WORDS: University of Toronto · Sir Robert Falconer · McGill University · University of British Columbia · University of Manitoba · University of Alberta · Harry S. Crowe · Canadian Association of University Teachers

INTRODUCTION

Is the defense of academic freedom central to the institution of tenure? Most Canadian academics are likely to answer, reflexively, in the affirmative. Yet, the question is more complicated than it seems at first glance, and a comprehensive answer needs to be qualified. At issue are what tenure and academic freedom mean, and how they interact and influence each other.

A persistent myth of Canadian academic life is that tenure was initiated and developed in order to protect academic freedom. As recently as October 2014, in addressing the 50th anniversary conference of the Ontario Confederation of University Faculty Associations, York University historian Craig Heron re-asserted this myth. In the context of a panel discussion about the future of faculty associations, he asked what lay ahead for academic freedom and 'the tenure that was designed to protect it.'¹ Did anyone beside myself notice anything problematic in this formulation?

Myths acquire force because they are usually true at least in part. And it *is* true that tenure, as it is understood in Canadian universities today, does protect

academic freedom as *it* is understood today, the freedom to teach, research, and publish, the freedom to express oneself on subjects of current interest and importance, and the freedom to criticize the institution in which one teaches. However, protecting all these things was not the original or initial purpose of tenure in either of its two main forms, tenure during good behavior, in which professors were secure in their employment unless gross incompetence, gross neglect of duty, or gross moral turpitude could be proven against them, and tenure during pleasure, in which they could be stripped of their employment if it suited a president and governing board (usually they needed to be in agreement) to do so. As well, the scope of academic freedom has changed over the decades.

TENURE IN THE 19TH AND EARLY 20TH CENTURIES

In both of its forms, tenure in the late 19th and early 20th centuries was a continuing appointment or appointment without term, granted to professors after a probationary period that was usually short. In

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the oldest English-language institution of higher education established in what is now Canada, i.e. King's College, Nova Scotia, professors enjoyed explicit tenure for life during good behavior until it was removed from the college statutes in 1885 and replaced by tenure during pleasure.² Most of the older institutions made no reference to professorial terms of office in their charters or statutes, feeding the assumption that professors held their positions for life. This was particularly the case in universities like Dalhousie and Queen's, that were influenced by the Scottish tradition in this respect. This did not mean that professors were absolutely secure. Gross negligence, incompetence, moral turpitude, or insubordination could lead to dismissal. Furthermore, professors might be pensioned off if it suited a governing board to allocate the necessary money. In the absence of pension plans, which did not emerge until early in the 20th century, professors carried on until they were clearly unable to do so. University boards, never flush with money, were understandably reluctant to devote scarce resources to pensions, so that not a few professors died in harness.

Judicial interpretation from 1860 onwards did not generally sustain the institution of tenure during good behavior. Whenever it was tested it was rejected, usually in favor of the idea that tenured professors held their offices at pleasure, that is, at the discretion of governing boards who might dismiss the professors in their employ, for reasons that they considered good and sufficient, and that they did not need to disclose. Moreover, with the passage of a new University of Toronto Act in 1906, tenure during pleasure became the legislatively imposed policy and practice of that institution and soon also of the provincial universities of Manitoba, Saskatchewan, Alberta, and British Columbia, whose statutes were influenced by the 1906 Act. In the provincial University of New Brunswick, tenure during pleasure had been established by means of judicial interpretation as far back as 1861.³

What did tenure mean in practice? An incident in the history of Queen's University is instructive. In 1864, the classicist George Weir was dismissed, essentially for disloyalty to the principal. Claiming that Queen's had been modeled on the University of Edinburgh, where tenure was for life unless impropriety of conduct was established, Weir sued to be reinstated in his chair. He cited as grounds that his dismissal had been improper, no notice having been given, no opportunity for defense provided, and no impropriety proved.⁴ He won his case in the Court of Chancery, a court of equity used by those who sought

to recover property rather than secure damages. However, in 1866 the Court of Appeal of Canada West, as Ontario was then called, ruled that the Court of Chancery had no jurisdiction because Weir's chair was not endowed. Beyond that, 'we see nothing in the evidence of any contract for any engagement of plaintiff beyond a general hiring, which the law would probably hold to be a yearly hiring ...'.⁵ If Weir were to sue in a court of law he might gain damages for wrongful dismissal, the judges stated, but they would not restore him in his employment.

This reinforced a change the board of governors had made in the Queen's statutes in 1863, stating that henceforth professors held their tenure during the board's pleasure. This change, the judgment in the Weir case, and the uncertainty they together created, complicated matters for the principals of Queen's in seeking recruits in Scotland, the preferred source for new faculty for a university that did not sever its Presbyterian links until early in the 20th century. It is not clear how William Snodgrass, principal from 1864 to 1877, dealt with this, but George Monro Grant, principal from 1877 to 1902, assured potential faculty members that they would hold their positions for life during good behavior.⁶ Although this was in defiance of the statutes, it reflected the de facto state of affairs. Asked in 1920 to define tenure at Queen's, Principal Bruce Taylor alluded to the statutes and the Weir case, but added: 'The practice has been to regard appointments as permanent after the first two years.'⁷

Permanence implied security, which was (and is) the core aspect of tenure. How secure should it be? In 1919 Ira MacKay, who taught law and political science at the University of Saskatchewan until his dismissal on the grounds of disloyalty to President W.C. Murray,⁸ undertook to explain tenure to a Saskatoon newspaper reporter. Only the tenure of the judiciary was more secure, he said: 'The reasons for this security are apparent. University appointments are made after a period of long probationary training ..., the remuneration is small and the offices are few.... A university professor once removed from his chair has very little chance of obtaining similar employment elsewhere.'⁹

Four years later, Mr. Justice A.K. Dysart of the Supreme Court of Manitoba offered a similar justification in an obiter dictum stated in the case of *Smith v. Wesley College*. Professors should not be lightly dismissed, he wrote. Trained for work of a special kind, 'their opportunities for suitable employment are rare, and if lost are not easily substituted by other congenial employment. Their special training unfits them for general service. In their chosen field, the

material rewards are relatively small. In order ... that this noble profession may still attract recruits, it is wisely acknowledged both in theory and practice that the employment of professors by colleges should be characterized by stability approaching to permanence'. How stable? Dysart equated the security that professors ought to have with that enjoyed by bank officers, whose positions (at that time; matters have changed since then) were normally assured until retirement.¹⁰

ACADEMIC FREEDOM IN THE EARLY 20TH CENTURY

Academic freedom did not figure in these justifications. However, very likely because of what was happening in the United States, where the American Association of University Professors (AAUP) was founded in 1915 and issued a declaration of principles in which the defense of academic freedom was central, there was growing interest in the subject in Canada. If any Canadian professors expressed themselves on the subject, their words have gone unnoticed. However, from 1919 to 1922, three university heads addressed the issue.

Speaking to the graduating class of the University of Manitoba in 1919, Queen's University's Bruce Taylor discussed the effects that financial dependence had on academic freedom, which he took to be the freedom of professors to teach, do research, and publish as they pleased. Predicting that the state would take an ever-increasing part in financing higher education, Taylor asked whether this entitled the government to control the type of teaching in the university. 'Will the administration of a University ... depend on the whims of the Legislature,' he asked: 'Will men of independence accept positions when the tenure may be insecure?' And what if administrators discouraged the expression of 'inconvenient and original' ideas so as not to displease those who provided the money?¹¹

Taylor was fully aware that this included wealthy benefactors, for late in 1917 he had faced down an attempt by some of them to have the political economist O.D. Skelton fired because of unwelcome views he was known to hold about conscription for overseas service (he was against it unless the matter was first approved by Canadians in a referendum).¹² However, Taylor did not specifically address the influence that wealthy individuals might have. Someone who did was President E.E. Braithwaite of Western University in London, Ontario. Speaking at the 1919 con-

vocation of his own institution, he stated that wealthy men had put 'undue pressure' on professors in the US and that similar pressure was not unknown in Canada. This undermined 'the spirit of independence in ... which alone the best work can be accomplished'. Using words that sound highly relevant today, Braithwaite said that scientists should not be judged by the financial benefit of their research to their university or the community, professors should not be judged by the number of students their courses attracted, nor should they have to worry about the acceptability of their teaching and research to influential people. 'If the Professor of Political Economy must make his conclusions conform to the ideas of the capitalists who may occupy a seat on his governing board, the usefulness of the institution is seriously impaired.'¹³ But Braithwaite added that he feared many professors, concerned about their jobs, would not oppose infringements of academic freedom if those who applied pressure were powerful enough.

SIR ROBERT FALCONER AND ACADEMIC FREEDOM AT THE UNIVERSITY OF TORONTO

Taylor and Braithwaite were the heads of small private universities. As president of the considerably larger and public University of Toronto from 1907 to 1932, Sir Robert Falconer had to concern himself with occasional pressure not only from men of wealth and influence, but also from the provincial government, the chief source of the institution's financial support. Among the former was Reuben Wells Leonard, a silver-mining magnate and a member of the university's governing board, who in 1921 objected strenuously to the views of the University of Toronto political economist Robert M. MacIver. Arriving from the University of Aberdeen in 1915, MacIver four years later published *Labor and the Changing World*,¹⁴ which among other things supported industrial workers in their efforts to organize collectively. Leonard loathed unions, which he saw as a threat to his own welfare as well as to the national economy. When he got wind of MacIver's book, Leonard complained to the board chairman, the banker Sir Edmund Walker, about the Scot's 'ultra-socialistic teachings'.¹⁵ Walker expressed mild concern but counselled inaction: 'Nothing would seem more dangerous than to restrain a free expression of opinion by a professor short of almost anything but treason.'¹⁶

Having received copies of this correspondence, Falconer felt compelled to add his voice to Walker's.

It would be 'extremely injurious were the Board of Governors to attempt to restrain the expression of views on economic subjects different from their own,' he wrote. That was not the British way of doing things. Besides, 'the most treasured privilege of the University is freedom of thought'. Unless the views expressed were 'so extreme as to cause some injurious action,' it was best not to interfere.¹⁷

Leonard disagreed, insisting that the board had a duty to prevent 'any teaching tending to upset a civilization which has been the result of some thousands of years of struggle'.¹⁸ Leonard was not the first person, nor would he be the last, to identify his pecuniary self-interest with civilization itself. Conscious of this, Falconer replied that Canada had nothing to fear from 'the thoughtful, earnest man, who is endeavouring to arrive at principles that will stabilize the country'.¹⁹ Leonard would have none of it. Later that year the millionaire informed Falconer that if MacIver were permitted to teach his views, 'we should be honest with ourselves and true to the trust imposed upon us by the people of Ontario, and establish a Chair of Political Anarchy and Social Chaos, so that the people of Ontario, who pay for the University, and the students who take the courses, will know what is being taught under its proper name'.²⁰

Falconer replied that MacIver's views were not outrageous, that it was wrong to repress freedom of expression, and that social progress came through discussion.²¹ Did he think his words needed wider distribution? Falconer's biographer believes that Falconer thought the time had come to make a statement that would make it awkward for Leonard to continue to press his attack on MacIver.²² When Falconer addressed a meeting of alumni in February 1922, he was determined to make the case for his conception of the academic freedom of professors in the most persuasive way possible, praising it as 'the freedom which gives its distinction to the ancient English academic life' and called it 'one of the most sacred privileges of a university'. The privilege came with limitations, however. A tenured professor was 'not fixed for life in an easy place' in which he was 'free to do as he will and say whatever he pleases'. He was 'the servant of the nation' in matters intellectual. Like judges and civil servants, he was not free to take an 'active share in party politics' by running for office or discussing 'burning political questions,' and doing so might easily harm his institution: 'A government might well without giving any reason easily show its displeasure in such a way as to affect adversely the fortunes of the institution and the financial position of many guiltless and wiser col-

leagues.' Finally, in a few remarks that were clearly directed at Leonard, Falconer discussed the role of governing boards. One of their duties, he said, was to secure 'the best possible persons available for the professorial office'. Their views might differ from those held by board members, but the latter would be ill-advised either to challenge a professor's competence or to deny 'that there is a place in the University for his type of thought'. It was better 'to tolerate an erratic or even provocative thinker' than to disturb the normal functioning of the university.²³

Leonard's response was perhaps to be expected. 'The inference I would draw from your Paper,' he wrote to Falconer, 'is the necessity for exercising extreme caution in the selection of Professors'.²⁴ The most efficacious way of preventing professors from saying or writing something potentially objectionable was to prevent the appointment of those who might do such things. From Leonard's perspective, MacIver was such a person, and he dissented when the governors approved Falconer's 1923 recommendation that the Scot succeed James Mavor in the chair of political economy. 'If I had not made this nomination,' Falconer told Leonard, 'there would have gone abroad a feeling that a man was not at liberty to express views which are widely held in the economics departments of the leading English Universities'. This would have harmed the University of Toronto more than 'any subversive doctrines that MacIver would ever promulgate'.²⁵ MacIver served as head of the department until 1927, when he left Toronto to join the faculty of New York's Barnard College and, in 1929, Columbia University. (In the 1950s he headed the project that gave birth to studies of academic freedom in the USA by the historians Richard Hofstadter and Walter P. Metzger, and by MacIver himself.²⁶)

Newspaper coverage of Falconer's speech focused less on academic freedom than on the limitations he sought to impose on it. 'No Party Politics for the Professor,' stated a *Mail and Empire* headline.²⁷ 'Says Professor Must Keep Out of Politics,' a *Toronto Star* headline noted.²⁸ The *Telegram* sent a reporter to inquire whether a complaint from the Ontario government had prompted the president's remarks (he denied it).²⁹ Only the *Globe* registered an editorial criticism. Surely Falconer did not mean that professors 'should keep silence on public questions such as the tariff, the railways, immigration, or public policy in regard to education'? This seemed unreasonable.³⁰

If it involved discussing issues of current controversy, Falconer meant what he said. His conception of academic freedom was influenced by the German

tradition of 'Lehrfreiheit', the freedom to teach and publish (Falconer had done graduate work in Leipzig, Marburg, and Berlin) and its adaptation in the American research universities that developed after the US Civil War. This led eventually to the *General Report of the Committee on Academic Freedom and Tenure*, issued in 1915 by the newly-established AAUP. In Germany, where professors were civil servants, involvement in party politics and political debate, though not unknown, was uncommon. In the USA it happened more often, but there professors were more constrained in the classroom than were their German counterparts.³¹ The 1915 general report stated that professors had a role to play in public debate but added that they should avoid unverified statements and sensational modes of expression, and it remained silent on the matters of working for a political party or running for office. Academic freedom did not cover all professorial speech, the report said: 'Not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching ... is asserted by this declaration of principles.' Disciplinary action, if any, should be taken by professors: 'In matters of opinion, and of the utterance of opinion ... boards can not intervene without destroying, to the extent of their intervention, the essential nature of a university.'³²

Admission to full membership in this university would not be easy. The report recommended that after a probationary period of 10 (!) years, professors should either be granted tenure or let go. While on probation they should be given adequate notice of non-renewal; once tenured, they should only be dismissed after a fair hearing by a committee of their peers at which they could defend themselves against specific charges. Governing boards would presumably be bound by committee findings.³³

The report was a conservative statement committed to 'professional autonomy and collegial self-governance'.³⁴ As such, it would surely have appealed to Falconer (and other university presidents of the time), even if his view of professorial involvement in political life, as stated in 1922, was more restrictive than the AAUP committee's. Professorial free speech, which would in time come to be identified as a major aspect of academic freedom, was to him of questionable value at best. Yet, although Falconer sought to identify academic freedom with British rather than German or American university traditions, professorial free speech and political involvement were more widely accepted in Great Britain than in Germany or the USA.³⁵

Falconer may have thought that what was acceptable in the universities of England and Scotland was dangerous in Ontario's provincially-financed university. This restrictive view of academic freedom was rooted in recent experience. In 1916 he had received a strong complaint from Premier Sir William Hearst about the attack the head of political economy, James Mavor, was making in the press on the Ontario Hydro-Electric Power Commission (known more recently as Ontario Hydro). The utility had been created by the Conservative government headed by Hearst's predecessor, Sir James Pliny Whitney, chiefly to enable Ontario industries and consumers to enjoy lower prices for electricity than the private sector was charging. A classical liberal, Mavor objected in principle to government interference with what he believed to be free markets. Noting that Mavor had also objected to the government's introduction of the Workmen's Compensation Act, Hearst complained that the economist seemed 'anxious to injure the Government whenever he [could] and to attack everything in the nature of progressive legislation for the benefit and comfort of the people'. This had the effect of 'bringing condemnation upon the University' and undermined the government's efforts to support the institution adequately.³⁶

Falconer copied Hearst's letter to Mavor, who wrote a reply defending himself and his ideas and affirming his own freedom of speech as well as the university's autonomy from political interference. 'If the Members of the University are to be subjected to the dictation of the Government as to what they may or may not discuss,' Mavor wrote, 'the University may as well strike its name from the roll of Universities'.³⁷ Falconer copied the bulk of this letter to the premier, who backed off somewhat. He denied that he had threatened the university, but he did point out 'the unwisdom' of a professor at the University of Toronto, largely supported by public funds, 'carrying on a newspaper campaign of the kind in which Professor Mavor has been engaged'. It undermined support for the university among people who had not personally enjoyed the benefits of higher education, might be uneargued to fund it, and resented Mavor's articles, quite possibly inferring from them 'that the University is the friend and ally of the rich and the corporations, as against the labouring man'.³⁸

Mavor, who counted among his friends and acquaintances some of the richest and most powerful men in Canada,³⁹ was safe from discipline or dismissal. However, Falconer could not ignore Hearst's letters and their implications. He evidently drew the lesson that it was undesirable for professors to take

part in controversial political debate, and that to protect the university's autonomy and financial welfare, their free speech needed to be curbed. This explains the limitations he placed on academic freedom in his speech of February 1922. His biographer comments: 'The views outlined were widely shared and not only, one suspects, by administrators and politicians.'⁴⁰ Falconer might nevertheless have done well to heed what Harvard University's President A. Lawrence Lowell had said some years earlier, when he declined to dismiss a professor for making pro-German statements even though Harvard was threatened with the loss of a large bequest: 'A university that takes responsibility for deciding what professors may not say thereby assumes responsibility for everything professors do say, and a wise university would refuse the first responsibility in order to relieve itself of the second.'⁴¹ This incident had been well-publicized, and Falconer must have been aware of it. He may have thought, however, that the dangers his university faced from the Ontario government were greater than those Harvard faced from its donors.

During the remainder of his term as president—he retired in 1932—Falconer generally defended professors in their classroom teaching while cautioning them about statements outside the classroom. In 1924, for example, when Premier Howard Ferguson complained about the use in class of the *Communist Manifesto* and urged the summary dismissal of any professors who encouraged or condoned its doctrines, Falconer responded that the professor using the document was the staunchly anticommunist Gilbert Jackson, who in his course in economic history could not very well ignore the ideas of Karl Marx.⁴²

Four years later Falconer took a somewhat different tack. When the historian Frank Underhill was reported to have said in a public lecture that the British were as much to blame for the recent world war as the Germans, and Ferguson complained about this to board chairman Rev. Henry J. Cody, who had been his undergraduate roommate, Cody passed the complaint on to Falconer, who questioned Underhill. The historian denied he had made the statement ascribed to him, claiming he had actually said that Anglo-German rivalry had contributed more to the coming of the war than Belgian neutrality had, and that this 'historical commonplace' comment might have been misunderstood. Falconer informed Ferguson that he had urged Underhill 'to be careful in his casual remarks'.⁴³

This seemed to satisfy the premier, but in 1929 he reacted with annoyance to a column that Underhill

had written about Canadian-American relations in general and bootlegging of liquor to the USA in particular. Inferring criticism of his government, Ferguson complained to Cody that 'these articles are purely political. Some day when the estimates are brought over here I will be tempted to tick off a number of salaries of some men who seem to take more interest in interfering in matters of public policy than they do in the work for which they are paid'.⁴⁴ Others he may have had in mind were the political economists C. R. Fay, E. J. Urwick, and H. A. Innis.⁴⁵ It is not known whether Cody acquainted Falconer with the contents of this letter. If he did, the latter must have been confirmed in his belief that free speech by academics was dangerous to the university's financial health. Ferguson's views about what professors might and might not say, his biographer claims, were 'not out of line with the views expressed by Falconer in 1922'.⁴⁶ Their motives were surely different, however. Ferguson wanted to stop professors from saying what he did not want to hear; Falconer sought to control what professors said in order to safeguard the university's financial welfare.

Of course, on rare occasions this might require controlling what happened *in* the classroom. This was true both in public universities and in private ones, at that time mostly denominational. In the 1920s, as it had been in the years before the First World War,⁴⁷ religion was a source of more than one controversy in which academic freedom was at stake. In 1928, for example, William Irwin, professor of ancient languages at University College, the non-sectarian undergraduate college in the University of Toronto, aroused a storm of public protest with remarks about God and the Bible that may have been widely accepted among biblical scholars but seemed blasphemous to literal-minded believers. Falconer expressed no opinion on the controversy, but he became annoyed when he heard of the examination questions Irwin set that year, one asking to what extent the stories of Noah, Abraham, and Moses might be accepted as dependable history, another inviting examinees to decide whether the book of Jonah was history, allegory, or something else. Writing to the head of Irwin's department, Falconer noted that three of the questions contained 'dangerous explosives ... It is unfortunate that in a subject that has to be handled with such great care, he did not show more discretion.'⁴⁸

Did Falconer warn Irwin to be more prudent? No copy of a letter is on file, and he may have felt inhibited from asking a professor to modify a course. For his part, Irwin felt that the university had not done

enough to defend him against public criticism. Two years later he resigned to take a position at the University of Chicago (he later also taught at Southern Methodist University). Two days after his resignation, the student daily *The Varsity* carried a letter from him charging that the University of Toronto did not adequately protect the academic freedom of its professors because it was afraid of the government. The institution, he wrote, was 'mildewed with discretion'.⁴⁹

Falconer did not respond to the charge. Principal Maurice Hutton of University College dismissed Irwin's claim as 'rather absurd'.⁵⁰ It is hard, however, to escape the impression that senior university people tended to worry that someone important might criticize something a professor said or wrote. Furthermore, the experience of another provincial university, the University of British Columbia, suggests that such worry was not completely out of place.

ACADEMIC FREEDOM AT THE UNIVERSITY OF BRITISH COLUMBIA IN THE 1920s

In 1922, the Rev. Joshua Hinchliffe, an Anglican clergyman and Conservative member of the British Columbia Legislative Assembly, where he was prominent on the opposition front bench, publicly criticized the textbook used in the survey course in European history, taught by the head of the History department, Mack Eastman. Hinchliffe charged that *The History of Europe*, by J.H. Robinson and Charles Beard, should not be used because it was 'written by Americans for American students' and said too little about the British and Canadian contributions to the recent war effort.⁵¹ Eastman defended his choice both privately to John D. MacLean, the minister of education,⁵² and publicly with an article, 'Textbooks in European History,' that appeared in the *Vancouver Province*. The war, Eastman asserted, had stimulated popular interest in history. One result was that 'the enlightened, scientific and truthful historian has been oppressed by ambitious autocrats and badgered by ignorant democrats,' among them 'honest fanatics' and 'vote-catching politicians,' none of whom desired a balanced treatment of the past. If University of British Columbia's historians were incompetent, he concluded, 'the remedy is dismissal'. If they were competent, this should be taken as 'presumptive evidence that the history courses will be scholarly, truthful and beneficial; and the choice of textbooks will be at least defensible'.⁵³

MacLean quoted from this article approvingly in responding to Hinchliffe and deprecating his concerns,⁵⁴ and President Leonard S. Klinck stood by Eastman's textbook choice. The book continued to be used. In the long run, however, the incident may have helped to damage the university. We may safely assume that Hinchliffe appreciated criticism no more than the next person, and if he harbored a grudge as a result, some years later he had an opportunity for retaliation. In 1929, the Conservatives came into office, and Hinchliffe became Minister of Education. Eastman had left in 1925 to take employment with the International Labour Organization in Geneva, but it seems likely that Hinchliffe had not forgotten the historian's scorn. Furthermore, the new minister complained to President Klinck about the alleged Liberal bias of several professors.⁵⁵ Indeed, during his term in office, he showed a marked degree of hostility to the University of British Columbia. With the province in the grip of the Depression, the government grant for 1932-33 was cut by more than 60% from what it had been two years earlier, but had Hinchliffe had his way the cut would have been even deeper.⁵⁶

ACADEMIC TENURE AT MCGILL UNIVERSITY IN THE 1930S

The Depression raised the issues of academic freedom and tenure in a heightened manner. Provincial governments and boards of governors became increasingly sensitive to professorial criticism of the political, social, and economic order while at least a handful of professors were becoming more critical.⁵⁷ At the same time, the meaning of tenure assumed new importance for institutions facing financial crisis.

Given this crisis, it is probably not surprising that Principal Sir Arthur Currie of McGill University was thinking about faculty dismissals in 1933. McGill adhered to the notion of tenure during good behavior, and this complicated Currie's problem. Letting go of senior faculty would be difficult, so he mused about taking another course of action, that is, denying tenure to many faculty members in the first place. He thought of instituting a system whereby most junior faculty members would be replaced rather than given tenure, a system used at some of the private universities in the northeastern USA. As he explained to President Joseph S. Ames of Johns Hopkins University, this would make room for 'new men of genius on the staff'.⁵⁸ No doubt it would also have saved money.

Stephen Leacock disagreed. The renowned humorist, who taught economics at McGill, sought to dissuade Currie from his plans. Having learned of them, Leacock wrote to Currie: 'The tenure of a college teacher should not be on a mere basis of success. What has been called the "hire-and-fire" system makes every man tremble for his job. In the long run it kills a college at the root.'⁵⁹ Once appointed, faculty members should be maintained in their positions unless they committed some egregious offense, Leacock continued (he mentioned spreading communist propaganda in class). Only the security of tenure allowed professors to do their best work.

The issue became moot late in 1933, when Currie suddenly died. When, two years later, McGill needed to reduce costs in order to balance the budget, the Board of Governors decided to retire the 14 faculty members who had reached the age of 65, enforcing a rule that had come into existence soon after McGill joined the pension scheme originally begun by the Carnegie Foundation but had hitherto been ignored.⁶⁰

Among those who lost his position was the 66 year old Leacock, who felt well able to carry on. He commented, in a half-facetious half-serious article, on his dismissal within the context of academic freedom as he understood it: essentially, the freedom to teach and carry out research. 'The truth is,' he wrote, 'that any college which falls into the unhappy position on living on the current bounty of rich men, finds itself in chains'. In this situation, which existed at McGill for much of the 1930s, with board members balancing the budget out of their own pockets, the idea of academic freedom 'must be put aside', and professors like himself, said Leacock, could suddenly be told to leave.⁶¹

TENURE AT THE PROVINCIAL UNIVERSITIES: THE CASE OF JAMES A. CRAIG

The events Leacock deplored did establish a clear time limit on what otherwise continued to be tenure during good behavior at McGill. As far as the provincial universities were concerned, however, two cases in the early 1920s had clarified the issue: tenured professors served during the pleasure of the board of governors, although at most institutions—the University of Manitoba excepted—a recommendation from the president was required for appointment, promotion, and dismissal. In 1920, three judges of the Court of King's Bench of Saskatchewan, acting for the university's visitor, ruled that to dismiss any pro-

fessor 'no notice is required, nor need any hearing be given'.⁶² For that reason, the dismissals on grounds of disloyalty to President Walter C. Murray of Professors John Hogg, Ira MacKay, and Robert MacLaurin, all of them tenured, were allowed to stand.

This ruling was confirmed soon afterwards by the judgment in the case of James A. Craig at the University of Toronto. Having moved from the University of Michigan to Toronto at a late stage of his academic career, Craig was appointed professor in Semitic languages in 1916. His letter of appointment made no mention of the term, and he apparently assumed this meant he had life tenure. Was this a reasonable assumption? In 1919, President Falconer answered a query about terms of appointment by stating that professors and associate professors 'are not engaged under contract, but it is usually supposed that it is a life appointment unless the President has some adequate reason ... to recommend that the appointment terminate'.⁶³

In June 1920, Craig was disagreeably surprised to receive a letter from Falconer informing him that a board regulation put the age of retirement at 65 and that therefore he must retire a year hence.⁶⁴ Craig replied that he had never been apprised of the regulation, could not admit its validity, and expected to occupy his chair for as long as he could 'discharge the duties of the position acceptably'.⁶⁵ Falconer responded that a rule was a rule, that Craig had presumably qualified for a pension while at the University of Michigan, that he was getting on in years, and that it was time to make room for someone younger.⁶⁶

From Craig's point of view, this added insult to injury. He was 'quite unconscious of any struggle against advancing years,' he wrote, and was well able to carry on teaching. Moreover, retirement would not only hurt him financially but also violated 'the professor's rights which have been established by the historic traditions of centuries of university custom'.⁶⁷ When Falconer then referred him to a circular, sent to all faculty in 1919, stating that the age of retirement was 65, Craig asked for, and was granted, a postponement of one year.⁶⁸ Early in 1922, however, he informed Falconer that he questioned the board's right to retire him, noting that several of its members were working well beyond the age of 65.⁶⁹ (One of them, Sir William Mulock, became Chief Justice of Ontario in 1923 at the age of 80 and held that office until 1936, when he was 93!) Falconer submitted this letter to the board, as well as a petition signed by a number of students who asked that Craig be kept on, but the governors declined to reopen the matter.⁷⁰

Having failed to secure third-party arbitration of the difference between him and the board, Craig filed suit against the university and its president, seeking \$50 000 damages for wrongful dismissal.⁷¹ The trial took place without jury before Mr. Justice John Orde of the Supreme Court of Ontario, who took little time to decide in favor of the defendants. No definite term had been fixed at Craig's appointment, he wrote in his judgment, 'and the ordinary rule, that such a contract of employment could be terminated upon reasonable notice by either party would apply, unless the particular nature of a contract of employment of this kind, or the circumstances in which it was made, override that rule.' Neither was the case. Craig's contention that 'the appointment to a professorship ... without limitation is an appointment for life, subject only to the appointee's good behaviour and his ability to perform his duties efficiently,' met with disbelief. 'If this contention were correct, the contract for a life-appointment must necessarily be mutual. It could not be binding on the University without at the same time binding the professor ... It should only be necessary to state this contention to show its absurdity.' (The doctrine of mutuality as an argument against life tenure also featured in US jurisprudence, notably in an 1898 New York case to which, however, Orde did not refer.⁷²) Even if the board of governors had always treated tenured appointments as if they were for life, this would not affect their power to dismiss someone whose tenure was during pleasure, provided the president so recommended. He did not adjudicate the contention by the defendants that the University of Toronto Act gave them 'power to dismiss at pleasure without any notice whatever,' saying it was unnecessary to do so in order to decide in their favor on the larger issue.⁷³

How many professors took note of this judgment? No answer is possible, but lawyers surely paid attention to it. One was the solicitor for the University of British Columbia. The province's University Act of 1908 was based on the 1906 University of Toronto Act, so that tenured professors served during pleasure. Asked in 1932 how the board of governors, faced with a deep cut in the provincial grant, could go about dismissing professors, both tenured and hired for fixed terms, R.L. Reid informed President Klinck: 'Where the terms of the contract do not provide for its termination, the law imposes that it may be terminated provided reasonable notice is given.' No court had laid down 'a hard and fast rule' as to what constituted reasonable notice, but it ranged from three months to a year. 'If it were possible in all cases to give six months' notice, we would advise that length.'

The law was clearer in the case of those engaged for fixed terms: 'The employee can be dismissed before the end of such period, but such dismissal is *ex hypothesi* wrongful and is a basis for a claim to damages.' How much? That would depend on actual loss suffered 'after diligent effort to secure other employment'. Such employees should therefore get 'as long notice as possible'.⁷⁴

In the spring of 1932, a number of faculty members were informed that their appointments might be terminated, and late in July, seven associate and four assistant professors received notice that their employment would end on 31 August. All eleven were on contract, four on contracts ending on 31 August 1933, and one on a contract ending 31 August 1934. The board secured consent by means of severance pay and promises of re-appointment when circumstances might permit.⁷⁵ No one sued, and only one fired professor registered a reproach.⁷⁶

Why were tenured professors exempted from dismissal, although they generally earned more than untenured faculty and Reid had advised that dismissing tenured faculty was preferable to dismissing untenured faculty with multi-year contracts? Neither the board minutes nor the presidential files offer a clue, and we are left to speculate about the answer. It seems likely that President Klinck feared the effects on future recruiting if the university encroached on tenure. He would probably not have seen the letter warning against dismissals and drastic reductions in salaries that a University of British Columbia graduate then teaching at the University of Toronto sent to Premier Tolmie, but he would surely have been alive to its central argument. 'When the present depression is over and an offer is made to a Toronto or McGill professor to go to British Columbia,' Harry Cassidy warned, 'he will very probably hesitate seriously, thinking that ... British Columbia will not be able to offer that security of tenure and position which is usually considered the chief economical advantage of academic life'.⁷⁷ We may assume that those charged with the university's affairs saw their quandary in that light. The University of British Columbia could not afford to keep all its teaching staff, but its president and board respected tenure.

TENURE AT THE UNIVERSITY OF MANITOBA IN THE DEPRESSION

During the Depression, some tenured faculty did lose their positions on financial grounds, three at Acadia University alone.⁷⁸ The controversial dis-

missal of J. King Gordon from his tenured position at Montreal's United Theological College was prompted primarily by the institution's budgetary shortfall, though objections to his outspoken Christian socialism probably played a contributory role.⁷⁹ However, tenure was nowhere more in danger than at the University of Manitoba. Cuts in the provincial government grant were very difficult to accommodate, though increases in tuition fees covered part of the shortfall. More devastating still was the revelation in August 1932 that the chairman of the board of governors and honorary bursar, the prominent lawyer J.A. Machray, had embezzled most of the university's endowment.⁸⁰ Within days, the board decided to notify all faculty members that they had a job only until 31 August 1933, and that they would be informed as early as possible in 1933 what their future tenure would be.⁸¹

The 1917 University Amendment Act stated that the tenure of the university's officers and employees, 'unless otherwise provided, shall be during the pleasure of the board'. The board sharpened this in early 1934, passing a by-law stating that every appointment contract 'shall be terminable at the will of the board'.⁸² Faculty anxiety, which had waned somewhat when the great majority of professors were re-engaged for 1933-34, grew again at this point. The board also lowered the retirement age from 68 to 65. At a meeting of the board and the faculty, the latter argued that they should enjoy greater security of tenure, and, more specifically, 'that staff members should not be required to hold office at the pleasure of the Board of Governors'.⁸³ A board member responded that tenure during pleasure was also the rule at the Universities of Saskatchewan and Alberta, and since grants fluctuated annually, the governors of a provincial university could safely make commitments only from year to year. However, the board intended 'to retain its staff with as great a degree of permanency as the circumstances warranted'.⁸⁴ Board chairman Mr. Justice A.K. Dysart added to this that the board recognized the importance of the faculty as 'the heart and soul of the University,' but that even more important than the desire to give professors peace of mind about their tenure was the duty 'to build up and maintain efficiency in the staff'. The board must be able to weed out those who had 'become incapable of rendering the requisite service'.⁸⁵ This introduced an additional element into the discussion, with a professor's contribution to the university's functioning becoming central.

By the autumn of 1934, with the financial crisis receding, the Manitoba board adopted a new by-law

stating that henceforth three months' notice would be given.⁸⁶ Gradually, the faculty began to feel more secure. At a meeting of the board's staff committee 20 years after the crisis of 1932, President A.H.S. Gillson said that professors seemed to think their appointments were permanent. He considered this undesirable; the board members present agreed and at a subsequent meeting confirmed the by-law requiring only three months' notice.⁸⁷

This was effectively a dead letter. Whatever the board might think, and whatever the situation might be legally, tenure during good behavior was becoming a *de facto* reality. It remained for Gillson's successor, Hugh H. Saunderson, to spell this out. In January 1959, he explained to the board that a tenured appointment was one without term until retirement at 65. Its purpose was 'to protect the community and its universities by maintaining places where scholars can seek to find truth and to express their views, even although their individual views may currently be unpopular with a very large fraction of the community'.⁸⁸ Tenure was not a means of protecting the incompetent, Saunderson added, for machinery existed to encourage improved performance and, if necessary, to dismiss someone for cause.

This statement was remarkable. It contradicted not only the 1917 University Amendment Act and the board's 1934 by-law, but also the jurisprudence of tenure in Canada and the way it had been understood. For example, when Frank Underhill was threatened with dismissal in 1941, his lawyer cited the Craig judgement and said that, provided President Cody recommended termination, the board was free to show Underhill the door.⁸⁹ Eventually, President H.J. Cody, under political pressure because Underhill was a person of interest in the USA, a country British and Canadian politicians were eager to enlist in the Allied cause, withdrew his recommendation that Underhill be dismissed. However, it was a near run thing.⁹⁰

TENURE AT THE UNIVERSITY OF ALBERTA IN THE 1940s

At the University of Alberta a year later, President Robert Newton recommended to the board that three senior professors, including the heads of chemistry and pharmacy, be 'retired' on 31 August 1942, because they were 'inefficient'.⁹¹ The board accepted the recommendation, although there had been no hearing of any kind. Seven years later, the board ignored their own 1943 statement on dismissals, as

well as common standards of fairness, to fire, with 20 weeks' pay in lieu of notice, the head of the department of biochemistry, George Hunter, who had been at the University of Alberta since 1929.⁹² No explanation was ever given, and Newton offered only generalities to justify the dismissal. To the media he spoke of 'dissatisfaction over the years' and 'his whole unsatisfactory history in this university'.⁹³ In a letter to an acquaintance, he mentioned what he called 'a long career of trouble and making trouble'.⁹⁴ The board's right to dismiss Hunter was beyond challenge, for he served at their pleasure, and they were under no obligation to explain their decision.

It is difficult to imagine a president and board of governors declining to explain a similar decision only ten years later, and impossible to imagine their behaving that way 20 years after the Hunter case. Professors, both tenured and untenured, were still occasionally dismissed after 1960, but not without at least a semblance of due process and some attempt to justify the decision publicly. One reason may have been that Hunter's dismissal exposed the University of Alberta to a certain amount of negative comment, but more important was the extraordinary amount of publicity that came to surround the dismissal of the historian Harry S. Crowe from United College (now the University of Winnipeg) in 1958. This publicity was greater than it would have been a decade earlier because the Canadian Association of University Teachers (CAUT), which had come into existence in 1951, drew attention to the dismissal.

THE CROWE CASE, 1958

Unlike the AAUP, the CAUT did not initially focus on academic freedom and tenure.⁹⁵ Bread-and-butter concerns such as salaries, pensions (several universities did not yet have pension plans), and health benefits dominated during the early years. By 1958, however, the CAUT was beginning to concern itself with matters of appointment and dismissal, and the Crowe case was highly relevant to the latter.

The reasons for the dismissal, and whether Crowe's academic freedom or his tenure were central to the case, continue to be sources of disagreement to this day.⁹⁶ At the time, and since, many people have believed that Crowe was improperly dismissed for expressing, in a private letter that was illegally diverted, opinions hostile to organized religion. These were unwelcome in a denominational college, an institution of the United Church of Canada. That was in part the finding of a committee of inquiry

formed by the CAUT and consisting of V. C. 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 Canada).⁹⁷ However, the investigators also found that Crowe's first dismissal in July 1958—a second took place in September—was due to his 'audacity in protesting an invasion of privacy and violation of what he conceived to be his legal rights, as well as protesting possible adverse use of the contents of the letter based on conclusions which he declared were unfounded'.⁹⁸ Although the board of regents acted on the basis of the 1938 United College Act by which professors held their tenure during the pleasure of the board, Fowke and Laskin held that the board had infringed on tenure as Canadian professors had come to understand it, adding: 'Security of tenure is prerequisite to academic freedom.'⁹⁹

Did Crowe's dismissal have any relation to academic freedom? Fowke and Laskin concluded that it did.¹⁰⁰ Were they right? And by whose definition?

On the issue of tenure: it may well be true that some, possibly many, Canadian professors had come to assume that they held their tenure during good behavior and could be dismissed only for cause and after a proper hearing in which they would have a chance to defend themselves. All the same, the legal situation was that Crowe's tenured position had been terminated because it no longer pleased the board to employ a man they regarded as insubordinate. A recommendation from Principal Wilfred Lockhart was not required, and he did not make one. By law, the regents owed Crowe neither a hearing nor an explanation, and he received neither.

Since Crowe's critical remarks about religion were made in a private letter, the issue of academic freedom with respect to them arose mainly because in September the regents made the contents of Crowe's letter, of which they had been previously unaware, the reason for changing the notice of one year, during which Crowe would have taught at United, to dismissal with a year's salary in lieu of notice. The reference to academic freedom with respect to the July dismissal was problematic. In fact, it was novel in Canada at the time. Did the concept of academic freedom, in this country or elsewhere, cover actions that boards might regard as insubordinate?

The 1915 and 1940 AAUP statements on academic freedom and tenure did not discuss this, but Fowke and Laskin judged that Crowe, in protesting an invasion of his privacy and demanding that any copies of the letter be sent to him, was 'neither intemperate nor vigorous beyond the point of reasonable firm-

ness'.¹⁰¹ His dismissal for defending his rights they saw as an attack on his academic freedom. Beyond that, they saw an implicit attack on the dignity of the academic profession. At United College, and not only there, professors were expected to defer to the authority of executive heads and lay boards of governors. In challenging this state of affairs, Fowke and Laskin signaled a change in the self-perception of Canadian professors. Commenting on Crowe's protest against the photocopying of his letter by Principal Lockhart, they wrote: 'Canadian scholars are not commonly or properly held in such low esteem that they must abstain from protest in such circumstances.'¹⁰²

The assumption that boards of governors or regents were synonymous with the colleges and universities they governed had legal support, but professors were beginning to question it. A small but growing number were asking why members of lay boards, who did none of the institution's essential work of teaching and research, and often seemed to lack interest in it, should be able to dispose of professors' careers. They looked to changes in university government that would award more power and influence to the teaching staff.¹⁰³ Fowke and Laskin made a logical leap in linking this issue to the issues of academic freedom and tenure. In the 1960s the CAUT would do much to spread this idea in the academic world, notably in a book edited by George Whalley and published under CAUT sponsorship in 1964, *A Place of Liberty: Essays on the Government of Canadian Universities*.¹⁰⁴ The essay on academic freedom was written by Frank Underhill, who identified it with faculty self-government but claimed that 'academic freedom will only be securely established through the growth in the community at large of a genuine belief in the supreme value of intellectual activity'.¹⁰⁵ This was unlikely to happen anytime soon because the belief could be damned as 'elitist'. Bora Laskin contributed a discussion of tenure, with a synopsis of several court cases and a brief account of the Crowe affair. The principles of tenure laid down by the courts, Laskin concluded, 'do not comport with the views generally held by the academic community'.¹⁰⁶

THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS AND TENURE

A 1965 report on tenure that Queen's law professor Daniel Soberman prepared for the CAUT made the same point in greater detail. Finding the justification

of tenure in the protection of academic freedom, he wrote that the jurisprudence of tenure in Canada was 'not helpful ... The picture of our legal rights is an unhappy one. Indeed, if the legal picture were the whole story, the state of academic freedom in Canada would be intolerable'.¹⁰⁷ The 'whole story' was that tenure during pleasure had generally become tenure during good behavior in fact if not in law. He urged professors to work towards reaching agreements with governing boards that would establish tenure during good behavior in law and provide for procedures dealing with appointments, promotions and dismissals, including full hearings and appeals.

Encouraged by the CAUT and aided by a temporary shortage of qualified people, Canadian professors in the 1960s sought and obtained agreements that established tenure during good behavior. At the University of Toronto, for example, a committee appointed by President Claude T. Bissell in 1964 and chaired by the physiologist R.E. Haist, authored the 'Haist rules' dealing with appointments, promotions, and tenure, which included a requirement to show cause in cases of dismissal. The board of governors adopted these rules in 1967, thereby significantly limiting their own power.¹⁰⁸ Other governing boards were doing the same thing. By 1970, many university people, including presidents and board members, had come to the view that tenure as a permanent appointment, terminable only for cause and after a properly constituted hearing, should be enjoyed by all professors who had passed a period of probation, usually three to six years in length. The protection that academic freedom derived from tenure had become its chief justification, and professors now understood that freedom to include not only the freedom to teach, do research and publish, but also the freedom to speak freely as citizens and even the freedom to criticize one's own institution.¹⁰⁹

For a time the argument for tenure as a guarantee of economic security dropped out of the discussion. It was absent from Soberman's discussion of tenure even though the CAUT's initial statement on academic freedom and tenure in 1960 had claimed that the provision of 'sufficient economic security to make the profession attractive to men and women of ability' was one of two key ends of tenure, the protection of academic freedom being the other.¹¹⁰ That claim echoed Mr. Justice Dysart's obiter dictum in the Smith case 40 years earlier; yet Soberman, writing when academic jobs had suddenly become plentiful, described Dysart's attitude as 'patronizing'.¹¹¹ It soon became relevant again, however, when new academic positions became scarce after 1971, even as

the number of graduate programs and thus of qualified candidates kept growing. Among other things, this meant that those who lost their position found it very hard to find another. This in turn prompted a renewed appreciation of the need for security.

'University employment is rather like membership of some profession,' the University of Alberta legal scholar G.H.L. Fridman wrote in 1973, 'because dismissal is like loss of professional status: the dismissed party is deprived of the means of obtaining a livelihood by the exercise of that skill and expertise for which he has prepared himself by years of training'.¹¹² In an obiter dictum in 1990, the Supreme Court of Canada made a related point. Professors, the Court held, 'must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas.'¹¹³

CONCLUSIONS

The justification of tenure as employment security was as relevant at the end of the 20th century as it had been at the beginning. If professors are less likely to make this point, it is because the argument is too easily described as self-serving. Nevertheless, the desire for economic security has a close link to academic freedom.

Tenure during good behavior, terminable only after cause had been established in a fair hearing, had by 2000 become the rule, and academic freedom had come to include the freedom not only to embrace controversial research topics but also to espouse unpopular causes. In some senses, then, academic freedom is safer than it was before. However, in recent decades Canadian universities have been increasingly reluctant to appoint academics to tenurable positions, and the teaching staff has come to include a growing number of people who are employed on eight month contracts. Although collective agreements usually contain a clause protecting academic freedom, in fact the insecurity of contract of part-time faculty members has seriously limited their academic freedom. Especially their freedom to carry on long-term research projects is severely hampered, not least because most need to work during the summer.

Economic security, not academic freedom, is at the core of tenure, but without that security, academic

freedom in all its forms is embattled. Tenure may protect people whom others regard as undeserving and who may in fact be so, people who, in spite of the promise they showed when they received tenure, have turned out to be wanting in some aspect of their work. But this drawback is the price that may have to be paid to protect the innovative, the outspoken, the unconventional, and the unpopular, those whose fields of academic specialization have fallen into temporary disfavor and, most of all, those who do research, sometimes very important research, that does not produce quick results and satisfies no commercial demand. As it did in the past, tenure continues to serve the long-term interest of the universities and of society.

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⁹²Horn, *Academic Freedom in Canada: 195–202*

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⁹⁵Horn, *Academic Freedom in Canada: A History*, 221–222

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