

Notes for Remarks before the New Brunswick
Legislative Assembly

Law Amendments Committee
Bill 82
“Access to Information and Protection of Privacy
Act”

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Monsieur le ministre,
Honorables députés de l'Assemblée législative,
Mesdames et messieurs,

Nous tenons d'abord à remercier votre comité d'avoir accepté de recevoir nos commentaires ce matin dans le cadre de votre révision de la Loi 82.

La Fédération des associations de professeures et professeurs d'universités du Nouveau-Brunswick fête cette année son trente-cinquième anniversaire.

Depuis 1973, la fédération représente les intérêts de plus de 1 300 professeures et professeurs à temps complet et près de 700 professeures et professeurs à temps partiel dans les sept campus de nos quatre universités publiques.

Peu de temps après son arrivée au pouvoir en 2006, le gouvernement provincial a entamé une série de réformes dans un nombre important de secteurs. Jusqu'à maintenant, aucune réforme n'a suscité autant d'opposition que les changements proposés à l'ensemble du système d'enseignement postsecondaire au Nouveau-Brunswick.

La fédération continue de veiller aux intérêts de ses membres en proposant des alternatives au gouvernement vis-à-vis son Plan d'action.

Aujourd'hui, nous souhaitons vous inviter à la réflexion.

Nous avons pris connaissance du projet de loi proposé et nous avons pris le temps nécessaire pour analyser les répercussions possibles auprès de nos membres.

J'inviterais maintenant mon collègue, le professeur David Bell, à vous présenter les préoccupations de la fédération.

Honorable members, I would now like to ask my colleague, David Bell, from the Law Faculty at the University of New Brunswick, and one of the federation's valued board members, to continue with our joint presentation.

As Mr. Allain has just stated, we are the Federation of New Brunswick Faculty Associations, representing more than 2,000 full- and part-time academic staff at university campuses at Edmundston, Fredericton, Moncton, Sackville, Saint John and Shippagan.

We appear before you to address one aspect of Bill 82, the proposed *Access to Information and Protection of Privacy Act*: its implications for the province's universities.

Our primary concern is the very principle of extending access to information legislation to the university sector. But we will also address a particular misunderstanding reflected in the proposed legislation on a matter that is important to our members.

ARE UNIVERSITIES "GOVERNMENT"?

Nearly everyone agrees that access to information legislation *should* now be extended to the government sector generally. Bill 82 moves New Brunswick decisively in that direction. But the public's legal right to information should be confined in its application to the government - its departments, agencies and crown corporations. Universities are not and have never been part of "government".

UNB, Mount Allison, Université de Moncton and St Thomas were all founded in the 19th century to pursue a religious and cultural mission. St. Thomas still claims such a mission. Each now operates under what is called a *private* act of incorporation. University employees fall under the **Industrial Relations Act**, not the **Public Service Labour Relations Act** because they are not public servants.

They do not participate in the government pension plan. In short, no one could regard universities as part of “government”. In a landmark case, the Supreme Court of Canada has recognized that universities, even when supported *by* government, must be independent *from* government.¹ In that case, the Court held that the **Charter of Rights and Freedoms** did not apply to universities because in Canada universities are not government.

On the principle of extending Bill 82 to the university sector, we find ourselves in agreement with presidents of the province’s universities in their submissions to the Savoie taskforce that gave rise to Bill 82. Universities are institutions of education and research into the natural and social worlds.

When academic staff and students make autonomous choices about the programs they will offer or take, society is enriched in ways that cannot be anticipated. Universities thrive only when insulated from the short-term concerns of government, business and other influential sectors.

None of the great universities of the world – a status to which we here in New Brunswick must aspire – is under political or religious direction.

¹ **McKinney v. University of Guelph** [1990] 3 S.C.R. 229. As UNB noted in its submission to the Savoie taskforce, if access to information legislation were to treat universities as if they were a branch of government, that would become an argument that **McKinney** was outdated and that the **Charter** did apply to universities. In a school setting this would have enormously disruptive consequences.

But now, in a whole constellation of ways, New Brunswick is proposing to turn its four largest universities into instruments of government policy. Several measures undermining university autonomy are to be found in last June's **Action Plan** on post-secondary education.²

In the same month that the **Action Plan** was released, Bill 82 was introduced into the Legislature. Broadly speaking, the two are part of the same move to transform the accepted relations of government and universities without perhaps understanding what those relations properly are.

In the result, there has never been such tension between government and the university sector. It was only a year ago that a thousand protestors converged on the Legislature to oppose what they feared would become government higher education policy.

One year ago this week hundreds of demonstrators converged in Edmundston to send the same message. Within the last few weeks New Brunswick's university senates have taken a vow to resist what they regard as governmental encroachment on their autonomy. However well intentioned, Bill 82's treatment of universities as if they were just another branch of government is a move in the same direction.

² Among policies announced in the **Action Plan to Transform Post-Secondary Education** are the following. Some of them may be laudable but they confuse accountability *to* government with academic direction *by* government.

- § university governance supervised by a Post-Secondary Education Agency
- § funding dependent on conformity to Self-Sufficiency Agenda, performance-based contracts and performance indicia
- § annual appearance before the Legislature

We are not claiming that universities should be less than fully accountable for the financial grants they receive.³ However, we would emphasize that both the provincial government and the Maritime Provinces Higher Education Commission receive extensive reporting on university operations.

There must be few sectors with as many measures of performance and cycles of accountability as universities and those who teach in them. Moreover, we would have no practical objection if the province sought to increase transparency by making public additional information about the university sector.

For example, the **Telegraph-Journal** has editorialized in favour of publication of the salaries of senior university administrators, which Ontario requires of its universities.

We would not oppose such a limited disclosure regime for New Brunswick. But treating universities as just another branch of government, as Bill 82 does, would undermine their mission, detract from their credibility and, ultimately, disserve the public interest.

THE SCOPE OF SECTION 4

Our second purpose in speaking to you today is to raise a concern with the scope of section 4, the bill's key provision, as it would apply to universities. Section 4 provides that the access to information regime would apply "to all records in the custody of or under the control" of the four named universities, except in a number of cases that are enumerated.

³ Some people assume that universities derive the great majority of their funding from government in the same way that hospitals do. At the province's largest university in the academic year 2007-08, government funding accounted for 58% of operating income. That percentage has been falling since the McKenna era. New Brunswick universities now have the second lowest level of public funding in Canada.

Two of these enumerated exceptions, (h) and (i), would apply to a university's teaching faculty. That is, members of the public could not get access to "teaching materials or research information" or to "a question that is to be used on an examination or test".⁴

While these would seem to be sound exceptions, the problem is that they imply that such records would be in the "custody" or "control" of the university *in the first place* (and so are exempted from disclosure only by reason of the specified exceptions). This is not so and reflects a misunderstanding of how universities differ from other workplaces.

In the university context, nearly all records generated by academics in the course of their teaching, research and service are regarded as records belonging to *the academic employee*, not the university employer.

By the nature of their work, academic staff are not as other employees. Faculty members and librarians do not have the same "duty of loyalty" that most employees have towards their employer.

On the contrary, they are granted what is called academic freedom, which includes the freedom to criticize the university-employer. This is a right guaranteed in collective agreements in New Brunswick and indeed throughout Canada but is unique to a university work setting.

⁴ Even as exceptions, these two categories are so narrow as to suggest limited understanding of the range of work that goes on in universities. What about e-mail generated by the student counseling that is an almost daily feature of any academic's life, by no means confined to academics who are priests or psychologists. None of this is exempted. What about the poetry or short-stories that the English professor is writing or the emerging symphony from the music professor? None of this would fall under a "teaching" or "research" exemption. Examples could be multiplied. What public interest would be served by making such records accessible to everyone who asked?

As well, academic employees are accorded unusual independence in their work. For example, they, not their employer, own the intellectual property in their work product. For that reason, the records generated by an academic's work product are not within the employer's "custody" or "control". Bill 82's exception for teaching and research materials assumes that they are.

When academic staff leave their employment, they take with them their lecture notes, electronic files, books, and other materials related to teaching, research and creative activity, librarianship and service to their institutions, disciplines and society.

The employer can assert no claim to such records because they do not belong to the employer. Hence, this was never documentation in the university's "custody" or "control".⁵

There are, of course, records connected with the *administration* of a university that the university does own and that should be caught by s. 4 (if Bill 82 is to apply to universities at all). The best way we can suggest to clarify the scope of the provision so as to reflect the reality of the academic worksite is to add to the proposed Act a sub-section 4 (2) that would read as follows:

4 (2) For greater certainty, records owned by academic employees of a university are not records in the custody of, or under the control of, a public body.

Hence, such records would not be subject to access to information requests.

⁵ This understanding that an academic's records are not within the "custody" or "control" of the university-employer has very recently been affirmed in **Association of Professors of the University of Ottawa v. University of Ottawa** (arbitrator Philip Chodos, 29 Sept 2008).

SUMMARY

The purpose of access to information legislation is to allow citizens to know more about what *government* is doing. Accordingly, its scope should be confined to government in all of its various guises.

In no sense of the word are universities part of government. It is an error in principle to include New Brunswick's four largest universities within Bill 82.

Section 4 of Bill 82, as it would apply to universities, is based on the misunderstanding that universities have "custody" or "control" of most of the records generated by their academic staff in the course of their duties. In the main, this is not the case. We have suggested an amendment to s. 4 that would clarify this.