

Dear MAUT members,

As many of you are aware, AGSEM—the association that represents teaching assistants at McGill—is currently negotiating its collective agreement with the university. As part of these negotiations, AGSEM recently held a vote on strike action which was approved by its membership.

Over the past week or so, numerous faculty members have received messages from their chairs and deans instructing them to obtain all graded material in their courses and to be prepared to grade all upcoming assignments in the event of a strike. On March 13, 2024, the administration sent out two documents—a Quick Guide for Instructors Regarding Student Assessments and an FAQ on the Labour Dispute involving AGSEM—stating that “[g]rading is part of the duties of an instructor who is responsible for the course in question. It is not exclusive to the function of TAs”.

The TA union has a different opinion on the legality of professors performing such work, such as grading assignments and exams, which AGSEM characterizes as illegal “scabbing” on an FAQ on their web site: <https://www.agsem.ca/bargaining/ta-strike-faq>.

In anticipation of the possible strike, MAUT requested a legal opinion through the Canadian Association of University Teachers (CAUT), who sought advice from Melançon Marceau Grenier Cohen (MMGC), a Montreal law firm specialized in labour law. The law firm was asked about, “the obligations of professors at McGill University during a possible strike by Teaching Assistants”, and specifically “about the potential legal consequences for professors if they were to do grading work in lieu of TAs on strike... [and] possible employer-initiated ramifications for professors who would *refuse* to do grading work in lieu of TAs on strike.”

The legal opinion (appended below in its entirety) suggests that the University’s position does not conform with the law. The opinion investigates the question of whether *any* additional grading by professors (beyond what had already been contemplated) violates the law or any disproportionate (assessed by the amount of work involved) grading violates the law. The opinion also addresses the issue of whether professors who do grade work habitually done by TAs are complicit in the violation of labour law. Finally, the opinion indicates possible recourses that MAUT and/or professors may take if they believe that professors are being asked to do work that is prohibited by [s. 109.1 of the Québec Labour Code](#).

Below is a reproduction of the summary of the main conclusions from the legal opinion:

- there are diverging views in the case law as to whether the exclusivity—or lack thereof—of functions of employees on strike is relevant or not in determining whether another person is discharging that function in violation of [s. 109.1](#);
- some decisions consider that the exclusivity of the functions—or lack thereof—is not really relevant; on this understanding, *any* performance of work that is part of the TA bargaining unit by a person who could be subjected to a [s. 109.1](#) prohibition (here, professors) would be prohibited;

- other decisions take account of the non-exclusive nature of the duties of the employees on strike and consider that persons who habitually perform a task that is *also* performed by employees on strike *can* carry on performing these tasks without violating [s. 109.1](#), with the important caveat that only the work that has been *habitually done in the past* can be carried on by persons who could be targeted by a [s. 109.1](#) prohibition;
- in our view, even on this understanding, there is thus substantial support for the principle that the continuing performance of nonexclusive work by employees on strike by people who are potentially subject to [s. 109.1](#) prohibitions (here, by professors) is possible only insofar as the performance of that work by the latter employees during the strike is not disproportionate with past practice;
- if, during a TA strike, professors were asked to grade exams that have been assigned to TAs using a Workload Form, one could plausibly argue that this would disrupt the standard practice and proportions in which grading work is distributed outside of a strike;
- the prohibition against strike-breakers in [s. 109.1](#) only applies *during* the strike;
- the [s. 109.1](#) prohibition only applies to *employers*;
- however, a person who accepts to discharge the duties of an employee on strike where a [s. 109.1](#) prohibition applies is *complicit* in committing with the employer the penal offence of violating [s. 109.1](#);
- as a general principle, employees who refuse to follow the employer's directions might face discipline for insubordination;
- the "Obey now, grieve later" principle is often applied in labour relations, but it does have exceptions, which include orders requiring an employee to commit an illegal act
- the argument that the requirement by the employer that a professor perform the entirety of grading work, for example, whereas this would not happen in the normal course of business and would derogate from grading tasks that had already been attributed to TAs, that this would constitute a violation of [s. 109.1](#), and that the professor's "complicity" in allowing the employer to violate [s. 109.1](#) would constitute a violation of [s. 145](#), thus justifying the professor's refusal to follow the employer's directive, appears to us sound as a matter of principle, although it is not without risk as a tribunal could come to a different conclusion on the matter in a given case;
- there is a substantial risk if an association of employees were to direct or incite its members to refuse to perform such work, as it could be seen to be a concerted action amounting to an illegal strike;
- although most [s. 109.1](#) complaints are filed by the union on strike, it appears that other, non-striking unions or their employees could also file such a complaint;
- employees who are forced to perform work that entail in their view a violation of [s. 109.1](#) would seem to be better placed than their association to assert the irreparable harm required to obtain an interim order, although the tribunal opined in one decision that the threat of disciplinary measures by the employer or of penal complaints against them are not actually irreparable harm for the employees because of the availability of recourses or defenses in such situations.

**Please note, MAUT is not directing its members to take any course of action but is making the legal opinion available so that faculty and instructors may be better informed about the situation.** Members are invited to contact MAUT for further information and advise. We will provide more information as the situation unfolds.

The complete legal opinion from MMGC is [here](#).

MAUT Council