

REPORT OF THE COMMITTEE ON
ACADEMIC FREEDOM

*Version revised to correct some inaccuracies in references to legal precedent.

Dear President Frémont:

I am pleased to submit this report from the Committee on Academic Freedom, which began its work on April 23, 2021. The Committee is very satisfied with the consultations that were undertaken with the University community and hopes that its efforts will make a substantive and meaningful contribution to creating a peaceful study and work environment on campus, respectful of academic freedom and freedom of expression, in accordance with the University's values of diversity, inclusion and respect, in a bilingual institution dedicated to promoting true equality.

It is no secret that consensus can be difficult to achieve when behaviours, opinions and value judgments are involved. We are aware of the challenges involved in undertaking any attempt to identify and provide a framework for the expression of viewpoints. However, we firmly believe that a broader understanding of the rights at issue and their related limits and obligations will assist the University in fulfilling its duty to clarify its own mandate in this regard. We realize that there are feelings of hostility and apprehension at present. However, we also believe that the consultations revealed a strong attachment to the University and a genuine desire to contribute to its harmonious development. This gives hope for the future.

On behalf of the Committee members, I would like to thank the University administration for the confidence it placed in us and for the administrative support provided, especially by Caroline Tremblay and Anne-Lyse Gagné.

Respectfully submitted,

Michel Bastarache, CC, QC
Chair, Committee on Academic Freedom

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1. REPORT SUMMARY

Following events that generated considerable turmoil over the issue of respect for academic freedom at the University of Ottawa, the administration established the Committee on Academic Freedom, whose mandate was to take stock of the situation on campus and opinions on the subject in the University community, and to clearly define academic freedom and freedom of expression with a view to suggesting an oversight mechanism. The University wishes to affirm its unwavering support for those freedoms and clarify how it proposes to approach them. The Committee's mission has been to help the University attain this goal.

The Committee conducted research to gain insight into the situation on other campuses in and outside of Canada, practical policies and mechanisms, and scholarly studies done on the scope of the freedoms at issue. It then held consultations with the entire University community to determine how the incidents in question had affected its members' perceptions of the freedoms at issue and its views on their application. The consultations, which garnered more than 100 written briefs and comments, were supplemented by online discussions.

The Committee subsequently decided how to structure its report, which it then drafted. The report includes a foreword that provides background and context for the situation, followed by a summary of the remarks of the persons who were consulted, giving the reader a clear sense of the positions of the groups, associations and individuals who took part in the consultation process. That process revealed a lack of consensus and much apprehension. Some participants were critical of the administration's handling of the problem, while others lamented a lack of effort to prevent intimidation and infringements on freedom of expression. In general, participants wanted a new complaints mechanism to be instituted.

The Committee—cognizant of policies in place, the incidents that shaped opinion and studies on the subject—discussed what should be included in the report. The Committee ultimately proposed definitions for the freedoms at issue, criteria for their implementation and norms for setting limits on them. Some limits are statutory, while others may be contingent upon action by the administration.

The Committee's terms of reference also required it to make recommendations. It made a number of recommendations covering all of the topics that were discussed during the consultations. The recommendations are specific enough for everyone to decide on their merits. However, the reader would do well to refer to the body of the report in order to understand the source of the recommendations and the Committee's rationale for them.

2. RECOMMENDATIONS

The recommendations are as follows:

- a. The Committee determined that there is a lack of consistency in how the concepts of academic freedom and freedom of expression are understood. However, it is necessary that everyone know what these rights actually entail in order for them to be implemented. Without affecting existing policies, the Committee recommends that its definitions of these freedoms be shared with the entire University community, to produce principles that can be put into practice. The complaints mechanism and the criteria on which it is based must also be made known to the University community.
- b. Although several stakeholders said that a complaints mechanism already exists, it would appear to be poorly known and considered ill suited to dealing with situations involving academic freedom and freedom of expression. To strengthen protections for academic freedom and to reassure the University community, it is recommended that a standing committee be established to review and implement the policy on academic freedom and freedom of expression.

Such a committee would have the authority to receive complaints and concerns about academic freedom from faculty members as well as those about freedom of expression from any member of the University who feel they have been aggrieved, and to conduct in-depth reviews of the situation at the University". The Committee could study implementation of the policies and principles of academic freedom and freedom of expression in all areas of activity (teaching, research, academic conferences, etc.) on campus and report annually on complaints that have been received and processed, and issues it has analyzed. The committee's annual report would be submitted to the Provost and Vice-President, Academic Affairs, and be appended to the Vice-President's annual report to the Higher Education Quality Council of Ontario.

In essence, the committee would support the mandate of the Provost and Vice-President, Academic Affairs, to protect academic freedom, thereby increasing the tools at the Vice-President's disposal for carrying out the position's duties in that regard and strengthening accountability to the University community and the Higher Education Quality Council of Ontario.

- c. The members feel that the standing committee would have to do more than simply hear from complainants, conduct investigations and impose penalties. In fact, there will be cases where the solution will not be to take punitive measures. The Committee will first have to clearly define the nature of the complaint or worrisome incident and subsequently examine the situation by applying known criteria (recommended in Section J) and consider that, in cases involving academic freedom, the latter rests on the assumption that the actions under review have an academic purpose. There could also be dual-aspect

cases where academic purpose overlaps with a purpose more suggestive of outright discrimination. The Committee recommends that the administration establish an action plan not only to fight racism and discrimination, but also cyberbullying — a constantly increasing threat to both freedoms that is more and more difficult to keep in check. Leadership will be needed to establish a mechanism in which the University community has faith. Such a mechanism will set out the conditions for filing complaints, assessment criteria, remedial measures and a public accountability procedure. The standing committee could also supervise the implementation of training tools for faculty members to assist them in eliminating the self-censorship that some professors engage in to protect themselves. To that end, the standing committee could draw on the required expertise and resources that are available through the University’s Teaching and Learning Support Service (TLSS) and allocate sufficient financial resources to ensure proper training of TLSS staff.

- d. The Committee feels that a diversity and inclusion training program should be established, along with a personal consultation service for faculty members. The consultations clearly showed that faculty members often feel ill equipped to address the issue and that they urgently need information and resources to do so. These resources can be put at the disposal of the faculty in its entirety, but they can also include access to tailored guidance.
- e. The many incidents that left faculty and some students feeling insecure showed that there is a need to establish norms of conduct applicable to students, faculty and other University staff, and measures prohibiting cyberbullying. Dialogue and the search for truth will be impossible if differences of opinion give rise to invective and insults, disrespect for diversity or disregard for human dignity. The University must regulate such conduct and possibly review the scope of the principles underlying [Policy 121—Statement on Free Expression](#).
- f. The Committee recommends that the University affirm the need to protect academic freedom and freedom of expression in fulfilment of its teaching and research mission. The Committee is therefore against the exclusion of words, works or ideas in the context of respectful academic presentations and discussions whose educational goal is to promote the dissemination of knowledge. Although the University could adopt policies and regulations limiting academic freedom and freedom of expression while respecting collective agreements, and given that some stakeholders said the University should intervene when sensitive topics are involved, the Committee is not in favour of institutional or self-censorship that is apt to compromise the dissemination of knowledge or is motivated by fear of public repudiation. The Committee believes that students and the University community must be willing to address sensitive topics in an academic context. Providing advance notice of topics deemed sensitive by some students may be

expedient in certain cases to ensure they are not caught off guard. It must not affect the professional responsibilities of faculty, however.

- g. The Committee recommends that the University unequivocally reaffirm its commitment to academic freedom and freedom of expression, and that it clarify its rights and obligations as an educational institution. The members of the University community must be certain of the University's support when their right to free expression is at stake, and they must be able to rely on an effective mechanism for addressing issues of concern in that regard.

3. FOREWORD

It should be noted that the Committee that produced this report is an advisory body only. The Committee's mandate was rather specific, as it had to address questions from University administration and present recommendations by the end of the summer. To that end, the Committee first had to take stock of the situation at the University regarding the practical application of the concepts of academic freedom and freedom of expression. The Committee had to become familiar with how the members of the University community interpret these concepts and how they think they should be implemented. The Committee therefore had to consult the various stakeholders in the University community in order to propose a mechanism that would make it easier to implement the two freedoms in the future.

The Committee elected to begin the consultations by inviting members of the University community—associations, groups and individuals—to submit briefs or comments. As the deadline for submissions was rather short, the Committee was more interested in knowing stakeholders' opinions or positions on the issue as opposed to receiving in-depth assessments. The Committee received 102 briefs and comments. The Committee also wanted to hear directly from faculty professional associations, student associations, support staff and the Action Committee on Antiracism and Inclusion. To that end, we also held online consultation sessions. The Support Staff University of Ottawa (SSUO) bargaining unit did not take up our invitation. It did submit a brief, however. The Committee also invited the BIPOC Caucus to a meeting. It declined, but submitted a brief as well.

The Committee also conducted research. The Committee inventoried documented cases at Canadian universities, and at universities in the United States and the United Kingdom. The Committee obtained and analyzed documents from Canadian universities on the concepts of academic freedom and freedom of expression, in order to see how they are interpreted and applied. The Committee accessed two major studies produced by lawyers specializing in the subject. The Committee also secured documentation from the Canadian Association of University Teachers and from international bodies. Of course, the Committee also had access to University of Ottawa official documents. The

Committee wanted to have a clear picture of the situation before making its own recommendations.

Not surprisingly, the Committee came across significant differences of opinion. There is no consensus at the University of Ottawa or at Canadian universities as a whole, even though most stakeholders believe in the importance of the freedoms in question. The Committee did not try to sway anyone during its consultations, whose purpose was to let participants have their say. The Committee acted strictly in a listening capacity. With regard to limits on rights, the Committee could find very few helpful precedents, particularly when it came to potential penalties for offenders. The Committee proposed the establishment of another committee that would review complaints or situations requiring action by the administration, together with an analytical grid and criteria that would enable consistent, balanced decisions. The Committee did not recommend any penalties, as it felt that the system currently in place should be used.

Of course, the number of briefs and comments and the opinions that were given in person do not provide a scientific basis for the Committee to conclude that it now knows the entire University community's opinions on the matter. However, the Committee believes that the quality of the consultation process and the fact that it included the entire University community generated significant insights not only into trends, but also into the apprehensions, fears and criticisms of the persons who were consulted. That is important because it sets out a pathway for sharing information with the University community and for proposing a mechanism for dealing with grievances and situations in need of monitoring.

We know only too well that the main challenge lies in articulating what the limits on the freedoms in question are. Some people believe that the only limits are those that derive from legislation. On the other hand, others are of the view that there are limits that are dictated by University policies and programs or that there are obligations of civility, such that the freedoms enjoyed by one group must not prevent others from exercising theirs. Some participants spoke of collective rights, of social morality and of the need to dismiss the constraints of persons who feel aggrieved but have not been libelled. Several participants argued that academic freedom is more limited than freedom of expression because it comes into play solely in cases where the people exercising it do so in their capacity as professors, teachers, researchers or professionals in their area of expertise. They are bound by their employment contract, by the program they are required to follow and by obligations governing relations with students and colleagues.

There are several ways of describing this reality, and there are good examples in the submissions, which the reader can peruse in the appendix dedicated to them. Differences of opinion notwithstanding, there are common threads running through the submissions. It was said that there should be no censorship, that independent intellectual discourse should be promoted, and that people should be able to broach sensitive topics without

fear of reprisals or other constraints, including those resulting from action by students. The right to be protected by the administration from external, ideological, religious, political and economic forces was also mentioned. This topic is important, as several professors reported having been subjected to outrageous attacks by students simply for having expressed their opinion, with deans and other members of the administration unwilling to intervene. That professors should have to engage in self-censorship in order to protect themselves is unacceptable, it was said. The University must denounce all forms of retribution as well as physical and verbal violence. These are the requirements of a free and democratic society.

Although the majority of stakeholders felt there are differences between academic freedom and freedom of expression, none saw any contradiction between the two. One is an extension of the other in that freedom of expression applies to everyone and is independent of faculty employment obligations. However, this freedom is not without limitations. It is limited in law; incitement to violence and hatred, fraud, libel and sedition are prohibited. A few faculty members said that students' freedom of expression does not give them the authority to insult, bully or threaten faculty and thus to create a climate of fear. Students who do so could be sanctioned under University policies that apply to them. We learned that members of associations who disparage their employer online and tarnish the employer's reputation can be dismissed. Such is the case in the United Kingdom. False messages intended to harm others are not considered to be the expression of ideas in search of truth. This is a variation on the duty of loyalty as recognized in employment law. However, it should be remembered that, there as here, the right to criticize is not diminished, and that the right to not be offended does not exist. It all boils down to a governance issue—hence the utility of guidelines and criteria.

The University is the cradle of freedom of expression and debate, and, ideally, the pursuit of truth. This does not mean, however, that the University should be open to all manner of propagandist ideologies. The University must be open and democratic. However, there are established programs and rules of conduct that faculty and students must follow. The University has values that it is entitled to defend. These values may even be debated by subjecting them to empirical assessment. However, there is a framework for voicing opposing views, one where mutual respect is paramount. Blatant falsehoods, insults and denigration have no place in the name of academic freedom or freedom of expression, as they obstruct dialogue and negate other people's freedom.

Given the issue before it, the Committee also had to determine how academic freedom should be balanced with the values of equity, diversity and inclusion. Some of the submissions state that the pursuit of genuine equality and bilingualism should also be included. Some stakeholders said that these values are not incompatible with academic freedom or freedom of expression, while others argued that freedom of expression could interfere with the right to diversity. As a result, some people will say that they are not

incompatible, precisely because there are limits on these freedoms. Nonetheless, the majority view was that academic freedom should prevail. Diversity could be promoted irrespective of content, pedagogy or research methods.

The report's structure provides an overview of the Committee's terms of reference and work, submissions that were made and the Committee's conclusions as stated in the responses to the questions from the University administration. The Committee also has made a series of recommendations.

4. INTRODUCTION AND CONTEXT

This past year, polarizing events concerning the nature and limits of academic freedom and the responsibility of the University of Ottawa as an academic and research institution have caused a stir in public opinion and exposed some divisions within our own University community.

In light of those events, and in an effort to reconcile the issues at stake, namely, academic freedom, freedom of expression, the institutional autonomy of universities and the values of equity, diversity and inclusion, the President of the University of Ottawa asked retired justice the Honourable Michel Bastarache, CC, QC, to chair a Committee on Academic Freedom responsible for reviewing the issue independently and for making recommendations on the following:

- a. The issues at stake, namely academic freedom; freedom of expression; the institutional autonomy of universities; equity, diversity and inclusion; and the pursuit of genuine equality; along with the legal aspects of these issues
- b. The challenges that these issues present for the University of Ottawa, a bilingual university, in fulfilling its mission of teaching, conducting research and serving the community
- c. The lessons learned from incidents that have occurred at the University of Ottawa and elsewhere in Canada
- d. The best approaches and mechanisms to be used by members of the administration and University community for reconciling the issues at stake and to face such situations as they arise

The Committee was also tasked with consulting the University community and conducting any research it deemed necessary. It had to submit its report to the President, the Senate and the Board of Governors.

5. COMMITTEE MEMBERSHIP

On April 23, 2021, Jill Scott, Provost and Vice-President, Academic Affairs, at the University of Ottawa announced the membership of the Committee on Academic Freedom. The Committee, chaired by the Honourable Michel Bastarache, consisted of five University of Ottawa professors whose profiles and breadth of experience reflect the diversity of faculty:

- a. [The Honourable Michel Bastarache](#) (CC, QC), retired Justice and Chair of the Committee on Academic Freedom
- b. [Tansy Etro-Beko](#), Part-Time Professor, Department of Philosophy, Faculty of Arts
- c. [Jude Mary Cénat](#), Associate Professor, School of Psychology, Faculty of Social Sciences
- d. [Dr. Alireza Jalali](#), Associate Dean, external relations, engagement and advancement, Faculty of Medicine
- e. [Jonathan Paquette](#), Professor and holder of the research chair on the international Francophonie and cultural heritage policies, Faculty of Social Sciences
- f. [Sophie Thériault](#), Vice-Dean (Academics) and Full Professor, Faculty of Law, Civil Law Section

6. TERMS OF REFERENCE

The Committee was tasked with independently reviewing the following topics to assist the University in better fulfilling its mission of teaching, conducting research and serving the members of its community, Anglophone and Francophone alike:

The issues at stake, including those involving academic freedom; freedom of expression; the institutional autonomy of universities; equity, diversity and inclusion; and the pursuit of genuine equality; along with the legal aspects of these issues

The challenges that these issues present for the University of Ottawa, a bilingual university, in fulfilling its mission of teaching, conducting research and serving the community

The lessons learned from similar incidents that have occurred at the University of Ottawa and elsewhere in Canada

The best approaches and mechanisms to be used by members of the administration and University community for reconciling the issues at stake and to face such situations as they arise

7. PROCESS AND CONSULTATIONS

The Committee began its work on April 23, 2021. It met several times to fulfil the terms of its important mandate and to prepare this report. The Committee examined a variety of sources of research and information, and held two rounds of consultations with the University community.

The Committee also undertook the following actions:

- a. Compiled a list of incidents involving academic freedom and freedom of expression that have occurred on Canadian campuses
- b. Completed an inventory of the principles invoked and actions taken in handling grievances at Canadian universities, and at some universities in the United States and the United Kingdom
- c. Reviewed studies on issues related to freedom of expression and academic freedom, including two major studies
- d. Consulted with a similar committee at the Université de Montréal.

The first round of consultations involving key stakeholders in the University community took place from May 14 to June 4, 2021. During that first round, faculty, students and support staff were asked to submit briefs and share their thoughts on the following major topics:

- a. How do you feel about academic freedom?
- b. In a university setting, is there a difference between academic freedom and freedom of expression? If so, how are they different?
- c. What do you feel are the limits of academic freedom and freedom of expression?
- d. What is the scope of freedom of expression at the University as an institution?
- e. As a bilingual institution, how should the University balance academic freedom with its values of equity, diversity and inclusion?

- f. What mechanism(s) should the University put in place to handle complaints related to academic freedom and University values?

The consultations elicited keen interest, and the Committee was pleased with the wealth of comments and submissions received.

A second round of consultations was held from June 16 to 22, 2021. During this round, the Committee met with the following groups representing formal governance entities on campus in order to enhance its information gathering:

- a. The Association of Professors of the University of Ottawa
- b. The Association of Part-Time Professors of the University of Ottawa
- c. The Graduate Students' Association
- d. The University of Ottawa Students' Union
- e. The Special Adviser, Anti-Racism and Inclusive Excellence, and members of the Action Committee on Antiracism and Inclusion

8. CONSULTATION SUMMARY AND CONCLUSIONS

The Committee received a total of 102 briefs and comments during the first phase of its consultation. More than 60 briefs were submitted by members of the teaching staff, while students submitted close to 40 briefs, support staff prepared 1 brief, and campus unions or interest groups submitted 2 briefs.

These briefs and comments greatly enriched and guided the Committee in its work and in the writing of this report. You will find in [Appendix B](#) a complete descriptive synthesis and literature review of the briefs and comments received.

Readers will also find appended ([Appendix C](#)) reports on consultations with bodies representing the diverse elements of the University community. Reports do not follow the same format nor always contain answers to the same questions. This is because the Committee did not impose a format for the interventions, but rather, favoured individual participation and questions and answers resulting from those interventions. It was important that participants felt totally free to establish their priorities and to choose whether or not to formulate specific recommendations.

9. BACKGROUND

The Committee also conducted an environmental scan of definitions and policies at Canadian universities. It found that there are no major differences in definitions or policies at Canadian universities. In fact, no university appears to have found a formula through regulation allowing it to avoid controversy or to build a consensus around the procedures to follow when incidents force the administration to intervene. Readers will find appended ([Appendix A](#)) a description of the situation in the universities that the Committee consulted.

The Committee also attempted to discover whether universities outside Canada had experienced difficulties in applying the principle of academic freedom. This research was limited to the best-known universities that had been reported on in the media. Readers will find appended ([Appendix A](#)) a report on this research, which showed no notable difference between these institutions' approaches and those of Canadian institutions

10. COMMITTEES' RESPONSES

a. What is academic freedom?

Although the University of Ottawa's collective agreements provide a definition of academic freedom, it is worth noting that there is no universally accepted definition of this term. The Canadian Association of University Teachers (CAUT) describes academic freedom as the freedom of teachers, without restriction by prescribed doctrine and free from institutional censorship, to carry out research and publish the results thereof, to teach and discuss, and to criticize the university. Individuals do not have to remain neutral and are free to support causes. They do, however, have a number of duties, including the duty to carry out their research and teaching activities for the sole purpose of enriching knowledge:

CAUT Policy Statement

1. The institution serves the common good of society, through searching for, and disseminating knowledge, and understanding and through fostering independent thinking and expression in academic staff and students. These ends cannot be achieved without academic freedom. All academic staff members have the right to academic freedom.
2. Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service; freedom to express one's opinion about the institution, its

administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

3. Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible. All academic staff members have the right to fulfil their functions without reprisal or suppression by the employer, the state, or any other source. Institutions have a positive obligation to defend the academic freedom rights of members.
4. All academic staff members have the right to freedom of thought, conscience, religion, expression, assembly, and association and the right to liberty and security of the person and freedom of movement. Academic staff members must not be hindered or impeded in exercising their civil rights as individuals, including the right to contribute to social change through free expression of opinion on matters of public interest. Academic staff members must not suffer any institutional penalties because of the exercise of such rights.
5. Academic staff members are entitled to have representatives on and to participate in collegial governing bodies in accordance with their role in the fulfilment of the institution's academic and educational mission. Academic staff members shall constitute at least a majority on committees or collegial governing bodies responsible for academic matters including but not limited to curriculum, assessment procedures and standards, appointment, tenure and promotion.
6. Academic freedom is a right of members of the academic staff, not of the institution. The employer shall not abridge academic freedom on any grounds, including claims of institutional autonomy.¹

In 1997, UNESCO published a number of recommendations concerning postsecondary education which included a definition of academic freedom.² This definition is virtually identical to CAUT's. However, these documents have no legal weight. The only legally valid source is a contract, making academic freedom a labour standard. This is why most decisions on academic freedom are issued by labour tribunals.

¹Canadian Association of University Teachers, "Policy Statement: Academic Freedom", (November 2018) <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>

² UNESCO, "Recommendation concerning the Status of Higher-education Teaching Personnel", (1998) <https://unesdoc.unesco.org/ark:/48223/pf0000113234.page=20>

Some 85% of Canadian universities include the principle of academic freedom in their collective agreements. Moreover, 7% of universities recognize academic freedom in both a collective agreement and a general university policy. Furthermore, 4% of universities do not have a collective agreement but recognize the concept of academic freedom in agreements with faculty associations. Finally, 3% of universities simply recognize academic freedom in a general university policy.

In *McKinney*,³ the Supreme Court recognized the importance of academic freedom in the context of a university tenure policy:

Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas.⁴

[...]

Academic freedom and excellence are essential to our continuance as a lively democracy. Faculty renewal is required if universities are to stay on the cutting edge of research and knowledge. Far from being wholly detrimental to the group affected, mandatory retirement contributes significantly to an enriched working life for its members. It ensures that faculty members have a large measure of academic freedom with a minimum of supervision and performance review throughout their period at university.⁵

Justice Wilson, who dissented in *McKinney*, offers some interesting insights:

The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of the free flow of ideas.⁶

While I believe that the principle of academic freedom serves an absolutely vital role in the life of the university, I think its focus is quite narrow. It protects only against the censorship of ideas. It is not incompatible with administrative control being exercised by government in other areas. In this respect, it may be somewhat analogous to the principle of judicial independence in relation to the adjudicative function. I do not believe that the fact that the province has not exercised control over the retirement policies of the universities is decisive of their status although it is clearly relevant to it.⁷

³ *McKinney v. University of Guelph*, [1990] 3 SCR 229 [*McKinney*].

⁴ *Ibid.* p. 282.

⁵ *Ibid.*, pp. 286-287.

⁶ *Ibid.*, pp. 374-375.

⁷ *Ibid.*, p. 376 [Justice Wilson, dissenting]

Justice Wilson was quoting an excerpt from an essay by Frank Underhill, “The Scholar: Man Thinking,” in Whalley (ed.), *A Place of Liberty* (Toronto 1964) at p. 68, emphasizing the collective and individual nature of academic freedom: “Academic freedom is the collective freedom of a profession and the individual freedom of the members of that profession.”⁸

In an arbitration interpreting a clause protecting academic freedom at York University, arbitrator Russell Goodfellow found that York University had undermined the academic freedom of a professor at the university. Though the arbitrator did not consider the professor’s text to be “high scholarship,” he did consider it a protected activity under this clause, and emphasized the importance of academic freedom, writing:

There are few concepts or principles more important to the healthy and vibrant functioning of a university than academic freedom. The academy is and must be a bulwark against conventional thought and received opinion not just for the benefit of its members but for society at large. It is through free thought, investigation, and the development and dissemination of ideas that society advances and progress is made. Today’s accepted practices and beliefs become tomorrow’s discredited notions and out-moded ideas when exposed to the freedom of public debate and scientific scrutiny. The university has an essential role to play in this process – a role that can only be fulfilled if academic freedom is broadly defined and jealously guarded.⁹

The arbitrator noted that the University has the right, within the limits of the applicable collective agreement, to respond to a professor’s statements. However, this is must be handled delicately: “The overall effect of Article 10.01 is to require the University, when fashioning a public response to the work of one of its professors, to perform a highly judicious balancing act – one that addresses its own concerns while, at the same time, upholding, protecting and promoting the academic freedom of its faculty members.”¹⁰

Interestingly, the arbitrator in *York* noted that:

The test, at minimum, is whether the action or actions of the University are such as would tend to discourage the average employee of reasonable fortitude and conviction from engaging in a particular academic pursuit. It is not incumbent upon the Association, when asserting a breach of the Article, to show that it actually had that effect on the given employee or, indeed, on any employees. It is enough if the step or steps taken by the University could reasonably be seen as having that effect even if they did not actually do so in the circumstances of a

⁸ Quoted in *McKinney*, p. 375.

⁹ *York University v. Y.U.F.A.* (2007), 167 L.A.C. (4th) 39 2007 CarswellOnt 9171, para. 50

¹⁰ *Ibid*, para. 32

given case. While the absence of any practical effect on the employee's activities may be of significance to the question of remedy, it cannot preclude a finding of breach.¹¹

The issue of interpreting academic freedom also arises when interpreting the *Human Rights Code*, RSO 1990, c H.19. The Code may sometimes be of limited use in this context. See *McKenzie v. Isla*, 2012 HRTO 1908:

With respect to academic freedom, it is well-established that courts and tribunals should be restrained in intervening in the affairs of a university in any circumstance where what is at issue is expression and communication made in the context of an exploration of ideas, no matter how controversial or provocative those ideas may be. See *Maughan v. UBC*, 2008 BCSC 14, aff'd 2009 BCCA 447, leave to appeal ref'd [2009] S.C.C.A. No. 526, at para. 493. However, the principle of academic freedom does not override an organization or person's obligations under the Code. In other words, academic freedom is not a license to discriminate against another person because of his or her religious beliefs. See *Ketenci v. Ryerson University*, 2012 HRTO 994, at para. 42. That said, in my view, given the importance of academic freedom and freedom of expression in a university setting, it will be rare for this Tribunal to intervene where there are allegations of discrimination in relation to what another person has said during a public debate on social, political, and/or religious issues in a university.

In *Marceau v. Brock University*, 2013 HRTO 569, the Human Rights Tribunal decided that the content of an academic paper does not fall under the definition of a "service":

[16] It follows that the content of an academic paper does not fall within the meaning of "services" under s. 1 of the Code. This conclusion flows from the need to interpret ambiguity in the word "services" in the Code to favour freedom of expression and academic freedom in the writing and presentation of academic papers. The Code is not intended to govern which academic papers are acceptable at conferences or in journals, just as it does not apply to related matters at the core of Charter freedoms such as the content of newspapers and religious teachings. The context of this Application, which relates to the content of academic writings at a student conference, is different from allegations that a student was discriminated against in the provision of educational services by the university, such as in admissions or classes.

That said, academic expression can be discriminatory and a violation of the *Human Rights Code*: "where the comment or critique transcends the scholarship and amounts to differential treatment of a student because of a Code-related ground".¹²

¹¹ Ibid, para.50

¹² *Ketenci v Yeates School of Graduate Studies at Ryerson University*, 2012 HRTO 994, para 40.

We may thus conclude that academic freedom is generally related to teaching. In most cases, academic freedom is described as the freedom to teach, carry out research, publish, and participate in conferences free from institutional censure. In some cases, academic freedom is linked to freedom of speech, even if the professor is not expressing themselves at the university itself. Professors who share opinions outside the university on topics unrelated to their academic or research areas do so not under the rubric of academic freedom but simply freedom of speech. In practice, this means that restrictions to the freedom to teach and share ideas related to a field of research are only valid if they are imposed under a policy approved by the university and its professors.

b. In a university setting, is there a difference between academic freedom and freedom of speech? If so, how are they different?

i. Freedom of speech (i.e., freedom of expression)

Freedom of expression is protected under Section 2 b) of the *Canadian Charter of Rights and Freedoms*:

2. Everyone has the following fundamental freedoms: [...]

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

In *Irwin Toy*¹³, the Supreme Court of Canada defined freedom of expression in the following way:

“Expression” has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court “the matrix, the indispensable condition of nearly every other form of freedom” (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was “little less vital to man's mind and spirit than breathing is to his physical existence” (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as

¹³ *Irwin Toy Ltd v. Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*].

the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

...is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.¹⁴

Later, the Court summarized this freedom as follows: “Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.”¹⁵

In *Keegstra* a few years later, Chief Justice Dickson specified that “the term “expression” as used in s. 2 (b) of the Charter embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.”¹⁶ It is now widely recognized that activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed.¹⁷

It may be interesting to examine the values freedom of expression is meant to protect. Professor Thomas I Emerson identified the values associated with freedom of expression:

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in society.¹⁸

Justice Sharpe of the Ontario Court of Appeal, meanwhile put forward the following reason:

The first is that freedom of expression is essential to intelligent and democratic self-government [. . .] The second theory is that freedom of expression protects an open exchange of views, thereby creating a

¹⁴ *Irwin Toy Ltd v. Québec*, pp. 968-969.

¹⁵ *Ibid*, p. 970.

¹⁶ *R v. Keegstra*, [1990] 3 SCR 697, p. 729.

¹⁷ *R v. Butler*, [1992] 1 SCR 452 at p. 488, quoting *Keegstra*, p. 828.

¹⁸ Emerson, Thomas I, “Toward a General Theory of the First Amendment” (1963), 72 Yale L.J. 877, p. 878, quoted in *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712, p. 62.

competitive market-place of ideas which will enhance the search for the truth ...

The third theory values expression for its own sake. On this view, expression is seen as an aspect of individual autonomy. Expression is to be protected because it is essential to personal growth and self-realization.¹⁹

On behalf of the majority of the Supreme Court in *Sharpe*,²⁰ Chief Justice McLachlin succinctly explained the values underpinning the right to free expression, namely “individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy.”²¹ She also wrote that “The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images.”²²

The question we must ask ourselves with respect to freedom of expression in a university setting is whether the Charter, specifically section 2(b) thereof, applies to universities. The Supreme Court of Canada has not given a definitive answer.²³ Courts can only answer this question in a specific context based on concrete facts.

ii. Differences and overlap between freedom of expression and academic freedom

The Alberta Court of Appeal has ruled on the relationship between freedom of expression and academic freedom:

I reject the argument by the University, supported by the intervener Association of Universities and Colleges of Canada, that the application of the Charter in these circumstances undermines or threatens the University’s academic freedom or institutional autonomy. Academic freedom, as that idea has come to be understood, is an important value in Canadian society. LaForest J. in *McKinney* described it as the “free and fearless search for knowledge and the propagation of ideas” (para 62), that is “essential to our continuance as a lively democracy” (para 69). But, it does not follow that it trumps freedom of expression. The Supreme Court of Canada has described the purpose of the section 2(b) guarantee of free expression “to promote truth, political and social participation, and self-fulfilment” (*Ross v New Brunswick School*

¹⁹ Sharpe, Robert J, “Commercial Expression and the Charter” (1987), 37 U of TLJ 229, p. 232.

²⁰ *R. v. Sharpe*, 2001 SCC 2 [*Sharpe*].

²¹ *Ibid*, para. 23.

²² *Ibid*, para. 21.

²³ For example, see the debate in *Pridgen v. University of Calgary*, 2012 ABCA 139. See also Craig Forcese, “The Expressive University: The Legal Foundations of Free Expression and Academic Freedom on Canada’s Campuses”

District No. 15, 1996 CanLII 237 (SCC), [1996] 1 SCR 825 at para 59), and has commented that “[i]t is difficult to imagine a guaranteed right more important to a democratic society”: *Edmonton Journal v Alberta* (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 SCR 1326 at p 1336.

Academic freedom and freedom of expression are not conceptually competing values. Freedom of expression, of course, is guaranteed to all Canadians. Academic freedom is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution. It has also been described as having an aspect of academic self-rule – the right of academic staff to participate in academic decisions of the university, and, more broadly, an aspect of institutional autonomy – the right of the institution to make decisions, at least with respect to academic matters, free from government interference: see Eric Barendt, *Academic Freedom and the Law* (Oxford: Hart Publishing, 2010) at pp 23-34.

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

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

...

In my view, there is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in the Charter are handmaidens to the

same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist. That said, if circumstances arise where these values actually collide, a section 1 analysis would be required to properly balance them. That circumstance does not arise in this case.²⁴

Professor Craig Forcese²⁵ summarizes these distinctions as follows:

The concept of “academic freedom” that emerges from this cacophony of sources is different than free expression. It is more purposive, tied to the search for knowledge. And that means it is not all sail. Universities Canada asserts academic freedom must be based on “reasoned discourse, rigorous extensive research and scholarship, and peer review” and applicable professional standards.²⁶

[...]

Applied in this manner, academic freedom and free expression diverge only when individuals engage in protected speech in a private capacity. Academic freedom would not extend, for instance, to the professor’s Yelp restaurant reviews or Kijiji sales (assuming these were not tied in some plausible ways to the professor’s professional activities). But free expression rights may, so long as the speech in question was protected (eg., not defamatory). This one area without overlap between academic freedom and free speech seems a trifling disconnect.²⁷

c. What are the limits of academic freedom and freedom of speech?

On the subject of freedom of expression, the Supreme Court of Canada, in *Irwin Toy*, stated that “Clearly, not all activity is protected by freedom of expression, and governmental action restricting this form of advertising only limits the guarantee if the activity in issue was protected in the first place.”²⁸ An activity which does not convey or attempt to convey a meaning, and thus has no content of expression, is not protected.²⁹ An expression which conveys a meaning but through a violent form of expression, is also not within the protected sphere of conduct.³⁰

²⁴ *Pridgen v. University of Calgary*, 2012 ABCA 139 at paras 113-17.

²⁵ Forcese, Craig, « The Expressive University; The Legal Foundations of Free Expression and Academic Freedom on Canada’s Campuses » (November 6, 2018). Ottawa Faculty of Law Working Paper No. 2021-14, available at SSRN

²⁶ *Ibid*, p. 41.

²⁷ *Ibid*, pp. 48-49.

²⁸ *Irwin Toy Ltd v. Québec*. pp. 967-968.

²⁹ *Ibid*, p. 969.

³⁰ *Ibid*, p. 970.

Freedom of expression is a very broad concept, but it does have certain limits. First, in terms of the nature of the expression, it must be stated that it is the expression of the ideas that is protected. From a conceptual standpoint, freedom of thought, freedom of belief, freedom of opinion, and freedom of the press all related to the sharing ideas. One cannot share ideas just anywhere and expect to be protected. Therefore, freedom of expression cannot be invoked on private property, or even in certain public places, such as government offices. However, the government can delineate specific spaces where anyone can freely express themselves.

There are also limits on the types of ideas that can be expressed. Threats, violence, and incitement to commit criminal acts are not protected. In Canada, hate speech and clearly discriminatory language are not protected. However, some speech may be protected under s. 1 of the Canadian Charter if the government proves that the measures it proposes are very important and that there is a rational link between its goals and its means, so long as the means minimally impair the duty in question. The best example here is hate speech.

In addition to internal limits, freedom of expression can also be limited by s. 1 of the *Canadian Charter*:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

According to the Supreme Court, “[a]ll rights guaranteed under the *Canadian Charter of Rights and Freedoms* are subject to reasonable limitations.”³¹ In particular, “the right to freedom of expression is not absolute and limitations of freedom of expression may be justified under s. 1 [of the Charter.]”³² In *Whatcott*, following an analysis of s. 1 of the Charter, the Supreme Court ruled that a provision of the *Saskatchewan Human Rights Code* could limit hate speech. In *Sharpe*, Justice McLachlin outlined certain recognized limits such as “the prevention of hate that divides society” and “the prevention of harm that threatens vulnerable members of our society”.³³

It is clear that “expression” part must be respected in a university setting. However, this expression also has its limits, particularly those limits arising from provincial human rights legislation. The aim of human rights legislation is to prohibit discriminatory speech. We must however distinguish between things that are clearly discriminatory and things that are simply offensive. In *Marceau v. Brock University*, 2013 HRTO 569 at para. 22, the application concerned a text that was offensive to certain racial minorities. In this text, the author supported slavery, opposed affirmative action programs, and suggested that veganism leads to mental retardation. The Human Rights Tribunal of Ontario refused to sanction the author because the

³¹ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467 [*Whatcott* at p. 503].

³² *Ibid*, p. 503.

³³ *R. v. Sharpe*, 2001 SCC 2 [*Sharpe*] para. 22.

text in question was an academic paper. The Tribunal would have sanctioned the author if the statements had been symptomatic of another form of discrimination rather than its source. According to the Tribunal, one cannot prevent the exchange of ideas simply because they relate to someone's deeply held convictions. That being said, one must wonder if the university can itself prohibit certain forms of expression.

First, we must recognize that universities are generally considered subject to the *Canadian Charter of Rights and Freedoms*. The question arises because universities consider themselves to be independent from the government, while the Charter applies to all governmental entities. Hence, in some ways, universities can be considered tied to governments, either owing to the government's control over their activities or due to the fact that they are implicitly government agents since they implement governmental educational policies. Debate arises when universities want to apply internal disciplinary codes.

Generally, courts examined whether universities had the power to compel students in the same way a professional order can compel its members. Therefore, it could be argued that there are two ways to justify the limits imposed by universities: the university's similarity to a professional order or the fact that it carries out government policy. However, it is important to note that different provinces have ruled differently on this topic.

Several matters have been heard on the issue of anti-abortion protests. The British Columbia Court of Appeal decided that the university had full authority to regulate the use of its property. The same thing was decided in Ontario. The Alberta Court of Appeal came to a different decision. Some university charters, such as that of Wilfrid Laurier University, explicitly mention the right to freedom of expression.

The *1965 University of Ottawa Act*, S.O. 1965, C.137, does not set out a right to freedom of expression. Hence, the situation is not very clear: a university can invoke its property rights to keep strangers off its campus. It can stop anyone from speaking if such speech is clearly illegal. It can stop a student from interfering with a course in a way that prevents the professor from teaching normally. This is because students must comply with the University's policies and respect other students' right to normal access to education.

Most often, conflicts are resolved based on the context, the principles at issue, and other legitimate expectations. Academic freedom does not negate contractual obligations. For the University of Ottawa, this principle was upheld in *Rancourt*. Opposing a statement made by a professor at the university is always a sensitive issue. An arbitrator allegedly suggested that it is often preferable for the university to say nothing and to wait for the professor's peers to speak up. The professor is expected to speak truthfully and respect others' opinions. Civil rights lawyer Alan Borovoy said in 1995 that "academic freedom is better seen as a willingness to accept academic responsibility, a commitment to critically assessing ideas, to challenging their own cultural and political assumptions, and to persuading students to think harder and to question their beliefs." The Association of Universities added that "It is a scholarly obligation to base research and teaching on an honest and critical quest for

knowledge.” According to one author, this is equivalent to the approach proposed by the Supreme Court of Canada in *Doré*. This means, in practice, that the factors allowing it to decide whether a decision is reasonable will refer to the policy, collective agreements, mission statements and goals of the university already included in legal decisions.

d. What is the scope of freedom of speech at the University as an institution?

It is generally understood that academic freedom, like freedom of speech, applies to persons. When discussing the values protected by these two freedoms, Justice Sharpe of the Ontario Court of Appeal mentioned that the third theory (justifying their application) values expression for its own sake. In keeping with this view, expression is seen as an aspect of personal autonomy that must be protected because it is essential to personal growth and self realization. The Supreme Court of Canada provided a similar definition of these freedoms (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326 at p. 1336) while outlining how this affects the university. *Pridgen v. University of Calgary* 2012 ABCA 139 is often cited for the same purpose:

Academic freedom and freedom of expression are not conceptually competing values. Freedom of expression, of course, is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution. It has also been described as having an aspect of academic self-rule – the right of academic staff to participate in academic decisions of the university, and, more broadly, an aspect of institutional autonomy – the right of the institution to make decisions, at least with respect to academic matters, free from government interference...

Thus the University’s academic freedom is its ability to exercise its powers in the academic field without impediment. Since freedom of expression can be limited by s. 1 of the *Canadian Charter of Rights and Freedoms* (as well as provincial human rights legislation), it seems reasonable to assume that the University’s academic freedom would also be subject to this limit.

In the event of a conflict between academic freedom and freedom of expression, we believe that it would be useful to apply the provisions of s. 1 of the Charter to strike the right balance. According to us, the University could limit freedom of expression if: (1) the objective sought by the university addresses urgent and real preoccupations in a free and democratic society; (2) the means taken by the university are proportional to its objective insofar as the identified objective (a) has a rational connection with the identified means, (b) impairs freedom of expression as little as possible and (c) does not infringe on freedom to the extent that the objective sought is superseded by the violation of rights. In other words, the last criterion is to determine whether the objective sought outweighs the negative effects of limiting freedom of expression.

It has not yet been established that the Charter applies to universities, but that should not prevent us from using this mechanism. Professor Forcese, quoting a Universities Canada document, would define academic freedom as “reasoned discourse, rigorous extensive research and scholarship, and peer review”, and applicable professional standards.”³⁴

According to him, academic freedom has its own set of requirements, and freedom of expressions diverges from it only as it applies to private statements made irrespective of similar constraints, namely those arising from an academic setting.

The university can indeed directly contribute to limiting academic freedom because, according to Forcese, “academic freedom does not trump other professional obligations under contract.”³⁵ This has already been recognized at the University of Ottawa in arbitration. The arbitrator concluded that academic freedom cannot be invoked to justify misconduct that is prohibited by the collective agreement. The University of Chicago’s model statement on freedom of expression emphasizes that:

The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish. The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.³⁶

There is an important debate on whether the Charter applies to a university’s disciplinary policies. In Ontario, such policies were not set aside. According to some arbitrators, the university is also free to respond to statements by professors or students that are damaging to its reputation. It is clear, however, that university members have the right, according to a United Nations text, “to embrace even expression that may be regarded as deeply offensive.”³⁷

There are, however, limits that uphold the right to act: “For respect of the rights and reputations of others; For the protection of national security or of public order, or of public health and morals” (ICCPR, Art 19(3)). The difficulty here is differentiating between that which is offensive and that which is prohibited, even for professors. It is generally acknowledged that exceptions must be interpreted within limits, but that is not enough. The Chicago report confirmed, for instance, that a university’s role does not extend to suppressing

³⁴ Forcese, Craig, "The Expressive University; The Legal Foundations of Free Expression and Academic Freedom on Canada’s Campuses", p 41

³⁵ Ibid, p. 38

³⁶ Stone, Geoffrey R. et al. “Report of the Committee on Freedom of Expression”, University of Chicago, 2014, p. 2

³⁷ *Malcolm Ross v. Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee (HRC), October 26, 2000.

offensive speech. This was also supported by arbitrators in Canada (see *York University v York University Faculty Assn.* (2007), 91 CLAS 262 at para. 47).

As will be seen below, we believe that three criteria should be used to decide contentious issues: legality, legitimacy, and necessity (based on proportionality). However, the University will not normally wish to limit its actions to suppressing speech that is illegal since it considers that expressing certain facts and ideas can offend, shock, anger or jeopardize free expression for fear of further marginalization or stigma. The University strives to encourage respectful, tolerant and empathetic discourse, and will thus seek a balance, in the same way a professor would not want to disregard the impact of certain teachings.

Freedom of expression and academic freedom should be vigorously protected, but not at the expense of silencing marginalized people and groups. There is no straightforward solution to this dilemma. Each case needs to be analyzed within its context. In the words of Justice Lynn Smith of the B.C. Supreme Court:

A key aspect of academic freedom is that it is intended to protect the free and full discussion, not only of ideas which are safe and accepted, but for those which may be unpopular or even abhorrent. The censorship or silencing of ideas or voices is the antithesis of such full and free discussion. However, discussions and discourses are not one-way streets: they are only full and free to the extent that every person who wishes to participate in them is not threatened or silenced by other louder or more strident voices. The protections of academic freedom do not include an unlimited right to offend, nor do they include disrespectful actions or behaviors which have the effect of quieting or silencing and thus limiting the participation of some members of the university in the free and full discussion of all ideas.³⁸

This can serve as a guide for the University.

³⁸ Hon Lynn Smith, “Academic Freedom History and Principles: Excerpt from the Smith Report: University of British Columbia Faculty Association” (October 7, 2015), p. 17

e. How should the University balance academic freedom with its values of equity, diversity and inclusion?

In *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, at paragraph 66, the Supreme Court of Canada stated that:

We are [...] required to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing Charter rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.

This passage does not suggest that academic freedom is incompatible with the University's values. The University's Policy 121 sets out that academic freedom is the fundamental value of the institution, but Policy 67a still provides sanctions for harassment. Some people view this as contradictory while others do not since the freedom in question is subject to limitations. Note that harassment includes a wide range of behaviours. The issue stems from the fact that limits are often poorly defined or little known, and professors can end up being taken to task even if they had no intention to discriminate. According to Shaikh, "from a policy rationale perspective, if academic staff are penalized for internal rules that could not have been 'reasonably' known or lack accessibility and foreseeability, let alone are not explicitly elaborated, it will inadvertently lead to a chilling effect on the freedom of expression".³⁹ Thus the university is responsible for specifying and justifying exceptions.

Several universities have mandated courses to clarify these issues. Other universities have asked professors to warn students before discussing potentially sensitive topics. In 1977, the Canadian Association of University Teachers proposed a text to better describe the principles at issue. Statements were later made by UNESCO, by the Association of Universities and Colleges of Canada (now Universities Canada) and, in 2011, by the Canadian Association of University Teachers. These statements have no legal weight, which means that current rules actually stem from collective agreements and university policies. Sixty percent of institutions included obligations that apply in conjunction with academic freedom.

Most often, professors' obligations are specified in arbitral awards. In Ottawa, the most probative decision is *Rancourt*, where the arbitrator stated that:

...the academic freedom concept is not so wide as to shield a professor from actions or behaviour that cannot be construed as a reasonable exercise of his responsibilities in an academic setting, nor does it protect

³⁹ Shaikh, Murtaza, « Advisory Memorandum: University of Ottawa lecturer's reference to racist term in an academic context and applying a human rights-based approach », CREDP, p. 7

him when exercising said academic freedom in contravention of the provisions of the collective agreement in general.⁴⁰

Other decisions go even farther by examining the reasonableness of speech. In *Assoc. des professeurs de l'Université Concordia c Université Concordia*, 2014 LNSARTQ 42, at para. 233, the arbitrator said that “reasonableness is to be assessed by reference to time, place, content and style of the remarks. As such, in some circumstances, rudeness, short of shutting down a presentation, can exceed the bounds”. According to Forcese, “it is hard to contest the long standing 1977 CAUT model clause, which speaks of ‘the duty to use that freedom in a manner that is consistent with the scholarly obligation to base research and teaching on an honest and ethical quest for knowledge.’” A professor’s duty is also to follow the teaching program.

The issue becomes more fraught in cases where statements are made outside an academic setting. There is a recognition of the limits of what guest speakers can say and how students can act in the classroom. Students are not allowed to impede a professor’s academic freedom or hinder other students’ learning. Public spaces and social media pose a different challenge.

Professors keep their status when they speak in public spaces, but it is often harder for them to argue that they are pursuing knowledge or truth unless they are sharing opinions related to their area of expertise. Issues more often arise when professors or teachers speak freely on a general topic. Professor Forcese believes that the best approach is that of *Doré v. Barreau du Québec*, 2012 SCC 12, which decides whether or not the speech is reasonable by considering constitutional guarantees and the values stemming from them in light of the university’s goals, namely post-secondary education. Anyway, the courts will decide these cases under administrative law, where reasonableness will be a determining factor. The factors to be considered will be context, applicable policies, collective agreements, the university’s mission and precedent. Freedom of expression does not automatically become unlimited once a person is outside the classroom.

Several stakeholders have argued that bilingualism should be considered a fundamental value of the University even though the question raised to the Committee refers to the University as a bilingual setting. The Committee believes that bilingualism is inherent to the institution and its importance cannot be denied nor its abolishment promoted without affecting the University’s role and reputation. Attacks on the University’s linguistic makeup or the moral value of its Francophone or Anglophone components cannot, under current circumstances, be protected by freedom of expression.

⁴⁰ *University of Ottawa and Association of Professors of the University of Ottawa* (2014), O.L.A.A. No 509, para. 91

f. What mechanisms should the University put in place to handle complaints related to academic freedom and University values?

Several stakeholders stated that an administrative framework is in place to process complaints, although there does not seem to be a provision allowing management to take matters up on their own initiative. In their opinion, the University's senior managers simply failed to implement the mechanism, and more specifically Policy 121, during recent events. However, other stakeholders stated that this mechanism, if it exists, is poorly understood and insufficient to reassure those who submit complaints involving harassment or retribution.

In any event, the Committee believes that an independent, representative and competent mechanism is needed to handle complaints in a consistent and timely manner to provide the academic community with a process it can trust. It should also be possible to use this mechanism without having to lodge a complaint when circumstances so require.

The Committee members do not believe it is their place to decide on the composition of a committee or name who should sit on it. This type of decision should be made by the senior management, which will likely want to hold consultations. We believe the committee should have a limited number of members, possibly five, with solid qualifications. We believe members should have fixed terms of at least two years, and should be replaced on a rotating basis so ensure continuity and retain the experience acquired. It seems clear to us that the committee could consult with student representatives as required.

As mentioned elsewhere in this report, to ensure the success of this initiative, it is very important for concepts to be clearly defined and well understood by the academic community. Members of the University community should, insofar as possible, understand their rights and obligations. Although it is impossible to predict every potential situation, we could take a preventative approach by offering training and possibly providing consultants to give advice to professors. However, we will still need to take decisions to deal with cases that are often sensitive. Cases should be analyzed within their context, which assumes that we will have created an assessment chart to identify the factors to consider. As shown above, case law often provides models for this purpose.

The Committee wishes to propose an assessment process to recognize academic freedom while ensuring that it aligns with students' rights and the University's management obligations. This does not relieve the University of its responsibility to strongly confirm that it intends to protect freedoms and to implement an effective mechanism for this purpose. We will proceed in accordance with a suggestion by Dr Murtaza Shaikh published in December 2020 in an advisory opinion on University of Ottawa's anti-racism policy. We are primarily interested in the three criteria he used to determine whether academic freedom has been respected: legality, legitimacy, and necessity (considered on the basis of the principle of proportionality).

‘Legality’, when applied to an institution such as a university, is applicable to internal rules, guidelines and bylaws which may be adopted and expressed generally or incorporated in contractual terms (notably collective agreements) which are readily available and consistently applied so as to be reasonably known. The criterion requires that such rules be precise, clear, and predictable. Two key tests would be that of ‘accessibility’ and ‘foreseeability’. Would someone have had ample opportunity in advance to be notified of the rule and, on reading it, be certain as to whether an intended act would or would not fall foul of it?⁴¹

The University of Ottawa has a policy for this purpose: Policy 121. It affirms the University’s duty to respect academic freedom and freedom of expression, and its commitment to not prohibit the expression of controversial or objectionable views, within the limits set out by Canadian and Ontario law. The University has also adopted Policy 67a on harassment and discrimination. It prohibits vexatious speech and prohibited conduct, or conduct that ought reasonably to be known to be prohibited. Though harassment usually consists of a series of actions of comments, a single incident also counts as harassment if it is serious enough. A serious incident includes intimidating, humiliating, dehumanizing or dominating conduct, including the use of abusive or threatening language. Harassment is directed towards a person or a group rather than society at large:

‘Legitimacy’, requires that interference with someone’s freedom of expression can only be pursuant to explicitly stated and finite legitimate aims. As already noted, these include national security, public safety, prevention of crime, protection of health and morals, and the rights of others.⁴²

The author notes that “the perceived and subjective offense caused to some students in light of a lack of animus by the lecturer is not an established human right in need of protection.”⁴³ There is no right not to feel offended since academic freedom protects controversial and hurtful statements. We must distinguish between the concept (the citation) and its use in speech. Racist or hateful statements – in practice – are not protected because they have no scientific or educational justification. Racially-motivated discrimination is discrimination that distinguishes, excludes, restricts, or creates a preference based on race. Context will help determine whether statements incite unequal treatment. Since dissemination of ideas based on racial superiority or hatred as propaganda is prohibited, it is clear that such dissemination is inherently prohibited.

⁴¹ Shaikh, Murtaza, “Advisory Memorandum: University of Ottawa lecturer’s reference to racist term in an academic context and applying a human rights-based approach”, p 4

⁴² Ibid, p 4

⁴³ Ibid, p 7

Necessity and proportionality

“What was the intent of the academic? What was the setting? Was the racist term depicted in a positive or negative light? Was there a necessity or benefit to using the term in full? Was it used as many times as necessary or excessively and with insensitivity, so to render its purpose ambiguous or insidious?”⁴⁴

The European Court of Human Rights has dealt with various cases, emphasizing the intent and purpose of comments to decide whether or not they constitute hate speech. A 2012 CERD recommendation (No. 35) proposes five criteria to take into account: the content of the speech; its form; the economic, social and political climate; the position or status of the speaker; and the intended audience. The United Nations Committee on the Elimination of Racial Discrimination also took a stance by affirming that in the context of any type of academic debate or political activity, so long as there is no incitement to hatred, contempt, violence or discrimination, such messages should be considered as protected by freedom of speech even if they are controversial. Note that journalists, politicians, and judges should be especially careful due to their status and public functions. As mentioned above, an institution like University of Ottawa can always intervene to limit freedom of expression in this context, but it must assess this intervention in terms of proportionality: its actions should be necessary, have no valid alternative, and be foreseeable. We must distinguish between “necessary” and “alternative.” A book containing an offensive word can always be replaced. Rather, “necessary” refers to the purpose of using such a book: is it necessary to have students read a particular book to teach a certain academic concept? Similarly, “alternative” refers not to choosing another book in this example, but rather to choosing another way of presenting the issue on an academic level. There is clearly a value judgment to be made here: normally this judgment will be protected by academic freedom. If the judgment is arbitrary, it will not meet the requirements of academic freedom.

The University must respect academic freedom and combat racism. This is difficult because the University cannot ignore history, the impact of systemic racism during certain periods, and sensitive reactions when certain words or events are referred to. The University must take into account societal changes in Canada and the makeup of the University community. Shaikh says that:

Ethnic, religious, racialized, and other minorities must feel included in the activities, governance and decision making of the university. Further still, mechanisms, spaces and initiatives should be instituted to allow aggrieved students to express their concerns openly and safely, to share experiences and to pitch initiatives towards creating a more

⁴⁴ Ibid, p 8

tolerant and understanding university community inclusive of students, academics and other staff.⁴⁵

We believe that this really means that the complaint processing is only one of the problems that need correction, and that discrimination in teaching methods, programs, and social support must also be addressed.

11. COMMITTEE RECOMMENDATIONS

In light of the foregoing, the Committee makes the following recommendations:

- a. The Committee determined that there is a lack of consistency in how the concepts of academic freedom and freedom of expression are understood. However, it is necessary that everyone know what those rights actually entail in order for them to be implemented. Without affecting existing policies, the Committee recommends that its definitions of these freedoms be shared with the entire University community to produce principles that can be put into practice. The complaints mechanism and the criteria on which it is based must also be made known to the University community.
- b. Although several stakeholders said that a complaints mechanism already exists, it would appear to be poorly known and considered ill suited to dealing with situations involving academic freedom and freedom of expression. To strengthen protections for academic freedom and to reassure the University community, it is recommended that:
A standing committee be established to review and implement the policy on academic freedom and freedom of expression.

Such a committee would have the authority to receive complaints and concerns about academic freedom from faculty members as well as those about freedom of expression from any member of the University who feel they have been aggrieved, and to conduct in-depth reviews of the situation at the University". The committee could study implementation of the policies and principles of academic freedom and freedom of expression in all areas of activity (teaching, research, academic conferences, etc.) on campus and report annually on complaints that have been received and processed, and issues it has analyzed. The committee's annual report would be submitted to the Provost and Vice-President, Academic Affairs, and be appended to the Vice-President's annual report to the Higher Education Quality Council of Ontario.

In essence, the committee would support the mandate of the Provost and Vice-President, Academic Affairs, to protect academic freedom, thereby increasing the tools at the Vice-President's disposal for carrying out the position's duties in that regard and strengthening

⁴⁵ Ibid, p 11

accountability to the University community and the Higher Education Quality Council of Ontario.

- c. The members feel that the standing committee would have to do more than simply hear from complainants, conduct investigations and impose penalties. In fact, there will be cases where the solution will not be to take punitive measures. The committee will first have to clearly define the nature of the complaint or worrisome incident and subsequently examine the situation by applying known criteria (recommended in Section J) and considering that, in cases involving academic freedom, the latter rests on the assumption that the actions under review have an academic purpose. There could also be dual-aspect cases where academic purpose overlaps with a purpose more suggestive of outright discrimination. The Committee recommends that the administration establish an action plan not only to fight racism and discrimination, but also cyberbullying—a constantly increasing threat to both freedoms that is more and more difficult to keep in check. Leadership will be needed to establish a mechanism in which the University community has faith. Such a mechanism will set out the conditions for filing complaints, assessment criteria, remedial measures and a public accountability procedure. The standing committee could also supervise the implementation of training tools for faculty members to assist them in eliminating the self-censorship that some professors engage in to protect themselves. To that end, the standing committee could draw on the required expertise and resources that are available through the University’s Teaching and Learning Support Service (TLSS) and allocate sufficient financial resources to ensure proper training of TLSS staff.
- d. The Committee feels that a diversity and inclusion training program should be established, along with a personal consultation service for faculty members. The consultations clearly showed that faculty members often feel ill equipped to address the issue and that they urgently need information and resources to do so. These resources can be put at the disposal of the faculty in its entirety, but they can also include access to tailored guidance.
- e. The many incidents that left faculty and some students feeling insecure showed that there is a need to establish norms of conduct applicable to students, faculty and other University staff, and measures prohibiting cyberbullying. Dialogue and the search for truth will be impossible if differences of opinion give rise to invective and insults, disrespect for diversity or disregard for human dignity. The University must regulate such conduct and possibly review the scope of the principles underlying Policy 121—Statement on Free Expression.

- f. The Committee recommends that the University affirm the need to protect academic freedom and freedom of expression in fulfilment of its teaching and research mission. The Committee is therefore against the exclusion of words, works or ideas in the context of respectful academic presentations and discussions whose educational goal is to promote the dissemination of knowledge. Although the University could adopt policies and regulations limiting academic freedom and freedom of expression while respecting collective agreements, and given that some stakeholders said the University should intervene when sensitive topics are involved, the Committee is not in favour of institutional or self-censorship that is apt to compromise the dissemination of knowledge or is motivated by fear of public repudiation. The Committee believes that students and the University community must be willing to address sensitive topics in an academic context. Providing advance notice of topics deemed sensitive by some students may be expedient in certain cases to ensure they are not caught off guard. It must not affect the professional responsibilities of faculty, however.

- g. The Committee recommends that the University unequivocally reaffirm its commitment to academic freedom and freedom of expression, and that it clarify its rights and obligations as an educational institution. The members of the University community must be certain of the University's support when their right to free expression is at stake, and they must be able to rely on an effective mechanism for addressing issues of concern in that regard.