Constitutional forum constitutionnel

table of contents

Volume 29, No 2

The Campus Speech Issue

Constitutional forum constitutionnel

Introduction: Symbolic Politics, Constitutional Consequences[1]

Kate Bezanson and Alison Braley-Rattai*

Free expression that leads to the vibrant exchange of ideas is thought to be the very lifeblood of a democratic society. It appears self-evident that campuses, where even the most resolute 'truths' not only *may* but even *should* be examined and re-examined, are the nucleus of such a society. Despite this, campus speech has become a flashpoint for competing — some would say irreconcilable — demands. On the one hand is the view that some speech should not be tolerated in an environment that must embrace diversity that is also a hallmark of our advanced liberal democracy, and which should aim for the equality of its members. Per this argument, some members of the university community are treated unequally when speech that tends to reinforce their marginalization as members of a sub-dominant group is permitted. This view may also extend to pedagogical practice, and so we might identify the debate as to whether certain words are *ipso facto* impermissible, regardless of their intended purpose.[2]

For others, the view that some speech may be restricted in the name of inclusivity or equality contradicts the very purpose of a university education. Here, restrictions on speech demonstrate a particular ideological predisposition (often termed "political correctness") that seeks to silence, sanitize, or anesthetize opposing — often conservative — viewpoints. Per this

1 The phrase "symbolic politics" is drawn from Stephen Newman's article (this issue).

* Dr. Kate Bezanson is Associate Professor of Sociology and Associate Dean of the Faculty of Social Sciences at Brock University. Dr. Alison Braley-Rattai is Assistant Professor of Labour Studies at Brock University. Both hold LLMs (in Constitutional and Labour Law respectively) from Osgoode Hall's Professional Development Program. The guest editors for this issue wish to thank the authors whose work appears in this issue, as well as Patricia Paradis, the Forum's editor, the Forum's copy editors, and footnote editors.

2 Randall Kennedy, "How a Dispute Over the N-Word Became a Dispiriting Farce" (8 February 2019), online: *The Chronicle of Higher Education* <www.chronicle.com/article/How-a-Dispute-Over-the-N-Word/245655> [perma.cc/HR2L-8EAV].

view, rather than fostering cultures of intellectual flourishing, universities increasingly quell intellectual and political debate, "coddling" rather than challenging young minds.[3]

Governments have stepped into the fray. Following on the heels of U.S. President Trump's statements regarding withholding federal funds for public universities for perceived campus censorship,[4] provincial governments in both Ontario and Alberta have taken measures to 'protect' campus speech[5] with the view that universities lack the vibrant and free exchange of ideas that is the *sine qua non* of higher education. Whether there is in fact a dearth of free expression on campus is highly debatable; also debatable is whether our constitutional guarantee of freedom of expression under the *Canadian Charter of Rights and Freedoms* does, or should, have anything to say about it.

This issue of *Constitutional Forum* considers constitutional and adjacent concerns stemming from the politicization and issuing of directives regarding expressive freedom on campus. It opens with Jamie Cameron's "Compelling Freedom on Campus: A Free Speech Paradox", which scrutinizes such governmental manoeuvres from the perspective of *compelled*, rather than restrained, expression. Cameron calls for a reinvigoration of the 'large and liberal' view of freedom as the absence of coercion or restraint, adopted by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, an early *Charter* case which dealt with perceived violation of religious freedom.[6]

Cameron traces the genealogy of the Chicago Statement of Free Speech principles, which emanated from an ad hoc speech committee at the University of Chicago, from an internal institutional governance mechanism to its mutation in Ontario and Alberta as an instrument of government regulation and coercion. Canvassing serious implications for institutional autonomy and academic freedom, Cameron asserts that the fact of compulsion in the mandating of free speech policies itself represents a grave violation of the *Charter's* guarantee of freedom of expression.

---

3 Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind: How Good Intentions and Bad Ideas Are Setting Up a Generation for Failure* (New York: Penguin Press, 2018).

4 As Newman (this issue) notes, in March 2019 U.S. President Trump issued an executive order regarding free inquiry on campus at public universities, compliance with which was conditioned by a threatened loss of federal grants.

5 Ministry of Training, Colleges, and Universities, "Upholding Free Speech on Ontario's University and College Campuses" (30 August 2018), online: *Government of Ontario Newsroom* <news.ontario.ca/opo/en/2018/8/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [perma.cc/7VXR-K4RB]; Moira Wyton, "Post-Secondaries Across Alberta Adopt American-Flavoured Free Speech Policies" (17 December 2019), online: *Edmonton Journal* <edmontonjournal.com/news/politics/post-secondaries-across-alberta-adopt-american-flavoured-free-speech-policies> [perma.cc/3YKC-ZC2E]. As Cameron (this issue) notes, the issue of campus speech was also part of the 2019 federal Conservative electoral platform. See Melanie Woods, "Conservative Platform Makes Free Speech Policies a Requirement for University Grants" (11 October 2019) online: *Huffington Post* <www.huffingtonpost.ca/entry/andrew-scheer-free-speech-conservative-platform_ca_5da10705e4b087efdbae5cb8> [perma.cc/9VZW-BPZY]; "Andrew Scheer's Plan for You to Get Ahead" (2019) at 63, online (pdf): *Conservative Party of Canada* <cpc-platform.s3.ca-central-1.amazonaws.com/CPC_Platform_8.5x11_FINAL_EN_OCT11_web.pdf> [perma.cc/YQZ7-V5BG].0

6 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321.

The explicitly political context of the campus speech issue is considered in the two articles that follow: Stephen Newman's "Ford, Trump, and the Politics of Campus Free Speech" and James Turk's "Universities, the *Charter*, Doug Ford, and Campus Free Speech", with both authors concluding government responses to the campus speech 'crisis' serves a political agenda first and foremost. Newman's analysis traces the politics of campus speech, focussing on the symbolic politics of U.S. President Trump's executive order on campus speech and Ontario Premier Ford's Directive. It notes the significant differences in constitutional contexts, assessing the treatment of campus speech codes in American courts and querying the evidence regarding the volume of free speech incidents on campuses in North America. Newman cautions there is no easy path while navigating the stormy relationship between the values of free expression and inclusion; the left-right partisanship of campus speech debates poses a normative challenge to unsettling political and ideological entrenchment on both sides in service of a reasoned defense of controversial speech.

James Turk considers the Ontario Directive and its consequences in relation to the institutional autonomy of universities, academic freedom, and the *Charter*. Contra the Ontario provincial government's claims that expressive freedom on campus is endangered, Turk asserts that there is "more freedom of expression on university campuses than anywhere else in Canada." Centering his analysis on recognition that free speech is not absolute, but subject to legitimate limits, he recalls that free expression on campus grows from community discussion, debate, and engagement, and must contend with the recognition of other demands and values. Turk concludes that there is considerable potential to enhance free expression without jeopardizing either academic freedom or institutional autonomy on campus, via the application of the *Charter* to aspects of Ontario universities, which he contends is a likely outcome of Ontario's campus speech Directive.

The final two papers in this special issue consider academic freedom, and, to different extents, their intersections with expressive freedom and institutional autonomy. In "Academic Freedom, Canadian Labour Law, and the Scope of Intra-Mural Freedom" Michael Lynk considers an under-examined aspect of academic freedom: intra-mural expression, or the right of faculty members and librarians to criticize the university and its leadership. Lynk notes that academic freedom is regulated distinctly in Canada as a negotiated right secured through collective bargaining, with courts rarely addressing its scope and legislation being largely silent. Canvassing the uneven treatment of intra-mural expression in Canadian arbitral decisions on the basis that universities are treated in some respects like any other workplace (*commes les autres*), and at other times like unique workplaces (*d'un genre spécial*), Lynk proposes that arbitral decisions must give consistently strong content to intra-mural speech as a "salient" aspect of the academic freedom that underpins the mission of the University. Lynk asserts that the right to criticize, as an integral part of academic freedom, merits generous protection inclusive of blunt and even intemperate dissent.

In "UnChartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy" Alison Braley-Rattai and Kate Bezanson reflect on one of the potential consequences of the Ontario Directive on campus speech: to make the *Charter* applicable to those aspects of Ontario's universities that are animated by free speech concerns. They suggest that the intersections of expressive freedom, academic freedom, and institutional autonomy are undertheorized in the academic literature

and (minimal) case law, and require a more nuanced elucidation of the differences, conflicts, and tensions among these related, yet distinct, concepts in the unique landscape of university campuses, particularly if the *Charter* is to apply.

This brief introduction cannot, of course, do justice to the nuanced and sophisticated analyses offered by these varied contributions; nor can this small collection canvass all that there is to canvass on this necessarily broad topic. However, we believe that this collection provides valuable insights into some key aspects of the campus speech issue, in some of its political and constitutional dimensions. We are honoured that the contributors chose to share their time and talents, and we invite you, the reader, to consider each article in turn.

Constitutional forum constitutionnel

Compelling Freedom on Campus: A Free Speech Paradox

Jamie Cameron*

Introduction

In 1985, it was largely unknown how the Supreme Court of Canada would respond to the *Charter*.[1] At first glance, a drugstore's right to be open for business on Sunday, selling groceries, plastic cups, and a bicycle lock, seemed an unlikely source of inspiration for the Court's first pronouncement on the essence of freedom. Perhaps unexpectedly, the justices enforced the entitlement, finding that a Sunday closing law compelling a corporation to comply with the Christian Sabbath infringed section 2(a)'s guarantee of religious freedom.[2] In doing so, *R v Big M Drug Mart* defined freedom as "the absence of coercion or constraint," stating without equivocation that no one who is compelled "to a course of action or inaction" is "truly free".[3] In Justice Dickson's considered view, coercion includes "blatant forms of compulsion", such as "direct commands to act or refrain from acting on pain of sanctions", as well as forms of indirect control.[4] In plain and unmistakeable terms, *Big M* promised that, under the *Charter*, "no one is to be forced to act in a way contrary to his beliefs or conscience".[5]

---

* Professor Emeritus, Osgoode Hall Law School. I thank Kate Bezanson and Alison Braley-Rattai for including me in this special issue of Constitutional Forum, and am grateful to Kate Bezanson for her comments on an earlier draft. I also thank Ryan Ng (JD 2021) for his valuable research assistance in the preparation of this paper. Finally, I note that I was a member of York University's Free Speech Working Group in fall 2018. This paper does not in any way express the views of York University or the Working Group, which has long since disbanded.

1 *Canadian Charter of Rights and Freedoms*, s 2(a), Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M*].

3 *Ibid* at 336.

4 *Ibid*.

5 *Ibid* at 337

At a time of worrying forms of state-prescribed ideologies, creeds, and partisan positions, *Big M*'s idea of freedom remains monumental, and vital. The precarity of shared values and wedging of public discourse have loosened the bonds of democratic community, with expressive freedom emerging as one of the prime battlegrounds. Those in power realize that dominant values can be coercively defended by silencing those who offend majoritarian impulses, and can also be promoted by forcing minorities and non-conformists to adopt state-based values. In Quebec, Bill 21 compels those whose faith requires face covering and other forms of apparel-based religious observance to comply with an official policy of state secularity. Those who cannot or will not comply are disqualified from providing or receiving a variety of government services.[6] While resistance to Bill 21 is highly mobilized, there has been less focus on the crux of the law which, in coercing the adoption of secular values that offend against religious observance, is in principle a compulsion of identity. Quebec's "laicity of the state" is a profound affront to *Big M*'s principal insight that compelling a prescribed view of religion — or non-religion — is deeply destructive of freedom.[7]

Elsewhere, the government of Ontario compels gas pumps in the province to carry stickers publicizing its battle with the federal government on carbon taxes, potentially attaching significant fines to non-compliance.[8] Backwardly, the government proclaimed that its mandatory stickers advance free expression and transparency, in doing so overlooking the state's appropriation of citizen voices to create a forum for its partisan views.[9] On another front, medical professionals, institutions, and organizations are compelled to provide services and forms of treatment that offend religious and conscientious beliefs and sensibilities.[10]

Compelled expression and association also surface in forms referred to, at times, as "virtue signalling".[11] One such example, the 2017 Canada Summer Jobs program, made eligibility for federally funded summer employment contingent on an applicant's declaration of support for

---

6 Bill 21, *An Act Respecting the Laicity of the State*, 1st Sess, 42nd Leg, Quebec 2019 (assented to 16 June 2019), SQ 2019, c 12.

7 See also *Mouvement laïque Québécois v City of Saguenay*, 2015 SCC 16 at paras 74-75 (endorsing "a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality", and stating that the state may not, "*by expressing its own religious preference*, promote the participation of believers to the exclusion of non-believers *or vice-versa*"; emphasis added).

8 *Federal Carbon Tax Transparency Act*, SO 2019, c 7, Schedule 23 (requiring government-prescribed stickers to be displayed in certain ways on gas pumps, and outlining the consequences and penalties for non-compliance). Though the *Provincial Offences Act* allows fines of $5000 for a first offence and $10,000 for subsequent offences, the government has indicated that inspectors will be instructed to give warnings. It is also reported that the chief justice has set fines at $150. Canadian Federation of Independent Business, "Ontario's Gas Station Carbon Tax Stickers — What You Need to Know" (2019), online: <cfib-fcei.ca/en/Ontario_Carbon_Tax_Stickers>.

9 Allison Jones, "Ford government argues carbon tax stickers on gas pumps help 'further' free expression", *CTV News* (30 October 2019) online: <toronto.ctvnews.ca/ford-government-argues-carbon-tax-stickers-on-gas-pumps-help-further-free-expression-1.4662986>.

10 See *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (finding a violation of religious freedom and upholding the limit under s 1 of the *Charter*).

11 Defined, in one source, as "behaviour that is aimed at demonstrating one's own enlightened attitudes". See Collins Dictionary, "virtue-signalling", online: <collinsdictionary.com/dictionary/english/virtue-signalling>.

governmentally prescribed values.[12] Another instance is the mandatory Statement of Principles (SOP), which required members of the legal profession to make a declaration adopting or endorsing the Law Society of Ontario's official objectives on equity in the profession.[13] That initiative inspired a revolt that led to a radical shift in law society governance, and repeal of the SOP.[14]

Among a panoply of state-based coercive measures, the introduction of mandatory free speech policies for publicly funded colleges and universities is one of the most ominous. In two provinces, Ontario and Alberta, the government has directed colleges and universities to adopt and comply with an official free speech policy that is modelled on the US-based Chicago Statement on Principles of Free Expression.[15] That model was inspired by, and responded to, a perception that some perspectives and voices had been shut down and shut out of campus discourse. Rather than respect the autonomy of colleges and universities to develop internal policies, provincial governments in Canada imposed a mandatory policy on free expression. In doing so, their actions appropriated and transformed the Chicago Statement from a policy for internal governance into a diktat of the state.

It is manifest and axiomatic that compulsion is not freedom, and that a mandatory policy is the opposite, not the epitome, of free expression. Though it may not be as egregious as Bill 21's coercion of individual identity, this compulsion of institutional and academic identity differs little in principle. While commenting in passing on the breach of institutional autonomy and academic freedom, this brief reflection lingers more on the question of compulsion. Specifically, the discussion calls for *Big M*'s conception of freedom as the absence of coercion to be refreshed, re-invigorated, and robustly promoted in this and other settings.

The Chicago Statement transformed: from freedom to coercion

The Chicago Statement presents a vision of free speech that, on its face, is more conventional than radical, explaining that a university's commitment to "free and open inquiry" demands

12 See Brian Bird, "Canada Summer Jobs Program and the *Charter* Problem", *Policy Options* (16 January 2018) online: <policyoptions.irpp.org/magazines/january-2018/canada-summer-jobs-and-the-charter-problem/> (explaining the *Charter* implications of the 2018 program's mandatory attestation that applicants respect human rights and *Charter* values, and specifically endorse reproductive rights, defined as "the right to access safe and legal abortions"; also accusing the Trudeau government of "weaponizing" the *Charter*); The following year applicants were required to attest that no funding from Canada Summer Jobs would be used to "undermine or restrict rights legally protected in Canada". Cited in David Ross, "A New Canada Summer Job Attestation: The Good, the (Potentially) Bad, and the Unknown" (20 December 2018), online (blog): *Christian Legal Fellowship* <http://www.christianlegalfellowship.org/blog/2018/12/20/a-new-canada-summer-jobs-attestation-for-2019-the-good-the-potentially-bad-and-the-unknown>.

13 See Law Society of Ontario, "Guide to the Application of Recommendation 3(1)" (undated), online (pdf): <jurisource.ca/prj/phpe7rTLf1551195791.pdf>

14 See generally, Jacques Gallant, "Law Society Scraps key diversity initiative", *The Star* (11 September 2019) online: <https://www.thestar.com/news/gta/2019/09/11/law-society-scraps-key-diversity-initiative.html>.

15 See University of Chicago, "Statement on Principles of Free Expression" (July 2012), online: ≤liberalstudiesguides.ca/wp-content/uploads/sites/2/2017/04/Statement-on-Principles-of-Free-Expression-_-Free-Expression-_-The-University-of-Chicago.pdf>; See also University of Chicago, "Report of the Committee on Freedom of Expression" (undated), online (pdf): <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

"the broadest possible latitude to speak, write, listen, challenge and learn".[16] This latitude extends to ideas that are "thought to be offensive, unwise, immoral, or wrong-headed", and is bi-directional or reciprocal in nature, directing members of the community to "act in conformity with this principle".[17] Accordingly, the Statement denounces obstruction, disruption, or interference with the freedom of others, calling on the community instead to deploy "robust counter-speech" in the face of offensive or disagreeable thoughts.[18] Recognizing, as well, that any "vibrant commitment to free and open inquiry" must tolerate limits, the Statement proposes restrictions on expression that violates the law, and allows for reasonable time, place, and manner restrictions to enable the university to function without disruption.[19]

The Chicago Statement has been remarkably influential in the United States, where it has reportedly been adopted by more than sixty institutions.[20] In an environment of perennially attentive and unrequited debate, the Statement is not without detractors who challenge its soundness and objectives. On one account, the Statement advances a "legalistic and formal framework" that applies "blunt tools" to diverse and complex dynamics that do not reduce to a "one-size-fits-all statement".[21] Put another way, rigidity in a policy on free expression is somewhat at odds with the Statement's professed objective of open inquiry. Moreover, the sermonizing tone of broad-brush principles belies the role context and community dynamics must play in any discussion of university free speech.[22] To others, the Statement serves as a proxy for resistance to policies aimed at inclusive objectives and development of a "safe space" for learning on campus.[23] Whatever its purpose or direction, the American debate on difficult questions of internal governance is by, for, and of the university community.

The Statement experienced a critical mutation when it crossed the border and re-surfaced in Canada. First endorsed by a conservative politician running for party leadership at the federal level of government, the Statement was appropriated and adopted by two provincial premiers deeply committed to the implementation of conservative policies.[24] In this way, the

16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 Victor Yang, "The Chicago Principles Arrive at Other Universities", *The Chicago Maroon*, May 23, 2019 (stating that more than 63 institutions have adopted or endorsed the Chicago Statement, or a version of it). Online: <https://www.chicagomaroon.com/article/2019/5/24/chicago-principles-arrive-universities/>.
21 Sigal Ben-Porath, "Against Endorsing the Chicago Principles", *Inside Higher Education* (11 December 2018) online: <academicmatters.ca/against-endorsing-the-chicago-principles/>.
22 *Ibid* (stating that an institution's endorsement of the principles could end the conversation and undermine its ability to fulfill its teaching mission).
23 See e.g., Richard Pérez-Peña, Mitch Smith & Stephanie Saul, "University of Chicago Strikes Back Against Campus Political Correctness", *New York Times* (16 August 2016) online: <nytimes.com/2016/08/27/us/university-of-chicago-strikes-back-against-campus-political-correctness.html>. See also P.E. Moskowitz, *The Case Against Free Speech* (U.S.A.: Hachette Book Group, Inc., 2019) (providing extensive discussion of conservative movements and their interest in free speech issues on American campuses).
24 This initiative had its Canadian genesis in the 2015 leadership campaign of federal Conservative Party leader, Andrew Scheer. The Statement's evolution into an instrument of government control followed a pathway into Canada from Donald Trump, who first raised it as a way for American government to play a role on matters of internal university governance. A few years later, during the federal election campaign of fall 2019, then Conservative Party leader Andrew Scheer renewed his pledge to cut funding to any

Chicago Statement was converted to a mechanism of regulation, emerging as a political directive that imposed a free expression policy on colleges and universities. Thus transformed, the Statement is not a matter of abstract or scholarly debate and university governance but is understood, more cynically, as a top-down ploy to protect and promote conservative voices on campus.

To back up a moment: the paradox of advanced education in Canada is that, in principle, colleges and universities are autonomous in their mission and pursuit of knowledge, but at the same time are dependent on public funding and subject to regulation by the state. This paradox has been functional over the years because governments accept the independence of institutions that serve the public interest by educating the community and advancing knowledge. The governmental regulation of free speech on campus sets the system — and its established understandings — on a new footing.

On August 30, 2018, the government of Ontario issued a directive requiring all publicly-assisted colleges and universities in the province to post a free speech policy by January 1, 2019. The directive was clear that institutional policies must meet "a minimum standard *specified by the government*", and warned of reductions to operating grant funding for any institution not in compliance.[25] Almost one year later, Alberta's provincial government followed suit on July 4, 2019, calling on its colleges and universities to adopt the Chicago Statement or an equivalent, and setting December 15, 2019 as the deadline for compliance.[26]

This mutation diverted the Statement from its foundation in matters of university governance and re-styled it an instrument of government coercion. Compelling colleges and universities to adopt and comply with a government policy of free expression is offensive to institutional autonomy, the core mission of a university, and the academic freedom of its community. Moreover, Ontario's free speech directive is explicitly aimed at reining in the expressive activities of students; this essential aspect of the policy defies the text and purpose of the Chicago Statement.[27] Hostility to student activism is evident in the directive's demand for enforcement of government policy against students and their organizations, including disciplinary processes

---

university or institute of higher learning that does not comply with the party's conception of free speech. See Melanie Woods, "Conservative Platform Makes Free Speech Policies a Requirement for University Grants", *Huffington Post* (11 October 2019) online: <huffingtonpost.ca/entry/andrew-scheer-free-speech-conservative-platform_ca_5da10705e4b087efdbae5cb8>. See Conservative Party of Canada, "Andrew Scheer's Plan for You to Get Ahead" (2019) at 61, online (pdf): <cpc-platform.s3.ca-central-1.amazonaws.com/CPC_Platform_8.5x11_FINAL_EN_OCT11_web.pdf>.

25 Office of the Premier, "Upholding Free Speech on Ontario's University and College Campuses", (31 August 2018) online: <https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [emphasis added].

26 In July 2019, the Advanced Education Minister "requested" that Alberta colleges and universities "strengthen" free expression on campus by adopting the Chicago Statement or an analogous policy compliant with the spirit of the Chicago Statement. In a letter dated July 4, 2019, the Minister advised institutions that "[i]t is your responsibility to ensure that whatever action is taken … *demonstrates clear commitment* to the key principles of free speech as found within the Chicago Statement" [emphasis added]. A copy of this letter is on file with the author.

27 Office of the Premier, *supra* note 25 (requiring institutions to consider student group compliance with the free speech policy as a condition for ongoing financial support or recognition, and to encourage student unions to adopt policies that align with the free speech policy).

in cases of "disruption" on campus.[28] A subsequent directive decreeing that student fees, an established issue of local governance, must be optional confirmed the government's antipathy to student activism. Without a hint of subtlety, the premier of Ontario stated, in defence of the policy, that "I think we all know what kind of crazy Marxist nonsense student unions get up to".[29] In fall 2019, the directive on student fees was quashed in court on the basis that the government has no legal authority to interfere in this aspect of university governance.[30]

Meanwhile, Alberta's policy sets and aspires to a different and less confrontational approach. There, the process was promoted from the start as being "collaborative and collegial" in nature.[31] Accordingly, the Minister of Advanced Education stated that he would be working closely with Alberta institutions "to ensure practice is compliant with the policies outlined".[32] The nuance there is that "[t]his unified approach provides *a common understanding* of freedom of expression throughout Alberta's post-secondary system, while giving institutions flexibility to create policies that meet their unique needs."[33] While Ontario's threat of budget repercussions for non-compliance is explicitly coercive, Alberta's does not address the implications of any failure to adopt or comply with the government's policy. Moreover, Ontario targeted student activism and Alberta has not expressly done so. Though Ontario's free speech directive is a more egregious interference, both government policies interfere with institutional autonomy, academic freedom, and the constitutionally protected rights of college and university communities.

Despite the appeal to collaboration, a negative reaction was more palpable in Alberta, where ex-premier Rachel Notley stated that "[t]his is not about free speech on campus" but is a matter of "the [United Conservative Party] dictating that colleges and universities owe everyone, including hate groups, a platform".[34] Elsewhere, the Chicago Statement was described as an "ingenious manifesto that uses 'free speech' as code for the right of the privileged and powerful to shout down everyone else".[35] As such, it was denounced for opening university cam-

28 *Ibid* (declaring that existing student discipline measures must apply to students whose actions are contrary to the policy, including "ongoing disruptive protesting" that "significantly interferes" with an event).

29 Quoted in Joe Friesen, "Doug Ford defends cutting mandatory student-union fees", *Globe & Mail* (11 February 2019) online: <theglobeandmail.com/canada/article-doug-ford-fundraising-letter-accuses-student-unions-of-crazy-marxist/>.

30 *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 [*Canadian Federation of Students*]. The decision is under appeal.

31 Moira Wyton, "Advanced Education minister promises Chicago Principles details coming soon as students, academics concerned for September deadline", *Edmonton Journal* (19 June 2019) online: <edmontonjournal.com/news/politics/advanced-education-minister-promises-chicago-principles-details-coming-soon-as-students-academics-concerned-for-september-deadline>.

32 Stephanie Babych, "Universities hand in updated free-speech policies for review by provincial government", *Calgary Herald* (updated 20 November 2019) online: <calgaryherald.com/news/local-news/universities-hand-in-updated-free-speech-policies-for-review-by-provincial-government>.

33 Government of Alberta, "Enhancing free speech on campuses", *Education News Canada* (17 December 2019) online: <educationnewscanada.com/article/organization/14113/807304/Enhancing-free-speech-on-campuses.htm> (emphasis added).

34 Rachel Notley, "This is not about free speech on campus — we already have free speech. This is the UCP dictating that universities and colleges owe everyone, including hate groups, a platform." (30 July 2019 at 12:30), online: *Twitter*, <twitter.com/rachelnotley/status/1156270897952542721?lang=en>.

35 David Climenhaga, "The 'Chicago Principles' are code for the right of the powerful and privileged to shout down everyone else" *AlbertaPolitics.ca* (30 July 2019) online: <albertapolitics.ca/2019/07/the-chicago-

puses "wide to anti-union rights extremists and advocates of Trump-style racism", and allowing "anti-abortion radicals to harass and threaten users and workers on the steps of women's health clinics".[36]

In the meantime, and albeit with some grumbling, Ontario's institutions of higher learning acquiesced in the government's assertion of control over free speech on campus, posting policies in compliance with the Chicago Statement, as required, by January 2019.[37] While Ontario's 24 colleges closed ranks to develop a single policy — not exposing any one institution to scrutiny and potential repercussions — all but three universities either developed new policies or tweaked pre-existing campus policies.[38] Almost one year later, and only a day or two after the deadline, Alberta proclaimed that the province's 26 institutions had posted policies that align with the Chicago Statement.[39]

One year after Ontario's January 2019 deadline for a government-compliant speech policy, there is little indication that campus free speech has been concretely altered or is at imminent risk from the government directive. Pursuant to the plan for ongoing monitoring and evaluation of "system-level progress on the free speech policy", Ontario's colleges and universities also complied with the instruction to file an annual report addressing "implementation progress" and a summary of [each institution's] compliance.[40] Though it found no institution in default, the Higher Education Quality Council of Ontario's Report of November 2019 flagged a systemic deficit in the policies. Specifically, the HECQO complained that university and college policies did not explicitly state that free speech is dominant and "unequivocally" takes precedence over values of civility and respect in public discourse.[41] Noting that the government did not "explicitly require a statement identifying the hierarchy of free speech over civility", the Report nonetheless described this as an "issue to watch".[42] In doing so, this observation implied and assumed that the government could have, and might still, make that a mandatory requirement of the policy.

---

principles-are-code-for-the-right-of-the-powerful-and-privileged-to-shout-down-everyone-else/>.

36 *Ibid.*

37 See e.g., Public Service Alliance of Canada, "Statement on government-mandated free speech policies" (undated), online: <ontario.psac.com/statement-government-mandated-free-speech-policies> (articulating the dangers and denouncing the free speech policy, calling on the government to reconsider the directive, withdraw prescribed disciplinary measures and threatened funding cuts, and respect the autonomy of institutions and speech rights of members of the academic community); See also James Turk, "No Thank You Premier Ford" (5 September 2018), online (blog): *Centre for Free Expression Blog* <https://cfe.ryerson.ca/blog/2018/09/no-thank-you-premier-ford>.

38 See Higher Education Quality Council of Ontario, "Freedom of Speech on Campus, 2019 Annual Report to the Ontario Government" (undated), Appendix A, online: <heqco.ca/SiteCollectionDocuments/HEQCO%202019%20Free%20Speech%20Report%20to%20Government%20REVISED.pdf> (linking the free speech policies of Ontario's colleges and universities).

39 Moira Whyton, "Post-secondaries across Alberta adopt American-flavoured free speech policies", *Edmonton Journal* (17 December 2019) online: <edmontonjournal.com/news/politics/post-secondaries-across-alberta-adopt-american-flavoured-free-speech-policies>.

40 See Higher Education Quality Council of Ontario, supra note 38, Appendix B (linking the annual reports filed by Ontario colleges and universities).

41 *Ibid* at 2.

42 *Ibid.*

Furthermore, the Report maintained that the HEQCO's task is limited to matters of implementation and does not include passing judgment on or policing institutions.[43] Yet the government's response to the Report offers further, troubling indication that free speech on campuses is a captive of politics. In commenting on the HEQCO Report, the Ministry of Colleges and Universities was quick to claim that the government had "delivered on its promise" to uphold free speech on Ontario campuses, and that Ontario institutions were in "full compliance with its new free speech policy requirements".[44] That statement confirmed and cemented the government's authority to regulate free speech on campus, but did not provoke objection or challenge. Meanwhile, the coercive undercurrent and lack of transparency in Alberta's policy make it difficult for institutions to gauge the risks of non-compliance.

The relative calm of the status quo may be misleading. Contests over free speech on campus are frequent, exposing unresolved tensions in highly diverse communities whose purpose is to join issue and engage in vibrant and open inquiry actively, freely, and with passion.[45] The existence of a mandatory policy with a mechanism of oversight and threat of repercussions places institutions of higher learning at ongoing risk of government interference for — among other things — placing limits on free speech the government does not approve of, being overly solicitous of civility, or tolerating too much student activism.[46]

The mandatory free speech policies are a clear and unprecedented interference in matters of internal governance that establish and validate a hierarchical relationship of subservience to government oversight. Compliance with a mandatory government policy is about compulsion, not freedom. It is troubling that colleges and universities in two provinces have accepted their subservience to the government on campus free speech, which is a core issue of internal governance.[47] Beyond that, it is deeply concerning that this dynamic can migrate to other issues and even re-define the relationship between institutions of higher education and the government, thereby legitimizing government involvement in other aspects of university and academic governance. In short, the imposition of a mandatory free speech policy creates

43 *Ibid*.

44 Ministry of Colleges and Universities, News Release, "Ontario Protecting Free Speech on Campuses" (4 November 2019) online: <news.ontario.ca/maesd/en/2019/11/ontario-protecting-free-speech-on-campuses.html>.

45 In fall 2019 there was a near-violent confrontation between activist groups at York University. See Joseph Brean, "York University launches review after event with ex-Israeli soldiers met with massive protest", *National Post* (21 November 2019) online: <nationalpost.com/news/york-university-launches-review-after-event-with-ex-israeli-soldiers-met-with-massive-protest>.

46 Confrontation between the government and educational institutions can be avoided at moments of tension. The onus and risk of enforcing the Chicago Statement, and necessarily interfering in university affairs, are on the government. To avoid that risk, the government could defer to an institution, professing that its mandatory free speech policy set a broad framework that by design leaves the details to local implementation. The government could as easily go in a different direction, enforcing a hierarchy between free expression and civility, or directing an institution to allow an event it has decided not to permit.

47 As noted above, I was a member of York University's Free Speech Working Group in fall 2018. Within the Working Group I expressed my concerns about the constitutionality of this directive. The University's position and preferred response was to maintain that existing policies were in compliance and could be refreshed and collated, following a process of consultation with the community, to comply with the government's January 2019 deadline. I re-iterate that this paper expresses my views and not those of the University.

precedent for the government to interfere with college and universities in areas that centre and define their mission.

In addition, the mandatory free speech policy is a grave violation of section 2(b) of the *Charter*, which guarantees freedom of expression. Whether the policy is generous or restrictive of expressive freedom matters little because the fact of compulsion is a constitutional violation in itself. Up to now, and perhaps because colleges and universities have complied, the question of constitutional rights has been in the background, playing little or no role in debate and discussion of the mandatory free speech policy. Freedom from compulsion and coercion is at the core of section 2's fundamental freedoms, and it is wrong in principle for colleges and institutions to comply with directives that place them under the yoke of government oversight. In the circumstances, educational institutions that seemed quick to second their autonomy to the government might have concluded there was no other choice.

The purpose of the *Charter* is to protect the community from the violation of constitutional rights by the state. Here, the impermissible overreaching and interference by government with the institutional autonomy and academic freedom of colleges and universities also engages the *Charter*. On their face, the mandatory speech policies are aimed at compulsion, not freedom. The imposition of a mandatory policy does not advance or respect freedom but is, instead, its opposite. As such, the policies are a form of compelled expression and association that violate core *Charter* principles, including *Big M*'s conception of freedom as the absence of coercion.

Freedom: the absence of coercion or constraint[48]

Compelling expression is just as serious a violation of section 2(b) of the *Charter* as prohibiting it; in many ways, compelling affirmation or adoption of an objectionable point of view is a more egregious violation of freedom than prohibiting a point of view being voiced. In this instance, there can be no doubt that the governments' mandatory free speech policies engage constitutional rights, and the fact that institutions complied in both provinces does not negate the violation. If and when Ontario imposes a budgetary penalty or challenges a university decision - i.e., on civility, the use of university space, external speakers - section 2(b) of the *Charter* will be engaged. Constitutional rights might also be at issue in Alberta, should the promises of collaboration and flexibility break down to expose conflict between campus protocols and the government's conception of what free speech requires.

Freedom rests on two core principles and cannot thrive without a robust conception of each. First, a commitment to tolerance for offensive, repugnant, and unacceptable points of view is reflected in *Irwin Toy*'s framework principle of content neutrality.[49] The Court's commitment to that principle was confirmed and doctrinalized in its egalitarian definition of

48 *Big M, supra* note 2 at 336.

49 *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927 at 968, 969, 58 DLR (4th) 577 (stating that freedom of expression is guaranteed so that "everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream," and adding therefore that the Court cannot exclude "human activity" from the scope of expressive freedom "on the basis of the content or meaning being conveyed") [*Irwin Toy*].

expression as "any attempt to convey meaning".[50] Drawing from *Big M*, the second is a vision of freedom as the absence of coercion or constraint. Both core principles are implicated where free speech on campus is at issue.

The overarching goal of these governmental policies is to superimpose an official view of free speech and control the scope of expressive activity on campus. In other words, the issue is about who controls what expression is permitted, and whether it is a matter of government authority or university governance. The government can only regulate expressive activity on campus by overriding the traditional prerogative of colleges and universities to decide this issue as a matter of institutional autonomy and local governance.[51] Yet, as the Supreme Court of Canada has declared, "[t]he government […] has no legal power to control the university even if it wishe[s] to do so".[52] More recently, *Canadian Federation of Students* explained that Ontario has had a "legislated policy of non-interference in university affairs" for more than 100 years, finding as a result that the student fees directive represented "a significant incursion into the ability of universities to govern their affairs autonomously".[53] Directives that compel universities to comply with a state-prescribed free speech policy interfere equally with institutional autonomy and academic freedom. As such, these policies raise the second key principle in the conception of freedom, and that is freedom from coercion or constraint.

Big M's contribution to the methodology of *Charter* interpretation was as monumental as its conception of freedom. Specifically, the Court's call for a "generous" interpretation of the *Charter*'s rights and freedoms, "rather than a legalistic one", has been enormously influential.[54] That generosity has only partly been realized under section 2(b); while it set a low threshold for breach when the government prohibits expressive activity, the Court has been less certain whether and in what circumstances the Charter protects freedom from compulsion by the state.

The judicial resistance to constitutional claims of freedom from compulsion traces in part to the dynamics of democratic governance. Being co-opted by government policies and programs, including those that are objectionable, is constant because it is inherent in being a member of a democratic community.[55] In principle, the protocols of democratic governance, including the rules of responsible parliamentary government and regular elections, sufficiently protect the interests of those who dislike or reject a governing party's platform. Against that understanding of the relationship between the government and its citizens, courts have found find it difficult to conceptualize and articulate when mandatory policies cross the threshold into impermissible forms of state compulsion. Mandatory gas pump stickers, the Law Society

50 *Ibid* at 969 (stating if an activity "conveys or attempts to convey meaning, it has expressive meaning and *prima facie* falls within the scope of the guarantee").

51 Local free speech governance has always been subject to the law, including criminal law concerning hate propaganda, human rights legislation, and civil law (i.e., the law of defamation).

52 *McKinney v University of Guelph,* [1990] 3 SCR 299 at 273, 76 DLR (4th) 545 (per La Forest J).

53 *Canadian Federation of Students, supra* note 30 at paras 8, 18.

54 *Big M, supra* note 2 at 344.

55 *In Lavigne v Ontario Public Service Employees Union,* [1991] 2 SCR 211 at 260, 81 DLR (4th) 545, Wilson J. maintained that freedom from association would lead to absurd results, such as the right to challenge taxes that were then used to support causes taxpayers find objectionable [*Lavigne*]. La Forest J. remarked, as well, that "it certainly could not have been intended that s.2(d) protect us against the association with others that is a necessary and inevitable part of membership in a democratic community"; *ibid* at 320.

of Ontario's mandatory declaration of values (the SOP), the Canada Summer Jobs attestation, and the citizenship oath to the Queen are among the manifold ways the government compels the voices of its community in more or less invasive ways. At the least, the *Charter* must apply when the state compels members of the community to affirm, endorse, or adopt a policy, creed, pledge, or partisan position and attaches consequences to non-compliance.[56]

Part of the resistance to constitutionalizing freedom from government compulsion is also contextual. It is surprising, for instance, that the *Charter* jurisprudence has been slow to incorporate *Big M*'s conception of freedom into the section 2(b) jurisprudence. With the exception of *Devine v. Quebec*, *Big M*'s insights on coercion have played little or no role in discussion of freedom from compulsion; only a few claims have succeeded under section 2(b), albeit without substantial or meaningful discussion of how and why coercion threatens freedom.[57]

The question of compulsion under subsections 2(b) and (d) has only received careful consideration in two cases arising in a labour union context, where the state's regulation of union membership and compulsory dues to support non-workplace issues was at stake.[58] With some justices dismissing the concept of non-association absolutely and others suggesting a higher threshold under section 2(d), the Court in *Lavigne v OSPEU* signalled its discomfort with the concept and was unable to agree on a standard for breach.[59] Only La Forest J. returned to *Big M* and relied on its conception of freedom in finding that "[f]orced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it".[60]

Justice McLachlin spoke only for herself in setting a high threshold for breach, indicating that a claim for freedom from compulsion is contingent on criteria of forced ideological conformity, public identification with an objectionable message, and the presence or absence of opportunities to disavow the offending message.[61] In principle, the question of breach should not depend on whether ideological conformity is demanded, whether the expression com-

56 In *McAteer v Canada (AG),* 2014 ONCA 578, the Ontario Court of Appeal held that a compulsory oath to the Queen, as part of citizenship eligibility, did not even constitute a *prima facie* violation of the Charter.

57 See e.g., *Devine v Quebec (AG)*, [1988] 2 SCR 790, 55 DLR (4th) 641 (citing *Big M* and finding that Quebec's outdoor advertising sign law violated s.2(b) of the *Charter* by prohibiting the use of the English language as well as by compelling the exclusive use of the French language); See also *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1 (concluding that Parliament's mandatory unattributed tobacco package warnings violated s.2(b) of the *Charter*); See also *Libman v Quebec (AG)*, [1997] 3 SCR 569, 151 DLR (4th) 385 (concluding that Quebec's referendum law compelling third parties to participate either in "yes" or "no" committees, without sufficient alternative options for participation, violated s.2(b) of the *Charter*); See also *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1089, 59 DLR (4th) 416 (rejecting the claim that a mediator's order requiring an employer to write a mandatory reference letter violated s.2(b)).

58 *Lavigne, supra* note 55 (rejecting the claim that mandatory union dues used for non-workplace objectives are impermissible forms of compelled expression and association); See *R v Advance Cutting & Coring Ltd,* 2001 SCC 70 (rejecting the claim that mandatory union membership as a condition of employment violates s.2(d) of the *Charter*).

59 See Lavigne, supra note 55 at 263, 270 (per Wilson J, excluding the right not to associate from s.2(d) and deflecting claims of non-association to ss.2(b) and 7 of the Charter and then stating, under s.2(b), that it was not necessary to decide whether the guarantee includes a right not to express oneself at all on an issue).

60 *Ibid* at 318.

61 *Ibid* at 343, 344, and 273 (*per* Wilson J, on disavowal).

pelled is objectively and publicly identified with an individual or institution, or whether there are opportunities for those compelled to disavow the message.[62] The better view is that a standard more analogous to the low threshold for breach of expressive freedom — the *Irwin Toy* test — should apply when freedom from compelled expression or association is at issue.[63]

Even under a more onerous standard of compulsion, the governments' mandatory campus speech policies offend the *Charter*: they are a form of forced ideological conformity that publicly identifies colleges and universities with a governmental conception of free speech, and does not permit institutions to disavow the policy. Despite her hostility to the claim in *Lavigne*, Wilson J. agreed that it would clearly violate section 2(b) for the government "to put a particular message into the mouth of [an individual]".[64] That is precisely the purpose and effect of compulsory free speech policies for colleges and universities.

From the perspective of *Charter* interpretation, the deeper concern is that the rules for freedom from coercion are out of touch with section 2's core purposes. Again, that purpose is to protect vulnerable individuals and institutions from the state's coercive power, whether it operates as a prohibition on expressive freedom or a compulsion to adopt a government message or practice. In that regard, *Big M* is still the closest the Court has come to grasping section 2's essence: in the context of section 2(a)'s guarantee of religious freedom, *Big M* represents the Court's most insightful discussion of compulsion as a profound violation of freedom.

At this time, any number of current examples provide an opportunity to ameliorate the *Charter*'s approach to freedom from compelled expression and association. For instance, litigation arising from the Ontario government's mandatory gas pump stickers will allow the judiciary to incorporate and embed *Big M*'s concept of freedom from coercion in section 2(b). In similar fashion, any attempt to enforce an official government policy on campus free speech will enable, and even require, colleges and universities to defend their constitutional rights. There, as well, *Big M* vindicates the claim and, in the process, institutions might also have the opportunity to reclaim and revitalize their autonomy in matters of university governance.

Compelled freedom's paradox

In *Big M*, Justice Dickson defined coercion as "blatant forms of compulsion", such as "direct commands to act or refrain from acting on pain of sanctions".[65] That definition accurately and decisively describes Ontario's mandatory free speech policy for colleges and universities across the province. Even without the threat of immediate sanctions, it also describes Alberta's "collaborative" and flexible approach. No academic institution would freely choose to comply with dictates that so profoundly vitiate longstanding understandings of institutional autonomy, local governance, and academic freedom. As Justice Dickson again recognized, no one who is compelled to a course of action or inaction is "truly free".[66] In 1985, that included a

62 *Ibid* at 322. As La Forest J stated, "[i]t is of little solace to a person who is compelled to associate with others against his or her own will that no one will attribute the views of the group to that person."

63 Ibid at 328. Note also that La Forest J proposed a more generous conception of freedom from compelled association in *Lavigne*.

64 *Ibid* at 267.

65 *Big M*, *supra* note 2 [emphasis added].

66 *Ibid*.

corporate drugstore selling bicycle locks on a Sunday, and in 2020 it must include institutions of higher learning. The imposition of a state-based version of the Chicago Statement on Free Expression Principles constitutes an impermissible form of compelled expression and association with a governmental conception of what expression is free. In principle, is much better than a university free expression policy that is controversial or restrictive, a more generous conception of free expression imposed by government.

A byproduct of mandatory free speech is that the policies fundamentally alter the *Charter* status of colleges and universities, in two ways. First, the policies directly interfere with the section 2 rights of these institutions of higher education, and are subject to the *Charter*. Any attempt to enforce a governmental view of expressive freedom is therefore open to challenge under the *Charter*. In Ontario, student federations have successfully challenged the province's attempt to regulate student fees, albeit not in relation to the *Charter*. Second, and equally important, free speech policies in Ontario and Alberta are now a matter of government policy, and any limits on campus expression — i.e., those that were formerly a matter of local governance – are now subject to the *Charter*.[67] While some may welcome this change, others might regard it as a further loss of institutional autonomy and deference to the local governance of university affairs.

Beyond these concerns, the imposition of a mandatory free speech policy points to and reinforces a more ominous development: the rise of mechanisms — in a variety of contexts and settings — to compel members of a democratic community to observe and adopt various state-based ideological, religious, political, and partisan positions by members of the democratic community. As suggested above, these are serious incursions that fundamentally undermine *Big M*'s core conception of freedom as the absence of coercion or constraint. These incursions must be resisted and met by a robust conception of freedom from compulsion under section 2 of the *Charter*. Achieving that goal is simply a matter of adopting and acting on *Big M*'s conception of freedom under section 2 of the *Charter*, including its guarantees of expressive and associational freedom.

67 See *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 (applying the *Charter* to the university, independently of the mandatory free speech policy).

Constitutional forum constitutionnel

The Politics of Campus Free Speech in Canada and the United States

Stephen L. Newman*

Ontario Premier Doug Ford and US President Donald Trump have something in common: both recently issued directives to colleges and universities intended to promote free speech on campus. Premier Ford's came first. In August 2018, shortly after winning the provincial election, Ford required all colleges and universities in the province to devise policies upholding free speech on their campuses in line with a minimum standard prescribed by his government. The policies were to be in place no later than January 1, 2019. Failure to comply would result in a reduction of operating grant funding from the province. President Trump's executive order concerning "free inquiry" on American campuses was issued in March 2019. The order states that it is the policy of the federal government to encourage institutions of higher learning "to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."[1] Colleges and universities that fail to do so are threatened with the loss of federal research and education grants.

In contemplating these parallel directives, two things stand out. First, politics is driving policy. Conservatives in both countries have been complaining for years that the professoriate skews to the left, making college and university campuses inhospitable toward conservative ideas and hostile environments for conservative-minded students. That President Trump was playing to his base is made abundantly clear by his remarks at the signing ceremony. Addressing an audience that included conservative students, he said: "Under the guise of speech codes, safe spaces, and trigger warnings, these universities have tried to restrict free

* Associate Professor, Department of Politics, Faculty of Liberal Arts and Professional Studies, York University where he teaches political theory.

1 Andy Thomason, "Here's What Trump's Executive Order on Free Speech Says", *The Chronicle of Higher Education* (21 March 2019), online: <chronicle.com/article/Heres-Wat-Trumps-Executive/245943?cid+bn&utm_medium=en&cid=bn>. An executive order is a directive issued by the President of the United States in his capacity as head of the executive branch and has the force of law. Trump's executive order on campus free speech is reproduced in its entirety online.

thought, impose total conformity, and shut down the voices of great young Americans like those here today."[2] That Trump previewed his executive order at a speech to the Conservative Political Action Conference offers further evidence of its political character. Writing in *The Atlantic*, Adam Harris described the order as "red meat for Trump's base."[3]

What also stands out is the vagueness of these directives. It is far from clear how they will be enforced or what changes they will require in the way colleges and universities manage free speech on campus. At York University, where I am on faculty, the administration responded to Premier Ford's directive by establishing a committee to formulate the required policy. The committee held a series of stakeholder meetings on campus, reviewed existing policies on free speech and academic freedom, and in the end produced a document that bundles together all of the university's pre-existing policy statements touching on free expression, which was duly transmitted to the province.

In the judgment of many this was much ado about nothing; the Premier's directive was a solution in search of a problem. As it happens, this is also how the American Association of University Professors (AAUP) characterizes President Trump's Executive Order, observing that public institutions of higher learning in the United States are required by the First Amendment to protect free expression on campus and, as Trump's order itself notes, private institutions already have policies in place protecting free speech. What, if anything, American colleges and universities will need to do differently going forward is unknown.[4] The vagueness and ambiguity of the president's executive order leads two prominent American legal scholars to doubt its constitutionality.[5]

It is conceivable that the Ford and Trump governments will attempt to meddle with how colleges and universities go about protecting free speech on campus, using the threat of withholding public monies as a lever. In the United States, in any event, the right has demonstrated a keen appetite for this sort of intervention. In 2017, the Goldwater Institute, a right-wing libertarian think tank, and the conservative American Legislative Exchange Council (ALEC) each developed model legislation for safeguarding free speech on campus. The model legislation gives students the right to sue colleges and universities for infringements of their free speech rights; prohibits colleges and universities from disciplining faculty and students for exercising their speech rights; requires college and university administrators to discipline students who interfere with the free speech rights of others; disallows the creation of "free speech zones" that confine expressive activity to one part of campus; and mandates annual public reports on the state of free expression on campus.

---

2 Lauren Cooley, "Federal Funding, the First Amendment, and Free Speech on Campus", *Quillette* (24 March 2019), online: <https://quillette.com/2019/03/24/federal-funding-the-first-amendment-and-free-speech-on-campus/>.

3 Adam Harris, "Trump's Redundant Executive Order on Campus Speech", *The Atlantic* (21 March 2019), online: <https://www.theatlantic.com/education/archive/2019/03/trump-signs-executive-order-campus-free-speech/585484/>.

4 Julie Schmid, "Response to President Trump's Executive Order on Denial of Research Funds" (21 March 2019), online: *American Association of University Professors* <aaup.org/news/response-president-trumps-executive-order-denial-research-funds>.

5 Erwin Chemerinsky & Howard Gillman, "Trump's executive order on college free speech is unconstitutional", Op-Ed, *Los Angeles Times* (22 March 2019), online <https://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-gillman-trump-free-speech-college-201903222-story.html>.

The Goldwater Institute's proposal makes no attempt to mask its agenda, declaring that its ultimate goal is to "change the balance of forces contributing to the current baleful national climate for campus free speech."[6] The American Civil Liberties Union characterizes the model legislation drawn up by the Goldwater Institute and ALEC as straightforwardly political, intended to support "the embattled minority of conservatives on campus against the 'politically correct' majority."[7] Also problematic in the view of the ACLU is the heavy emphasis the model legislation places on disciplining students who disrupt speakers or otherwise interfere with the speech rights of their fellow students, substituting state-mandated punishments for the disciplinary policies of individual institutions. Intentionally or not, this punitive approach could have a chilling effect on campus free speech.

The Goldwater Institute and ALEC have a Canadian counterpart: the Justice Centre for Constitutional Freedoms (JCCF), based in Alberta. The JCCF has developed its own model legislation for protecting free speech on campus. Included among its provisions are protection for all speech that does not explicitly violate the sections of the Criminal Code pertaining to hate speech and a requirement that all campus policies affecting speech be viewpoint neutral. While institutions would be allowed to retain their own procedures for dealing with complaints arising in connection with speech on campus, the provincial government would gain authority to conduct its own investigations along with the power to impose significant financial penalties on institutions found to be in violation of the law.

As in Ontario, failure to implement and enforce a campus free speech policy could also result in a loss of provincial funding. Like the model legislation proposed by the Goldwater Institute and ALEC, this bill would seriously impair institutional autonomy. And like its American counterparts, the JCCF's model bill tilts to the right, as revealed by provisions that bar colleges and universities from requiring student groups to pay security costs associated with inviting controversial figures to campus but allowing those who *protest* such speech to be made to foot the bill for any additional security required.

The JCCF bill has not yet been enacted, but in May 2019, the conservative government of Alberta Premier Jason Kenny announced its intention to require Alberta's post-secondary institutions to enact policies about free speech on campus patterned on the University of Chicago "Statement on the Principles of Free Expression."[8] Observers anticipate that the government's legislation will hew closely to the JCCF model bill.[9]

---

6 Stanley Kurtz, Jim Manley & Jonathan Butcher, "Campus Free Speech: A Legislative Proposal" (30 January 2017) at 4, online (pdf): *The Goldwater Institute* <goldwaterinstitute.org/wp-content/uploads/cms_page_media/2017/2/2/X_Campus%20Free%20Speech%20Paper.pdf>.

7 American Association of University Professors Committee on Government Relations, "Campus Free-Speech Legislation: History, Progress, and Problems" (April 2018) at 3, online (pdf): <aaup.org/file/Campus_Free_Speech_2018.pdf>.

8 See Madeline Smith, "Kenney follows Ford's push for campus free speech. But critics say it's a dog whistle for far-right voters", *The Star* (6 May 2019), online: <thestar.com/calgary/2019/05/06/alberta-and-ontario-premiers-campus-free-speech-policies-a-dog-whistle-blow-for-the-right-expert.html>.

9 See Field Law, Alert, "New Challenges to Free Speech on Campus" (May 2019), online: <fieldlaw.com/News-Views-Events/149902/New-Challenges-to-Free-Speech-on-Campus?&utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original>.

The legislative battle is much further advanced in the US. By the March of 2019, thirty-nine American states had taken up bills inspired by the model legislation drawn up by the Goldwater Institute and ALEC. In thirteen of these states, the bills became law.[10] At the federal level, similar legislation was introduced early in 2018 by Republican Senator Orin Hatch of Utah.[11] Two years earlier, the Republican controlled Senate passed the Anti-Semitism Awareness Act, a like-minded piece of legislation that required the federal government to adopt a definition of anti-Semitism so broad as to risk impugning protected political speech critical of Israel when determining whether schools have violated civil rights laws by failing to protect students from anti-Semitic speech.[12] Hatch's bill failed to clear the Senate and the Anti-Semitism Awareness Act died in the House of Representatives. The sponsors of the latter did not give up, however. The Act was reintroduced in the Senate in 2018 and again in 2019.[13]

The model legislation developed by the Goldwater Institute and ALEC, along with the multiple legislative initiatives undertaken at the state and federal levels for the purpose of safeguarding free speech on campus, testify to the seriousness with which the American conservative movement regards the contest for hearts and minds that it sees being played out at colleges and universities, as well as the lengths to which conservatives are willing to go in order to combat what they regard as the unfair tactics employed by the other side. The same may be said of the Canadian conservative movement in regard to the JCCF's model bill and the directive issued by Premier Ford. It deserves to be noted that, to date, the greater number of legislative efforts to dictate terms on campus free speech have failed. But even failed legislation can be counted as a victory of sorts if it succeeds in framing the ongoing conversation over campus free speech in a way favourable to conservative aims. This could very well be what conservatives hope to achieve by their efforts.

With this in mind, it makes sense to view President Trump's executive order — and Premier Ford's similar directive — as being most importantly an instance of *symbolic politics*. In symbolic politics, what is signaled matters more than any substantive result. Trump's executive order can be understood as yet another volley in the "culture wars" that American conservatives have been fighting for decades. Canadian conservatives have shown an interest in waging a similar struggle, but thus far have been less successful than their American counterparts in generating enthusiasm for a *kulturekampf* among their base.

---

10 For data through the end of 2018, see Jonathan Friedman, "Chasm in the Classroom: Campus Free Speech in a Divided America" (April 2019) at 72-75, online (pdf): *PEN America* <pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf>. On Kentucky's campus free speech law, see Christopher Vondracek, "Kentucky's Bevin signs bill to protect expression on campus, ban 'free speech' zones", *The Washington Times* (27 March 2019), online: <washingtontimes.com/news/2019/mar/27/kentucky-enacts-campus-free-speech-law-bans-free-s/>. On Iowa's law, see Stephen Gruber-Miller & Aimee Breaux, "Kim Reynolds signs bill requiring Iowa universities to respect 'free speech' on campus", *Des Moines Register* (27 March 2019), online: <desmoinesregister.com/story/news/politics/2019/03/27/free-speech-on-campus-governor-kim-reynolds-bill-university-iowa-business-leaders-christ-ui-isu-uni/3288307002/>. For a fuller discussion of the model legislation, see also AAUP, *supra* note 7.

11 AAUP, *supra* note 7 at 8.

12 "Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire" (7 November 2017) at 5, online (pdf): *PEN America* <pen.org/wp-content/uploads/2017/11/2017-wrong-answer_11.9.pdf>.

13 US, Bill S 852, *Anti-Semitism Awareness Act of 2019,* 116th Cong, 2019.

It hardly seems like a coincidence that the Ford government is requiring Canadian schools to adhere to principles contained in a statement on free speech issued by the University of Chicago and much celebrated by American conservatives.[14] Indeed, it hardly seems a stretch to say that the tone associated with the politics of free speech on campus has been imported into Canada from the United States, and the whole business, both north and south of the 49th parallel, probably has as much or more to do with electoral strategy than with making fundamental alterations to campus life. It's not that conservative proponents do not want to humble what they regard as an intractably left-leaning academic establishment; it's just that bashing the academic left wins points with the conservative base even if nothing much changes on campus.

Politically speaking, then, the Ford and Trump directives look pretty much the same. From a constitutional standpoint, however, there is a significant difference. While both the American Bill of Rights and the Canadian Charter of Rights afford constitutional protection to the freedom of expression, it is as yet unclear whether or to what extent the Charter guarantee is (or ought to be) applicable to public colleges and universities.[15] In contrast, there is no ambiguity in American constitutional law; the free speech clause of the First Amendment is binding on state-run schools, and private American colleges and universities can be made to conform to the requirements of the First Amendment as a condition of accepting public funds, such as research grants.

Arguably, the uncertainty of the Charter's application to post-secondary education offers Premier Ford a plausible rationale for stepping in to safeguard free speech on campus. This is not to say that the freedom of expression is currently impaired on provincial campuses, nor is to imply that the Premier was moved to act by a well-founded concern regarding the exercise of free speech rights at colleges and universities in Ontario. It is merely to acknowledge that there is nothing inherently wrong with having a provincial government take steps to protect the exercise of a fundamental right in public institutions of higher learning, especially if the protection of the Charter cannot be counted on. How government goes about that, of course, makes all the difference in the world. Useful legislation would not turn campus free speech into a partisan wedge issue, and it would not pre-empt a post-secondary institution's own policies and procedures.

In contrast with the situation in Canada, the well-established applicability of the First Amendment to public schools, and conditionally to private educational institutions as well, would seem to render President Trump's vague and ambiguous executive order redundant.[16] It also undercuts the argument for intrusive legislation to ensure free speech on campus. If stu-

14 Committee on Freedom of Expression, "Report of the Committee on Freedom of Expression", online (pdf): *University of Chicago* <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>.

15 The Supreme Court's understanding of the Charter's relationship to post-secondary education appears to be evolving. *Cf* Linda McKay-Panos, "Universities and Freedom of Expression: When Should the Charter Apply?" (2016) 5:1 *Can J Hum Rts* 59. Model campus free speech legislation developed by Alberta's Justice Centre for Constitutional Freedom (JCCF) would make post-secondary institutions "governmental" and therefore subject to the *Charter*'s guarantee of free expression. See Field Law, *supra* note 9.

16 Benjamin Wermund points out on Politico.com that Trump's order "essentially reinforces what schools are already supposed to be doing." Benjamin Wermund, "Trump's hyped free speech order asks colleges to do what they already have to do", *Politico* (21 March 2019), online: <politico.com/story/2019/03/21/trump-free-speech-college-1286517>.

dents or faculty members at American colleges or universities believe that their First Amendment right to free expression is being infringed by the practices or policies of their institution, they have an effective remedy: they can go to court. As a matter of policy, the added threat of de-funding public institutions that abridge the free speech rights of students and faculty would only appear truly necessary if this judicial remedy were ineffective. But the relevant case law shows just the opposite.

Take the example of speech codes. President Trump referenced speech codes in his remarks at the signing ceremony for his executive order, including them among the stratagems used by the left to shut down conservative voices. In their 2017 book, *Free Speech on Campus*, Erwin Chemerinsky and Howard Gillman report that over 350 American colleges and universities adopted hate speech codes in the early 1990s. The codes were intended to prevent the creation of a hostile learning environment for minority students by curtailing overtly racist speech.

While the architects of these codes did their best to make them consistent with the First Amendment, the task ultimately proved impossible. In practice, as Chemerinsky and Gillman observe of one such policy at the University of Michigan, "the code was used not against the kinds of purely hateful slurs that inspired its passage, but against people who expressed opinions that others objected to."[17] Under challenge, the University of Michigan's code was struck down by a federal judge for being impermissibly vague and overbroad, such that it was impossible for the court to discern any limitation on the policy's reach. In fact, between 1989 and 1995, every court that examined a university speech code found the code to be unconstitutional, either because, as in the University of Michigan case, the code was void for vagueness and overbroad, or because, as in the case of Stanford University, the code was found to penalize speech based solely upon its objectionable content, which violates the long established rule of First Amendment jurisprudence requiring that permissible regulation of protected expression be content-neutral.[18]

Shutting down racist hate speech remains a concern on American campuses, more so than on Canadian campuses, because First Amendment jurisprudence treats hate speech as protected speech so long as the impugned utterance does not entail a credible threat of violence.[19] In contrast, the Canadian Supreme Court's *Keegstra* decision determined that criminalization of the willful promotion of hatred is a reasonable limit on the right to free expression.[20] This gives Canadian universities a freer hand when it comes to penalizing hateful speech. In the United States, good faith efforts to curb racist speech on campus ran afoul of the First Amendment because campus speech codes overreached and penalized expression that was offensive

17 Erwin Chemerinsky & Howard Gillman, *Free Speech on Campus* (New Haven: Yale University Press, 2017) at 99.

18 *Ibid* at 102. Chemerinsky and Gillman explain that the court in the Stanford case relied on a California statute that prohibits private schools from punishing speech that would be deemed protected in a public institution, thus making Stanford's speech code subject to First Amendment jurisprudence under which permissible government regulation of expression, such as time, manner and place restrictions, must be content-neutral. See also Timothy C Shiell, *Campus Hate Speech on Trial* (Lawrence, Kansas: University of Kansas Press, 1998), ch 4, for a discussion of the court challenges to campus speech codes.

19 See *RAV v City of St Paul,* 505 US 377 (1992). For a proposal to limit at least some forms of hate speech on campus within the limits set by the First Amendment, see Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" (1990) 1990:3 *Duke LJ* 484.

20 *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.

but not threatening. Attempts to anchor speech codes in the anti-discrimination and anti-harassment provisions of federal civil rights law also failed, not because the law is inapplicable to colleges and universities (the federal courts have ruled that it is), but because speech that is merely rude or discourteous or expresses offensive views toward a protected class is not regarded as injurious.[21]

The unqualified defeat of campus speech codes in American courts hardly conforms to Trump's narrative of political correctness run amok. Of course, campus speech codes are not the only or even the primary target of his executive order. At the forefront of the current campus free speech controversy is the practice of "no-platforming" controversial speakers, either by disinviting them or by disrupting their talks. Recent targets have included high profile conservatives such as Ann Coulter, Charles Murray, Milo Yiannopolous, Ben Shapiro, and Richard Spencer.[22] Similar incidents have occurred on Canadian campuses involving some of the same figures.

The idea behind no-platforming is to deny persons whose views are deemed utterly reprehensible the appearance of legitimacy (or normalcy) that being invited to speak at a college or university confers. Also at issue are trigger warnings and safe spaces, two other left stratagems for imposing "total conformity" on campus according to Trump. Trigger warnings are cautions issued by professors to their classes so that students who have experienced personal trauma or are otherwise especially vulnerable can avoid exposure to material they might find particularly offensive or disturbing. Safe spaces are designated zones on campus within which expression potentially offensive to historically marginalized social groups is curtailed. Like campus speech codes, trigger warnings and safe spaces are intended to make campuses more inclusive of racial minorities and other persons whose subaltern status makes them subject to discrimination.

There is reason to question just how widespread a problem these practices pose for free speech. In 2018, Zack Beauchamp analyzed data on campus free speech incidents compiled in three separate studies conducted between 2011 and 2018. He reports that the number of confirmed incidents is relatively small, especially when one stops to consider that there are over 4,500 colleges and universities in the United States. Georgetown University's Free Speech Project, which keeps records on all types of free speech incidents involving both faculty and students, cataloged roughly sixty incidents between 2016 and 2018. A study published by the libertarian Niskanen Center looking solely at faculty disciplined or dismissed because of expressly political speech turned up a total of forty-five cases between 2015 and 2017. The Foundation for Individual Rights in Education (FIRE), a nonprofit educational foundation, tracked the number of *attempts* to disinvite speakers from American campuses between 2011 and 2017 and found that the number ranged between 20 and 42 disinvitations per year. As reported by FIRE, the actual numbers of speakers disinvited in each year were considerably lower: 12 in 2011 and 24 in 2016 (the year with the highest number of attempted disinvitations).[23]

---

21 Chemerinsky & Gillman, *supra* note 17 at 118–120.

22 For a discussion of these and other incidents, see Friedman, *supra* note 10 at 5–46; see also Chemerinsky & Gillman, *supra* note 17 at 1–21.

23 FIRE, "Disinvitation Database", online: *FIRE* <thefire.org/research/disinvitation-database/#home/?view_2_per_page=500&view_2_page=1>.

In short, while any interference with free speech on campus is regrettable, the relatively low number of incidents hardly supports the notion of there being a free speech crisis at American colleges and universities. Moreover, as Beauchamp points out, a fairly large percentage of the individuals targeted in these incidents were liberals, which further serves to undercut the argument that conservatives are at a particular disadvantage on campus when it comes to exercising their speech rights.[24]

Comparable data regarding incidents on Canadian campuses is harder to come by. If one were to judge by the annual Campus Freedom Index issued by the Justice Center for Constitutional Freedoms (JCCF) since 2011, it would appear that free speech is gravely endangered at virtually all of Canada's colleges and universities. Graded on a scale of A through F, most institutions consistently receive low or failing marks for having inadequate policies safeguarding free speech and abominable practices affecting speech.[25] Sadly, the index does not provide a tally of incidents. It is impossible to know from the assigned grades how many outside speakers have had their invitations canceled or how many students have faced disciplinary measures for having expressed a disfavoured opinion.

What seems to irk the JCCF are policy statements that contain any proscription of offensive, discriminatory, or disrespectful speech; institutional funds going toward any group that engages in "ideological advocacy" by promoting "vague and ambiguous concepts" such as "diversity" and "inclusion;" and the failure to penalize students who disrupt speakers or otherwise interfere with free expression.[26] The JCCF's own ideological orientation is revealed clearly enough by its characterization of speech in favour of diversity and inclusion as "ideological advocacy." By this token, it is easy to imagine that the JCCF criteria would justify labeling the government of Canada a mouthpiece for the ideology of the extreme left because it celebrates multiculturalism, embraces the nation's diversity, and expresses a commitment to including historically oppressed and marginalized groups in the social and political life of the nation. Perhaps in their own minds, the authors of the JCCF criteria made a distinction between official multiculturalism and "ideological advocacy," but the criteria themselves do not make any such distinction clear. And, are we really to believe that free speech is impaired on campus if there are prohibitions on offensive and disrespectful speech in the classroom or in living areas?

This is not to say that there have been no free speech incidents on Canadian campuses. If, as Beauchamp reports, there have been dozens of incidents on American campuses every year, it is safe to assume that Canadian campuses have experienced a proportionately similar number. Anecdotal information abounds. But while everyone might know a story involving the likes of Jordan Peterson[27] or Ann Coulter[28], it seems unlikely that the incident rate in

24 Zack Beauchamp, "The myth of a campus free speech crisis", *Vox* (31 August 2018), online: <vox.com/policy-and-politics/2018/8/31/17718296/campus-free-speech-political-correctness-musa-al-gharbi>.

25 For the most recent findings, see "Campuses" (2020), online: *Campus Freedom Index* <campusfreedomindex.ca/campuses/>.

26 See "Methodology" (2020), online: *Campus Freedom Index* <campusfreedomindex.ca/methodology/>.

27 Peterson was shouted down when he tried to deliver a talk at McMaster University in 2017. Colleen Flaherty, "'Hijacking a Fundamental Right'", *Insider Higher Ed* (21 March 2017), online: <insidehighered.com/news/2017/03/21/shouting-down-controversial-speaker-mcmaster-raises-new-concerns-about-academic>.

28 In 2017 Coulter cancelled a scheduled talk at the University of Ottawa out of security concerns after some 200 students held a protest. Michael Rowe, "Sorry Ann Coulter, Canada's Just Not That Into

Canada is higher than that recorded in the US — which, in the Trump era, has shown itself to be a far more volatile political environment than its northern neighbour.

Still, even if talk of a free speech crisis on American and Canadian campuses is overblown, the relatively small number of incidents that have occurred should be a cause for concern to anyone worried about the future of free expression. This is for two reasons. First, recent surveys show that while American students are generally supportive of free speech in the abstract, a majority of them also show a deep ambivalence toward tolerating expression that is racist, sexist, homophobic, or otherwise offensive.[29] In Canada, where the right to free expression is not as deeply rooted in the political culture, acceptance of limitations on offensive speech of this sort in the interest of making all members of the community feel secure and protected is already the default position.[30] Second, the arguments mobilized in defense of speech codes, no-platforming, and to a lesser degree, trigger warnings and safe spaces demonstrate a troubling willingness to sacrifice free speech in the interest of creating an inclusive campus community. To the extent that these arguments take hold in the academy (and beyond), they could further erode the majority's willingness to tolerate offensive and controversial speech.

PEN America's 2019 white paper on campus free speech, *Chasm in the Classroom*, goes so far as to warn of "a looming danger that our bedrock faith in free speech as an enduring foundation of American society could give way to a belief that curtailing harmful expression will enable our diverse population to live together peaceably."[31] Taken at face value, PEN America's worry appears to be that the United States will come to be more like Canada. But the real danger here is that both countries will become increasingly less tolerant of speech that is merely offensive and not truly injurious.

Although Americans have been taught for generations that the freedom of expression is the first freedom, prerequisite to all the rest, the fact is that the idea of giving *everyone* free speech has never enjoyed anything close to unanimous support. On the contrary, as Chemerinsky and Gillman point out, "American history amply demonstrates that there is no natural or inevitable intuition to support disruptive, offensive, or even countercultural speech."[32] In the decade following the Second World War — an era today's students are likely to regard as ancient history — conservatives argued that free speech must be weighed against the nation's security. The balance they favored placed the expression of pro-communist sympathies beyond the pale of tolerable discourse, with dire repercussions for free

---

You", *Huffington Post* (6 December 2017), online: <huffpost.com/entry/sorry-ann-coulter-canadas_b_513865?guccounter=1&guce_referrer=aHR0cHM6Ly9kdWNrZHVja2dvLmNvbS8&guce_referrer_sig=AQAAAA-wMDPYA75gLo2JySVafGU82n9CFpJM7c_HxCTnZnZmmo0EAF52gm-C7620ufPZEYYk4nBpsOXk2SI623ysjzRbEtOShTqrrCAhsKexyiXz9WKTOVvfZwP34N6gYaTwxXagaDwAA9FcA0xN-55dThjUIJK7JR2PbgcMJZdB4gxK>.

29 Chemerinsky & Gillman, *supra* note 17 at 9; Friedman, *supra* note 10 at 60-71; Conor Friedersdorf, "America's Many Divides Over Free Speech", *The Atlantic* (9 October 2017), online: <theatlantic.com/politics/archive/2017/10/a-sneak-peek-at-new-survey-data-on-free-speech/542028/>.

30 Rhoda Howard-Hassmann, "Canadians Discuss Freedom of Speech: Individual Rights Versus Group Protection" (2000) 7:2 *Intl J Minority & Group Rts* 109; *Cf* Paul M Sniderman et al, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1997) at 57-8.

31 Friedman, *supra* note 10 at 9.

32 Chemerinsky & Gillman, *supra* note 10 at 12.

speech on campus.[33] At the time, it was the left that championed a broader interpretation of the right to free expression, arguing that the fate of allegedly "un-American" ideas be decided through free and open debate. Today, the players in America's never-ending conversation about free speech have repositioned themselves. Those wanting to balance free speech against other important values are on the left, while the right bemoans a free speech crisis on campus.

It is impossible to imagine President Trump standing in the footsteps of the civil libertarians who took a brave stand against the anti-communist hysteria of the 1950s. Critics of his executive order have pointed out that, as president, he has demonstrated little interest in defending the First Amendment. On the contrary, his characterization of the news media as "enemies of the people" and oft repeated preference for stronger libel laws reveal him as having little appreciation for First Amendment values. Small wonder that critics see his executive order on campus free speech as a crassly partisan measure.[34] The danger in this for anyone genuinely concerned about the state of free speech on campus is that the very real concerns identified by the likes of the ACLU, Chemerinsky and Gillman, and PEN America will be overlooked in the sort of partisan brawl that President Trump appears to enjoy.

When it comes to weighing the value of free speech against good faith efforts to combat prejudice and build more inclusive campuses, there is no obvious right answer. But in the United States, First Amendment jurisprudence provides a framing mechanism within which the discussion can proceed. Using First Amendment law as their guide, Chemerinsky and Gillman helpfully enumerate what public colleges and universities may and may not do to create inclusive learning environments:

Public colleges and universities may not censor or punish speech merely because some or even many persons consider it offensive or hateful; they may, however, censor or punish credible threats of physical injury, speech acts that meet the legal criteria for harassment, and other speech acts not protected by the First Amendment, like libel and slander.

Public colleges and universities may not prevent protests on campus or impose restrictions that render protest ineffective; however, they impose time, place, and manner restrictions on protests for the purpose of preventing protestors from disrupting the normal operation of classes and other educational activities.

Public colleges and universities may not impose content-based restrictions on speech in living areas on campus; however, they may impose content-neutral speech restrictions in dormitories designed to ensure a supportive living environment for students.

---

33 For a timely reminder of what the McCarthy era was like, see Geoffrey R Stone, "Free Speech in the Age of McCarthy: A Cautionary Tale" (2005) 93:5 *Cal Law Rev* 1387.

34 See e.g. Patricia McGuire, "Whose Freedom of Speech?", *Inside Higher Ed* (27 March 2019), online: <insidehighered.com/views/2019/03/27/trumps-free-speech-executive-order-protects-only-those-right-political-spectrum>; Leah Asmelash, "Academic Freedom: Move to protect free speech on US campuses raises concerns", *Index: The Voice of Free Expression* (29 April 2019), online: <indexoncensorship.org/2019/04/move-to-protect-free-speech-on-us-campuses-raises-concerns/>; Osita Nwanevu, "Trump's Free-Speech Executive Order and the Right's Fixation on Campus Politics", *The New Yorker* (22 March 2019), online: <newyorker.com/news/current/trumps-free-speech-executive-order-and-the-rights-fixation-with-campus-politics>.

Public colleges and universities may not selectively censor or punish some speakers but not others based on the content of their speech; however, they may employ content-neutral regulations governing on-campus expression, for example a rule allowing leaflets to be distributed in public areas of campus but not in student residences.

Public colleges and universities may not penalize faculty or students for what they say in a private capacity on matters of public concern; however, faculty and students should expect to have their scholarly work evaluated according to professional standards.

Public colleges and universities may require that all student organizations, as a condition of receiving funding and official recognition, be open to all students; however, they may not deny recognition or funding to a student organization or penalize it on account of the views expressed by the organization, its members, or the outside speakers it hosts.[35]

Chemerinsky and Gillman see no impediment to trigger warnings or even safe spaces in principles derived from the First Amendment, so long as the former are not imposed by the administration on reluctant professors and the latter are conceived as educational settings designed to ensure that students feel free to express themselves and are not used to censor speech deemed too offensive for students to hear. No-platforming speakers, on the other hand, is clearly at odds with First Amendment principles. Public colleges and universities have a constitutional obligation to ensure that protestors do not exercise the heckler's veto. Again, Chemerinsky and Gillman's list of constitutional dos and don'ts is legally binding on public colleges and universities, not private schools; but they offer it as a workable and appropriate set of guidelines for both.[36]

It is certainly useful for colleges and universities to know what the law is when it comes to regulating speech on campus. But in order to shore up support for the broad, robust conception of free speech associated with the First Amendment today, it is necessary to present a compelling argument that what the law requires is also the right thing to do. Laws can change — American courts did not always interpret the free speech clause of the First Amendment as a shield for speech that legislative majorities and public opinion found dangerous or morally pernicious. It is not impossible to think that the judicial tide could change once again, acted upon by the tangled political currents that give us President Trump's showboating executive order on the one hand and the zeal shown by elements of the campus left for no-platforming on the other.

While Canada has its own constitutional tradition of free expression to help frame the debate over campus free speech, the normative challenge is the same in Canada as in the United States. Legal doctrine must be backed up by a morally compelling defense of allowing offensive and otherwise controversial speech that a great many persons consider indefensible. Selling any such defense to a skeptical public is no easy task and never was, which is why organizations like the ACLU and PEN America stress the need for educating the current generation of American students about the importance of First Amendment values to the struggle for civil rights and social justice in the United States. There is a similar case to be made for educating Canadian students about the Charter right to free expression and how it actually

35 Chemerinsky & Gillman, *supra* note 17, ch 5.

36 PEN America offers similar guidelines. Friedman, *supra* note 10 at 91-94.

contributes to a more inclusive campus and fosters greater comity in a diverse, multicultural society.

Free speech advocates also need to challenge the absolute moral certainty, not infrequently paired with a profound sense of victimization, which one too often encounters on both the right and the left. Sure that their cause is righteous, and equally certain that they have suffered unjustly, partisans in the free-speech wars tend to view the politics of free speech on campus as a zero sum game. The result is as unfortunate as it is predictable. If one's goal is to make secure the expression of "good" speech and to stifle "bad" speech, having the better argument matters less than having the power to assign and enforce these labels. Ironically, this divorces the struggle over free speech from speech itself. If power is allowed to decide the question of what may and may not be said on campus, then only those persons and groups favoured by the powerful will have the right to speak freely — and only for as long as they remain in favour.

Constitutional forum constitutionnel

Universities, the Charter, *Doug Ford, and Campus Free Speech*

James L. Turk*

On a warm summer day at the end of August 2018, Ontario Premier Doug Ford's office issued a press release announcing, "Ontario's Government for the People is delivering on its promise to uphold free speech on every Ontario publicly-funded university and college campus."[1] An accompanying "Backgrounder" spelled out the details.[2]

Although this policy seems progressive on its face, it is actually anything but. That said, it may have the unintended but beneficial effect of bringing Ontario universities under the *Canadian Charter of Rights and Freedoms*.[3] More about that later. First, the problems.

Overrides Institutional Autonomy

The Ford government's announcement overrides the institutional autonomy that historically has provided some protection for free speech and academic freedom on campus. For a very long time, it has been recognized that the freedom to ask difficult questions, explore unpopular viewpoints, question conventional wisdom — in short, to do what is essential to advance

* Distinguished Visiting Scholar and Director, Centre for Free Expression. Faculty of Communications & Design, Ryerson University.

1 Office of the Premier, News Release: "Ontario Protects Free Speech on Campuses: Mandates Universities and Colleges to Introduce Free Speech Policy by January 1, 2019" (30 August 2018), online: *Government of Ontario* <news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html> [Office of the Premier, "Ontario Protects"].

2 See Office of the Premier, Backgrounder "Upholding Free Speech on Ontario's University and College Campuses" (30 August 2018), online: *Government of Ontario* <news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html> [Office of the Premier, "Upholding Free Speech"].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

knowledge and educate students — requires that universities have a significant measure of autonomy from the thin skins and political infatuations of politicians and governments.

A university properly fulfilling its role can challenge dominant forces in society. The 1991 (and still current) University of Toronto Statement of the "Purpose of the University" describes that role:

> Within the unique university context, the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. It is this human right to radical, critical teaching and research with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.[4]

While generally accepted in principle, this vision of the university has been frequently contested when powerful interests — whether private or government — have been subjected to vigorous challenge. The American Association of University Professors was formed in 1915, largely in response to the firing of academics, like prominent economist E. A. Ross, for their critical perspectives on prevailing social and economic policies.[5] Similar pressures on universities continue to this day, as when wealthy benefactors threatened to withdraw their donations from the University of Alberta in 2018 after it announced it was awarding an honorary degree to David Suzuki.[6]

The threat to institutional autonomy by Ford's directive is that it puts Ontario universities' free speech policies and practices under the thumb of the provincial government. It sets up a government agency, the Higher Education Quality Council of Ontario (HEQCO),[7] to police university free speech behaviour and advise the government about what it finds. The policy

4 University of Toronto Governing Council, "Statement of Institutional Purpose" (15 October 1992) at 3, online (pdf): *University of Toronto* <governingcouncil.utoronto.ca/Assets/Governing+Council+Digital+Assets/Policies/mission.pdf>.

5 See Richard Hofstadter and Walter P Metzger, *The Development of Academic Freedom in the United States*, (New York: Columbia University Press, 1955) at 468-477. For a general description of the pressure on universities one hundred years ago as well as a detailed account of Ross's firing at Stanford, see Thomas L Haskell, "Justifying the Rights of Academic Freedom in the Era of 'Power/Knowledge'" in Louis Menand, ed, *The Future of Academic Freedom* (Chicago: University of Chicago Press, 1996) 43.

6 See Kelly Cryderman, "Debate Sparked Over University of Alberta Tribute to David Suzuki", *The Globe and Mail* (24 April 2018), online: <theglobeandmail.com/canada/alberta/article-debate-sparked-over-university-of-alberta-tribute-to-david-suzuki/>. The pressure was not only from external special interest groups; they were joined by the University's deans of engineering and business. See Cryderman; Gordon Kent, "U of A Honorary Doctorate for David Suzuki Angers Dean of Engineering, Donors" *Edmonton Journal* (23 April 2018), online: <edmontonjournal.com/news/local-news/furor-erupts-over-honorary-university-of-alberta-degree-for-environmentalist-david-suzuki>. Unlike in the Ross case, the University of Alberta administration rejected the demands and awarded the degree to Suzuki. See David Turpin, "Consider This: Why Should the University Stand Up for a Controversial Honorary Degree?" (25 April 2018), online (blog): *The Quad* <blog.ualberta.ca/consider-this-why-should-the-university-stand-up-for-an-unpopular-honorary-degree-50171d9c67d6>.

7 Online: *Higher Education Quality Council of Ontario* <heqco.ca/en-ca/Pages/Home.aspx>.

then threatens funding reductions for individual universities that fail to comply with government requirements.[8] This threat to cut funding casts aside a longstanding Canadian tradition in which, unlike in many US states, university autonomy is protected because governments set system-wide formulae for funding and do not deal with the budgets of individual universities. In the United States, where many state legislatures directly approve the budgets of individual universities, legislatures not infrequently use the real threat of cutting individual university budgets to ensure universities bend to their political will.[9] Premier Ford is introducing that practice to Ontario.

Based on a False Premise

The Ford government policy is based on the false premise that freedom of expression is endangered at Ontario's universities. It is not. Despite occasional lapses, universities (along with journalist and media organizations and public libraries) are the principal advocates for, and defenders of, freedom of expression in our society. At universities, every day of the academic year, thousands of classes are held and innumerable guest speakers lecture without issue. The university's *raison d'être* is premised on free expression. Universities cannot fulfill their missions of creating knowledge and educating students without it.

General campus freedom of expression is bolstered almost universally at all Canadian universities through collective agreement guarantees for academic freedom. These agreements ensure academic staff have free expression rights in their teaching and research as well as the right to publicly criticize the university itself and its administration — an action that would lead to discipline, if not termination, in most other workplaces. There is more freedom of expression on university campuses than anywhere else in Canada.

Much of the public understands this. As a result, it is big news whenever the principle of free speech appears to have been compromised at a university; it is big news precisely because it is such an exception to the pervasive respect for free expression within the academy. When there is an exception that threatens universities' commitment to free expression, there is a vigorous response to correct the situation — often led by the Canadian Association of University Teachers — because of the recognition that, left unchecked, failure to protect free expression on campus destroys the foundation of the university and threatens academic freedom. One of the ironies is that, since there is often media coverage of the rare exceptions but not of the daily respect for free expression on campus, the public can get a distorted sense of campus reality. Premier Ford is taking advantage of this fact.

The health of free expression on campus is best measured not by the absence of any lapses or failures to protect campus free expression rights, but by the infrequency of failure and the response of the institution and community when there is a failure. The widely publicized Lindsay Shepherd case at Wilfrid Laurier University is a sign of a healthy system. Initially, the uni-

8 Office of the Premier, "Upholding Free Speech", *supra* note 2.

9 See Adrienne Lu, "Brandishing Budget Power, State Lawmakers Pressure Public Universities", *Stateline* (24 April 2014), online: <pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/04/24/brandishing-budget-power-state-lawmakers-pressure-public-universities>.

versity handled it badly[10], but following public outcry, there was community self-examination and discussion[11] that resulted in the university embracing one of the best campus free expression policies in the country.[12]

We can only understand the Ford government policy when we recognize that it is not about saving free expression on campus — which is alive and well. This is a deliberate political measure borrowed from the American right and alt-right, to play to what Premier Ford sees as his political base and to try to expand that base.

Creating a Wedge

The Ontario initiative channels Donald Trump who, in response to the controversy over alt-right provocateur Milo Yiannopoulos at the University of California at Berkeley in February 2017, famously tweeted, "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view — NO FEDERAL FUNDS?"[13] Trump's approach was elaborated shortly afterwards by the *National Review* in an article saying to Congress, "It's time to crush campus censorship."[14] and subsequently formalized by the Goldwater Institute into a model bill designed to impose free expression rules on US public universities.[15] Seeing

10 See Luisa D'Amato, "WLU Censures Grad Student for Lesson that Used TVO Clip", *Waterloo Region Record* (14 November 2017), online: <therecord.com/news-story/7923200-wlu-censures-grad-student-for-lesson-that-used-tvo-clip/>.

11 See "Apology from Laurier President and Vice-Chancellor Deborah MacLatchy." Wilfrid Laurier University (21 November 2017), online: *Wilfred Laurier University* <wlu.ca/news/spotlights/2017/nov/apology-from-laurier-president-and-vice-chancellor.html>.

12 Not only was the process for developing the Wilfrid Laurier Statement a broad and inclusive one, the content of the statement recognizes that freedom of thought, association, and expression are fundamental to the university; unequivocally embraces the principles of free expression; challenges the idea that free expression and the goals of diversity, equity, and inclusion must be at odds with one another, to embrace the concept of inclusive freedom; acknowledges that free expression can cause harm and that it is the responsibility of everyone in the university community and the university itself to provide support as well as ensure safety from physical harm; affirms that it is not the role of the university to censor speech, but that there are limits which are the same as in general society, as well as limits to ensure both that the ordinary activities of its community are not disrupted and that the physical safety of its members is not impinged upon — while also affirming that this administrative discretion should not be exercised in a manner inconsistent with Laurier's overarching commitment to free expression. Finally, the statement distinguishes between the context of classroom and that of the general campus outside the classroom. See also "Statement on Freedom of Expression" (29 May 2018), online: *Wilfred Laurier University* <wlu.ca/about/discover-laurier/freedom-of-expression/statement.html>.

13 Donald J Trump, "If U.C. Berkeley does not allow free speech and practices violence on innocent people with a different point of view — NO FEDERAL FUNDS?" (2 February 2017 at 4:13), online: *Twitter* <twitter.com/realDonaldTrump/status/827112633224544256?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E827112633224544256&ref_url=https%3A%2F%2Fwww.nbcbayarea.com%2Fnews%2Flocal%2Fpresident-donald-trump-takes-on-uc-berkeley-on-twitter-threatens-federal-funds%2F35521%2F>.

14 See David French, "It's Time to Crush Campus Censorship", *National Review* (24 April 2017), online: <nationalreview.com/2017/04/free-speech-campus-censorship-congress-must-punish-universities-indulging-student-mob/>.

15 Goldwater Institute, "Restoring Free Speech on Campus" (last visited 22 July 2019), online: *Goldwater Institute* <goldwaterinstitute.org/campus-free-speech/>.

advantage in this use of campus free speech as a wedge issue, Andrew Scheer brought the idea to Canada during the federal Conservative Party leadership contest in May 2017. Following the American right's script, Scheer declared, "I will withhold federal funding from universities that shut down debate and can't stand different points of view."[16] The UK Conservative government's higher education minister, Jo Johnson (Boris Johnson's brother), picked up the refrain in December 2017, declaring that universities failing to protect free expression could be fined.[17]

Ahead of the start of the 2018 Ontario provincial election, Doug Ford joined the chorus, announcing he would tie university funding to free speech on campus.[18] As Premier, he has now put these words into action in Ontario. The United Conservative Party of Alberta followed Ford's example in 2019. After winning a majority government, Alberta Premier Jason Kenney announced that all Alberta universities and colleges will be required to "develop, post and comply with free speech policies that conform to the University of Chicago Statement on Principles of Free Expression."[19]

Ford's policy works as a wedge issue by bringing together two very different constituencies. On the one hand, there are those on the right who have chosen to weaponize free expression, pushing relentlessly and aggressively at the outer boundaries of speech and vilifying those who express concerns. Think of the denigration of students who are concerned about racist, Islamophobic, anti-Indigenous, or homophobic speech as "snowflakes."[20] In a recent *New Yorker* article, Harvard historian Jill Lepore suggested that the guide for those weaponizing free speech "isn't the First Amendment; it's the hunger of the troll, eager to feast on the remains of liberalism."[21] How better to do that than to use the rhetoric of liberalism to attack one of the principal repositories of liberal, Enlightenment values — the university?

The other constituency Ford is seeking to draw in are those who genuinely care about universities and have come to believe, from the high-profile media stories of campus free speech controversies, that campus free expression is endangered. This is a potentially larger constituency than his core right-wing base. Ford's campus free speech policy aims to unite these two

16 See Stephanie Levitz, "Andrew Scheer's Free Speech Pledge Wouldn't Apply in Toronto Case: Spokesman", *National Post* (16 August 2017), online: <nationalpost.com/news/news-pmn/canada-news-pmn/andrew-scheers-free-speech-pledge-wouldnt-apply-in-toronto-case-spokesman/wcm/1a8a0ef2-02a3-47b2-b371-10f58c51ab3f>.

17 See Rajeev Syal and Rowena Mason, "Jo Johnson to Tell Universities to Stop 'No-Platforming' Speakers", *The Guardian* (26 December 2017), online: <theguardian.com/education/2017/dec/26/jo-johnson-universities-no-platforming-freedom-of-speech>.

18 See Tamara Khandaker, "Doug Ford Wants to Tie Funds for Universities to Free Speech", *Vice News* (9 May 2018), online: <news.vice.com/en_ca/article/3k48w8/doug-ford-wants-to-tie-funds-for-universities-to-free-speech>.

19 See Madeline Smith, "Kenney Follows Ford's Push for Campus free speech. But Critics Say It's a Dog Whistle For Far-Right Voters", *The Star* (6 May 2019), online: <thestar.com/calgary/2019/05/06/alberta-and-ontario-premiers-campus-free-speech-policies-a-dog-whistle-blow-for-the-right-expert.html>.

20 See e.g. Chris Quintana, "Colleges Are Creating 'a Generation of Sanctimonious, Sensitive, Supercilious Snowflakes,' Sessions Says", *The Chronicle of Higher Education* (24 July 24 2018), online: <chronicle.com/article/Colleges-Are-Creating-a/243997>.

21 Jill Lepore, "Flip-Flopping on Free Speech: The Fight for the First Amendment, on Campuses and Football Fields, From the Sixties to Today", *The New Yorker* (9 October 2017), online: <newyorker.com/magazine/2017/10/09/flip-flopping-on-free-speech>.

very different groups against an unspecified university and university-educated "elite" that has betrayed its own liberal values.

Peculiar Champions of Free Speech

Ford and the Conservative Party are peculiar champions of free expression, as they have a long history of attacking the free speech rights of those with whom they disagree — particularly in relation to criticism of Israeli government policies. One of Ford's first post-2018 election statements was that he would seek to ban an annual Palestinian solidarity event, Al Quds (Jerusalem) Day.[22] While a Toronto municipal councillor, Ford sought to defund Toronto's Pride Parade because Queers Against Israeli Apartheid were allowed to march alongside hundreds of other groups.[23] This is consistent with denunciation by the Conservative Party (with support from their Liberal colleagues) of universities and groups that host Israeli Apartheid Week or permit advocacy of the Boycott, Divestment and Sanctions (BDS) movement.[24]

Policy Platitudes, Not Community Commitment

Free speech is a messy business. There is no such thing as absolute free speech; its legitimate limits are the issue here. Ford's policy does not answer questions concerning these limits, but it does undermine the autonomy of the university community and with it the possibility of vibrant campus free expression by turning over authority to decide acceptable limits to the third-party, government-appointed HEQCO and the Government of Ontario.

Meaningful campus free expression depends on community discussion, debate, and recognition of free expression's foundational importance to the university and democratic society, and what, therefore, should be acceptable limits within the university committed to free expression and academic freedom.

Campus free expression can only thrive where university communities seriously engage in the difficult consideration of how to protect free expression while recognizing other demands and values. These include the law, which raises as many questions as it provides answers;[25]

22 See David Reevely, "Reevely: Ford Promises to Ban Al-Quds Day Protests Somehow" *Ottawa Citizen* (11 June 2018), online: <ottawacitizen.com/news/local-news/reevely-ford-promises-to-ban-al-quds-day-protests-somehow>.

23 See Martin Regg Cohn, "Doug Ford's Conversion and Confusion on Free Speech Versus Hate Speech" *Toronto Star,* (7 September 2018), online: <thestar.com/opinion/star-columnists/2018/09/07/doug-fords-conversion-and-confusion-on-free-speech-versus-hate-speech.html>; Yves Engler, "Doug Ford's Election as Premier May Benefit Pro-Palestinian Movement", *rabble.ca* (18 June 2018), online: <rabble.ca/blogs/bloggers/yves-englers-blog/2018/06/doug-fords-election-premier-may-benefit-pro-palestinian>; Natalie Alcoba, "Queers Against Israeli Apartheid's Pride Participation Doesn't Violate Anti-Discrimination Policy: Report", *National Post* (13 April 2011), online: <nationalpost.com/posted-toronto/queers-against-israeli-apartheids-pride-participation-doesnt-violate-anti-discrimination-policy-report>.

24 See Evelyn Hamdon and Scott Harris, "Dangerous Dissent? Critical Pedagogy and the Case of Israeli Apartheid Week" (2010) 2:2 *Cultural and Pedagogical Inquiry* 62.

25 There is no clearer example of the difficulty setting boundaries of what is constitutionally protected expression in Canada than the decisions in relation to four homophobic pamphlets written by Saskatchewan fundamentalist pastor William Whatcott. The Saskatchewan Human Rights Tribunal found that all four violated the provincial human rights code: *Wallace v. Whatcott*, 2005 CanLII 80912 (SK HRT),

requirements of good pedagogy;[26] recognition that the university is also the living space for students in residence; university values of diversity and inclusivity; and the requirement of academic freedom[27] if the university is to fulfill its mission of advancing knowledge.

There are numerous examples where university communities have engaged the issue of campus free expression and its limits; they have developed and articulated their own understandings and policies where freedom of expression has a real meaning in the life of the community rather than being an abstract principle which is dutifully acknowledged but has little impact on the activities and behaviour of its members.

Typically, serious community engagement follows from a community-wide crisis — not, if ever, by a directive from on high. Arguably one of the best and most consequential university statements on free expression emerged 45 years ago at Yale University.[28] This was after the Yale community wrestled with free speech issues for more than a decade and after the faculty members had passed a resolution calling on the university to appoint a "commission to examine the condition of free expression, peaceful dissent, mutual respect and tolerance at Yale, to draft recommendations for any measures it may deem necessary for the maintenance of those principles, and to report to the faculties of the University early next term."[29] This resolution was precipitated by a controversial speaker being prevented from lecturing at Yale.[30]

2005 CarswellSask 725 (WL Can). The Saskatchewan Court of Queen's Bench upheld the decision of the Tribunal: *Whatcott v Saskatchewan Human Rights Tribunal*, 2007 SKQB 450. The Saskatchewan Court of Appeal, in granting Whatcott's appeal, found that none of the pamphlets violated the Code: *Whatcott v Saskatchewan Human Rights Tribunal*, 2010 SKCA 26. The Supreme Court of Canada then granted the Saskatchewan Human Rights Commission's appeal for two of the pamphlets and rejected it for the other two; *Saskatchewan Human Rights Commission v Whatcott*, 2013 SCC 11.

26 See Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017) at 85-102.

27 Academic freedom should not be confused with freedom of expression. Academic freedom is a special right necessary for all academic staff if they are to fulfill the university's societal mission of advancing knowledge and educating students. Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; to carry out research and disseminate and publish the results thereof; to produce and perform creative works; to engage in service to the university and the community; to express one's opinion about the institution, its administration, and the system in which one works; to acquire, preserve, and provide access to documentary material in all formats; and to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship. In short, it makes it possible for academic staff to use their best professional judgment in teaching and research, university governance, and community engagement. Freedom of expression, on the other hand, is a general human right of everyone to both express their own views *and* to hear the views of others. Academic freedom and freedom of expression are related as it is impossible to have vibrant academic freedom within the university in the absence of general freedom of expression in the society.

28 See Committee on Freedom of Expression at Yale, "Report of the Committee on Freedom of Expression at Yale" (23 December 1974), online: *Yale College* <yalecollege.yale.edu/deans-office/reports/report-committee-freedom-expression-yale>.

29 See C Vann Woodward, "Chairman's Letter to the Fellows of the Yale Corporation" in Committee on Freedom of Expression at Yale, *ibid*.

30 See "President Salovey's Freshman Address Professor Woodward's Legacy after 40 Years: Free Expression at Yale" (22 August 2014), online: *Yale News* <news.yale.edu/2014/08/22/professor-woodward-s-legacy-after-40-years-free-expression-yale>.

In response to the faculty resolution, Yale's president appointed a committee of thirteen, consisting of five faculty members, two members of the administration, three graduate students, two undergraduates, and one member of the Yale alumni. The committee reviewed Yale's record of the past decade, sought the views and opinions of all members of the university community, held advertised public and private hearings, and recorded hours of testimony and advice.[31] Subsequently the report was shared across the university and was adopted as policy, guiding its community since.

A similar sequence resulted in the recent Wilfrid Laurier University policy. In response to the Lindsay Shepherd case noted above that rocked the university,[32] the university community struggled with what to do. Out of that struggle emerged a process beginning with a broadly-based university committee, extensive consultation with the university community, development of a statement on free expression that was debated within the community, amended, and then brought to the university senate which adopted it.[33]

Short-circuiting that community process and engagement only results in empty policy statements to which the community has no ownership or commitment; such statements have minimal impact on the life of the university in practice. Sadly, that is what the Ford government's directive has invited, with its short timeline and directed conclusion, in almost every university in Ontario. A notable exception is Wilfrid Laurier, an institution that had already engaged the issue as a community for its own reasons.

The Charter

There is likely to be one positive outcome of the Ford initiative: judicial recognition that the *Charter* applies to universities in Ontario. Section 32 of the *Charter* specifies that it applies to "the Parliament and government of Canada in respect of all matters within the authority of Parliament" and to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province."[34]

Subsequent jurisprudence has given some clarification about the extent of the *Charter's* applicability to non-government entities — entities created by government for the purpose of legally enabling them to do things of their own choosing (such as establishing private corporations, hospitals, and universities). The fact that non-government entities like universities perform a public service and, as a result, may be subjected to the judicial review of certain decisions, does not *in itself* make them part of government within the meaning of section 32 of the *Charter*. The exercise of supervisory jurisdiction by the courts is not grounded in the fact that such non-government entities are government, but that they are "public decision-makers."[35]

---

31 Vann Woodward, *supra* note 29.

32 See D'Amato, *supra* note 10.

33 See Robert Gordon, "Policy Development in the Aftermath of a Reputational Challenge: Managing Freedom of Expression on Campus" (delivered at the Summit and Annual Conference of Faculty Bargaining Services, Montréal, 31 October-2 November 2018).

34 *Charter*, *supra* note 3, s 32.

35 See *McKinney v University of Guelph*, [1990] 3 SCR 229 at 268, 76 DLR (4th) 545 [*McKinney*].

In 1986 in *RWDSU v Dolphin Delivery Ltd,* the Supreme Court of Canada suggested that the *Charter* seemed to apply to many forms of delegated legislation such as regulations, orders in council, and possibly municipal by-laws as well as the by-laws and regulations of other creatures of Parliament and the legislatures — and this is not an exhaustive list.[36] Writing for the majority, Justice McIntyre held, "where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable."[37] That said, he notes that "the element of governmental intervention necessary to make the *Charter* applicable in an otherwise private action is difficult to define."[38] *Dolphin Delivery* is important because the Court made clear that it contemplated the *Charter's* applicability to non-government entities even when they are not controlled by the government. Three years later, in *Slaight Communications Inc v Davidson*, the Court agreed that the *Charter* applies to administrative bodies, indicating that relation to government is based on the source of the non-government entity's authority, not just the government's control of its operation.[39]

Subsequently in 1997 in *Eldridge v British Columbia,* the plaintiffs alleged that the province discriminated against deaf patients by failing to provide sign language interpretation in its hospitals.[40] The province and the Medical Services Commission replied that decisions in relation to sign language interpreters were made by hospitals, rather than the province, and therefore were not subject to the *Charter.* The Supreme Court ruled unanimously that the hospital's failure to offer sign language interpretation was subject to *Charter* review. It reaffirmed that "the mere fact that an entity performs what may loosely be termed a 'public function,' or the fact that a particular activity may be described as 'public' in nature, will not be sufficient to bring it within the purview of 'government' for the purposes of … the *Charter*."[41] Justice La Forest, writing for the unanimous Court, however, did add another consideration with regard to indirect *Charter* application: whether the entity is "found to be implementing a *specific* governmental policy or program."[42]

The result is that successive court decisions have created the test for whether the activities of a non-government entity are subject to the *Charter.* Following *Eldridge,* this test now has three aspects:

1. Whether the non-government entity is controlled by government;

2. Whether it is exercising delegated statutory authority;

3. Whether it is implementing specific government policies, programs, or objectives.

---

36 *RWDSU v Dolphin Delivery Ltd,* [1986] 2 SCR 573 at 602-603, 33 DLR (4th) 174 [*Dolphin Delivery*].
37 *Ibid.*
38 *Ibid* at 599.
39 *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1078-1079, 59 DLR (4th) 416, Lamer J, dissenting in part.
40 *Eldridge v. British Columbia (AG),* [1997] 3 SCR 624, 59 DLR (4th) 416.
41 *Ibid* at para 43.
42 *Ibid* [emphasis in original].

The seminal case involving universities and the *Charter*, *McKinney v University of Guelph,*[43] was decided by the Supreme Court of Canada in 1968 — after *Dolphin Delivery* and *Slaight*, but before *Eldridge*. Eight university professors and one librarian argued that the retirement policies of four universities requiring retirement at age 65 were contrary to the academic staff's equality rights under Section 15 of the *Charter.* In a 5-2 decision with five different judgments, the Court ruled against the academic staff. The divided judgments arguably reflect the disputable issues in regard to the applicability of the *Charter* to universities.[44]

Justice La Forest wrote for the three judges who held that universities are generally not subject to the *Charter.* Basing his argument largely on the necessary autonomy of universities, he emphasized that the primary purpose of the *Charter* was as an instrument for checking the powers of government over the individual, and that the exclusion of private activity from *Charter* protection was deliberate.[45]

He outlined two circumstances in which the activities of a non-government entity should face constitutional review: (1) when such an entity is exercising delegated statutory authority,[46] and (2) when it is subject to government control.[47] After reviewing these two possibilities, he rejected the argument that the universities' mandatory retirement policies constituted state action — universities were not acting pursuant to statutory authority, nor are they under the government's control because they are carrying out a public purpose or a function of an important public nature.[48]

While Justice La Forest did not foreclose the possibility of the *Charter* applying to universities, his rationale made clear that it would be an exceptional situation in which the government directed or was part of their decisions.[49] Two of the judges who concurred in the majority's conclusion and the two dissenting judges took a less restrictive view that universities could be subject to the *Charter* under different circumstances.[50] That said, as Marin notes, "the principle that emerged from La Forest J.'s judgment in *McKinney* is that decisions regarding a university's internal affairs are immune from *Charter* review."[51]

With the additional consideration regarding the applicability of the *Charter* to non-government entities subsequently articulated in *Eldridge* seven years later, more recent cases regarding universities and the *Charter* have resulted in a divide between the courts in Alberta and those in British Columbia and Ontario. The former have shown a greater willingness to find certain decisions of universities as subject to the *Charter*, while those of Ontario and B.C.

43 *McKinney*, *supra* note 35.
44 For a thorough discussion of *McKinney* and *Charter* issues in relation to the university, see Michael Marin, "Should the *Charter* Apply to Universities?" (2015) 35:1 National J Constitutional L 29; Krupa M Kotecha, "*Charter* Application in the University Context: An Inquiry of Necessity" (2016) 26:1 Education & LJ 21; Franco Silletta, "Revisiting Charter Applicability to Universities" (2015) 20 Appeal 79.
45 *McKinney*, supra note 35 at 262.
46 *Ibid* at 264-265.
47 *Ibid* at 273.
48 *Ibid* at 275.
49 *Ibid* at 274.
50 See Kotecha, *supra* note 44 at 27-28.
51 Marin, *supra* note 44 at 34.

have not. They instead rely on a broad interpretation of *McKinney* and not arguments based on *Eldridge*.

The key Alberta decisions in which *university* actions were found subject to the *Charter* were *Pridgen v University of Calgary*,[52] *R v Whatcott*,[53] and *Wilson v University of Calgary.*[54] *Pridgen* involved two students challenging the University's discipline of them for non-academic misconduct as violating their free expression rights under Section 2(b) of the *Charter.* The Alberta Court of Appeal upheld the lower court decision that the University's actions warranted *Charter* scrutiny;[55] the Court deemed that the University's discipline of its students affected the extent to which they were able to participate in higher education learning activities that the province's *Post-Secondary Learning Act* specifically entrusted to the universities in the province.[56]

R v Whatcott involved the arrest of an individual under the province's *Trespass to Premises Act* after complaints that he was distributing anti-LGBTQ pamphlets on campus. Justice Jeffery held that the *Charter* applied both in respect to the arrest being an exercise of delegated statutory authority[57] and the arrest impinging on the University's fulfilment of a specific government policy objective specified in the *Post-Secondary Learning Act.*[58]

Wilson v University of Calgary dealt with the University directing a registered student organization (Campus Pro-Life) to turn its display of graphic images away from public walkways. The students refused and were disciplined under the University's student discipline policy. In the students' appeal, Justice Horner held that the University, as "an institution which facilitates scholarly inquiry," failed to take into account "the nature and purpose of a university as a forum for the expression of differing views"[59] thereby implicating its public mandate and triggering *Charter* scrutiny.

In a series of cases, courts in Ontario have taken a narrow view of university mandates and failed to find *Charter* applicability.[60] While ostensibly addressing the relevance of the *Charter* based on the furtherance of government objectives, they have been largely unwilling to look beyond universities' governing structures and statutory authority and have, as a consequence, failed to do the analysis that would meaningfully assess whether the institutions are implementing specific government policies, programs, or objectives and thus subject to *Charter* scrutiny.[61]

---

52 *Pridgen v University of Calgary*, 2010 ABQB 644 [*Pridgen* QB], aff'd 2012 ABCA 139 [*Pridgen* CA].
53 *R v Whatcott*, 2012 ABQB 231 [*Whatcott* 2012].
54 *Wilson v University of Calgary*, 2014 ABQB 190 [*Wilson*].
55 *Pridgen* CA, *supra* note 52 at para 128.
56 *Pridgen* QB 644, *supra* note 52 at para 67.
57 *Whatcott* 2012*, supra* note 53 at para 31.
58 *Ibid* at para 34.
59 *Wilson*, *supra* note 54 at para 163.
60 See *Lobo v Carleton University,* 2012 ONSC 254; *Alghaithy v University of Ottawa*, 2012 ONSC 142; *Telfer v University of Western Ontario*, 2012 ONSC 1287.
61 For a closer examination of the Ontario cases, see Marin, *supra* note 44 at 38-40; Kotecha, *supra* note 44 at 37-39.

British Columbia courts have likewise refused to apply the *Charter* to free speech cases in relation to universities.[62] As Marin observes, "[Alberta courts] identify the university's policy mandate and then determine whether a particular decision bears upon it. Although the B.C. and Ontario courts have suggested that the role of universities is different in Alberta … there is no basis for such a distinction."[63]

The Unintended Effect of Ford's Directive

The Ford government's directive to universities will likely cause Ontario courts to reconsider their position on Charter applicability to universities. The government directive is unambiguous: Ontario universities must implement and comply with a free speech policy consistent with the "Chicago principles" by January 1, 2019; they must report annually on their progress to the Higher Education Quality Council of Ontario (HEQCO) starting in September 2019; HEQCO will monitor their compliance on behalf of the government and, should any university's compliance be found inadequate, that university may be subject to a reduction in operating grant funding.[64]

This clearly meets the requirement for *Charter* scrutiny spelled out by Justice La Forest in *Eldridge*: whether the non-government entity can be "found to be implementing a specific governmental policy or program."[65] It is hard to imagine that Ontario courts can any longer fail to apply this third consideration of the test for whether the activities of a non-government entity are subject to the *Charter*.

At the end of the day, it is interesting that the Ford government campus free speech directive would have this unintended result, given it arose as a way of dog-whistling the Premier's base and bringing in others who were worried about free speech on campus; it offers no solution whatsoever to free speech issues existing on campus, and it opens the door to American-style political intervention in universities.

The Charter, Universities, Autonomy, and Academic Freedom[66]

While there is no institution for which freedom of expression is more fundamental to its societal mission than the university, application of the *Charter* to universities has been strongly contested. The concern is that bringing universities under the *Charter* will threaten university

62 See *Maughan v University of British Columbia*, 2009 BCCA 447; *BC Civil Liberties Assn v University of Victoria*, 2016 BCCA 162.

63 Marin, *supra* note 44 at 41.

64 See Office of the Premier, "Ontario Protects", *supra* note 1.

65 *Eldridge, supra* note 40 at para 43 [emphasis in original].

66 Note that since writing this paper, the *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 decision has been issued. In that case, the Court held that "the University's regulation of freedom of expression by students on University grounds should be considered to be a form of governmental action" for the purposes of section 32 of the *Charter*: *ibid* at para 148. This decision may make it more difficult to avoid *Charter* scrutiny of decisions concerning the expressive activities of students. It has arguably made campus "free speech" a matter of provincial government policy, not merely of internal university administration. This decision is of course, only binding in Alberta. It is inconsistent with the jurisprudence in Ontario, Saskatchewan, and British Columbia and is merely persuasive there and in other jurisdictions.

autonomy and, with it, academic freedom. This was key for Justice La Forest in 1990 when he wrote the plurality *McKinney* decision:

> The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment.[67]

This is a misplaced fear. *Charter* scrutiny can only enhance free expression on campus. The fear that it will undermine academic freedom is misplaced for several reasons. The first is that the assumed link between institutional autonomy and academic freedom is only partially correct at best.[68] There certainly are threats to academic freedom from outside the university — from special interest groups, donors, politicians, and governments, among others. Sometimes institutional autonomy has helped ward off these attacks. But sometimes, it has not, especially when administrators or colleagues pick up the external demands and press them. The protective wall of "autonomy" has proven porous on too many occasions.

Further, many proponents of autonomy as the protection for academic freedom ignore the reality that threats to academic freedom originate just as frequently from inside the university as they do outside — from board members, administrators, colleagues, and students. Walling off the university may diminish outside threats but could grant free reign to internal threats. That recognition was a significant factor in Canadian university academic staff unionizing beginning in the early 1970s. It also explains why the rate of unionization has accelerated so significantly since La Forest wrote *McKinney* in 1990; today, more than 90 percent of Canadian academic staff are unionized. Every university collective agreement has as its centrepiece a clause protecting academic freedom and enforceable through the grievance/arbitration process. That collective agreement language is the only real protection for academic freedom. This will not change as a result of universities being brought under *Charter* scrutiny, as that scrutiny does not extend to contractual relations between the university and its employees.

In considering the implications of universities being subject to *Charter* scrutiny, it is important to remember that the application of the *Charter* to the university does not bring every university decision, policy, and action under *Charter* scrutiny. As noted above, the *Charter* will only be relevant in respect to matters when the university is acting under direct government control, when it is exercising delegated statutory authority, or when it is implementing a specific government policy, program, or objective.[69]

Further, even for those matters that are subject to *Charter* scrutiny, the standard is determined solely by administrative law principles. In matters of discretion, including most university decisions, that standard is reasonableness; it requires that the outcome must "reflec[t]

67 *McKinney, supra* note 35 at 273-274. See also *ibid* at 268, 273.

68 See Len Findlay, "Institutional Autonomy and Academic Freedom in the Managed University" pp. 49-64 in James L Turk, ed, *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Toronto: James Lorimer & Co, 2014) 49.

69 See Kotecha, *supra* note 44 at 46.

a proportionate balancing" between the decision-maker's statutory mandate and the relevant *Charter* values.[70] More generally, Marin notes:

> [T]he Supreme Court has encouraged greater independence of public authorities, specifically by excluding their private actions from judicial review and affording them deference on most questions of fact and law, including those involving the *Charter.* These developments have made it possible to envision a more liberal application of the *Charter* without unduly compromising institutional autonomy.[71]

As Justice Paperny correctly wrote in *Pridgen*:

> [T]here 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.[72]

Free expression and academic freedom are the lifeblood of the university in fulfilling its twin missions of advancing knowledge and educating students. Campus free expression can only be enhanced by universities being subject to *Charter* scrutiny; conversely, academic freedom and the legitimate autonomy of the university to make decisions regarding curriculum, academic standards, and staffing will not be compromised.

70 See *Doré v Barreau du Québec*, 2012 SCC 12 at para 57. See also *ibid* at paras 45-58.
71 Marin, *supra* note 44 at 30.
72 *Pridgen* CA, *supra* note 52 at para 117.

Constitutional forum constitutionnel

Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression

Michael Lynk*

1. Introduction

The Murray Library is the central library at the University of Saskatchewan. In January 2013, the Library Dean announced that ten support staff in the University's library system, including several working at the Murray Library, were to be laid off. All were women. After each staff member had been individually informed by the Dean that she was being laid off, she was told to collect her possessions and was then immediately escorted off the campus property. The layoffs were part of a University-wide cost cutting measure, which would ultimately result in 40 layoffs among the support staff across the campus. The support staff were unionized, in a bargaining unit represented by the Canadian Union of Public Employees.

The University librarians were also unionized, in a separate bargaining unit represented by the University of Saskatchewan Faculty Association. In the librarians' collective agreement was a broadly drafted provision protecting academic freedom. Among other things, the provision guaranteed the right of the unionized librarians "…to criticize the University and the Association without suffering censorship or discipline." This provision did not contain any language which would restrict the scope of its protection to reasonable or responsible comments. This right of faculty and librarians to criticize the university leadership is known, among the various features that make up academic freedom, as the freedom of intra-mural expression.[1]

* Associate Professor, Faculty of Law, Western University, London, Ontario, where he teaches labour law, human rights law, and constitutional law.

1 See generally Matthew Finkin & Robert Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, Connecticut: Yale University Press, 2009), ch 5.

Shortly after the layoffs were announced, a meeting was organized by the library leadership at the Murray Library to explain the decision to the other employees. The meeting was led by the branch head of the Murray Library. About 20 employees, half librarians and half support staff, were present. Some of them posed a variety of questions and comments to the branch head that were highly critical of the layoff decision. Four librarians, in particular, led the criticism of the layoff decision, citing the lack of consultations, questioning the process by which the laid-off staff were selected, voicing concerns about the ability to maintain library services, and stating that the escort of the staff off campus property following their meeting with the dean had been disrespectful. One librarian asserted that the laid off employees had been "targeted" because they were female and older, while another inquired as to why the dean's office had not had to offer up a "sacrificial lamb" instead. The branch head would later testify that she felt she was under attack.

After the meeting, the branch head reported her uncomfortable experience to the library dean. The dean followed up by sending emails to the four librarians who had led the intensive questioning. The emails included the following passage:

> Today, I was made aware that your behaviour at a meeting of Murray Library employees was viewed by some in attendance to be offensive, inappropriate and inconsiderate to those present at the meeting. I find news of this very worrying and disturbing.

Subsequently, the library dean held individual meetings with each of the four librarians and their union representatives regarding the tone and tenor of the Murray Library meeting. Afterwards, she sent letters of caution to each of them, and placed these non-disciplinary letters in their personal employment files. In the letters, the dean stated that the librarians should be:

> Civil and respectful in our written and verbal communications — everyone has the right to express an opinion and to ask questions, but we need do so in a respectful and courteous manner, and in a way that does not cause intentional distress to others.

The librarians disputed the dean's account of the Murray Library meeting, and they opposed the placement of the letters in their personal files. Through their union, they filed grievances against the dean's actions, arguing that she had violated their academic freedom by infringing upon their right to criticize the University's academic leadership. The grievances eventually proceeded to an arbitration hearing before Arbitrator Andrew Sims. His subsequent decision, which was both comprehensive and contentious, has become a leading legal precedent in defining the scope of academic intra-mural expression in Canada.[2] We shall return to Arbitrator Sims's decision and reasoning shortly.

2. Academic Freedom and Labour Law in Canada

The *University of Saskatchewan* case is illustrative of the distinct nature of how academic freedom is regulated legally in this country. In the United States, academic freedom for public post-secondary institutions is primarily anchored in the right to freedom of speech contained

2 *University of Saskatchewan v University of Saskatchewan Faculty Association,* 2015 CanLII 27479 (SK LA) (Arbitrator: Andrew Sims) [*University of Saskatchewan*].

in the First Amendment of the U.S. Constitution.[3] In the European Union, it is grounded in the EU's *Charter of Fundamental Rights*.[4] A number of individual countries either explicitly protect academic freedom in their governing constitutions,[5] or do so implicitly through constitutional guarantees of the institutional autonomy of universities.[6] In all of these countries, disputes over academic freedom are invariably litigated in the courts.

In contrast, academic freedom in Canada is a negotiated right, secured through labour law, and given shape and content in the collective agreements that govern the terms of academic employment. Approximately 90 percent of the faculty employed by Canadian universities are unionized, ensuring the broad reach of collective agreements.[7] Collective agreements are commonly renegotiated between faculty unions and university administrators every three to four years, providing a flexible process for reviewing and revising the scope of academic freedom. As a consequence, many university collective agreements today contain comprehensive definitions of the term. Challenges by faculty unions to decisions made by university administrators when academic freedom becomes an issue are adjudicated through a mandatory labour arbitration process, which provides an expert and accessible dispute forum as well as legally binding decisions. The Supreme Court of Canada, like the rest of the judicial system,

3 *Regents of the University of California* v *Bakke*, 438 US 265 at para 312 (SC 1978) per Powell J: "Academic freedom, though not a specifically enumerated right, long has been viewed as a special concern of the First Amendment." The First Amendment of the U.S. Constitution provides that: "Congress shall make no law… abridging the freedom of speech."See US Const amend I.

4 Council of Europe, PA, *Charter of Fundamental Rights of the European Union*, OJEU, C,303/1, (2007) art 13: "The arts and scientific research shall be free of constraint. Academic freedom shall be respected." See also Terence Karran & Lucy Mallinson, "Academic Freedom in the U.K.: Legal and Normative Protection in a Comparative Context",[Report for the University and College Union] (2007), online (pdf): *University of Lincoln Repository* <eprints.lincoln.ac.uk/26811/>.

5 The constitutions of Greece (Article 16), Spain (Article 20.4), Germany (Article 5), South Africa (Article 16(1)(d)) and the Philippines (Article 14(5)), among other countries, expressly protect academic freedom, with qualifications. See "The Constitution of Greece as revised by the parliamentary resolution of May 27th 2008 of the VIIIth Revisionary Parliament" (2009), online (pdf): *Hellenic Parliament* <www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf>, art 16; See "Spanish Constitution" (7 May 2019), online: *Senado de España* <senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html#t1c2s1>, s 20(c); See "Basic Law for the Federal Republic of Germany", online; *Bundesministerium der Justiz und für Verbraucherschutz* <www.gesetze-im-internet.de/englisch_gg/>, art 5; See *Constitution of the Republic of South Africa, 1996,* No. 108 of 1996 as amended by *Constitutional Seventeenth Amendment Act of 2012*, art 16(1)(d); See "The Constitution of the Republic of the Philippines", online: *Official Gazette* <officialgazette.gov.ph/constitutions/1987-constitution/>, art 14(5)(2).

6 See e.g. the constitutions of Finland (Section 123) and Estonia (Article 38(2)). See "The Constitution of Finland 11 June 1999 (731/1999, amendments up to 817/2018 included)", online (pdf): *Ministry of Justice, Finland* <finlex.fi/en/laki/kaannokset/1999/en19990731.pdf>, art 123; See "Constitution of the Republic of Estonia", online: *President* <president.ee/en/republic-of-estonia/the-constitution/>, art 38.

7 The faculty at all major and medium-size universities in Canada are represented by bargaining agents certified under the governing labour relations legislation, with the exception of Toronto, Waterloo, McMaster and McGill. Intriguingly, at the first three of these universities, the professors are represented by non-certified faculty associations which act much like trade unions, and they have negotiated memorandums of agreement on terms and conditions of employment, with arbitration provisions, with their employers that mirror collective agreements.

has rarely addressed the scope of academic freedom,[8] and legislation in Canada is silent on the issue.

Labour arbitrators in Canada have treated academic collective agreements as part of the same legal whole cloth as collective agreements found in other types of workplaces. As such, arbitrators apply the universally accepted arbitral rules of collective agreement interpretation when determining employee and management rights on university campuses.[9] For the most part, this makes intrinsic legal sense. Universities are workplaces, the relationship between the academic leadership and the professoriate is hierarchical (even if less so than most other workplaces), and the academic leadership retains the final decision-making authority over the core administrative functions of the university, such as budgets, student policies, human resource decisions, academic program reforms, capital expenditures, and institutional direction. The involvement of faculty members in collegial decision-making — such as department policy-making, hiring, and promotion recommendations and participation in university senate deliberations — is rooted primarily in their educational and departmental expertise, and not as representatives of management or through the qualitative devolution of fundamental managerial authority.

This is not the accepted legal view in the United States. In 1980, the American Supreme Court ruled in *Yeshiva University* that full-time professors at a private university exercise managerial powers through the system of shared governance, thereby excluding them from the definition of 'employee,' as per labour relations legislation, and denying them the right to unionize.[10] While faculty unions exist at approximately 20 percent of American universities (primarily at public institutions), judicial decisions such as *Yeshiva* have had a dampening effect on their growth.[11] By way of distinction, the leading decision in Canada on the employment status of university professors — *Mount Allison University* — accepted in 1982 that they are 'employees,' and their involvement in collegial decision-making on some university governance matters distinguishes them only in kind, but not in essence, from employees in other Canadian workplaces.[12] The approach by Canadian labour law that universities are fundamentally workplaces *comme les autres* has been flexible enough to support an effective labour

8 One of the few occasions where the Supreme Court of Canada has expressly commented on academic freedom is *McKinney* v *University of Guelph,* [1990] 3 SCR 229 at para 652, 76 DLR (4th) 545 [*McKinney*], per the majority judgement of La Forest J, Wilson J dissenting at paras 596-7. However, it is worth noting that these comments on academic freedom were *obiter* to the thrust of the *McKinney* ruling, which focused on the legality of mandatory retirement at Canadian universities.

9 See generally the College and University Employment Law electronic newsletters issued regularly by Lancaster House, a Toronto workplace law publication house: <http://lancasterhouse.com/>

10 *National Labor Relations Board* v *Yeshiva University*, 444 US 672 (SC 1980) [*Yeshiva University*]. See also *NLRB v Catholic Bishop of Chicago*, 440 US 490 (SC 1979) which has stymied faculty unionization at religious-affiliated private universities.

11 William Herbert & Jacob Apkarian, "Everything Passes, Everything Changes: Unionization and Collective Bargaining in Higher Education" (2017) *Perspect Work* at 30.The minority of American university professors who are unionized will invariably have academic freedom provisions in their collective agreements.

12 *Mount Allison Faculty Association* v. *Mount Allison University* (1982), 3 CLRBR 284 (NBIRB) at para 96 [*Mount Allison University*]). The New Brunswick Industrial Relations Board specifically rejected *Yeshiva University*. The Board stated that: "…when all is heard and the dust does settle we have come to one unalterable conclusion…the final decisions are made by those who have the power and are obligated to do so".

relations voice for university professors through their unions on employment and academic freedom matters, while both preserving the benefits of collegial decision-making on some aspects of institutional governance and ensuring that the lines of managerial authority are clearly delineated and protected.[13]

However, if Canadian universities are, at one level of labour law, workplaces *comme les autres*, they are also, at another level, workplaces *d'un genre spécial*.[14] Academic freedom as a negotiated employment right is unique to universities (and, increasingly, to community colleges) in Canada. In a leading contemporary study examining academic freedom in the American landscape, Matthew Finkin and Robert Post identify the four components of the freedom regarding university faculty: (i) freedom to teach, (ii) freedom to research and publish, (iii) freedom of intra-mural expression, and (iv) freedom of extra-mural expression.[15] These four components of academic freedom have been endorsed by the Canadian Association of University Teachers (the umbrella association of Canadian faculty unions),[16] and they are found in many university collective agreements across Canada.[17] Given the centrality of academic freedom to the university mission to pursue free and fearless inquiry,[18] and its broader relationship to a vibrant democracy,[19] the ability to define the legal content of the freedom with sensitivity and rigour, recognizing its *sui generis* nature in the workplace, has become an important interpretative task for Canadian labour arbitrators. As Louis Menard has written: "Academic freedom is not just a nice job perk. It is the philosophical key to the whole enterprise of higher education."[20]

---

13 This observation is rooted in the broad prevalence, stability and acceptance of collective bargaining relationships among Canadian universities, and the fact that university governance has adjusted, but not fundamentally changed, following the advent of faculty unionization.

14 *Mount Allison University, supra* note 12 at para 97. The New Brunswick Industrial Relations Board pointed out that "University faculty has always had more freedom, independence and communication with their administrations than almost any other endeavour."

15 15 Finkin & Post, *supra*, note 1.

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

17 See the academic freedom provisions in the following representative collective agreements: University of Western Ontario, "Collective Agreements" (1 July 2014 – 30 June 2018), online: *The University of Western Ontario Faculty Association* <www.uwofa.ca/collective-agreements>, s Academic Freedom; Dalhousie University, "Collective Agreement 2017-2020", online: *Dalhousie Faculty Association* <www.dfa.ns.ca/publications/collective-agreement-2017-2020>, art 3; University of Victoria, "Collective Agreement 2015-2019" (5 June 2015), online: <www.uvicfa.ca/collective-agreement/articles/>, art 4; Queen's University, "Queen's-QUFA Collective Agreement" (15 July 2019), online: <www.queensu.ca/facultyrelations/faculty-librarians-and-archivists/queens-qufa-collective-agreement>, art 14.

18 See *York University v York University Faculty Association* (2007), 167 LAC (4th) 39 (OLAA) at para 26 (Arbitrator: Russell Goodfellow) [*York University*]: "There are few concepts or principles more important to the healthy and vibrant functioning of a University than academic freedom."

19 See Jonathan Cole, "Academic Freedom as an Indicator of a Liberal Democracy" (2017) 14:6 *Globalizations* 862, at 862: "The institutionalization and commitment to academic freedom and free inquiry…is…a key indicator (of course not the sole indicator) of the existence and form of a liberal democracy. Its existence will allow us to measure whether democratic ideals and adherence to principles of individual liberty and free expression really exist within a society."

20 Louis Menard, *The Marketplace of Ideas: Reform and Resistance in the American University* (New York, New York: W.W. Norton, 2010) at 131.

Arbitrators in Canada have accepted that academic freedom requires a generous content to exemplify its significance to the academy and beyond. Arbitrator Sims, in *University of Saskatchewan*, held that: "…academic freedom and its protections are concepts to be interpreted liberally in ways that allow them to achieve their purpose."[21] In rulings over the past 20 years, arbitrators and other legal forums have stated that academic freedom includes the broad, but not absolute, right of professors to determine their own grades,[22] to claim ownership over their course notes,[23] and to decide the content of their university courses.[24] But, as well, arbitrators have also held that academic freedom cannot be stretched so far as to protect non-objective methods for student grade evaluation.[25] Nor can it be used to strike down a university's implementation of mandatory course evaluations by students,[26] or a university's replacement of its internal email system with an American-based system.[27]

One important component of academic freedom that has received, at best, a tepid and cloudy arbitral consideration in Canada has been the freedom of intra-mural expression. Even when this particular freedom has been expressly negotiated and clearly articulated, as in the governing collective agreement in *University of Saskatchewan*, labour arbitrators have tended to adopt a *comme les autres* approach to intra-mural expression. In particular, they have been influenced by the arbitral rules that have been developed from non-academic unionized Canadian workplaces regarding insubordination[28] and loyalty-to-the-employer,[29] rather than employing a contextual application of the distinctive nature of academic freedom to the factual issues on expression before them. These common law arbitral rules on insubordination and loyalty are drawn from non-academic workplaces that requires employees to respect the hierarchical structure of the workplace; they must obey, and not challenge, the directions and policies of management; and they must not publicly criticize their employers or damage

21 *University of Saskatchewan, supra* note 2.

22 See *Memorial University of Newfoundland Faculty Association v Memorial University of Newfoundland* (2007), 89 CLAS 137 (NLA) (Arbitrator: Paula Knopf); See also *University of Waterloo* v *Faculty Association of the University of Waterloo* (22 February 2001), unreported (Arbitrator: R. Kennedy).

23 See *Lukits v Treasury Board (Department of National Defence),* 2019 FPSLREB 32 (Jaworski); See also, *University of British Columbia v University of British Columbia Faculty Association (Bryson)*, 2006 BCLRB No. B56.

24 See *University of Ottawa* v *Association of Professors of the University of Ottawa* (2008), 94 CLAS 163 (ON LA) (Arbitrator M. Picher).

25 See *University of Ottawa v Association of Professors of the University of Ottawa,* 2014 CarswellOnt 19219 (ON LA) (Arbitrator: Claude Foisy).

26 See *Re Memorial University of Newfoundland Faculty Association and Memorial University of Newfoundland* (2003), 73 CLAS 399 (NLA) (Arbitrator: Bruce Outhouse) . But see *Ryerson University v Ryerson Faculty Association (FCS & Related Issues)*, 2018 CanLII 58446 (ON LA) (Arbitrator: William Kaplan), which restricted the use of student evaluations when assessing academic performance, although not on the grounds of academic freedom.

27 See *Lakehead University (Board of Governors) v Lakehead University Faculty Association,* 2009 CanLII 24632 (ON LA) (Arbitrator: Joseph Carrier).

28 See generally *Upper Grand District School Board v CUPE, Local 256* (2004) 77 CLAS 368 (OA) (Arbitrator: Tom Jolliffe). Canadian arbitrators have ruled that workplace insubordination amounts to a "challenge to the authority of a supervisor", which would justify the imposition of discipline.

29 In Canadian law, employees are expected to display loyalty to their employers, which prohibits them from criticizing them beyond situations where the employer has engaged in illegal acts or endangered health and safety. See *Chopra v Canada (Treasury Board)*, 2006 FCA 295; See also *Fraser v. Public Service Staff Relations Board*, [1985] 2 SCR 455, 23 DLR (4th) 122.

their reputational brand.[30] While these rules may be appropriate for an ordinary command workplace, they make for a poor fit in the university environment. The result, in Canadian academic freedom cases, has been a lacklustre arbitral appreciation and application of the freedom of intra-mural expression.

3. Intra-Mural Expression and Canadian Labour Arbitration

Intra-mural expression is the component of academic freedom that allows university faculty to freely comment on, and challenge, academic policies, practices, programs or positions enacted or enunciated by their universities without suffering institutional censorship or any chilling of their expressive rights.[31] UNESCO's 1997 *Recommendation concerning the Status of Higher-Education Teaching Personnel* — the leading international statement on academic freedom — states that intra-mural expression is an integral part of academic freedom: "Higher-education teaching personnel are entitled to the… freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies."[32] In Canada, the interest of university teachers in safeguarding intra-mural expression as an essential component of academic freedom arose, in large part, from the seminal case of Harry Crowe, a tenured professor who was terminated in 1958 by the United College (now the University of Winnipeg) after a private letter he had written containing harsh criticisms of the academic leadership was forwarded to the College president.[33] In recent years, intra-mural expression has been expressly bargained into a number of Canadian university collective agreements as part of the negotiated definition of academic freedom.

Given the singular nature of academic freedom, the established traditions of vigorous evaluation, opposition and argument in the university community,[34] and the broadly negotiated protection for the right to criticize,[35] one might expect that the freedom of intra-mural

30 See generally Donald Brown, David Beatty & Adam Beatty, *Canadian Labour Arbitration* 5th ed (Toronto, Ontario: Thomson Reuters, 2019) (loose leaf updated 2019), ch 7.

31 The term 'intermural' in this context refers not to the location where the expression takes place but rather to its subject: the home university of the faculty member and its administrative decisions, policies and practices.

32 *Recommendation concerning the Status of Higher-education Teaching Personnel*, C/Res31, UNESCOOR, 29th Sess, UN Doc C/Res31/29 (1997) at 26.

33 Michiel Horn, *Academic Freedom in Canada: A History* (Toronto, Ontario: University of Toronto Press, 1998), ch 9. See also Vernon Fowke & Bora Laskin, "Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of Professor H.S. Crowe by United College, Winnipeg, Manitoba" (21 November 1958), online (pdf): *Canadian Association of University Teachers* <https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-the-investigation-into-the-dismissal-of-professor-h-s-crowe-by-united-college-winnipeg-manitoba-%281958%29.pdf> (the CAUT investigation report into the Crowe firing conducted by Professors Bora Laskin (later the Chief Justice of the Supreme Court of Canada) and Vernon Fowke).

34 See *Mabey v Reagan*, 537 F (2d) 1036 (9th Cir 1976) at para 51: "Robust intellectual and political discussions can and should thrive on college campuses. These discussions will not always be models of decorum."

35 For a broad view on the protection of speech in an academic setting, albeit under human rights legislation, in a dispute between a university professor and a church-appointed university chaplain over a university-sponsored student program, see *McKenzie v Isla*, 2012 HRTO 1908, at para 35. The Human Rights Tribunal of Ontario stated that: "…given the importance of academic freedom and freedom of expression in a

expression in a scholarly setting would be treated, in law, as something akin to parliamentary debates, with much latitude allowed for the professoriate to express frank views and engage in robust disagreements with the academic leadership. Short of violating the legal limitations on expression — such as defamation, hate speech, criminalized pornography and obscenity, incitement to violence or vandalism, harassment, discrimination, breaches of confidentiality and privacy, statutory requirements for civility, or interference with the expressive rights of others — should the ability of a faculty member to freely criticize her or his institution and its leadership not protect a wide form of comment and reproach, even when the comments were honestly mistaken or uncomfortably posed? Academic inquiry values cogent evidence, civil exchanges and reasoned arguments, and these are likely to be the most persuasive interventions in any debates and challenges within a university setting, but the freedom of intra-mural expression should not limit the reach of its protection only to these forms of criticism and dissent.

(i) Civility and the Freedom to Criticize

In recent years, universities in Canada have been at the forefront of the social debate over civility. Civility is an admirable standard to encourage, and the concept has attracted university codes and campaigns around North America which seek to reduce tensions over issues involving race, gender, harassment and the expression of a range of political views. However, and more importantly, civility can also be seen as a threat to the robust defence of academic freedom through its regulation of criticism that may be harsh and even offensive, but which does not cross the red lines into unlawful speech. Civility policies at universities have tended towards the production of porous and nebulous definitions that, whatever their genuine intent, have sometimes over-reached in their dampening of speech because they forbid, or restrict, views that some may potentially find offensive, unwelcomed and provocative. George Orwell once wrote that: "If liberty means anything at all, it means the right to tell people what they do not want to hear."[36] After all, few people change their minds unless they are challenged, sometimes as a result of assertive and uncomfortable exchanges, and one person's offensive comments are another person's invitation to re-think a settled opinion. As Canadian constitutional law scholar, Jamie Cameron has written with respect to recent calls for civility at Canadian universities: "As much as we may disapprove of the content or manner of their expression, that is not reason enough to silence or punish their interventions. Unless and until they cross a threshold of harm that justifies a regulatory response, transgressions that are merely offensive must be tolerated and addressed by other means."[37]

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."

36 George Orwell, "The Freedom of the Press", *The New York Times* (8 October 1972) 12, online: <www.nytimes.com/1972/10/08/archives/the-freedom-of-the-press-orwell.html>.

37 Jamie Cameron, "Giving and Taking Offence: Civility, Respect, and Academic Freedom" in James Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto, Ontario: James Lorimer & Company Ltd, 2014) at 303.

(ii) University of Saskatchewan

In *University of Saskatchewan*, Arbitrator Andrew Sims dismissed the union grievances challenging the placement of the letters of caution on the librarians' employment files. A key consideration for him were the values of collegiality, civility, and respect. While acknowledging the fundamental importance and breadth of academic freedom, he found that "it is a freedom that is exercised in a collegial and institutional setting. Academic freedom is not simply a set of individual rights; one person's freedom can easily become another's restraint."[38] Citing an earlier arbitral award that he had issued involving university industrial relations,[39] the arbitrator emphasized the importance of "a civil, healthy, robust and respectful environment" to ensure the blossoming of ideas, an encouraging scholarly environment for academics and a positive climate for students to flourish.

Offering a cautious view on the place of assertive comments when criticizing the leadership in the academic workplace, Arbitrator Sims expressed concern that the provincial laws on workplace health and safety, specifically those dealing with psychological well-being, as well as the collective agreement provisions on ensuring a 'positive working environment' and prohibiting discrimination and harassment, might be breached by the protection of sharp speech. While acknowledging that the academic workplace is "far less regulated than in an industrial setting, and includes the high priority attached to academic freedom," he relied upon a number of arbitral cases arising from non-university settings to establish the importance of regulating, and even punishing, speech that might constitute harassment, humiliation, unpleasantness or otherwise adversely affect the well-being of a university environment.[40]

As to the core question — whether the dean's letters to the librarians constrained their academic freedom in violation of the collective agreement — Arbitrator Sims ruled: "There is a subtle but important distinction between exercising one's right and freedom to criticize and 'calling someone to account.'"[41] Crucial for him was the fact that the librarians' criticisms of the layoff decisions were orally directed at the branch head of Murray Hall who, while she was the person designated by university management to conduct the meeting and explain the rationale for the layoffs, was not the person responsible for making the layoff decisions. Yet, absent in the decision's reasoning was any detailed review of the scope and breadth of intra-mural expression and its place within the broader concept of academic freedom. The underlying issue was not who conducted the meeting, but whether, and how, the librarians' close questioning of the representative of management who was justifying the decision crossed a red line into impermissible expression. Calling someone to account is precisely the sort of critical speech that one would have thought a liberal understanding of intra-mural expression would protect.

Instead, the focus of the arbitral inquiry in *University of Saskatchewan* was on the requirement for an investigation into the allegations of harassment and psychologically harmful conduct. As such, Arbitrator Sims found that the dean's investigation was legally required, and the

38 *University of Saskatchewan, supra* note 2.
39 *Re University of Calgary and University of Calgary Faculty Association* (1999) 60 CLAS 13 (Alta A) at para 492 (Arbitrator: Andrew Sims).
40 *University of Saskatchewan, supra* note 2.
41 *Ibid.*

subsequent letters of caution were actually 'exculpatory' of the librarians' behaviour and had thereby removed any blame from them for their actions at the Murray Hall meeting.[42] What was not directly answered in the ruling, and which was central to the librarians' grievances, was whether the placing of these letters of caution on the librarians' personal files might reasonably chill the exercise of intra-mural expression; that is, whether the negotiated freedom in the collective agreement to "…criticize the University…without suffering censorship…" was breached by the cautionary letters.[43]

(iii) University College of the North

University of Saskatchewan is part of the pattern of arbitration awards in Canada which have provided a guarded and hesitant approach to the scope of intra-mural expression. In *University College of the North,*[44] a 2011 ruling, an assistant tenure-track professor in sociology was terminated following several emails that he sent to the university's interim president, criticizing him for rejecting the recommendation of a hiring committee that the professor chaired. The professor had also written to the unsuccessful candidate, informing him of the president's decision and suggesting to him that he might wish to speak to the faculty union (as he was an internal candidate) about his rights under the collective agreement. Additionally, the professor sent an email message to a senior human resources officer, informing her that he was withdrawing from the hiring committee, that he would not provide his notes from his work on the hiring committee, and that he lacked confidence in the interim president's ability to respect university procedures on hiring.

In his termination letter to the professor, the interim president stated that he had made unfounded allegations, he had not followed proper channels and his remarks had been insolent and intolerable. The professor's comments and actions, said the president's letter, were "clearly intended to undermine me and my authority."[45] The faculty union grieved the professor's firing.

At the arbitration hearing, Arbitrator Robert Simpson considered the faculty union's arguments that the professor's remarks to the human resources officer respecting the interim president were protected by academic freedom. In evaluating what would constitute insubordination in arbitral law, the arbitrator relied upon case law from non-academic arbitration rulings, and offered no analysis on how to read critical remarks from the professoriate towards the leadership within the context of academic freedom. As he stated:

> *While it may have been acceptable to the Grievor to express his disappointment with [the interim president's] response to the committee recommendation, it was not appropriate for him to make general comments on the [interim president's] respect for the policies and procedures of Human Resources. I do not accept that [the professor's email to the human resources officer] fell within the service component of the Grievor's role as an Assistant Professor, nor can I find that it could be said to be encompassed within the parameters of academic freedom. The comment directed at the Interim President has a degree of insolence, amounting to insubordination.*[46]

42 *Ibid.*
43 *Ibid.*
44 *Re University College of the North and Manitoba Government and General Employees' Union (Thompson)*, 2011 CarswellMant 785 (MA) (Arbitrator: Robert Simpson) [*University College of the North*].
45 *Ibid* at Appendix "A".
46 *Ibid* at para 69 [emphasis added].

However, Arbitrator Simpson regarded the professor's insolence at the low end of the discipline scale, and thought that it deserved only a verbal, or maybe a written, reprimand. And, when he considered all of the factors that the university had relied upon to terminate the professor, he reduced the dismissal to a two-month suspension without pay.[47]

University College of the North offers a thin precedent on how to think about intra-mural expression within the legal boundaries of academic freedom in Canada. It did not explore the content of academic freedom, it did not assess the particular protections for expression that the professoriate might rely upon when criticizing the academic leadership, and it did not read and apply the language of the negotiated right to academic freedom in the governing collective agreement to the facts. Most lamentably, the award accepted, without reflection, that insolence in the tone of remarks directed towards the academic leadership can be a proper ground for discipline and censorship in a university setting.

(iv) University of Manitoba

A related arbitration award (which, strictly speaking, deals with extra-mural expression, but which employs an analysis pertinent to the intra-mural issue) is *University of Manitoba*.[48] In this 1991 decision, a tenured professor of marketing in the Faculty of Management attended a reception hosted by Xerox Canada at the University's faculty club. A number of academic leaders and faculty members were also at the reception, along with several representatives from Xerox. The purpose of the meeting was to provide a platform for Xerox to explain the available employment opportunities for students in the University's business management program.

During the presentation by one of the Xerox representatives, the professor interrupted to correct the mistaken assertion (in his view) that Xerox had regained its position as the top seller in the copier field. He stated that Japanese manufacturers, such as Canon, had developed a superior marketing strategy and were now the leaders in the home copier field. The professor later testified that he thought it was his scholarly obligation to remedy the statements of the Xerox representative because the students in attendance might leave with an erroneous impression. As it turned out, he was wrong on his facts. As well, there were no current students at the reception, although several recent graduates were present.

Several weeks later, the dean of the Faculty wrote a short letter to the professor, stating that the tone of his intervention at the reception was "unpleasant," and his "grilling" of the Xerox representative was "inappropriate." He concluded the letter by stating that the Faculty had been working hard to cultivate positive relationships with the business community, and the professor's remarks at the reception were "counterproductive." The note was not meant by the administration as a letter of discipline, and it was not placed on the professor's personnel file. The faculty union subsequently launched a grievance on the professor's behalf, maintaining that his academic freedom had been compromised by the letter.

In his ruling, Arbitrator Perry Schulman provided an extensive consideration of the scope of academic freedom in Canada and the United States, as a backdrop to making his findings. He held that a professor does not have to be disciplined for statements or actions in order for

47 *Ibid* at para 79.

48 *Re University of Manitoba and University of Manitoba Faculty Association*, 1991 CarswellMan 511 (Arbitrator: Perry Schulman) [*University of Manitoba*].

her or him to be able to assert that academic freedom has been breached.[49] As well, the arbitrator also found that a professor's comments uttered at a university-related reception would be covered by academic freedom.[50]

A particular feature in the *University of Manitoba* case was the language on academic freedom in the governing collective agreement. At the time, there was no specific provision which mentioned or protected intra-mural expression.[51] The academic freedom article did require faculty members to act "…reasonable, fairly and in good faith with dealing with others" and "…to discharge their duties reasonably."[52] The arbitrator read this language to mean that academic freedom was "…to be exercised reasonably," which would be assessed by contextual reference to the "time, place, content and style" of the remarks.[53]

In the course of finding that an expression of disapproval by an academic leader of a professor's remarks could amount to institutional censorship, Arbitrator Schulman held that, on the facts of this case, the remarks by the professor at the reception exceeded the bounds of academic freedom. He was particularly struck by the evidence of other professors that were present at the reception, who had found their colleague's conduct to be "unacceptable and rude." Taking this into account, the arbitrator concluded:

> *I find that Dr. Vedanand's conduct was unreasonable in relation to time, place, subject matter and tone. I find that he exceeded the acceptable limits of academic freedom. His conduct comprised a breach of etiquette which entitled Dean Mackness to make some comment. [The dean's note sent to the professor], a Confidential memo with a very limited circulation was not an act of institutional censorship.*[54]

While the *University of Manitoba* ruling was rich in its consideration of the general meaning of academic freedom, it stumbled in its specific appraisal of the scope of protected expression within a university environment. It did not examine whether expressive rights could include a mistaken perspective, even if that perspective was honestly believed. Nor did it offer much insight as to when intemperate or rude speech would fall beyond the boundaries of permissible speech. An arbitral finding that "a breach of etiquette" would place a professor outside of the shelter of academic freedom is a frail reed upon which to build a substantive right of expression within the academy.

(v) Bishop's University

Two other arbitration awards, both issued in 2007 — one from Quebec, and the second from Ontario — resulted in the upholding of grievances by professors that their academic free-

49 *Ibid*, at para 81: "…it is my view that an act of discipline is not a prerequisite for a finding a breach of academic freedom."

50 *Ibid* at para 90: "…I see no reason why remarks made in certain circumstances at a combined social/business reception could not be afforded the same protection."

51 The language on academic freedom in the governing collective agreement between the University of Manitoba and its faculty association has evolved considerably since 1991. On intra-mural expression, the 2017-2021 collective agreement, in Article 37 (which defines academic freedom), states that faculty members have the right to: "criticize the University, the Association or any corporate, political, public or private institution…without penalty of reprisal." There is no limiting language going to reasonableness or good faith.

52 *University of Manitoba, supra* note 48 at Schedule 'B'.

53 *Ibid* at para 98.

54 *Ibid* at para 104 [emphasis added].

dom had been infringed in the course of critical remarks directed at the university leadership. However, the awards differed in the quality of their analysis of the boundaries of intra-mural expression.

In *Bishop's University*,[55] the chair of the Executive Committee of the Corporation (the university's board of governors) wrote a disapproving letter to a computer science professor (who was also the president of the faculty association at the time). This letter had been sent in response to recent controversies on the campus involving the professor. These controversies included the issuance of an open statement of non-confidence in the leadership of the principal (the president) of the university, which had been widely endorsed by faculty members. As well, campus debates had focused on the composition of a selection committee to hire a new human resources director. In his letter to the professor, the chair wrote, "you, like every other employee of Bishop's University, owe a duty of loyalty to the University. You cannot use your office to publicly criticize legitimate decisions of the Corporation on any matter whatsoever."[56] Two weeks later, the chair withdrew this letter but, in his replacement letter, stated that the professor's critical comments were not helpful in promoting positive dialogue at the university.

The academic freedom provision in the governing collective agreement expressly endorsed the right to intra-mural freedom, stating that the university professors possessed "…the right to criticize the University, the Corporation and even the Association in a lawful and non-violent manner."[57] It guaranteed "freedom from institutional censorship."[58] As a balancing factor, the collective agreement also provided that: "The right to academic freedom carries with it the duty to use that freedom in a responsible way."[59]

In addition to the definition of academic freedom in the collective agreement, Arbitrator Diane Veilleux also had to consider the statutory duty on employees in Quebec to act with loyalty towards his or her employer,[60] and the legislative right under the province's human rights legislation to freedom of expression.[61] In assessing how to read the right to academic freedom and intra-mural expression together with these two legislative directions, the arbitrator adopted the following approach:

> *In the present case, the parties to the collective agreement have spelled out the right of a professor to criticize the university. As previously stated, this right must be used responsibly, non-violently and in a lawful manner. When exercising the right to criticize the University, a professor is to respect her or his duty of loyalty to the University. As a corollary, the University cannot reproach, nor ask a professor to, restrict the expression of her or his criticisms, in terms of its content and form, beyond the duty to use the expression in a responsible, non-violent and lawful manner.*[62]

55 *Association of Professors of Bishop's University c Bishop's University*, 2007 CanLII 68089 (QC SAT) (Arbitrator: Diane Veilleux) [*Bishop's University*].

56 *Ibid* at para 5.

57 *Ibid* at para 32.

58 *Ibid*.

59 *Ibid* at para 94.

60 *Civil Code of Quebec*, CQLR c. CCQ-1991, s 2088: "The employee is bound not only to perform his work with prudence and diligence, but also to act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work."

61 *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s 3: "Every person is the possessor of the fundamental freedoms, including…freedom of expression."

62 *Bishop's University, supra* note 55 at para 101 [translated] [emphasis added].

The core question posed by Arbitrator Veilleux was whether the professor had criticized the university in a responsible manner. She pointed out that the professor had not revealed any confidential information. As well, the tone of her comments and criticisms towards the academic leadership "were polite and full of civility." However, the ruling noted the importance of infusing criticism with loyalty and responsibility. Accordingly, it disapproved of the professor's decision to issue a public criticism of the academic leadership through a widely distributed email which, it found, she had no need to do. The arbitrator then cautioned: "As an employee of the University, Mme Khouzam, when exercising her right to criticize the University, is required to avoid, as much as possible, any unnecessary negative impact upon the interests and reputation of the University."[63]

As a remedy, Arbitrator Veilleux ordered the two letters written by the chair of the Executive Committee of the Corporation to the professor to be voided, as they infringed upon her academic freedom. However, with the purported damage (never proven) to the university's reputation in mind, she did not award the professor any compensation, because, in the arbitrator's view, she had widely, and unnecessarily, circulated her criticism of the university.

Bishop's University illustrates the predicament of giving breadth and depth to academic freedom when it is qualified, in collective agreement language, by a negotiated duty to use the freedom in a "responsible" fashion. More often than not, the terms 'responsible' and 'reasonable' can become an empty linguistic vessel waiting to be filled with the mores of civility and courtesy, which may disproportionately curb the range of protected expressive freedom in the academy. Additionally, the statutory requirement in Quebec that expressly embeds the employee's duty of loyalty to her or his employer into every provincially regulated workplace contributed to the circumspect approach adopted in this award.[64] Ultimately, the restrained precedent established by *Bishop's University* provides us with only a half-formed understanding of what intra-mural expression may protect.

(vi) York University

In recent years, the Israeli-Palestinian conflict has provided a steady source of controversies for testing the scope and limits of academic freedom and expressive rights in both Canada and the United States.[65] In *York University*,[66] a tenured sociology professor distributed a pamphlet among the audience at a film screening on the university campus. His pamphlet contained a detailed critique of the leadership of the York University Foundation (the fundraising arm of

63 *Ibid* at para 114 [translated].

64 In English Canada, the duty of loyalty is a common law principle which can be trumped by the specific language in a collective agreement, permitting more flexibility for universities and faculty associations when negotiating the content of academic freedom.

65 In Canada, see Richard Moon, "Demonstrations on Campus and the Case of Israeli Apartheid Week" in *supra* note 37, ch 9; In the United States, see Stanley Fish, "Academic Freedom and the Boycott of Israeli Universities" in Akeel Bilgrami & Jonathan Cole, eds *Who's Afraid of Academic Freedom?* (New York, New York: Columbia University Press, 2015) 275; See Judith Butler "Exercising Rights: Academic Freedom and Boycott Politics" in Akeel Bilgrami & Jonathan Cole, eds *Who's Afraid of Academic Freedom?* (New York, New York: Columbia University Press, 2015) 293; See John Mearsheimer "Israel and Academic Freedom" in Akeel Bilgrami & Jonathan Cole, eds *Who's Afraid of Academic Freedom?* (New York, New York: Columbia University Press, 2015) 316.

66 *Supra*, note 18.

the university). Its criticism focused on the purported relationship between the corporate ties and pro-Israel sympathies of some of the Foundation's board of directors, and decisions made by the university leadership regarding campus disputes involving the Israeli-Palestinian conflict. Among other things, the pamphlet stated, "The [Foundation] is biased by the presence and influence of staunch pro-Israel lobbyists, activists, and fundraising agencies," and it was "the tail that wags the dog that is York University."[67]

Within a day of the pamphlet's appearance, the university issued a widely distributed media release denouncing the pamphlet. In the release, the university president condemned it as "highly offensive material, which singles out certain members of the York community on the basis of their ethnicity and alleged political views."[68] Another person quoted in the media release called the pamphlet a "type of bigotry." The release did not mention the professor's name. Following the university's media release, several newspapers, including the *Toronto Star* and the *Globe & Mail*, wrote stories about the pamphlet, and identified the professor. The university had not sought to speak to the professor prior to issuing the release. In response, the faculty association filed a grievance in support of the professor respecting the purported infringement of his academic freedom.

The academic freedom provision in the collective agreement expressly required the parties to continue the practice of "upholding, protecting and promoting academic freedom as essential to the pursuit of truth and the fulfillment of the University's objectives."[69] It went on to guarantee the right of professors "…to criticize the University or society at large; and to be free from institutional censorship."[70] The article did not contain a provision requiring professors to exercise their academic freedom in a 'responsible' or 'reasonable' fashion. Arbitrator Russell Goodfellow noted that the academic freedom guarantee was defined in extremely broad terms, and this would be his interpretative talisman for assessing whether the collective agreement was breached in this instance.

Importantly, the arbitrator stated that a broad reading given to a professor's expressive freedom would not deprive the university of its own freedom of speech: "Simply because a matter emerges from the pen or computer of a faculty member does not mean that the University is barred from addressing it. The University has the right to take positions, including public positions, on whatever matter it chooses."[71] However, in doing so, a university must exercise restraint, because of the sensitive circumstances in which it finds itself:

> *Where the University chooses to make a public statement in respect of the academic activities of one of its professors, however, it finds itself in a delicate position. Article 10.01 [the academic freedom provision] requires the University not only to not give offense to the concept of academic freedom, but to uphold, protect and promote it. For this reason, simply choosing to speak publicly about the teachings or writings of a faculty member is a vexed question. In many instances, the better option may be to choose silence and to allow public discussion or debate to take its course.*[72]

67 *Ibid* at para 2.
68 *Ibid* at par 1.
69 *Ibid* at para 15.
70 *Ibid*.
71 *Ibid* at para 29.
72 *Ibid* at para. 30 [emphasis added].

In such circumstances, Arbitrator Goodfellow reasoned, universities have to perform a "highly judicious balancing act" that would address both its own concerns as well as respecting the academic freedom of its faculty members.[73] Part of the balancing act would involve the determination of whether the offensive remarks were directed at vulnerable people who have little opportunity to defend themselves, or at better-positioned members of the community who can competently answer for themselves. In this case, he found that the target of the professor's criticisms were well-positioned to respond to the pamphlet's allegations.

In the end, the arbitrator upheld, in part, the union's grievance, and found that the professor's academic freedom had been infringed. He observed that the university had not even considered the issue of academic freedom when it drafted and issued the media release. Arbitrator Goodfellow was critical of both the university and the professor, finding that: "…neither [of them] behaved as they should." The professor, he said, was unlikely to have been as surprised as he said he was when the university reacted to his pamphlet. But, crucially, the arbitrator stated that the professor and the university did not stand in the same position regarding their respective actions. As such, he noted that:

> *…the fact remains…that York breached [the academic freedom provision of the collective agreement] by failing to respect Professor Noble's rights as an academic. Indeed, it may be said that York failed to extend Professor Noble even the most basic of courtesies that might reasonably be expected to be enjoyed by a faculty member. The University publicly vilified his work without first consulting him or [the faculty association] to advise of its concerns, to investigate the matter, or to indicate what it was contemplating.*[74]

The power imbalance between the two meant that their actions had to be judged distinctively:

> *Professor Noble handed out a two-page flyer to a number of people on campus, at least in part, as a scholarly exercise and in accordance with his Collective Agreement rights. York, by contrast, issued a two-page Media Release to several of the major news organizations in the country and posted it on its website for the world to see. While Professor Noble, as I have already stated, might reasonably have expected such treatment from others, he had the right to expect more from York.*[75]

In his consideration of remedies, Arbitrator Goodfellow ordered the university to remove the media release from its website. He did not direct the university to issue an apology, and he dismissed the union's claim for defamation damages. However, he did allow a modest damage award of $2,500 for the breach of the professor's academic freedom.[76]

In the prevailing arbitral landscape of academic freedom awards that offer a hesitant, incomplete and subdued approach towards intra-mural expression, *York University* stands out. The ruling is significant for several reasons. It recognized a liberal scope for the right of a professor to criticize her or his institutional leadership. It endorsed the general right of a university to reply to intra-mural criticism when warranted. The award required the university to think through its academic freedom obligations towards a professor before issuing a statement or taking other action in reply to intra-mural criticism. It aptly cautioned a university — because of its considerable power within the public sphere — to weigh when and whether a

73 *Ibid* at para 32.
74 *Ibid* at para 103.
75 *Ibid* at para 104.
76 *Ibid* at para 75.

reply is appropriate, given the existence of more and less vulnerable groups within the broader university community. And the ruling established a viable balancing test for universities to employ in such circumstances. While it did not explore the outer boundaries of permissible intra-mural expression — and, to be fair, that ought to wait for the right set of challenging facts — it did confirm that, in law, this form of expression within a university environment deserves a generous content in light of its sizeable purposes.

4. Ontario University Free Speech Policies

In August 2018, the newly elected Ontario government of Premier Doug Ford issued a directive that all provincially funded universities and colleges in the province were to create and publicly post free-speech policies which would protect a broadly defined right of expression on post-secondary campuses. The Ontario government's directive required those universities and colleges to ensure through these policies that they would be places for open discussion and free inquiry, that students would not be shielded from disagreeable or offensive ideas and that, while members of the academic community would be free to criticize and contest views expressed on campus, they would not be entitled to interfere with the freedom of others to express their views.[77] The free speech policies from the universities and colleges were submitted to the Ontario government at the beginning of January 2019.

A review of the free speech policies submitted by 16 Ontario universities in response to the Ontario government's directive indicates that intra-mural expression did not appear as a prominent feature in the policies.[78] Only two of the 16 university policies — Toronto and Western — provided any explicit recognition of intra-mural expression in their policy. Western's policy, for example, states that freedom of expression: "also includes the right to criticize the University and society at large."[79] Six of the remaining universities contained implicit language in their free speech policies that could be reasonably stretched to cover intra-mural expression, such as at Queen's: "Queen's students, faculty, staff and visitors have the right to exercise free expression at the University."[80] The remaining university policies provided no explicit or implicit language on intra-mural expression.

Three factors should be kept in mind when assessing the significance of these Ontario university free speech policies to the protection of intra-mural expression as a primary compon-

77 Government of Ontario, *Ontario Protects Free Speech on Campuses: Mandates Universities and Colleges to Introduce Free Speech Policy by January 1 2019,* (News Release), (Office of the Premier, 30 August 2018); Government of Ontario, *Upholding Free Speech on Ontario's University and College Campuses*, (Backgrounder), (Office of the Premier, 30 August 2018).

78 The universities whose free speech policies were reviewed were: Brock, Carleton, Guelph, Lakehead, McMaster, Nipissing, Ontario Tech, Ottawa, Queen's, Ryerson, Toronto, Trent, Waterloo, Western, Wilfred Laurier and York.

79 Western University, "Policy 1.54 – Freedom of Expression Policy" (29 November 2018), online (pdf): *Manual of Administrative Policies and Procedures* <uwo.ca/univsec/pdf/policies_procedures/section1/mapp154.pdf>

80 Queen's University, "Free Expression at Queen's University" (18 December 2018), online: *University Secretariat and Legal Counsel* <queensu.ca/secretariat/policies/administration-and-operations/free-expression-queens-university-policy#targetText=Policy%20Statement%3A,which%20University%20is%20also%20committed,disturbing%2C%20offensive%2C%20or%20unpopular>.

ent of academic freedom. First, academic freedom and freedom of expression are overlapping, but distinct, categories of freedom. One protects a fulsome and dynamic right to teach, write, speak, and criticize freely on academic, social, and civil matters as a member of a community of scholars without being bound by prescribed orthodoxy. Academic freedom belongs both to the individual professor, as well as to the collective body of the professoriate.[81] The other protects the broad freedom of expression on a variety of mediums, subject only to the justifiably reasonable limits of the law. The expressive freedom belongs generally to all members of the university community. In the case of the university free speech policies in Ontario, they provide content on the scope and limits of free expression on an academic campus, but they do not, explicitly or implicitly, speak to, or abridge, the breadth or the predominance of the negotiated right of academic freedom.

Second, these free speech policies would appear to have only a limited scope in law. In effect, they are recommendations on how the various members of the university community, including visitors, should conduct themselves when seeking to address, criticize or defend a particular idea or activity that is related to a campus event. However, when put to the test, such policies are always deemed to be subordinate to legislation, to collective agreements, and to other binding instruments that have the force of law. They are also subject to the arbitral common law standard of reasonableness, which would also trim the reach of their legal coverage.[82] As the British Columbia Court of Appeal ruled in *Alma Mater Society of UBC*,[83] university policy statements are not generally considered to be contractually enforceable documents of law. Thus, any faculty member or other unionized staff whom the university wished to punish or reprimand for actions or inactions that purportedly breached a free speech policy would have the full protections of both the 'just cause' guarantee and the academic freedom provisions in the governing collective agreement.

And third, the relative absence of any explicit mention of intra-mural expression in most of the Ontario university free-speech policies under review says much more about the political origins of the government's directive to produce these policies than it does about the importance of intra-mural speech in a university setting. It seems likely that the shaping of these statements of policies was motivated by a desire to satisfy a politically minded directive from the Ontario government, which was concerned about the perceived underrepresentation of conservative-minded speakers and the purported overrepresentation of more liberal or radical views on provincial campuses.[84] While occasional controversaries on university campuses have emerged over the past decade with respect to high-profile and divisive speakers (such as

81 Turk, *supra* note 37 at 11-14.

82 See *Lumber & Sawmill Workers' Union, Local 2537 & KVP Co* (1965), 16 LAC 73 (OLAA) (Arbitrator: D Wren) aff'd *Irving Pulp & Paper Ltd v CEP, Local 30,* 2013 SCC 34 at paras 81-2.

83 *Gray* v *Alma Mater Society of UBC,* 2003 BCSC 846, paras. 89-97. In this case, the Court of Appeal dealt with the claim by a student organization that the academic freedom policy statement of the University was a contractual document which provided legal shelter for the student group wishing to be able to display anti-abortion materials at university gatherings. At para. 92 of its decision, the Court of Appeal stated: "…a statement of policy in a university document, without more, does not give rise to an enforceable contractual "right" by the students of that university."

84 Justin Giovannetti & Jack Hauen "Doug Ford says Ontario postsecondary schools will require free-speech policies", *The Globe and* Mail (30 August 2018), online: <www.theglobeandmail.com/canada/article-doug-ford-says-ontario-postsecondary-schools-will-require-free-speech/>.

Professor Jordan Peterson) and issues (including the Israeli-Palestinian conflict), universities in Canada and Ontario have generally, but not always, sustained their tradition of providing open and robust forums for debating some of society's most fervently-felt issues with all of the usual mixture of academic rigour and passionate intensity that such contentious issues often draw. The drafting of these policies was meant to satisfy a government directive to broadly protect expression rights generally on university campuses, not to develop a finely granular, and comprehensive, understanding of free expression within the larger context of academic freedom. Consequently, the very occasional mention of the freedom of intra-mural expression in the policies neither reduces its importance as a primary component of academic freedom, nor does it alter in any way the special place of negotiated collective agreement provisions as the foundational legal source for giving life and breadth to academic freedom in Canada.

5. Conclusion

The Canadian Charter of Rights and Freedoms provides constitutional protection for the freedom of thought, belief, opinion and expression, and proclaims them as part of the fundamental freedoms of Canadians.[85] While universities are not directly subject to the *Charter* — it only applies to state actors, and the Supreme Court of Canada ruled in 1990 that universities are autonomous from the Canadian state[86] — the courts in Canada have endorsed a broad, but not absolute, scope for expressive rights that should serve as a constructive guide for universities when the issues of academic freedom and intra-mural expression arise during a campus controversy.[87] In *WIC Radio*, the Supreme Court of Canada stated in 2008, "We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones," and "public controversy can be a rough trade, and the law needs to accommodate its requirements."[88] A leading text on Canadian constitutional law has observed that:

85 *Canadian Charter of Rights and Freedoms,* s 2(b), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

86 *McKinney, supra*, note 8. Note that several recent lower court rulings have subsequently held that aspects of a university's activities might fall within the scope of the *Charter of Rights and Freedoms,* particularly if a level of government has devolved specific state responsibilities to a university. See *UAlberta Pro-Life v University of Alberta*, 2020 ABCA 1; See *Wilson v University of Calgary*, 2014 ABQB 190; See *Pridgen v University of Calgary*, 2012 ABCA 139; See *R. v Whatcott*, 2002 SKQB 399. This is not a consistent trend. See *British Columbia Civil Liberties Association v University of Victoria*, 2016 BCCA 162. See generally Michael Marin, "Should the Charter Apply to Universities?" (2015) 35:1 NJCL 29.

87 See *Doré v. Barreau du Québec,* 2012 SCC 12 [*Doré*]. The Supreme Court of Canada endorsed the importation of the values of the *Charter* — including the freedom of expression — into the development of the Canadian law in areas beyond the activities of state actors. The Supreme Court in *Doré* held that a reprimand for a lawyer in response to a vituperative letter that he wrote to a presiding judge was appropriate, in light of the civility requirements anchored in law that lawyers must follow. However, once the specific context of *Doré* — the legal regulation of lawyers as officers of the court — is put aside, the ruling also stands for the principle that administrative decision-makers, such as labour arbitrators, are required to consider and apply fundamental *Charter* values, including the freedom of expression, when reading the applicable statutes and collective agreements before them: para 35. For a recent example of the breadth of the expressive freedom in the unionized workplace context, see *Taylor-Baptiste v Ontario Public Service Employees Union*, 2015 ONCA 495.

88 *WIC Radio Ltd v Simpson*, 2008 SCC 40 at paras 4, 15 [*WIC Radio*]. Like *Doré*, the SCC in *WIC Radio* also endorsed the importation of *Charter* values, including a broadly defined freedom of expression, into the Canadian common law.

"Political debate is often heated and intemperate. Criticism of public institutions and officials will not always be respectful and measured: those who challenge established authority often have to resort to strong language and exaggeration in order to gain attention."[89]

The fact that only a handful of arbitration cases have considered intra-mural expression since the early 1990s may speak to the fact that the right of faculty members to critically address their academic leadership is actually quite well respected in practice. Equally, it could mean that the opaque and lukewarm protection offered by the law to date has chilled the willingness of many university teachers to assertively challenge the actions of their deans, presidents and governors. Likely, the answer lies somewhere in between. The job ahead is to articulate a coherent, purposive and workable definition of intra-mural expression that can become embedded in the law. The Canadian advantage is that the power to accomplish this has not been ceded to distant courts, but instead is functionally grounded in the negotiated language agreed upon by universities and faculty unions at the collective bargaining table. With this language in hand, the remaining task is to give content and context, through arbitral litigation, to the special place of academic freedom in Canada and, more particularly, to the salient purposes of intra-mural expression in the university workplace.

Accordingly, a purposive interpretation of intra-mural expression, as an integral part of academic freedom, would recognize the broad scope for expressive freedoms in Canada. It would take into account the *sui generis* nature of academic freedom, the narrowly defined limitations in the law on speech and expression, the specific language in the collective agreement, the qualified right of the university to reply to the criticism, the inherent power imbalance between the university and an individual professor, and the appropriate parallels that can be drawn to the culture of debate in Parliament and other comparable forums. The values of civility and collegiality, respect and fidelity, responsibility and reasonableness should not be the only forms of protected expression available to the professoriate when they are engaged in contesting the words, policies or actions of the academic leadership. While these values have their venerated place in persuasively advancing arguments and expressing dissent within the academy, frank and blunt criticism, along with candid and even intemperate comments, are also permissible means to assert a position, and are thus deserving of generous legal protection.

89 Robert Sharpe & Kent Roach, *The Charter of Rights and Freedoms,* 6th ed (Toronto, Ontario: Irwin Law, 2017) at 166.

Constitutional forum constitutionnel

Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy

Alison Braley-Rattai and Kate Bezanson*

Introduction

In August 2018, the Ford Government in Ontario introduced a 'Directive' entitled "Upholding Free Speech on Ontario's University and College Campuses" (the Directive).[1] The Directive required all publicly supported universities and colleges[2] in Ontario to create a free speech policy by January 1st 2019 that applies to "faculty, students, staff, management and guests," and includes a) a definition of free speech, and b) reference to various "principles" of free speech similar to those elucidated by the University of Chicago (Chicago Principles).[3] According to the Directive, speech that is otherwise illegal is not permitted. Illegal speech includes hate speech and uttering threats that are proscribed by Canada's *Criminal Code*,[4] defamatory

* Dr. Alison Braley-Rattai is Assistant Professor of Labour Studies at Brock University. Dr. Kate Bezanson is Associate Professor of Sociology and Associate Dean of the Faculty of Social Sciences at Brock University.

1 Ministry of Training, Colleges, and Universities, "Upholding Free Speech on Ontario's University and College Campuses" (30 August 2018) online: *Government of Ontario Newsroom* <https://news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html> [perma.cc/7VXR-K4RB] [Directive].

2 This piece is only concerned about the university sector. There are noteworthy differences between colleges and universities with regard to topics discussed in this piece that are unexplored here.

3 The Committee on Freedom of Expression, "Report of the Committee on Freedom of Expression" (2014) online (pdf): *University of Chicago* <provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> [perma.cc/LAA4-RW43].

4 *Criminal Code*, RSC 1985, c C-46, s 319(1).

speech which can give rise to both criminal[5] and civil[6] actions, as well as workplace harassment.[7]

The Directive obliges universities to rely upon existing internal measures to deal with students who run afoul of the ensuing policy. It also obliges universities to take student groups' compliance with the policy into account to secure institutional funding or official recognition. It concludes that "unresolved complaints" against an institution "about free speech" may be referred to the Ontario Ombudsman after having exhausted the university's internal channels.[8] The Directive includes a reporting requirement to an Ontario government agency — the Higher Education Quality Council of Ontario (HEQCO) — and institutional compliance with the speech policy is conditioned by the prospect of provincial funding cuts.

Many Ontario universities previously had express or adjacent speech policies that reflected their central mission: to produce and share knowledge via research and teaching.[9] These policies included language analogous to the requirements of the Directive, in particular recognition that universities were places of "open discussion and free inquiry."[10] Constituent members of the University — students, faculty, staff, administrators, and, by extension, society at large — have long evinced principled disagreement among themselves about what open discussion and free inquiry require in different circumstances, including genuine disagreement about what kind of expression counts as hate speech, defamation, discrimination, and harassment, all of which remain, rightly, proscribed.[11] Speech, on campus as elsewhere, has never been limitless; its bounds, and the principled justification of those bounds, are negotiated and renegotiated.[12]

In traditional accounts of free speech, speech is instrumental because it aids truth-seeking and the exchange of ideas necessary for a democratic polity, and is also intrinsically good

---

5 *Ibid*, ss 297-304.

6 *Libel and Slander Act*, RSO 1990, c L.12.

7 *Occupational Health and Safety Act*, RSO 1990, c O.1; *Human Rights Code*, RSO 1990, c H.19.

8 Directive, *supra* note 1.

9 See e.g. McMaster University "Statement on Academic Freedom" (15 December, 2011) online (pdf): *McMaster University* <secretariat.mcmaster.ca/app/uploads/SPS-E1-Statement-on-Academic-Freedom.pdf> [perma.cc/2669-KP4N]; University of Toronto Governing Council, "Statement on Freedom of Speech" (18 May, 1992) online: *University of Toronto* <governingcouncil.utoronto.ca/secretariat/policies/freedom-speech-statement-protection-may-28-1992> [perma.cc/2YZG-PSPL].

10 Directive, *supra* note 1.

11 See e.g. Richard Moon, "Understanding the Right to Freedom of Expression and its Place on Campus" (Fall 2018) online: *Academic Matters* <academicmatters.ca/understanding-the-right-to-freedom-of-expression-and-its-place-on-campus/> [perma.cc/DPQ6-6N78].

12 The protection of free expression is not the preserve of either those whose perspective align with liberalism and progressivism or conservatism, as members of both sides have sought to limit the speech of those with whom they disagree. Both sometimes appeal to the same logic: that the speech in question disparages members of certain groups in a way that is harmful to them, constituting a prohibited act of harassment, hate, or discrimination; at other times, with an appeal to a basic right to speak or express freely. See generally Nat Hentoff, *Free Speech for Me — But Not for Thee: How the American Left and Right Relentlessly Censor Each Other* (New York: Harper Collins, 1992); Diane Ravitch, *The Language Police: How Pressure Group Restrict What Students Learn* (New York: Knopf, 2003).

because it enables the self-expression necessary for autonomy.[13] Universities are principally concerned with the *instrumental* function of free speech and expression. A core purpose of a university education is to learn to distinguish the credible or substantive — ideas that are supported by evidence, or from which one may draw reasoned inferences, where nuanced distinctions are necessary for comprehensive and accurate understanding — from that which ignores or cherry-picks evidence, draws inferences and conclusions that are easily rebutted, or forsakes nuance.

The fact that the University is in the business of distinguishing ideas and speech does not mean that it is justified in censoring what it may deem to be bad. However, the Directive does not illuminate how to address disagreement among constituent members of the University identified above. As such, it offers no 'solution' to the alleged campus speech 'problem.'

The purpose of this article is to consider the Directive through the prism of one its principal potential consequences: to make the *Charter* applicable to those aspects of Ontario's universities that are animated by free speech concerns. While some argue that this outcome may be overdue,[14] this paper reflects upon the application of the *Charter* to Ontario's universities regarding the intersection of expressive freedom, academic freedom, and institutional autonomy, which is presently undertheorized. It proceeds in two parts. Part I reviews the applicability of the *Charter* to the University sector. Part II reflects on what such applicability might imply for the intersection of expressive freedom, academic freedom, and institutional autonomy. We suggest that the expressive concerns animating the unique landscape of university campuses require a more nuanced understanding of the differences and tensions among expressive freedom, academic freedom, and institutional autonomy.

Part I: The *Charter* and its application to universities

It is perhaps axiomatic that the University's mission underwrites the quintessentially public good of an educated citizenry, whether understood in the classical Aristotelian sense of education leading to better democratic governance, or in a more contemporary sense of enabling the provision of high-quality goods and services via a skilled workforce. In Canada, universities provide education to nearly 1.5 million students per year.[15] They are partially publicly funded, and they operate pursuant to establishing legislation at the provincial level.[16]

13 See generally John Stuart Mill, "On Liberty" in John Gray, ed, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991). Mill's conception is adopted by the Supreme Court of Canada in its seminal freedom of expression case, *Irwin Toy Ltd v Quebec (AG)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

14 See e.g. Franco Silletta, "Revisiting *Charter* Application to Universities" (2015) 20 Appeal 79; Linda McKay-Panos, "Universities and Freedom of Expression: When Should the *Charter* Apply?" (2016) 5 Can J Human Rights 59; Sarah E Hamill, "Of Malls and Campuses: The Regulation of University Campuses and Section 2(b) of the *Charter*" (2017) 40:1 Dal LJ 157; Dwight G Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45 RDUS 133; Michael Marin, "Should the *Charter* Apply to Universities?" (2015) 35 NJCL 29.

15 "Enrollment by University" (2019) online: *Universities Canada* <www.univcan.ca/universities/facts-and-stats/enrolment-by-University> [perma.cc/RCX6-8JY9].

16 See e.g. *University of Ontario Institute of Technology Act, 2002*, SO 2002, c 8, Sch O; *Algoma University Act, 2008*, SO 2008, c 13.

Given their avowedly public character, it may seem illogical that *Charter* rights are generally neither operational nor guaranteed at a university. Courts in both Saskatchewan[17] and Alberta[18] have affirmed that the *Charter* applies to the University sector in view of its provision of an important government program — notably, publicly-available post-secondary education — which other jurisdictions, notably Ontario[19] and British Columbia,[20] have thus far declined to do. The *Charter*'s applicability — or lack thereof — to the University sector in Canada has thus resulted in contradictory and unsettled caselaw.

As Turk and Cameron also canvass in this volume, the *Charter* applies to government, but not private, action. This stems from the view that since private actors may be restrained by government action, it is only government that requires constitutional restraint. This distinction in applicability has drawn criticisms of arbitrariness.[21] Nonetheless, drawing the distinction between government action and private action is the purview of jurisprudence involving the *Charter*'s "application clause" (section 32).[22] The mere fact that an entity exists pursuant to legislation or is highly regulated, is in receipt of public funding, or that it serves a public purpose does not automatically make the difference. As Justice La Forest explained:

> Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse.[23]

The two earliest landmark cases involving section 32 are *McKinney v University of Guelph* (*McKinney*)[24] and *Eldridge v British Columbia (Attorney General)* (*Eldridge*).[25] *McKinney*

17 See *R v Whatcott*, 2002 SKQB 399.

18 *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 [*UAlberta Pro-Life*]. See also *R v Whatcott*, 2012 ABQB 231 [*Whatcott*]. There, the Alberta Court of Queen's Bench upheld a lower court's ruling that the *Charter* applied to the University of Calgary, in view of the language of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 [*PSLA*]. Mr. Whatcott, who was not affiliated with the University of Calgary, left anti-gay and anti-abortion pamphlets on vehicles parked at the University, and was arrested under the province's *Trespass to Premises' Act*, RSA 2000 c T-7, after refusing to leave the premises. The Court concurred with the lower court's conclusion that the "the University is the vehicle through which the government offers individuals the opportunity to participate in the post-secondary educational system," and that decisions which prevent participation in "learning opportunities […] directly impacts the stated policy […] under the [*PSLA*]" (at para 29). In this case, his arrest for trespassing violated his *Charter* rights to free expression (at para 49).

19 See e.g. the following trio of cases: *AlGhaithy v University of Ottawa*, 2012 ONSC 142 [*AlGhaithy*]; *Telfer v The University of Western Ontario*, 2012 ONSC 1287 [*Telfer*]; *Lobo v Carleton University*, 2012 ONCA 498.

20 *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162.

21 See e.g. Patricia Hughes, "The Intersection of Public and the Private under the *Charter*" (2003) 52 UNBLJ 201; Allan C Hutchison & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38:3 UTLJ 278.

22 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

23 *McKinney v University of Guelph*, [1990] 3 SCR 229 at 269, 76 DLR (4th) 171 [*McKinney*].

24 *Ibid.* See also *Harrison v University of British Columbia*, [1990] 3 SCR 451, 77 DLR (4th) 55; *Stoffman v Vancouver General Hospital*, [1990] 3 SCR 483, 76 DLR (4th) 700.

25 *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577 [*Eldridge*]. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31.

invoked the *Charter*'s applicability to the University sector. On the facts of the case involving a question of mandatory retirement, the Court determined that the *Charter* did not apply; the autonomy in their day-to-day operations precluded universities from constituting a government entity. Nevertheless, the Court was alive to the possibility that even if the University was not a government *entity* (such that *all* of its activities may come under *Charter* scrutiny) some *particular activity* of non-government entities might constitute government action (such that only *that* activity could come under *Charter* scrutiny), but only if that activity was somehow mandated or directed by government. The purpose of such an analysis has been to preclude the government from establishing a non-government entity to deliver what is otherwise a government program, policy, or objective, and thus derogating from its *Charter* obligation.

Eldridge tested this 'non-derogation' principle. The case involved the denial of sign language interpretation as one of the services provided pursuant to the province of BC's comprehensive, public medical insurance plan. In *Eldridge,* the Court held that by "guaranteeing access to a range of medical services,"[26] the *Hospital Insurance Act*[27] constituted a "specific government policy,"[28] thus bringing the provision of those services under *Charter* scrutiny. The corollary *Medical and Health Services Act*[29] provided wide discretion to determine what services would be included within that plan. The discretionary determination to deny sign language interpretation as part of the public plan was held to violate the *Charter*'s equality rights provision, even while the *Medical and Health Services Act* itself remained constitutionally sound.

Universities' governance structures remain sufficiently independent of government that they are not considered government entities, but certain of their activities have attracted *Charter* scrutiny. One reason for this is when a university has been held to be implementing a specific governmental policy or program when engaged in those activities.[30] A second reason is when a university is found to be exercising statutory control over specific activities. The power of compulsion beyond that which a 'natural person' possesses is a key component of the criterion of finding the *Charter* to apply in view of a grant of statutory authority. Some commentators have argued that student discipline, with its power to carry long-term and serious consequences for students, particularly in the context of expulsion, *ipso facto* constitutes such a grant,[31] although courts have not always agreed.[32]

Finally, the *Charter* may be at play in virtue of administrative law principles, and not in virtue of section 32 at all, in which case the *Charter* is thought to be 'indirectly' — as opposed to 'directly' — applicable. Administrative law is a branch of law concerned with the quality of decision-making by public bodies; it concerns the circumstances under which administrative decisions may be judicially reviewed, and the circumstances under which the decisions of

26 *Ibid*, at 51.
27 *Hospital Insurance Act*, RSBC 1979, c. 180, as repealed by RSBC 1996, c 204.
28 *Eldridge*, *supra* note 25 at 51.
29 *Medical and Health Care Services Act*, SB.C 1992, c. 76, as repealed by *Medicare Protection Act*, RSBC 1996, c 286.
30 See e.g. *Pridgen v University of Calgary*, 2010 ABQB 644 [*Pridgen* (QB)]; *R v Whatcott*, *supra* note 18; *UAlberta Pro-Life*, *supra* note 18.
31 See Silletta, *supra* note 14; Marin, *supra* note 14.
32 See *Telfer*, *supra* note 19; *AlGhaithy*, *supra* note 19.

such bodies may be rejected. The failure of such bodies to pay adequate attention to 'balancing' the *Charter* interests of those involved with other considerations given by the relevant policies, that is to consider '*Charter* values,'[33] may result in a decision being rejected by a reviewing court.[34]

Alberta has taken the broadest approach to the application of the *Charter* to the University sector among the various jurisdictions. In *Pridgen v University of Calgary* (*Pridgen*),[35] the Court of Queen's Bench held that students disciplined by the University of Calgary for Facebook postings critical of one of their professors had had their *Charter* rights to freedom of expression violated. There, the province's *Post-Secondary Learning Act* (*PSLA*)[36] was held to implement a government program, thus bringing at least some aspects of the University within *Charter* applicability. At the Court of Appeal, however, two of the three justices declined to answer the question of the *Charter*'s applicability, choosing to decide the questions before it upon other legal principles.[37] Only Justice Paperny undertook a comprehensive *Charter* analysis. She opined that the university in question had acted pursuant to both a specific policy or program entrusted to it by the *PSLA*, *and* a grant of statutory authority owing to the power to discipline students — up to and including expulsion — granted by the *PSLA*.

Despite the fact that *Pridgen* did not bring the University sector within the *Charter*, Justice Paperny's comprehensive analysis "evoked a whole new wave of comments on the possibility of *Charter* application to universities in the media, on blogs, and from law firms."[38] In early 2020, in *UAlberta Pro-Life*, the Alberta Court of Appeal expressly waded into the unsettled *Charter* waters. Pursuant to the principle elucidated in *Eldridge*, it found that the *PSLA* evidenced a government program in its provision of public post-secondary education.[39] The Court issued this ruling despite the fact that the lower court had chosen to dispense with the specific questions before it on the basis of administrative law principles, thus skirting the more complicated issue of direct *Charter* applicability.

Reviewing courts in Ontario have declined to apply the *Charter* in situations similar to those in which it has been held to apply by courts in other jurisdictions.[40] In its attempt to secure expressive rights of "faculty, students, staff, management and guests" on campus, however, the Directive carries the potential to persuade courts in Ontario to apply the *Charter* to aspects of the University. Offering reasons relevant to the Ontario Directive, in 2016 the BC Court of Appeal in *BCCLA v University of Victoria* concluded that the *Charter* did not apply to the University. Willcock J, writing for the unanimous court, wrote that "[t]he government

33 See e.g. *Doré v Barreau du Quebec* 2012 SCC 12; *Canada Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65.

34 For example, in the Alberta case *Wilson v University of Calgary*, 2014 ABQB 190, the Court of Queen's Bench determined that the discipline of students for having ignored a formal Notice from the University — to turn the placards of a Pro-Life display inward so that one had to enter the display to view it and could not simply view it as a passer-by — was unreasonable. There, the Court ruled that the decision did not take sufficient heed of the expressive rights of Pro-Life group members.

35 Pridgen (QB), *supra* note 30.

36 *PSLA*, *supra* note 18.

37 *Pridgen v University of Calgary*, 2012 ABCA 139 [*Pridgen* (CA)].

38 Newman, *supra* note 14 at 137-38.

39 *UAlberta Pro-Life*, *supra* note 18.

40 For academic criticism of the courts' rationale, see generally *supra* note 14.

neither assumed nor retained any express responsibility for the provision of a public forum for free expression on university campuses. The Legislature has not enacted a provision of the sort adopted in the United Kingdom," whose *Education Act*[41] obliges universities to secure free speech rights on campus. Justice Willcock concluded that BC's *Education Act* "does not describe a specific governmental program or policy which might have been affected by the impugned decisions" but also that there was "no evidence before the judge of any legislation or policy that does so."[42] The Ontario Directive goes some way to providing the type of evidence that the BC Court of Appeal might have found persuasive in that case, and that, accordingly, so might courts in Ontario in similar instances. Regardless, the possibility of the eventual application of the *Charter* to the University looms, given the recent Alberta Court of Appeal decision, the ongoing indirect applicability of the *Charter* upon administrative law principles, and the possibility of legislative changes similar to that expounded within the UK's *Education Act*.

The expressive concerns animating campus life — notably expressive freedom, academic freedom, and institutional autonomy — are at times conflicting and are not interchangeable. The addition of Ontario's Directive to unsettled provincial caselaw regarding the application of the *Charter* to universities lends urgency to the need for greater conceptual clarity about their scope and consequence. It is to these we now turn.

Part II: Academic freedom, institutional autonomy, and free expression: three interrelated, but distinct, concepts

There is scholarly support for the application of the *Charter* to the universities, particularly — though not exclusively — for purposes relating to students' free expression.[43] One motivation for this position stems from several cases where students/student groups were disciplined for, or otherwise prevented from, engaging in certain activities owing to the expressive content of those activities, and the view that that content ought normally to be allowed in a university setting. Supporters see the operation of the *Charter* within the University as a means to remedy limitations on the expressive rights of students by university administrators. The context for this position is the putative conflict between expressive rights on the one hand, and other values and principles such as equality and inclusion on the other. However, there is very little focus upon the countervailing demands emanating from within the exercise of expressive rights themselves.

Drawing in the judiciary over expressive rights on campus may opportune occasion when the judiciary is required to choose *which* expressive rights to champion. Expressive rights themselves are at times in conflict in university settings. In this context, insufficient academic and judicial differentiation among expressive freedom, academic freedom, and institutional autonomy carries implications that are underexamined. In contradistinction to the optimism in some scholarly literature, we are agnostic about the potential treatment of academic freedom under the *Charter*, proposing that it is too early for either optimism or pessimism. We seek instead to offer some initial critical reflection.

41 *Education (No. 2) Act 1986* (UK), 1986 c. 61

42 *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at paras 32-33 (underline in original).

43 Supra note 14.

In academic and judicial discussions, the term academic freedom is often conflated with freedom of expression. This stems from the fact that each is necessary to the proper functioning of the university. Jamie Cameron observes that "academic freedom and expressive freedom overlap," but they "do not serve identical purposes."[44] Academic freedom is here understood as a concept distinct from expressive freedom, pertaining to the individual rights and responsibilities of faculty members to research and teach without reference to prescribed doctrine, and to criticize the institutional decisions of the academy in the name of collegial governance.

Academic freedom derives from a longstanding notion that only members of the professoriate are sufficiently expert to command deference for their judgements on matters in which they are expert and to hold other members of the professoriate to account for theirs. Matthew W. Finkin notes that "within her sphere of professional competence a professor is not subject to lay disposition; she enjoys a professional liberty to test received wisdom, to propose new ways of thought, even to essay that which may be thoroughly distasteful — indeed, profoundly offensive — to the larger community from which the institution drew support."[45] This liberty is tied to the corollary duty to exercise it, with regard for scholarly standards "of care the determination of which, however, must lie in the hands of the academic profession."[46] Being concerned with the *legitimacy* of intellectual contribution, academic freedom is thus different from the broader notion of freedom of expression. The broader notion is both instrumentally *and* intrinsically good. Expressive freedom does not depend for its legitimacy upon the particular expertise of the speaker.

Shannon Dea asserts that expressive freedom and academic freedom are often conflated, with expressive freedom taking centre stage, sometimes to the "exclusion of academic freedom."[47] She attributes this to the fact that academic freedom, with its cluster of sub-freedoms — "to teach, to learn, to decide on which research questions to inquire into and what methods to use in that inquiry, to engage in extramural communication, and to criticize the university itself" — is more difficult to grasp than "the comparatively simpler concept of freedom of expression."[48] Indeed, in the popular imagination, academic freedom sometimes "has

---

44 Jamie Cameron, "Giving and Taking Offence: Civility, Respect, and Academic Freedom" in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 287 at 296.

45 Matthew W Finkin, "Academic Freedom and Professional Standards: A Case Study" " in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 65 at 65-66.The idea expressed in this quote is the basis for the American Association of University Professors' "1915 Declaration," see "1940 Statement of Principles on Academic Freedom and Tenure" online: *American Association of University Professors: Reports and Publications* <www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [perma.cc/Z2WQ-4ZCA]; "Statement on Academic Freedom" (25 October 2011) online: *Universities Canada* <www.univcan.ca/media-room/media-releases/statement-on-academic-freedom/> [perma.cc/VK53-LHFU]; John Semley, "Are University Campuses Where Free Speech Goes to Die?" (9 July 2019) online: *The Walrus* <thewalrus.ca/are-university-campuses-where-free-speech-goes-to-die/> [perma.cc/CHV7-KLA6]. Academic freedom is not limitless: see generally the chapter by Michael Lynk in this special issue.

46 *Ibid* at 66.

47 Shannon Dea, "First Dispatch: Academic Freedom and the Mission of the University" (5 September 2018) online: *University Affairs* <www.universityaffairs.ca/opinion/dispatches-academic-freedom/first-dispatch-academic-freedom-and-the-mission-of-the-university/> [perma.cc/E4SJ-Q483].

48 *Ibid*.

a broader and more inclusive meaning"[49] and accordingly is often viewed as a subset of free expression that can extend beyond members of the academy, to students speaking on matters of academic or public interest. Importantly, academic freedom inheres in members of the professoriate, and not others, owing to their expertise.

In contrast to both academic freedom and freedom of expression, institutional autonomy inheres in the capacities of the institution itself to make decisions without deference to partisan political pressure.[50] In a recent decision, the Ontario Superior Court had reason to revisit the evolution of institutional autonomy. There, the Court cited from the 1906 Flavelle Commission, which had been instigated "as a response to past political interference in university affairs."[51] The Court cited approvingly from the Commission: "the process by which universities make decisions should be autonomous from the political whims of government."[52] Accordingly, "institutional autonomy represents a fundamental principle of university governance in Ontario dating back to the early 20th century."[53]

Institutional autonomy, thus, is related to academic freedom in that it shares the idea that the university is an institution with a specialized mission that requires insulation from external interference. For example, the decision as to what programs to offer is appropriately thought of as an institutional decision about an academic matter, subject to codified internal and external review processes as well as collegial governance structures that, in principle, is insulated from external interference.[54] While institutional autonomy and academic freedom overlap, they can also be *in conflict.* At such times, conflating the concepts can lead to divergent outcomes and conclusions.

In the most comprehensive judicial treatment to date of the applicability of the *Charter* to the operation of the University and its implication for academic freedom[55] — Justice Paperny's analysis in *Pridgen* — the various concepts; expressive freedom, academic freedom and institutional autonomy, are conflated. Justice Paperny proposes that academic freedom and freedom of expression are "inextricably linked,"[56] that there is "no legitimate conceptual con-

49 Cameron, *supra* note 43 at 289.

50 The important concept of institutional autonomy is instantiated via statute. It is conditioned by external funding pressures, and therefore is porous, but not without form. See e.g. *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 [*CFS*]. There, in deciding that a particular government 'initiative' was ultra vires its legislative capacity owing to its statutory duty to preserve a space for institutional autonomy, the Court recognized that the government may present general direction with regard to provision of funding, but that any direction must be consistent with its own legislative authority.

51 *Ibid* at para 38.

52 *Report of the Royal Commission on the University of Toronto* (Toronto: LK Cameron, 1906) [The Flavelle Commission], cited in *Ibid* at para 39.

53 *CFS*, *supra* note 49 at para 45.

54 We need only refer to the situation in the US, where certain institutions have been threatened with defunding if they offer certain programs, to appreciate the importance of institutional autonomy. See e.g. Amanda Jackson, "University Stands by 'Problem of Whiteness' Course" (23 December 2016) online: *CNN* <www.cnn.com/2016/12/23/health/college-course-white-controversy-irpt-trnd/index.html> [perma.cc/DU8K-3WXJ].

55 Even though the decision in *Ualberta Pro-Life*, *supra* note 18, had the effect of directly applying the *Charter* to Alberta's universities, the Court cited approvingly of Justice Paperny's earlier analysis in *Pridgen* (CA), *supra* note 37.

56 *Pridgen* (CA), *ibid* at para 115.

flict between academic freedom and freedom of expression," and that these two freedoms are "handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge."[57] At the same time, she characterizes academic freedom as an individual right of the professor, as inclusive of institutional autonomy, and as a means by which "to promote discussion in the university community as a whole."[58] While Justice Paperny uses all three terms — academic freedom, institutional autonomy, and freedom of expression — at different times in her analysis, thus suggesting that she recognizes that they are distinct concepts, the ensuing analysis elides the distinctions, failing to identify, as Cameron does, the "different purposes" they serve, leaving only what is overlapping among them.

Marin contends that "it is important not to conflate institutional autonomy and academic freedom."[59] He notes that institutional autonomy and academic freedom are in tension, precisely *because* universities may at times deploy their autonomy to override academic freedom. He maintains that, as a result, universities should not be "the sole arbiters of academic freedom" and concludes that "applying the *Charter* in a balanced manner, is probably the most appropriate forum to resolve disputes relating to academic freedom."[60] Two important facts bear noting in the relationship between institutional autonomy and academic freedom under the *Charter*. The first is that in Canada, universities are *not* the sole arbiters of academic freedom in most cases. The second is that the constitutional 'balancing' of free speech principles in the US has often served to *uphold* the institutional autonomy of universities over faculty exercises of academic freedom,[61] the very thing about which Marin is concerned.

As Michael Lynk explicates in a separate piece in this issue, in Canada the concept of academic freedom is captured as a right that is negotiated within collective agreements between universities and faculty associations.[62] Adjudication about academic freedom is generally the purview of independent arbitrators, rather than of universities themselves in their management function. This is not to suggest that the judiciary is *incapable* of dealing effectively with issues concerning academic freedom; at this point, there is little substantive basis to tell. Rather, the fact that universities in Canada are *not* the sole arbiters of such conflicts removes any urgency for judicial intervention on the basis that such conflicts are, as a matter of course, decided by one of the two contending sides.

The arbitration of conflicts over academic freedom in Canada can be contrasted with the manner in which academic freedom is treated in the US, where the courts *are* the final arbiter of such conflicts under the auspices of their First Amendment jurisprudence. In First Amend-

57 *Ibid* at para 117.
58 *Ibid* at paras 114-5.
59 Marin, *supra* note 14 at 56.
60 *Ibid.*
61 See generally David M Rabban, "Professors Beware: The Evolving Threat of 'Institutional' Academic Freedom," in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 23. See also Len Findlay, "Institutional Autonomy and Academic Freedom in the Managed University" in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 49.
62 See also Linda Rose-Krasnor & Michelle Webber, "Freedom with Limits? The Role Faculty Associations Play Protecting the Speech Rights of Their Members" (Fall 2018) online: *Academic Matters* <academicmatters.ca/freedom-with-limits-the-role-faculty-associations-play-protecting-the-speech-rights-of-their-members/> [perma.cc/4DE5-3QSD].

ment jurisprudence, principles of academic freedom are elucidated as individual rights of the professoriate, in *counterbalance* to the First Amendment rights of the institutions themselves. As has been noted by American jurist Richard Posner, First Amendment academic freedom refers to both the freedom of the institution *and* the freedom of the teacher and "these two freedoms are in conflict."[63] In a search for the appropriate balance between the two, academic freedom has sometimes been construed more narrowly than it might otherwise have been, to preserve a space for the constitutionally equal rights of the institution to operate.[64]

Institutional design in Canada is different. Academic freedom, as a creature of collective agreements, is protected more or less broadly by the language in the agreement made between the contending parties themselves. With this design, the reach of academic freedom is contemplated by the very experts to whom it would apply. Moreover, a relatively robust arbitral jurisprudence has developed concerning the exercise of academic freedom in the *particular* context of its existence as a collective agreement right, with its own institutional particularities, rather than a subset of the constitutional right to free expression. One particularity is that arbitrators are usually jointly selected by universities and faculty unions when issues arising between the parties require arbitration. They are selected owing to the arbitrators' expertise not only in the workplace, but in the specific *type* of workplace: the academy. Other institutional features particular to administrative decision-making, including greater access, recommend this particular design. If in fact the *Charter* is the "most appropriate forum" for adjudicating issues of academic freedom, the reason for this is not immediately obvious here; in the US, the dearth of unionized faculty makes it largely impossible to deal with these issues in any other fashion. That is not so in Canada.

The application of the *Charter* to the University would not, of course, extinguish the current administrative design.[65] In the new world of *Charter* applicability, some faculty associations might start making *Charter* arguments to bolster their claims to academic freedom. However, the addition of constitutional considerations in the form of the expressive rights of the institution[66] as well as of its individual members, namely students,[67] may increase the propensity to seek and receive judicial review of the decisions of labour arbitrators in the context of conflicts over academic freedom. Indeed, although administrative law principles already apply indirectly, the adjudication of academic freedom could now be conditioned by countervailing expressive rights of non-parties to collective agreements.

Since the Canadian judiciary has had little opportunity to expound any significant understanding of academic freedom, much less how it might weigh *against* institutional autonomy or freedom of expression in particular instances, it would likely draw upon US jurisprudence. Justice Paperny's analysis in *Pridgen* does just that to defend the proposition that academic

63 Judge Richard Posner, cited in in Rabban, *supra* note 61 at 30.

64 See generally *ibid*.

65 However, contractual arrangements between faculty and the University would not obviously escape *Charter* scrutiny, despite the fact that in *McKinney*, *supra* note 23, such contractual arrangements did. In contrast to *McKinney*, if the *Charter* is found to apply to University in view of expressive rights, it is hard to see how academic freedom could be simply excised.

66 See generally Rabban, *supra* note 61. There, he discusses the judicial evolution of academic freedom as a special subset of the First Amendment to include 'institutional' academic freedom.

67 And possibly even those not affiliated with the university at all. See *Whatcott*, *supra* note 18.

freedom and freedom of expression are "inextricably linked" and that the latter is "not universally seen as a threat" to the former.[68] She concludes that the application of the *Charter* neither undermines academic freedom nor institutional autonomy, and that it isn't obvious that academic freedom "trumps freedom of expression."[69] Should circumstances in which they do conflict arise, she says, simply, that the *Charter*'s section 1 is available "to properly balance them."[70] At this time, though, we cannot know how the judiciary would undertake that balancing.

The classroom is the site in which the three concepts — expressive freedom, academic freedom and institutional autonomy — interconnect and potentially collide. The myriad spaces on a university campus serve vastly different purposes and are not reasonably subject to the same speech regulation. The classroom is a particular space where "stricter standards should be applied" because, among other reasons, the "members of the class are in an ongoing relationship" and the space is hierarchically organized "based on the teacher's authority."[71] Thus expressive limits should be assessed differently from how such limits may be imposed in other campus spaces. At least some classroom limits on speech are inextricably tied to the exercise of academic freedom and the university's core mission as a place where one's learning is curated by a member of the professoriate. This depends, foremost, on a faculty member being able to generally claim the content and method of teaching as against others who would seek to impose different content or methodology. However, this idea becomes fraught when academic freedom is interpreted broadly as "the freedom to explore a diversity of viewpoints before coming to a conclusion,"[72] thus failing to locate the centrality of expertise.

Lindsay Shepherd, whose case is often cited to underscore the need for the Ontario campus speech Directive, is relevant here. Shepherd was a graduate student and teaching assistant at Laurier who was accused of having created a "toxic environment" for students who identify as transgender, by showing a TVO clip in the course of leading an undergraduate tutorial, featuring an interview with Jordan Peterson, without an accompanying rejection of Peterson's view.[73] She was consequently called into a meeting with the course director and the director of Office of Diversity and Equity. The substance and outcome of that meeting are well-known, so will not be repeated here.[74] A subsequent investigation cleared Shepherd of any wrongdoing

68 *Pridgen* (CA), *supra* note 37 at para 115.

69 *Ibid* at para 113.

70 *Ibid* at para 117. Notably, since most decisions pertaining to academic freedom would be administrative decisions rather than legislative ones, section 1 of the *Charter* would be unlikely to be the avenue through which they were balanced, rather; it would be via the 'balancing' that attends administrative law principles.

71 Richard Moon, "Demonstrations on Campus and the Case of Israeli Apartheid Week" in James L Turk, ed, *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 185 at 195.

72 Hamill, *supra* note 14, at 174.

73 Joseph Brean, "Lindsay Shepherd Sues Wilfrid Laurier, Claiming 'Attacks' Have 'Rendered Her Unemployable in Academia'" (13 June 2018) online: *National Post* <nationalpost.com/news/canada/lindsay-shepherd-files-lawsuit-against-wilfrid-laurier-university-claiming-attacks-have-rendered-her-unemployable-in-academia> [perma.cc/GQZ5-J6XJ].

74 See e.g. Rebecca Joseph, "Wilfrid Laurier Admits It Mishandled Lindsay Shepherd Academic Freedom Case" (19 December 2017) online: *Global News* <globalnews.ca/news/3923478/wilfrid-laurier-no-complaint-lindsay-shepherd/> [perma.cc/TF7B-HWCS]; Tristin Hopper, "Here's the Full Recording of Wilfrid Laurier Reprimanding Lindsay Shepherd for Showing a Jordan Peterson Video" (21 November

under university policy. Additionally, the university has apologized for its handling of the situation.[75] In the time since, Shepherd has become the face of the campus-speech cause célèbre.

The episode highlighted the tension endemic across universities, identified at the outset of this essay, with regard to what *kind* of expression is rightly proscribed, in the context of countervailing demands between expression, and other important values.[76] In its positive iteration, the incident propelled community-wide discussion necessary to the ongoing negotiation of campus expression.[77] Obfuscated in all this was the tension emanating from within the demands of expressive rights themselves. To illuminate the point, let us imagine an alternative scenario in which Shepherd is not lambasted after the fact and accused of violating both university policy and Canadian law, but is given prior work direction about how the seminar material is to be handled. In this scenario, Shepherd submits a lesson plan prior to each session as part of her prescribed duties (indeed, she was subsequently asked to do this), and the professor identifies the clip as "problematic" (as he did in his meeting with Shepherd after the fact). Imagine that he directs her to be cautious about her approach, or even directs her not to show it altogether. Clearly, there can be no positive duty on the professor to show the clip.[78] However much his position may be criticized, it sits comfortably within the bounds of what is contemplated by academic freedom. Academic freedom understood in its 'broad' sense, as in free expression related to matters of academic or public concern, suggests a different outcome to this incident than academic freedom understood as an individual right of faculty. This is why the conflation of the various concepts matters. Expressive rights on campus may be well served by *Charter* capture;[79] however, disentangling the distinctions, tensions, and affinities

---

2017) online: *National Post* <nationalpost.com/news/canada/heres-the-full-recording-of-wilfrid-laurier-reprimanding-lindsay-shepherd-for-showing-a-jordan-peterson-video> [perma.cc/AC3N-M8C3].

75 See e.g. Brian Platt, "Wilfrid Laurier University's President Apologizes to Lindsay Shepherd for Dressing-Down over Jordan Peterson Clip" (21 November 2017) online: *National Post* <nationalpost.com/news/politics/wilfrid-laurier-universitys-president-apologizes-to-lindsay-shepherd-for-dressing-down-over-jordan-peterson-clip> [perma.cc/69JS-PR77].

76 The attempt to reconcile expression with these other values is best illustrated by the idea of 'inclusive freedom.' See generally Sigal R Ben-Porath, *Free Speech on Campus* (Philadelphia: University of Pennsylvania Press, 2017). For a rejection of this view, see Nirmal Dass, "Review of Sigal R Ben-Porath, *Free Speech on Campus*" (September 2018) online: *Society for Academic Freedom and Scholarship* <www.safs.ca/newsletters/article.php?article=977> [perma.cc/8YDS-GDUA].

77 See James Turk in this special issue.

78 Recall that academic freedom in Canada is instantiated within various faculty collective agreements. Teaching assistants in Ontario are generally unionized — at Laurier that was not true in Shepherd's case, but teaching assistants there have since certified — and some of these have collective agreement language recognizing academic freedom. Where that is the case, however, such freedom is generally limited by the overriding academic freedom of the course instructor in whose course they are assisting. In other words, teaching assistants must be afforded appropriate leeway to develop and manage their seminars and tutorials, but only to the extent afforded them by the person who has primary responsibility for the course and whose determination as to content and methodology takes precedence.

79 There is notable and reasoned optimism among scholars regarding the reconcilability of expressive freedom, academic freedom, and institutional autonomy in a context of potential *Charter* application. For example, Newman, *supra* note 14 at 151, cites Justice Paperny approvingly, agreeing that academic freedom and freedom of expression are not in conflict, and that should a conflict present itself "the availability of a limitations analysis means that there always remains a mechanism by which academic freedom considerations can be part of the analysis." With such a mechanism "that *Charter* application actually has prospects of furthering academic freedom" (*ibid* at 152). Similarly, Mckay-Panos, *supra* note 14 at 92, writes

among expressive freedom, academic freedom, and institutional autonomy remains consequential to both balancing and outcome of expressive rights.

Conclusion

Reception to the Ontario Directive has been mixed. It has been applauded in some quarters for potentially solving the 'problem' of campus censorship. Others have been at pains to articulate the ways in which the *Charter* could or ought to apply to universities, consistent with relevant statutory and constitutional language, because *Charter* scrutiny would secure expressive rights on campus. This paper has articulated the possibility that the Directive could have the effect of bringing the two camps together by persuading Ontario courts, thus far reluctant to follow the lead of jurisdictions like Alberta, to apply the *Charter* to those aspects of the University intertwined with the obligatory free speech policies.

In contrast to the literature which characterizes the operation of the *Charter* as an unqualified good, however, the purpose of this general overview has been to caution against the idea that expressive freedom, academic freedom, and institutional autonomy, which courts have understood to be the expressive concerns animating campus life, can be used interchangeably without consequence. We have tried to 'trouble the waters' by highlighting that conflicts will arise from within the demands of expressive freedom itself, which will require thinking-through.

It is possible that universities will continue much as they have done, with the Directive itself and its potential invocation of the *Charter* playing a very limited role. Although it remains early days, the HEQCO report released in late 2019 and canvassing the first 9 months of the implementation of the Directive revealed that over 40,000 events on campuses took place in that time, and there was only one instance in which a complaint was lodged with a university, which appears to have been handled internally, which is consistent with the Directive.[80] Given the sheer amount of contested expression on Canadian campuses, proof of observance of free speech principles is in the (rare) breach. By the same token, courts have had to address claims of *Charter* applicability to the University in the past and will likely have to do so again. In that regard, it is not yet clear whether we are in for stormy weather or smooth sailing.

"university autonomy is not sacrificed by allowing and protecting freedom of expression on campuses in the current context. It is possible under current administrative law principles to defer to decisions of university officials and respect academic freedom while also protecting freedom of expression." Marin, *supra* note 14 at 56, claims that that freedom of expression and academic freedom are "entirely reconcilable." Our aim here is not to contradict this optimism, but to problematize the reconciliation of the distinct expressive concepts.

80 Higher Education Quality Council of Ontario, *Freedom of Speech on Campus: 2019 Annual Report to the Ontario Government* (2019) online (pdf): *Higher Education Quality Council of Ontario* <www.heqco.ca/SiteCollectionDocuments/HEQCO%202019%20Free%20Speech%20Report.pdf> [perma.cc/63LW-CQN5].