Constitutional forum constitutionnel

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

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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]

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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]

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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.