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Freedom of expression, academic freedom, and equality: seven institutional responsibilities

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Author's note: This brief paper has been written in response to the "Freedom of Expression Statement Draft" dated 8 November, 2017. I endorse the tenets of mutual respect and collective responsibility that are set out in that document. However, while the draft statement properly emphasizes collective responsibility for fostering freedom of expression, it does not expressly set out the university's institutional responsibilities. A clear statement of these responsibilities is necessary to ensure that institutional structures and decision-making processes protect and advance principles that are fundamental to academic culture. This paper represents my efforts to identify the institutional responsibilities that arise from the separate but related values of freedom of expression, academic freedom, and equality rights insofar as they apply to UBC.

1. Freedom of expression, academic freedom and equality rights are distinct¹ values² that have technical legal meanings.³ In Canada, each of these values has a different definition,

* Thank you to Lynn Smith and Margot Young for providing very helpful comments on earlier drafts of this paper. Of course, I take sole responsibility for the contents of this paper including any errors.

¹ In respect of the distinctions between freedom of expression and academic freedom, see Jacob Levy, "Safe Spaces, Academic Freedom and the University as Complex Association", Bleeding Heart Libertarians, March 2016 online: <http://bleedingheartlibertarians.com/2016/03/safe-spaces-academic-freedom-and-the-university-as-a-complex-association/>.

² The term "values" is used by the Supreme Court of Canada when describing the role of Charter rights and freedoms in administrative decision making, for example *Doré v Barreau du Québec*, 2012 SCC 2.

³ Freedom of expression is a fundamental freedom under s. 2(b) of the *Canadian Charter of Rights and Freedoms* [Charter]. Equality rights are protected by s. 15 of the Charter. There is detailed case law defining the scope and purpose of each of these provisions. (See for example *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 968 and 977 re freedom of expression; *Withler v Canada*, [2011] 1 SCR 396 at [31] – [37] re equality.) Under Canadian law, universities are not generally government actors for the purposes of the Charter: *McKinney v University of Guelph*, [1990] 3 SCR 229 at 275. In this respect (and others), Canadian public universities are in a different legal position from their American counterparts: *Rosenberger v University of Virginia*, (1995) 515 US 819 at 822; Levy, above note 1. However, public bodies that are not directly bound by the Charter have been required to consider "Charter values" in some aspects of their decision-making and subjected to judicial review with respect to whether "the decision-maker disproportionately, and therefore unreasonably, limited a Charter right." *Doré v Barreau du Québec*, 2012 SCC 2 at [6]. While the law is not entirely settled, the better view is probably that this requirement applies to some university processes: See *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162 at [55]. Academic freedom is recognised in UBC's academic calendar and the collective agreement between UBC and its faculty association. For more information about the legal status of this freedom at UBC, see Lynn Smith, "Academic Freedom: An Extended Excerpt from the Report of the Honourable Lynn Smith QC" online: https://academic.ubc.ca/sites/vpa.ubc.ca/files/documents/Smith_Academic_Freedom_History_and_Principles.pdf (Smith, "Academic Freedom").

history and potential for limitation than in other jurisdictions.⁴ Given the fundamental role of these values within universities and the prevalence of misunderstandings about their Canadian legal form, UBC's governors, senators, senior administrators and those charged with making institutional decisions (such as tenure & promotion decisions and student discipline decisions) should receive substantive training in their source, meaning and scope. This training should be designed, and ideally delivered, by a person who possesses appropriate teaching skills and who has academic expertise or exceptional professional experience with *freedom of expression, academic freedom, and equality rights*. To facilitate the university community's participation in academic governance and advance the understanding of these values among university members,⁵ the training materials should also be made available to the broader university community.

2. Under Canadian law, there is no hierarchy of rights and freedoms.⁶ For example, freedom of expression does not presumptively prevail over the right to equality, and *vice-versa*. UBC's governors, senators, senior administrators and decision-makers should receive substantive training in how to recognise and resolve situations in which rights and freedoms may come into conflict with one another.⁷ This training should be designed, and ideally delivered, by a person who possesses appropriate teaching skills and who has academic expertise or exceptional professional experience in *administrative decision-making and conflicts of rights and freedoms*. For the reasons set out above, these training materials should also be made available to the broader university community.

3. In some circumstances, the university may properly limit freedom of expression. At UBC, university administrators and other community members hold positive and reciprocal obligations to foster academic freedom. This obligation may require university administrators to respond when an expressive act threatens the academic freedom of those who reasonably feel

⁴ See for example *R v Keegstra*, [1990] 3 SCR 697 at 738 – 744; Kent Greenawalt, “Free Speech in the United States and Canada” (1992) 55 *Law and Contemporary Problems* 5; Frederick Schauer, “Free Speech and the Cultural Contingency of Constitutional Categories” (1992) 14 *Cardozo Law Review* 865; Stanley N Katz, “The Strange Birth and Unlikely History of Constitutional Equality” (1988) 75 *The Journal of American History* 747; Lynn Smith and William Black, “The Equality Rights”, (2013) 62 *SCLR* (2d) 301; Martha A Fineman, “Beyond Identities: The Limits of an Antidiscrimination Approach to Equality” (2012) 92 *Boston University Law Review* 1713; Michael Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999); Carolyn Sale, ““By Whose Definition?”: The University of Saskatchewan's Firing of a Dean and the Textual Battle to Define Academic Freedom in Canada” (2016) 29 *Journal of Historical Sociology* 23; Smith, “Academic Freedom”, *ibid*.

⁵ Throughout this paper, references to community members or members of the university are intended to have the same meaning as in the academic calendar.

⁶ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877.

⁷ See for example *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 at [29]; *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 (now under appeal to the Supreme Court of Canada); *Reference re Same Sex Marriage*, 2004 SCC 79 at [50] and cases cited therein; Pierre Cloutier de Repentigny, “Of Diversity and Balancing of Rights: TWU v LSUC” *Canlii Connects* <http://canliiconnects.org/en/commentaries/42963>; *R v NS*, 2012 SCC 72; Frank Iacobucci, “Reconciling Rights’: The Supreme Court of Canada’s Approach to Competing Charter Rights” (2003) 20 *SCLR* (2d) 137.

targeted by that expression.⁸ The nature of the necessary response is likely to vary with the circumstances. Beyond threats to academic freedom, there are additional circumstances in which the university may limit freedom of expression.⁹ As an institution of teaching and research, the university is also a workplace, a learning environment and – for an increasingly large number of community members – a home.¹⁰ Recognising that the university performs these multiple roles, the *Charter* value of equality, BC laws, the UBC Statement on Respectful Environment, and university policies establish obligations and administrative principles that help to inform when and how it is appropriate for a university administrator or decision-maker to regulate expression.¹¹

4. In some circumstances, it will be improper to restrict expression: “in the university, unconventional ideas and controversial opinions deserve special protection.”¹² For members of the university community, responding critically to ideas or forms of expression with which one disagrees is generally consistent with respecting another’s freedom of expression.¹³ In the course of academic discussions, “academic freedom must be accompanied by academic responsibility; that is, [participants] must act responsibly, base statements and opinions on fact and evidence, and use acceptable scholarly methods in the pursuit of truth. ... Peer review is the best system we know of to ensure that a scholar's work is evaluated by the dispassionate judgement and knowledge of experts, rather than by the court of public opinion or political policy.”¹⁴ While expressing respect for academic freedom, senior administrators and presidents can make clear

⁸ Lynn Smith, “Summary of the Fact-Finding Process and Conclusions Regarding Alleged Breaches of Academic Freedom and Other University Policies at the University of British Columbia” October 15, 2015 at p 5 (Smith, “Summary”). Online: <https://president.ubc.ca/files/2015/10/Summary-of-Process-and-Conclusions-Final.pdf>.

⁹ The purposes of freedom of expression help to inform the circumstances in which regulation may be proper. See *Irwin Toy v Quebec*, [1989] 1 SCR 927 at 977 per Dickson CJ, Lamer and Wilson JJ, stating that these purposes include seeking truth, fostering participation in social and political decision-making, and cultivating diversity in individual self-fulfillment and human flourishing; *R v Keegstra*, [1990] 3 SCR 697 at 762 – 767 per Dickson CJ providing an example of how these purposes help to inform the circumstances in which freedom of expression may properly be limited.

¹⁰ See Richard Moon, “Demonstrations on Campus and The Case of Israeli Apartheid Week” in James Turk (ed) *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Lorimer, 2014) 185 at pp 194 – 198; Levy, above note 2.

¹¹ Online: <http://www.hr.ubc.ca/respectful-environment/files/UBC-Statement-on-Respectful-Environment-2014.pdf>. See also Moon, *ibid*; Levy, above note 2.

¹² Martha Piper, speech to the President’s Circle, October 9, 2001: https://senate.ubc.ca/sites/senate.ubc.ca/files/downloads/va_minutes_october2001.pdf; See also Stephen J Toope, *President’s Message to the UBC Community on Respectful Debate*. Online: <https://president.ubc.ca/featured/2017/04/06/presidents-message-to-the-ubc-community-on-respectful-debate-2/>.

¹³ See cases cited above, note 9. The same principle holds for academic freedom. Moon explains that academic freedom requires “the treatment of others in the academic community as interlocutors, as conversation partners who should be addressed and listened to.” Above note 10 at 186. American Civil Liberties Union, “Speech on Campus” online: <https://www.aclu.org/other/speech-campus>. Piper, *ibid*.

¹⁴ Piper, *ibid*; Levy, above note 2.

that repugnant and discriminatory views are not those of the university and that academic peers are the best judges of the scholarly merits of any given expression.¹⁵

5. Members of the university community and invited guests have the freedom to criticise UBC or its governance, and to raise concerns about academic freedom. This activity is protected as an exercise of academic freedom if it is performed honestly and in good faith, regardless of whether the person has research expertise in academic freedom.¹⁶ Governors, senators, university administrators and other university decision-makers must foster and respect this freedom even when it is uncomfortable or inconvenient to do so.

6. Members of the university should be supported in their activities and should not be expected to defend themselves without institutional support when they are criticised or threatened in connection with activities performed honestly and in good faith in the course of their role at the university.¹⁷ For example, faculty members who study or teach controversial or sensitive topics should be defended by university administrators against unfair criticism if such criticism is levelled at them, and should have timely access to training and institutional support.¹⁸

7. Proactively establishing a robust, diverse and inclusive institutional culture is indispensable to fostering a community that is resilient in the face of offensive expression.¹⁹ In addition to offering better training about legal responsibilities, the university should develop institutional policies and activities that advance substantive equality by ensuring that members of all backgrounds, identities and disciplines have equal opportunities to succeed at UBC. Designing institutional processes that include members of diverse backgrounds and value their input – while appropriately recognising and rewarding the work involved in participating in such processes – is one way to foster a more robust and inclusive culture.²⁰ Cluster hiring with appropriate internal processes and transitional support is another strategy by which the university

¹⁵ Speaking out against discriminatory expression helps to secure the academic freedom and dignity of targeted members of the university community, consistent with the UBC Statement on Respectful Environment, *ibid*, and Smith, Summary, above note 8. See also *R v Keegstra*, [1990] 3 SCR 697 at 756 – 758 per Dickson CJ. For further discussion of the importance of institutional responses, see ACLU, above note 13; Richard Cohen, “Colleges Must Uphold Free Speech but can Denounce Racist Speakers” Southern Poverty Law Centre, 26 October 2017 online: <https://www.splcenter.org/news/2017/10/26/splc-senate-colleges-must-uphold-free-speech-can-denounce-racist-speakers>

¹⁶ Smith, above note 4 at pp 19 – 21.

¹⁷ Smith, “Fact-Finding” above note 8 at p 7 – 8.

¹⁸ Jeannie Suk Gersen, “The Socratic Method in the Age of Trauma” (2017) 130 Harvard Law Review 2320 especially at 2339 – 2341.

¹⁹ ACLU, above note 15.

²⁰ Sara Ahmed, *Living a Feminist Life*, (Durham: Duke University Press, 2017) especially Part II; Shakil Choudhury, *Deep Diversity: Overcoming Us vs. Them* (Toronto: Between the Lines, 2015); Frances Henry et al, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017) especially at 310 – 316.

can advance diversity, research excellence and learning outcomes.²¹ Adopting culturally appropriate processes to implement the Calls to Action of the Truth & Reconciliation Commission of Canada within the university's activities should be a top institutional priority.²² Equality concerns also arise in respect of ostensibly neutral institutional policies. To take an example that is salient to freedom of expression, university activities regarding media engagement should recognise that the benefits and risks of public engagement are not equally distributed. Some groups and individuals (including young adults, Indigenous people, visible minorities, LGBTQ2S people and feminists) are more frequently targeted by serious forms of online harassment than others.²³ Whether considering how to encourage public engagement or establishing institutional procedures for responding to online threats and harassment, the university should ensure that it does not place disproportionate burdens on those who bear greater risks in this domain.

²¹ Urban Universities for HEALTH and the Association for Public and Land Grant Universities Advisory Committee on Faculty Cluster Hiring, *Faculty Cluster Hiring for Diversity and Institutional Climate* (2015) online: http://urbanuniversitiesforhealth.org/media/documents/Faculty_Cluster_Hiring_Report.pdf; Beth McMurtrie, "The Promise and Peril of Cluster Hiring", *The Chronicle of Higher Education*, 3 March 2016.

²² Truth and Reconciliation Commission of Canada, *Calls to Action* online: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

²³ Alice Marwick and Rebecca Lewis, *Media Manipulation and Disinformation Online* (Data & Society Research: 2017) online: http://centerformediajustice.org/wp-content/uploads/2017/07/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf; Pew Research Centre, *Online Harassment* (2014) online: http://www.centralvalleybusinesstimes.com/links/PI_OnlineHarassment_102214-1.pdf; Ruth Lewis, Michael Rowe, Clare Wiper, "Online Abuse of Feminists as an Emerging Form of Violence Against Women and Girls" (2016) 57 *British Journal of Criminology* 1462; George Veletsianos, *Social Media in Academia: Networked Scholars* (London: Routledge, 2016) chapter 8; Irfan Chaudhry, "#Hashtagging Hate: Using Twitter to Track Racism Online" (2015) 20 *First Monday*; Jamie Bartlett et al, *Anti-Social Media* (Demos, 2014) online: https://www.demos.co.uk/files/DEMOS_Anti-social_Media.pdf?1391774638; Mary Beard, "The Public Voice of Women" (2014) 36 *The London Review of Books* 11; Lise Gotell and Emily Dutton, "Sexual Violence in the 'Manosphere': Antifeminist Men's Rights Discourses on Rape", (2016) 5 *International Journal for Crime, Justice and Social Democracy* 65; Elizabeth Sheehy, "Defending Battered Women in the Media", (2016) 5 *International Journal for Crime, Justice and Social Democracy* 81.