

**Presentation to Board of Governors, The University of British Columbia  
People, Community & International Committee; Property Committee**  
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Good afternoon. Thank you for the opportunity to speak to you about these issues.

Both Emma and I are professors in the Allard School of Law and, while we are not practicing lawyers and, thus, not licensed to give formal legal advice, we both research the issues at play and feel strongly that some central distinctions and questions are important.

We have not been given much sense about the focus of our conversation today. But we begin by emphasizing that proper consideration of free expression and academic freedom concerns must be contextual. Courts and scholars alike emphasize that context makes all the difference to sound analysis. Abstract formulation risks analysis blind to key effects and community impact. So, our remarks today reflect the context of the June 23 event and the University's relevant policies, contractual commitments, and mission values.

Our task is to aid in sorting out the relevant conceptual framework. Most critically, a first step is to be clear that the notions of freedom of expression and academic freedom are distinct.

The two ideas are not interchangeable. Each has its own conceptual history and legal, political configuration. Rigour and clarity suffer when they are equated, or simply shuffled through indeterminately. But, they are both properly considered and the relationship between the two in context is important.

We touch on three topics, briefly, given our time limits.

First Emma is going to say a bit about academic freedom.

I will follow with some thoughts on the constitutional values of free expression, substantive equality and dignity.

Emma will conclude, triangulating the conversation with the University's commitments, values, and policies.

### **Free Expression**

Freedom of expression, along with the equality-related concepts of inclusivity, diversity, and dignity, are common building blocks of the debate.

Canadian conversations tend to use the term "free expression" rather than "free speech." This recognizes the full range of activities that have communicative content. Indeed, the Supreme Court of Canada (SCC) notes that,

The content of expression can be conveyed through an infinite variety of forms of expression: for example the written or spoken work, the arts, and even physical gestures or acts.<sup>1</sup>

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<sup>1</sup> *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR 927, 969.

Sources of the norm of free expression include, of course, s. 2 (b) of the *Canadian Charter of Rights and Freedoms*.<sup>2</sup> Section 2(b) is placed under the heading of “Fundamental Freedoms” and reads as follows:

2. Everyone has the following fundamental freedoms:

...

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

The operating assumption of this comment is that the *Charter* is not, generally, applicable to institutions such as our university. Caselaw on the issue of *Charter* application is complicated, and evolving. There is an interesting discussion about how the SCC has picked away at the edges of its general statement in early caselaw that universities are immune from *Charter* review. But, this is not the place for that digression.

So, I leave aside the question of constitutional applicability in the university context, to focus on the rich understanding of these notions that jurisprudence—case law and scholarship—contribute to thinking about these principles. These notions are not necessarily legal constraints but are nonetheless valuable elements to inform any conversation about expression.

Important within the context of the university, then, are the purposes the SCC has identified as critical to constitutional protection of free expression. These purposes are the search for truth, the orchestration of democracy, and an individual’s self-fulfillment. The Court has relied on classical texts of liberalism in its articulation of these purposes. These texts lie within a particular political tradition, and are, in much literature, subject to criticisms about their failure to acknowledge modern appreciation of the manipulative powers of unequal resources, power, and purposively dissemination of false knowledge. Political conversation outside of the judicial forum, thus, engage in more nuanced appreciation of the values of free expression and how they must take account of the concerns of equality, marginality, and vulnerability.

It is worth appreciating as well that, although this right has been given wide purview by the SCC, cases involving the freedom tend to be resolved in the context of justifiable limitations of the right under s. 1 of the *Charter*,<sup>3</sup> rather than on the question of whether or not the right is implicated. In this context, justifiable limitations of the right, the Court takes account explicitly of the value of the expression at issue and engages in a discussion that is more amenable to the considerations of inequality harms that the critical literature details. So, while the protection of the right is initially wide, its actual ambit has been constrained through application of the limitation clause of the *Charter*. Section 2(b) and 1 operate in tandem to forge how expression is protected under the *Charter*. Similarly, we are wise to read our commitments to free expression and to substantive equality and inclusive community together.

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

<sup>3</sup> Section 1 reads:

Rights and freedoms in Canada

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

While the *Charter* caselaw on expression is not directly relevant to our institution, the message of clear recognition of the value of free expression, along with justified limitation of that expression in aid of other central, collective goals, is a useful framework to keep in mind.

Two points pertain.

First, too often we overstate what free expression, as a value, invokes.

Respect for freedom of expression does not entail supporting absolute liberty, free licence, to speak, wherever and whenever one might wish. The obvious and classic example is calling “fire” in a crowded theatre. This illustrates that a clear starting place for any discussion of expression is acknowledgment that there is always a line to draw.

The notion of freedom of expression always recognizes some limit—a line is always drawn, justifying some restrictions; the debate is where to draw that line. The first step is to acknowledge this, as our courts do.

Most pointedly, support for free expression does not entail a guarantee to a platform at a university, or other public, non-governmental institution. While concerns are legitimately considered about facilitating the speech of the marginalized, this does not translate into support for the notion that anyone has a claim to speak anywhere. This wide ambit is simply not something that the idea of free expression has ever logically implied. It is a convenient elision of the nuances of the principles surrounding protection of free expression. Context matters; other values are equally relevant and, importantly, on occasion must trump expressive freedom.

The notion of the marketplace of ideas is similarly a misleading metaphor. Actual markets are highly regulated in order to function and to be fair. Similarly, power—both material and ideological—distorts expressive dialogue and debate. Curation of speech is often part of how freedom of expression, supportive of the values that animate its protection in the first place, is realized.

Emma notes, as well, freedom of expression intersects with academic freedom obligations; a key consideration may be the connection to the academic community speakers have—a purely economic nexus of renting space has different contextual significance than situations that involve invited guests or members of our community.

Second, the values of substantive equality, inclusivity, diversity, and mutual respect must define a university environment, and they then must shape the character of our commitments to free expression, and, incidentally, to academic freedom. Values coexist—advocacy of free expression cannot render our many statements to inclusivity and diversity meaningless.

Indeed, these equity values are instrumental in helping us to define what the parameters of free expression are, for our academic community. Equally, these values provide nuanced guidance—in the guise legally of the *Human Rights Code*—to ensuring that our policies of who gets to use our space are not discriminatory.

In particular, the SCC has recognized that the harms of inequality are legitimate reasons to limit expression. Discriminatory speech need not be protected, its restriction can be justified in terms of our commitment to the values that animate human rights protection largely. And, expression that undermines the very values that justify protection of expression in the first place—truth, democracy, self-fulfilment, personal dignity—is an obvious candidate for restriction.

This can be particularly true when that expression is destructive of the community into which it intrudes. Thus, one clear recognition in that debate is that expression that is harmful is precisely the sort of expression for which limitation is appropriately mooted. Discriminatory expression must face scrutiny, not simply met with the simple, too often facile, response of free expression above all else.

We must resist the weaponization of claims to free expression as a means to further marginalize those who struggle for full citizenship in our community—we must resist allowing, in the words of one academic commentator, our campus facilities being used to punch down, rather than challenge upwards. The struggle against power, the advancement of equality, and the moving of the marginalized to the valuative centre are hallmarks of expression worth protecting. Expression that seeks to undo equality achievements raises different considerations. Judgments about the value of the expression are important and central elements, as our courts have told us, when assessing legitimate restriction.

I leave you with the words of an American scholar, Judith Butler—a provocative comment on the times in which we live...

“If free speech does take precedence over every other constitutional principle and every other community principle, then perhaps we should no longer claim to be weighing or balancing competing principles or values. We should perhaps frankly admit that we have agreed in advance to have our community sundered, racial and sexual minorities demeaned, the dignity of trans people denied, that we are, in effect, willing to be wrecked by this principle of free speech.”

*Judith Butler, cultural theorist and Berkeley professor, speaking at a 2017 forum sponsored by the Berkeley Academic Senate*