

# **York University Independent Review**

**The Honourable Thomas A. Cromwell C.C.**

**April 30, 2020**

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## Foreword

### A. Overview

I have conducted an independent review of the University's policies, procedures and practices in light of the events that occurred on November 20, 2019 at Vari Hall, Keele campus.<sup>1</sup> After interviewing 22 groups and individuals, studying nine written briefs and countless documents and extensive research, I now offer my conclusions and recommendations.

The Review focuses on the University's rules in relation to free expression in extra-curricular activities by student organizations. This includes a number of related topics such as the use of space on campus and security matters. I have thoroughly examined the existing framework and have developed a number of recommendations about how to strengthen it. I have tried to be specific, recognizing that the University must address these issues through its own governance structure and in light of its own traditions and practices. No doubt in light of those considerations my recommendations, if accepted in principle, will need to be modified and adapted. But my hope is that by being specific, I have conveyed in concrete terms what I believe needs to be done. As I see it, attention to these matters is urgently required.

As required by my mandate, the Review has focused on the University's rules. Rules are necessary to ensure equality, clarity and transparency. But as the University moves forward to address these challenging issues,

it will need to bear in mind that rules, while important, cannot on their own ensure the inclusive and safe environment that the University seeks to maintain and enhance.

Universities across the globe are struggling with the scope — and the limits — of free expression. Expressive rights on campus are central to the very idea of a university. At the centre of this struggle is a sharply differing understanding of the meaning and value of free expression. For some, untrammelled expression is the lifeblood of democracy and putting restraints on it is a tactic of despots. For others, protecting such expression gives a licence to inflict officially sanctioned harm. While both views are too extreme, they remind us of two important points.

The first is that free expression has some boundaries. We value the university as the embodiment of the market place of ideas. But just as most markets need some regulation, no civil society can tolerate expression with no limits. As Michael S. Roth reminds us, “[m]arkets, including the ones for ideas, often work very well, but when they are unregulated, real pollution, real harm, occurs, all too often wounding people who historically have been abused by those with power and privilege.”<sup>2</sup> We must therefore view claims for unregulated free expression on campus with the same scepticism we would view the claim that the law in its majestic equality forbids everyone to sleep under bridges and beg in the streets.<sup>3</sup> As the University develops its policies, procedures

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<sup>1</sup> The full terms of reference for my Review are included at Appendix B.

<sup>2</sup> Michael S Roth, “How free should free speech be on campus?”, *Washington Post* (September 22, 2017), online: <[https://www.washingtonpost.com/outlook/how-free-should-free-speech-be-on-campus/2017/09/22/248ae04e-7e10-11e7-9d08-b79f191668ed\\_story.html](https://www.washingtonpost.com/outlook/how-free-should-free-speech-be-on-campus/2017/09/22/248ae04e-7e10-11e7-9d08-b79f191668ed_story.html)>.

<sup>3</sup> Anatole France, *Le Lys Rouge* (Paris: Calmann-Levy, 1932) at chapter 7.

and practices, it must recognize and be clear about the boundaries of free expression.

Second, rules set out minimum standards of conduct. Just because we may do something does not mean that we should. While the University needs to be clear about the outer limits of free expression, it also needs to help members of its community appreciate that exercising their expressive rights may cause real harm to others. The University needs more than rules of minimally acceptable conduct in order to create the welcoming, inclusive and safe place that it strives to be.

## **B. The themes of this Review**

While perspectives on what happened on November 20 and why are sharply divided, there was a broad consensus on some deeper, general issues. Many were of the view that racism and discrimination were at the root of

what went wrong, although the nature of that racism and discrimination and against whom they are practised were the subject of strong disagreement. I am in no position to assess the accuracy of these claims. But the fact that they are made suggests to me that the University has work to do to make clear the boundaries of acceptable conduct. Many expressed the view that the rules in relation to aspects of free expression were unclear or lacking altogether. Many told me that the University often seemed not enforce its rules and, when it did enforce them, it did so inconsistently. Again, it is impossible to assess the accuracy of all of these concerns, but the fact they exist indicates that the University must strive for greater clarity and effectiveness of its policies.

These, and many other considerations that I will develop in the following chapters, lead me to offer five broad recommendations:

- Clarify the parameters of free expression in relation to extra-curricular events on campus;
- Reinvigorate the University's policies and procedures on racism, discrimination and harassment, particularly in relation to conduct by student groups;
- Make the Temporary Use of University Space process more robust and transparent;
- Clarify and make transparent the University's responsibility to promote free expression by providing for community safety; and
- Clarify the University's responsibility and authority in relation to student groups.

In the chapters that follow, I elaborate on these main points. I also offer a number of specific recommendations about how the University could pursue these suggested courses of action if it is so inclined.

## **C. Process and acknowledgements**

This Review was a large project, conducted under tight time constraints. As part of this initiative, I created a website in connection with the Review on which I posted an invitation for written submissions from the

University community and interested parties.<sup>4</sup> The invitation indicated that the most helpful submissions would be those that addressed and were organized around the matters specified in my terms of reference. The invitation also indicated that persons or groups submitting written submissions were welcome to indicate whether they wanted to have a personal interview with me and, if so, to set out how a personal interview was likely to provide additional assistance. As mentioned earlier, 22 groups and individuals were interviewed and nine written submissions were received.

I would not have been able to complete the Review without the assistance and cooperation of many individuals and groups. The University administration promptly provided extensive documentation relating to the issues under review and responded quickly and effectively to my many requests for additional information and documentation. Groups and individuals made themselves available for an interview and

filed written submissions, all in a timely way. Everyone who wanted to be interviewed was and several others agreed to my request for an interview. I gratefully acknowledge all of this help from all of these sources, help that often was given despite personal inconvenience.

My only disappointment was the failure of the York Federation of Students to respond to, let alone participate in my Review. Emails, voicemail and a hand-delivered letter did not elicit any response.

I thank my colleagues Alannah Fotheringham and Mannu Chowdhury, two gifted young lawyers without whose skilled and committed help I could not have completed the Review in the time allotted. I am also grateful to Simon Margolis, student-at-law, for his first-rate assistance in the final stages of the Review.

Finally, my earnest hope is that this Review will assist the University to move forward on the challenging issues that I have considered.

While there are many challenges ahead, the University motto provides the inspiration to overcome them: *tentanda via*, the way must be tried.

Ottawa

April 30, 2020

The Honourable Thomas A. Cromwell C.C.

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<sup>4</sup> “A message from the independent reviewer, The Honourable Thomas Cromwell CC”, Independent Review — York University, online: <<http://www2.blg.com/Independent-Review>>.

## Chapter 1. Overview of Policies and Events

### A. Background

I was engaged to conduct an independent review “concerning certain of the University’s policies, procedures and practices in light of the events that occurred on November 20, 2019 at Vari Hall.” The events themselves are not my primary focus. Rather, they provide a context in which to assess the broader issues concerning the University’s capacity to plan, prepare for and manage events of this nature.

The story of the November 20 events starts, in one sense, with an application by a recognized student group, Herut Zionism (“Herut”), for permission to hold an event on campus with speakers from outside the University and the plan by another recognized student group, Students Against Israeli Apartheid (“SAIA”), to hold its own event on November 7 and to organize a protest of the Herut event. But in another sense, the beginning of the story is more complicated. It has its roots in faraway conflicts, long-simmering campus tensions and the history of other campus events. The November 20 events were not isolated or unexpected. They were an emanation of deeply held and hotly contested views. The conflict that resulted gives rise to many important questions about the role of the university as a place that values free expression, celebrates diversity and protects safety.

Both Herut and SAIA are recognized clubs at York and both occasionally seek to hold events on campus. Before turning to an overview of the events, it will be helpful to outline the University’s governance structure and the policy framework relating to student conduct, club recognition, use of space and event advertising.

### B. Governance framework

Before reviewing the various University policies that bear most directly on the November 20 events, it will be helpful to place them in the context of the University’s governance framework.

At the foundation of that framework is the *York University Act, 1965*. It sets out the objects and purposes of the University: the advancement of learning; the dissemination of knowledge; the intellectual, spiritual, social, moral and physical development of its members; and the betterment of society.<sup>5</sup> The *Act* creates a bicameral governance structure. The Senate has enumerated powers in relation to certain academic matters.<sup>6</sup> As for the Board of Governors, it has powers other than those specifically assigned to the Senate including all those powers “necessary or convenient to perform its duties and achieve the objects and purposes of the University....”<sup>7</sup>

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<sup>5</sup> *York University Act, 1965*, at section 4.

<sup>6</sup> *Ibid* at section 12.

<sup>7</sup> *Ibid* at section 10.

The President is the University's Vice-Chancellor and chief executive officer, who, among other things, has the "power to formulate and implement regulations governing the conduct of students and student activities."<sup>8</sup> Two such regulations are the *Code of Student Rights and Responsibilities* and the *Regulation Regarding Student Governments/Organizations*.

The Divisional Court of the Ontario Superior Court of Justice recently noted that powers delegated to governing bodies, such as those found in the *York University Act, 1965*, "have the effect of granting universities autonomy over their governance and internal affairs, including the conduct of student activities."<sup>9</sup> While these statutory powers, like all others, must be exercised reasonably and for the purposes for which they are granted, the *Act* gives the University wide discretion with respect to regulating student activities.

### C. Student rights and responsibilities

As noted earlier, there is a Presidential Regulation putting in place a *Code of Student Rights and Responsibilities*. It provides that, among other rights, students have the right to freedom of expression and assembly on campus, the right to participate in activities for students without harassment, intimidation, discrimination, disruption or acts of violence and the right to engage and participate in dialogue and to examine diverse views and ideas. It further provides that students, among other responsibilities, have the responsibility not to disrupt or interfere with University activities, including student co-curricular activities and tabling

and to uphold an atmosphere of civility and respect.

While the *Code* applies to non-academic student conduct including that of student groups (i.e., both clubs and student governments), the processes provided for in the *Code* are not well suited to addressing concerns about the conduct of student groups. I will address this point in more detail later in my Review.

### D. Club recognition

Aspects of club recognition are addressed in *Presidential Regulation Number 4* ("PR-4") and the *York University Student Organization Recognition Guidelines* ("Guidelines").

The *Guidelines* establish a formal process for recognition by the University of a student club on the University's campus. They are administered by the Centre for Student and Community Leadership ("SCLD") under the authority of the Provost and the Vice-Provost Students.<sup>10</sup> Recognition carries with it eligibility to receive funds from various sources and the status of an "eligible user" for booking University space for the club's events.

To gain recognition, a student club must submit a completed application that includes the organization's agreement to abide by the *Statement on Rights and Responsibilities* and the requirement that it must complete a mandatory Clubs 101 Orientation Session offered during the current registration period.<sup>11</sup> Once recognized, clubs agree to

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<sup>8</sup> *Ibid* at section 13.

<sup>9</sup> *Canadian Federation of Students v Ontario*, 2019 ONSC 6658 at para 116 (emphasis added).

<sup>10</sup> "Club Recognition – York University Student Organization Recognition Guidelines", York University, (undated), at para 1, online: <<https://studentclubs.sclد.yorku.ca/club-recognition/>>.

<sup>11</sup> *Ibid* at para 8.



comply with all University policies<sup>12</sup> and may not deny membership to students in a way contrary to Ontario human rights legislation.<sup>13</sup> All recognized clubs are required to renew their status annually.

The SCLD may raise concerns with a club or its members over the group's activities and policy violations and may suspend the club's status as a recognized student organization "until necessary steps are taken to rectify the situation."<sup>14</sup> The *Guidelines* do not set out a process by which this might occur or provide any further guidance about what sorts of activities or policy violations could lead to suspension.

*PR-4* also addresses aspects of club recognition as well as student government. After being approved by the "relevant body" (which for University-wide clubs is the SCLD), a club must provide the Provost with a copy of its constitution, the names and addresses of executive officers including the treasurer and an undertaking to observe the general regulations and policies of the University and the regulations and procedures governing financial accountability.<sup>15</sup> Section 10(d) of *PR-4* specifies that if a student club fails to observe "these requirements," the Provost may suspend the payment of funds and draw the situation to the attention of the Student Relations Committee for "appropriate action."

While the *Guidelines* and *PR-4* spell out potentially serious consequences for a club's

failure to observe the various requirements, there is no policy framework setting out a process for determining whether the club has failed to observe the requirements or, if so, an appropriate penalty.<sup>16</sup> Moreover, the "requirements" are not clearly set out in one document and terms such as "censure" and "suspension" are not defined or explained. There is no distinction between temporary and permanent suspensions. There is no accountability framework for alleged breaches by student governments of University policies in relation to expression or use of space.

#### E. Use of University space

As mentioned earlier, both Herut and SAIA, in common with many other student clubs, wish occasionally to hold events on campus. Booking these sorts of extracurricular events is governed by the *Temporary Use of University Space Policy* ("*TUUS Policy*") and associated *Procedure*.

To book event space on campus, eligible users (which include clubs and student governments) must submit an application to the TUUS office in the form of an online questionnaire relating to the event that hosts must complete. The TUUS office processes thousands of applications each year.

It is unclear to me whether the *TUUS Policy* applies to organized protests held on University property. The *TUUS Policy* defines an "event" as "an activity that is

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<sup>12</sup> *Ibid* at para 1.

<sup>13</sup> *Ibid* at para 14.

<sup>14</sup> *Ibid* at para 9.

<sup>15</sup> "Presidential Regulation Number 4 - Regulations Regarding Student Governments/Organizations", York University, effective January 1, 1989, at section 6, online: <<https://secretariat-policies.info.yorku.ca/policies/presidential-regulation-number-4-regulations-regarding-student-governments-organizations/>>.

<sup>16</sup> There are some specified penalties (e.g. in the *Guidelines*) that provide for suspension for the failure to meet with the SCLD if requested to do so.

planned, advertised and/or invitational in nature and is intended to attract participants and/or an audience.”<sup>17</sup> That description could reasonably be thought to include an organized protest such as that organized by SAIA for the evening of November 20. The *TUUS Policy* applies to the use of “university grounds” including an “outdoor activity.” I have seen no suggestion that SAIA was required to apply for a permit to hold its protest but I was told that it is generally understood at the University that other aspects of the *TUUS Policy* apply to protests held on University premises.

The *TUUS Policy* provides (among other things) that:

- University members are “encouraged and allowed to hold events and to engage in the full expression of their opinions on the University’s premises”<sup>18</sup> and that the University “upholds the principles of freedom of speech and freedom from intimidation and harassment. All persons having access to and use of University space shall observe these principles, and the laws of Canada.”<sup>19</sup>
- Those hosting events in the University’s space are responsible for making necessary arrangements with the University’s security and transportation

services for any special security services.<sup>20</sup>

- If the *TUUS Policy* and its associated *Procedure* are not followed, the University reserves the right to withdraw or deny access to its facilities.<sup>21</sup>

Associated with the *TUUS Policy* is a detailed *Procedure* document that includes a guide for hosting events on the University’s campus.

Eligible users, such as recognized clubs, use the TUUS website to find descriptions of spaces that are available for booking.<sup>22</sup> For routine academic, administrative or club meetings, the booking request should be submitted 10 working days in advance.<sup>23</sup> However, for an event involving a “high profile or controversial external speaker,” organizers are to notify the TUUS office as early as possible. The *Procedure* notes that in that case, the TUUS office will arrange a consultation meeting with the organizer, Security Services and any other relevant service areas.<sup>24</sup> The *Procedure* defines “high profile or controversial external speaker or group” as “celebrities, public figures and dignitaries...entertainers, and others who attract media attention and/or whose presence on campus may require special security arrangements.”<sup>25</sup>

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<sup>17</sup> “Temporary Use of University Space Policy”, York University, effective May 15, 1993 (updated in 2008), at section 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid* at section 5.

<sup>20</sup> *Ibid* at section 6.

<sup>21</sup> *Ibid* at section 9.

<sup>22</sup> “Temporary Use of University Space Procedure”, York University, effective January 15, 2010, at section 13.1; at the time of this Report, the *Procedure* was unavailable online.

<sup>23</sup> *Ibid* at section 2.1.1.

<sup>24</sup> *Ibid* at section 2.2.2.

<sup>25</sup> *Ibid* at section II (“Definitions”).

The organizer is also responsible for developing a safety plan for non-routine events and the website provides a link to a “security safety assessment tool for events.”<sup>26</sup> So far as I can tell, use of this assessment tool is not mandatory. I completed the assessment tool based on information known at the time of Herut’s application. The result was a rating of “high risk” for the University’s Security Services and “medium risk” for police.

A safety plan is “a written document...that identifies potential hazards and risks associated with the temporary space use, and the measures to be employed to mitigate potential harm to individuals or damage to property. The Safety Plan shall take into consideration the nature of the Event; the adequacy of the size of the space relative to the number of participants (including audience and/or spectators); possible or known opposing perspectives; logistical set-up; special circumstances (e.g. persons with disabilities); security arrangements; participant health and safety...emergency response/evacuation plan; etc.”<sup>27</sup>

While it does not appear that the organizing groups prepared their own safety plans in connection with the November 7 and November 20 events, both SAIA and Herut, as described further below, met with the representatives of the University’s Community Safety department that prepared operation/incident action plans.

The *TUUS Procedure* also prohibits the use of “sound amplification devices” in interior

corridors, lobbies, foyers and atria that are adjacent to rooms/facilities used for teaching ... [etc.]”<sup>28</sup> Because this prohibition is found in the *TUUS Procedure*, it is unclear whether it applies other than to the organizer of the event and those attending it.

The TUUS office reviews the booking application. If the application meets the conditions, the TUUS office consults with other offices within the University’s administration (such as Security Services and Insurance and Risk Management) and, subject to any concerns, issues the permit.<sup>29</sup> If the TUUS office is not satisfied that the application meets the requirements, it explains why the permit is not authorized and the requirements that need to be fulfilled.<sup>30</sup> For non-routine events (such as ones for which elevated risks have been identified), the planning for the event may be escalated to the Campus Relations Committee.

The Campus Relations Committee is an inter-departmental group of directors and senior members of the University’s administration co-chaired by the Vice-Provost Students and the Vice-President Finance & Administration. I understand that, at present, there are no terms of reference for this committee. In the past, it has in some instances made decisions itself and in others made recommendations to the President for her decision. The Committee has a dedicated meeting time set aside each week, but meetings take place only as needed.

The Committee has the advantage of bringing to bear on any event referred to it a wide

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<sup>26</sup> *Ibid* at section V; see also “Security Safety Assessment Tool for Events”, York University, (undated), online: <[https://tuus.info.yorku.ca/files/2013/01/Security\\_Safety\\_Assessment\\_Tool.pdf?x42573](https://tuus.info.yorku.ca/files/2013/01/Security_Safety_Assessment_Tool.pdf?x42573)>.

<sup>27</sup> *Ibid* at section II (“Definitions”).

<sup>28</sup> *Ibid* at section III.8.1.

<sup>29</sup> *Ibid* at section 13.2.7.

<sup>30</sup> *Ibid* at section 13.2.4.

range of experience, perspectives and expertise. However, it also has the drawbacks of a membership that is too large so that responsibility and authority are too diffuse to deal effectively with a rapidly evolving, time-sensitive situation. Moreover, there is no guidance given to this Committee as to what level of risk is acceptable for campus events, or how to evaluate such risks.

The *Procedure* also sets out a mechanism to address “serious reservations about the appropriateness of an external speaker” on the part of members of the University community (i.e. a faculty member, registered student, governor or staff member).<sup>31</sup> So far as I can determine, there is no procedure provided to address similar concerns on the part of those who are not members of the University community.<sup>32</sup>

The concerns are to be given in writing to the Chair of the Advisory Committee on External Speakers who is to “review the concern” from the point of view of Canadian law or University policy and provide advice to the President. Appendix A of the *Procedure* sets out the membership and terms of reference of the Advisory Committee. So far as I can determine, this Committee has never been populated. There is no existing policy framework specifically addressing how this Advisory Committee is to conduct its work or the circumstances under which it ought to recommend that the University not approve the use of University space for the external speaker.

## F. Event advertising

Two policies touch directly on event advertising. There are advertising provisions in section III.7 of the *TUUS Procedure* and the University’s *Postering Guidelines* which apply to advertising posters.

The *TUUS Procedure* requires that “eligible users” (a term that includes recognized student clubs) to observe the *Postering Guidelines*.<sup>33</sup> The *TUUS Procedure* also stipulates that advertising that “disseminates hate propaganda, discriminates or appears to differentiate on the basis of any of the grounds of the Ontario *Human Rights Code*” may be the subject of a complaint to the University Ombudsperson. In addition, the TUUS application process requests that the organizer of an event provide a copy of the event poster.

The *Postering Guidelines* provide that a poster that advertises an event may only be posted with the prior approval of the Department of Campus Operations. My understanding, however, is that this requirement is honoured more in the breach than in the performance and that the vast majority of posters do not seek or receive approval.

Aside from the requirements just noted, the policy framework as to the propriety of posters is lacking. Posters are, no doubt, subject to the *Statement of Policy on Free Speech* as I will discuss in more detail in the next chapter. There is also no policy framework to guide how the University should respond to an allegedly inappropriate

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<sup>31</sup> *Ibid* at section V; This is the sense in which I will use the term “University community.”

<sup>32</sup> When I am referring to or intend to include others, I will use the terms “guests,” “broader University community” or “interested parties.”

<sup>33</sup> *Ibid* at section III.7.1.2.

poster, apart from through the Ombudsperson's process.

### G. Herut and its events

Herut is a recently recognized student group at the University. It planned a number of events on campus in the fall of 2019. Most notably, there was a "tabling event" on October 7, an event planned for November 4 and the event of November 20 itself. The November 4 event, which was to involve speakers addressing the advent, history and development of Zionism, did not proceed because it was not approved for the use of University space in time to permit planning and advertising.

The tabling event of October 7 gave rise to security concerns. The Director of Herut at the University told me in her written submission that she was "surrounded by a hostile mob, spitting and swearing at her." Following complaints received from staff from the Wellness Hub regarding a disturbance at the tabling event, members of the University's Security Services attended the event. On arrival — which Herut's Director told me was 20 minutes after the fact — they observed two individuals, one of whom was her, in a heated argument and in close physical proximity. The situation was de-escalated and the tabling continued. Herut's Director met on at least two occasions with members of the University's Community Safety department and the SCLD to discuss security and related concerns and how Community Safety could support Herut going forward.

The November 20 event, referred to as featuring "Reservists on Duty" was described by Herut, in its application, in these terms:

We will be hearing from former IDF [Israel Defense Forces] soldiers, who are now educators, about the situation

on the Israeli-Gaza border. These guest speakers will give us first-hand stories about their experience and what they learned from the region. These speakers will travel to different universities in order to share their knowledge of the situation and discuss possible solutions and productive cooperation in the Middle East. We are excited to have open dialogue about the Middle East and learn how we can be a part of the solution abroad. There will be a short lecture-style presentation, with the majority of the presentation open to Q&A and open conversation. Everyone will be offered a chance to speak and hopefully everyone in attendance will learn about the complexities and possibilities in Gaza and Israel.

Herut submitted its application nearly two months in advance of the proposed November 20 event. As the online form provides for, Herut requested the presence of York Security on the following basis: "[w]e believe people will try to disrupt our event and intimate [*sic*] our IDF speakers and attendees."

Herut's TUUS application was circulated to the relevant campus partners for consideration, including Community Safety and the SCLD. Members of the University's Community Safety department appeared to take the lead in gathering information about the event, and liaising with Herut regarding the application. Community Safety also coordinated with the Toronto Police Service ("TPS") about their attendance at the event. In addition, Community Safety developed an event operations plan, under which the department's role was described as de-escalating situations that may arise between event participants and non-participants. It set out the identified risks, mitigation, response



and recovery procedures for, among other things, disruptive behaviour, potential violence and suspicious persons/activities.

The TUUS application asks the event host to provide the names of external speakers and their affiliation. Herut's application said that speakers from Reservists on Duty would be presenting, but did not provide their names. Herut later provided the names of the individual speakers on October 17 following a request by a member of the University's Community Safety department.

The TUUS application also asks the host to provide details of the advertising plan for the event, as well as to upload a copy of the poster or image to be used for advertising. On October 26, 2019, Herut submitted its poster for the November 20 event for approval. Several University campus partners reviewed and ultimately approved it in accordance with the *Posting Guidelines*.

The November 20 event was approved by the TUUS office on November 4, 2019, to take place in Lecture Room C in Vari Hall.

#### **H. SAIA's November 7 event**

While Herut's application for its November 20 event was being reviewed by various campus partners within the University, SAIA was planning an event, entitled "From the Holocaust to Palestine" to take place in the York University Graduate Students' Association ("YUGSA") office, located in the Student Centre.

On October 28, 2019, the national Director of the Canadian chapter of the Jewish Defence League ("JDL") wrote to President Lenton requesting that she cancel SAIA's November 7 event. (As noted earlier, there is no policy framework governing how to address such a request from an "outside" individual or group.) The next day, the executive director

of York's Community Safety department became aware of concern that the JDL would come to the campus to disrupt SAIA's event.

Both Herut's November 20 and SAIA's November 7 events were referred to the Campus Relations Committee along with a tabling request from Herut.

With respect to SAIA's November 7 event, the Campus Relations Committee recommended to President Lenton that it proceed with certain safety precautions. Those precautions included arranging meetings between Community Safety and the event organizers and Community Safety preparing a safety plan. Community Safety met with SAIA in advance of the event to discuss safety planning and developed an operations/incident action plan. As envisaged by that plan, the Community Safety department monitored critical areas for signs of protest or rally activity, conducted a walkthrough of the location of the event and deployed additional security personnel to the area in and around the YUGSA office and the Student Centre. The event ultimately took place without incident.

#### **I. Planning for the November 20 event**

At the beginning of November, SAIA began advertising a protest of Herut's November 20 event. When Herut became aware of this, it requested the presence at the event of additional members of York's security team. On November 8, 2019, the JDL distributed an email newsletter calling for a "Jewish response" to the protests planned at the November 20 event.

Around the same time, students at the University began writing emails to various departments at the University requesting that they cancel the November 20 event. Students expressed the view that the presence of foreign military personnel and the possible

attendance of the JDL at the event caused them to feel unsafe. There was no clear channel through which to express these concerns and no policy framework (aside from that reviewed earlier) to deal with them. Various campus partners coordinated the response to these communications.

Simultaneously, members of the University's Community Safety department began liaising with the TPS regarding the November 20 event. Herut also contacted the TPS independently to request their presence at the event.

In preparation for the event, the University's Community Safety department developed an event operations plan. The department also coordinated and attended meetings with SAIA leadership regarding the protest planned for the event. They continued to monitor social media for additional information regarding the event and the planned protests and counter-protests. Five days before the event, the SCLD inquired about moving the event to a different space. However, the event ultimately remained scheduled to proceed in Vari Hall.

On November 15, 2019, a further meeting was held between Herut's Director and representatives from Community Safety, the Centre for Human Rights, Equity & Inclusion and the SCLD. The meeting addressed, among other things, the safety plan and the *Statement of Policy on Free Speech*.

Posters advertising SAIA's protest of the November 20 event began appearing on campus. These posters were not pre-approved as required by the *Postering Guidelines*. The posters had a picture purporting to show an Israeli soldier putting a child in a headlock with the banner, "All Out! No Israeli Soldiers

on Our Campus!" The poster attracted controversy because of the nature of the image and also because its message could be understood as encouraging people to interfere with or prevent the Herut event from taking place. On the direction of the Vice-Provost Students, York's facilities department removed the posters. While removing the posters, members of the facilities department were confronted by students who asked why they were being taken down. The non-routine removal of posters generated internal debate about the appropriateness of the decision to have them removed, and subsequent discussions regarding the content of the SAIA protest poster concerned whether the images used were "true" representations or had been "doctored" in some way.

On November 19, 2019, Herut's Director wrote to the TPS again, advising that she was expecting hundreds of protestors at the event. She requested that 20 police officers attend. She also consulted with a private "security advisor," who invited several others to attend the event to act as volunteer security persons. According to Herut's "security advisor," members of the University's Community Safety department approved the presence of these volunteers and also allowed them to search event attendees' bags. However, York's Community Safety department was not able to confirm that such a meeting took place or that any approval was given to have volunteer security attend on behalf of Herut.

The *TUUS Procedure* provides that "[a]ll private security firms and/or pay duty police officers shall be coordinated through Security Services."<sup>34</sup> It is doubtful whether the *Procedure* addresses the sort of "volunteer security" that Herut's Director recruited. However, it is clear enough that the intent is that the York Security Services should

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<sup>34</sup> "Temporary Use of University Space Procedure", York University, effective January 15, 2010, at section 4.2.2.

coordinate *all* security arrangements and that no outside security personnel, volunteer or otherwise, should be active at campus events.

In addition to the JDL's newsletter calling for a "Jewish response" to SAIA's planned protest of the November 20 event, Never Again Canada (a group affiliated with the JDL) also advertised a counter-protest on social media, including by creating an event entitled "Confront Pro-Terror Jew haters at York University."

On November 20, 2019, the University sent a letter to the national Director of the Canadian chapter of the JDL regarding the JDL's possible attendance at the event that evening. The letter was a "formal notice" advising that if the JDL members attended on campus and engaged in any inappropriate conduct (including, but not limited to, "participating in protests or demonstrations"), York Security Services and/or the TPS would request the JDL to leave campus.

The Campus Relations Committee met again the evening before the event. Following that meeting, the Executive Director of Community Safety circulated a safety plan risk and response matrix to the Committee members. This matrix outlined three potential outcomes for the event: (i) the event proceeds; (ii) the event is suspended due to safety concerns; and (iii) third party intervention by police is required (while event is progressing or if it is suspended). The matrix also outlined the safety planning and responses for each of the University, Herut and the TPS with respect to each potential outcome.

There was no pre-registration or sign-in procedure used at the event to identify who was in attendance and how many among them were members of the University community. No provision was made to keep protestors and counter-protestors separated or

to prevent disruption of the event by protestors clogging the access routes to the event and making noise.

## **J. The November 20 event**

Approximately 42 York Security Services and TPS officers were present for the event. Marshals for SAIA's protest arranged by the York Federation of Students were also present, identified by blue or red armbands. I was told that SAIA had a list of chants that could be used.

Even a casual look at the extensive video of the event shows what a dangerous situation existed in Vari Hall that evening. There are multiple entrances, mezzanines on each floor open to the ground floor below, narrow hallways leading to some of the entrances to the lecture room and a live acoustic that makes sound reverberate throughout the space.

According to incident reports prepared after the event, members of SAIA and the national Director of the JDL arrived around 6:20pm, with protesting commencing at 6:30pm. Around that time, the incident reports indicate, SAIA members went to the second floor of Vari Hall and blocked the stairs and impeded access to the event by people wishing to attend.

Video footage from the event shows a large number of people gathered on the first and second floors of Vari Hall. The hallway leading to some of the entrances to the lecture theatre was crowded with people, shoulder to shoulder, with some shouting and waving flags and banners, making it difficult to enter the lecture room. The video shows verbal and physical altercations. York Federation of Students marshals, York security officers and TPS officers are shown acting as physical barriers between event supporters and protestors.



The footage also shows that protestors inside the lecture hall, who were standing during the lecture holding up certain images, were physically removed by individuals who appear not to be York security or police personnel. The footage shows protestors banging on the walls of the lecture hall and other protestors outside the lecture hall but inside the building using sound amplification equipment. The footage also shows that individuals bearing the crest of the JDL were identifiable at the event, participating in the pushing and shoving amongst event supporters and protestors. The video footage also appears to show a SAIA member being punched. I understand that another individual was knocked unconscious and that there is an on-going police investigation.

The event itself was held, although with some disruption from some protestors in the lecture hall and with sounds of shouting and banging on the walls clearly audible. Some participants were escorted out of the building given the presence of protestors.

According to incident reports, by 8:30pm, SAIA protestors had mostly relocated to the ground floor of the Vari Hall rotunda, but continued to protest until about 9:00pm, after which they began to disperse. The Herut event finished at 8:40pm. Around 9:10pm,

physical and verbal altercations took place between SAIA and the JDL, with those groups separately escorted away from Vari Hall by members of York Security Services and the TPS.

### K. The immediate aftermath

The University was flooded with communications following the event. Prominent community leaders issued statements and there was extensive media coverage.<sup>35</sup> Some of the comments and coverage made factual statements for which there appears to be no objective evidence. President Lenton issued a statement expressing deep disappointment in the behaviour on display on the evening of November 20.<sup>36</sup>

After the event, a Facebook post appeared on Herut's Director's account thanking her private "security organizer" who "rallied many people in the community" to come to the event. The post thanked the Riders of the Covenant, The Deplorables and the JDL who attended the event "to keep community members safe."<sup>37</sup>

On December 3, 2019, the Vice-Provost Students and the Vice-President, Finance & Administration wrote to Herut and SAIA

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<sup>35</sup> For instance, on November 21, 2019, Premier Doug Ford tweeted: "I was shocked by the vile hatred that was on display last night at York University. I have been clear that there is no place in Ontario for racism and hatred. My caucus and I stand with the students at York University who had to endure this." In addition, on November 24, 2019, Prime Minister Justin Trudeau tweeted: "On Wednesday night, violence & racist chants broke out against an event organized by the Jewish community at York University. What happened that night was shocking and absolutely unacceptable. Anti-Semitism has no place in Canada. We will always denounce it & all forms of hatred." Each of Global News, City News, *Toronto Sun*, CP24, *National Post*, *Globe and Mail* and the *Toronto Star* ran coverage of the event as well.

<sup>36</sup> November 21, 2019.

<sup>37</sup> Specifically, the post states "I personally appointed a security organizer who rallied many people in the community to come out and help us stay safe. He had connections to certain Jewish motorcycle groups like The Riders of the Covenant and The Deplorables, whose members came out and selflessly protected our community. Thank you guys! My security organizer also reached out to the JDL, who sent out a group of guys. We are very grateful to them as they helped keep the protestors away from our event, protected the Jewish students and Zionist community members, and helped to safely escort us home after the event."

advising that their “privileges including reserving space, tabling and postering” had been withdrawn temporarily, including at all buildings “who have usage agreements with the University.” The letter did not provide detailed reasons for the temporary withdrawal but noted that a “preliminary internal review” had led to the conclusion that “a more immediate intervention is needed.” The withdrawal was stated to be “in keeping with the Temporary Use of University Space Policy and associated Procedures.”

So far as I have been able to determine, there is no policy framework in relation to how a decision of this nature should be made or by whom. As I noted earlier, the *TUUS Policy* provides that failure to observe “the policies and procedures set forth herein” entitles the University to “withdraw or deny access to the use of its facilities.” The *TUUS Policy* and *Procedure* do not set out any process by which this may be done or by whom or what sorts of failure to follow the policies and procedures justify a denial of access. The letters to Herut and SAIA do not allege any specific failures to follow the *TUUS Policy* and *Procedure*. There was no suggestion that SAIA was required to apply for use of space in relation to the November 20 events.

On November 28, the Annual General Meeting of the York Federation of Students passed a motion referring to the events of November 20 and resolving, in part as follows:

... that if representatives of the Israeli state or any other imperialist power

- Clarify the parameters of free expression in relation to extra-curricular events on campus;
- Reinvigorate the University's policies and procedures on racism, discrimination and harassment, particularly in relation to conduct by student groups;

are invited to gather support for war and occupation in Palestine and elsewhere, the York Federation of Students must organize mass mobilizations of students, workers, marginalized communities in opposition....

The YFS [York Federation of Students] provides material support for student activist groups fighting against imperialist propaganda by providing resources and using their multi-million dollar apparatus to lead the organizing effort ...

The YFS defend[s] the right of students to speak freely and organize against the far-right [*sic*], war, and imperialism on campus by defending students from repression by the administration or state forces.

Following a mediation process, Herut and SAIA’s privileges were restored, effective January 13, 2020.

#### L. Areas to be addressed

The events of November 20 reveal a number of aspects of the University’s policies, procedures and practices that would benefit from reconsideration and revision. I have identified five steps that I suggest that the University take to better equip it to plan for and manage controversial extra-curricular events. I will set out those five areas here and make more detailed suggestions with respect to each of them in subsequent chapters. Those five main steps are:

- Make the Temporary Use of Space process more robust and transparent;
- Clarify and make transparent the University's responsibility both to promote free expression and provide for community safety; and
- Clarify the University's responsibility and authority in relation to student groups.

## Chapter 2. Expression on Campus — Providing Clarity and Strengthening the Culture

### A. Introduction

In common with many universities around the world, York University has experienced the collision of deeply held views about the scope and limits of free expression on its campus.<sup>38</sup> As Robert J. Zimmer, President of the University of Chicago, has observed, "... universities have come under attack from a range of groups, both external and internal, that demand the silencing of speakers, faculty, students and visitors."<sup>39</sup> He noted that the "attack is sometimes driven by a desire of an individual or group not to have its authority questioned. Other times it derives from a group's moral certainty that its particular values, beliefs or approaches are the only correct ones and that others should adhere to the group's views."<sup>40</sup> President

Zimmer concluded that some claim that "their own discomfort with conflicting and challenging views should override the value of free and open discourse."<sup>41</sup> The November 20 events at York must be seen as part of a widespread and deep tension concerning the scope and limits of free expression on university campuses.<sup>42</sup>

In the course of my interviews and review of the written submissions, it became clear that there are important misunderstandings in some quarters of the University about the scope and the limits of free expression. Some take an unduly broad view of the sorts of expression that should not be allowed on campus while some take an unduly broad view of their right to interfere with the expression of others. There is little shared

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<sup>38</sup> Some recent examples of campus free speech controversies include the following: Rob Picheta, "A leading politician was no-platformed an hour before speaking at Oxford, sparking another debate about free speech on university campuses," *CNN*, (March 6, 2020), online: <<https://www.cnn.com/2020/03/06/uk/amber-rudd-oxford-speech-canceled-scli-gbr-intl/index.html>>; Lois Beckett, "Arrests made after more than a thousand protest Ann Coulter speech," *The Guardian*, (November 21, 2019), online: <<https://www.theguardian.com/us-news/2019/nov/21/ann-coulter-berkeley-protesters-arrests>>; Sean Boynton, "UBC threatened with legal action over free speech concerns after cancelling event," *Global News*, (January 4, 2020) online: <<https://globalnews.ca/news/6367366/ubc-free-speech-andy-ngo>>.

<sup>39</sup> Robert J. Zimmer, "Free Speech is the Basis of a True Education," *Wall Street Journal*, (August 26, 2016) online: <<https://www.wsj.com/articles/free-speech-is-the-basis-of-a-true-education-1472164801>>.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> See generally, William A Schabas, "Free Speech on Campus: Lessons from International and Comparative Law" (1995) 44 UNB LJ 111; Jeannie Suk Gersen, "The Socratic Method in the Age of Trauma" (2017) 130 Harvard Law Review 2320; Frances Henry *et al*, *The Equity Myth: Racialization and Indigeneity at Canadian Universities* (Vancouver: UBC Press, 2017); Michiel Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999); James Turk (ed), *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Lorimer, 2014); Keith E Whittington, "Free Speech and the Diverse University" (2019) 87:6 Fordham L Rev 2453; Noah C Chauvin, "Policing the Heckler's Veto: Toward a Heightened Duty of Speech Protection on College Campuses" (2018) 52:1 Creighton L Rev 29; Gregory P Magarian, "When Audiences Object: Free Speech and Campus Speaker Protests" (2019) 90:2 U Colo L Rev 551; T Benson Clayton & J Huff, "Resolving Conflict on Campus: A Case Study of Free Speech and Controversial Speakers" (2018) 2 J of Dispute Resolution 7; Kelly Lamrock, "Free Speech on Campus: The Principle beyond the Crucible" (1995) 44 UNBLJ 103; Sigal R Ben-Porath, *Free Speech on Campus*, (Pennsylvania: UPenn Press, 2017).

understanding of when the University may justifiably deny the use of its property to those seeking to express their views, of the extent of the right of the University to control the place in which expression occurs, of the fact that the right to protest does not extend

to obstruction of free expression by others and of the circumstances in which the exercise of free expression may justifiably be limited because it threatens the safety of others.

The lack of clarity about the scope and limits of the exercise of free expression is compounded by the lack of clear, transparent and robust decision-making processes in relation to these difficult and contested questions.

To address these concerns, I recommend three main courses of action:

- **first**, the University should clarify the parameters of free expression by producing a set of procedures and/or a handbook to supplement its *Statement of Policy on Free Speech*;
- **second**, the University should develop and present training on the scope and limits of free expression; and
- **third**, the policy framework and the processes of decision-making in relation to contentious issues related to free expression should be clarified and strengthened.

In this chapter, I will address in detail the first two of these suggestions. I will first set out the general framework within which freedom of expression in the University must be viewed and then turn to suggest what should be contained in the University's further elaboration of free expression and the sorts of training that should be provided. I will turn to the third recommendation in subsequent chapters.

I emphasize that my analysis concerns free expression in the context of *extra-curricular* events at the University, that is, the scope and justified limits of free expression outside of purely academic settings.<sup>43</sup>

## B. Free expression in the University

Universities, it has been said, should be places of light, of liberty and of learning.<sup>44</sup> Consistent with this description, the express objects and purposes of the University are

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<sup>43</sup> The University has a different set of policies that pertain to academic settings. For example, "Senate Policy on Disruption and/or Harassing Behaviour in Academic Situations", York University, approved October 26, 2006, online: <<https://secretariat-policies.info.yorku.ca/policies/disruptive-andor-harassing-behaviour-in-academic-situations-senate-policy>>. The ambit and limits of free expression in academic settings engage different questions than those that I address in this Review.

<sup>44</sup> UK, HC, *Parliamentary Debates*, vol 214, col 1814 (11 March 1873) (Benjamin Disraeli) ("[a] University should be a place of light, of liberty, and of learning. It is a place for the cultivation of the intellect, for invention, for research; it is not a place where you should expect to find interdiction of studies, some of them the most interesting that can occupy the mind of man." For a more contemporary discussion of similar ideas, see Jon Nixon, *Higher education and the public good* (London: Continuum, 2011).

“the advancement of learning and the dissemination of knowledge” as well as “the intellectual, spiritual, social, moral and physical development of its members and the betterment of society.”<sup>45</sup> The University is a community where “there is freedom to teach, freedom to engage in research, freedom to create, freedom to learn, freedom to study, freedom to speak, freedom to associate, freedom to write and to publish.”<sup>46</sup>

This freedom exists within a largely self-governing institution. The *York University Act, 1965* provides that the Board of Governors, except as to matters specifically assigned to the Senate, has the “government, conduct, management and control of the University and of its property” and “all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University.”<sup>47</sup> Within this framework, the President “has power to formulate and implement regulations governing the conduct of students and student activities.”<sup>48</sup> This authority supports the creation of the *Code of Student Rights and Responsibilities* by Presidential Regulation.

The University, of course, is not — and should not be — remote from the debates and conflicts of the wider world. A challenge for the University, as for many other universities, is to find a path that accommodates sharply diverging and deeply held opinions while preserving the freedoms essential to the

University’s mission. Finding that path is important not just to the University community, but to civil society.<sup>49</sup> As Northrop Frye argued, a university “is the centre of all genuine social order” and “all serious and effective social action has to begin by strengthening and unifying the university community.”<sup>50</sup> And, as the Supreme Court of Canada has said, “[f]reedom of expression is fundamental to freedom. It is the foundation of any democratic society. It is the cornerstone of our democratic institutions and is essential to their functioning.”<sup>51</sup> The issues with which the University is wrestling are at the heart of our life together in a diverse, democratic society.

## C. Defining free expression on campus

### 1. Background

The precise scope and limits of freedom of expression are sometimes unclear and often controversial. What expression is included? Where can the right be exercised? How can the expressive rights of protest as well as those of the objects of the protest be reconciled?

The Government of Ontario sought to clarify the nature of free expression in the province’s universities. It issued an announcement to all publicly funded colleges and universities to develop free speech policies within certain

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<sup>45</sup> *York University Act, 1965*, at section 4.

<sup>46</sup> Bora Laskin, *Freedom and Responsibility in the University Report of the Presidential Committee on Rights and Responsibilities of Members of York University* (Toronto: University of Toronto Press, 1970).

<sup>47</sup> *York University Act, 1965*, at section 10.

<sup>48</sup> *Ibid.*

<sup>49</sup> See generally, John Dewey, *Democracy and Education* (New York: Macmillan, 1916); Stefan Collini, *What Are Universities For?* (London: Penguin UK, 2012). For a classical discussion of the purpose of a university, see John Henry Newman, *The Idea of a University*, Ian Kerr eds (Oxford: Oxford University Press, 1976).

<sup>50</sup> Northrop Frye, *On Education* (Markham: Fitzhenry & Whiteside, 1988) at 87.

<sup>51</sup> *UFCW Local 1518 v K Mart Canada Ltd*, [1999] 2 SCR 1083 at para 21.



parameters and according to certain principles.<sup>52</sup> For the ease of reference, I will call this announcement the “*Directive*” in this Review.

The *Directive*, understood in the context of the *York University Act, 1965*, will be the reference point for my analysis of what freedom of expression requires in relation to extra-curricular events on campus.<sup>53</sup> I will first examine the formal requirements under the *Directive*, the inspiration behind it, and its implementation thus far. I will then suggest the sorts of elaborations of the scope and limits of free expression that the University ought to adopt.

The *Directive*, like the University’s policy responsive to it, refers to “free speech.” Technically, “free speech” is only one example of free expression because expression includes all expressive activities, such as protesting, that may not have a speech component. When the *Directive* and the University’s policy are read as a whole, they clearly intend to address free expression rather than simply expression through speech. I have therefore proceeded on this broader understanding of the topic and have

used the terms “expression” and “speech” interchangeably except where the context requires a more precise meaning.

## 2. Ontario’s free speech *Directive*

On August 30, 2018, Ontario announced that publicly funded universities and colleges in Ontario must implement campus free speech policies applicable to faculty, students, staff, management and guests.<sup>54</sup> These policies shall meet the following “minimum” requirements:

- Provide a definition of free speech;
- Adopt the following principles based on the University of Chicago’s “Statement on Principles of Free Expression”:
  - Ensuring that universities remain open places for discussion and free inquiry;
  - Exposing students to ideas or opinions that they disagree with and/or find offensive;

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<sup>52</sup> Office of the Premier (Ontario), “Ontario Protects Free Speech on Campuses”, (August 30, 2018), online: <<https://news.ontario.ca/opo/en/2018/08/ontario-protects-free-speech-on-campuses.html>>; Office of the Premier (Ontario), “Upholding Free Speech on Ontario’s University and College Campuses”, (August 30, 2018), online: <<https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html>>.

<sup>53</sup> There is a complex and evolving body of jurisprudence on whether the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11) applies to universities. Some courts, including the Ontario Court of Appeal, have held that the *Charter* does not apply to universities on, among other things, the use of space on campus and extra-curricular activities: *Lobo v Carleton University*, 2012 ONSC 254; affirmed *Lobo v Carleton University*, 2012 ONCA 498; *AlGhathiy v University of Ottawa*, 2012 ONSC 142, *Telfer v The University of Western Ontario*, 2012 ONSC 1287; *BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162. Conversely, some Alberta courts have found that the *Charter* may apply to universities: *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1; *Wilson v University of Calgary*, 2014 ABQB 190; *R v Whatcott*, 2012 ABQB 231; *Pridgen v University of Calgary*, 2012 ABCA 139. For the purposes of this Review, I will rely on the *Directive*, the *Chicago Principles* - to which it refers - and general legal principles in relation to free expression.

<sup>54</sup> Office of the Premier (Ontario), “Upholding Free Speech on Ontario’s University and College Campuses”, (August 30, 2018) online: <<https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html>>.

- Protecting the freedom of the university community to criticize and contest views expressed on campus while ensuring the criticism does not obstruct or interfere with the freedom of others to express their views;
- Prohibiting speech that violates the law;
- Applying the university's existing student disciplinary sanction to students whose actions are contrary to the free speech policy (such as disruptive protests that significantly interferes with the ability of an event to proceed);
- Taking into account student groups compliance with the free speech policy as a condition for financial support or recognition;
- Encouraging student unions to adopt policies that align with the free speech policy; and
- Using existing mechanisms to manage complaints and enforce compliance with the free speech policy, including referring matters to the Ontario Ombudsman's office where a complaint cannot be resolved internally.<sup>55</sup>

Ontario stipulated that failure by the universities to comply with the free speech policy requirements, or failure to follow policies once implemented, could result in a reduction by the province to universities' operating grants.<sup>56</sup> The reductions in funding would be proportional to the severity of non-compliance.<sup>57</sup>

In addition, Ontario authorized the Higher Education Quality Council of Ontario ("HEQCO") to oversee the implementation of the *Directive* and advise the Ministry of Training, Colleges and Universities.<sup>58</sup> The HEQCO is to provide an annual report to the Ministry updating the Ministry on the implementation of the *Directive*.<sup>59</sup> Universities must submit an annual report to the HEQCO about their implementation of the *Directive*.<sup>60</sup>

The *Directive* also emphasizes the need for enforcement. A university is required to specify that "existing student discipline measures apply to students whose actions are contrary to the policy (e.g. ongoing disruptive protesting that significantly interferes with the ability of an event to proceed)."<sup>61</sup> If a complaint to the university remains unresolved, the *Directive* repeatedly underscores that the affected parties may bring their complaint to the Ontario Ombudsman. As part of its mandate, the *Ombudsman Act*<sup>62</sup> provides the Ombudsman wide jurisdiction to investigate complaints about administrative

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<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> RSO 1990, c O.6.



issues in the public sector, including universities.<sup>63</sup>

### 3. *The Chicago Principles*

The *Directive* stipulates that university free expression policies must include principles developed by a committee appointed in 2014 at the University of Chicago to provide a statement of principles (the “*Chicago Principles*”), “articulating the University’s overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University’s community.”<sup>64</sup>

Before delving into the *Chicago Principles*, some clarifications are necessary. In expressly guiding Ontario universities to develop policies based on the *Chicago Principles*, Ontario has required post-secondary institutions in effect to adopt some of them. My goal here is to offer my best understanding of those rules and their implications. I recognize that the *Chicago Principles*, in common with rules generally, represent only one of a number of possible ways of understanding their subject matter. I

recognize, too, that thoughtful concerns have been raised about the *Principles*.<sup>65</sup>

The *Chicago Principles* have four elements.

First, free expression on campus is integral to the university fostering an environment of free inquiry. The Committee at the University of Chicago explained that because a university is “committed to free and open inquiry,” it follows that all members of the University community should be granted the “broadest possible latitude to speak, write, listen, challenge, and learn.”<sup>66</sup> This means that, on the one hand, the fact that a form of expression is “unwelcome, disagreeable, or even deeply offensive” is not in and of itself sufficient to make an expression unacceptable on campus.<sup>67</sup> But, on the other hand, freedom of expression does not extend to suppressing the expression of others.

Second, concerns about civility, polite discourse, and respect cannot justify a university circumscribing speech, even if that speech is unsavory or divisive. The Committee explained that although all members of the university community “share in the responsibility for maintaining a climate of mutual respect,” this does not mean that

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<sup>63</sup> In terms of the legal basis for the *Directive*, it appears that the *Directive* emerged as an announcement from the Office of the Premier. It has not been subsequently formalized through legislative mechanisms, such as forming a part of a bill or amending a previous provision. Nor is the *Directive* officially part of a regulation or a ministerial guideline. The only legislative change undertaken for the *Directive* is that Ontario amended the “Ontario Regulation 336/06” under the *Higher Education Quality Council of Ontario Act, 2005*, SO 2005, c 28, Sch G to ensure that the HEQCO had the delegated authority to monitor and advise on the implementation of the *Directive*.

<sup>64</sup> “Report of the Committee on Freedom of Expression”, University of Chicago, (January 2015), online: <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>.

<sup>65</sup> Some scholars have argued that the *Chicago Principles* do not adequately address concerns of exclusion and empowerment: see Sigal Ben-Porath, “Against Endorsing the Chicago Principles,” *Inside Higher Ed* (December 11, 2018) online: <<https://www.insidehighered.com/views/2018/12/11/what-chicago-principles-miss-when-it-comes-free-speech-and-academic-freedom-opinion>>; Shama Rangwala, “The real free-speech crisis on Alberta’s campuses might not be what you think it is,” *The Globe and Mail* (August 31, 2019) online: <<https://www.theglobeandmail.com/opinion/article-the-real-free-speech-crisis-on-albertas-campus-might-not-be-what/>>.

<sup>66</sup> Above, note 64.

<sup>67</sup> *Ibid.*

“concerns about civility and mutual respect can...be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community...”<sup>68</sup> In other words, no matter how “*offensive, unwise, immoral, or wrong-headed*” an idea might be, the content of the idea alone cannot justify the university’s prohibition of it being expressed on campus.<sup>69</sup>

Third, the *Chicago Principles* recognize that freedom of expression does not mean that “individuals may say whatever they wish, wherever they wish.”<sup>70</sup> Speech may be limited if it violates the law, defames specific individuals, constitutes a genuine threat or harassment, unjustifiably invades substantial privacy or confidentiality interests of individuals, or “is otherwise directly incompatible with the functioning of the University.”<sup>71</sup> A university can reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt its ordinary activities.

Fourth, the *Chicago Principles* recognize that while members of a university community are “free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus,” they may not obstruct or otherwise interfere with the freedom of “others to express views they reject or even loathe.”<sup>72</sup> The *Chicago Principles* imply that ensuring the intellectual diversity and openness of universities is a

communal project. It falls on the university to provide a forum for a wide range of speech while observing the (narrow) exceptions to permitted campus expression. Meanwhile, members of the university must recognize that while they can critique and contest the views being expressed on campus, their actions cannot rise of the level of expressly or implicitly denying others their ability to express such views.

In a nutshell, the *Chicago Principles* provide that free expression on campus is indispensable to the functions of a university. Unlike the *Directive*, the *Principles* explicitly provide that in the event of conflict between civility and free speech, free speech must be favoured, but the *Principles* provide no explanation of what “civility” entails. Concerns about safety and disruption can be used to justify limitations on expression in the appropriate circumstances.

#### 4. Implementing the Directive

Since the *Directive* was announced in 2018, Ontario universities and the HEQCO have published reports on implementing the *Directive*.<sup>73</sup> In its report to the HEQCO, the University observed that it had adopted a campus free speech policy and had not faced complaints about campus events being limited as a result of free speech concerns.

The HEQCO concluded in its 2019 annual report to the Ministry of Training, Colleges and Universities that the *Directive* had been

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid* (emphasis added).

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> “Freedom of Speech on Campus 2019 Annual Report to the Ontario Government by the Higher Education Quality Council of Ontario”, HEQCO, (undated), online: <<http://www.heqco.ca/SiteCollectionDocuments/HEQCO%202019%20Free%20Speech%20Report%20to%20Government%20REVISED.pdf>>.

successfully launched and that the policies reviewed, including York's, "reflect the University of Chicago principles articulated by government." It observed, however, "a fundamental component of [the *Principles*] is not evident in all of the Ontario policies, perhaps because it was not included in the [M]inistry's list of minimal conditions." This "fundamental component," in the HEQCO's view, was that "freedom of speech explicitly and unequivocally takes precedence over civility and respect in public discourse."<sup>74</sup> As noted, the *Directive* does not include this aspect of the *Chicago Principles* in its list of what is required to meet the "minimum standard." The HEQCO noted that some university policies – and I would note, York's – refer to respect, civility and the role of the institution as a place for free and open dialogue, but do not explicitly acknowledge the dominance of free speech within that context. This, according to the HEQCO, has the potential to undercut the "very essence" of the *Chicago Principles*.<sup>75</sup> The HEQCO indicated that it will "continue to be mindful of this potential issue" while noting that its task "is to report on the implementation of the government's free speech initiative, not to pass judgment on or to police institutions."<sup>76</sup>

#### **D. York's free speech policy framework**

The University has responded to the *Directive* in a manner satisfactory to the HEQCO.<sup>77</sup> However, my review convinces

me that further clarification of the scope and limits of free expression is required.

#### **1. The University's free speech policies**

The University's *Statement of Policy on Free Speech* (the "*Statement*") provides that "free speech [is]...a fundamental principle upon which it pursues its mission."<sup>78</sup> The *Statement* defines "free speech" in a broad and flexible way: "...freedom of speech is the right to seek, receive, share and impart information and ideas of all kinds, in a variety of forms, including orally, in writing, in print, and in the form of art or music, or through any other media of one's choice."<sup>79</sup> The *Statement* recognizes that "attempts to prevent such free inquiry, whether from other members of the University community or from external groups, are inconsistent with this mission."<sup>80</sup>

The *Statement* adopts a nuanced approach to free speech. On the one hand, it notes that there is a wide-range of University policies that "reflect the right of all community members and invited guests to express their views within the law without fear of intimidation or harassment."<sup>81</sup> The result is that "community members may be exposed to ideas or opinions they find disagreeable or offensive."<sup>82</sup> On the other hand, the *Statement* cautions against intolerance wrapped in the banner of free speech. The *Statement* provides that "freedom of speech

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<sup>74</sup> *Ibid* at 2.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* at 5.

<sup>78</sup> "Statement of Policy on Free Speech", York University, approved December 13, 2018, online: <<https://secretariat-policies.info.yorku.ca/policies/free-speech-statement-of-policy>>.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* at para 2.

<sup>81</sup> *Ibid* at para 3.3.

<sup>82</sup> *Ibid*.

is not absolute and does not protect expression that constitutes hate speech, harassment, threats, discrimination or otherwise violates the law.”<sup>83</sup> Consequently, the University “*will not tolerate members of the community or guests engaging in threatening speech or actions*” which may create safety concerns for the University’s community members as outlined in other University policies such as its policies on racism and sexual violence.<sup>84</sup> In other words, the *Statement* functions within a network of existing York policies governing student and university conduct.

Finally, the *Statement* reiterates that by virtue of accessing and using the University’s property, students “are responsible for upholding an atmosphere of civility, diversity, equity and respect in their interactions with others, and should strive to make the campus safe, support the dignity of individuals and groups, and uphold

individual and collective rights and responsibilities.”<sup>85</sup>

As noted above, the *Statement* expressly refers to 19 other related University policies and/or procedures. There is an obvious need to consolidate the information relevant to defining the scope and limits of free expression and setting out the mechanisms for enforcement and related matters. While the *Statement* refers to mechanisms that are in place to deal with complaints, interpretation and enforcement, there are serious gaps and weaknesses in these mechanisms, as I will describe in detail in later chapters. The *Statement* also notes that “additional guidelines, tool-kits, education and training with respect to free speech will be developed from time to time as needed.”<sup>86</sup> My understanding is that these have not yet been developed, but in my view they are needed and I will offer some concrete suggestions later in this chapter.

## **E. Recommendations for bringing greater clarity to the scope and limits of free expression**

My review convinces me that the University community requires greater clarity of and enhanced familiarity with some of the basic elements, and limits, of free expression on campus.

My review convinces me that the University community requires greater clarity of and enhanced familiarity with some of the basic elements – and limits – of free expression on campus.

I say this recognizing that the scope and limits of extra-curricular free expression at

the University are neither uncontroversial nor self-applying. It may well be that articulating that scope and those limits more specifically will bring with it objection, debate and perhaps contestation. But that, in my view, would be preferable to leaving the University’s position on certain key aspects of free expression so vague that it provides

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid* (emphasis added).

<sup>85</sup> *Ibid* at para 3.4.

<sup>86</sup> *Ibid* at para 6.

little guidance either for those who must conform to it or for those who must administer it.

Clear principles are only one of the essential elements of a strategy to improve the exercise of free expression on campus. Another key element is improved knowledge of those principles. For that reason, I suggest that the University, in addition to clarifying the scope and limits of free expression, also institute educational initiatives so that the University community, and especially students and student organizations have a firmer grasp of the principles. I will address these two recommendations in detail in the next sections.

### 1. Providing clarity to the scope and limits of free expression

I suggest that the University bring greater clarity to certain key elements of the scope and limits of free expression at extra-curricular campus events.<sup>87</sup> This could be achieved by developing a “Procedure” document as is done with some other University policies or by amending the *Statement* itself. A plain language handbook setting out these principles should also be prepared.

Below, I will set out the elements that need to be addressed and provide my suggestions as

to what should be included. I do not intend to suggest by doing so that the existing policies in relation to free speech fail to meet the requirements of the *Directive*. My focus is purely on matters requiring greater clarity and more guidance for the University community and its guests participating in extra-curricular events on campus.

#### (a) *Clarify what is “expression”*

The *Directive* and the *Chicago Principles* do not address what is included in the concept of “speech” or “expression.” The *Statement* refers to freedom of speech taking a “variety of forms, including orally, in writing, in print, and in the form of art or music or through any other media of one’s choice.”<sup>88</sup> Such a generalized statement is not particularly instructive for the University community.

Instead, the University should specify that (1) “expression” is broadly understood in line with Canadian law on the subject and (2) that “expression” encompasses a wide range of activities. For example, the Supreme Court of Canada has stated that “expression” extends to an “activity” that “conveys or attempts to convey a meaning.”<sup>89</sup> This covers nearly all typical activities on campus.<sup>90</sup> In fact, the Supreme Court memorably noted that parking a car could be an “expressive

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<sup>87</sup> Several interested parties provided written submissions that echo the need for greater clarity in policies: B’nai Brith Canada’s Written Submissions (February 10, 2020); Canadian-Arab Anti-Discrimination Committee’s Written Submissions (February 6, 2020); Canadian Muslim Lawyers Association’s Written Submissions (February 10, 2020); Centre for Israel and Jewish Affairs’ Written Submissions (February 18, 2020); and Friends of Simon Wiesenthal Center for Holocaust Studies’ Written Submissions (March 2, 2020).

<sup>88</sup> “Statement of Policy on Free Speech”, York University, approved December 13, 2018, at para 2, online: <<https://secretariat-policies.info.yorku.ca/policies/free-speech-statement-of-policy>>.

<sup>89</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 968-9; *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 95.

<sup>90</sup> OCAD University has recognized this point in its free speech policies: see “OCAD University Freedom of Expression Statement and Policies”, OCAD University, effective December 10, 2018, online: <<https://www2.ocadu.ca/internal-update/ocad-university-freedom-of-expression-statement-and-policies>>.



activity” whereby it may qualify as an “expression.”<sup>91</sup>

*(b) Make clear that the expression of offensive ideas is in general protected*

The *Directive* and the *Chicago Principles* note that a university should not attempt to shield students from ideas or opinions that they disagree with or find offensive. The *Chicago Principles* state that “debate or deliberation may not be suppressed because the ideas expressed are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed.”<sup>92</sup>

The *Statement* at present simply provides that “it is recognized that community members may be exposed to ideas or opinions they find disagreeable or offensive.” However, the point that needs to be made clearly (whether in revisions of the *Statement* or in an accompanying Procedure or handbook) is that the University should not suppress expression simply because some or even most people may find it “unwelcome, disagreeable or even deeply offensive.”<sup>93</sup>

*(c) Clarify the limits of free expression*

The *Canadian Charter of Rights and Freedoms*, which is part of the *Constitution of Canada*,<sup>94</sup> protects us from unjustified limitations by government actors of freedom of speech and assembly and, to some extent, makes public property available for the exercise of those freedoms.<sup>95</sup>

There are strong reasons to think that these protections do not apply to extra-curricular expression on campus. There is binding Ontario Court of Appeal authority holding that the constitutional guarantee of free expression does not apply to a university’s booking of space for non-academic extra-curricular use.<sup>96</sup> Moreover, the University’s property is private, not public. In addition, the *Chicago Principles* (and implicitly the *Directive*) recognize that the University may restrict expression that is “directly incompatible with the functioning of the University.”<sup>97</sup>

Three important ideas follow from this:

- First, the University may impose limitations on expression on campus that are *at least as restrictive* as the limitations

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<sup>91</sup> *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at para 132.

<sup>92</sup> “Report of the Committee on Freedom of Expression”, University of Chicago (January 2015), online: <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>.

<sup>93</sup> Some universities have made attempts to clarify this point in plain language by way of “frequently asked questions”: see University of Guelph (<https://www.uoguelph.ca/freedom-of-expression/links>); University of British Columbia (<https://academic.ubc.ca/support-resources/freedom-expression/frequently-asked-questions>); McMaster University (<https://president.mcmaster.ca/frequently-asked-questions>); University of California, Berkeley (<https://freespeech.berkeley.edu/frequently-asked-questions>).

<sup>94</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.

<sup>95</sup> *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 60.

<sup>96</sup> *Lobo v Carleton University*, 2012 ONCA 498 at para 4.

<sup>97</sup> “Report of the Committee on Freedom of Expression”, University of Chicago, (January 2015), online: <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>.

permitted by the general law and the *Constitution*.

- Second, members of the University community and their guests cannot reasonably expect to be free to engage in expression on campus that exceeds the bounds of what the general law and the *Constitution* protect.
- Finally, the *Directive* should not be understood as requiring the University to permit forms of expression on campus that exceed those bounds. In addition, the *Chicago Principles*, on which the *Directive* is based, endorse the existence of limitations of free expression that are necessary to the functioning of the University.

For these reasons, it will be helpful to set out in broad terms the legal limits of free expression to serve as a guide to the *minimum* standard for extra-curricular events on campus.

The *Statement* correctly notes that “[f]reedom of speech is not absolute and does not protect expression that constitutes hate speech, harassment, threats, discrimination or otherwise violates the law.”<sup>98</sup> It further says that the University will restrict and/or

sanction conduct that rises to “threatening speech” or actions which violate the University’s commitment to safety.<sup>99</sup> While this is a helpful start, my interviews made clear that what falls outside of the ambit of protected free expression is unclear to many.

Canadian law excludes two types of expression from protection: *acts and threats of violence*.<sup>100</sup> As the Supreme Court has explained, “a murderer...cannot invoke freedom of expression in justification of the form of expression he has chosen.”<sup>101</sup> While what constitutes a “threat of violence” is not easy to capture in a single definition,<sup>102</sup> in general a threat of violence is a tool of intimidation “which is designed to instill a sense of fear in its recipient” and that reflects an intent to carry out violence that can cause physical harm.<sup>103</sup>

Other types of expression, while not entirely excluded, are limited because doing so is “demonstrably justified.” In other words, the limitation of expression is justified because that limitation serves an important objective *and* does not limit expression any more than reasonably necessary to achieve it. Examples of these justified limitations include the prohibition of hate speech and other types of discriminatory expression, advocacy of genocide,<sup>104</sup> publicly inciting hatred,<sup>105</sup> and

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<sup>98</sup> “Statement of Policy on Free Speech”, York University, approved December 13, 2018, at para 3(3), online: <<https://secretariat-policies.info.yorku.ca/policies/free-speech-statement-of-policy>>.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 970; *R v Keegstra*, [1990] 3 SCR 697 at 731; *R v Khawaja*, 2012 SCC 69 at para 70.

<sup>101</sup> *Ibid.*

<sup>102</sup> In terms of examples of threats of violence that would not be protected under the law, see *Foo v Law Society of British Columbia*, 2017 BCCA 151 at paras 71-77. The Court upheld a discipline panel’s suspension of a lawyer for violent speech. In the hallway of a courthouse, the lawyer told a social worker that he “should shoot” her, because “she takes away too many kids.”

<sup>103</sup> *R v McRae*, 2012 QCCA 236 at para 5.

<sup>104</sup> *Criminal Code*, RSC 1985, c C-46, section 318.

<sup>105</sup> *Criminal Code*, RSC 1985, c C-46, section 319(1).

willfully promoting hatred<sup>106</sup> of an identifiable group through telephone, broadcasting or other audible or visible means.<sup>107</sup> An identifiable group is one that is distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.<sup>108</sup>

Turning to hate speech, it often has one or more of the following characteristics:

- it vilifies the target group by blaming its members for the current problems in society; alleging that they are a “powerful menace;” that they are carrying out secret conspiracies to gain global control; or plotting to destroy western civilization;
- it delegitimizes the targeted group by suggesting its members are illegal or unlawful such as by labelling them as “liars, cheats, criminals and thugs;”
- it equates the targeted group with groups traditionally reviled in society, such as child abusers and pedophiles; and
- it may dehumanize a protected group by describing its members as animals or as subhuman.<sup>109</sup>

Conversely, hate speech *does not* include the following forms of expression:

- merely offensive or hurtful expressions;<sup>110</sup>
- repugnant or offensive ideas;<sup>111</sup>
- speech that is offensive, but does not incite the level of abhorrence, delegitimization, and rejection that risks causing discrimination or other harmful effects;<sup>112</sup> or
- censoring of ideas or to compel a person to think “correctly.”<sup>113</sup>

In the context of discussing general principles of free expression, some to whom I spoke raised concerns that a university is a unique setting where rational discourse requires mutual respect. Members of the community asked whether expression that otherwise fell inside the legal limits but was offensive and uncivil could be censored or punished because it is disrespectful.

As noted earlier, while the *Chicago Principles* provide that free expression trumps civility, the *Directive* does not include this element as part of the “minimum standard” to be met by free speech policies. Thus the *Directive* permits universities to limit “uncivil” expression to the extent that

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<sup>106</sup> *Criminal Code*, RSC 1985, c C-46, section 319(2).

<sup>107</sup> The Supreme Court’s leading authorities on hate propaganda includes the following: *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11; *R v Keegstra*, [1990] 3 SCR 697; *R v Andrews*, [1990] 3 SCR 870; *R v Krymowski*, 2005 SCC 7; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40; *R v Zundel*, [1992] 2 SCR 731.

<sup>108</sup> *Criminal Code*, RSC 1985, c C-46, section 318(4).

<sup>109</sup> *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 42-45.

<sup>110</sup> *Ibid* at para 46.

<sup>111</sup> *Ibid* at para 51.

<sup>112</sup> *Ibid* at para 57.

<sup>113</sup> *Ibid* at para 58.



any such limitation is consistent with the required elements of free expression. However, given the observations in the HEQCO's 2019 Annual Report about civility, I note two considerations so that this "civility versus free expression" conflict is kept in perspective.

First, "civility" is a nebulous concept that defies clear definition.<sup>114</sup> We must therefore take care not to understand the idea that free expression trumps civility too broadly. This idea is *not* that all "uncivil" expression is inside the limits of free expression and is therefore permissible. The *Chicago Principles* themselves, read as a whole, suggest some expression that could be described as lacking civility is *outside* those limits. They include all of the limits mentioned above, including the limit on expression that is directly incompatible with the functioning of the University.

This last limit is important. The University is a place that should "foster rigorous, constructive, truth-seeking discussions about

questions that matter."<sup>115</sup> While free expression is central to that mission, free expression alone is not enough to accomplish it. Hurling nasty provocations at one another may, in some settings, fall within the ambit of free expression, but not in the university setting. The reason is not that universities have an excessive concern for politeness; the reason is that such conduct is inconsistent with the University's mission to foster rigorous, constructive, truth-seeking discussion.<sup>116</sup> That is, such conduct, at least in its more extreme forms,<sup>117</sup> is "incompatible with the functioning of the University" because it undercuts the University's ability to achieve its mission. The *Code of Student Rights and Responsibilities* appropriately identifies some of the sorts of expression that is incompatible with the functioning of the University.

The second consideration is this. The limits on free expression that I have reviewed describe the *outer* limits of free expression. As in most other areas of life, the

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<sup>114</sup> Some classical and philosophical discussions of civility and tolerance include the following: John Locke, *A Letter Concerning Toleration* Tully (ed), (Indianapolis: Hackett, 1983); Teresa Bejan, *Mere Civility: Disagreement and the Limits of Toleration* (Cambridge: Harvard University Press, 2017); Joseph Raz, "Autonomy, Toleration, and the Harm Principle," in S Mendus (ed), *Justifying Toleration: Conceptual and Historical Perspectives* (Cambridge: Cambridge University Press, 1998). See also George Washington's personal endorsement of the "Rules of Civility & Decent Behavior in Company and Conversation", undated, online: <<https://www.mountvernon.org/george-washington/rules-of-civility>>. Finally, for helpful discussions of civility on campus, see P M Forni, *Choosing Civility: The Twenty-five Rules of Considerate Conduct* (St. Martin's Griffin, 2003); Judy Rookstool, *Fostering Civility on Campus* (Rowman & Littlefield Publishers, 2007); Sigal Ben-Porath, *Free Speech on Campus* (University of Pennsylvania Press, 2017); Ashley N Woodson, "Defining and Practicing Deep Civility on College Campuses", *Higher Education Today*, December 10, 2018, online: <<https://www.higheredtoday.org/2018/12/10/defining-practicing-deep-civility-college-campuses>>; Christopher L. Eisgruber, "Contested Civility: Free Speech & Inclusivity on Campus", undated, online: <[https://president.princeton.edu/blogs/contested-civility-free-speech-inclusivity-campus#\\_ftnref4](https://president.princeton.edu/blogs/contested-civility-free-speech-inclusivity-campus#_ftnref4)>; Gary Pavela, "Civility and Student Life" (1997) 27:1 Stetson L Rev 161; Thomas C Grey, "Civil Rights, Civility, and Free Speech - What Takes Precedence: Panel VI--Discriminatory Harassment and Free Speech" (1991) 14:1 Harv JL & Pub Pol'y 157.

<sup>115</sup> Christopher L. Eisgruber, "Contested Civility: Free Speech & Inclusivity on Campus", undated, online: <[https://president.princeton.edu/blogs/contested-civility-free-speech-inclusivity-campus#\\_ftnref4](https://president.princeton.edu/blogs/contested-civility-free-speech-inclusivity-campus#_ftnref4)>.

<sup>116</sup> *Ibid.*

<sup>117</sup> I reiterate that the term "proper functioning of the University" should not be interpreted overly broadly such that, for example, mere rudeness could be viewed as thwarting the "proper functioning of the University."

appropriateness of a person's conduct as a member of society should be guided, and will be judged, by more than the law's outer limits. If everyone in society did or refrained from doing only what the law requires, the quality of life in civil society would be greatly diminished.<sup>118</sup> Put simply, the mere fact that students may be permitted to engage in offensive expression on campus in their extracurricular activities should not be understood as encouragement to do so. On the contrary, students, administrators and community members should do their best to foster an environment at the University that is predicated on inclusion, diversity and respectful dialogue.

Some universities have undertaken civility initiatives<sup>119</sup> and the University may wish to study their experience.<sup>120</sup> However, I tend to think that a stronger policy framework to deal with expression in the context of extra-curricular events, coupled with the

reinvigoration of policies in relation to racism and harassment and the educational initiatives that I propose, will be sufficient, over time, to reinforce the culture of respectful discussion so essential to attaining the University's mission.

To conclude, the University community requires greater clarity about the principle that expression that takes the form of violence, threats of violence, hate speech and/or discriminatory conduct or otherwise is incompatible with the functioning of the University is not permissible on campus.<sup>121</sup> The *Statement*, associated procedure and/or a handbook, using practical examples, should clearly set out what these terms mean and how they apply in the university setting.

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<sup>118</sup> See generally, William Smith, *Civil Disobedience and Deliberative Democracy* (Routledge: New York, 2013).

<sup>119</sup> "Civility" can be a troublesome notion: see for example Nicholas Healey, "Ethics, Legal Professionalism and Reconciliation: Enacting Reconciliation Through Civility" (2018) 26 Dal J Leg Stud 113; Amy Salyzyn, "John Rambo v Atticus Finch: Gender, Diversity and the Civility Movement" (2013) 16:1 Legal Ethics 97; Richard Collier, "'Nutty Professors', 'Men in Suits' and 'New Entrepreneurs': Corporeality, Subjectivity and Change in the Law School and Legal Practice" (1998) 7:1 Social & Legal Studies 27; Constance Backhouse, *Gender and Race in the Construction of 'Legal Professionalism': Historical Perspectives*, LSUC, online: <[www.lsuc.on.ca/media/constance\\_backhouse\\_gender\\_and\\_race.pdf](http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf)>.

<sup>120</sup> Some examples of civility initiatives include the following: University of Maryland, (<https://archive.hshsl.umaryland.edu/bitstream/handle/10713/4666/CivilityDiscourseWhitePaper.pdf;jsessionid=701D0A970AF85D66C8A5D86D8CEA5674?sequence=1>); Rutgers University, (<https://sas.rutgers.edu/news-a-events/news/newsroom/student-news/1058-draft-2-rutgers-project-advances-edu-civility-on-campus-and-beyond2nd-draft-for>); Johns Hopkins University, (<https://krieger2.jhu.edu/civility/>); Furman University, (<http://www2.furman.edu/sites/parents/tips/campusliving/Pages/Civility-on-Campus.aspx>); Arcadia University, (<https://www.arcadia.edu/university/offices-facilities/student-affairs/civility-campus>); University of Missouri, (<https://understand.missouri.edu/civility-you-mizzou>); University of Wisconsin, (<https://uwosh.edu/civilityworks/>); University of California, Davis, (<http://civilityproject.ucdavis.edu/>); and American University, (<https://www.american.edu/ocl/civility.cfm>).

<sup>121</sup> Some universities have taken measures to explain this point. For example, see "Freedom of Speech Policy", Carleton University, effective November 30, 2018, online: <<https://carleton.ca/secretariat/wp-content/uploads/Freedom-of-Speech.pdf>>; "OCAD University Freedom of Expression Statement and Policies", OCAD University, effective December 10, 2018, online: <<https://www2.ocadu.ca/internal-update/ocad-university-freedom-of-expression-statement-and-policies>>; "Free Expression Policy", Lakehead University, effective December 18, 2018, online: <[https://www.lakeheadu.ca/sites/default/files/policies\\_procedures/Free%20Expression%20Policy.pdf](https://www.lakeheadu.ca/sites/default/files/policies_procedures/Free%20Expression%20Policy.pdf)>.

(d) *Protest is a form of protected expression, but it cannot legitimately suppress the expressive rights of others*

Although the *Code of Student Rights and Responsibilities* provides that students have the right to peaceful protest and assembly, the *Statement* and the relevant policies do not provide guidance about campus protesting — specifically on the point that protest must not unduly stifle the free expression of others.<sup>122</sup> This is a significant gap in the University’s present framework because protesting brings to the forefront some of the core challenges to understanding free expression on campus. Moreover, it appears that some members of the University community do not fully grasp that expression by protest does not trump another person’s ability to express him or herself freely.

Once again, I note that University property is private, not public and that the current law in Ontario does not support the view that the University is under any constitutional obligation to allow its property to be used for extra-curricular events. However, the University’s traditions and objects, the *Statement* and the *Directive* are all supportive of freedom of expression through protest. I have therefore thought it useful to provide a brief survey of the legal limits of protest

given that the University is on firm ground in requiring protest at extra-curricular activities at least to conform to those limits. I recommend that the University address these topics as part of its efforts to clarify the scope and limits of free expression on campus.

(i) Hallmarks of peaceful protests

The law understands peaceful protest to lie “at the very heart of freedom of expression.”<sup>123</sup> It will be helpful to highlight the hallmarks of what is generally considered peaceful protest.

*Peaceful assembly.* People must be able to gather for peaceful demonstrations.<sup>124</sup> “Peaceful” in general means not violent and does not incite violence or hatred.

*Right to dissent.* Peaceful protestors have wide latitude about how they wish to protest including, for example, chants, posters and banners.<sup>125</sup> Subject to municipal and other justified regulatory constraints, the right to dissent includes the selection of reasonable methods to voice that dissent.

*Reasonable access to space.* In general, the ability to protest includes the ability to access a space where the subjects of the demonstration can hear and be put on alert to

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<sup>122</sup> Some institutions set out the right to and limits of protesting: “Guidance Regarding Free Expression and Peaceable Assembly for Students at Yale”, Yale University, undated, online: <<https://studentlife.yale.edu/guidance-regarding-free-expression-and-peaceable-assembly-students-yale>>; “Freedom of Expression, Protest and Dissent: Guidance For Event Organizers and Participants”, McMaster University, June 8, 2018, online: <[https://op.mcmaster.ca/wp-content/uploads/2019/02/Guidance-for-Event-Organizers\\_FINAL\\_8Jun18.pdf](https://op.mcmaster.ca/wp-content/uploads/2019/02/Guidance-for-Event-Organizers_FINAL_8Jun18.pdf)>.

<sup>123</sup> *R v Guignard*, 2002 SCC 14 at para 20.

<sup>124</sup> *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at para 158; *Ontario (Attorney General) v Dieleman* (1994) 20 OR (3d) 229 at paras 329-330. For general discussions of protesting (and picketing in particular), see *RWDSU, Local 558 v Pepsi-Cola Canada Beverages*, [2002] 1 SCR 156; *Dolphin Delivery Ltd. v RWDSU Local 580*, [1986] 2 SCR 573; *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214; *Morasse v Nadeau-Dubois*, 2016 SCC 44.

<sup>125</sup> *Montreal (City) v Buczynsky* (1990), 59 CCC (3d) 302 at 307 (QSC); *Forget (Re)* (1990), 1990 CarswellAlta 191 (ABQB); *Montreal (City of) c Nelson*, 2015 QCCM 146 at para 99; *Batty v City of Toronto*, 2011 ONSC 6862 at para 75.

the content of the protest.<sup>126</sup> It also means that the space is physically suitable for protesting.

(ii) Limits on peaceful demonstrations

The courts often recognize the following limits on the right to peaceful protesting.

*Violent and other unlawful conduct.* A peaceful demonstration ceases to be “peaceful” or lawful if it provokes, endorses and/or causes violent or other unlawful conduct.<sup>127</sup> Violence includes both acts of physical violence and threats of violence that are meant to intimidate. “Other unlawful conduct” is a nebulous term: it may involve legal wrongs committed against an individual or the state. They can range from incidents of petty theft to property damage to blockades that halt transportation routes.<sup>128</sup> For example, the *Criminal Code* contains provisions limiting individuals’ rights in the

context of protesting.<sup>129</sup> A violation of any of these provisions likely makes a protest unlawful.

*Allow for other lawful activities.* While protesting is naturally disruptive, the right to protest does not take priority over the broader and legitimate needs of a community. For example, protesting cannot obstruct, physically impede, or blockade other lawful activities.<sup>130</sup> As one court explained, “[w]hatever else might be encompassed within the freedoms of assembly and expression, they do not include the right to physically impede or blockade lawful activities.”<sup>131</sup>

For the University, this means that protest at an event must not significantly impede the holding of the event. *Protest exceeds its limits when it prevents others from exercising their freedom of expression.*<sup>132</sup> While some

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<sup>126</sup> *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 at para 43.

<sup>127</sup> *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 66 and 103; *British Columbia Teachers' Federation v British Columbia Public School Employers' Assn*, 2009 BCCA 39 at para 57; *Gateway Casinos & Entertainment Limited v BCGEU*, 2018 BCSC 1700 at para 57; *Bombardier Transportation Canada Inc v Unifor et al*, 2014 ONSC 4635 at para 29.

<sup>128</sup> *Canadian National Railway Company v Persons Unknown*, 2014 ONSC 1945 at para 9; *Hudson Bay Mining & Smelting Co, Limited v Dumas et al*, 2014 MBCA 6 at para 69; *Ideal Railings Ltd v Laborers' International Union of North America, Local 183*, 2013 ONSC 701 at para 43; and *Brookfield Properties Ltd v Hoath*, 2010 ONSC 6187 at para 36.

<sup>129</sup> Some relevant *Criminal Code* provisions include the following: blocking or obstructing a highway (section 423(1)(g)); causing a disturbance (section 175); common nuisance (section 180); interfering with transportation facilities (section 248); mischief (section 430); suppression of riots (sections 32 and 33,); unlawful assemblies and riots (sections 63-65 and 67-69); breach of the peace (section 31); assault (section 266); assault of a police officer (section 270); and using a mask or disguise with intent to commit an indictable offence (section 351(2)).

<sup>130</sup> *West Fraser Mills Ltd v Lax Kw'Alaams Indian Band et al*, 2004 BCSC 815 at para 21; *Canadian National Railway Co v Doe*, 2013 ONSC 115 at para 11; *Sunshine Logging (2004) Ltd. v Prior*, 2011 BCSC 1044; and *Repap Manitoba Inc v Mathias Colomb Indian Band et al* (1996), 1996 CanLII 18341 (Man CA), 110 Man R (2d) 125 (MBCA); *Newfoundland (Attorney General) v NAPE*, 1988 CanLII 59 at para 16, [1988] 2 SCR 204.

<sup>131</sup> *Guelph (City) v Soltys*, 2009 CanLII 42449 at para 26 (ONSC).

<sup>132</sup> This idea is expressly recognized in the *Chicago Principles* and the *Directive*: see “Report of the Committee on Freedom of Expression”, University of Chicago, (January 2015), online: <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>; Office of the Premier (Ontario), “Upholding Free Speech on Ontario’s University and College Campuses,” (August 30, 2018), online: <<https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html>>.



reasonable disruption is inherent in protesting, a protest becomes unlawful when that disruption significantly impedes the proper functioning of the University or the holding of authorized University events.<sup>133</sup> While the *Code of Student Rights and Responsibilities* touches on this, further clarification is needed.

Specifically, regarding the November 20 event, there were a number of behaviours that impeded the Herut event and therefore exceeded the bounds of free expression through protest. Actions such as banging on

the walls of the auditorium where the event was taking place and using sound amplification devices in close proximity to it exceed the boundaries of free expression.

*Space restrictions.* In general, protests are not permitted on private property without the consent of the property owner.<sup>134</sup> Even for public property, individuals often have the right to use public space that, among other things, has historically been used for peaceful demonstrations, such as streets and parks.<sup>135</sup> However, not all public or government-owned property is available for protesting.<sup>136</sup>

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<sup>133</sup> Universities in North America widely recognize this limit on campus demonstrations: see “Free Speech Guidelines”, Harvard University, effective May 15, 1990, online: <[https://www.fas.harvard.edu/files/fas/files/freespeech\\_guidelines\\_1990.pdf](https://www.fas.harvard.edu/files/fas/files/freespeech_guidelines_1990.pdf)>; “Protests and Demonstrations Policy”, University of Chicago, undated, online: <<https://studentmanual.uchicago.edu/student-life-conduct/protests-and-demonstrations-policy/>>; “Protest and Demonstration Policy”, Brown University, undated, online: <<https://www.brown.edu/offices/student-conduct/protest-and-demonstration-policy>>; “Guidance Regarding Free Expression and Peaceable Assembly for Students at Yale”, Yale University, undated, online: <<https://studentlife.yale.edu/guidance-regarding-free-expression-and-peaceable-assembly-students-yale>>; “Guidelines Regarding Protest and Dissent”, New York University, effective May 2, 1991, online: <[https://www.nyu.edu/content/dam/nyu/compliance/documents/protest\\_dissent.pdf](https://www.nyu.edu/content/dam/nyu/compliance/documents/protest_dissent.pdf)>; “Speech and Expression Policy”, Georgetown University, undated, online: <<https://studentaffairs.georgetown.edu/policies/student-life-policies/speech-expression/>>; “Statement on Academic Freedom”, McMaster University, effective December 11, 2011, online: <[https://secretariat.mcmaster.ca/app/uploads/2019/05/SPS\\_E1-Statement\\_on\\_Academic\\_Freedom.pdf](https://secretariat.mcmaster.ca/app/uploads/2019/05/SPS_E1-Statement_on_Academic_Freedom.pdf)> [“Behaviour that obstructs free and full academic and scholarly pursuit, not only of ideas which are safe and accepted but of those which may be unpopular or even abhorrent, vitally threatens the integrity of the University, and cannot be tolerated.”]; “Student Code of Conduct – Non-Academic”, Lakehead University, effective May 1 2019, online: <[https://www.lakeheadu.ca/sites/default/files/policies\\_procedures/Student%20Code%20of%20Conduct%20-%20Non-Academic.pdf](https://www.lakeheadu.ca/sites/default/files/policies_procedures/Student%20Code%20of%20Conduct%20-%20Non-Academic.pdf)>

[46.] *No Student shall interfere, obstruct or disrupt University Operations (e.g. teaching, research field and/or community placements, practicums, studying, Student events, disciplinary proceedings, etc.). No Student shall incite hatred or violence on University Premises or while engaged in University Operations, individually or with a group or in connection with a demonstration.*; “Freedom of Speech Policy”, Carleton University, effective November 30, 2018, online: <<https://carleton.ca/secretariat/wp-content/uploads/Freedom-of-Speech.pdf>>;

“Statement of Student Rights and Responsibilities”, Laurentian University, effective April 16, 1998, at section 8, online: <<https://intranet.laurentian.ca/policies/1998april%2016%20-%20statement%20of%20student%20rights%20and%20responsibilities-EN.pdf>>;

“OCAD University Freedom of Expression Statement and Policies”, OCAD University, effective December 10, 2018, online: <<https://www2.ocadu.ca/internal-update/ocad-university-freedom-of-expression-statement-and-policies>>.

<sup>134</sup> *Greenpeace Canada v MacMillan Bloedel Ltd*, 1994 CanLII 943 at para 28 (BCCA). See also Penelope Simons and Lynda M Collins, “Participatory Rights in the Ontario Mining Sector: an International Human Rights Perspective” (2010) 6:2 McGill Journal of Sustainable Development Law 177.

<sup>135</sup> *Bracken v Fort Erie (Town)*, 2017 ONCA 668 at para 33. See also *Montréal (City) v 2952-1366 Québec Inc*, [2005] 3 SCR 141.

<sup>136</sup> *Canadian Civil Liberties Association v Toronto Police Service*, 2010 ONSC 3525 at para 108.

For example, the courts have constrained the right to demonstrate in public spaces in the following scenarios:

- a protest featuring protestors occupying a government office and refusing to leave after closing hours;<sup>137</sup>
- an anti-nuclear protest involving protestors securing themselves to the anchor chain of a U.S. aircraft carrier with the intent of displaying a radiation symbol flag;<sup>138</sup>
- a protest involving protestors blocking a parcel of land in opposition to the construction of a road;<sup>139</sup> and
- a protest involving the erection of tents in a public park contrary to municipal by-laws.<sup>140</sup>

One unifying thread for these examples is that even a public space is not automatically available for protest of all kinds. Rather, the communal character of a public space requires the law to balance the important interest of protecting dissent with the broader needs of society.

This brings us back again to an important point: these principles were developed in relation to public property. However, the University justifiably takes the position that its space is private property,<sup>141</sup> whereby it reserves the “right to control access to its campuses, and the use of its space and facilities.”<sup>142</sup> This underlines the point made by the *Chicago Principles* that a university must be able to “reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the University.”<sup>143</sup> Therefore, for on campus protesting, the University has a wide latitude to administer the place and manner of that protest.

*Audience restrictions.* Protest as a form of expression includes the protestors’ ability to have their voices heard, especially by those perpetuating or enabling conduct that they are protesting. But even when free expression is protected by the *Constitution*, that right is not unlimited. The Supreme Court has recognized that peaceful demonstrators exercising their constitutional right to free expression in a public place are not entitled to a “captive audience.” That is, the right to express also includes the right not to hear. Even constitutionally protected protest must respect the functions of the place where the

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<sup>137</sup> *R v Pratt and Stevenson*, 1990 CanLII 7540 (SKPC).

<sup>138</sup> *R v Tan*, 1992 CanLII 312 (BCCA).

<sup>139</sup> *R v Drainville*, [1991] OJ No 340 (ONSC).

<sup>140</sup> *Victoria (City) v Thompson* (2011), 94 MPLR (4th) 260 (BCSC).

<sup>141</sup> Some cases have made passing references to this idea: *Queen’s University at Kingston v CUPE Local 229*, 120 DLR (4th) 717, 76 OAC 356 at paras 5-9, 10, 19 (ONCA); *Barbour v The University of British Columbia*, 2009 BCSC 425 at para 49.

<sup>142</sup> “Temporary Use of University Space Policy”, York University, effective May 15, 1993 (updated in 2008), at section 2.

<sup>143</sup> “Report of the Committee on Freedom of Expression”, University of Chicago (January 2015) online: <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>. Ontario universities have also taken this view: for example, see “Freedom of Speech Policy”, Carleton University, effective November 30, 2018, online: <<https://carleton.ca/secretariat/wp-content/uploads/Freedom-of-Speech.pdf>>.

protest is occurring and not unduly interfere with those functions.<sup>144</sup>

*Safety precautions.* As part of administering a safe space for public demonstrations, peaceful protestors may be required to submit to safety precautions that may interfere with their right to protest in the manner that they would prefer. As a result of being a private property owner<sup>145</sup> and an “occupier” who must take care for the safety of those on its premises,<sup>146</sup> the University may impose reasonable safety measures, tailored to ensure the well-being of event attendees, protestors, and the University community writ large. Some such restrictions may involve setting up a perimeter for the contested event and conducting bag checks of event attendees.

*Relevant local ordinances.* The right to protest can also be subject to municipal and regulatory ordinances designed to ensure that the needs of the larger community are balanced with the needs of the protestors. Peaceful protestors must comply with any reasonable permit process that the governing authorities may impose in order for protests to take place. Protests must comply with all valid local ordinances on nuisance, trespass,

the use of speakers and megaphones, and littering in order to maintain the lawful character of a peaceful protest.<sup>147</sup>

(e) *The University should develop a more effective and practical posting guideline that has a realistic approval mechanism and addresses what makes a poster unacceptable*

The November 20 events exposed gaps in the *Guidelines* relating to posting,<sup>148</sup> both in terms of what constitutes an unacceptable poster and how decisions about a poster’s acceptability are made. The SAIA poster calling on people to attend its protest of the November 20 Herut event aroused considerable controversy and was to some highly objectionable. But there were no existing guidelines that were helpful in assessing its acceptability and no clear process of decision-making in relation to whether it should be removed. The absence of such guidelines and procedures gives rise to the risk that decisions made in relation to posters will be perceived as arbitrary.

Presently, the *Posting Guidelines* and parts of the *TUUS Procedure*<sup>149</sup> govern posting

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<sup>144</sup> *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139 at 395. While the Supreme Court was divided on several issues in *Committee for the Commonwealth of Canada v Canada*, the concept of a “captive audience” has been widely endorsed in Canadian law: see *R v Breen*, 2009 BCCA 463; *R v Spratt*, 2008 BCCA 340; *R v White*, 2008 ABCA 294; *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154.

<sup>145</sup> The common law recognizes that private property owners have the powers to exclude persons from the property, remove persons from the property, and impose terms and conditions on persons while they are on the property: see *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255 at para 74. Of course, given the University’s vital role in ensuring an open and inclusive civil society, these restrictions should be reasonable, transparent, and proportionate.

<sup>146</sup> *Occupiers’ Liability Act*, RSO 1990, c O2, s 3(1). For general application of occupiers’ liability to the university and college context, see *Abara, et al v Georgie, et al*, 2019 ONSC 2654, *Bukshtynov v. McMaster University*, 2018 ONSC 4819, and *Mirsoltani v Canadian Memorial Chiropractic College*, 2018 ONSC 5639.

<sup>147</sup> *McGowan c City of Montréal*, 2018 QCCS 1740 at para 133; *Abbotsford (City) v Shantz*, 2015 BCSC 1909 at paras 157-162.

<sup>148</sup> “Posting (Guidelines)”, York University, effective September 1, 2005, online: <<https://secretariat-policies.info.yorku.ca/policies/postering-guidelines>>.

<sup>149</sup> “Temporary Use of University Space Procedure”, York University, effective January 15, 2010.

on campus. These *Guidelines* and *Procedure* do not define what makes a poster unacceptable. However, they provide that all posters advertising an event must be pre-approved by the University. Despite these provisions, it seems that in practice posters are rarely submitted and/or approved.

The University should dispense with the requirement that all posters be pre-approved, including those pertaining to the use of University space. Given the volume of posters, it seems to me that this across-the-board requirement is not viable. My suggestion is that the *Postering Guidelines* should set out what constitutes an acceptable poster. These *Guidelines* should also specify who has the authority to remove posters that do not comply. In addition, once a planned event is identified as one requiring special planning (as I will discuss in a later chapter) all posters *pertaining to that event*, including any related protests, must be approved before posting. If this suggestion is taken up, the TUUS process would need to publish a list of events subject to this requirement so that those intending to protest the event will be aware of the requirement to have their posters approved.

The *Guidelines* should elaborate on what makes a poster unacceptable. The starting points are the *Directive* and the *Statement*. A poster is clearly unacceptable if it falls outside the ambit of expression protected by the *Statement* and the law. As discussed earlier, content that falls outside that ambit includes, among other things, hate speech,

inciting or threatening violence, advocating genocide, and discriminatory statements about an identifiable group.

However, posters are different from some other forms of expression. The viewer of a poster may not have a choice as to whether to see what it expresses. One can turn off the radio or not attend an event, but may not easily be able to avoid seeing a widely distributed poster. This is especially true given the *Guidelines* do not limit postering to any specific areas on the campus. The result is that people may in effect be forced to see a poster's message that they find deeply offensive or disturbing. They are, in a sense, a captive audience.

Ensuring that people have the room to avoid speech that they find troublesome is integral to protecting one's right *not to hear*.<sup>150</sup> If there is sufficient evidence that an impugned poster will widely circulate such that avoidance is effectively impossible, then the University may appropriately consider factors beyond the exceptions of unprotected expression to limit offensive and disturbing posters.

In my view, the University needs to enumerate some criteria for approval of posters for controversial campus events. Some helpful guidance on this point can be derived from how the law limits discriminatory publications and offensive posters in order to strengthen the equality and dignity interests of individuals.<sup>151</sup> The

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<sup>150</sup> *Ontario (Attorney General) v Dieleman*, 1994 CanLII 7509 at paras 640-642 (ONSC).

<sup>151</sup> Legally, there is no postering or placard guideline that is dispositive of the issues facing the University. The courts have wrestled with the issue of controversial posters targeting an identifiable group in some contexts. For example, there has been litigation regarding individuals postering and/or leafleting around abortion clinics. There, the courts have often limited such postering and have alluded, either explicitly or implicitly, to some of the principles that I have mentioned. For detailed discussions of this, see *Ontario (Attorney General) v Dieleman*, 1994 CanLII 10546 (ONSC), *R v Spratt*, 2008 BCCA 340, *R v Von Dehn*, 2013 BCCA 187 and *R v Sears*, 2019 ONCJ 104.



University should consider whether a poster, in its purpose or effect, does the following:

- falls outside of the protected forms of speech (e.g. advocates for violence);
- perpetuates and reinforces existing stereotypes, stigma, and/or prejudices;
- targets an identifiable group of people for scorn, ridicule or condemnation as a group;
- incites hate or discrimination; or
- ridicules or trivializes foundational moral precepts that are widely shared.

As with other suggestions in this chapter, I recommend that the University update its *Posting Guidelines* and clearly set out the considerations it will weigh when reviewing the appropriateness of posters. I also recommend that the process for determining the acceptability of posters and responding to concerns expressed about posters be clarified and published. There ought to be clear lines of authority and accountability for these decisions.

#### (f) *Clarifying the role of safe spaces*

Some members of the University community stressed that the presence on campus of controversial speakers, in this case reservist soldiers, made them feel unsafe. In their view, the University ought to be a safe space and on that basis, even the very presence of the reservists on campus should not be allowed, even in a place that students could

easily avoid without interfering with their studies.

While I do not for a moment doubt either the intensity or the sincerity of this belief, such a subjective approach to safety poses some challenges. Accepting a broad and largely subjective understanding of personal safety would lead to limitations on the expression of others and expand what the notion of “safety” can reasonably include. The University should make clear that subjective beliefs about safety that are created by the permitted free speech of others and which have no objective basis in fact may not reduce the scope of permitted expression by others.

That said, the University should recognize the depth and sincerity of these concerns as well as the danger that some types of permitted free expression may contribute to a sense of exclusion from full membership in the University community on the part of others. As Professor Ben-Porath has noted, a university’s policies should aim at creating a culture of “continuing commitment to listening and responding to the legitimate demands of students who feel excluded, while helping them grow and recognize their agency and power.”<sup>152</sup>

#### (g) *Cost of Security Arrangements*

Controversial speakers on campus raise a practical issue: who pays for the extra security that these often require? When controversial speakers are invited on campus – which other students may protest – significant logistical and security arrangements may be necessary. Those arrangements can be expensive.<sup>153</sup>

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<sup>152</sup> Sigal Ben-Porath, “Against Endorsing the Chicago Principles,” *Inside Higher Ed* (December 11, 2018) online: <<https://www.insidehighered.com/views/2018/12/11/what-chicago-principles-miss-when-it-comes-free-speech-and-academic-freedom-opinion>>.

<sup>153</sup> For example, for the November 20 event, I understand there was a combined total of 42 members of York’s Community Safety department and TPS officers present. There have been incidents in the United States in which

The *TUUS Procedure* provides that student groups requiring additional security may have to reimburse the University for enhanced security arrangements. So far as I can determine, this has not caused any difficulties in relation to routine events. It is not problematic as a matter of principle, to assess security costs based on objective factors that are unrelated to the content of the expression or the security risk created by potential reaction to it. Such objective factors include the anticipated number of attendees, the size of the space, ticket price, whether alcohol will be served, etc.

Security costs for controversial events, however, may raise different considerations. This is because some controversial events need the additional security to address not the event itself, but rather the anticipated hostile reaction to it by protestors. Levying security costs on the organizer on that basis is highly problematic from a free expression perspective for a number of reasons.

Imposing costs on organizers because of the feared reaction to the event is unfair to the organizers. More fundamentally, it is also a financial version of the heckler's veto. Imposing the levy in effect makes the organizers of the event pay for the security required because of the actions of others who oppose it. As one U.S. judge put it in memorable terms, expression should not be financially burdened simply because it might

inflame a hostile mob.<sup>154</sup> In addition to concerns about unfairness and the heckler's veto, there are also legitimate concerns that authority to impose such levies may be used as an indirect form of censorship of the content of the expression. For these reasons, making the organizers pay for extra security because of the anticipated actions of protestors is deeply inconsistent with the protection of expression envisioned by the *Chicago Principles* and the *Directive*.

At present, University policy does not confront this issue. Most other university policies that I have reviewed are vague and leave imposing the levy to largely unfettered discretion.<sup>155</sup> The academic literature on the subject and the limited Canadian jurisprudence are not very helpful in formulating specific policy recommendations.<sup>156</sup> However, experience in the United States has shown that a more transparent policy approach is required. There is concern that campus free expression principles lead to universities being exploited by controversial speakers as prestigious, highly visible and inexpensive venues of choice. The result is that universities are spending hundreds of thousands of dollars of taxpayers' money on events that are peripheral to the universities' mission.

I offer the following suggestions:

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the host university incurred security costs of over \$500,000: see for example, Clay Calvert, "College Campuses as First Amendment Combat Zones and Free-speech Theatres of the Absurd: The High Price for Protecting Extremist Speakers from Shouting Matches and Insults" (2018), 16:3 First Amendment L Rev 454; Suzanne B. Goldberg, "Free Expression on Campus: Mitigating the Costs of Contentious Speakers" (2018), 41 Harv J L & Pub Pol'y 163.

<sup>154</sup> *Forsyth v. Nationalist Movement* 505 US 123 (1992) at 134-5.

<sup>155</sup> Some universities have addressed this in passing: see University of Guelph, <<https://www.uoguelph.ca/freedom-of-expression/faq>>; University of Colorado Boulder, <<https://www.colorado.edu/free-expression>>; NC State University, <<https://www.ncsu.edu/free-speech>>; Georgetown University, <<https://studentaffairs.georgetown.edu/policies/student-life-policies/speech-expression/>>

<sup>156</sup> See, e.g., *UAlberta Pro-Life et al v. Governors of the University of Alberta* 2020 ABCA 1 at paras 154–215.

First, the *TUUS Procedure* should be amended to specify the circumstances under which extra security costs may be levied for routine events and to set out an approximate scale of charges. The *Procedure* should set out the factors guiding the need for the levy and specify a range of amounts. These factors should not be related to either the expressive content of the event or the risk that it will provoke a hostile response.

Second, the University should consider establishing an extra-curricular event security budget, set at a reasonable amount in light of experience. Additional security for the risk of hostile reaction to these events may be paid out of that budget. When the budget is exhausted, the University could refuse to host any additional events giving rise to similar security concerns in that budget cycle. This approach would keep the financial exposure of the University within some reasonable bounds in a transparent manner and would do so in a way that is completely unrelated to the expressive content of particular events.

Third, the University may consider using the cost of security as a measure of any financial penalty imposed on a student group for breach of the University's policies in relation to expression and use of space and related policies. Such a penalty should be proportionate to the seriousness of the misconduct and to the cost of additional security needed to address that misconduct. Failure to pay the penalty could result in

suspension of campus privileges until it is paid.

## 2. Increased education and training

As I have discussed, the University must bring greater clarity to the scope and limits of free expression for extra-curricular activities on campus. However, clear principles are only one element of what is needed. The principles must be known and respected by the University community and by all of those who wish to engage in expressive conduct on the campus. More proactive and concrete steps are needed, specifically at the community engagement level.

The *Statement* contemplates that the University will develop “guidelines, tool-kits, education and training with respect to free speech.”<sup>157</sup> This is an excellent idea and should be pursued with vigour. While the University is best placed to decide what will be most useful, it may be helpful for me to identify some opportunities.

All free expression training<sup>158</sup> should cover the scope and limits of free expression and provide concrete examples of what is and what is not permitted, including the scope and limits of peaceful protest. The training should also cover the importance of respectful dialogue at the University. While, as discussed, this is not a limit on protected expression, it is part of the conduct that is expected of a member of the community. This training should emphasize that

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<sup>157</sup> “Statement of Policy on Free Speech”, York University, approved December 13, 2018, online: <<https://secretariat-policies.info.yorku.ca/policies/free-speech-statement-of-policy>>.

<sup>158</sup> Nearly all interviewees encouraged further thought be given to educational and sensitivity trainings: B’nai Brith Canada’s Written Submissions (February 10, 2020); CUPE 3903 Chairperson’s Written Submissions (February 10, 2020); Canadian-Arab Anti-Discrimination Committee’s Written Submissions (February 6, 2020); Canadian Muslim Lawyers Association’s Written Submissions (February 10, 2020); Centre for Israel and Jewish Affairs’ Written Submissions (February 18, 2020); Herut Zionism’s Written Submissions (February 10, 2020); Students Against Israeli Apartheid’s Written Submissions (February 13, 2020); Friends of Simon Wiesenthal Center for Holocaust Studies’ Written Submissions (March 2, 2020).

appropriate conduct cannot be described simply by the limits of what is prohibited.

One training opportunity is in the club recognition process. The *York University Student Organization Recognition Guidelines* contemplate a mandatory Clubs 101 Orientation Session.<sup>159</sup> The *Guidelines* ought to specify which representatives of the club must attend and should include a module on free expression in extra-curricular activities on campus. The University could consider supplementing this orientation session with mandatory on-line training. The club representatives should also have to undertake to brief club members about free speech at the first suitable club event of the academic year. In addition, club leaders and event organizers should be required to undertake that they will make reasonable efforts to ensure that their club members are apprised of this training and comply with free expression policies if and/or when they engage in protesting.<sup>160</sup>

Another opportunity exists during Orientation Week. Training on free expression and protesting should be included in the

Orientation Week program, perhaps in the form of mandatory online training.

A further opportunity for training exists in the context of the process for booking space at the University. Anyone booking space should have the Clubs 101 training or at least have to certify that they have read and understood the University's handbook and/or procedure concerning freedom of expression if one is developed in response to my earlier recommendation.

A final opportunity arises in the context of planning for particular events. As I will discuss in a subsequent chapter, some events are identified as requiring special security planning which will generally include a meeting with the organizers and University officials. Those meetings should include a plain language description of what is and what is not within the bounds of protected free expression and a review any security measures that are to be put in place for the event.

## F. Summary of the recommendations in this chapter

I recommend the following ways the University can supplement its free speech policies:

**2.1** The University should clarify the parameters of free expression by producing a set of procedures and/or a handbook to supplement its *Statement of Policy on Free Speech*. These clarifications should include the following elements.

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<sup>159</sup> “York University Student Organization Recognition Guidelines”, York University, undated, online: <<https://studentclubs.scl.d.yorku.ca/club-recognition/>>.

<sup>160</sup> Carleton University appears to impose an analogous requirement through its campus free speech policy: see “Freedom of Speech Policy”, Carleton University, effective November 30, 2018, online: <<https://carleton.ca/secretariat/wp-content/uploads/Freedom-of-Speech.pdf>>.

- (a.) The *Statement* and related documents apply to “expression” which extends to an “activity” that “conveys or attempts to convey a meaning.”
- (b.) The offensiveness of an idea alone cannot be an appropriate basis to circumscribe expression. Expression cannot be suppressed simply because some or even most people may find it unwelcome, disagreeable or even deeply offensive.
- (c.) Free expression is subject to two types of limits.
  - Some types of expression are not protected.
    - Expression in the form of violence and the threat of violence is not protected.
  - Some expression may be limited when doing so is demonstrably justified, that is, where the limitation serves an important objective *and* does not limit expression more than reasonably necessary to achieve it.
    - Examples include expression that is unlawful: hate speech, other types of discriminatory expression, advocacy of genocide, publicly inciting hatred, and willfully promoting hatred of an identifiable group through telephone, broadcasting or other audible or visible means, including through the use of an internet platform or through social media and expression that is incompatible with the mission of the University.
- (d.) The University should provide the community with more detailed descriptions of the sorts of expression that exceed the limits of free expression.
- (e.) Protest is a form of permitted expression, but not when it significantly interferes with the expressive rights of others. The University must provide guidance on campus protesting — specifically on the forms of protest that are permissible and those that are not. The characteristics of protected, peaceful demonstration include the following.
  - People may gather for peaceful demonstrations.
  - Peaceful protestors may have wide latitude in what and how they wish to protest.
  - Peaceful protest includes voicing one’s dissent, in a peaceful manner, in recognized and authorized places.
  - Peaceful protesting does not include the following.

- A peaceful demonstration ceases to be “peaceful” — and thereby lawful — if it provokes, endorses, and/or commits violent or unlawful conduct.
- A peaceful demonstration cannot obstruct, physically impede, or blockade other lawful activities. Peaceful protest does not include directly or in effect impeding the occurrence of an authorized University event.
- Not all property is available for protesting.
- Peaceful demonstrators are not entitled to a captive audience.
- Peaceful protestors may be required to take necessary safety precautions which may interfere with their right to protest in the manner that they would prefer (e.g. bag checks).

2.2 The *Posting Guidelines* should be clarified and amended as detailed in the text of this Review.

2.3 The *TUUS Procedure* should be amended to address the issue of security costs as detailed in the text of this Review.

2.4 The University should make clear that subjective beliefs about safety that are created by the permitted free speech of others, and which have no objective basis in fact, may not reduce the scope of permitted expression by others. At the same time, the University should recognize and respond to the sense of exclusion that some types of permitted speech may create.

2.5 Increased training and education are necessary to do all that is reasonably possible to ensure that the community members understand and internalize the principles of free speech. In other words, the basic parameters of free expression need to become part of the culture of the University. In addition and to the extent practicable, training and education are also necessary so that community members recognize that some forms of expression are deeply offensive and that the outer limits of free expression should not be understood as a licence to inflict harm.



## Chapter 3. Strengthening Policies on Racism, Discrimination and Harassment

### A. Introduction

My review revealed deep concern about the University's<sup>161</sup> ability to address conduct that was viewed as constituting racism, discrimination and harassment.<sup>162</sup> In addition, concern was expressed about the robustness and transparency of the University's processes to address and the sanctions that could be imposed for this sort of conduct.<sup>163</sup> These concerns were expressed at many levels and in many ways.

For example, the submission by the Canadian-Arab Anti-Discrimination Committee viewed discrimination as the ultimate, underlying cause of the November 20 events. The Committee submitted that attempts to address what went wrong with the November 20 events "will not be effective without a recognition of systemic discrimination and

commitment to address it permanently."<sup>164</sup> B'nai Brith Canada noted that there was no clear definition of "racism" in the University's "various and interdependent policies" and urged that the University adopt the International Holocaust Remembrance Alliance's ("IHRA")<sup>165</sup> *Working Definition of Antisemitism*.<sup>166</sup> A number of submissions called for further training in relation to discrimination, racism and anti-Semitism.

Some submissions addressed the objects of the student organizations involved in these events. B'nai Brith submitted that SAIA had "openly distributed hate propaganda pertaining to Israelis" and had a "long history of fomenting anti-Israel disruptions on campus."<sup>167</sup> SAIA, on the other hand, submitted that Herut's singular objective "is to promote a colonial, racist regime and to

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<sup>161</sup> Universities increasingly encounter concerns about racism, discrimination and harassment: see generally, Rachele J Brunn-Bevel *et al*, *Intersectionality and higher education: identity and inequality on college campuses* (New Brunswick: Rutgers Univ Press, 2019); Lawrence Ross, *Blackballed: the black and white politics of race on America's campuses* (New York: St Martin's Press, 2016); Julie Minikel-Lacocque, "Racism, College, and the Power of Words: Racial Microaggressions Reconsidered" (2013) 50:3 *American Educational Research Journal* 432; Kerry A Bailey, "Racism within the Canadian university: Indigenous students' experiences" (2016) 39:7 *Ethnic and Racial Studies* 1261.

<sup>162</sup> In their written submissions, nearly all interviewees expressed some concerns about issues of racism, discrimination and harassment: B'nai Brith Canada's Written Submissions (February 10, 2020); CUPE 3903 Chairperson's Written Submissions (February 10, 2020); Canadian-Arab Anti-Discrimination Committee's Written Submissions (February 6, 2020); Canadian Muslim Lawyers Association's Written Submissions (February 10, 2020); Centre for Israel and Jewish Affairs' Written Submissions (February 18, 2020); Herut Zionism's Written Submissions (February 10, 2020); Students Against Israeli Apartheid's Written Submissions (February 13, 2020); Friends of Simon Wiesenthal Center for Holocaust Studies' Written Submissions (March 2, 2020).

<sup>163</sup> *Ibid.*

<sup>164</sup> Canadian-Arab Anti-Discrimination Committee's Written Submissions (February 6, 2020).

<sup>165</sup> "Working Definition of Antisemitism", International Holocaust Remembrance Alliance, (undated), online: <<http://www.holocaustremembrance.com/working-definition-antisemitism>>.

<sup>166</sup> B'nai Brith Canada's Written Submissions (February 10, 2020).

<sup>167</sup> *Ibid.*

justify Israel’s egregious abuses of Palestinian human rights.”<sup>168</sup>

Other submissions related to concerns about racism, discrimination and harassment in relation to the events of November 20 themselves. Herut expressed concerns about the University’s ability to “maintain a safe environment for Jewish and pro-Israeli students, free from intimidation and harassment.”<sup>169</sup> The Canadian-Arab Anti-Discrimination Committee urged me to “investigate and note the active discrimination or at least inadequate regard for the concern, rights and security of the students protesting the event.”<sup>170</sup> There were sharply differing submissions about SAIA’s use of the chant “viva, viva Intifada.” Some heard this as a call for violence against Israeli civilians. SAIA, on the other hand, submitted that the term “Intifada” is not a call for violence, but rather to “aggressive nonviolent resistance.”

Given the scope of these concerns, the University ought to reinvigorate its policies in relation to racism, discrimination and harassment. The University should also implement more robust and transparent processes to address these concerns, particularly in relation to student organizations. I will outline some of the ways in which this might be done.

## **B. The existing policy framework**

There is a host of University policies dealing with aspects of racism, discrimination and harassment. The webpage for the University’s Centre for Human Rights, Equity and Inclusion lists 24 University policies, guidelines and procedures supporting diversity and inclusion.<sup>171</sup> None of them deals specifically with racism, discrimination or harassment in relation to student organizations. I will refer briefly to the most relevant policies.

### **1. Racism and discrimination**

The University’s current *Racism (Policy and Procedures)*, consisting of four sentences, became effective in 1995.<sup>172</sup> It essentially refers to the Ontario *Human Rights Code*<sup>173</sup> and indicates that anyone in the University community who infringes a right protected by that *Code* is subject to the existing complaints procedures, remedies and sanctions in the University’s policies, codes, regulations, and collective agreements, as they exist from time to time. There is, however, a document, *Understanding Racism: A Guide for Students, Faculty & Staff* that sets out in plain language an explanation of what constitutes racism.<sup>174</sup> This is an excellent resource to build on.

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<sup>168</sup> Students Against Israeli Apartheid’s Written Submissions (February 13, 2020).

<sup>169</sup> Herut Zionism’s Written Submissions (February 10, 2020).

<sup>170</sup> Canadian-Arab Anti-Discrimination Committee’s Written Submissions (February 6, 2020).

<sup>171</sup> “York University Human Rights Policies and Procedures”, Centre for Human Rights, Equity and Inclusion, (undated), online: <<https://rights.info.yorku.ca/york-university-human-rights-policies-and-procedures/>>.

<sup>172</sup> “Racism (Policy and Procedures)”, York University, effective June 26, 1995, online: <<https://secretariat-policies.info.yorku.ca/policies/racism-policy-and-procedures/>>.

<sup>173</sup> RSO 1990, c H 19.

<sup>174</sup> “Understanding Racism: A Guide for Students, Faculty & Staff”, York University, (undated), online: <<https://rights.info.yorku.ca/understanding-racism-a-guide-for-students-faculty-staff/>>.

## 2. Hate propaganda

The *Hate Propaganda (Guidelines)*, dating to 2001, describe hate propaganda and indicate that dissemination of hate propaganda may violate one or more of five University policies and constitute a crime.<sup>175</sup>

## 3. Harassment

There is an existing Senate policy dating from 2006 relating to *Disruption and/or Harassing Behaviour in Academic Situations*.<sup>176</sup> There is nothing that I am aware of specifically addressing these sorts of behaviours in extra-curricular settings.

## 4. Procedures for dealing with complaints of workplace violence, harassment or discrimination

There are policies and procedures for dealing with alleged harassment and discrimination in the workplace.<sup>177</sup> However, there is nothing other than the *Code of Student Rights and Responsibilities* that specifically addresses such conduct in relation to students or student organizations in extra-curricular events. As noted earlier, the *Code* is not well suited to concerns of this nature in relation to student organizations.

## C. Opportunities to further strengthen University policies

Given the depth of concerns about racism, discrimination and harassment in relation to extra-curricular activities, the University should implement more robust and transparent policies and procedures in relation to these issues, especially in the context of activities by student organizations. The University should consider four areas for further development.

### 1. Providing clearer definitions

At the heart of the problem is that while the affected parties allege “racism,” “harassment” and “discrimination,” there is no shared understanding — and little in the way of official University definitions — of these concepts. While some parties may possess fundamental disagreements, it is imperative for the University to make clear *what* it understands “racism,” “harassment” and “discrimination” to mean and what it will do about them. In this process, the Ontario *Human Rights Code* is, of course, an authoritative source. However, the *Code*’s larger ideas must be particularized for the university context and explained in plain language for the University community.

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<sup>175</sup> “Hate Propaganda (Guidelines)”, York University, approved May 2, 2001, online: <<https://secretariat-policies.info.yorku.ca/policies/hate-propaganda-guidelines>>.

<sup>176</sup> “Senate Policy on Disruption and/or Harassing Behaviour in Academic Situations”, York University, approved October 26, 2006, online: <<https://secretariat-policies.info.yorku.ca/policies/disruptive-andor-harassing-behaviour-in-academic-situations-senate-policy>>.

<sup>177</sup> For example, see “Policy on Workplace Violence Prevention”, York University, effective March 1, 2010, online: <<https://secretariat-policies.info.yorku.ca/policies/workplace-violence-prevention-policy>>; “Healthy Workplace Policy”, York University, effective May 13, 1995, online: <<https://secretariat-policies.info.yorku.ca/policies/healthy-workplace-policy>>; “Policy on Workplace Harassment Prevention”, York University, approved February 10, 2010, online: <<https://secretariat-policies.info.yorku.ca/policies/workplace-harassment-prevention-policy/>>; “Policy on Sexual Violence”, York University, approved October 8, 2019, online: <<https://secretariat-policies.info.yorku.ca/policies/sexual-violence-policy-on>>.

I received many submissions expressing concern about anti-Semitism on the campus. This is one aspect of racism, among others, that must be addressed. Several submissions urged adoption of the IHRA's *Working Definition of Anti-Semitism*. As I write this, draft legislation is before the Legislative Assembly of Ontario that, if enacted, would add this definition to the province's *Legislation Act*.<sup>178</sup> The University should monitor the progress of the draft legislation and also consider the IHRA's *Working Definition* as it develops its own statement on racism and discrimination.

## 2. Focusing on extra-curricular activities

While campus free speech issues arise in a number of contexts, they are often at the centre of controversial extra-curricular events on campus.<sup>179</sup> As discussed earlier, free speech controversies challenge the very *ethos* of a university and bring to the forefront a myriad of competing ideas and interests that a university community must accommodate. In turn, given how difficult these challenges are and how they tend to arise by way of extra-curricular events, the University's augmented racism, harassment and discrimination policies must specifically focus on extra-curricular activities and

conduct by student groups. The new policies should not leave students, administrators, and community members guessing about how the University's human rights policies affect the governance of student groups or the conduct of extra-curricular events.

## 3. Creating a simpler and more transparent complaint process

The University should develop a clear, effective and transparent process to address concerns and complaints about alleged racist, harassing and discriminatory conduct, including in the context of extra-curricular activities and conduct by student groups. The University could consider creating a unified complaint process — akin to that of other Ontario universities<sup>180</sup> — in which all allegations of human rights violations on campus are subject to one set of procedures and dispute resolution mechanisms. This would turn the adjudication process into a “one-stop shop” and may allay concerns and confusion about who to contact regarding alleged incidents of discrimination on campus. Another model to consider is a process resembling the one for complaints of harassment and discrimination, although I was told that this is not a very suitable procedure in relation to complaints against student groups.<sup>181</sup>

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<sup>178</sup> Bill 168, *Combatting Antisemitism Act 2020*, 1<sup>st</sup> Sess, 42<sup>nd</sup> Leg, Ontario, 2019 (Ordered referred to Standing Committee on Justice Policy on February 27, 2020). Bill 168 would amend the *Legislation Act 2006*, SO 2006, c 21, Sch F.

<sup>179</sup> See generally, Erwin Chemerinsky and Howard Gillman, *Free speech on campus* (New Haven: Yale University Press, 2017); Sigal R Ben-Porath, *Free speech on campus* (Philadelphia: University of Pennsylvania Press, 2017); Tom Slater (eds), *Unsafe space: the crisis of free speech on campus* (London: Palgrave Macmillan, 2016); Keith E Whittington, *Speak freely: why universities must defend free speech* (Princeton, New Jersey: Princeton University Press, 2018); Demetri L Morgan and Charles HF Davis (eds), *Student activism, politics, and campus climate in higher education* (New York: Routledge, 2019).

<sup>180</sup> For example, McMaster University has adopted a unified adjudication process for discrimination and harassment allegations: see “Discrimination & Harassment Policy”, McMaster University, effective January 1, 2020, online: <<https://secretariat.mcmaster.ca/app/uploads/Discrimination-and-Harassment-Policy.pdf>>.

<sup>181</sup> “Procedure for Dealing with Complaints of Harassment or Discrimination”, York University, (undated), online: <<https://rights.info.yorku.ca/york-university-human-rights-policies-and-procedures/>>.

#### 4. Increasing focus on educational opportunities

Finally, as with free expression, I suggest that the University put in place educational opportunities for students and student organizations in relation to these issues. I have identified some of the opportunities for this sort of education in relation to free expression issues and they are equally applicable here. A sense of where the

boundaries are needs to become part of campus culture. Education will make a significant contribution over time to ensuring that it is.

#### D. **Summary of the recommendations in this chapter**

In terms of strengthening the University's racism, discrimination, and harassment policies, I suggest the following:

- 3.1 The University should develop a clear policy framework defining what constitutes racism, harassment and discrimination, particularly in relation to extra-curricular activities and conduct by student groups.
- 3.2 The University should develop a clear, effective and transparent process to address concerns and complaints about alleged racist, harassing and discriminatory conduct, including in the context of extra-curricular activities and by student groups.
- 3.3 The University should put in place educational opportunities for students and student groups similar to what I have suggested in relation to free expression issues.

## Chapter 4. Rethinking the Temporary Use of University Space Process

### A. Introduction

In chapter 1, I briefly reviewed the University's *TUUS Policy*<sup>182</sup> and drew attention to some areas that would benefit from further reflection and some gaps that need to be filled. They included:

- The process to address concerns about the appropriateness of an external speaker appears not to be functioning.
- There is no clear policy framework concerning the circumstances under which an external speaker would not be permitted to speak on campus and no clear process by which a decision would be made.
- It is unclear whether organized protests fall within the *TUUS Policy*.
- It is unclear whether the *TUUS Policy* in relation to sound amplification applies to persons other than those participating in the authorized event.
- It is unclear whether, and if so how, "volunteer security" may be present for campus events.
- Responsibility and lines of authority are unclear in relation to planning for controversial events.

This list points to the need for development of some further policy frameworks, some more robust and nimble decision-making processes and the revision of some aspects of

the existing *TUUS Policy* and accompanying *TUUS Procedure*.<sup>183</sup> I will address each in turn.

### B. Additional policy frameworks

#### 1. Concerns about speakers

As I noted in chapter 1, the *TUUS Procedure* sets out a mechanism to address "serious reservations about the appropriateness of an external speaker" on the part of members of the University community.<sup>184</sup> However, that mechanism appears to exist only on paper and does not address the concerns of those who are not members of the University community.

In my view, the University ought to have both a policy framework to consider concerns about the appropriateness of speakers and a clear decision-making process with respect to that issue.

#### (a) *A policy on the appropriateness of speakers*

The *Statement of Policy on Free Speech* and the related policies shed light on the circumstances under which the University may deny permission to use University space for an event involving an inappropriate speaker. However, the policy framework should be more explicit and transparent in order to assist the University in addressing this complex and divisive issue. This could be accomplished by adding a "Procedure" section to the existing *Statement of Policy on*

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<sup>182</sup> "Temporary Use of University Space Policy", York University, effective May 15, 1993 (updated in 2008).

<sup>183</sup> "Temporary Use of University Space Procedure", York University, effective January 15, 2010.

<sup>184</sup> *Ibid*, at section v, page 14.



*Free Speech* or by revising the *Statement* itself.

Denial of space for, or cancellation of a planned controversial event will likely be highly contentious and, under the *Directive*, potentially the object of government as well as broader public scrutiny. (I will refer to both denial of space and cancellation of a planned event as “cancellation” in what follows.) A strong policy framework provides a principled basis for the cancellation, which in turn enhances its acceptability and prevents it from being attacked as either *ad hoc* or arbitrary. Moreover, the absence of a strong policy framework within which to voice objection to an event may be used by objectors to excuse or even justify efforts to close the event down by protest.

I will offer some suggestions as to the substance of such a policy framework.

Cancellation may be justified by either of two considerations. The first relates to the anticipated content of the event; the second pertains to the safety of participants and the broader University community and the functioning of the University.

(i) [Anticipated content of event](#)

Cancellation should be a measure of last resort, to be used only in rare and exceptional circumstances. Preventing expression before it has occurred is a highly suspect form of prior restraint that brings with it a high risk of undue limitation of freedom of expression. It invites accusations of censorship.

Cancellation based on the content of the remarks should be considered only where there is a real risk that the speaker may flout the proper limits of free expression such as, for example, by engaging in expression that is contrary to the *Criminal Code* or the *Ontario Human Rights Code*.

In general, prior restraint is only justified if there is a real risk that breach of an obligation will occur, that measures short of restraint will not adequately address that risk and that leaving the victim of that breach to remedies that may be provided after the fact will not adequately address the anticipated harm caused by the breach.<sup>185</sup> I suggest that the University adopt a similar approach to the issue of cancellation on the basis of the anticipated content of expression.

Before cancellation, the University should be satisfied that two conditions are met. First, the University must reasonably form the view that there is a real risk that the speaker’s presentation will exceed the limits of free expression. Second, the University must conclude, after careful consideration of all other reasonable measures short of cancellation that could mitigate that risk, that such measures are not adequate to do so. Such measures could include, for example, obtaining written assurances from the speaker and/or vetting an advance copy of the intended remarks.

There should also be a clear process for decision-making in these difficult and

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<sup>185</sup> For instance, in the case of *quia timet* injunctions (i.e. restraint before any breach has occurred), relief will only be granted where there is a high degree of probability that the harm will in fact occur: see *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at para 35. Similarly, a publication ban of a program out of concern for a fair trial will only be ordered where: (i) the ban is necessary in order to prevent a real and substantial risk to the fairness of the trial because reasonably available alternative measures will not prevent the risk; and (ii) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected. See *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at 839.

controversial situations. I will suggest a possible approach later in the chapter.

(ii) Safety concerns

Cancellation as a result of safety concerns is even more problematic than cancellation because a speaker is likely to abuse free expression. Cancellation on the basis that the anticipated reaction to the expression creates an unacceptable safety risk is the ultimate form of the heckler's veto. In effect, protected expression is silenced because of the risk that the reaction to it will lead to violence and/or property damage. Nonetheless, the University's first duty is to take all reasonable steps to protect the safety of its community members. The University should have a clear policy on this difficult topic.

In my view, the University is justified in cancelling an event if, after considering all reasonable security measures, the University believes on the basis of compelling evidence that the event will create a significant risk of personal injury or significant property damage. This must be a last resort and employed only when there is no reasonable alternative.<sup>186</sup>

The University must actively explore and seriously consider all reasonable alternatives to cancellation. For this, and other reasons, I suggest later in my Review that the University develop a menu of possible security measures, ranked roughly from the least to the most intrusive. Such a list would make the range of acceptable security measures transparent and would help dispel suspicions that security concerns were being used as a subterfuge for censorship. The

menu would provide a guide to decision-makers about the alternatives they ought to consider before cancelling an event.

(iii) Postponement of events

Like cancelling, postponing an event is not a decision that should be made lightly. However, it is not as drastic a step as cancellation, provided of course that postponement is not used to effectively cancel the event. Given that sensitive student events are often fluid, the University should have a wide latitude to postpone events for a reasonably short time, especially if there are security concerns and insufficient time to address them properly. The planning for controversial events is time-consuming and the security environment for the event may evolve quickly and in unexpected ways. The November 20 event provides a good illustration. Several material elements became known only late in the planning: the estimated number of non-University attendees increased sizably shortly before the event; the magnitude of the protests and counter-protests was not apparent until shortly before the event; and Herut's volunteer security arrangements may not have been known to those in charge of University security until the event was underway. Changes such as these may require amendments to the event's security plan and may mean that there is insufficient time to make the necessary security arrangements.

There ought to be a clear policy about the circumstances justifying postponement of extra-curricular events and clear lines of authority and accountability for the decision

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<sup>186</sup> Other universities have adopted a similar approach as provided in their "frequently asked questions" in relation to their respective free speech policy: University of Windsor, (<http://www.uwindsor.ca/provost/expression/FAQ>); University of Guelph, (<https://www.uoguelph.ca/freedom-of-expression/faq>); University of California, Berkley, (<https://freespeech.berkeley.edu/frequently-asked-questions/>).

to postpone or not. In general, I suggest that a previously approved event may be postponed where: (a) the organizer has not met all of the requirements of the *TUUS Procedure*;<sup>187</sup> (b) it becomes clear that the information provided by the organizer about the nature or scope of the event was or has become inaccurate such that the planning for the event is materially compromised;<sup>188</sup> (c) the event requires security and/or other measures which cannot reasonably be put in place in time for the event; (d) there is no suitable space available for the event in light of the circumstances now known; or (e) the holding or the continuation of the event will cause a serious threat of personal injury, significant property damage or significant interference with the proper functioning of the University.

*(b) A clear decision-making process*

Decision-making in universities is often the result of a highly consultative, collegial process. This approach to decision-making, however, is not well suited to the challenges of planning for and managing an event that has the potential to attract controversy. What is needed, in my view, is a body within the University that has the capacity to apply a clear policy framework and address freedom of expression and security issues not only fairly and thoughtfully, but also promptly and decisively.

As I noted earlier, it is unclear where a member of the University community would go with a concern that a planned event is likely to exceed the proper scope of free expression. There is no clear line of authority or accountability in relation to the issue of cancellation or postponement of extra-curricular events. And although the TUUS

approval process appears to involve escalating controversial matters to the Campus Relations Committee, my review of the November 20 events indicates that a more nimble and efficient process and more transparent lines of responsibility and authority are needed. There is also a need, in my view, for more effective means of early identification of events that are likely to give rise to issues about the scope and limits of free speech and/or raise security concerns.

To address these matters, I make two recommendations. First, the University should establish a more robust and clearly defined triage element as part of the TUUS application process. Second, the University should establish a small, high-level committee whose role is to manage and address concerns about the appropriateness of speakers and extra-curricular events that require intensive special planning. I will elaborate on each in turn.

*(i) Triage of events*

The TUUS office processes thousands of events each year. While many of these events are routine, among them will be a handful of events that reasonably give rise to concerns about free expression and/or security. I will refer to these events as ones requiring “special planning.” Planning for those events is a complicated and labour-intensive undertaking. To permit adequate time for that planning to occur requires that the need for such planning be identified as early as possible.

My impression is that Community Safety and others within the University effectively identify events that are likely to need extra

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<sup>187</sup> “Temporary Use of University Space Procedure”, York University, effective January 15, 2010, at section III.3.4.

<sup>188</sup> *Ibid* at section III.5.2.

planning. However, a more formalized method of flagging those events is needed.

To identify events requiring special planning as early as possible, I suggest that at the intake stage, the staff responsible for the initial review of an application for the temporary use of space at the TUUS office should apply objective criteria to new applications. The online assessment tool currently referred to in the *TUUS Policy* may be a good place to start in establishing those criteria. Front-line staff will need training about how to apply these criteria and to incorporate the perspective of equity and inclusion in doing so.

In order to facilitate this screening process, I also recommend that the *TUUS Policy* and *Procedure* be clarified to indicate that an application for the use of temporary space will not be processed until the application is complete (including with the names of event speakers, if applicable). The *Policy* ought also to indicate that there is an ongoing obligation on the organizer to disclose, promptly, changes in relation to the nature, scope or risk assessment of the event.

(ii) [More nimble and effective management of events requiring special planning](#)

My understanding is that at present, an event requiring special planning is referred to the Campus Relations Committee. The Campus Relations Committee is an inter-departmental group of directors and senior members of the University's administration and is currently co-chaired by the Vice-Provost Students and the Vice-President Finance & Administration. I understand that, at present, there are no terms of reference for this Committee. In the past, the Committee in some cases has made its own decisions and in others made recommendations to the President for the President's consideration.

The Committee has a dedicated meeting time set aside each week, but meetings take place only on an as-needed basis.

The Committee has the advantage of bringing to bear on any event referred to it a wide range of experience, perspectives and expertise. The drawback is that the Committee's membership is too large and its responsibility and authority are too diffuse to deal effectively with a rapidly evolving, time-sensitive situation.

To make the process more nimble, I recommend that the University establish a senior committee (which can draw on members of the Campus Relations Committee as required) to which events requiring special planning can be immediately referred after triage by the TUUS office. As with the Campus Relations Committee, this new senior committee should have a dedicated meeting time set aside each week which it can use as needed for the purposes of discussing these events. The committee should be composed of a small group of individuals with expertise in freedom of expression, human rights and risk assessment. One model might include the Vice-President Finance & Administration; a senior member of the University community with expertise in free expression and human rights such as the Vice-President Equity, People and Culture or her nominee; a senior member of the Community Safety department; the Vice-Provost Students or her nominee; and the University's legal counsel.

The committee should have clear terms of reference that establish its role and responsibilities. The terms of reference should also set out clear lines of responsibility and accountability, including what decisions the committee is empowered to make and which ones must be referred to the President. Under those terms of reference, I suggest the committee be empowered to: (i)

consider complaints from the University community and interested parties about the suitability of planned extra-curricular events and speakers; (ii) conduct objective risk assessments of planned events and approve appropriate security measures; and (iii) refer matters to the Campus Relations Committee or make recommendations directly to the President regarding the refusal, cancellation or postponement of planned events based on either their proposed content and/or potential security risks.

### **C. Organized protests and sound amplification**

I noted in chapter 1 that the *TUUS Policy* is unclear about whether it applies to the use of University space for organized protests. While I am informed that the *TUUS Policy* has been applied informally to protests, this should be clarified. On the one hand, it is odd that an event for 50 people in a classroom requires TUUS approval but a demonstration

by hundreds of people that effectively takes over a whole building does not. On the other hand, there are principled objections to, and many practical problems with trying to regulate protests through the TUUS process. While I invite the University to consider this issue further, my suggestion is that there are other, more effective ways of putting measures in place to assure a robust opportunity to protest while observing the proper boundaries of free expression.

The rules about the use of sound amplification equipment also need clarifying to make sure that the limits apply to those protesting as well as those participating in an event.

### **D. Summary of the recommendations in this chapter**

In summary, my recommendations developed in this chapter are as follows:

**4.1** The University should create a policy framework establishing when it may refuse to provide a space for an event, including cancellation of a previously approved event. The policy should include the following elements.

(a.) Cancellation may be justified by either of two main considerations. The first relates to the anticipated content of the event. The second pertains to the safety of participants and the broader University community as well as the functioning of the University. Cancellation on this basis may be justified by the following considerations.

(i) Cancellation on the basis of anticipated content:

- This should be a measure of last resort, only used in rare and exceptional circumstances.
- Before cancellation, the University should be satisfied that two conditions are met. First, the University must reasonably form the view that there is a real risk that the speaker's presentation will exceed the limits of free expression. Second, the University must consider and adopt all reasonable measures short of

cancellation that sufficiently mitigate that risk. Such measures could include, for example, obtaining written assurances from the speaker and/or vetting an advance copy of the intended remarks.

- (ii) Cancellation on the basis of the safety of participants and the broader University community as well as the functioning of the University:
  - This must be a last resort and employed only when there is no reasonable alternative.
  - The University is justified in cancelling an event if, after considering all reasonable security measures, the University believes on the basis of compelling evidence that the event will create a significant risk of personal injury or significant property damage and that no reasonably available security measures can satisfactorily mitigate that risk. Normally this step should not be taken without a thorough risk assessment including, if available in a timely way, risk assessment by the TPS.

**4.2** The University should create a policy framework setting out the circumstances under which it may postpone a planned event. The policy should address the following elements.

- (a.) A previously approved event may be postponed where:
  - The organizer has not met all of the requirements of the TUUS process;
  - It becomes clear that the information provided by the organizer about the nature or scope of the event was or has become inaccurate;
  - The event requires security and/or other measures which cannot reasonably be put in place in time for the event;
  - There is no suitable space available for the event in light of the circumstances now known; or
  - The holding or the continuation of the event will cause a serious threat of personal injury, significant property damage or to the proper functioning of the University.

**4.3** The University should establish a more robust and clearly defined triage capability as part of the TUUS application process.

- (a.) Staff responsible for the initial review of an application for the use of temporary space at the TUUS office should apply objective



criteria to new applications to identify events requiring special planning as early as possible.

- (b.) Intake staff should be trained to apply the relevant criteria and to incorporate the perspective of equity and inclusion in formulating them.

4.4 The University should establish a small, high-level committee whose role will be to manage and address concerns about the appropriateness of speakers and extra-curricular events that require intensive prior planning.

- (a.) This committee would be a senior committee (with the ability to draw on the Campus Relations Committee as required) to which events requiring special planning can be immediately referred after triage by the TUUS office.

- (b.) As with the Campus Relations Committee, the committee should have a meeting time set aside each week for the purposes of discussing these events as needed.

- (c.) The committee should be composed of a small group of individuals with expertise in freedom of expression, human rights and risk assessment.

- One such model might include the Vice-President Finance & Administration or nominee; the Vice-President, Equity, People and Culture or nominee, a senior member of the Community Safety department; the Vice-Provost Students or nominee; and the University's legal counsel.

- (d.) The committee should have clear terms of reference that establish its role and responsibilities. The terms of reference should also set out clear lines of responsibility and accountability, including what decisions the committee is empowered to make and which ones must be referred to the President.

- (e.) The committee should be empowered to: (i) consider complaints from the University community and interested parties about the suitability of planned extra-curricular events and speakers; (ii) conduct objective risk assessments of planned events and approve appropriate security measures; and (iii) refer matters to the Campus Relations Committee or make recommendations to the President regarding the refusal, cancellation or postponement of planned events based on proposed content and/or potential risks.

4.5 The University should clarify whether the TUUS process applies to organized protests and that the limitations on use of sound amplification equipment apply to protestors as well as participants.

## Chapter 5. Clarifying the Interaction of Free Expression and Security

### A. Introduction

One of the University's key obligations is to protect the safety of event attendees and the University community.<sup>189</sup> But carrying out this obligation will often have important implications for free expression on campus. On the one hand, order and security must not stifle or unduly inhibit free expression; on the other hand, free expression is not possible without order and security. As a result, the University will often find itself on the horns of a dilemma: how to take reasonable steps to protect community safety while at the same time protecting everyone's freedom of expression?

My impression is that there is a significant lack of clarity about and understanding of how security and free expression can work together at the University.<sup>190</sup> There is justified concern that the *Directive* constrains security options given the potential that the *Directive* creates for punitive measures by the government against the University if it is thought to have failed to live up to its government mandated free speech policies. Some members of the broader University community are of the view that safety should prevail over free speech considerations; others claim that security concerns seldom justify constraints on free expression. All of this demonstrates that the University should

take steps to clarify how it can discharge its responsibilities with respect to safety and security while at the same time implementing its mission to further and protect free expression.

I have already suggested clarifications in relation to the proper scope and limits of free expression. In my view, these should be accompanied by the development and publication of a list of *objective* factors to be taken into account when assessing the risk posed by an event and a suite of security measures that the University may apply to events when justified by objective assessment of risk.

I will turn first to the conditions under which security measures that may have some limiting effect on expression may be imposed. I will then offer some suggestions about what a suite of security measures could look like. While I have no professional expertise in security matters, I offer this high-level list based on discussions with members of the broader University community and many years of experience working in public places in which security concerns regularly arise. I will conclude with a word about the use of "volunteer security" personnel on the campus, an issue that arose in connection with the November 20 events.

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<sup>189</sup> See generally, Brett A Sokolow *et al*, "College and University Liability for Violent Campus Attacks" (2008) 34:2 JC & UL 319; Donald Challis, "Appropriate Responses of Campus Security Forces" (2010) 17:1 Wash & Lee Race & Ethnic Ancestry LJ 169; Nancy Tribbensee, "Privacy and Confidentiality: Balancing Student Rights and Campus Safety" (2008) 34:2 JC & UL 393.

<sup>190</sup> Many interviewees stressed the importance of proper security protocols: B'nai Brith Canada's Written Submissions (February 10, 2020); CUPE 3903 Chairperson's Written Submissions (February 10, 2020); Canadian-Arab Anti-Discrimination Committee's Written Submissions (February 6, 2020); Canadian Muslim Lawyers Association's Written Submissions (February 10, 2020); Centre for Israel and Jewish Affairs' Written Submissions (February 18, 2020); Friends of Simon Wiesenthal Center for Holocaust Studies' Written Submissions (March 2, 2020).

## B. Appropriate resort to security measures

The *Directive* and the *Chicago Principles* provide that the University may reasonably regulate the time, place and manner of expression to ensure that it does not disrupt the ordinary activities of the University. This ability extends to putting in place appropriate security measures for extra-curricular events on campus. However, when are these measures “appropriate”?

The *Directive* specifies that each university’s free speech policy must include the principle that “while members...are free to criticize and contest views expressed on campus, they may not obstruct or interfere with the freedom of others to express their views” and further that “existing student discipline measures apply to students whose actions are contrary to the policy (e.g. ongoing disruptive protesting that significantly interferes with the ability of an event to proceed.)”<sup>191</sup> Moreover, the *Chicago Principles* state that “[t]he University may restrict expression ... that constitutes a genuine threat or harassment ... or that is otherwise directly incompatible with the functioning of the University.”<sup>192</sup> Importantly, the *Chicago Principles* go on to emphasize that these are “narrow exceptions” and that “it is vitally important that these exceptions never be used in a manner that is inconsistent with the University’s commitment to a completely free and open discussion of ideas.”<sup>193</sup>

In my view, the University should operate on the basis that these statements appropriately

set out the scope of its authority to put effective security measures in place for extra-curricular events on campus. But in order to be “appropriate,” the measures must satisfy two conditions: (1) security measures must be based on an objective risk assessment and must be *the least intrusive measures* that adequately respond to the risk; and (2) such measures must *never* be used for the purpose of suppressing free expression.

I suggest the University take three steps to improve the clarity and transparency of its decisions in relation to security measures.

- The University should prepare and publish a list of objective factors that it takes into account in assessing the risk of an extra-curricular event on campus.
- To the extent possible, recommendations about security arrangements by Community Safety to the senior administration must be aligned with these objective factors and based on objective and verifiable information.
- The University should develop and publish a list of the sorts of security measures that it may impose, roughly ranked by increasing order of stringency.

## C. Objective risk assessment

The *Statement of Policy on Free Speech* and other policies do not shed light on what factors the University considers when situations arise where expression, or the anticipated reaction to it, give rise to security risks. These factors need to be public and

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<sup>191</sup> Office of the Premier (Ontario), “Upholding Free Speech on Ontario’s University and College Campuses” (August 30, 2018) online: <<https://news.ontario.ca/opo/en/2018/08/upholding-free-speech-on-ontarios-university-and-college-campuses.html>>.

<sup>192</sup> “Report of the Committee on Freedom of Expression”, University of Chicago, (January 2015), online: <<https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf>>.

<sup>193</sup> *Ibid.*

known by the community to the extent reasonably possible. York Community Safety has risk assessment expertise and considers event-specific risks in planning for campus events.<sup>194</sup> Community Safety also appears from my review to have a constructive relationship with many groups on campus and with the TPS, relationships that can contribute to effective risk assessment. Community Safety should produce a publicly available list of risk factors that it takes into account in assessing risk and should be able to report to the senior administration about its risk assessment in terms of those factors. The existing risk self assessment tool is a useful model to consider in developing the list.<sup>195</sup>

In addition, the University's security policy ought to reflect a requirement that risk assessment, to the extent possible, must be based on reliable, verifiable information. Of course, some elements of risk assessment will depend on highly confidential information and on the exercise of sound judgment based on experience. But assertions that something is a threat, which are unsupported or based only on vague allegations or concerns, cannot provide a sound basis for risk assessment where that assessment results in measures that may impede free expression.

#### **D. A public "suite" of security measures**

My interviews with the members of the University community often addressed the security measures adopted for the November 20 event and what could be done differently in the future. A consistent message was that there needed to be greater clarity about the security measures that the

University could justifiably take in light of the risks raised by an extra-curricular event. Indeed, several people to whom I spoke were critical of the security measures used on November 20. The perspective of the interviewees often boiled down to "why did/did not the University implement security measure *x*?"

This sort of critique is to some extent based on 20:20 hindsight. This is reflected in the old adage that there are two rules about security arrangements: if nothing happens, you had too much; if something happens, you did not have enough. But this critique also reflects a lack of knowledge and understanding of the sorts of measures that the University may properly take to address risk. Some members of the University community felt in the dark with regard to the measures the University took and the University's authority to take such measures. Some senior administrators indicated that they were unsure about the scope of their authority with respect to security measures, especially in light of the *Directive*.

I can best illustrate these concerns by looking at some of the security lessons learned from the November 20 event.

Community members and University administrators agreed that there were missed opportunities in the planning for the November 20 event. Interviewees often underscored two gaps. I emphasize that these points emerge with the benefit of hindsight.

First, Vari Hall is a poor venue for an event likely to attract protest. The space has multiple access points; is centrally located;

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<sup>194</sup> Community Safety developed several documents in which it assessed the risks posed by the November 20 event. Chief among them, it developed an extensive "Event Operations Plan" (dated November 14, 2019) that considered the varied risks posed by the event.

<sup>195</sup> "Security Safety Assessment Tool for Events", York University, (undated), online: <[https://tuus.info.yorku.ca/files/2013/01/Security\\_Safety\\_Assessment\\_Tool.pdf?x42573](https://tuus.info.yorku.ca/files/2013/01/Security_Safety_Assessment_Tool.pdf?x42573)>.

has narrow corridors; has the potential to create “choking points” in the staircases; and has classrooms where lectures might be taking place. The consensus among interviewees was that Vari Hall structurally does not lend itself for hotly contested student events and poses serious security challenges.

Second, the security planning did not adequately address the number of persons attending, the extent of the protest and counter-protest or the presence of “volunteer security” personnel. Admission to the event was not regulated in any way. There was no designated area for protesting or counter-protesting. Beyond a makeshift human barrier, there did not appear to be any attempt to ensure separation between protestors and counter-protestors.

All of this leads me to think that a detailed and transparent list of security measures that are open to the University in response to objectively verified risks would be useful both to the Security Service and to the wider community.

In terms of what a suite of security measures could look like, I suggest the following, with an approximate ranking from the least restrictive to the most restrictive. No doubt, those with expertise in security matters could devise a more comprehensive list, but I hope this list at least illustrates what I have in mind.

1. Assigning of University security personnel to attend the event.
2. Selecting the venue and timing for the event, including changing venue and

timing subject to relevant security and other developments.

3. Providing an appropriate and safe place for demonstrators who wish to protest the event (e.g. creating “protest zones”). The space selected must allow the protestors to have the message heard by those organizing and attending the event and even to create some unease on the part of organizers and attendees. But the demonstrators must not prevent attendees from attending, threaten anyone, or significantly interfere with the ability of an event to proceed.
4. Creating multiple protest zones if counter-protestors are expected. If the risk justifies it, the University may separate the groups — for example, by creating clearly designated areas where each group may protest.
5. Restricting attendance to those with University identification (students, faculty and staff) or requiring advance registration or sign in for people without such ID. University IDs would be examined at entrance, but not recorded.
6. Conducting bag checks as a precondition to attend the event.
7. Requesting the assistance of the TPS.
8. Restricting attendance to those who have pre-registered.
9. Restricting attendance to invitees only.<sup>196</sup>

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<sup>196</sup> Harvard University has an analogous list of measures as part of its free speech policies: see “Free Speech Guidelines”, Harvard University, effective May 15, 1990, at “V. Security” and “Appendix A”, online: <[https://www.fas.harvard.edu/files/fas/files/freespeech\\_guidelines\\_1990.pdf](https://www.fas.harvard.edu/files/fas/files/freespeech_guidelines_1990.pdf)>.

## E. Mandatory meeting between protest organizers and security

In addition to the suite of security measures, the University may develop specific policies for demonstrations on campus. That is, in order to ensure planned protests of campus events remain within the bounds of acceptable free speech, I recommend implementing a requirement for meetings between protest organizers and members of York's Community Safety department. The substance of what is discussed at those meetings should be documented by Community Safety and the notes made available to the senior administration as needed for planning and review purposes.

In the case of the November 20 event, I understand that meetings took place between members of SAIA and members of the University's Community Safety department prior to the event in order to discuss the logistics of the protests. That these meetings took place on an informal basis is commendable, and ought to be encouraged, but formalizing this requirement in the *TUUS Policy* (or *Procedure*) would assist in ensuring event protests are conducted in a safe manner.

## F. Evaluating policies on special constables

As part of rethinking its security measures, I recommend that the University carefully

weigh the issue of whether some members of its Security Service should become special constables.<sup>197</sup>

My review of the various videos of the November 20 events and observations made in a number of submissions convince me that a more robust University security capability is likely required for events of this nature. Persons who are violating University policies in relation to free expression and related matters should be promptly ordered to leave the campus. If they persist in their misconduct and refuse or fail to leave, they are committing an offence and may be charged under the *Trespass to Property Act* ("TPA"). As a last resort where other alternatives have failed or are ineffective, they may also be arrested. These are robust powers and they are available to address threatening and disruptive behaviour exceeding the bounds of free expression.<sup>198</sup>

Recent case law has made clear that the *TPA* is not a source of power to establish restrictions on or conditions for access to property.<sup>199</sup> Rather, the University's power to place restrictions on campus access arises from (i) its status as a private property owner which can impose conditions on the time, manner, and place of access to its property and (ii) as an occupier of land that can take reasonable steps motivated by legitimate concerns about the safety of persons on its premises.<sup>200</sup>

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<sup>197</sup> For general discussions of policing on campus, see Diane C Bordner, David M Petersen, *Campus policing: the nature of university police work* (Lanham, MD: University Press of America, 1983); Jennifer Wood & Clifford Shearing, "Securing Safety on Campus: A Case Study" (1998) 40:1 Can J Corr 81; Kimberley Pochini, "Managing Risk of Violence in the Post-Secondary Educational Environment" (2008) 18:1 Education & Law Journal 145.

<sup>198</sup> RSO 1990 c T21, section 2(1)(b); *R v Asante-Mensah*, [2003] 2 SCR 3; *Tucker v Cadillac Fairview Corp*, 2005 CanLII 24579 (ONCA).

<sup>199</sup> *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255 at para 88. See also *Bracken v Fort Erie (Town)*, 2017 ONCA 668 at paras 70-72.

<sup>200</sup> *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255 at para 74; *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 244-45; *Weisfeld v Canada* (1994) 116 DLR (4th) 232 at 251 (FCA);



Recent case law has also made clear that where the owner’s authority to direct a person to leave the property is exercised by “a person authorized” by the owner, that authority to act on behalf of the owner to restrict access to the property must have been clearly given.<sup>201</sup> It follows that if the University intends its security personnel to exercise this authority on its behalf, there should be some explicit policy or direction to that effect.

The current Standard Operating Procedures (“SOPs”) under which the Security Services work indicate that arrests under the *TPA* should normally be limited to those occasions where (i) the individual persists in the prohibited activity despite a warning or caution, is a habitual offender, or refuses to leave York property; (ii) the individual is deemed to represent an ongoing and serious threat to persons or to property; (iii) an arrest is in the best interests of the University and/or the community; and (iv) awaiting the arrival of the TPS is not practical under the circumstances.

As I see it, many persons ought to have been told to leave the campus on the evening of November 20. No doubt the SOPs are wise in setting a high threshold in most circumstances for the use of coercive powers. But I am concerned that the SOPs may set too high a threshold when dealing with a situation calling for rapid and decisive intervention and it is unclear to me whether the York security personnel have the

capability to decide when those directions to leave campus should be given and once given, enforced.

A number of submissions suggested that some York Security personnel should be sworn and trained as special constables. At present, no members of the service have that status. Special constables may be given some (or indeed all) of the powers of a police officer.<sup>202</sup> The basis of the suggestion is that special constables have the training and powers to provide a more robust security presence. On the other hand, there are justified concerns about the role of special constables on a university campus. While several Ontario universities have their own “police” made up of special constables, there are concerns about whether having special constable powers may make it harder for the Security Service to interact effectively with the community. There are also some regulatory concerns.<sup>203</sup>

I suggest that the Security Service should review its SOPs with special attention to the security approach that is necessary in the case of events such as that of November 20. In addition, the University should consider whether it should move forward with having some members of the Security Service sworn and trained as special constables.

### G. The role of “volunteer security”

As I mentioned earlier, the use of “volunteer security” personnel was also an issue at the

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*Bracken v Fort Erie (Town)*, 2017 ONCA 668 at paras 69-73. See also *Occupiers' Liability Act*, RSO 1990, c O2, s 3(1).

<sup>201</sup> *Stewart v Toronto (Police Services Board)*, 2020 ONCA 255 at para 101.

<sup>202</sup> *Comprehensive Ontario Police Services Act, 2019*, SO 2019, c 1, s 92. See also George S Rigakos, *Campus Special Constables in Ontario*, Ottawa: Ontario Association of College and University Security Administrators, 2013.

<sup>203</sup> See, for example, Deputy Chief Michael Mann and Ian B Johnstone, *Report on Special Constables in Ontario: A White Paper from the Ontario Association of Chiefs of Police*, Ontario Association of Chiefs of Police, February 2010.

November 20 event. In a Facebook post on Herut’s Director’s account posted on November 22, the writer said:

I personally appointed a security organizer who rallied many people in the community to come out and help us stay safe. He had connections to certain Jewish motorcycle groups like the “The Riders of the Covenant” and “The Deplorables” whose members came out and selflessly protected our community. Thank you guys! My security organizer also reached out to the JDL, who sent out a group of guys. We are very grateful to them as they helped keep the protesters away from our event, protected the Jewish students and Zionist community members, and helped to safely escort us home after the event.<sup>204</sup>

I was told that “volunteer security personnel” invited by Herut took it upon themselves to conduct bag checks. While Herut maintains that this was done with knowledge and approval of York Security, senior management of York Security had no knowledge of any advance approval. It also

appears from the videos of the event that persons other than York Security or TPS members physically removed people who disrupted the event from the meeting room.

In my view, University policy and procedure in relation to “volunteer security” must be clarified. At present, the *TUUS Procedure* deals only with York Security, private security firms and pay-duty police officers. The *Procedure* ought to make clear that use of “volunteer security” is *absolutely prohibited* and that anyone purporting to play such a role who applies force to anyone will be immediately removed from campus and the matter referred to the police for possible prosecution. It will be necessary to define “volunteer security” so as not to include protest marshals drawn from the University community or persons carrying out administrative roles such as checking admissions at events.

#### **H. Summary of the recommendations in this chapter**

With respect to reconsidering security measures at the University, I recommend the following:

- 5.1 Free expression and security should be understood as complementary and not as competing values. The University has considerable discretion to control the time, place and manner of extra-curricular expression on the campus. This includes putting appropriate security measures in place.
- 5.2 The University should endorse the principle that security measures will be appropriate when: (a) they are based on objective risk assessment which is founded on reliable information; and (b) they are the least intrusive measures that will satisfactorily mitigate the identified risk.
- 5.3 The University should develop and publish a list of criteria informing its risk assessment process. All advice to the senior administration about the

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<sup>204</sup> Herut’s Director, “I again want to thank everyone who made our event at York U possible!” (November 22, 2019) online: Facebook.

risk posed by an event should be provided on the basis of the assessment of these criteria.

**5.4** The University should develop and publish a suite of security measures, in ascending order of intrusiveness that can be applied to mitigate the risk associated with an event. I offer the following by way of example, with an approximate ranking from the least restrictive to the most restrictive:

- Assigning University security personnel to attend the event;
- Selecting the venue and timing of the event;
- Providing an appropriate and safe place for demonstrators who wish to protest the event (e.g. creating “protest zones”);
- Creating separate protest zones if counter-protestors are expected;
- Requesting the assistance of the TPS;
- Restricting attendance to those with University identification (students, faculty and staff) and requiring advance registration or sign in for people without such ID. University IDs would be examined at entrance, but not recorded;
- Conducting bag checks as a precondition to attend the event;
- Restricting attendance to those who have pre-registered; and
- Restricting attendance to invitees only.

**5.5** The University should consider whether it should have some members of its Security Service sworn and trained as special constables.

**5.6** The University should implement a requirement for meetings between protest organizers and members of York’s Community Safety department. The substance of what is discussed at those meetings should be documented by Community Safety and the notes made available to the senior administration as needed for planning and review purposes.

**5.7** The University should clarify its policies to explicitly prohibit outside security personnel, including volunteer security, on campus without written permission from the University. The policy should be clear that these restrictions do not apply to those carrying out administrative roles or to marshals drawn from the University community that protestors and counter-protestors have appointed to ensure appropriate discipline within a protesting group.

## Chapter 6. The Administration, Student Groups and the Student Centre

### A. Introduction

I often heard during my review that the University lacks transparent and robust mechanisms to address concerns about the conduct of student groups, particularly in relation to free expression issues. These concerns came from very different perspectives, but had in common the point that the University appeared to lack the tools to address these issues.

SAIA in its written submission stated: "...it was entirely understandable and predictable that an event organized by Herut, attended by the JDL and featuring Reservists on Duty would make Palestinian students and their supporters feel unsafe, would be an affront to their dignity as human beings, and would elicit their strong objections."<sup>205</sup> As a result, SAIA submitted that Herut and other organizations should be banned from the campus. On the other hand, Herut's Director stated in her written submission that SAIA's protest of the November 20 Herut event was a "shocking display" marked by "intimidation and harassment to the point where attendees had to be escorted out of the Herut event and past the mob with police assistance."<sup>206</sup>

Each group urged sanctions against the other and criticized the University for imposing temporary suspensions on themselves.<sup>207</sup> They also expressed concern that the

University did not have a transparent process to consider the suspensions and that it gave no reasons for and offered no policy framework to support them.<sup>208</sup>

The York Federation of Students passed a resolution shortly after the event that also gave rise to concern. The resolution provided in part:

...if representatives of the Israeli state or any other imperialist power are invited to gather support for war and occupation in Palestine and elsewhere, the York Federation of Students must organize mass mobilizations of students, workers, marginalized communities in opposition" and calling on YFS to provide "material support for student activist groups fighting against imperialist propaganda by providing resources and using their multi-million-dollar apparatus to lead the organizing effort."<sup>209</sup>

Some viewed this resolution as being anti-Semitic and threatening. Again, it was unclear what policies and processes the University had in place to address these concerns.

I also heard concerns about tensions between University policies and the governance of the Student Centre. I became aware of one incident in which a proposed event failed to

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<sup>205</sup> Students Against Israeli Apartheid's Written Submissions (February 13, 2020).

<sup>206</sup> Herut Zionism's Written Submissions (February 10, 2020).

<sup>207</sup> Students Against Israeli Apartheid's Written Submissions (February 13, 2020); Herut Zionism's Written Submissions (February 10, 2020).

<sup>208</sup> *Ibid.*

<sup>209</sup> "Resolution" (passed at Annual General Meeting), York Federation of Students, November 28, 2019.

get the University's approval through the TUUS process but was nonetheless allowed to proceed in the Student Centre. I should note that, more recently, an event that had been refused space through the TUUS process was also denied use of space in the Student Centre. There appears to be considerable uncertainty about the lines of authority and accountability for the operation of the Student Centre and particularly in relation to the planning for events that occur there.

Following the November 20 event, politicians and various groups weighed in. The view expressed from many quarters was that the University needed to "do something" to sanction misconduct and to prevent similar occurrences in the future. There was criticism of the temporary suspensions of SAIA and Herut and calls for the permanent suspension of both. The absence of a transparent policy framework and publicly-stated reasons for the suspensions fed concerns about arbitrariness.

In light of these factors, I reviewed the adequacy of the University's tools to address concerns of the nature that I have just described. Consistent with my terms of reference, I will not opine on the validity of these specific concerns, but focus on whether the University's policies and procedures provide appropriate mechanisms for the University to address them.

I will address two areas: the University's policies in relation to student organization

activities and the relationship between University policies on events and the Student Centre.

## **B. The University's policies in relation to student organizations**

### **1. Background**

The main policies on this subject are the *York University Student Organization Recognition Guidelines* (the "Guidelines"),<sup>210</sup> *Presidential Regulation Number 4* ("PR-4")<sup>211</sup> and the *Code of Student Rights and Responsibilities* (the "Code").<sup>212</sup>

To avoid confusion, we need to pay attention to which student organizations these three documents cover and to clarify some terminology. The key point is that they use the term "student organization" to refer to different things.

*PR-4* deals separately with student clubs and student governments. It refers to clubs as "student organizations." Similarly, the *Guidelines* deal with the recognition of "student organizations" by which it means student clubs. However, the term "student organizations" has a broader meaning in the *Code*. The *Code* applies to "students" and "student groups." It defines "student groups" to include "student organizations" which in that context means both clubs and student governments. Thus while *PR-4* distinguishes between "student organizations" and "student governments," the *Code* uses the terms

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<sup>210</sup> "York University Student Organization Recognition Guidelines", York University, undated, online: <<https://studentclubs.scl.d.yorku.ca/club-recognition>>.

<sup>211</sup> "Presidential Regulation Number 4 - Regulations Regarding Student Governments/Organizations", York University, effective January 1, 1989, online: <<https://secretariat-policies.info.yorku.ca/policies/presidential-regulation-number-4-regulations-regarding-student-governments-organizations>>.

<sup>212</sup> "Code of Student Rights & Responsibilities", York University, undated, online: <<https://secure.students.yorku.ca/pdf/CodeofRightsandResponsibilities.pdf>>.

“student group” and “student organizations” to include both.

In what follows, I will use the term “clubs” to refer to student organizations in the sense that term is used in *PR-4* and the *Guidelines*. I will use the term “student groups” in the way it is used in the *Code* to include both clubs and student governments.

I will now turn to what each of these three documents contributes to my review of how the University may enforce its policies with respect to campus expression and use of space.

I can deal briefly with the *Code*. It addresses alleged breaches of University policies, including the *Statement* and the *TUUS Policy*, by both students and student groups. However, the *Code* is not well suited to deal with complaints against student groups for a number of reasons. The list of responsibilities in the *Code* do not extend to some of the conditions, such as for example, security conditions for events, that may appropriately be imposed by the University on student group activity on campus. Under the *Code*, complaints must be filed by a student, staff or faculty member, but individuals and particularly individual students are not likely to want to pursue a complaint against a student group or to have responsibility for establishing the complaint on the balance of probabilities. Anonymous complaints are not permitted (although if personal safety is involved, only the first name of the harmed party and complainant may be provided to the party complained against). Complaints against a student group would most likely go to the University Tribunal whose process is

fairly adversarial and has the potential to extend over a long period of time. The possible sanctions are not well suited to the situation of student groups. For these reasons, I suggest that *PR-4* and the *Guidelines* should be the main vehicles to address concerns about the conduct of student groups in relation to expression and use of space.

Turning to the *Guidelines* and *PR-4*, I briefly reviewed them in chapter 1. My review suggests that there are two significant gaps.

First, they provide little policy guidance in relation to how to enforce the conditions on which student clubs are recognized and there is inadequate accountability for student groups that allegedly breach the University’s free expression and use of space policies.

Second, the existing framework does not effectively address the concern that clubs may be able to avoid the impact of suspension or withdrawal of recognition simply by forming another similar group under a different name. I will offer some suggestions about how to fill each gap.

## 2. Club recognition and student group accountability

As I mentioned in chapter 1, both the *Guidelines* and *PR-4* address aspects of club recognition. They assign various authority and responsibility to the Centre for Student Community & Leadership Development (“SCLD”), the Manager of Student Life, the Provost, and the Student Relations Committee.<sup>213</sup> The two documents set out potentially serious consequences for a club’s failure to observe requirements but, with a

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<sup>213</sup> “Presidential Regulation Number 4 - Regulations Regarding Student Governments/Organizations”, York University, effective January 1, 1989, online: <<https://secretariat-policies.info.yorku.ca/policies/presidential-regulation-number-4-regulations-regarding-student-governments-organizations/>>; “York University Student Organization Recognition Guidelines”, York University, undated, online: <<https://studentclubs.sclد.yorku.ca/club-recognition/>>.



couple of exceptions, there is no policy framework or process for determining whether a club has failed to observe the requirements or how an appropriate penalty is to be determined.<sup>214</sup> Neither document specifically addresses temporary suspension. Moreover they do not address accountability for student groups who allegedly breach the University's policies in relation to expression or use of space. As mentioned earlier, the *Code* is not an appropriate or practical vehicle to deal with these issues.

In addition to these gaps, there is also some important lack of clarity in the *Guidelines* and *PR-4*. In particular, there are significant ambiguities in sections 10(c) and (d) of *PR-4*. Section 10(c) requires a club to provide certain documentation to the Provost, including an “undertaking to observe the general regulations and policies of the university and the regulations and procedures governing financial accountability.”<sup>215</sup> Section 10(d) provides that the Provost may suspend the payment of funds if a club “fails to observe these requirements.”<sup>216</sup> There are at least two problems with these paragraphs.

First, what is included in the term “these requirements” (under section 10(d)) the breach of which may lead to suspension? On one reading of *PR-4*, “these requirements” in section 10(d) refers to the requirements to provide documentation as set out in section 10(c). On another reading, “these requirements” could include the obligation to

“observe the general regulations and policies of the university ... (etc).”<sup>217</sup> I suggest that there should be clear authority to sanction or suspend a club for serious breaches of the general regulations and policies of the University. *PR-4* should clarify this and provide some guidance as to the types of conduct that could justify imposing these penalties.

Second, section 10 of *PR-4* deals only with the Provost's authority *to suspend payment of funds* to a club and contemplates that the Student Relations Committee will consider the matter at the Provost's request and take “appropriate action.”<sup>218</sup> But there is no express power to suspend all of the organization's privileges and there is no indication of how the Student Relations Committee is to consider the matter or what “appropriate action” could entail.

To fill these gaps and provide greater clarity, I suggest the following.

- The *Guidelines* should set out the process for club recognition, including: criteria for recognition; the identity of the decision-maker; and an appeal from or a review of refusal of recognition.
- *PR-4* should be amended to include:
  - the grounds on which a student group may be sanctioned for serious breaches of the University's policies

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<sup>214</sup> The *Guidelines* provide for an appeal to the Manager of Student Life of a refusal of recognition. The penalty of suspension is specified in the *Guidelines* with respect to a club's failure to meet with the SCLD if requested to so and *PR-4* refers to suspension of payment of funds.

<sup>215</sup> “Presidential Regulation Number 4 - Regulations Regarding Student Governments/Organizations”, York University, effective January 1, 1989, online: <<https://secretariat-policies.info.yorku.ca/policies/presidential-regulation-number-4-regulations-regarding-student-governments-organizations>>.

<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> *Ibid.*

concerning expression and use of space;

- a process for decision-making including specifying the decision-maker and providing appropriate opportunities for the student group to respond to concerns before a decision is made;
- a process setting out how a complaint about the conduct of a student group may be made;
- possible sanctions and penalties and the grounds on which they may be imposed;
- a requirement for the decision-maker to advise the student group of the reason or reasons for the sanction or penalty; and
- a process for a non-punitive, temporary suspension of club privileges to hold events on campus for a limited period (for example, 30 or 45 days). The policy should include: the grounds on which such a temporary suspension of privileges may be imposed; the maximum duration of the suspension; who may impose it; the opportunity for the club to respond to the grounds for suspension before, or in cases of great urgency, within a short period of time following its imposition; a right of review (i.e. a fresh assessment by another decision-maker of whether the suspension was justified). Grounds may include the fact that there are credible allegations of misconduct which, if established,

would justify a penalty, and/or that there is need for time to properly investigate those allegations and permitting further events while that investigation is ongoing would create an unacceptable risk of violence or property damage. The decision-maker should be required to give reasons, based on the policy, for the suspension.

### 3. Evading the impact of suspension

Some expressed concern to me that student organizations could in effect avoid the impact of a suspension by getting recognition for a new organization having similar objectives and membership as the suspended one. I have not been able to assess how serious an issue this is in practice, but in principle, this should not be permitted and the policy could easily address it.

Section 3 of the existing *Guidelines* addresses this in part by specifying that recognition may be refused “if, based on the application, it appears that the organization’s objectives duplicate the objectives/programming of another organization or university department.”<sup>219</sup> I suggest two adjustments to this provision to make it more effective.

First, the words “based on the application” should be deleted. The decision-maker should not be limited to consideration of what the application discloses. Second, this issue should be addressed directly by adding a clause akin to this: “or there is a sound basis to believe that the new organization is seeking recognition to avoid the impact of a suspension imposed on another organization with similar objectives or membership.”

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<sup>219</sup> “York University Student Organization Recognition Guidelines”, York University, undated, online: <<https://studentclubs.scl.d.yorku.ca/club-recognition/>>.

Relatedly, the University may wish to consider strengthening the “fronting” provision currently found in section 4 of the *Guidelines*.<sup>220</sup> The section could simply provide that the University will not recognize a student organization that will serve as a “front” for an off-campus organization so that it may have certain campus privileges, including the use of University space.

### C. Events at the Student Centre

*PR-4* affirms the University’s belief that “independent student governments and student organizations promote learning, growth and responsibility amongst those who conduct these activities and serve the interests of their fellow students.”<sup>221</sup> The practical issue that arose in the course of my Review was how the University can ensure that all necessary steps are taken to uphold free speech and protect community safety for events in the Student Centre.<sup>222</sup>

*PR-4* does not specifically address the governance of the Student Centre. That is the subject of a long-term, detailed management agreement between the University and the York University Student Centre Incorporated (the “Corporation”). Under that agreement, the Corporation is responsible for “the management, operation and supervision of the Student Centre in a diligent and responsible manner.”<sup>223</sup> This responsibility

includes the “allocation and use of space” in the Centre and the “supervision and control of the activities of users of the Student Centre...”<sup>224</sup> However, the Centre’s “guidelines, practices and regulations” must “conform with the policies, guidelines, practices, regulations, contractual obligations and legal responsibilities of the University” subject to the ability of the University to waive or modify its policies, guidelines, practices, etc. to the extent that they apply to the Centre, its management, operation and use.<sup>225</sup> It is an act of default under the Agreement for the Corporation to act in a way that “gravely impairs the interests or regulations of the University.”<sup>226</sup>

So far as I have been made aware, the University has not waived any of its policies or guidelines.

It is not my role to provide legal advice about the meaning of the Agreement. However, it is important for campus safety and security that the University and the Corporation have a coordinated policy with respect to free expression and security. I recommend that if the University revises the *TUUS Policy and Procedure*, the University should satisfy itself that the Corporation has in place policies and procedures that conform to the University’s revised policy and procedures as the Agreement requires. In addition, any event at the Centre involving a potentially

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<sup>220</sup> For an example of such a clause, see “Fronting”, Stanford University, undated, online: <<https://ose.stanford.edu/policies/event-planning-policies/fronting>>.

<sup>221</sup> “Presidential Regulation Number 4 - Regulations Regarding Student Governments/Organizations”, York University, effective January 1, 1989, online: <<https://secretariat-policies.info.yorku.ca/policies/presidential-regulation-number-4-regulations-regarding-student-governments-organizations/>>.

<sup>222</sup> *Ibid* at section A(1).

<sup>223</sup> “York University and York University Student Centre Incorporated Management Agreement”, April 5, 1988, at section 13(a).

<sup>224</sup> *Ibid* at section 13(a)(i) and (v).

<sup>225</sup> *Ibid* at section 13(b) and (c).

<sup>226</sup> *Ibid* at section 23(a)(iii).

controversial issue or speaker should be required to go through the triage process that I recommend as part of the TUUS process. This should ensure that security concerns are identified and known to the University so that they can be addressed appropriately. There should also be a clear understanding between the University and the Corporation that if an event has been refused the use of University space or has been cancelled or postponed on the grounds that the expression at the event exceeds the proper ambit of free expression

or the event cannot be held safely, such an event *cannot* be held at the Student Centre. The University and the Corporation should implement a notification process so that the Corporation is promptly made aware of the University's decisions of this nature.

#### **D. Summary of the recommendations in this chapter**

I suggest the following steps with respect to student organizations and the Student Centre:

#### **6.1 Clarify the policy framework and process for club recognition and student group accountability along the following lines.**

##### **(a.) Amend the *Guidelines* as follows:**

- The *Guidelines* should set out the process for club recognition, including: criteria for recognition; the identity of the decision-maker; an appeal from or a review of refusal of recognition.
- The words “based on the application” should be deleted from section 3.
- Add to section 3 words to the effect that “or there is a sound basis to believe that the new club is seeking recognition to avoid the impact of a suspension imposed on another club with similar objectives or membership.”
- Consider strengthening the “fronting” provision in section 4.

##### **(b.) *PR-4* should be amended to include:**

- The grounds on which a student group may be sanctioned, for serious breaches of the University's policies concerning expression and use of space;
- A process for decision-making including specifying the decision-maker and providing appropriate opportunities for the student group to respond to concerns before a decision is made;
- A process setting out how a complaint about the conduct of an student group may be made;
- The possible sanctions and penalties and the grounds on which they may be imposed;
- A requirement for the decision-maker to advise the student group for the reason or reasons for the sanction or penalty;

- A process for non-punitive, temporary suspension of club privileges to hold events on campus for a limited period (for example, for 30 or 45 days) including:
    - The grounds on which such a temporary suspension may be imposed (such as that there are credible allegations of misconduct which, if established, would justify a penalty and/or there is a need for time to properly investigate those allegations, and permitting further events while that investigation is ongoing would create an unacceptable risk of violence or property damage);
    - Specify the decision-maker and require that the decision-maker give reasons for the temporary suspension that are communicated to the University community;
    - The maximum duration of such a suspension;
    - An opportunity for the organization to respond to the allegations before, or in cases of great urgency, within a short period following its imposition; and
    - A right of review.
- 6.2** If the University amends the *TUUS Policy* along the lines that I have suggested, it should satisfy itself that the York University Student Centre Incorporated has in place policies that conform to that revised policy. In addition, any potentially controversial event or speaker at the Student Centre should be subject to the triage process under the *TUUS Policy*.
- 6.3** The University and the Student Centre should have a clear understanding that an event cannot be held at the Centre if it has been refused the use of University space or has been postponed because the expression at the event will exceed the proper ambit of free expression or that it cannot be held safely.
- 6.4** The University and the Centre should put in place a notification process so that the Centre is promptly made aware of the University's decisions of this nature.

## Conclusion

My terms of reference in effect ask me to consider one main question: how well does the current framework of policies, procedures and practices serve the University as it deals with complex, quickly evolving and potentially dangerous situations arising from use of its facilities for extra-curricular activities? The events of November 20, 2019 tested that framework and exposed some gaps and weaknesses. Those events also provided an impetus for reflection and re-assessment of which my Review forms a part.

I have concluded that there are many opportunities to improve and strengthen the current framework. My observations and recommendations ought to assist the University as it proceeds with its overall response, of which this Review is only a part, to the many issues raised by that evening at Vari Hall.

Even the best policies, procedures and practices cannot solve every problem or meet every challenge. No framework can turn hatred into respect, intolerance into acceptance, or exclusion into inclusion. A robust and effective framework is, however, one of the indispensable components of a comprehensive response to these problems and challenges. Some clear boundaries and expectations, good education about them and meaningful consequences for their non-observance must be part — but of course only one part — of the foundation of the welcoming, safe and inclusive place that every university strives to be.

I hope that the observations and recommendations that I offer based on my Review will assist the University to strengthen that foundation.



## Appendix A: List of Recommendations

### Chapter 2: Free Expression on Campus — Providing Clarity and Strengthening the Culture

- 2.1** The University should clarify the parameters of free expression by producing a set of procedures and/or a handbook to supplement its *Statement of Policy on Free Speech*. These clarifications should include the following elements.
- (a.) The *Statement* and related documents apply to “expression” which extends to an “activity” that “conveys or attempts to convey a meaning.”
  - (b.) The offensiveness of an idea alone cannot be an appropriate basis to circumscribe expression. Expression cannot be suppressed simply because some or even most people may find it unwelcome, disagreeable or even deeply offensive.
  - (c.) Free expression is subject to two types of limits.
    - Some types of expression are not protected.
      - Expression in the form of violence and the threat of violence is not protected.
    - Some expression may be limited when doing so is demonstrably justified, that is, where the limitation serves an important objective *and* does not limit expression more than reasonably necessary to achieve it.
      - Examples include expression that is unlawful: hate speech, other types of discriminatory expression, advocacy of genocide, publicly inciting hatred, and willfully promoting hatred of an identifiable group through telephone, broadcasting or other audible or visible means, including through the use of an internet platform or through social media and expression that is incompatible with the mission of the University.
  - (d.) The University should provide the community with more detailed descriptions of the sorts of expression that exceed the limits of free expression.
  - (e.) Protest is a form of permitted expression, but not when it significantly interferes with the expressive rights of others. The University must provide guidance on campus protesting — specifically on the forms of protest that are permissible and those that are not. The characteristics of protected, peaceful demonstration include the following.
    - People may gather for peaceful demonstrations.
    - Peaceful protestors may have wide latitude in what and how they wish to protest.

- Peaceful protest includes voicing one’s dissent, in a peaceful manner, in recognized and authorized places.
- Peaceful protesting does not include the following.
- A peaceful demonstration ceases to be “peaceful” — and thereby lawful — if it provokes, endorses, and/or commits violent or unlawful conduct.
- A peaceful demonstration cannot obstruct, physically impede, or blockade other lawful activities. Peaceful protest does not include directly or in effect impeding the occurrence of an authorized University event.
- Not all property is available for protesting.
- Peaceful demonstrators are not entitled to a captive audience.
- Peaceful protestors may be required to take necessary safety precautions which may interfere with their right to protest in the manner that they would prefer (e.g. bag checks).

**2.2** The *Posting Guidelines* should be clarified and amended as detailed in the text of this Review.

**2.3** The *TUUS Procedure* should be amended to address the issue of security costs as detailed in the text of this Review.

**2.4** The University should make clear that subjective beliefs about safety that are created by the permitted free speech of others, and which have no objective basis in fact, may not reduce the scope of permitted expression by others. At the same time, the University should recognize and respond to the sense of exclusion that some types of permitted speech may create.

**2.5** Increased training and education are necessary to do everything reasonably possible to ensure that the community members understand and internalize the principles of free speech. In other words, the basic parameters of free expression need to become part of the culture of the University. In addition and to the extent practicable, training and education are also necessary so that community members recognize that some forms of expression are deeply offensive and that the outer limits of free expression should not be understood as a licence to inflict harm.

### Chapter 3: Strengthening Racism, Discrimination and Harassment Policies

**3.1** The University should develop a clear policy framework defining what constitutes racism, harassment and discrimination, particularly in relation to extra-curricular activities and conduct by student organizations.

- 3.2** The University should develop a clear, effective and transparent process to address concerns and complaints about alleged racist, harassing and discriminatory conduct, including in the context of extra-curricular activities and by student organizations.
- 3.3** The University should put in place educational opportunities for students and student organizations similar to what I have suggested in relation to free expression issues.

#### Chapter 4: Rethinking the Temporary Use of University Space Process

- 4.1** The University should create a policy framework establishing when it may refuse to provide a space for an event, including cancellation of a previously approved event. The policy should include the following elements.
- (a.) Cancellation may be justified by either of two main considerations. The first relates to the anticipated content of the event. The second pertains to the safety of participants and the broader University community as well as the functioning of the University. Cancellation on this basis may be justified by the following considerations.
- (i) Cancellation on the basis of anticipated content:
- This should be a measure of last resort, only used in rare and exceptional circumstances.
  - Before cancellation, the University should be satisfied that two conditions are met. First, the University must reasonably form the view that there is a real risk that the speaker's presentation will exceed the limits of free expression. Second, the University must consider and adopt all reasonable measures short of cancellation that sufficiently mitigate that risk. Such measures could include, for example, obtaining written assurances from the speaker and/or vetting an advance copy of the intended remarks.
- (ii) Cancellation on the basis of the safety of participants and the broader University community as well as the functioning of the University:
- This must be a last resort and employed only when there is no reasonable alternative.
  - The University is justified in cancelling an event if, after considering all reasonable security measures, the University believes on the basis of compelling evidence that the event will create a significant risk of personal injury or significant property damage and that no reasonably available security measures can satisfactorily mitigate that risk. Normally this step should not be taken without a thorough risk assessment including, if available in a timely way, risk assessment by the TPS.

**4.2** The University should create a policy framework setting out the circumstances under which it may postpone a planned event. The policy should address the following elements.

(a.) A previously approved event may be postponed where:

- The organizer has not met all of the requirements of the TUUS process;
- It becomes clear that the information provided by the organizer about the nature or scope of the event was or has become inaccurate;
- The event requires security and/or other measures which cannot reasonably be put in place in time for the event;
- There is no suitable space available for the event in light of the circumstances now known; or
- The holding or the continuation of the event will cause a serious threat of personal injury, significant property damage or to the proper functioning of the University.

**4.3** The University should establish a more robust and clearly defined triage capability as part of the TUUS application process.

- (a.) Staff responsible for the initial review of an application for the use of temporary space at the TUUS office should apply objective criteria to new applications to identify events requiring special planning as early as possible.
- (b.) Intake staff should be trained to apply the relevant criteria and to incorporate the perspective of equity and inclusion in formulating them.

**4.4** The University should establish a small, high-level committee whose role will be to manage and address concerns about the appropriateness of speakers and extra-curricular events that require intensive prior planning.

- (a.) This committee would be a senior committee (with the ability to draw on the Campus Relations Committee as required) to which events requiring special planning can be immediately referred after triage by the TUUS office.
- (b.) As with the Campus Relations Committee, the committee should have a meeting time set aside each week for the purposes of discussing these events as needed.
- (c.) The committee should be composed of a small group of individuals with expertise in freedom of expression, human rights and risk assessment.
- One such model might include the Vice-President Finance & Administration or nominee; the Vice-President, Equity, People and Culture or nominee, a senior member of the Community Safety department; the Vice-Provost Students or nominee; and the University's legal counsel.

- (d.) The committee should have clear terms of reference that establish its role and responsibilities. The terms of reference should also set out clear lines of responsibility and accountability, including what decisions the committee is empowered to make and which ones must be referred to the President.
- (e.) The committee should be empowered to: (i) consider complaints from the University community and interested parties about the suitability of planned extra-curricular events and speakers; (ii) conduct objective risk assessments of planned events and approve appropriate security measures; and (iii) refer matters to the Campus Relations Committee or make recommendations to the President regarding the refusal, cancellation or postponement of planned events based on proposed content and/or potential risks.

**4.5** The University should clarify whether the TUUS process applies to organized protests and that the limitations on use of sound amplification equipment apply to protestors as well as participants.

#### Chapter 5: Clarifying the Interaction of Free Expression and Security

**5.1** Free expression and security should be understood as complementary and not as competing values. The University has considerable discretion to control the time, place and manner of extra-curricular expression on campus. This includes putting appropriate security measures in place.

**5.2** The University should endorse the principle that security measures will be appropriate when: (a) they are based on objective risk assessment which is founded on reliable information; and (b) they are the least intrusive measures that will satisfactorily mitigate the identified risk.

**5.3** The University should develop and publish a list of criteria informing its risk assessment process. All advice to the senior administration about the risk posed by an event should be provided on the basis of the assessment of these criteria.

**5.4** The University should develop and publish a suite of security measures, in ascending order of intrusiveness that can be applied to mitigate the risk associated with an event. I offer the following by way of example, with an approximate ranking from the least restrictive to the most restrictive:

- Assigning University security personnel to attend the event;
- Selecting the venue and timing of the event;
- Providing an appropriate and safe place for demonstrators who wish to protest the event (e.g. creating “protest zones”);
- Creating separate protest zones if counter-protestors are expected;
- Requesting the assistance of the TPS;

- Restricting attendance to those with University identification (students, faculty and staff) and requiring advance registration or sign in for people without such ID. University IDs would be examined at entrance, but not recorded;
  - Conducting bag checks as a precondition to attend the event;
  - Restricting attendance to those who have pre-registered; and
  - Restricting attendance to invitees only.
- 5.5** The University should consider whether it should have some members of its Security Service sworn and trained as special constables.
- 5.6** The University should implement a requirement for meetings between protest organizers and members of York’s Community Safety department. The substance of what is discussed at those meetings should be documented by Community Safety and the notes made available to the senior administration as needed for planning and review purposes.
- 5.7** The University should clarify its policies to explicitly prohibit outside security personnel, including volunteer security, on campus without written permission from the University. The policy should be clear that these restrictions do not apply to those carrying out administrative roles or to marshals drawn from the University community that protestors and counter-protestors have appointed to ensure appropriate discipline within a protesting group.

Chapter 6: The Administration, Student Groups and the Student Centre

- 6.1** Clarify the policy framework and process for club recognition and student group accountability along the following lines.
- (a.) Amend the *Guidelines* as follows:
- The *Guidelines* should set out the process for club recognition, including: criteria for recognition; the identity of the decision-maker; an appeal from or a review of refusal of recognition.
  - The words “based on the application” should be deleted from section 3.
  - Add to section 3 words to the effect that “or there is a sound basis to believe that the new club is seeking recognition to avoid the impact of a suspension imposed on another club with similar objectives or membership.”
  - Consider strengthening the “fronting” provision in section 4.
- (b.) *PR-4* should be amended to include:
- The grounds on which a student group may be sanctioned, for serious breaches of the University’s policies concerning expression and use of space;



- A process for decision-making including specifying the decision-maker and providing appropriate opportunities for the student group to respond to concerns before a decision is made;
- A process setting out how a complaint about the conduct of an student group may be made;
- The possible sanctions and penalties and the grounds on which they may be imposed;
- A requirement for the decision-maker to advise the student group for the reason or reasons for the sanction or penalty;
- A process for non-punitive, temporary suspension of club privileges to hold events on campus for a limited period (for example, for 30 or 45 days) including:
  - The grounds on which such a temporary suspension may be imposed (such as that there are credible allegations of misconduct which, if established, would justify a penalty, and/or there is a need for time to properly investigate those allegations, and permitting further events while that investigation is ongoing would create an unacceptable risk of violence or property damage);
  - Specify the decision-maker and require that the decision-maker give reasons for the temporary suspension that are communicated to the University community;
  - The maximum duration of such a suspension;
  - An opportunity for the organization to respond to the allegations before, or in cases of great urgency, within a short period following its imposition; and
  - A right of review.

**6.2** If the University amends the *TUUS Policy* along the lines that I have suggested, it should satisfy itself that the York University Student Centre Incorporated has in place policies that conform to that revised policy. In addition, any potentially controversial event or speaker at the Student Centre should be subject to the triage process under the *TUUS Policy*.

**6.3** The University and the Student Centre should have a clear understanding that an event cannot be held at the Centre if it has been refused the use of University space or has been postponed because the expression at the event will exceed the proper ambit of free expression or that it cannot be held safely.

**6.4** The University and the Centre should put in place a notification process so that the Centre is promptly made aware of the University's decisions of this nature.

## Appendix B: Terms of Reference

The President of York University has engaged the Honourable Thomas A. Cromwell C.C. to conduct an independent review concerning certain of the University's policies, procedures and practices in light of the events that occurred on November 20, 2019 at Vari Hall, Keele campus.

1. The Reviewer is to conduct inquiries specifically for the purpose of making independent findings and recommendations with respect to the following, namely:
  - (a) The University's role in relation to the planning for the event on November 20, 2019;
  - (b) The preparations and security arrangements for the event;
  - (c) The University's policies, procedures, and practices governing provision of University space for student events;
  - (d) The University's policies governing freedom of speech on campus;
  - (e) The University's policies, procedures and practices relevant to the safety of all those who attend student events on campus.
2. The Reviewer shall, subject to the following directions, carry out this review in the manner that he considers appropriate. His process is not to be adversarial in nature, is not to involve formal public hearings and is not to assign or apportion fault to groups or individuals who were participants in the events of November 20, 2019. He shall be entitled to production of any relevant and non-privileged document within the possession, power or control of the University.
3. The Reviewer may conduct consultations and interviews in relation to his inquiries as he sees fit.
4. The Reviewer is authorized to retain those counsel reasonably required for his assistance.
5. The Reviewer shall provide a written report to the President as soon as possible and ideally no later than February 28 but in any event no later than March 30, 2020.<sup>227</sup> The report will be the property of the University and it may disseminate it as it sees fit.

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<sup>227</sup> In light of the unprecedented situation created by the COVID-19 pandemic, the submission date was extended to April 30, 2020.