

Freedom of Expression and the Cromwell Inquiry

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Executive Summary

- In defending the termination of the hiring process of Valentina Azarova to the position of Director of the International Human Rights Program (“IHRP”), the University has consistently highlighted the fact that the appointment is a non-academic appointment.
- The University has also consistently maintained that only academics and librarians are protected by “academic freedom”. This is based on the fact that the *Memorandum of Agreement between the University and the Faculty Association*, which contains a guarantee of “academic freedom”, applies only to members of UTFA – namely, academics and librarians.
- This distinction was built into the Terms of Reference set by the University for the Cromwell inquiry into the Azarova de-hiring. These Terms of Reference invite Mr. Cromwell to determine if any University policies dealing with “academic freedom” were violated.
- These Terms of Reference, when coupled with the University’s twin assertions that the IHRP Directorship is a non-academic appointment, and that “academic freedom” applies only to academics and librarians, thus virtually guarantee that Mr. Cromwell would find that no University policies relating to “academic freedom” were violated.
- In his report, Mr. Cromwell embraces the “conventional thinking” that only academics and librarians are protected by “academic freedom”. He thus determined that the IHRP Directorship, being a non-academic appointment, did not attract the protection of “academic freedom”.
- The “conventional thinking” is both egregiously and demonstrably wrong in at least two respects. First, the fact that librarians are protected by “academic freedom” under the *Memorandum of Agreement between the*

University and the Faculty Association shows that academic freedom is not conferred solely on the basis of title. This is shown by the fact that librarians, who do not have academic appointments, are nonetheless the beneficiaries of “academic freedom” when performing academic or academic-like *functions*.

- On the basis that Ms. Azarova, had she been appointed as Director of the IHRP, would have been required to perform demonstrably academic and/or academic-like functions (such as teaching and selection of cases for student review), Mr. Cromwell should have found that Ms. Azarova was in fact covered by the doctrine of “academic freedom”.
- Second, and more importantly, it is clear that all members of the University community, including prospective hires such as Azarova, are beneficiaries of the doctrines of freedom of expression, freedom of speech, equity, and diversity.
 - Governing Council’s *Statement on Freedom of Speech* (adopted in 1992) and allied documents confer “freedom of speech” and “freedom of expression” on all “members” of the University community. An examination of various Governing Council policies indicates that “members” includes not only internal constituents such as faculty, students, librarians, managerial staff, administrative staff, and other internal cohorts, but also external parties with no formalized or contractual relationship with the University, such as guests, visitors, and third parties temporarily using University space. This strongly suggests that prospective academic hires, whose interest in the University is much keener than that of visitors, guests, or third parties temporarily using University premises, should also be regarded as “members” of the community for the purpose of applying the *Statement on Freedom of Speech*.
 - More directly, Governing Council’s *Statement on Equity, Diversity, and Excellence* explicitly extends to *all* University policies, procedures, and decisions, which necessarily embraces hiring decisions.
 - Also directly on point, the University’s own internal hiring procedures for Professionals/Managers explicitly incorporate into the hiring

process all University policies dealing with such matters as freedom of speech and expression, equity, and diversity.

- o Lastly, it would make a mockery of broad-textured doctrines such as freedom of speech and expression, equity, and diversity if these doctrines were to apply only *after* the hiring process is complete, and not in the hiring process itself.
- Hence, the “conventional thinking” which the University urged on Mr. Cromwell, to which Mr. Cromwell adhered, and to which the University continues to give voice, is simply wrong.
- Rather than merely asking Mr. Cromwell to determine whether any policies relating to “academic freedom” had been violated, the Terms of Reference for the inquiry should have sought a determination of whether any University policies dealing with “freedom of speech”, “freedom of expression”, “equity”, or “diversity” were violated, and not merely “academic freedom”. The failure to do so casts doubt on the *bona fides* of the University in responding to the Azarova de-hiring, and renders Mr. Cromwell’s report of questionable validity.
- The University should also have ensured that Mr. Cromwell was in possession of the *Statement on Freedom of Speech* and allied documents. The failure to do so casts doubt on the *bona fides* of the University in responding to the Azarova de-hiring, and renders Mr. Cromwell’s report of questionable validity.
- Questions about the University’s *bona fides* are rendered all the more pressing given that senior University officials cannot have been unaware of the existence of the *Statement on Freedom of Speech* and allied documents through the course of these events. Reports filed by the University with the Province of Ontario in 2019 and 2020 – roughly contemporaneous with the Azarova de-hiring – discuss these documents in detail.
- These reports emanated from the Office of the Provost, who was intimately aware of the Azarova de-hiring and the subsequent inquiry by Mr. Cromwell. Nonetheless, as recently as May 27, 2021, in a document jointly released by the Vice-President, Human Resources & Equity, and the Vice-President & Provost, the University continues to maintain the fiction that “academic freedom” applies only to academics and librarians.

I. Academic Freedom? Or Freedom of Expression?

The administration at the University of Toronto has consistently framed the issue in the Azarova affair as one of “academic freedom”. Thus, for example, in announcing procedural changes to the University’s decision to conduct a review of the Azarova affair, President Gertler states:¹

Let me underscore, as I have said often during my term as president, that academic freedom is a fundamental value of the University of Toronto. Any suggestion that academic freedom has been violated must be treated with the utmost gravity. It is also critically important that the integrity of our search processes be upheld. Hence, it is imperative that these concerns be thoroughly and fairly reviewed to establish the facts.

More recently (May 27, 2021) the Vice-President, Human Resources & Equity, and the Vice-President & Provost released this statement:²

The search and its fallout have brought to the fore questions about the University’s commitment to our key principles of academic freedom for faculty and librarians, as well as merit-based hiring free of external interference for all employees.

The first statement affirms the University’s commitment to “academic freedom”, but the second statement indicates that “academic freedom” is restricted to faculty and librarians. This is, at best, a half-truth; at worst, a fundamental and deliberate mischaracterization of the rights of non-academic staff at the University of Toronto. As I detail below, all employees of the University, whether they are academics, librarians, clinical Directors, clerical staff, or janitors, are protected by both freedom of speech and freedom of expression – a fact that senior University officials are keenly aware of.

Before discussing these rights, however, it is useful to clarify what we mean by “academic freedom”, “freedom of speech”, and “freedom of expression”. Unfortunately, these terms are not always used consistently. At first blush, one might assume that freedom of expression is broader than freedom of speech,

¹ Meric Gertler, “Statement on the External Review of the Search Process for a Director of the International Human Rights Program at the Faculty of Law” (October 29, 2020), online: <http://ultravires.ca/wp/wp-content/uploads/2020/10/10-29-Statement-on-External-Review-IHRP.pdf>.

² Online: <http://ultravires.ca/wp/wp-content/uploads/2021/05/PDADC_Memo_CAUT-Censure.pdf>.

simply because one might express oneself by means other than speech, such as participating in a rally or march, creating a work of art, or circulating the views of others. The *Charter of Rights and Freedoms* (s.2.b)³ appears to reflect this view by protecting a range of activities that are broader than simply speech, namely “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”. However, participating in a rally or march might better be digested under the *Charter* rights of “freedom of peaceful assembly”⁴ and “freedom of association”.⁵ Moreover, expressing oneself by means of a work of art or by communicating the views of others have often (as in the U.S.) been seen to be intrinsic elements of “freedom of speech”. Thus, the comparative scope of “freedom of expression” and “freedom of speech” depend critically on how these terms are defined.

Academic freedom is best regarded as the subset of freedom of expression (or freedom of speech) which applies to academics. Since the primary (although not exclusive) means of academic expression are teaching and scholarship, these are typically the central focus of discussions concerning the contours of academic freedom.⁶

University documents dealing with these various freedoms (see Appendix A) are not always consistent in their use of these terms, however.⁷ It would be useful for the University to provide definitions of “freedom of expression”, “freedom of speech”, and “academic freedom”, and to ensure that these terms are used both correctly and consistently in all University documents and policies.

II. *The Terms of Reference of the Cromwell Inquiry*

³ The *Charter of Rights and Freedoms* has been held by the Supreme Court of Canada not to apply to university activities, unless those activities are in fact a manifestation of Government policy. See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 273-74.

⁴ *Charter*, s.2.c.

⁵ *Charter*, s.2.d.

⁶ See e.g. the University’s *Statement of Institutional Purpose*, online:

<https://governingcouncil.utoronto.ca/secretariat/policies/institutional-purpose-statement-october-15-1992>

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⁷ For example, the *Memorandum of Agreement between the University and the Faculty Association* extends “academic freedom” not only to academics, but to librarians when performing academic functions. The *Statement of Institutional Purpose* states “the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research”. Somewhat inconsistently, the *Statement on Equity, Diversity, and Excellence* states that “Excellence at the University of Toronto is predicated on core freedoms that are at the heart of every university’s mission - freedom of speech and expression, academic freedom and freedom of research.”

The University has consistently suggested that what is at stake in the Azarova case is “academic freedom”, and that academic freedom applies only to academics and librarians.⁸ In tandem with this (mis)representation, the University has repeatedly drawn attention to the fact that the position of IHRP Director is a *non-academic managerial position*.⁹ On this view, academic freedom, *by definition*, cannot apply to the IHRP Director, since she is neither an academic nor a librarian. President Gertler’s homage to academic freedom thus does little more than mislead the reader into believing that academic freedom was part of Mr. Cromwell’s mandate, when in fact it was not.

This is confirmed by the Terms of Reference of Mr. Cromwell’s inquiry. The preamble indicates that the IHRP Directorship is “a non-academic position”.¹⁰ Then, the Terms of Reference state:

The Review will consider whether existing University policies and procedures were followed in this search, including those relating to academic freedom, if applicable, and the obligation to preserve confidentiality throughout a search process.

The key phrase in the above quotation is “academic freedom, *if applicable*”. Having made Herculean efforts to point out that the IHRP Directorship is *not* an

⁸ The basis for this view is ostensibly the *Memorandum of Agreement between the University and the Faculty Association*, the collective agreement between the University of Toronto Faculty Association and the University, which applies only to academics and librarians.

⁹ Dean Iacobucci, “Message to law professors at Faculty of Law on Thursday, September 17” (“...the search for a non-academic director at the International Human Rights Program”), online: <<http://ultravires.ca/wp/wp-content/uploads/2020/10/Deans-Email-Oct-14-2020.pdf>>; “Statement by Kelly Hannah-Moffat, Vice-President of Human Resources and Equity on behalf of the University” (September 18, 2020) (“...the IHRP Director, which is a managerial staff position - not a faculty one...”), online: <<http://ultravires.ca/wp/wp-content/uploads/2020/09/Dean-Iacobucci-VP-Human-Resources-Equity-Statements.pdf>>; Kelly Hannah-Moffat, VP, HR & Equity, “Statement on the Search Process for a Director of the International Human Rights Program at the Faculty of Law” (October 14, 2020) (“...a new Director of the International Human Rights Program, a non-academic staff position...”), online: <<http://ultravires.ca/wp/wp-content/uploads/2020/10/Deans-Email-Oct-14-2020.pdf>>, Meric Gertler, President, “Statement on the External Review of the Search Process for a Director of the International Human Rights Program at the Faculty of Law” (October 29, 2020) (“...a new Director of the International Human Rights Program, an administrative staff position...”), online: <<http://ultravires.ca/wp/wp-content/uploads/2020/10/10-29-Statement-on-External-Review-IHRP.pdf>>.

¹⁰ Meric Gertler, President, “Statement on Updates to the External Review of the Search Process for a Director of the International Human Rights Program at the Faculty of Law” (December 7, 2020) (“...a new Director for the International Human Rights Program, a non-academic position...”), online: <<http://ultravires.ca/wp/wp-content/uploads/2020/12/12-07-Statement-on-Updates-to-IHRP-Review.pdf>>.

academic position, it would appear that the only option open to Mr. Cromwell was to find that no University policies dealing with academic freedom were breached.¹¹

III. *The Cromwell Report*

Mr. Cromwell's report falls squarely into the trap set by the administration. The report states:

...while a great deal of concern has been expressed about academic freedom, *it has been the conventional thinking at the University that the existing formal protections in the University for academic freedom apply to faculty members and librarians but not to positions in the "Professional/Managerial" classification.* There are distinct hiring policies and the *Memorandum of Agreement between the University and the Faculty Association* refer to the policies governing academic appointments and appointments of librarians, but not to the policy relating to professional/managerial staff. The Director's position in the IHRP is so classified. [emphasis added]

As indicated below, the "conventional thinking" is seriously in error. Other University documents (and in particular Governing Council's *Statement on Freedom of Speech* extend the rights of freedom of speech and freedom of expression to *all* members of the University community. This is discussed below.

IV. *The Modest Proposition: Function, Not Form*

The "modest proposition" is that it is not just those who are academics who should benefit from academic freedom, but all of those who perform academic or academic-like functions, regardless of their official title.

It is a commonplace in the legal community that in legal matters substance should triumph over form. Thus, for example, an individual who is not a duly appointed a corporate director but nonetheless performs directorial functions may be held liable as if they were in fact a director. More generally, under the common law, we strive so far as possible to treat like cases alike, regardless of formal differences.

¹¹ In fact, Mr. Cromwell might have indicated that the *Statement on Freedom of Speech* was violated, as it is a University policy. However, the Terms of Reference were drawn up with a view to direct his attention only to the issue of "academic freedom".

In like fashion, a person’s official designation (e.g. “academic”, “administrator”, “manager”) is scarcely relevant. The important question is whether a University employee (such as a clinical Director) performs academic or academic-like functions. If so, then that person must be accorded the benefit of “academic freedom” (or, more properly, freedom of expression).

Mr. Cromwell briefly mentions, but rejects the view that function should triumph over form, stating:¹²

While I understand that some members of the University community and beyond are concerned that this classification is not apt having regard to the nature of the Director’s duties, no one to whom I spoke thought that the position as currently classified was anything other than a PM-4 administrative position.

Mr. Cromwell also glosses over the fact that the *Memorandum of Agreement between the University and the Faculty Association*¹³ adopts a *functional* view. This follows rather directly from the fact that librarians do not have academic appointments, but are nonetheless protected by the doctrine of freedom of speech when performing *academic-like* functions.¹⁴

V. *The More Expansive Proposition: All University Constituents are Protected by Freedom of Speech*

In his report, Mr. Cromwell makes reference to Governing Council’s *Statement of Institutional Purpose* (“SIP”), opining that this document “serves as the

¹² Cromwell Report, p.60. Mr. Cromwell hints at a broader scope for freedom of expression, but ultimately declines to bite. He states (on p.66):

The current understanding is that the existing formal protections in the University for the foundational principle of academic freedom do not apply to positions in the “Professional/Managerial” classification such as the Director’s position in the IHRP. *That said, academic freedom, as the University’s policies recognize, is central to the proper functioning of a university and more broadly the search for the truth.* The concern with the search process in this case was that external actors considered the Preferred Candidate’s scholarship objectionable and that this external influence played a role in the decision not to proceed with the recruitment. [emphasis added]

¹³ *Memorandum of Agreement between the University and the Faculty Association*, online: <https://governingcouncil.utoronto.ca/secretariat/policies/faculty-association-memorandum-agreement-governing-council-and-university>>.

¹⁴ The *Memorandum* states:

For clarity, these protections apply to teaching, research and scholarship, including creative professional activities, carried out by faculty and librarians in their capacity as employees of the University.

University’s lodestar”. (p.59) He resists, however, the temptation to find a generalized right to freedom of expression in this document, even though, in a 2020 report emanating from the Office of the Provost, the University itself identifies the SIP as one of the two “cornerstones upon which the University of Toronto has built its commitment to free expression”.¹⁵

Mr. Cromwell commits a more serious error in omitting any mention of Governing Council’s *Statement on Freedom of Speech* (“SFS”), adopted in 1992,¹⁶ and allied documents listed in Appendix A. The SFS, without any doubt, extends the right of freedom of expression to all University constituents. It states:

In policies approved by the Governing Council, the University community has held that the essential purpose of the University is to engage in the pursuit of truth, the advancement of learning and the dissemination of knowledge. To achieve this purpose, *all members of the University must have as a prerequisite freedom of speech and expression*, which means the right to examine, question, investigate, speculate, and comment on any issue without reference to prescribed doctrine, as well as the right to criticize the University and society at large... [emphasis added]

The SFS confers the right to freedom of speech not simply on academics, but on all “members” of the University. The meaning of the term “members” is given the broadest possible scope by related University policies. Most notably, the *Statement on Equity, Diversity, and Excellence*¹⁷ extends its broad-textured principles to “every member of the community... including students, teaching staff, administrative staff, visitors, alumni and guests.” Thus, “members” includes not only those with a formalized relationship with the University, such as faculty, students, and staff, but also those who have no formalized or contractual relationship, such as alumni and guests. Similarly, Governing Council’s *Policy on the Temporary Use of Space at the University of Toronto* incorporates by reference other broad-textured policies enunciating fundamental values, and extends the

¹⁵ “University of Toronto – 2020 Annual Freedom of Speech Report”, online: <https://freespeech.utoronto.ca/wp-content/uploads/2020-U-of-T-Free-Speech-Report-October-2020.pdf>>. It is noteworthy that this report uses the phrase “freedom of expression” rather than “academic freedom”.

¹⁶ Online: <<https://governingcouncil.utoronto.ca/secretariat/policies/freedom-speech-statement-may-28-1992>>.

¹⁷ Online: <<https://governingcouncil.utoronto.ca/secretariat/policies/equity-diversity-and-excellence-statement-december-14-2006>>.

application of those values to “external groups” given permission to use University space.¹⁸

If alumni, guests, and external groups with no formalized or contractual relationship with the University are recognized as “members” of the University, it follows that prospective hires, who have a much greater interest in how the University conducts itself, must be similarly regarded.

In fact, the *Statement on Equity, Diversity, and Excellence* seems to establish this directly, and not merely by analogy. It states,

For its part, the University will strive to make considerations of equity a part of the processes of setting policies, developing procedures, and making decisions at all levels of the institution.

As hiring decisions (both academic and non-academic) are central to the University’s functioning, they are necessarily included in these policies, procedures, and decisions.

Mr. Cromwell might well have discovered the existence of the *Statement on Freedom of Speech* and its broad scope with relatively little difficulty, by asking University officials to forward to him any and all University documents dealing with academic freedom, freedom of expression, and freedom of speech. He apparently did not do this, but simply accepted the University’s erroneous and misleading assertion that “academic freedom” was confined to academics and librarians.

Mr. Cromwell was in fact directly made aware of the SFS in a submission to him by a group of law school professors (including myself) during the course of his

¹⁸ Online:

<<https://governingcouncil.utoronto.ca/secretariat/policies/space-university-toronto-policy-temporary-use-october-28-2010>>. It states:

Any use of University space must abide by principles which reflect the University’s purpose, mission and values.

investigation.¹⁹ For whatever reason, he appears not to have followed up on this lead.

That Mr. Cromwell’s report does not bring the SFS to light raises a number troubling questions. One is why Mr. Cromwell makes no reference to the SFS, given how critical it was in addressing his “Terms of Reference”, and given that he was alerted to the existence of the SFS in a submission made to him in the course of his inquiry. Another is how the University could also have entirely ignored the SFS – and indeed the entire subject of “freedom of expression” – and instructed Mr. Cromwell that the “conventional thinking” is that only academics and librarians are the beneficiaries of “academic freedom”. Yet another is why University officials who are fully cognizant of Mr. Cromwell’s failure to deal with “freedom of expression” have made no effort to bring this to light subsequent to the release of the report. Rather, the University steadfastly persists in advancing this misrepresentation in its public statements – most recently on May 27, 2021.

It is very unlikely that the SFS was simply overlooked. Beginning in 2018, the Office of the Vice-President and Provost has been actively engaged in reviewing the SFS and other freedom of expression documents. On August 30, 2018, the Office of the Premier (Ontario) released a “Backgrounder” stating that “The Ministry of Training, Colleges and Universities requires every publicly-assisted college and university to develop and publicly post its own free speech policy by January 1, 2019 that meets a minimum standard specified by the government.”²⁰ It further states that “The policy must apply to faculty, students, staff, management and guests...”²¹ Each institution covered by this requirement (which includes the University of Toronto) is required to submit a yearly report to the Higher Education Quality Council of Ontario (“HEQCO”) discussing the steps that they have taken to meet this requirement. In the 2019 HEQCO annual report, the

¹⁹ See “Submission from UofT Law Faculty Members to the IHRP Review”, January 22, 2021, online: > <http://ultravires.ca/wp/wp-content/uploads/2021/04/Faculty-Letter-to-Justice-Cromwell.pdf>> Part 3:

We therefore urge you to include the following in your report to President Meric Gertler, Dean Jutta Brunnée, and the UofT community: A. Affirmation that any position that touches academic matters (including clinical education) should be protected by academic freedom. We believe this norm is already embedded in the Memorandum of Agreement between the University of Toronto and the University of Toronto Faculty Association, as well as in the aforementioned Purpose Statement and UofT’s Statement on Freedom of Speech”.

In this submission, the *Statement on Freedom of Speech* is hyperlinked.

²⁰ Online:

<<https://news.ontario.ca/en/backgrounder/49950/upholding-free-speech-on-ontarios-university-and-college-campuses#content>>.

²¹ Ibid.

University of Toronto identifies the SFS as the document that meets the Ministry's requirements of a generalized right of freedom of speech.²²

The 2020 HEQCO report refers the reader to the University of Toronto's "2020 Annual Freedom of Speech Report", a document released by the Office of the Vice-President and Provost. The report states:

The commitment to free expression is one of the hallmarks of excellence at the University of Toronto. For over 25 years, the University of Toronto has had a formal policy framework that sets out its commitment to free expression. This framework has helped the University foster free expression and deal effectively and in a principled fashion with issues that naturally arise at an institution unequivocally dedicated to the pursuit of truth and the advancement of knowledge, especially one of U of T's size and scope. We anticipate that this policy framework will continue to serve the University well.

The 2020 report indicates that *any member of the University community* may file a complaint alleging that their freedom of speech or freedom of expression has been interfered with, even if only in connection with a "non-curricular event". The 2020 report also identifies various University documents which, both individually and collectively, leave no doubt that freedom of speech extends to all University constituents. These documents are gathered together in Appendix A.

Remarkably, the Provost, Cheryl Regehr, the academic administrator directly in charge of overseeing and implementing the University's freedom of expression policies (and the author of the 2019 and 2020 reports to HEQCO), was consulted by Dean Iacobucci before terminating the Azarova hire²³. She was also fully aware of the review process put in motion by the University, having been designated as one of the people to whom the initial reviewer (Bonnie Patterson) was to report.²⁴ She is the person directly responsible for filing the required annual reports with HEQCO dealing with freedom of speech. Despite this, neither she nor anyone else

²² "Freedom of Speech on Campus 2019 Annual Report to the Ontario Government by the Higher Education Quality Council of Ontario", online: <<https://heqco.ca/wp-content/uploads/2020/02/HEQCO-2019-Free-Speech-Report-to-Government-REVIS-ED-3.pdf>>.

²³ Cromwell Report, p.37.

²⁴ "Statement on the Search Process for a Director of the International Human Rights Program at the Faculty of Law", online: <https://hrandequity.utoronto.ca/memos/statement-on-the-search-process-for-a-director-of-the-international-human-rights-program-at-the-faculty-of-law/>>.

in the University appears to have made Mr. Cromwell aware of any of the University documents dealing with freedom of speech or freedom of expression, nor to bring the existence of these documents to light post-report.

VI. Is the Hiring Process Exempt from Freedom of Expression Concerns?

The Director of the IHRP, once hired, will (like any other clinical Director) be protected by the doctrine of freedom of expression. But what about the hiring process? How is it that freedom of speech can be engaged in that context? I have already noted that the *Statement on Freedom of Speech* extends its protections to all “members” of the University community, and that various Governing Council documents show that the University has given the term “members” its broadest meaning to include not only various internal constituents, but persons with no formalized or contractual relationship with the University. I have also shown that the *Statement on Equity, Diversity, and Excellence* directly includes hiring decisions within its purview.

In this section, I make two further arguments that hiring decisions are fully covered by the broad-textured doctrines enunciated in various University policies. The first is that internal hiring policies for Professional/Managerial staff explicitly incorporate by reference the broad-textured Governing Council policies noted above. The second is that the University’s ostensible commitment to freedom of expression, equity, and diversity, would be fatally compromised if hiring decisions did not fall within their ambit.

With respect to the first point, Mr. Cromwell’s report states, in relation to non-academic hires, that University hiring policies indicate that the “best qualified” candidate must be hired, and that:

[t]he determination of the most qualified candidate must be based on merit, determined through an evaluation of the candidate’s educations, experience, skills, knowledge and abilities in relation to the selection criteria.²⁵

Moreover,

The *Policies for Professional and Managerial Staff* (in this section, the “Policies”) states the goals of hiring “the best qualified candidate in

²⁵ Cromwell Report, p. 62. See also pp. 65, 66, 67, 69, 70.

accordance with the policies of the University”, and providing “opportunities for career development of Professionals/Managers...”²⁶

In stating that staff must be hired “in accordance with the policies of the University”, these hiring policies necessary import the principles embodied in all of the Governing Council documents noted above; i.e. those that enshrine the foundational principles of freedom of expression, equity, and diversity.²⁷

In respect of the second (the normative case) the application of the various broad-textured policies to the hiring process is necessary to give these policies meaning. Suppose, for example, that it is strict University policy that all members of the University may have a hair colour of their choice. Also suppose, however, that at the hiring stage, a bias is typically applied against those whose hair colour is not red. Needless to say, that would render meaningless the policy that members of the University community can have any hair colour they choose. In like fashion, if those with particular views are excluded at the hiring stage, then the ostensible commitment to freedom of expression becomes little more than empty words.

Governing Council’s *Statement on Equity, Diversity and Excellence*, adopted in 2006,²⁸ states:

At the University of Toronto, we strive to be an equitable and inclusive community, rich with diversity, protecting the human rights of all persons, and based upon understanding and mutual respect for the dignity and worth of every person.

No community can be equitable, inclusive, and diverse if discriminatory barriers operate in the hiring process.

The SFS states:

The existence of an institution where unorthodox ideas, alternative modes of thinking and living, and radical prescriptions for social ills can be debated contributes immensely to social and political change and the advancement of

²⁶ Cromwell Report, p.61.

²⁷ These values are reflected in Governing Council’s *Statement on Freedom of Speech, Statement of Institutional Purpose*”, and other documents collected in Appendix A.

²⁸ Online:

<<https://governingcouncil.utoronto.ca/secretariat/policies/equity-diversity-and-excellence-statement-december-14-2006>>.

human rights both inside and outside the University. Often this debate may generate controversy and disputes among members of the University and of the wider community. In such cases, the University's primary obligation is to protect the free speech of all involved. The University must allow the fullest range of debate. It should not limit that debate by preordaining conclusions, or punishing or inhibiting the reasonable exercise of free speech.

Once again, one cannot have “an institution where unorthodox ideas, alternative modes of thinking and living, and radical prescriptions for social ills can be debated”, nor can there be “the fullest range of debate” if non-merit-based fetters are engaged in the hiring process.

The University’s *Statement of Institutional Purpose* states:

The University of Toronto is dedicated to fostering an academic community *in which the learning and scholarship of every member may flourish*, with vigilant protection for individual human rights, and a resolute commitment to the principles of equal opportunity, equity and justice. [emphasis added]

Within the unique university context, *the most crucial of all human rights are the rights of freedom of speech, academic freedom, and freedom of research*. And we affirm that these rights are meaningless unless they entail the right to raise deeply disturbing questions and provocative challenges to the cherished beliefs of society at large and of the university itself. [emphasis added]

It is this human right *to radical, critical teaching and research* with which the University has a duty above all to be concerned; for there is no one else, no other institution and no other office, in our modern liberal democracy, which is the custodian of this most precious and vulnerable right of the liberated human spirit.²⁹ [emphasis added]

It does not require a close exegesis of these words to understand that each and every one of these broad principles would be rendered nugatory if they do not apply to the hiring process.

²⁹ A further reflection of these values is found in that part of the SIP which enunciates four principles to which the University is committed. Two of these are “Respect for *intellectual integrity, freedom of enquiry and rational discussion*” and “Promotion of *equity and justice* within the University and recognition of the diversity of the University community...” [emphasis added]