FÉDÉRATION QUÉBÉCOISE DES PROFESSEURES ET PROFESSEURS D'UNIVERSITÉ

October 2023
Opinion

Committee on Academic Freedom

The Duty of Loyalty of University Professors

Credits

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1. Introduction

The *Act respecting academic freedom in the university sector*[1] codifies the right of university professors to criticize educational institutions, including their own. Quebec labour law, on the other hand, imposes a "duty of loyalty" on employees, restricting their right to criticize their employers. This Opinion will begin by outlining the duty of loyalty and its traditional boundaries, then go on to explain how the duty of loyalty is subordinate to academic freedom, which now enjoys statutory protection. It will show how the scope of the duty of loyalty is thus considerably limited when applied to university professors.

2. Duty of Loyalty

2.1. SOURCES

In Quebec, the legal basis of the employment relationship is the *Civil Code of Québec*, which includes a chapter on the contract of employment. While other relevant laws contain discrete definitions of aspects of the employment relationship,[2] the *Civil Code* "lays down the *jus commune* [and] is the foundation of all other laws."[3]

The *Civil Code* defines a contract of employment as "a contract by which a person, the employee, undertakes, for a limited time and for remuneration, to do work under the direction or control of another person, the employer."[4] The conferral on the employer of the power to direct or control explains why the employment relationship is described as one of subordination; the employee is literally "under the command" of the employer. At first glance, professorial work seems poorly aligned with this notion of subordination. Is it not the precisely the freedom to pursue teaching and research, bound by no limits other than scientific rigour and collegial governance, that in fact defines a university professor's work?

In several types of employment—particularly in professional positions—employees enjoy broad latitude in performing their duties, without any change to their legal status. Participation in collegial governance is characterized by the same kind of autonomy, the courts and tribunals having long ruled that it in no way alters the subordinate status of professors vis-à-vis their university.[5]

[1] CQLR c. L-1.2 (hereinafter "*Act respecting academic freedom*" or "the *Act*").
[2] For example, see *Labour Code*, CQLR c. C-27, s. 1(l).
[3] C.C.Q., Preamble.
[4] Art. 2085 C.C.Q.
[5] See *Mount Allison Faculty Assn. v. Mount Allison University*, [1982] N.B.I.R.D. No. 3; *University of Saskatchewan v. University of Saskatchewan Faculty Association*, 2019 CanLII 16533 (SK LA) (CanLII).

The duty of loyalty[6] flows from the relationship of subordination, and the obligation to act in the employer's best interests is the "bedrock" of the employment relationship.[7]

Employment contracts or collective agreements sometimes contain clauses dealing with the duty of loyalty. More frequently, however, employers adopt a "code of ethics" or "code of conduct" to make their expectations clear.

2.2. SCOPE AND LIMITS

2.2.1. Scope

Put simply, the "duty of loyalty means that the employee must refrain from any act that could undermine the employer's legitimate interests."[8] It is an "arborescent concept,"[9] branching into related notions such as "fidelity, obedience, respect, honesty, good faith, civility, confidentiality, exclusivity of the employee's services, diligence, competence, and discretion."[10] This Opinion will not address all of these notions but instead will focus only on those most likely to conflict with academic freedom in universities, namely, the duties of fidelity, obedience, civility, and discretion. These are the aspects of the duty of loyalty that employers can invoke to restrict their employees' speech, particularly where employees criticize the employer or express themselves in a way that might cause the employer harm.

2.2.1.1. Criticism of the employer

As a general rule, the duty of loyalty, through its aspects of fidelity and discretion, imposes a certain reserve on employees. Accordingly, employees "must not attack the employer's reputation, denounce practices they disagree with, or air their disputes with the employer in public."[11] These rules apply regardless of the form of expression, and there is abundant caselaw upholding sanctions on employees who criticized their employers in the newspapers, on television, or on social media.[12] Thus, the freedom of expression of employees is limited by their duty of loyalty to the employer.

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[6] Although the Civil Code refers to the "obligations" binding employees, we have chosen to use the term "duty of loyalty" here because it is the one generally used in the caselaw.

[7] Peter M. Neumann & Jeffrey Sack, *eText on Wrongful Dismissal and Employment Law* (Toronto: Lancaster House, 2020); 2012 CanLIIDocs 1, <https://canlii.ca/t/nc>, s. 4.1.5.1. In Quebec, this fundamental obligation is set out in article 2088 of the *Civil Code*, which provides that the employe is bound "to perform his work with prudence and diligence" and "to act faithfully and honestly."

[8] *Syndicat des fonctionnaires municipaux de Montréal (SCFP- 429) -et- Montréal (Ville de) (Jean-François Levasseur)*, 2014 QCTA 902 at para. 44 (my translation).

[9] Fernard Morin, Jean-Yves Brière, Dominic Roux & Jean-Pierre Villaggi, *Le droit de l'emploi au Québec*, 4th ed. (Montreal: Wilson & Lafleur, 2010) at 368 (my translation).

[10] Christian Brunelle & Mélanie Samson, "La liberté d'expression au travail et l'obligation de loyauté du salarié : plaidoyer pour un espace critique accru" (2005) 46 *Les Cahiers de Droit* 847 at 853 (my translation).

[11] Marie-France Bich, "Contrat de travail et Code civil du Québec — Rétrospective, perspectives et expectatives" in Service de la formation permanente, Barreau du Québec, *Développements récents en droit du travail (1996)*, vol. 78 (Cowansville, Qc.: Yvon Blais, 1996) at 199 (my translation).

[12] For an overview, see André Sassevile & Georges Samoisette Fournier, "La protection des dénonciateurs d'actes répréhensibles : outil efficace ou obstacle à la gestion des ressources humaines ?" in Service de la formation permanente, Barreau du Québec, *Développements récents en droit du travail (2017)*, vol. 429 (Cowansville, Qc.: Yvon Blais, 2017) at 44-47.

This limit is not absolute; the caselaw is clear that a balance must be struck between the duty of loyalty and freedom of expression. As the following passage illustrates, however, the search for balance can involve a certain amount of vacillation:

> [The] right to freedom of expression is not absolute, and its exercise must take into consideration the employee's duty of loyalty to the employer, among other things. However, the duty of loyalty cannot nullify the right to freedom of expression, which, it must be recalled, is a fundamental right ranking far above the rights and obligations of employer and employee under a contract of employment. Yet the duty of loyalty must be taken into account. The duty of loyalty cannot be an absolute bar preventing the employee from criticizing the employer. But the right to freedom of expression does not grant a licence to all employees to use a business as a forum to discuss and contest the employer's decisions, nor does it provide absolute and unlimited authorization to publicly criticize the employer's decisions by any means whatsoever.[13]

This passage clearly illustrates the leeway afforded to courts and tribunals to rule one way or the other when balancing freedom of expression against the duty of loyalty. This is often the case when abstract notions must be applied to specific situations, and the outcome ultimately depends on how the facts of the case are assessed. Unfortunately—and despite the status of freedom of expression as a fundamental right protected by the *Charter of human rights and freedoms*[14]—the trend seems to favour assigning more weight to the duty of loyalty.[15] As a result, some have gone so far as to declare that "the freedom of expression of employees is subordinate to their duty of loyalty."[16]

Although this exceptional limitation on freedom of expression can appear shocking at first glance, its purpose is easier to understand when the employer is a private business. For a private employer, the ultimate interest in the employment relationship is to obtain an economic benefit from the work of its employees; it would therefore be contradictory if those employees could use their right to speak as citizens to undermine that very interest. Moreover, a certain hierarchy is inherent in the relationship of subordination that typifies the employment relationship. Airing grievances in public instead of going through the business's internal communication channels would circumvent this hierarchy and thus constitute a form of insubordination.[17]

In the case of employees working for political branches of the government—i.e., public servants—the justification for curtailing freedom of expression is quite different. The capacity to criticize the

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[13] *Alliance du personnel professionnel et technique de la santé et des services sociaux (APTS) -et- Centre de santé et de services sociaux Jardins-Roussillon*, D.T.E. 2011T-660 at para. 43 (my translation).

[14] CQLR c. C-12, s. 3.

[15] Christian Brunelle & Mélanie Samson "La liberté d'expression au travail et l'obligation de loyauté du salarié : étude empirique de l'incidence des charte" (2007) 48 *Les Cahiers de Droit* 281.

[16] Sasseville & Samoisette Fournier, *supra* note 12 at 44 (my translation).

[17] "The duty of loyalty must also be considered from a hierarchical perspective, since the caselaw imposes on the employee the duty to exhaust all internal, hierarchical channels, one by one, before any external disclosure can be authorized." *Ibid* (my translation).

employer, elsewhere limited by the duty of loyalty, is circumscribed for public servants by the duty of reserve, codified in the *Public Service Act*.[18] Thus, public servants are required to refrain from publicly criticizing the government because impartiality, neutrality, fairness, and integrity of the public service are important features of our democratic system.[19]

Between these two categories—employees of private businesses and public servants—are the thousands of individuals who work for "parapublic" bodies such as schools and hospitals. In these sectors, the *jus commune* applies, and public services, which include universities, can be legally equated with private businesses when determining the scope of the duty of loyalty of the people who work there. In other words, professors are not public servants and are therefore not subject to a duty of reserve of any kind.

2.2.1.2. Damaging statements

Although employees who make public statements that have no direct connection with their employment are exercising freedom of expression in their private lives, this sort of statement can nevertheless constitute a sanctionable breach of the duty of loyalty. The caselaw has recognized that an employer's intervention is justified when acts committed outside work damage the business's reputation or product.[20] There are numerous cases, for example, where an employer was justified in disciplining an employee who told jokes that were racist[21] or in bad taste[22] on social media. To the extent that the person could be identified as an employee of the business, the comments damaged the business's reputation in the eyes of its clientele and thus constituted a breach of the duty of loyalty. That said, it is not sufficient for the employer to allege damage to its reputation; it must also prove the damage.[23]

2.2.2. Limits

Despite the intensity of the duty of loyalty, the caselaw has recognized that it is subject to certain limits. Three of those limits will be discussed here.

First, an employee can be loyal while also "minimally and respectfully" expressing an opinion that is different from, or even contrary to, their employer's.[24]

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[18] *Public Service Act*, CQLR, c. F-3.1.1, s. 11.

[19] *Fraser v. P.S.S.R.B.*, [1985] 2 S.C.R. 455.

[20] This was established in the Ontario case *Re Millhaven Fibres Ltd, Millhaven Works, and Oil, Chemical & 86 Atomic Workers Int'l Union, Local 9-670*, [1967] OLAA No 4, and subsequently taken up in the caselaw in Quebec.

[21] *Wasaya Airways LP v. Air Line Pilots Assn., International (Wyndels Grievance)*, (2010) 195 L.A.C. (4th) 1.

[22] *Syndicat des employé-es du Loews Hôtel Québec c. Loews Hôtel Québec inc*, 2013 CanLII 56312 (QC SAT); *Syndicat des chauffeurs d'autobus de la rive-sud c Société de transport de Lévis*, 2018 CanLII 68392 (QC SAT).

[23] *Alliance du personnel professionnel et technique de la santé et des services sociaux (APTS) c. CISSS de l'Abitibi-Témiscamingue (CISSSAT)*, 2023 CanLII 30923 (QC SAT); *Syndicat des travailleuses et travailleurs des Laurentides en santé et services sociaux-CSN (STTLSSS-CSN) c. Centre intégré de santé et de services sociaux des Laurentides*, 2023 CanLII 65423 (QC SAT).

[24] *APTS -et- CSSS Jardins-Roussillon*, *supra* note 13 at para. 47 (my translation); *Syndicat de l'enseignement de la Haute-Yamaska -et- Commission scolaire du Val-des-Cerfs*, D.T.E. 2013T-694. A similar principle applies to the duty of reserve of public servants, who have the right to express themselves publicly on issues that affect them as citizens, provided their criticisms do not relate to their employment (see *Fraser v. P.S.S.R.B.*, *supra* note 19 at para. 34).

Second, an employee may disregard the duty of loyalty when disclosing illegal acts or wrongdoings by their employer or acts that jeopardize the life, health, or safety of others.[25] This is now codified in the Act *to facilitate the disclosure of wrongdoings relating to public bodies*[26] and the *Act respecting Labour Standards*.[27] It is important to note that, in cases of illegal acts and wrongdoings, the exception is marginal, since it does not apply unless the employee has first used internal reporting mechanisms[28] or exercised their right to make a report to the Public Protector.[29] This restrictive condition requiring prior recourse to internal reporting mechanisms also applies to acts that jeopardize the life, health, or safety of others (or the environment), unless the employee is able to establish an urgency to act.[30]

Third, people who occupy union positions enjoy "relative immunity" when criticizing their employer. To properly exercise their bargaining and representation rights under the *Labour Code*, people holding union positions must be able to criticize their employer, even in the media. In these circumstances, "a union representative's freedom of expression … cannot be lessened in a bargaining context or in the power relationship between the union and the employer under the pretext of the duty of loyalty."[31] Again, union immunity is "relative" because the person who invokes it must establish that the actions or comments in question actually fell within their union duties and were not performed or expressed in a personal capacity.[32]

3. Academic freedom and the duty of loyalty

In Quebec, academic freedom in universities is now protected by the *Act respecting academic freedom*.[33] Because it is a public order statute, no collective agreement or contract of employment may derogate from it; its provisions are incorporated into every collective agreement, although those agreements may also provide for more robust protections than what the *Act* itself provides.[34]

The *Act* expressly acknowledges that the unique nature of professorial work[35] entails a broad right to criticize, which extends to a professor's "respective institution." Section 3 reads as follows:

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[25] *Fraser v. P.S.S.R.B.*, *ibid.*

[26] CQLR c. D-11.1.

[27] CQLR c. N-1.1, s. 122. See *also Criminal Code*, RSC 1985, c. C-46, s. 425.1 (employers prohibited from retaliating against employees who report a violation of the law).

[28] *Société canadienne des postes -et- Syndicat des travailleuses et travailleurs des postes*, D.T.E. 2005T-692; *Fédération interprofessionnelle de la santé du Québec (SPSSRY) -et- Centre de santé et de services sociaux Richelieu-Yamaska*, D.T.E. 2014T-527.

[29] *Act to facilitate the disclosure of wrongdoings relating to public bodies*, *supra* note 26, s. 6.

[30] *Ibid.*, s. 7.

[31] *Petitclerc c. Commission des relations de travail*, 2009 QCCS 2687 (my translation).

[32] *Syndicat des employées et employés professionnels-les et de bureau, section locale 574 c. Librairie Renaud-Bray*, 2017 CanLII 1695 (QC SAT); *Centre universitaire de santé McGill c. Syndicat des employées et employés du Centre universitaire de santé McGill*, 2020 CanLII 37606 (QC SAT).

[33] *Supra*, note 1.

[34] COPLA, *Avis nº 3* : *Les effets de la Loi sur la liberté académique dans le milieu universitaire sur les conventions collectives des professeures et professeurs* (Montreal: FQPPU, 2022).

[35] The protections under the *Act* apply to any person who contributes to the university's mission, and their specific scope may vary depending on the contribution in question. This Opinion concerns only professors, who historically are the holders of academic freedom and whose protections are likely to be the most robust.

> **3.** The right to university academic freedom is the right of every person to engage freely and without doctrinal, ideological or moral constraint, such as institutional censorship, in an activity through which the person contributes to carrying out the mission of an educational institution.
>
> That right includes the person's freedom:
>
> (1) to teach and discuss;
>
> (2) to research, create and publish;
>
> (3) to express their opinion about society and about an institution, including their respective institution, and about any doctrine, dogma or opinion; and
>
> (4) to freely take part in the activities of professional organizations or academic organizations.
>
> It must be exercised in accordance with the standards of ethics and of scientific rigour generally recognized by the university sector and taking into account the rights of the other members of the university community.
>
> (Emphasis added.)

On the heels of submissions made by the FQPPU,[36] the *Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique dans le milieu universitaire* (the "Cloutier Commission") found that "the strict application [of the duty of loyalty] can … curtail the scope of academic freedom."[37] This is precisely why the FQPPU proposed that an interpretive clause be included in the *Act* to provide that the duty of loyalty should not be applied in a manner that impairs academic freedom.[38]

The *Act respecting academic freedom* does not specifically refer to the duty of loyalty. Nevertheless, in the definition in section 3, the inclusion of the right of holders of academic freedom to express their opinions on their own institutions could produce the same effects as the FQPPU's proposal, in particular because of the hierarchy of sources of law. Specifically, in the event that a court or tribunal (or grievance arbitrator) is asked to reconcile the duty of loyalty with

[36] FQPPU, *La nécessité d'une loi pour affirmer la liberté académique et fournir un cadre interprétatif. Réponse de la FQPPU à la consultation menée par la Commission scientifique et technique sur la reconnaissance de la liberté académique dans le milieu universitaire* (Montreal: FQPPU, 2021) at 15–16.

[37] Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique dans le milieu universitaire, *Reconnaître, protéger et promouvoir la liberté universitaire* (Québec, Qc.: Gouvernement du Québec, 2021) at 20. See also COPLA, *Avis nº 1* : *Analyse sommaire du rapport de la Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique dans le milieu universitaire* (Montréal: FQPPU, 2022) at 6.

[38] FQPPU, *Consultations particulières et auditions publiques sur le projet de loi n° 32. Loi sur la liberté académique dans le milieu universitaire* (Montreal: FQPPU, 2022) at 13–15.

academic freedom when critical statements have been made about a university (or its administration), academic freedom will prevail because it is protected by a special statute.[39]

Many collective agreements protect academic freedom and have done so since long before the *Act respecting academic freedom* came into force. Courts and tribunals have already dealt with the interaction discussed here, and that caselaw will undoubtedly be considered in the future. That said, the caselaw must also evolve and, where it is found inconsistent with the *Act*, it will be replaced by a line of authority that better protects academic freedom.

3.1. CRITICIZING ONE'S OWN INSTITUTION

The right of professors to criticize their own institutions is closely related to the principle of collegial governance, which is itself an essential component of a university's autonomy.[40] All the constitutive statutes and laws establishing Quebec universities provide for the participation of professors in various governing bodies, the purpose of which is to determine broad institutional orientations for teaching and research. Rigorous, energetic, and sometimes raucous debate is an essential requirement for these bodies to operate, and if professors are to play their role, they have the right – and even the duty[41] – to express their dissent.[42]

It is easy to see how academic freedom, expressly protected in section 3 of the *Act*, can be in tension with a strict approach towards the duty of loyalty. Caselaw prior to the *Act* provides some guidelines on how to resolve this tension. First, it has long been recognized that, with regard to the duty of loyalty, "the rights of university professors are broader than those of employees in other sectors of activity because they include the right to criticize the institution that employs them."[43] Nonetheless, the caselaw teaches that these "broad rights" have limits: criticism of one's own institution may be public and it may be sharp, but its form and its means of dissemination must be reasonable, having regard to its objective.

In this respect, an arbitrator relied on a provision of the applicable collective agreement to explain the balance between the duty of loyalty and the right to criticize one's own institution, writing:

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[39] See the Preamble to the *Civil Code* (specific laws may "complement the Code or make exception to it"); *Isidore Garon ltée c. Tremblay; Fillion et Frères (1976) inc. v. Syndicat national des employés de garage du Québec inc.*, [2006] 1 S.C.R. 27 (the provisions of the Civil Code apply in a unionized workplace only when they are not inconsistent with other statutes governing work).

[40] *McKinney v. Université de Guelph*, [1990] 3 S.C.R. 229; *Blasser v. Royal Institute for advancement of Learning*, 1985 CanLII 3061 (QC CA).

[41] *Royal Institution for the Advancement of Learning and Gray*, 1969 CanLII 1442 (QC LA) at 22 ("[I]f criticism of one's university is "disloyalty", then we must say that we recognize that there may be circumstances in which an academic has not only a right, but a duty to be "disloyal".")

[42] The freedom to express oneself on the management of one's institution is often called "intra-mural" academic freedom, that is, freedom of expression "inside the walls of the University." This evocative term does not refer to the place of expression but to the subject: "the home university of the faculty member and its administrative decisions, policies and practices." See Michael Lynk, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression" (2020) 29(2) *Constitional forum constitutionnel* 45 at 51.

[43] *Université du Québec à Montréal et Syndicat des professeurs de l'Université du Québec à Montréal (SPUQ-CSN)*, (1991) AZ-51126397 (my translation).

> [100] The obligation to act with loyalty applies to all employed persons governed by an individual employment contract. It also applies when there is a collective working agreement. …
>
> [101] In this case, the parties to the collective agreement provided for the duty incumbent on professors when exercising the right to criticize the University. As stated above, the right must be used responsibly, without violence, and in accordance with law. By exercising the right to criticize the University this way, a professor fulfils their duty of loyalty towards the University. As a corollary, the University may not censure the professor or require that they limit the content and form of their criticism beyond the duty to express it in accordance with law, non-violently, and responsibly.[44]

Later in her decision, the arbitrator states that "the governance of the University concerns more than the University itself; it is a subject of particular interest to the entire university community," and the fact that criticism on this topic is displeasing or troubling does not make it irresponsible.[45] Nevertheless, the arbitrator decided that when the professor in this case answered an email from her principal, which had been sent to a few directors, by copying everyone with a university inbox, she was not exercising her right to criticize "responsibly," even though her remarks were accurate and were expressed in good faith and "politely and civilly."[46]

In another decision, an arbitration tribunal found that the right to criticize one's institution does not include the right to engage in a parallel process aiming to short-circuit communication channels between directors of the university and its institutional interlocutors.[47] In that case, the university directors were seeking to renew the accreditation of a program with a professional association. A professor who disagreed with the directors' position wrote a report separate from the university's and sent it to the organization concerned. He also told a representative of the organization that the university was "concealing" gaps in the program for which accreditation was being sought. The arbitrator decided that, in so doing, the professor "exceeded the bounds of his academic freedom and thereby breached his duty of loyalty to the employer."[48] That being said, the arbitrator found that the professor "was authorized by his academic freedom to continue to seek the improvements he believed necessary for the quality of the program, but not to do so within the accreditation renewal process."[49]

A third decision concerns an instructor's expression to his students of his disagreement with pedagogical decisions made by the department. In that case, a lecturer – who enjoyed academic freedom under the applicable collective agreement – complained to a professor responsible for a

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[44] *Association of Professors of Bishop's University -et- Bishop's University*, 2007 CanLII 68089 (QC SAT) (my translation; emphasis added).
[45] *Ibid.* at para. 112 (my translation).
[46] *Ibid.* at paras. 112-114 (my translation).
[47] *Syndicat des professeurs et des professeures de l'Université du Québec à Trois- Rivières c. Université du Québec à Trois-Rivières*, (2008) AZ-50517884 (T.A.) (my translation). See also *Université du Québec à Montréal et Syndicat des professeurs de l'Université du Québec à Montréal*, *supra* note 43.
[48] *Ibid.* at para. 152 (my translation).
[49] *Ibid.* at para. 153 (my translation).

course and to his associate dean about their choice to use an English-language textbook when many members of the student body had trouble reading English. Dissatisfied with the response, he denigrated and ridiculed their decision in front of his class, calling the textbook "the satanic verses" and describing the professor's work as "careless."[50] According to the arbitrator, "in this specific context, the remarks expressed not only a negative and inappropriate criticism of the professor's authority …. but also a form of disrespect."[51] The arbitrator found that the fact that the professor was not the lecturer's hierarchical superior was of no import, because the duty of loyalty includes an obligation of civility at work. Moreover, the criticism of the administration's decision to approve the choice of textbook "went far beyond what the exercise of his right to criticize and his status as lecturer permit" and "was not compatible with the faithful and loyal performance of his work."[52]

These decisions provide an indication of how the duty of loyalty might be interpreted in light of the right to criticize one's institution set out in the *Act respecting academic freedom*.

First, it is apparent that, even before the statute was enacted, academic freedom was understood to confer the right to criticize one's institution, including by publicly questioning its governance, even if it displeased or bothered those targeted by the criticism or occupying positions in the university administration.

Second, it may be said that the right to criticize one's institution includes the right to criticize *publicly*. More specifically, the right to criticize one's one institution means that the duty of loyalty cannot be invoked to demand that criticisms be made *solely* within the bodies of the institution.[53]

Third, the right to criticize one's institution must be exercised reasonably, in terms of form and means of dissemination. Since the *Act* does not establish the notion of "reasonable exercise" as a limit to academic freedom, it remains to be seen how this will be addressed. It is nevertheless possible that a court or tribunal seized of this question will choose to remain consistent with the caselaw by relying on the principle whereby "[n]o right may be exercised with the intent of injuring another or in an excessive and unreasonable manner."[54]

Last, as stated in section 3 *in fine* of the *Act*, criticism must respect the rights of the other members of the university community. Of course, this means that criticism must not harass or defame.[55] However, according to the caselaw from before the *Act*, criticism also must not exceed the bounds of civility, which is an aspect of the duty of loyalty. The notion of civility—as consensual as it may

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[50] *Syndicat des chargées et chargés de cours de l'Université de Sherbrooke (SCCCUS) -et- Université de Sherbrooke*, 2018 CanLII 103160 (QC SAT) (my translation).
[51] *Ibid.* at para. 183 (my translation).
[52] *Ibid.* at para. 191, 194 (my translation).
[53] See also *Université A et Syndicat des professeures et professeurs de l'Université A (grief syndical)*, 2007 CanLII 90350 (QC SAT) at para. 193 (a professor who criticized her university's expenditures in a newspaper "was exercising her responsibility to criticize in relation to the university and the safeguarding of its mission" (my translation))
[54] Art. 7 C.C.Q. (applicable in labour law pursuant to *Syndicat de l'enseignement de la région de Québec c. Ménard*, 2005 QCCA 440).
[55] *Association des professeurs de l'université Concordia c. L'université Concordia*, 2014 CanLII 149809 (QC SAT) at para. 223.

seem at first glance, since no one wants to be insulted at work—includes a risk for academic freedom. The university is a place where profound disagreements are debated vigorously and with a forcefulness rarely seen in other work environments.[56] The clash of ideas is essential for the university to fulfill its public interest mandate, and the courts should bear this in mind when tracing the boundaries of civility, or risk unjustifiably curtailing academic freedom.[57] Put another way, the sensitivity of others must not be the measure giving effect to the duty of civility, and in a university context, only remarks that are clearly insulting or offensive, or those that intend to injure others, should be considered "uncivil."

It should be emphasized that the above analysis concerns solely the right to express disagreement with decisions made by the administration of one's university, not a *claimed* right to disregard those decisions. While academic freedom can provide justification for professors who criticize their institutions and diminish their duty of loyalty in this respect, it does not authorize insubordination in the performance of their work. It has been consistently held that academic freedom does not allow professors to evade the requirements of their program, for example by refusing to evaluate students according to applicable guidelines,[58] by failing to submit marks within the prescribed administrative periods,[59] or by holding classes remotely when physical attendance is mandatory.[60]

3.2. PUBLIC STATEMENTS

As we have seen, the duty of loyalty can restrict an employee's speech in public even when the statement made is not related to their job, if it injures the employer's reputation, in particular with its clientele. Academic freedom, on the other hand, has long been understood to shield faculty members from any form of reprisal by their employer for their public statements about third parties.[61] This is now codified in the *Act respecting academic freedom*, which enshrines the right to "express their opinion about society and about an institution … and about any doctrine, dogma or opinion."

There are some who say that this protection applies only to speech that is clearly related to a professor's area of expertise. From this perspective, any statements that "overstep" the bounds of that expertise simply fall into the realm of freedom of expression as a citizen and therefore have

[56] See *Re University of Manitoba*, (1991) 21 C.L.A.S. 438 at para. 104.

[57] See Jamie Cameron, "Giving and Taking Offense: Civility, Respect, and Academic Freedom" in James L. Turk (ed.), *Academic Freedom in Conflict. The Struggle Over Free Speech Rights in the University* (Toronto: James Lorimer, 2014) at 285.

[58] *University of Ottawa and Association of Professors of the University of Ottawa*, 2014 CanLII 100735 (ON LA).

[59] *École de technologie supérieure c Syndicat des chargés-es de cours de l'école de technologie supérieure – services des enseignements supérieurs (Fédération nationale des enseignantes et enseignants du Québec)*, 2021 CanLII 114764 (QC SAT).

[60] *Syndicat des professeures et professeurs de l'Université de Sherbrooke c. Université de Sherbrooke*, 2022 CanLII 41896 (QC SAT).

[61] The literature calls the protection of professors against reprisals based on their statements about third parties "extra-mural" academic freedom. As in the case of intra-mural academic freedom, the notion of statements "outside university walls" is merely a metaphor, referring to the contents of the declaration, not the place. Criticism of an institution other than a university is covered by extra-mural academic freedom, even if it is expressed on the institution's premises.

nothing to do with academic freedom. Accordingly, to comply with the duty of loyalty, a professor who speaks as a citizen should not publicize their institutional affiliation. But this concept of academic freedom is ill-advised, for several reasons.

First, whether a statement falls within a given area of expertise is itself a matter of debate among experts, and it is not up to administrators to be disciplinary gatekeepers. This is all the more true as research becomes increasingly multidisciplinary, and a professor's field of expertise does not necessarily correspond with their title or department.

Second, and paradoxically, "extra-mural" academic freedom is necessary to protect freedom of thought within the university. Universities must foster environments where individuals feel empowered to challenge orthodoxies and advance new, even controversial, ideas. Such activity is not compatible with self-censorship or the fear that a position taken publicly risks sanction if the administration deems that it falls outside the speaker's expertise.[62]

Whatever the case may be, the *Act respecting academic freedom* is clear on the right to criticize, and the list of limitations on that right does not include fields of expertise.[63]

To our knowledge, no Quebec court or tribunal has ruled on academic freedom exercised in respect of an entity other than the employer or on the interaction between academic freedom and the duty of loyalty, despite certain cases involving this issue that have received media attention.[64] One such case is currently before an arbitration tribunal that has made a few procedural rulings and will consider the merits of the dispute in the coming months.[65] But there are two decisions from other provinces that can help us understand the outlines of academic freedom as exercised in relation to a dogma, an ideology, or a doctrine.

The first decision[66] – rendered by an arbitration tribunal in Manitoba and cited by several courts in other provinces – concerns the notion of institutional censorship, which is explicitly prohibited by the *Act* in Quebec. In this case, a marketing professor interrupted a speaker from a company during a reception. The professor contradicted one of the presenter's statements on the market share his company occupied and then spent several minutes criticizing its marketing strategy, referring to the superior approach of one of its competitors. According to the evidence, the professor's remarks provoked some discomfort in the other attendees because of his inappropriate tone. The next day, his dean sent him a memo saying that his remarks were unpleasant and counterproductive because the faculty was making efforts to cultivate positive relationships with the business community. In the decision, the arbitrator found that the

[62] Keith Whittington, "Academic Freedom and the Scope of Protection for Extramural Speech" (2019) 105 *Academe* 20 at 24-25.
[63] On these limits, see COPLA, *Avis n° 2 : Les contours de la liberté académique selon la Loi sur la liberté académique dans le milieu universitaire* (Montreal: FQPPU, 2022).
[64] See for example Mark Gabbert, *Report on the Implications for Academic Freedom in the Case of Andrew Potter at McGill University* (Toronto: ACCPU, 2018); Anne-Marie Provost, "Deux professeurs de l'Université Laval suspendus pour leurs propos sur les vaccins" in *Le Devoir*, 29 June 2022.
[65] *Syndicat des Professeurs et Professeures de l'Université Laval c Université Laval*, 2023 CanLII 59994 (QC SAT); *Syndicat des Professeurs et Professeures de l'Université Laval c Université Laval*, 2023 CanLII 59998 (QC SAT).
[66] *Re University of Manitoba*, 1991 CanLII 13023 (MB LA).

professor's remarks would have been acceptable in a scientific debate but that they were not appropriate at a reception. They were therefore not a reasonable exercise of academic freedom.[67] That said, had the university responded with a disciplinary measure or publicly distanced itself from the professor's comments, its actions would have constituted institutional censure. But since there were no disciplinary consequences and the memo was confidential, the arbitrator found that the memo was merely a "reminder" of the conduct expected of the professor and therefore did not rise to the level of censorship.[68]

The fact that the memo at the heart of the Manitoba decision was confidential was determinative. Another decision[69] – this one rendered by an Ontario board of arbitration – also dealt with the issue of a university administration's response to troublesome statements by one of its professors. The dispute concerned a media release issued by the administration after a sociology professor had distributed flyers during the screening of a film on media coverage of the Israeli-Palestinian conflict. The flyers, based partly on the professor's research, described alleged connections between the pro-Israeli lobby and the university, and stated that these links explained the university directors' negative response to pro-Palestinian demonstrations on campus. The media release condemned the flyers, describing them as "highly offensive." In his decision, the arbitrator found that the university did not defame the professor, but that by publicly distancing itself as it did without even considering the impact on his rights, it had breached his academic freedom. He explained that the question was "whether the action or actions of the University are such as would tend to discourage the average employee … from engaging in a particular academic pursuit."[70] Answering in the affirmative, the arbitrator ordered the university to withdraw the media release and pay damages to the professor for breaching his academic freedom. The ruling does not mean, however, that university administrators do not have the right to comment on the work of their professors. The arbitrator set out the applicable parameters:

> Defining academic freedom in this way does not, however, deprive the University of its own freedom of speech. Simply because a matter emerges from the pen or computer of a faculty member does not mean that the University is barred from addressing it. The University has the right to take positions, including public positions, on whatever matters it chooses. Necessarily, this includes the right to defend itself against any challenges that it may perceive to its functioning as an open and welcoming learning community… .
>
> Where the University chooses to make a public statement in respect of the academic activities of one of its professors, however, it finds itself in a delicate position. Article 10.01 requires the University not only to not give offense to the concept of academic freedom but to uphold, protect and promote it. For this reason, simply choosing to speak publicly about the teachings or writings of a faculty member is a vexed question. In many instances, the better option may be to choose silence and to allow public discussion or debate to take its course.

[67] *Re University of Manitoba*, *supra* note 66 at para. 104.
[68] *Ibid.* at para. 101.
[69] *York University and York University Faculty Association*, 2007 CanLII 50108 (ON LA).
[70] *Ibid.* at 22 (my translation).

> If the University's concerns are well founded, this may be reflected in the outcome of that debate, or in commentary by others, without the University ever having to put at risk the academic freedom of its faculty members.[71]

Obviously, these decisions do not concern the Quebec *Act*. They do, however, chart a potential course for interpreting the right to criticize institutions, doctrines, and dogma without doctrinal, ideological, or moral constraint such as institutional censorship. Accordingly, when a professor makes a statement in a way that could be troubling for their university, the university would be within its rights to communicate its disapproval to the professor privately, so long as the expression does not take the form of a disciplinary measure. On the other hand, university administrators who decide to comment publicly on a faculty member's teaching or research must be prudent and take academic freedom into account. In many cases, it is more judicious to refrain from commenting altogether.

We have seen that the caselaw on the duty of loyalty applicable to other sectors of employment authorizes employers to sanction a statement by an employee if it damages the company's reputation. In the case of universities, it would be more difficult for the administration to prove such damage, since a university's reputation is based, at least in part, precisely on its ability to protect and promote academic freedom.

4. Conclusion

University administrations are mindful of public opinion and the sensitivities of their donors and partners. As a result, they may be tempted to invoke the duty of loyalty to restrict the speech of their professors, either by adopting policies and guidelines on the conduct expected when speaking publicly, or by sanctioning statements they deem contrary to their institutional interests after the fact. As this Opinion has shown, however, the duty of loyalty is limited by the *Act respecting academic freedom*. In other words, a university administration wields considerably less control over the speech of its professors than other employers are able to exert over their employees.

Accordingly, when a university justifies its actions by invoking the duty of loyalty of its professors, the union may contest by way of a grievance.[72] Professors who are not governed by a collective agreement may call on their institution's committee on academic freedom.[73] Regardless of the forum seized, the caselaw provides serious arguments to limit the scope of the duty of loyalty, which is subordinate to academic freedom.

[71] *Ibid.* at 15.
[72] See COPLA, *Avis nº 3*, *supra* note 34.
[73] *Act respecting academic freedom*, *supra* note 1, s. 4(1).

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Since 1991, the FQPPU has been the consultation and representation body for Quebec university faculty.

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