

Summary of the fact-finding process and conclusions regarding  
alleged breaches of academic freedom and other university policies  
at the University of British Columbia

The Honourable Lynn Smith, Q.C.  
October 15, 2015

## **A. Terms of Reference and Process**

The parties (UBC and the Faculty Association of the University of British Columbia (UBCFA)) asked me to conduct, as an independent fact finder, an impartial, full, and complete investigation into the following matter:

Whether Mr. John S. Montalbano, Chair of the Board of Governors, and/or individuals in the School of Business identified by the Faculty Association, conducted themselves in the events following Professor Jennifer Berdahl's publication of her blog on August 8, 2015 in a manner that violated any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any applicable University policies including whether her academic freedom is or was interfered with in any way.

The Terms of Reference may be found as a pdf online at the UBCFA's website at [http://www.facultyassociation.ubc.ca/docs/Terms of reference signed.pdf](http://www.facultyassociation.ubc.ca/docs/Terms%20of%20reference%20signed.pdf), or at UBC's website at [http://president.ubc.ca/files/2015/08/tor\\_fact\\_finding.pdf](http://president.ubc.ca/files/2015/08/tor_fact_finding.pdf).

When framing the Terms of Reference the parties were aware that this had become a matter in which there was considerable public interest. At the same time, investigations into employment-related matters require respect for privacy rights. The parties attempted to design a process that carefully balanced the need for transparency in the public interest with confidentiality in recognition of those privacy rights.

The parties provided lists of individuals whom they suggested I should interview, and in addition I identified four others. I was able to interview every person on the parties' lists and on my own list. I interviewed seventeen people in total. Three persons were interviewed on two separate occasions. In addition, the parties each produced relevant documents and exchanged them in advance. I reviewed those documents, as well as some others that I requested. I received full cooperation from the persons I interviewed and from the two parties.

The interviews were conducted in private, although those being interviewed were allowed to bring a representative and most did. The interviews were conducted in a context of confidentiality, with the assurance to the interviewees that the parties intended my report to them to be kept confidential.

Despite the parties' desire to avoid an adversarial process, as my work evolved it seemed important for the University and the Sauder School of Business to know what position the Faculty Association was taking about the events, and for the Faculty Association to know what positions the University and the Sauder School were taking. Accordingly, I asked the Faculty Association to specify the respects in which academic freedom was allegedly

disrespected or university policies were allegedly infringed, and by whom. Near the end of the process I asked each of the representatives to sum up their understanding of the events and the issues, and gave the others the opportunity to know what was said and to respond to it.

Pursuant to the Terms of Reference, I relied on the evidence that was provided to me through interviews and through documents. In assessing and weighing the evidence, I took into account whether or not it was first-hand (i.e. whether it would have been objectionable as hearsay in court). I also took into account surrounding circumstances bearing on the weight and reliability of evidence. Pursuant to the Terms of Reference, I applied the balance of probabilities standard in finding facts and reaching conclusions.

On October 7, 2015, I provided to the parties a detailed report setting out a review of the principles of academic freedom and of the pertinent university policies, my findings of fact and my conclusions based on those findings of fact.

## **B. Allegations**

The UBCFA alleged that specified individuals in the Sauder School of Business and Mr. John Montalbano, Chair of the UBC Board of Governors, had interfered with the academic freedom of Dr. Jennifer Berdahl. It also alleged that Mr. Montalbano or specified individuals in the Sauder School of Business had breached certain university policies: UBC Statement on Respectful Environment for Students, Faculty and Staff; Policy 2: Employment Equity; Policy 3: Discrimination and Harassment; Policy 114: Fundraising and Acceptance of Donations and related Policy 47: Chair, Professorship and Distinguished Scholar Honorifics; and Policy 97: Conflict of interest and Conflict of Commitment.

## **C. Summary of Conclusions**

My conclusions were:

- (1) UBC failed in its obligation to protect and support Dr. Berdahl's academic freedom. The Collective Agreement Preamble creates a positive obligation to support and protect academic freedom. Through the combined acts and omissions of Mr. Montalbano, the named individuals in the Sauder School, and others, UBC as an institution failed to meet that obligation with respect to Dr. Berdahl's academic freedom.
- (2) Mr. Montalbano, on his own, did not infringe any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any of the applicable university policies.

- (3) No individual in the Sauder School of Business identified by the Faculty Association, on his or her own, infringed any provision of the Collective Agreement, the UBC Statement on Respectful Environment, or any of the applicable university policies.

#### **D. Academic Freedom in the Collective Agreement**

Within universities, academic freedom is a cornerstone of the culture, an “indispensable [condition] for the performance of the purposes of higher education.”<sup>1</sup> At UBC, this is reflected both in the Academic Calendar and in the Collective Agreement between UBC and UBCFA. In the Collective Agreement, the commitment to academic freedom is stated in its Preamble this way:

THE UNIVERSITY OF BRITISH COLUMBIA and the FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

DESIRING to promote fair and proper economic conditions and terms of appointment for Faculty Members, Librarians, and Program Directors at The University of British Columbia;

RECOGNIZING that the University is a community of scholars whose essential functions are the pursuit and dissemination of knowledge and understanding through research and teaching and that academic freedom is essential to carrying out these functions;

BEING DETERMINED not to interfere with that academic freedom;

CONFIRM THAT the members of the University enjoy certain rights and privileges essential to the fulfillment of its primary functions: instruction and the pursuit of knowledge. Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, to engage in full and unrestricted consideration of any opinion. This freedom extends not only to the regular members of the University but to all who are invited to participate in its forum. Suppression of this freedom, whether by institutions of the state, the officers of the University or the actions of private individuals, would prevent the University from carrying out its primary functions. All members of the University must recognize this fundamental principle and must share responsibility for supporting, safeguarding and preserving this central freedom. Behaviour which obstructs free and full discussion, 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's forum. Such behaviour cannot be tolerated[.]

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<sup>1</sup> Vernon Fowke & Bora Laskin, “Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of Professor H.S. Crowe by United College, Winnipeg, Manitoba” (Winnipeg: October 6, 1958), available online at <https://www.crowefoundation.ca/documents/CroweReport.pdf> [the “Crowe Report”] at 40.

Virtually identical language is found in UBC's Academic Calendar. The core of this statement on academic freedom can be located within the single sentence which defines its substantive content:

Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, to engage in full and unrestricted consideration of any opinion.

Certain aspects of academic freedom have particular relevance to the matters engaged by the Terms of Reference.

### **1. What is meant by dissemination of knowledge and understanding?**

The Collective Agreement identifies two "essential functions" of the University to which academic freedom is essential: the *pursuit* of knowledge and understanding, and the *dissemination* of knowledge and understanding. The means by which scholarly understanding is disseminated have evolved, and electronic publication is now common, including through vehicles such as blogs. The protections of academic freedom extend to the dissemination of scholarly research and opinion through these new electronic media.

### **2. The responsibilities that accompany academic freedom**

The protections and rights associated with academic freedom at UBC exist alongside concurrent duties and responsibilities. As at other Canadian universities, legitimate restrictions and limitations apply to the academic freedoms of individual members of the UBC community. Included in these responsibilities are the obligations to obey the law, to create and maintain a respectful environment at UBC, to act in good faith, and to actively support and protect the exercise of academic freedom.

### **3. Positive obligations to protect academic freedom**

Academic freedom at UBC is recognized through providing protections and responsibilities, and through creating positive obligations. Both the Academic Calendar and the Collective Agreement state that all members of UBC, including senior administrators, have positive obligations with respect to the academic freedoms of others: "All members of the University must recognize this fundamental principle [of academic freedom] and must share responsibility for supporting, safeguarding and preserving this central freedom." This means both supporting individual members in the exercise of their academic freedoms and rights, and ensuring those protections are embedded in the larger governing structure. Because of the positive obligation to support and protect academic freedom, academic freedom can be threatened not only by acts, but also by failures to act. Failures to meet the obligation to support and protect academic freedom can occur both on the part of individuals and at a systemic level on the part of the institution. Further, such failures can arise without a specific intention to interfere with academic freedom.

#### **4. Commenting on University Governance**

Although the UBC Collective Agreement definition of academic freedom does not refer to commentary on university governance, in my opinion such commentary falls within its ambit. This follows from the fact that UBC is largely a self-governing institution, and from the positive obligation on members of the university community to support, safeguard and preserve academic freedom. Thus, in my view the freedom “to engage in full and unrestricted consideration of any opinion” referred to in the Collective Agreement and the Academic Calendar must extend to commentary (whether positive or negative) by members of UBC on the extent to which the central functions of the University are being advanced or hindered by decisions or initiatives affecting the University. (This does not mean that faculty members who participate in governance, either in representative capacities or as a part of the senior administration, might not have additional responsibilities and obligations *as a result of those other roles*. Those role-specific responsibilities and obligations might serve to limit their freedom to comment on university affairs.)

#### **E. Conclusions**

##### **1. Academic Freedom**

Having conducted the extensive review described above, I concluded that UBC did not live up to its responsibility to protect and support the academic freedom of one of its faculty members, Dr. Jennifer Berdahl.

When Dr. Berdahl published a blog post on August 8, 2015, commenting on the resignation of Dr. Arvind Gupta as President of UBC, she was doing so as a member of the UBC faculty, drawing on her research. Members of UBC faculty must be able to comment on topical matters, especially when they are drawing directly on their research, and even where the topic is university governance. The blog post was clearly an exercise of her right as a faculty member to disseminate her knowledge and research, including through commentary on current events in a blog.

In the chain of events that followed her publication of the blog post there were several moments where individuals (Mr. Montalbano and some members of the Sauder School of Business) could have acted differently and in a manner more consistent with UBC’s obligation to protect academic freedom, or where surrounding circumstances contributed to its failure to uphold academic freedom.

I concluded that no individual intended to interfere with Dr. Berdahl’s academic freedom, or made a direct attempt to do so. However, sometimes several relatively small mistakes can lead to a failure of the larger system. The systemic failure in this case resulted from a cascading series of events in which there were some errors of judgment by Mr.

Montalbano and some individuals at the Sauder School, and some unlucky circumstances. As a result, the institution failed Dr. Berdahl and missed an important opportunity to vindicate the principle of academic freedom.

The key points at which I found failures were:

1. In the short period just after the resignation of President Gupta, Mr. Montalbano and Chancellor Lindsay Gordon worked with UBC staff on the communication of responses to the flood of inquiries and commentary from the university community and the media, without bringing in the academic leadership of the University. Partly as a result of the absence of UBC academic leaders from that conversation, no-one thought to advise Mr. Montalbano against telephoning Dr. Berdahl when he said that he intended to do so. When Mr. Montalbano called Dr. Berdahl and told her about his deep concerns with respect to her blog post, he was mindful of the need to protect academic freedom and did not intend to interfere with it. He made the call in the context of a pre-existing positive relationship with Dr. Berdahl. However, even though he was not warned against it, Mr. Montalbano should have reflected on whether to call Dr. Berdahl. Such a call from the Chair of the Board of Governors to a faculty member was unprecedented and unwise. The call set up the ensuing chain of events.
2. As it happened, the Dean of the Sauder School of Business was away and only intermittently in touch when Dr. Berdahl's blog post and the *Georgia Straight* story appeared. The Dean's Office in Vancouver was aware that Mr. Montalbano found the blog post offensive and that he had telephoned Dr. Berdahl. Concerned about Mr. Montalbano, Sauder's reputation and future fundraising prospects, the Dean's Office conveyed a message about those concerns to Dr. Berdahl. At the same time, it failed to elicit her point of view or state support for her in the exercise of her academic freedom. In the context of the call she had received from the Chair of the Board of Governors, Dr. Berdahl should have been told by the Dean's Office that the Sauder School understood its positive obligation to support and protect her academic freedom.
3. Dr. Berdahl reasonably felt reprimanded, silenced and isolated. The events had a significant negative impact on her.

## **2. Other University Policies**

With respect to the alleged infringements of several UBC policies, I did not find that they were established on the facts of this case, for the reasons set out below. (The full text of all University policies can be found online at <http://universitycounsel.ubc.ca/policies/index/>.)

**(a) UBC Statement on Respectful Environment for Students, Faculty and Staff**

Generally speaking, the “Statement on Respectful Environment” prohibits “activities harmful to a respectful environment” because they are “not only a direct attack on the dignity and worth of the individual or group” at whom they are directed, but they also undermine “the freedoms of the whole community”. It is aimed at matters such as bullying and harassing behaviour. I did not find that the persons referred to in the Terms of Reference had been responsible for such behaviour or for acting inconsistently with the UBC Statement on Respectful Environment in any respect.

**(b) Policy 3, “Discrimination and Harassment”**

The Policy’s “fundamental objectives ... are to prevent Discrimination and Harassment on grounds protected by the B.C. *Human Rights Code*, and to provide procedures for handling complaints, remedying situations, and imposing discipline when such Discrimination or Harassment does occur.” The grounds protected by the *Human Rights Code* are (actual or perceived) age, ancestry, colour, family status, marital status, physical or mental disability, place of origin, political belief, race, relation, sex, sexual orientation and criminal conviction unrelated to employment. I did not find on the balance of probabilities that actions regarding Dr. Berdahl were related to any of those grounds. Further, Policy 3 is limited in its application to students, members of faculty, or a member of staff, and therefore does not, in any event, apply to Mr. Montalbano.

**(c) Policy 2: Employment Equity**

I did not find that any of the named individuals violated Policy 2, which is directed towards equal opportunity in employment matters, ensuring that “[b]oth current and prospective faculty and staff will receive equitable treatment in hiring, training, and promotion procedures.” There was no evidence establishing that Dr. Berdahl’s employment or promotion prospects at the Sauder School of Business, or at UBC generally, have been affected. She remains a tenured Full Professor.

**(d) Policy 114: Fundraising and Acceptance of Donations (and related Policy 47, “Chair, Professorship and Distinguished Scholar Honorifics”)**

Mr. Montalbano donated \$2,000,000 to UBC to establish an endowment fund, now called the “Montalbano Professorship in Leadership Studies: Gender and Diversity” (the “Montalbano Gift”).

Policy 114 “is intended to guide all UBC’s fundraising activities and the acceptance of donations on behalf of UBC”. With respect to donor involvement, Policy 114 states that “UBC recognizes that donors may wish to be actively engaged with UBC beyond making a financial contribution. UBC supports donor engagement that is consistent with section 2.2 of this Policy.”



Section 2.2 of Policy 114, in turn, states that “UBC values and will protect its integrity, autonomy and academic freedom, and will not accept donations when a condition of such acceptance would compromise these fundamental principles.”

The purpose of Policy 47 is to encourage the creation of Honorifics, which “are conferred by UBC to reward excellence in research and teaching”, and “to establish the academic, financial and accountability criteria for these Honorifics.” Accountability is achieved in part through regular reports which the holder makes to UBC, which then shares those reports with the donor. For example, in the case of the Montalbano Gift, the Gift Agreement states that UBC “will provide the Donor with confirmation regarding the impact and performance of the Gift.”

The UBCFA alleges that Mr. Montalbano’s involvement in the events following Professor Jennifer Berdahl’s publication of her blog on August 8, 2015 violated the terms or conditions of the Gift, and that the academic leaders of the Sauder School of Business had a duty under Policy 114 to manage Mr. Montalbano’s involvement as donor, which they failed to satisfy.

The provisions and procedures set out in Policy 114 clearly apply to the period of time when terms and conditions in the gift agreement are negotiated and agreed, up to UBC’s acceptance of the donation. Thus, if a donor insisted on conditions for a gift that would constitute a breach of or threat to academic freedom, Policy 114 requires the gift to be declined. Policy 114 does not on its face apply to the ongoing management of the relationship between the donor and UBC after the gift is in place.

However, Section 6.1 of the policy may contemplate an ongoing role. It states:

UBC recognizes that donors may wish to be actively engaged with UBC beyond making a financial contribution. UBC supports donor engagement that is consistent with section 2.2 of this Policy.

It is possible to read Section 6.1 as aimed only at describing permissible donor engagement parameters incorporated into the terms and conditions of the gift before its acceptance. If so, then Policy 114 has no application in this case.

If Section 6.1 is meant to have broader application, extending to a donor’s activities *after* the gift has been made, the question is the same as that raised in the allegations regarding infringement or failure to protect academic freedom. With respect to those contentions, I concluded that UBC failed to protect or uphold Dr. Berdahl’s academic freedom. In my view, Policy 114 does not add anything further to that analysis.

**(e) Policy 97, “Conflict of Interest and Conflict of Commitment”**

This Policy recognizes that “[o]ccasionally and as a result of normal and productive engagements inside and outside the University, Faculty Members, staff and students may find

themselves in a conflict of commitment, an actual or potential conflict of interest, or in a situation where there is a perception of a conflict of interest.” It also provides procedures for determining if, when, and how such conflicts can be managed.

My Terms of Reference do not require me to determine whether Mr. Montalbano was in breach of Policy 97.

The UBCFA alleges that academic leaders in the Sauder School of Business failed to appropriately manage the real and perceived conflicts of interest inherent in Mr. Montalbano’s various roles at the University and within the Sauder School.

In my view, it is not clear that a Dean or Associate Dean can be in breach of the conflict of interest policy through failing to manage the conflicts of an individual who does not report to that Dean or Faculty. In any event, I think that this allegation is subsumed in the allegation that there was a failure to protect academic freedom, which I have discussed above.