

# **CRITICISMS FROM WITHIN: The Duty of Loyalty v. Intramural Academic Freedom**

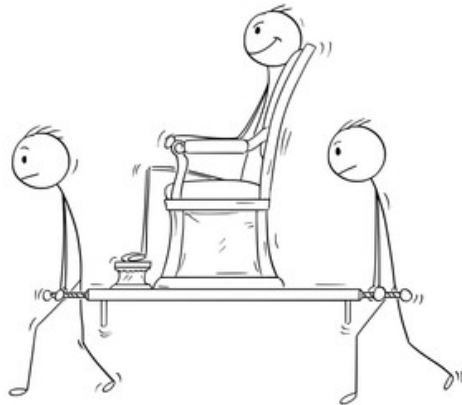
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# Outline

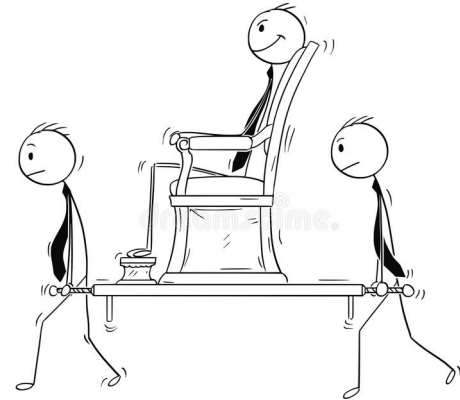
- Meaning of “duty of loyalty”
- Duty of loyalty in civil service setting
- Duty of loyalty for post-secondary academic staff
- Cases where academic freedom does not apply and cases where academic freedom prevails

# The Duty of Loyalty in Employment

Harkens back to the notion of the master and servant relationship



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# *Duty of Loyalty – The Principle*

- Sometimes called duty of fidelity
- Owed by all employees to their employer
- It is a broad, non-exhaustive principle covering an employee's improper conduct that damages an employer's interests.

# *Duty of Loyalty – The Principle*

Prohibits, for example:

- Competing with one's employer;
- Disclosing confidential information.
- Dishonesty
- Breach of conflict-of-interest policies
- **Public criticism of employer**

Requires, for example:

- Disclosing wrongdoing of colleagues
- **Inventions made in the course of employment are the employer's property**

# Duty of Loyalty in Post-Secondary Context

Generally, duty of loyalty applies in post-secondary context:

“The high degree of independence and discretion involved in a university faculty position, the heavy responsibility of faculty members and the university itself toward students, and the impossibility and undesirability of subjecting the teaching and research functions to close surveillance....”

*University of Ottawa and Assn. of Professors of University of Ottawa* (1995) 40 C.L.A.S. 186 (Adell)

# Duty of Loyalty in the Federal Civil Service

*"Loyalty to the public interest, as represented and interpreted by the democratically elected government and expressed in law and the Constitution, is among the most fundamental values of public service." \**

\*"[A Strong Foundation - Report of the Task Force on Public Service Values and Ethics](#)", 1996, John C. Tait, Q.C, Chair ( "the Report") pp. 27, 54. "Duty of Loyalty", <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/duty-loyalty.html> [last accessed January 20, 2022]

Yes,

**BUT**





# Freedom of expression for civil servants: PSDPA

Public criticism/disclosure of the government is allowed if:

1. The act or omission “constitutes a serious offence” under the law;
2. The act or omission “constitutes an **imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment**”.
3. The criticism has no impact on the ability of the employee to effectively perform their duties as a public servant, or on the public’s perception of that ability.

*Public Servants Disclosure Protection Act, S.C. 2005, c. 46, s. 16*

# Duty of Loyalty in the Federal Civil Service: PSEA

## [Public Service Employment Act S.C. 2003, c. 22](#)

**112** The purpose of this Part is to recognize the right of employees to engage in political activities while maintaining the principle of political impartiality in the public service.

**113 (1)** An employee may engage in any political activity **so long as it does not impair, or is not perceived as impairing, the employee's ability to perform his or her duties in a politically impartial manner.**

...

**(3)** In making regulations, the Governor in Council may take into consideration factors such as **the nature of the political activity and the nature of the duties of an employee or class of employees and the level and visibility of their positions.**

# Duty of Loyalty for Post-Secondary Academic Staff

- Generally, restrictions on an employee's right to criticize their employer have loosened over time.
- The duty of loyalty, in terms of critiquing one's employer, is even less constraining on academic staff.
- Academic freedom tempers the duty of loyalty requirement on employees to not criticize their employer.

# *The University of British Columbia and Kane, 1983 CanLII 4656 (BC LA)*

- Prof. suspended for three month for improper use of the university computer facilities for personal purposes, eventually overturned by SCC for procedural issues.
- Kane then convicted of fraud relating to the misuse of NRC grant money.
- President recommended Prof. be terminated but Hearing Committee reduced to 18-month suspension.

# *The University of British Columbia and Kane cont'd*

Prof. issued a press release accusing:

- The Dean of making bogus representations to the Ford foundation.
- The University of “unethical conduct” in covering up its own mistakes by accusing him.
- The University of criminal obstruction of justice.
- One of his students of “personality manipulation and political intrigue, including espousal of Maoist and terrorist groups”.

# *The University of British Columbia and Kane cont'd*

The Hearing Committee determined:

- “there is no room to doubt that [an employee] owes the University a general duty to “serve honestly and faithfully”.”
- “What is clear is that an employee will be in breach of the duty of fidelity owed to his employer if he makes false public statements when the employee either knows them to be false or is reckless as to the truth of the statements.”





# *Simon Fraser University v. A.U.C.E., Local 2* [1985] 18 L.A.C. (3d) 361

- Librarians (?) reprimanded for criticizing the university's open-door policy for the periodicals reading-room.

# *Simon Fraser University v. A.U.C.E., Local 2* [1985] 18 L.A.C. (3d) 361

- Can only breach duty of loyalty for higher purpose such as:  
“to expose crime or serious negligence, **to serve the cause of higher learning, to fairly debate important matters of general public concern related to the employer or those in authority over him**”
- Still, the criticism must be fair – “a deliberate omission and negligent misstatement of significant facts will be treated as a breach of the duty of loyalty”
- Employees “must exhaust all reasonable opportunities to resolve the issue internally before making matters public”.

# *Mount Allison University Faculty Association and Mount Allison University, 1994 CanLII 18326 (NB LA)*

- Association grieved the University's failure to appoint one professor as Associate Dean Arts II and another as Acting Director of Research
- Both professors had made “vociferous criticism of the University's administration” and participated in union activities including a strike
- Employer argued professors owe a duty of loyalty and they could have been disciplined for their “outspoken criticism of the President”.

# *Mount Allison University Faculty Association and Mount Allison University, cont'd*

- Board doubted that “the right to criticize the Employer can reasonably be extended to cover personal attacks on the President and other senior members of the administration”.
- Professors were not sanctioned for their opinions
- However, the President was entitled to consider “attitudinal factors which militate against the establishment of effective working relationships” “when considering the suitability of candidates for managerial and/or administrative appointments”.

# *York University v. Y.U.F.A.* [2007] 167 L.A.C. (4th) 39

- Professor Noble had prepared and distributed material on campus entitled “The York University Foundation: The Tail that Wags the Dog”
- He alleged that specific prominent members of the Jewish community were indirectly controlling York University, leading to the “clamping down” of on-campus pro-Palestinian activists.

# York University v. Y.U.F.A. cont'd

- University issued a media release accusing the Professor of racism and bigotry and suggesting that “no student *should be exposed to the kind of material which Professor Noble had produced*” [para. 51].
- Arbitrator Goodfellow held the university breached Professor Noble’s academic freedom

# *York University v. Y.U.F.A.* cont'd

*30 .... "[A university] 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. 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."*

# Association of Professors of Bishop's University c. Bishop's University, 2007 CanLII 68089 (QC SAT)

- Professor, and President of faculty association, sent an open letter to entire Bishop community, setting the record straight on comments made by the Principal during a meeting with 20 managers
- Chair of the Executive Committee of the Corporation (the university's board of governors) responded that she, "like every other employee of Bishop's University, owe a duty of loyalty to the University, and its legitimate University business affairs.



# *Association of Professors of Bishop's University c. Bishop's University* cont'd

Arbitrator held:

- Academic freedom must be exercised in way that avoids, as far as possible, unnecessarily compromising the interests and reputation of the University.
- Prof. should not have broadcast her criticism to entire university community
- Board could not limit Prof expressing an opinion only on matters of concern to the Association.

# *McKenzie v. Isla*, 2012 HRTO 1908

- Brock University offered the Solidarity Experiences Abroad (“SEA”) program – student volunteer placements working with the poor in developing countries, run by a Roman Catholic Chaplain
- Chaplain alleged that a professor had harassed and discriminated against him because of his Catholic religious beliefs contrary to the University’s Respectful Work and Learning Environment Policy

# *McKenzie v. Isla*, 2012 HRTO 1908 cont'd

- The professor had led a campaign to pressure the University to end its relationship with the program alleging it had ties to “far-right”, “cult like” Catholic organizations, which actively oppose abortion rights, women’s rights, gay and lesbian rights, liberation theology, and other progressive causes” and more.

# *McKenzie v. Isla*, 2012 HRTO 1908 cont'd

The Tribunal determined:

*"With respect to academic freedom, it is well-established that courts and tribunals should be restrained in intervening in the affairs of a university in any circumstance where what is at issue is expression and communication made in the context of an exploration of ideas, no matter how controversial or provocative those ideas may be."*