

A W A R D

The Association has not been certified as the bargaining agent for Professors employed by the University, but the parties have voluntarily entered into a Memorandum of Agreement setting out terms and conditions of employment for members of the Association, defining and describing the relationship between the University and the Association and providing means for resolving differences which may arise between them. The grievances being considered in this Award were lodged pursuant to that Memorandum of Agreement and my jurisdiction to determine the issues in question are established and defined in Article 9 of that Agreement.

Article 6 of the Memorandum of Agreement between the parties deals with academic freedom in the following terms:

- 6.1 Academic freedom provides the possibility of examining, questioning, teaching, and learning, and involves the right to investigate, speculate, and comment without deference to prescribed doctrine. As such, it entails the freedom of individuals to practise their professions of teacher, researcher and scholar, the freedom to publish their findings, the freedom to teach and engage in open discussion, the freedom to be creative, the freedom to select, acquire, disseminate, and use documents in the exercise of their professional activities, and the freedom to criticize the University and the Association. Academic freedom also entails freedom from institutional censorship.
- 6.2 The University and the Association recognize that the provision of academic freedom is particularly vital to those whose approaches to teaching, scholarship, and research result in criticism of and challenge to established, conventional beliefs and practices.
- 6.3 The academic freedom of any person shall not be infringed upon or abridged in any manner. As academic freedom will wither and die unless the university community as a whole is committed to it, the University and the Association agree to support and defend academic freedom at the University of Waterloo.
- 6.4 As the common good of society depends upon an unhampered search for knowledge and its free expression, and as academic freedom in

universities is essential to the attainment of each of these purposes in the teaching function of the university as well as in the pursuit of its scholarship and research, those who are guaranteed academic freedom have also a responsibility in exercising it not to infringe upon the academic freedom and rights of other members of the university community. Indeed, academic freedom carries with it the duty to use that freedom in a manner that is consistent with the scholarly obligation to base research and teaching on an honest and ethical quest for knowledge.

Academic freedom does not require neutrality on the part of the individual; rather, academic freedom makes commitment possible.

- 6.5 As the censorship of information is inimical to the free pursuit of learning, the creation, collection, organization, and dissemination of knowledge shall be done freely and without bias in support of the research, teaching, and study needs of the university community. No censorship shall be exercised or allowed against any material relevant to the pursuit of learning which a faculty member desires to be placed in the library collections of the University.

The background circumstances and the actions of the various individuals involved are not in dispute in any material sense, although there are significant differences between the parties as to their respective rights and obligations in those circumstances and the consequences that ought to result. Professor Lipshitz defined the circumstances of his grievance succinctly in the following terms:

1. That J. Alan George, the Dean of Mathematics (hereinafter called “the Dean”), assisted by David E. Matthews, the Associate Dean of Mathematics for Undergraduate Studies (“the Associate Dean”), altered the final grades that I, Stanley P. Lipshitz (“I”), submitted for the course MATH 247 [Calculus 3 (Advanced Level)], which I taught during the Winter 2000 term, without showing any persuasive evidence that they were not a fair reflection of the students’ performance in this course, and after their own investigation into the quality of my teaching of this course, and into my assignments, midterm test, and final examination, had revealed *no* evidence that I had taught the course in an inappropriate way or at an inappropriate level, had set unfairly hard tests or assignments, or had unfairly assessed the students’ knowledge of the material of the course;

2. That this alteration to my final grades was done without any prior consultation with me, and completely without my knowledge;
3. That such academically unjustified alteration to my final grades by the Dean is not sanctioned by any University Policy, and is contrary to the responsibility of the Dean. "... for fostering a free and harmonious environment for academic activity, and for promoting excellence in both teaching and scholarship," and to "...consult with the members of the Faculty ..." (Policy 45; The Dean of a Faculty);
4. That the Dean's actions have infringed upon my academic freedom to teach and assess my students honestly and fairly and without undue interference, contrary to Article 6 of the Memorandum of Agreement between the Faculty Association and the University of Waterloo, and that this action will affect the respect of students for my academic authority and judgments.

A policy grievance was subsequently filed by the Association that in substance repeats the complaint of Professor Lipshitz and asserts that if that breach is left unchallenged, it would jeopardize and erode the academic freedom of every faculty member represented by the Association. Policy 45 that is referred to in Professor Lipshitz's grievance provides as follows:

Policy 45

Effective Date: September 21, 1972

Last Updated: October 27, 1998

Class: A

I. GENERAL

The Dean of the Faculty provides leadership for the Faculty and for the University. The dean is appointed for a definite and known term after the appropriate selection procedure has been followed.

II. QUALIFICATIONS, DUTIES AND RESPONSIBILITIES

The Dean of a Faculty is a senior faculty member of academic stature, appointed for her/his intellectual and administrative abilities, devotion to education and research, and qualities of leadership. The Dean should have the ability to create an environment conducive to the growth of intellectual life within the Faculty and to maintain the confidence and co-operation of her/his colleagues.

The Dean of a Faculty is primarily a University Officer, serving in that capacity on the Senate, appropriate major committees and on other University bodies. As University Officer, the Dean has the dual role of making independent judgments on total University matters and representing the particular Faculty's policies and points of view. The Dean should oversee the particular Faculty's relations with other Faculties to ensure that they are harmonious and serve the total University's objectives. The Dean will report directly to the Vice-President, Academic & Provost.

Within her/his Faculty, the Dean of that Faculty is its senior executive officer. As such, the Dean is responsible for all matters academic, financial and material pertaining to the Faculty. The Dean has particular responsibility for fostering a free and harmonious environment for academic activity, and for promoting excellence in both teaching and scholarship. In providing leadership, the Dean shall consult with the members of the Faculty, providing them with an adequate basis of information concerning its operations, and ascertaining their views and ideas concerning the various aspects of Faculty operations. The Dean normally will meet regularly with the Chairs of departments within the Faculty, and normally will make a report at regularly scheduled Faculty Council meetings. The procedures followed by the Dean in all matters shall of course be governed by prevailing Faculty practices and University policies. Significant changes to Faculty practices or procedures should not be made without wide consultation.

The Dean may recommend the appointment of one or more Associate Deans to assist in these tasks.

The basic position taken by the Association is that the grading and assessment of students is an integral part of the profession of teaching, that it is an issue that is at the heart of academic freedom and, as such, is protected by the provisions of Article 6. The Association further asserted that the Dean lacked any jurisdiction or authority to change grades assigned by the instructor of a course within the established rules, policies, and procedures of the University. The position of the University was that the concept of academic freedom as manifested and protected in Article 6 does not

include any concept that it extends to assessment and grading of particular students in particular courses. The basic concept of the Article is that it is limited to restricting various forms of institutional censorship and any requirement of deference to prescribed doctrine and dogma. Issues of that nature are not raised by the factual circumstances of these grievances. In any event, and in the alternative, the University argued that on the facts of the case, the adjustment of the marks was an appropriate exercise of the role of the Dean as chief officer of the faculty.

The University possesses a continent-wide reputation for excellence in the field of mathematics. Its faculty in this area numbers about 145 members and it consistently attracts outstanding Faculty members and many of the best and brightest students available coming out of high school and in the post-graduate stream. Those students, both on a team basis and as individuals, consistently achieve very high standing in national and international mathematics competitions against all of the major universities in Canada and the United States. Many of the core courses in mathematics provided to students over their years of study are offered at both a regular and an advanced level. The regular level courses are taken by most of the students and cover all of the required material for that course as set out in the basic curriculum. The advanced levels, however, are in theory taken by only the best and brightest of the students and are intended to provide to those students more challenge and more topics than contained in the regular courses. All of the content of the regular course is covered, but in an advanced version with the intent that the students are given broader experience and challenge. It is recognized that actual marks are important, and particularly so to these students, due to their effect on scholarship entitlement, honours recognition, and post-

graduate or job placement. The top students are encouraged to participate in the advanced programs, but they are given the explicit understanding through the student advisors that they will not be penalized in marks for doing so, and the marks that will be achieved in the advanced level courses will be consistent with what they would have expected to receive in a regular level course. No student is required either to go into the advanced level program or to remain in it if the student would prefer to return to the regular level course. There is also no formalized procedure to remove a student from the advanced program unless the student voluntarily wishes to do so. In terms of numbers and with reference to the particular calculus course being considered in this Arbitration, the materials filed by the parties would indicate that there would normally be anywhere from 200 to 300 students in the regular program; whereas, the range for the advanced program could be as low as 6 and as high as 25.

There exists within the faculty a set of guidelines, the significance and status of which is a matter of dispute between the parties. That document reads as follows:

**Faculty of Mathematics
Guidelines on
Class Average in Core and Service Courses**

The Faculty's recruiting program attracts students with strong academic backgrounds. As a result, we admit talented students from across Ontario and Canada. Most of them should be successful in their studies.

Over time, the Faculty's program requirements have become much more exacting, in part because promotion decisions are now based on cumulative averages rather than averages that include only courses with passing grades. Students must maintain a Cumulative Average (CAV) of at least 60 percent to be *In Good Standing*. A class average of 60 percent or less means that about half the

students are not meeting the Good Standing level of performance. This judgment is unduly harsh.

In addition, the teaching of service courses for students in other faculties is an essential part of the Faculty's mandate. Other faculties have raised concerns about the low averages in some service courses.

An average of 60 percent indicates that a class is performing very poorly, and so should be a rare occurrence.

The Faculty's expectations are substantially higher than those of most Ontario high schools. Students soon realize this by the demands we make in the classroom. We must recognize students' previous educational experience and seek to provide appropriate academic challenges. The Dean's Advisory Committee, after considerable discussion, agreed that

averages in the first-and second-year core and service courses should normally be in the range from 65 percent to 75 percent.

If an instructor or course co-ordinator anticipates that a course average may lie outside this range, he or she should discuss possible actions as early in the term as possible with the Director of First Year Studies or the Associate Dean, Undergraduate Studies.

Typically, students taking advanced sections in the core courses are among the most gifted students in the Faculty, many of whom hold scholarships that require them to maintain a CAV of at least 80 percent. Most of these students are in the 90th percentile. These courses will normally have class averages well above 80 percent.

It is the Association's position that the foregoing guidelines have never been formally adopted or implemented by any appropriate authority within the University. It was, however, to achieve what is set out in the last paragraph of the guidelines that motivated the adjustment of Professor Lipshitz's grades.

Professor Lipshitz has been at the University since 1970, and it was the evidence of all who testified that he is highly regarded within the faculty as an excellent instructor and the student evaluations of his courses are consistently very complimentary. It was his evidence that the winter term of 2000 was the first time that he had taught the advanced level Math 247 course, although he had taught the regular level course many times. He was requested by the administration to take on the advanced level and agreed to do so, as he knew it would involve teaching the best students and his teaching could be directed to that level. There were originally 24 in the class; one never showed up, and four left before the end of the term, leaving 19 to write the final exam. Of those, it was Professor Lipshitz's view that there were some who should not have been in the advanced level class. He stated that the students' evaluations of his course had been very good, and that there was no suggestion of any unfairness or that he had not been doing a good job. With respect to the guidelines, he expressed strong opposition to telling students what the class average ought to be and that it would be adjusted. The guidelines in question had been circulated, but they were never made policy. During the term, he did express concern, based on the mid-term results, as to what the final results would be and did have discussions with others. The examination that he ultimately set had 12 questions, 8 of which were at the regular course level and 4 of which he considered to be at the advanced level. Each question had a potential of ten marks, so while the exam was, in fact, graded out of 100, each student had a potential of getting 120 marks. He was present when the examination was written and, based on his observations at that time, he decided also to extend the time for writing the examination by 30 minutes. In his initial marking of the exams, two students got 100, but the class average was 66.5 percent. He discussed the

situation with Associate Dean Matthews and after a further review of all of the results, Professor Lipshitz adjusted the marks by a factor of 1.1, which resulted in three students getting 100 and three getting over 90. The class average, however, was then 73. He advised Dean Matthews that he could not justify any further adjustment to the marks and if two students, who in his view should not have been in the course, were excluded, the average would go to 77.

At Dean Matthews' request, Professor Lipshitz provided a complete package of his term assignments and materials that he had used and indicated that he was quite prepared to have a third party assessment of the way he taught the course, and if it was found that he was the cause of the low marks, he would readily agree to a change. It was his understanding that these materials were turned over to Professor Brian Forrest, who had concluded that everything was in order and that the exam had been appropriate. He testified that he was never told that there was an intention to change his grades, and he stated that he was aware of three cases, including his own, where grades were changed by the Dean. He stated, however, that only in his case had there been no consultation. He stated that Dean Matthews had told him that there was no reason for concern over how he had taught the course. He learned on June 9, 2000, that his grades had been changed and immediately protested what had happened. A meeting of all people involved took place June 15, 2000, and at that meeting, Professor Lipshitz learned that Professor Forrest had offered to check the exams themselves and their grading, but that Dean Matthews had said that was not necessary or helpful. Professor Lipshitz stated that the only reason offered for changing the grades was to achieve the average set out in the guidelines. He stated that he would have changed the grades if he was shown that he was in any way

wrong in his assessments, but in his view, the problem was that there were five or six students in the class who should not have been there and who could not master the material to a level to justify a higher grade. He pointed out that if the class had been limited to those who had achieved over 80 in the prior year of calculus, the average would have been right on target. He pointed out that the class he taught had, in their prior year of advanced calculus, achieved only an average of 76 percent. He further noted that there had been no student challenges to his initial marks.

In his cross-examination, he expressed the view that he did not believe that anyone is entitled to good marks, but the University feels they are. He agreed that students might question whether they should be in the advanced class if it would reduce their grades and that students should not be penalized for taking an advanced course, but again expressed the view that students are not entitled to good grades unless they earn them. Students who accept the challenge of the advanced level have the expectation of the same level of grades, but they have to work harder to get them. He felt that his initial change of the grades by a factor of 1.1 was justified on the basis that he had misjudged the length and difficulty of the exam, but he was not prepared to change marks to achieve a bell curve. He agreed that the adjustment of the marks by a factor of 1.1 was a judgment call and that assessing students is partially subjective. With reference to earlier marks achieved in other courses by his students, he expressed the view that those classes had also been graded under the guidelines, so that they might have been adjusted and might not reflect actual performance of those students. In his view, the problem was that weaker students were permitted to stay in advanced classes. The better students in those classes will still do well and achieve the marks that they are entitled to irrespective of

what the average mark is. He agreed that he had extensive discussions over the issue with Associate Dean Matthews, but that he had no discussion whatsoever with Dean George, who was the one who changed the marks. He agreed that at the June 15, 2000, meeting, Dean George did apologize for not informing him that he had adjusted the grades. Professor Lipshitz indicated that Dean George had not apologized for not consulting with him before he did it.

Brian Forrest is an Associate Professor of Mathematics who has been at the University since 1989. He is currently Chair of the Department of Pure Mathematics. He testified that he was asked to look at Professor Lipshitz's examination to see if there was any problem with it and whether there was anything unusual on it from a student prospective. He also reviewed class assignments that Professor Lipshitz had given to the class. He spent about three hours doing some of the questions, and he stated that while the examination was different from what he would have set, it was compatible with the sort of assignments that had been given during the term. He saw no problem with the examination and no difference in style between the examination and previous assignments. He was not asked to do anything further. He was aware of what the problem was in relation to the results from that examination. He indicated that he had to adjust averages in courses that he had taught after the fact when he saw the results of the exam. He has never had his grades changed, however, by someone else. He has taught this particular advanced level calculus course four or five times, and if he were to investigate any further, he would have to talk to the students and look at the specific exam papers themselves. He described the advanced classes as being enriched programs with more in-depth study and including some materials that were not on the general

curriculum. He stated that if advanced students suffered on grades as a result of taking the course, the system might not work. The University wants to encourage the bright students to take advanced courses without the risk of lower grades and, hence, the guidelines exist. With respect to Professor Lipshitz's exam, he felt that the result was very surprising. He described it as an unusual situation and felt that the fact the students had high marks in previous classes makes it more difficult to understand. The differential in marks between advanced courses and regular courses is to be expected and, indeed, it would be surprising if it were not so. He described the exam as having the type of questions even the good students find really difficult. He stated that evaluation requires a considerable amount of the application of judgment based on considerations such as how long has been spent on the subject in the class, where the teaching level was pitched and how well the classes had gone. It is not a mechanistic process. He stated that the more you teach a course, the more you learn about it. He felt that was particularly so for the course in question. It is a very full course, the pace is difficult, and you can't cover all the material and complicated ideas.

Fred McCourt is a Professor of Chemistry and has been at the University since 1970. He is a former President of the Faculty Association. He was involved at the time that Article 6 was negotiated and included in the Memorandum of Agreement, and that clause is basically the model clause that was developed by the Canadian Association of University Teachers. The University accepted the clause substantially in the CAUT format. In his view, changing the grades is a serious undermining of the Professor and that what happened to Professor Lipshitz is a clear violation of academic freedom. He stated that the Association never foresaw the possibility that the University would define

teaching to the exclusion of grades. Within the language of Article 6, he believed that the freedom of individuals to practise their profession of teacher applied to the issues on this Arbitration on the basis that the profession of teaching includes evaluation.

John Wainwright is the Chair of the Department of Applied Mathematics and has been at the University since 1967. He was present at the June 15 meeting in his capacity as Chair-Elect of the Department. He described the meeting as one in which Professor Lipshitz presented his case, Dean George presented his, with the result that there was no change in the decision. At the meeting, Professor Wainwright expressed the view that the Dean's actions were ill advised, and that view was based on Professor Wainwright's knowledge of Professor Lipshitz as a dedicated and knowledgeable professor and also on the nature of the course itself. Professor Wainwright indicated that, in his view, no grounds were provided to justify the Dean's actions. The Dean had felt that the grades had been incompatible with the guidelines for these courses. Professor Wainwright indicated that the guidelines had never been approved by Faculty Counsel, although they were discussed, and there was no consensus on them, only arguments pro and con. Professor Wainwright felt that Professor Forrest had found nothing inappropriate in the exam. Professor Wainwright knew of two instances where grades had been changed by a Dean, but he did not know whether the faculty members had been informed first. He indicated at the meeting that the Dean did express regret that Professor Lipshitz had not been informed and that there had been a breakdown in communications.

David Siegel is a Professor of Applied Mathematics and has been at the University since 1986. During his time at the University, he has taught all of the courses in mathematics in both the regular and enriched programs. He provided Professor

Lipshitz with all of his course materials to assist Professor Lipshitz in undertaking the course. Professor Siegel had taught the same course during the winter term in 1997 and described the students in that course as not being enthusiastic. He stated that the course did not go as well as he would have liked and after he prepared his grades, he was requested to increase the marks. He stated that he had discussions with the Dean and the Associate Dean and that whereas the prior averages for the course had been in the 80's, his was in the low 70's. He voluntarily agreed to change his grades, but while he was asked to go to the mid-80's, he did not feel that he could go that far. The average on the final grades was 78. He stated that he was comfortable with the marks that he finally did submit for that class. He agreed that there was pressure put on him to comply, but there had been no discussion of what would happen if he did not change the grades. In the spring of 1999, he had taught the predecessor course in Advanced Calculus II, from which Professor Lipshitz's students had come. The class average for that group was 76 percent, but he stated that there had been no pressure on him to change the marks. He was aware that the marks did not meet the guidelines, but there had been three failures in the class and without those, the average would have been 80. He stated that there was a problem with weaker students who stayed in the advanced classes. He stated that the effort put forward by students in a course is not an automatic and that every instructor has some courses that go better than others. Many factors can influence the effort put in by students, such as their response to challenge, interaction with the instructor and the like. In Professor Siegel's view, if the student does not put in the effort, the student should not get the mark; there has to be a component of what the student brings to the course.

Anthony Vannelli is the Departmental Chair in Electrical and Computer Engineering and has been at the University since 1987. In the fall term of 1998, Professor Lipshitz taught a calculus course to engineering students in which the examination results were very disappointing. The class average was 58.5 percent and the failure rate 23.2 percent. The Associate Dean of Undergraduate Studies challenged whether or not those results were a reasonable assessment of the class and took issue with Professor Lipshitz's decision to leave the marks unchanged. After an exchange of information with respect to the achievements of the students in other courses and a further lengthy memorandum from Professor Lipshitz with respect to the legitimacy of the grades as awarded, it was ultimately decided not to make any change. Professor Vannelli knew the particular course well and, as a part of the review process, looked at the exam that had been held and concluded that it was at a reasonable level, although it was long. It was his evidence that the people in the Department became satisfied that the marks should stand and that the failures were also in trouble elsewhere. The course in question was fundamental to later courses of study, and it was considered that the content had to be mastered before the student could advance. He described Professor Lipshitz as a good instructor who received glowing student evaluations. He indicated that in his Department, they did not have target averages, but if marks appeared to be out of line, they would look for an explanation. It was his view that a Dean does have the authority to change grades, but that the power is not used. Other methods are generally sufficient to deal with any problems. It is the instructor who should make the judgment.

Donald Savage is currently an independent consultant, but for the period from 1973 to 1997, he was the Executive Secretary of the Canadian Association of

University Teachers. In addition to the functions of lobbying, collective bargaining, and the promulgation of ethical standards, Dr. Savage described one of the principal activities of CAUT as being to guarantee academic freedom in Canadian universities. In his years with the CAUT, he helped to formulate their policies on academic freedom and their model clauses for collective agreements, which included the clause that is substantially the same as Article 6 of the Memorandum of Agreement between the parties. The materials filed on the hearing establish that Dr. Savage has both written and spoken publicly extensively with respect to matters relating to academic freedom and is widely regarded both within and outside the University Community as being an expert in the area of academic freedom. He was put forward by the Association as an expert witness with respect to the issues in dispute on this Arbitration. That status was challenged by the University, not on the basis of Dr. Savage's professional abilities and qualifications, but rather on the basis that he lacked the independence that would normally be required of and expected from a person qualified to give expert testimony upon the issues in dispute. In accepting Dr. Savage's evidence, I am satisfied that he does possess an impressive and extensive background of knowledge and study in the area, and I found his evidence and written materials to be helpful. However, based on the totality of the evidence which I heard, including the views of Dr. Savage, it is clear that the area of academic freedom is anything but an exact science, and it is open to divergent and conflicting views when theory must be applied to real world factual situations. It is quite possible, and indeed to be expected, that members of the University Community acting in the utmost of good faith may hold divergent views on particular discreet issues while being in full agreement on basic principles.

In his academic life outside of CAUT, Dr. Savage's field was Modern History, he holds a Ph.D. in that area from the University of London, and he has taught at a number of colleges and universities. In defining academic freedom, he stated that it was necessary to look for guidance to the practices of the academic community as a whole. Violations of academic freedom could be committed by both university administrators and faculty members. With respect to the elements of teaching, he broke them down as being the selection and preparation of course materials, the delivery of the course, and the assessment and grading of the students in the course. An inherent part of the professional expectations of teaching is the setting and marking of examinations. He described grading as being very important communication, both to the students and to the rest of the world, as to the achievements in the course. He described the sort of issues that arise on this Arbitration as not being common occurrences, and it was a very unusual circumstance where an instructor's grades were altered. In the context of this University, and in considering the Memorandum of Agreement between the parties, the governing legislation, Senate by-laws, and policies governing the University and the Mathematics Department, it was his view that the Dean did not have the power to do what had been done with respect to Professor Lipshitz's grades. He stated that there are no procedures set down within the University with respect to changing grades, other than the procedures dealing with student appeals of the grades given. In his view, for the Dean to have such a power, there would have to be a specific policy and process with all of the appropriate safeguards established by the Senate. He felt that such a process would not be a violation of academic freedom so long as it involved proper appeal procedures and professional review. Dr. Savage provided a lengthy written opinion setting out what he considered to

be the general definition of academic freedom as recognized in Canadian universities and quoting extensively from CAUT policy statements and equivalent materials from the United States. He testified that all the materials upon which he relied expressly include teaching, without qualification, under the general rubric of academic freedom. He considered that the assessment and grading of students was generally acknowledged to be an integral component of the teaching function and, therefore, protected by the principles of academic freedom. Against that background, Dr. Savage was firmly of the view that on the factual circumstances of this case, there was a violation of the principle of academic freedom as contained in Article 6 of the Memorandum of Agreement between the parties and as recognized in Canadian universities generally.

In the course of his cross-examination, Dr. Savage stated that the effect of putting Article 6 into the Collective Agreement was that an issue that was substantially a moral issue within the University Community was translated into legally enforceable rights. He noted that there were five specific references to teaching in the Article itself. He felt that the act of altering grades could be considered censorship within the Article. He agreed that there was no specific reference to grading and assessment in either the CAUT model clause or in the Memorandum of Agreement. He explained this as being the result of the fact that such an issue has never before been challenged within the University community. In his view, the inclusion of grading and assessment within the protected area of teaching was such a common practice that there had been no need to make any specific reference to it. He pointed out that the clause also did not make any specific reference to other indisputable components of academic freedom, such as the choice of texts, and that the clause in no sense purported to define all aspects and

components of academic freedom. He agreed that in his written opinion, he had not dealt with or made any reference to the academic freedom rights of the University, which he acknowledged did exist. He referred to judicial authorities from the United States that had held that an instructor's marks could not be changed unilaterally by the institution, but that the institution did have the right to change grades so long as it was made clear that it was the institution, and not the Professor, who was making the change. He agreed that the cases from the United States dealt with the issue in the context of a first amendment freedom of speech violation, which resulted in the differing treatment where the change was clearly made by the institution. However, in Dr. Savage's view, such a change by the institution could still constitute a violation of a contractual provision providing for academic freedom. He reiterated his view that if there existed no policy within the University, the Dean would have no authority to change marks. He could question, challenge, discuss, but he could not unilaterally change the marks. The issue could be taken to the Senate if necessary.

Allan George is currently the Acting Vice-President, Academic, and Provost of the University, but at the material times was Dean of the Mathematics Faculty. He outlined in some detail the principles behind the teaching of advanced level courses, which has been reviewed earlier in this Award, and particularly the importance of the system in relation to the goals of the University. The Marks and Grade Average Guidelines, reproduced earlier in this Award, were generated in written form by the Dean's Advisory Committee. This is an *ad hoc* committee that has existed within the Faculty for over twenty years and is made up of all of the officers of the faculty who are charged with the operation of its various parts. Dr. George indicated that while the

written guidelines were issued in October 1998, they reflected policy that had been in existence over many years. The Advisory Committee unanimously approved the document, but subsequently one member did withdraw his support for it. The Guidelines were discussed at Faculty Council at its meeting on January 19, 1999, and it was Dr. George's evidence that they generated a lot of discussion, as does anything that deals with marks. The Guidelines were presented to Faculty Council for discussion and no approval was either sought or given. It was Dr. George's evidence that the setting of an exam is not an exercise in precision and that one can never predict, with certainty, the range within which the results will fall. A Professor can misjudge the difficulty or length of an exam, but in Dr. George's view, that did not destroy the usefulness of the exam as it would still establish the appropriate ranking of the students who wrote it, even if the actual marks are not reliable. It is a regular practice to adjust raw scores to bring the range within what is reasonable. Dr. George filed a sheet setting out the marks that had previously been achieved by the students in Professor Lipshitz's class in two prior advanced algebra courses and two prior advanced calculus courses. In his view, these figures would be predictive of the results that would be expected from the students in the course being taught by Professor Lipshitz. All but one of the students were on scholarships. As a result, he increased the original marks to achieve an 85percent average, which he felt he did on the basis of fairness in relation to the results in the regular course and the past results of the students involved. He emphasized that there was no suggestion of any impropriety on the part of Professor Lipshitz and that it is well known that he is a very good teacher. He stated that at the June meeting, Professor Lipshitz expressed his displeasure at what had happened and, in particular, he was upset

it was done without consultation. Dr. George indicated that he has apologized twice to Professor Lipshitz for the way it happened. He stated that he had, in the past, adjusted marks over the objections of the faculty member and that the previous Dean had made a number of interventions with respect to grades, which were resolved in discussions with the faculty member. The previous Dean also changed the marks on one occasion, but Dr. George indicated that such situations were rare. He viewed the powers of the Dean as being wide and encompassing in scope, and he believed that the maintenance of academic standards and consistency and fairness in the treatment of students was included in that scope. In his view, the average in a particular course has no effect on the individual mark and that the student still has to put in the effort to achieve a top mark.

In his cross-examination, he was asked about admission standards to the University, and he stated that for computer science, an average in the high 80's in high school was required, and for the rest of the courses, in the low 80's. He stated that it was unusual for students to apply for the advanced program unless recommended for it through the student advisors and usually those going into the advanced courses had averages in the 90's from high school. There is no formal monitoring or pro-active advice if the students are in trouble, but the advanced classes are small and the instructors will tell the students where they stand. The student advisors know of the Grades Guidelines and advise the students about them. The expectation in the advanced courses is to get the same grades as would have been achieved in the regular course. That does not, however, guarantee any individual anything by the expression of an expected average. That does not create any expectation of a higher mark in an advanced class as it is still the individual mark, and not the average, that is achieved. He stated that there

might be unusual circumstances that would require a different approach and, if reasonable, the average could remain below the Guidelines. He did not consider the situation with the marks in question to have any unusual circumstances based on the prior achievements of the students in the course. He knew the details of the examination itself, and he thought that the resulting average was unfair so he adjusted it. He felt that the situation was unfortunate in that the communication was not what it should have been. He thought that Associate Dean Matthews had told Professor Lipshitz that the grades were to be changed and only learned afterwards that it had not happened. In ideal circumstances, there is a consultation and a resolution can be reached with the instructor. He felt that all of the issues had been discussed and canvassed in Professor Lipshitz's discussions with Dean Matthews, but he agreed that Professor Lipshitz should have been told that if he didn't change the marks, the Dean would do it. Professor Lipshitz should have been given the opportunity to change them. He agreed that some faculty members had a concern with respect to the Guidelines that they might cause some students to put forth less effort. He stated that there was nothing, other than the principles underlying the Guidelines, that drove the change in grades as the students involved were exceptional students with expectations of high grades. It would be expected that they would master the course materials. He considered the action that was taken to have been appropriate but that the consultation should have been better. This is not the sort of issue that would ever get to the Senate, Faculty Council or any committee of Faculty Council and, in his view, what he did, however imperfectly, conformed to prevailing faculty practices. He readily agreed that student assessment was a component of teaching.

ARGUMENTS

In summarizing the material facts of the case, Ms. Blanchette pointed out that Professor Lipshitz had received a copy of the Guidelines Memorandum and with respect to this particular course, he was aware that the mid-term results had indicated that there would be a problem. At that point, he did seek the advice of others, including Associate Dean Matthews, as to how to meet the Guidelines and how to set the examination, and he followed those recommendations in setting an examination of 12 questions, 8 at the regular level and 4 at the advanced level, with each question having a potential of 10 marks for each student. In addition, an extra half hour had been allowed to write the examination and subsequently a further adjustment by a factor of 1.1 had been made. Even though there was nothing wrong in the resulting grades assigned by Professor Lipshitz, these grades were changed without consultation or notification. No student had complained about the grades assigned by Professor Lipshitz notwithstanding what their expectations might have been. The action was arbitrary and unreasonable and there existed no legal reason to change the grades. It was suggested that if there were no student complaints, how could it be said that their expectations were not met and that it was simply unreasonable to expect an average of 80 percent irrespective of the students' performance. Data and marks from previous classes are not reliable as those averages may also have been the product of adjustment. The decision of Dean George was based on the fact that students had good grades in prior courses, but the issue remains as to whether those grades are reliable. A Dean has a duty to act fairly, consistent with the principles of natural justice, and this did not happen in the circumstances of this grievance. All that Professor Lipshitz knew before the grades were actually changed was

that the Dean was not happy with the marks and that his course materials had been requested so that someone could look into it. When he was finally told, it was a done deal without consultation or notice. The Dean relied on Policy 45 as his authority to do what he did, but in that, he is simply wrong. That Policy requires the Dean to consult and Professor Lipshitz was not consulted. The Policy also requires the Dean to obtain the views of faculty and if he wishes to do that through his Associate Dean, he still has to make sure that it was, in fact, done. There are limits to the Dean's power under Policy 45, and he is governed by prevailing faculty practices and University policies. A University is a unique community and an employer does not have any sort of inherent management rights, such as exist in the private sector. It is well known that it is a collegial governance. Reference was made to the *University of Waterloo Act, 1972*, and in particular, Section 22, setting out the powers of the Senate, and it was argued that any policy or by-law had to conform to the legislation. Under that legislation, it is the Senate that has the power to delegate and to enact by-laws for the conduct of its affairs. Under By-Law No. 10, each Faculty is empowered to develop its own constitution, and Ms. Blanchette referred to the constitution for the Mathematics Faculty created under that By-law. Pursuant to Section II (c), it was argued by Ms. Blanchette that it was the Faculty Council that had jurisdiction to determine the results of examinations. Under Paragraph IV (e), provision was made for an Undergraduate Standings and Promotions Committee and under its duties and powers was the provision to "implement existing policies concerning examination results, standings, promotions, withdrawals and related matters." It was argued that if the Dean found that something was wrong with grades, the matter should have been pursued through either the Faculty Council or the Committee.

With reference to student expectations, it was argued that the fact that they exist does not mean they will always be realized. Individuals and groups may perform below expectation and when particular results are looked at, actual performance is what should be judged. The best person to do that is the instructor. He will be aware of who made effort and who didn't. The goal of having all succeed is all very well, but the reality is something different. To give credit to high expectations, regardless of performance, is not meeting the goals of the University and the goals of Policy 45 in promoting excellence.

It was argued that the Memorandum of Agreement between the parties constitutes the law in the University, but that Article 5.1.1 specifically provides that the relations between the parties, and between the University and the members, are defined partly in the Agreement and partly in University policies. Policy 45, which is relied upon by the University, is stated to be a Class A policy and pursuant to Article 5.2.3 of the Memorandum of Agreement, where there are differences between the Agreement and any Class A policy, the provisions of the Agreement shall prevail. It was argued that the Guidelines in question had no force of law, had never been approved by Faculty Council, and constituted simply a guideline. Professor Lipshitz had collaborated with everyone involved to see if it could be met, but, in the end, it could not.

With respect to the nature of academic freedom, Ms. Blanchette described it as a concept that exists in many countries, but that it has been better defined in the United States and Canada through the auspices of CAUT and the American Association of University Professors, whose materials were included in Dr. Savage's materials. It is recognized that there are limits on academic freedom based on ethical standards, and a

Professor is not protected if he or she engages in such things as racist comment, harassment, or illegal or unfair action. In the Associations' view, however, academic freedom in a University has precedence over any concept of management rights and that is what makes the difference between a University and a commercial corporation. Ms. Blanchette made reference to the decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, as a decision of the Supreme Court of Canada that acknowledged the principle of academic freedom in the University context and while it acknowledged the existence of academic freedom, it did not attempt to define it. It did provide that it was a concept peculiar to the University sector. It was, however, used to justify a limit on Charter Rights in the context of tenure and compulsory retirement. Ms. Blanchette argued that academic freedom had two faces, the collective and the individual, and each has to live with the other. When something goes wrong, the solution is to go to peer review. Everyone agrees that assessment is an integral part of teaching and, therefore, Article 6 constitutes a specific protection of that function.

Ms. Blanchette also referred to the Arbitration decision in *Re: The Board of Governors of Dalhousie College and University and Dalhousie Faculty Association*, Grievance of David B. Scott (MacDougall, unreported, January 19, 1990) as standing for the proposition that the assignment of grades is the responsibility of the Faculty member. The Arbitrator, however, could not deal specifically with the issue of academic freedom, because within the provisions of the collective agreement under which he was arbitrating, he did not have the necessary pre-qualifications to express a view on those issues. Reference was also made to the Arbitration decision in *Re: University of Calgary Faculty Association v. University of Calgary*, [1999] A.G.A.A. No. 104, being the decision of a

Board of Arbitration chaired by A. C. L. Sims, which decision, while focusing principally on other issues, did contain references to academic freedom. Reference was made to the quotation appearing at Section 25 of the decision as follows:

The role of a Dean as Chief Executive Officer is not, of itself, in conflict with the notion that academic decision-making authority lies elsewhere. While in the corporate world, the term CEO has acquired something of an omnipotent ring, the term still properly has a connotation of one who carries out or executes policies, or causes rules made by others to be followed.

Ms. Blanchette relied on the University of Calgary decision as indicating that while a Dean can express himself forcefully and that is part of his academic freedom, he can urge, but, in the end, he has no power to change what the instructor has done. It was argued that at the University of Waterloo, the Dean's powers were limited to the same extent as set out in the University of Calgary decision. He executes the wishes of the collegial bodies and, while he can urge specific policies, he cannot enforce unless he is doing so under a valid policy.

By way of remedy, it was urged that the grades involved should be changed back, because the change was not fair either to Professor Lipshitz or to the students involved. If the grades had been lowered by the Dean, it would be unfair not to give them back and similarly where they were raised, they should be returned to the level originally assessed. Had the mistake been of a clerical nature, the error would have been corrected. Here the mistake was one made by the Dean, and it also should be corrected. Second, the Association requested that a letter be sent to each student explaining that the original change had been made without the knowledge or approval of the instructor so that the students know it was not Professor Lipshitz who made the change. Third, there

should be a letter of apology to Professor Lipshitz and placed in his file. Last, there should be a specific determination that there was an infringement on academic freedom, and Policy 45 as interpreted by Dean George was not its correct interpretation and application. The University should be ordered to provide written notice to all Deans as to the correct interpretation of Policy 45 and that any change to a grade assigned by a Professor must be made by that Professor.

For the University, it was argued that as a basic proposition, and as Dr. Savage had stated in his evidence, in the area of academic freedom, we have moved from moral rights to contractual rights and that is what Article 6 is all about. It is those contractual rights that form the subject matter of this Arbitration. The Article must be construed as a whole and not in any sense as being inconsistent parts, one from the other. The subject matter of the grievance is the decision by Dean George to amend the marks and the Association asserts that the Dean had no such authority. That is not an issue that comes out of academic freedom. There is not a line between the contractual rights and the background, but it is a continuum which is consistent. Each institution will not define academic freedom in the same way and it is necessary to look to the particular document to determine the rights. Mr. Riggs referred to the University of Calgary case and, in particular, Section 8, wherein the Arbitration Board stated:

We must have regard to the specific words used in the Collective Agreement provision and not abandon them to broader concepts of academic freedom that reach beyond what the parties, by their choice of language, have chosen to subscribe to for the purposes of the Collective Agreement.

It was argued that Article 6 of the Memorandum of Agreement between the parties addresses the censorial issue of academic freedom and essentially is about the

unhampered search for knowledge. It prevents activity that will stop that search, be it censorship imposed, prescribed doctrines, dogma, and any particular economic or religious beliefs. What is important is that usually the Professor in question is putting forth views that may be offensive or obnoxious to many, but this is what makes the concept a reality. That is the issue Article 6 addresses, namely the stifling of views that are not Orthodox. It refers to teaching in that context and the unhampered search for knowledge. The same focus is contained throughout the Article in addressing those sorts of issues, and that is consistent with the approach that has been adopted in the courts to the extent that academic freedom has been dealt with there. Article 6, as a contractual matter, contains frequent references to the search for knowledge but nothing about grading and assessment, either explicitly or by necessary inference. The plain language of the contract makes no reference to those issues as part of the concept of academic freedom. The language tracks the language of the CAUT model clause, but there is no suggestion in that language, or in the policy statements referred to by Dr. Savage, about marking, grading, and assessment. It is totally silent on those sorts of issues.

It was argued that the American experience is important, and that Dr. Savage had agreed that CAUT tracked what went on in the United States. Again, Mr. Riggs argued that the American materials on academic freedom provided by Dr. Savage contained nothing on marking, grading or assessment. In the U.S., the issue arises in the Federal Courts where the argument is made that intervention in grading by administrators is a violation of the free speech protection offered by the First Amendment to the American Constitution. In that context, it was argued that the American cases answer on two points: First, the First Amendment does not include any right to prevent Deans and

administrators from amending marks or grades, but it does prevent them from forcing the Faculty member to do it himself. It does not stop a Dean from doing it on behalf of the university. Second, it recognizes that apart from freedom of the Faculty member, there is also an institutional academic freedom whereby the institution can take steps in its own interests. There can be tension between the academic freedom of the individual and of the institution and on this, the institution can change marks and assessments. Reference was made to a number of American decisions in this area in support of the general proposition that academic freedom, as a freedom of expression, does not include a right not to have marks changed by the institution, and that there does exist a countervailing academic freedom in this area for the institution itself. It was argued that academic freedom is, to a large extent, a North American phenomenon and, therefore, the U.S. trends are relevant to our understanding of what should constitute academic freedom. Article 6 of the Memorandum of Agreement is consistent with that view; whereas, the position taken by the Association is not. To the extent that the Section might be considered to be ambiguous, Mr. Riggs pointed out that the clause in question was substantially drafted by the Association and that, therefore, the application of the *contra proferentem* rule would ensure that the meaning least favourable to the author of the document would prevail. However, Mr. Riggs' basic proposition was that the document was not ambiguous and did not cover marks and grading. Should it be found to be ambiguous, then it must be interpreted against the grievor and the Association. In Mr. Riggs' view, that was sufficient to dispose of the grievance without reference to any of the evidence as to how it was done.

In the alternative, it was argued that if academic freedom includes marking, grading, and assessment, and a right not to have those marks changed, is that an absolute right? The answer has to be that there must be an interest in the University to intervene in circumstances of the exercise of a prejudice, bias, or unfairness. Dr. Savage, in his evidence, agreed that there could be a Senate policy permitting the changing of grades, so that puts an end to any argument that the Professor's rights are absolute. Mr. Riggs argued that it is simply unrealistic to suggest that every decision that is made has to be based on a specific policy. The University has Policy 45 and it is that Policy that empowers the Dean. The Senate has provided that the Dean is the CEO of the Faculty, he is the senior executive officer, and he is given responsibility for all matters academic. He has the obligation to consult and get the views of faculty, and it is the model of a CEO who does not act in an autocratic way. That is exactly what Dean George did and the Guidelines that were being considered were produced by the Deans' Advisory Committee. Those Guidelines were agreed to by the ten members of the Committee and only one of those committee members has subsequently changed his mind. This was not a new Guideline as it had been practiced to the knowledge of faculty for some years. It was fully disclosed and discussed at Faculty Council, and it had been acted on in the past. The Dean had the appropriate authority under Policy 45. There would appear to be no argument on the part of the Association as to the right of the Senate to pass rules and regulations on marking and assessment, and authority on academic matters has been given by the Senate to the Dean. That authority would be restricted only if the Senate put into place a different policy. Faculty Council and its committees have never in the past addressed issues of the nature being considered on this Arbitration.

Mr. Riggs argued that the test for when it was appropriate for the University to intervene was when there was a corporate interest in the institution which must be considered. Also, an appropriate test would be when there existed issues of bad faith or improper motive, and it was suggested that the measure might be an analogy to the way the courts approached judiciary review issues, wherein they will review a decision that is patently unreasonable. This University attracts large numbers of very gifted students and possesses an unequalled reputation in its field for both its students and its faculty. The University attempts to challenge the most gifted by providing more demanding courses, but that has to be done in a way that protects the students. The University can't say to a gifted student that he or she may be penalized by being put into an advanced course and thereby receiving poorer grades with higher standards to meet than for a less gifted student. As a matter of policy, the University wants to challenge, but, at the same time, give assurance the student will not be prejudiced by accepting that challenge. That is a totally rational policy for the benefit of the gifted student and for the University as a whole. The students involved are gifted students who have taken a number of advanced classes in the past and have done very well. The spread in averages between the general and the advanced levels have been consistent in the past, and it is a rational process and it is reasonable to expect these results. If the marks had been left alone, a substantial number of gifted students would have received lower marks than students at the regular level. There is a lack of precision and predictability in the examination process and the results are not an absolute. Professor Lipshitz set an exam with a possible 120 marks, gave extra time to write it and he, himself, decided on an upgrade of 10 percent. There is nothing negative on Professor Lipshitz in the process.

These marks are exactly why the University has the Guidelines. The resultant average is not relevant to any individual's results. With respect to the implementation of the change, there have been countless apologies for not advising the Professor, which go back to the initial meeting of June 15. It would have been better if it had been discussed directly with the Dean, but the grievor agrees that there were three or four detailed discussions with Associate Dean Matthews and all relevant issues had, in fact, been canvassed in detail. The only defect was that there was no direct involvement by Dean George with Professor Lipshitz.

With respect to the Association's arguments on remedy, it was Mr. Riggs' position that fairness was the most important consideration and in the circumstances of this case, fairness to the students involved must be the paramount consideration. Hypotheticals of other situations wherein marks might be changed are of no help in evaluating this case. Things have happened on the basis of the actual marks that had been awarded and it would be untenable and unconscionable to change them.

In reply, Ms. Blanchette stated that what we were dealing with here was a contractual provision, and it is clear on the language of Article 6 that teaching is protected. All functions of teaching, including grading and assessment, are included. The CAUT document was drafted in a vague manner in order not to limit the definition of academic freedom in all of its components. The jurisprudence from the United States addresses a constitutional approach and not a contractual one, and there are no Canadian cases dealing with grading. Institutional academic freedom refers to the collegial part of academic decision making and not to a corporate academic freedom. The University could have a policy on grading, but the Senate has not done so. The Senate did create a

Faculty Council so if there is a problem, that is where the Dean should go. It was argued that while the original AAUP statement referred to by Dr. Savage did not elaborate on the components of teaching, there does exist a subsequent document on grading that purports to follow from the original statement. The Guidelines relied upon by the Dean are not legally binding on Faculty members and only constitute a guide when evaluating students. On any matter, collegial decision making and peer review are requirements of academic freedom. The discussions that did take place were all about explaining the marks and did not involve any discussion of changing them. It was never mentioned that there could be a unilateral change to the marks.

DECISION

As I commented earlier in this award, academic freedom is anything but an exact science. The same may be said with respect to the appropriate standards of collegial decision making and governance, and this whole case focuses on the divergent and conflicting views of the members of this academic community as to the merits of the Guidelines in question and as to the authority of a Dean. The evidence and materials filed on the hearing make it very clear that the concept of academic freedom in all its facets is a guiding principle behind every action and activity within this University and, indeed, within most such institutions in Canada and the United States. Attempts, however, to describe and define the concept of academic freedom have not resulted in objective or precise definitions. The Supreme Court in *McKinney* went so far as to recognize the existence of the concept but is not of any particular assistance in setting definitions or boundaries. The application of the doctrine in this Arbitration is asserted by the Association with a strict focus on the rights of a particular Faculty member;

whereas I think it is clear that such rights are not absolute and inviolable. The University community is basically no different than any other part of society wherein there is always a need to balance conflicting interests and obligations. In that regard, I have found some of the American decisions to be helpful and while they are not binding in Canadian law on any principle of *stare decisis*, it is always appropriate to follow well-reasoned decisions and conclusions from other jurisdictions. In *Board of Regents of the University of Wisconsin System v. Southworth, et al*, [2000] SCT-QL 73, No. 98-1189, the United States Supreme Court was considering a situation wherein a student at the University challenged a segregated activity fee imposed by the University. At paragraph 46 of the decision, the following comments are made with respect to academic freedom:

Our understanding of academic freedom has included not merely liberty from restraints on thought, expression and association in the Academy, but also the idea that Universities and schools should have the freedom to make decisions about how and what to teach. In *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), we recognized these related conceptions. “Academic freedom thrives, not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision making by the Academy itself”.

In *Lovelace v. Southeastern Massachusetts University* (1986), 793 F. 2d 419, (U.S. Ct. App. 1st Cir.), the Court was dealing with the situation of a non-tenured teacher whose contract had not been renewed. It was the teacher’s claim that the reason for the non-renewal related to his refusal to inflate his grades or lower his expectations and teaching standards, and this constituted interference with his academic freedom. Commencing at p. 425 of the decision, the following is stated:

Whether a school sets itself up to attract and serve only the best and the brightest students or whether it instead gears its standards to a broader, more average population, is a policy decision which,

we think, Universities must be allowed to set. And matters such as course content, homework load, and grading policy are core University concerns, integral to implementation of this policy decision.

In *Parate v. Isibor* (1989), 868 F. 2d 821, (U.S.Ct. App. 6th Cir.), the Court was again reviewing the situation of a teacher whose contract had not been renewed on a basis which it was alleged violated the teacher's constitutional rights. The Court reviewed the facts in the context of academic freedom and commencing at paragraph 22, the following is stated:

Judge Posner of the 7th Circuit has explained that the term academic freedom "is used to denote both the freedom of the Academy to pursue its end without interference from the government and the freedom of the individual teacher to pursue his ends without interference from the academy; and these two freedoms are in conflict". Other commentators have identified the problems inherent in resolving clashes between the academy and individual academics when both parties claim a constitutional right to academic freedom. Academic freedom thrives not only on the robust and uninhibited exchange of ideas between the individual professor and his students, but also on the "autonomous decision making of the academy itself". Justice Frankfurter summarized the "four essential freedoms of the University": "It is the business of a University to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevails "the four essential freedoms" of a University—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study". *Sweezy v. New Hampshire* (1957), 354 U.S. 234.

Later in the same decision at paragraph 37, the Court deals with the respective rights of the teacher and of the University in the context of grades:

The District Court held that Parate's constitutional right to academic freedom does not permit him to override administrative authority; to ignore TSU grading policies; or to escape the supervision of the defendants over his grade assignments. In rebuttal, Parate correctly contends that even as a non-tenured professor, he retains the right to review each of the student's work and to communicate, according to his own professional judgment,

academic evaluations and traditional letter grades. Parate, however, has no constitutional interest in the grades which his students ultimately receive. If the defendants had changed student Y's GSW course grade, then Parate's first amendment rights would not be at issue. Parate's first amendment right to academic freedom was violated by the defendants because they ordered Parate to change student Y's original grade. The actions of the defendants, who failed to administratively change student Y's grade themselves, unconstitutionally compelled Parate's speech and precluded him from communicating his personal evaluation to student Y.

The foregoing statements of law would appear to be consistent with Dr. Savage's evidence as to the current position under American jurisprudence. The court expanded on its reasoning in paragraph 41:

We believe that the acts of the defendants deserve exacting first amendment scrutiny. First, we consider Parate's first amendment right to academic freedom and his interest in eliminating the defendants' arbitrary interference in the assignment of his course grades. Second, we consider Parate's first amendment right to be free from compelled speech. By insisting that Parate sign the grade change memoranda without including his reservations on the notation "per the instructions of the Dean", the defendants compelled Parate to conform to a belief and a communication to which he did not subscribe. We then balance Parate's interest against the defendants' interest in having Parate personally change student Y's grade. Arguing for the first amendment right to academic freedom, the defendants assert an interest in supervising and reviewing the grading policies of their non-tenured professors. If they deem Parate's grade assignments improper, however, the defendants could have achieved their goals by administratively changing student Y's grade. We conclude that by forcing Parate to change, against his professional judgment, student Y's grade, the defendants unconstitutionally compelled Parate's speech and chose a means to accomplish their supervisory goals that was unduly burdensome and constitutionally infirm.

Both counsel have correctly pointed out that on this Arbitration, the dispute focuses on contractual interpretation and what was intended by the parties in the language that they have included in the Memorandum of Agreement. In the *University of*

Calgary case, as quoted by Mr. Riggs, the Board was of the view that the focus had to be on the specific words used in the Collective Agreement and not to broader concepts of academic freedom that reach beyond what the parties, by their choice of language, have chosen to subscribe to. Unfortunately, such a direction is not easily followed. The use of the expression “academic freedom” in the contract language cannot be divorced from the understandings of that term within the University community. There has been no evidence of bargaining history that could support any other conclusion. As is to be expected, the Association focuses on the individual’s academic freedom; whereas, the University focuses on what reasonable restraints there may be on the individual’s academic freedom with respect to the interests of the institution itself. It is apparent from a reading of the various materials that have been filed with me, and particularly from the American authorities referred to, that both concepts of academic freedom exist and that they may come into conflict. Article 6.4 is a specific requirement that those who are guaranteed academic freedom have a responsibility not to infringe upon the academic freedom and rights of other members of the University community. Among those, I would include the administration and the institution itself. While the parties are creating contractual rights with respect to academic freedom, I do not believe that the words they have chosen can be interpreted in a vacuum and, absent evidence to the contrary, they must reflect what the parties have commonly understood the concepts to be in the past. The University has argued that the contractual rights should be limited to the censorial aspects of academic freedom and the pursuit of knowledge. In that context, it is argued that the protection of the profession of teacher should not extend to the grading and assessment of students. I consider the evidence to be overwhelming that the grading and

assessment of students is and has always been considered an essential component of teaching and, in the context of the protection afforded to any individual professor, I am satisfied that the protection of academic freedom would extend to the grading and assessment component of the professor's teaching. However, and as envisaged by Article 6.4, the extent of that protection cannot infringe upon the academic freedom and rights of other members of the University community and to the extent that those rights may be in conflict with the individual professor's rights, a resolution must be sought within the policies and procedures of the University. The Association, both through the evidence of Dr. Savage and in argument, conceded that the protection of academic freedom in the context of grading and assessment was not absolute and might have to give way in the face of valid University policies and procedures.

With respect to the Marks Guidelines themselves, their status is very much in dispute on this Arbitration. In the first instance, they were promulgated by the unanimous decision of the Dean's Advisory Committee, which was composed of all of the senior officers within the Faculty. They reflected established policies within the Faculty. While one individual subsequently withdrew his support, they may reasonably be considered to be a statement of administration policy for the Faculty. As to whether or not they constitute a proper policy, there would appear to be no consensus. Professor Forrest, in his testimony, recognized that the system of regular level and advanced level courses that was designed by the University might not work without the application of the Guidelines. Professor Siegel had been prepared to accommodate the Guidelines but not to the extent desired by the Dean. Professor Vannelli was of the view that the Dean did have the authority to enforce the Guidelines but that it was a power not to be used as

other methods could generally achieve the desired result. The evidence is further to the effect that, in the past, some Professors have accommodated the Guidelines; whereas, on a few other occasions, marks have been changed by a Dean without the Professor's agreement. This Arbitration would appear to mark the first occasion upon which the issues have been brought forward for formal determination. Based on the evidence, I would conclude that it is very much in the interests of the University in the pursuit of its goals to maintain the regular and advanced levels in the same course and to encourage the brightest students to accept the challenge without prejudice to their overall standing. I would find that goal to be a legitimate objective to pursue and one that does fall within Mr. Justice Frankfurter's four essential freedoms of a University. The Frankfurter principles have received general acceptance in the courts of the United States, and I believe may be validly imported into this country. That being said, however, those freedoms must be pursued in a manner that is not inconsistent with the academic freedom of the other members of the University community and wherever these valid interests come into conflict, they must be resolved on a basis of due process, natural justice, and collegial governance.

It is true, as argued by the Association, that the University is created by statute and that within the prevailing legislative framework, it is the Senate that has the power to delegate and to enact by-laws for the conduct of the affairs of the University. It was urged that there did not exist within the University any sort of inherent management rights, such as would be found elsewhere in the commercial and industrial sectors. I cannot accept the Association's contention, which is in substance that without pointing to a specific and particular policy or by-law of the Senate, a Dean has no authority

whatsoever. While there may not be management rights as in the context of the private sector, the fundamental rights of all parties are protected by the concepts and principles of academic freedom, and it would be my view that under those principles, the University and its administrators do carry the authority to run the day-to-day affairs of the University and to determine the issues that come within the academic freedom rights of the institution. Policy 45 does contain the direction and authority of the Senate that is conferred on the Dean and part of that authority must be, by necessary implication, to administer his Faculty. He is given specific authority and responsibility under Policy 45 with respect to all matters academic, financial, and material pertaining to the Faculty. While it is true that Article 5.2.3 gives the Memorandum of Agreement priority over that policy where there exists any difference, Article 6.4 maintains the rights and responsibility of the Dean within the purview of pursuing the legitimate interests of the institution.

The factual circumstances of this Arbitration bring into conflict the academic freedom of Professor Lipshitz to practice his profession of teacher with the academic freedom of the University to determine that particular courses will be taught at both a regular and advanced level and that students taking the advanced level will be given certain understanding as to how they will be treated in the context of grading and assessment. It is incontrovertible on the evidence that Professor Lipshitz is an excellent instructor and that with respect to the course in question, no one has any concern or criticism with respect to the way the course was presented. He has acted throughout in the utmost good faith and completed his grading and assessment of his students to the best of his ability. He was aware of the Guidelines with respect to grade averages, but he

gave precedence to his professional responsibility to grade his students in accordance with his principles. He firmly believed that of the students involved, those with a legitimate entitlement to and expectation of excellent marks, did receive appropriate marks. The Dean took a different view of the situation and felt that with respect to the students involved, their past performance was predictable of higher marks and that factor, in combination with the assurances given to students taking the advanced level courses, caused the Dean to change the marks that were assigned.

The evidence is inconclusive in any objective sense as to whether the original grades were unfair. The Association argued that since the average for this particular group of students in their previous advanced calculus class was 76 percent, it was unreasonable to expect a higher average in this course. That argument overlooks the fact that of the 25 students in the prior class, only 19 wrote Professor Lipshitz's exam, and it may reasonably be concluded that most of those who dropped out would have been those with the lowest marks. Based on the statistics of actual prior marks that were provided by Dr. George in his testimony, the students from the prior advanced calculus class, who found their way into Professor Lipshitz's class, had achieved an average in the low 80's in the earlier class. Their marks in the other three courses considered by Dean George were higher. A number of witnesses commented on the lack of precision in the use of examinations to grade students, and it is a very usual process for Professors to make adjustments to the raw grades once all the results are being reviewed. I cannot accept the Association's argument that the prior grades cannot be relied upon as a measure of performance as they may have been adjusted. The evidence establishes that many final grades in the University have been so adjusted. The whole grading process

involves a substantial degree of judgment and, indeed, the grades that were assigned by Professor Lipshitz did result from such a process. There does exist on the evidence a reasonable basis to conclude that the grades that were assigned by Professor Lipshitz could be viewed as an anomaly in comparison to the past performance of the students involved. Indeed, Professor Forrest, in his testimony, described the exam marks as very surprising and, in light of previous performance, difficult to understand.

I previously said in this award that where valid interests come into conflict, they must be resolved on a basis of due process, natural justice and collegial governance. Regrettably, I do not believe that those principles were followed by the parties. The change in grades was implemented by the Dean, and there can be no question on the evidence that this is a change that was made by the University and not by Professor Lipshitz. The final grades that were assigned to these students can in no sense be considered to be grades assigned by Professor Lipshitz. That is a very significant distinction within the American jurisprudence and those cases stress the need that the institution make it clear who made the change. In the interests of fairness and due process, that distinction ought to be made clear in the circumstances of this case, and I do not believe that it was. Second, Policy 45 requires consultation and there were serious deficiencies in the consultative process that preceded the decision. While Professor Lipshitz may have had discussions with the Associate Dean, he had none with the actual decision maker. Further, the discussions with the Associate Dean focused on a review of Professor Lipshitz's examination and grading processes, as opposed to highlighting any particular institutional rights or interests with respect to those grades. Professor Lipshitz was never informed that if he did not change his grades, someone else would and neither

was he given a final opportunity to either comply with the Guidelines or have his grades changed. While I would accept that those deficiencies resulted more from inadvertence than from any animosity or bad faith on the part of the administration, they are, nonetheless, unacceptable in the context of collegial governance. Professor Lipshitz had a valid and deeply held belief in the importance of his academic freedom in the context of student grades and that cannot lightly be brushed aside in the face of institutional priorities. It is impossible, at this stage, to know whether a different outcome might have resulted from direct consultations involving Dean George and perhaps other Faculty members. The evidence is that problems are usually resolved in that way. I would accept that under the policies and procedures in place within the University, the Dean does possess the final authority to make the decision that he made, but in reaching that decision, there must be full respect for the academic freedom of the other individuals involved. It must be made explicitly clear that the grades in question are being assigned by the University and not by the Professor, and the decision ought to be made only after a full, free, and frank exchange of views.

In determining what results ought to flow from the foregoing findings, I believe paramount consideration must be given to the interests of the students involved. What happened in this case was in fact what the students in question had been told was University practice. A significant period of time has elapsed and various things have happened based on the grades that were assigned by the University. I believe it would be intolerable and unconscionable and unfair to the students to attempt to turn back the clock. While the irregularities of process have been significant, I do not think it appropriate to vitiate the actions that were taken. However strongly the parties may view

their interests in the issues raised on this Arbitration, I would hope that they would agree with me that my award should not negatively impact any students involved.

In the result, I have concluded that the change of grades by Dean George was a decision falling within his jurisdiction and authority as the Dean of the Faculty within the provisions of the University's policies and procedures. However, such powers must be exercised by the Dean in a manner consistent with the academic freedom entitlements of other members of the Faculty and on the basis of consultation and due process. Where grades are changed in such a manner, it must be clear that those are not grades assigned by the Professor involved, but rather are grades assigned by the institution itself. Within the principles of academic freedom and absent extraordinary circumstances, the University cannot force a Professor to change the grades that had been assigned and to present them as that Professor's grades. In the context of the factual circumstances of this grievance, the University has established a system of regular and advanced levels with respect to particular courses, and it is a matter of University policy that the best students are encouraged to participate at the advanced level while being given assurances that they will not be prejudiced with respect to marks by accepting that challenge. I would agree with counsel for the University that this is a totally rational policy for the benefit of the gifted student and for the University as a whole. That is a matter falling within the academic freedom of the University and at the end of the day, its implementation is a matter for the University. Implementation, however, must be achieved while recognizing, to the maximum extent possible, the academic freedom interests of all other members of the University community. As previously set out in the aware, that was not achieved. In these circumstances, the process that was followed

constituted a significant infringement of Professor Lipshitz's academic freedom due to a deficient consultation process, and a failure to make clear that the final grades were being given by the University without Professor Lipshitz's concurrence. The Association is entitled to a declaration to that effect. With respect to the communication of the results of this Arbitration, I assume the contents of this award will become known to all members of the University community. The Association, in argument, requested a letter of apology and communication to the students involved. The issue of remedy was not, in fact, extensively argued at the hearing and if the parties consider it appropriate that anything in addition to this award is required, I would be pleased to receive further submissions on the issue of remedy. I will remain seized to deal with any matter relating to the implementation of this award should the parties not be able to agree.

Dated at Toronto this day of February, 2001.

Ross L. Kennedy