Meeting Room Policy Recommendation – Essay #1

Policy is an instrument that empowers or requires the agents of an institution to act in a particular way, leading to some set of outcomes for the institution and its users. It follows then that a good public library policy ought to be grounded in a thoughtful and contemporary analysis of the profession's objectives and values, as arbitrary or stagnant policy will inevitably fail to promote these objectives and values. Furthermore, library policy must be balanced with thoughtful legal analysis for it to be useful in the long run, as illegal policies will not only be struck down by the courts but could also subject the library to various costs as well as a loss of public trust. This approach to policy is especially important in the face of professional crises where the promotion of one value becomes an impediment to the promotion of another value. No crisis of contemporary librarianship has been more exemplary of this dynamic than that brought about by the platforming of white supremacist and transphobic organizations by major public libraries through their meeting room rental policies.[1] This platforming has been met with significant protest and criticism for the harm that it causes marginalized communities; however, this criticism has been countered with appeals to the intellectual freedom that the organizations in question have a constitutional right to.

It is recommended that public library meeting room policies in Ontario be revised to include a clause that states something resembling the following:

The library may deny or cancel a booking to an individual or organization when it is evident that their conduct in public promotes or has the effect of promoting discrimination, contempt, or hatred for any individual or group who is disadvantaged, including those that are disadvantaged because of race, nationality, ethnicity, colour, religion, gender expression, sexuality, disability, or age.

This policy recommendation is justified with respect to professional practice and legal viability. With respect to the former, an analysis of the professional values in tension is provided, as well as an argument that weaker policies than the one recommended fail to resolve these tensions adequately. With respect to the latter, the authority of a public library to make such a policy explained, followed by the potential for the policy to enable *Charter* violations, while at last it is shown that the public library has a significant objective for which these potential violations are justified.

Justification Based on Professional Values

As argued above, policy cannot be arbitrary if it is to have an instrumental part in achieving the objectives of an institution. This section argues for why this policy recommendation is sufficient and necessary to resolve the tension of professional values that meeting room policies have caused. This is done by first analysing the tensions of intellectual freedom and social justice, arguing that an absolutist position on intellectual freedom can be abandoned for the sake of social justice without compromising the democratic objectives of the intellectual freedom. Secondly, it is argued that popular public library meeting room policies tend to take absolutist positions on intellectual freedom, therefore failing to adequately resolve the tension between intellectual freedom and social justice; hence, a revision of these policies that takes a more restrictive position is necessary.

Analysis of the Values in Tension

Intellectual freedom is a value that promotes the rights of individuals to seek, receive, and express information without hindrance. Key to this concept is the idea that individuals should be able to access all thoughts and opinions on a particular topic or issue, rather than just those that conform to mainstream ideology.[2] Intellectual freedom is philosophically justified on both

utilitarian and humanistic grounds. The former argues that democratic and rational governance an open arena of public debate called the public sphere,[3] and intellectual freedom is a prerequisite for this. The latter argues that intellectual freedom is itself a value worth promoting, as these freedoms are integral to the human condition. Since the Library Bill of Rights was adopted by the American Library Association (ALA) in 1939, intellectual freedom has become a codified professional value of librarians in North America to uphold democracy in the face of rising fascism.[4]

Social justice, as defined by Nancy Fraser, is a value that promotes a fair distribution of resources, personal and cultural recognition, and the participation of all individuals in society as peers.[5] Key to this concept is that fact that contemporary society lacks the above ideals due to oppressive forces and structures such as capitalism, colonialism, hetero patriarchy, etc. Due to this, advocates of social justice conclude that actions must be taken to transform these social structures to meet these ideals. Social justice work in LIS is particularly evident in cataloging and classification, as scholarship has recognized that many of the aforementioned structures have shaped our metadata practices to marginalize, misrecognize, or exclude oppressed groups of people.

It should be clear from their definitions that intellectual freedom and social justice are not in direct opposition; in fact, the participatory aspect of social justice would seem to require some form of intellectual freedom. That said, absolutist positions on intellectual freedom, which I define as the privileging of the unrestricted expression of ideas above all other values, can have the consequence of promoting social injustices, especially in the form of misrecognition. For example, an absolutist position on intellectual freedom would allow for the unfettered expression of racist or transphobic ideas, which within a structure of colonialism and hetero patriarchy, can

be culturally legitimized, and thus inflict social and psychic damages on those who are misrecognized by these expressions. Thus, intellectual freedom can be an impediment to recognitive justice. Furthermore, absolute forms of intellectual freedom can have destructive impacts on the ultimate goals of intellectual freedoms, like the expansion of the public sphere. Indeed, the legitimization of expression that misrecognizes the already marginalized may in fact close off their participation in the public sphere for many reasons, including self-misrecognition and silencing.

Thus, a solution to the tension between intellectual freedom and social justice would be to reframe intellectual freedom as only limited by speech that is likely to misrecognize identifiable groups.

The Failure of Popular Contemporary Library Meeting Room Policies

Meeting room policies in Ontario public libraries closely conform to the Canadian Federation of Library Associations (CFLA) position on their use, which takes a (nearly) absolute position on intellectual freedom, only calling for the restriction of expression that would contravene Canadian law.[6] Take for example the Toronto Public Library's meeting room policy, which states that it will deny a booking whenever it "will be [used] for a purpose that is likely to promote, or would have the effect of promoting discrimination, contempt, or hatred for any group or person on the basis of race, ethnic origin … [etc.]".[7] This type of term is not uncommon to other public libraries in Ontario.[8] Thus, libraries will tend to restrict the use of their meeting spaces only in situations where there is an indication that the expression that will take place at the meeting is hateful or discriminatory. It is for this reason that Toronto Public Library (TPL) can allow trans-exclusionary radical feminists such as Meaghan Murphy to speak on topics like "gender identify [*sic*] and its legislation [*sic*] ramifications on women in Canada".[9]

Associations such as Murphy's should not be able to speak at public libraries, as the platform provided to them give a public legitimacy to all their expression, not only that which occurs in the library. Moreover, though libraries may state that they do not endorse the views and opinions of those who use their meeting spaces, it does not follow these opinions do not affect the library and its relationship to the public.[10] Though the criteria for hate speech in Canada may only fit a small subset of expressions, this does not mean that legally non-hateful speech does not damage the library and its community by allowing a culture of hate and discrimination exist within its walls. The policy that I have recommended would prevent these situations from arising by taking into consideration more facts than just the purpose of the meeting – recognizing that absolutist positions of intellectual freedom are self-undermining in their democratic objectives, and should thus be abandoned by so-called democratic institutions, such as libraries. The next section shall argue that such a policy is legally justified.

Justification Based on Legal Principles

In this section, the reasons for why a public library in Ontario may enact the policy recommendations of this report from a legal standpoint are provided. First, the authority under which a public library in Ontario may enact such a policy is provided. Second, it is shown that although the public in Ontario may enact policies regarding its rooms, that these policies may nonetheless violate rights guaranteed by the *Charter*, creating a legal liability for the library. Third, despite these violations, I argue that the library should not fear this liability, as the policy's violations to the *Charter* are reasonably justified.

The Authority of Libraries to Establish Meeting Room Policies

The Ontario *Public Libraries Act* (OPLA) is a provincial statute that empowers the council of a municipality in Ontario to establish a public library that is under the control of a

library board.[11] Under the OPLA, public library boards in Ontario are obliged to seek to provide "a comprehensive and efficient public library service that reflects the community's unique needs".[12] In addition, the OPLA allows a library board to make rules "for the use of library services" and the "[suspension of] library privileges for breaches of the rules",[13] so long as these rules do not impose charges to the public for neither admission to the library nor its primary services (i.e., borrowing materials and reference/information services).[14]

Hence, an Ontario public library board may establish policies that govern the usage of public library meeting spaces, and these policies may include rules that could restrict the usage of meeting spaces in particular circumstances. Indeed, since the booking of a meeting space is unrelated to public admission to the library and moreover is not a primary service, the library board has the authority to create regulations of this kind. That said, these policies are subject to compliance with other legal entities that have greater authority than the library board.

Section 2(b) Violations of Meeting Room Policies

The *Canadian Charter of Rights and Freedoms* sets out various rights that must be respected by the federal and provincial governments, including all matters that fall within their authority.[15] Of particular importance to the policy at hand is Section 2(b) of the *Charter*: "Everyone has the following fundamental freedoms: … freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".[16] It is important to recognize that, with respect to an Ontario public library's meeting room policies, the *Charter* may be applicable, and furthermore, the application of a restrictive meeting room policy would violate Section 2(b) of the *Charter*.

As noted in a publicly available legal opinion by Ross & McBride LLP, with input from James L. Turk, on a Hamilton Public Library policy regarding its partnerships, programs, and

spaces: there is no conclusive way to judge whether the *Charter* applies to public libraries in Ontario, nor to their implementation of policy.[17] In fact, in the Ontario Superior Court case *Weld v Ottawa Public Library*, which involved a judicial review of a Ottawa Public Library meeting room policy, it was found that their policy was not made in a public capacity nor amenable to judicial review, due to the fact that meeting rooms are not a primary function of the library as described in the OPLA.[18] That said, it is noted in the aforementioned legal opinion that amenability to judicial review is not equivalent to *Charter* applicability, and that although this court's opinion is persuasive and potentially binding, it takes a shallow view of a library's public services.[19]

Indeed, although public meeting spaces can and often do generate revenue for the library, this purpose ought to be secondary to the actual function of public meeting spaces in a library, which is simply to provide its community members with an accessible and affordable meeting space. Moreover, as discussed in the previous section, public libraries in Ontario are created by the OPLA and municipal councils, both of which are subject to the *Charter*. Although the OPLA does not contain any statutory obligation for an Ontario public library to provide meeting rooms to the public, it does establish the public character of the library at least with respect to its primary functions. Since a court could find meeting room policies to be of a sufficient public character for *Charter* application, it is best to assume so and analyze its potential consequences.

Thus, on the assumption that the *Charter* applies to public libraries in Ontario and their policies, it is important to realize that the recommended meeting room policy, when applied, would violate Section 2(b) of the *Charter*. This conclusion comes from the framework developed by the Supreme Court of Canada (SCC) in the case *Irwin Toy Ltd. v Quebec (Attorney General)*, a framework that can be applied to determine whether a Section 2(b) violation of the *Charter* has

occurred.[20] The framework has two stages. The first determines whether the conduct in question ought to be considered *expression*. The second stage determines whether one's freedom of expression has been violated.[21]

The first stage of the framework defines expression as any activity that "attempts to convey meaning".[22] This definition of expression is apathetic to the actual meaning of the expression – it simply requires evidence of meaning. A consequence of this is that Section 2(b) of the *Charter* protects not only mainstream and pleasant forms of expression, but also those that are found to be offensive and controversial. The only limitation to this definition is when that expression takes on the form of violence,[23] or in certain contexts where expression may be limited due to rules of decorum or privacy, such as in Parliament or a cabinet meeting, respectively. Hence, if the activity in question is a non-violent attempt to convey meaning, and it is not subject to other contextual limitations, then it is an expression that is eligible for protection under Section 2(b) of the *Charter*.

In the second stage of this framework, it is determined whether the restriction of expression violates the *Charter*. Restriction of expression are categorized dichotomously in this framework: they are either content- or effects-based. Content-based restrictions restrict expression based on the meaning that are likely to convey. Effects-based restrictions are the result of policies that are not purposes to restrict a particular expression, but nonetheless do. In cases of content-based restriction, there is always a violation of the *Charter*, whereas in effects-based, it must be shown that the expression that is being restricted aligns with the *Charter* values that freedom of expression is intended to protect.[24]

In the case of restricting meeting room bookings based on public conduct, this would be a restriction of expression in many cases, as room bookings are often to speak on a particular topic

or to share ideas, etc., which surely meets the criteria of the above framework. Also, while this policy would not restrict expression based on its content (the policy can be applied regardless of the content of the speech), it would contravene *Charter* values in many cases, because meeting rooms are often used to discuss and debate ideas Thus, this meeting room policy recommendation would violate the Section 2(b) of the *Charter*.

Justification of Section 2(b) Violation

The *Charter* does not protect the freedoms therein absolutely – in fact, the first section of the *Charter* states that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[25] This means that although certain laws and regulations made by public bodies may violate the rights contained in the *Charter*, such as how the recommended policy would violate Section 2(b), they may still be allowed if the can be justified adequately.

Like the Section 2(b) framework outlined above, the SCC developed a framework to address Section 1 in the case *R v Oakes*.[26] This framework is broken into two parts: (i) whether the objective of the limit is pressing and substantial in a free and democratic society, and (ii) whether the means employed to realize this objective are justified.[27] This second part can be answered by addressing three criteria: (a) whether there is a rational connection of the policy to its objectives, (b) whether the policy is minimally impairing of the right being limited, and (c) whether the limiting effects of the policy is proportional to its goals.[28] Hence, I will show that that this criteria is met by the recommended policy, and is thus a legally justifiable limit on the rights granted in Section 2(b).

Objective of the Policy

The objective of this policy is to promote recognitive and participatory justice to

disadvantaged groups, such as those who are racialized, queer, have a disability, etc. This is a pressing objective as a lack of justice on these fronts undermines democracy by making vital democratic institutions such as the library unwelcoming and unsafe environments for these groups due to the damages caused by misrecognition.[29] This is furthermore pressing as disadvantaged groups like transgender youth face higher rates of suicide and psychological distress,[30] which cannot be dissociated from a culture that misrecognizes transgender people. Measures such as this that work towards the amelioration of conditions of disadvantaged groups are also enshrined in Section 15(2) of the *Charter*.

Rational Connection of the Policy to its Objectives

A policy that could deny the use of a meeting room to an individual or organization based on public conduct that is discriminatory, contemptuous, or hateful is rationally connected to the promotion of recognitive and participatory justice to disadvantaged groups because libraries and their services are a source of *social capital* that develops and strengthens the social relations of its users.[31] The effect of this is to further legitimize expression that misrecognizes disadvantaged groups, to the detriment of recognitive and participatory justice for these groups. Not only this, but it has been observed that the use of library meeting space by groups with discriminatory public conduct, such as Meaghan Murphy's at TPL, has led to a lack of trust in the library by the communities who are impacted by speaker's discriminatory conduct.[32]

Minimal Impairment in Meeting Its Objectives

While there are policy alternatives to the one at hand that may promote similar objectives while also being less impairing, it is found that this policy is necessary to a programme that is designed to obtain this objective – a condition that the SCC finds reasonable in satisfying this part of the test.[33] Indeed, although more positive policies like those that would promote values of

equity, diversity, and inclusion in librarianship (e.g., through educational series, hiring practices, collections development, etc.) are valid steps on the path towards recognitive and participatory justice, they are limited by already existing structures that continue to marginalize disadvantaged populations.[34] Positive measures such as these should be accompanied by negative measures that eliminate these structures rather than just competing with them. Moreover, less impairing restrictive measures, (e.g., those that impose security deposits for controversial speakers) are not restrictive enough: the effectiveness of this policy relies on the fact that it can restrict the expression of all speakers and associations whose public conduct is discriminatory, policies whose restrictions could be overridden by sufficient funds, etc. would undermine this policy.

Proportionality of the Objective to the Limiting Effects of the Policy

As stated by the SCC in *R v Keegstra*: "[f]ew concerns can be as central to the concept of a free and democratic society as the dissipation of racism".[35] In good faith, I would presume that the court would extend this centrality to other social maladies such as transphobia and ableism. The fact that the objective of this policy is to dissipate these through the promotion of recognitive and participatory justice should convey the enormity of its importance to a free and democratic society.

Some may claim that this policy has the effect of issuing *prior restraint*, which free expression activists assert is "a heavier and more draconian sanction than subsequent punishment," because it "attaches a presumption of guilt to words or publication that is not yet written".[36] However, this is not really the case, as this policy is indifferent to the content of the expression that it would restrict. Instead, this policy recognizes that platforming individuals and organizations with discriminatory public conduct in the library space has the effect of legitimizing their prior conduct, as discussed above.

That said, it does have the effect of restricting conduct that might, in normal circumstances, be protected by Section 1 of the *Charter*, and moreover, may promote some of the Section 2(b) values like public debate and the marketplace of ideas. But I assert that in the circumstances under discussion, these expressions can in fact undermine public debate and the marketplace of ideas, as was discussed in an earlier section, by increasing the harmful impact of expressions said in the past and future that misrecognize disadvantaged groups and likewise make the library a less participatory space for these groups.

It should also be noted that while this policy has the effect of restricting expression that may not contravene the *Criminal Code*,[37] it does not have the effect of criminalizing nor censoring the intended expression. Indeed, there is no punishing mechanism beyond the restriction, and often there will be alternative venues that can serve as a meeting place.

Conclusion

Public libraries in Ontario are empowered to enact policies that can limit the use of their public meeting spaces. Although these policies may violate Section 2(b) of the *Charter*, if the policy is well-crafted and put towards an objective of great importance to democratic society, it may remain constitutionally valid. The policy recommended here, which would allow public libraries to deny meeting space to individuals and groups whose public conduct is discriminatory, is an example of such a policy. It is purposeful in promoting democratic ends by limiting the proliferation of expression that contributes to culture of exclusion for disadvantaged groups, an end that is proportional to its objective. The importance of this policy is in its resolution of the tension between intellectual freedom and social justice in librarianship by continuing to allow expression and debate but limiting expressions from those who would contribute to the marginalization of disadvantaged groups.

Notes

[1] Sam Popowich, "Community, Value, and Worth" (2019), online: Red Librarian <https://redlibrarian.github.io/article/2019/10/13/commmunity-value-worth.html>.

[2] American Library Association, "Intellectual Freedom and Censorship Q & A" (2007) online: American Library Association <https://www.ala.org/advocacy/intfreedom/censorship/faq>.

[3] Jürgen Habermas et al., "The Public Sphere: An Encyclopedia Article (1964)" (1974) New German Critique, 1974:3 49 at 52-53.

[4] Alessandra Seiter, "Libraries, Power, and Justice: Toward a Sociohistorically Informed Intellectual Freedom" (2020) 47 Progressive Librarian 107 at 110.

[5] Kay Mathiesen, "Informational Justice: A Conceptual Framework for Social Justice in Library and Information Services" (2015) 64:2 Library Trends 198 at 202.

[6] Canadian Federation of Library Associations, "Position on Third Party Use of Publicly Funded Library Meeting Rooms and Facilities" (2019) online: Canadian Federation of Library Associations <http://cfla-fcab.ca/wp-content/uploads/2019/03/CFLA-FCAB_statement_meeting_rooms.pdf>.

[7] Toronto Public Library, "Community and Event Space Rental" (2018) online: Toronto Public Library <https://www.torontopubliclibrary.ca/terms-of-use/library-policies/community-and-event-space.jsp#RentalCategories>.

[8] See equivalent policies from London Public Library, Hamilton Public Library, Thunder Bay Public Library, etc.

[9] Vickery Bowles, "City Librarian Statement on Upcoming Third-Party Room Rental Event" (2019) online: Toronto Public Library <https://torontopubliclibrary.typepad.com/news_releases/2019/10/city-librarian-statement-on-upcoming-third-party-room-rental-event-.html>.

[10] Popowich, *supra*.

[11] *Public Libraries Act*, R.S.O. 1990, Chapter P.44 at s 2 & 3(1).

[12] *Ibid* at s 20(1).

[13] *Ibid* at s 23(4)(a) & (e).

[14] *Ibid* at s 23(1) & (2).

[15] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, at s 32(1) [*Charter*].

[16] *Ibid* at s 2(b).

[17] Wade Poziomka & Nick Papageorge *Legal Opinion on the Working with Us Policy* (2021), Ross & McBride LLP at 2.

[18] *Weld v Ottawa Public Library*, 2019 ONSC 5358, at para 15 [*Weld*].

[19] Poziomka, *supra* at 6.

[20] *Irwin Toy Ltd. v Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927 [*Irwin Toy*].

[21] Robert J. Sharpe & Kent Roach *Essential of Canadian Law: The Charter of Rights and Freedoms* 5th ed (Toronto: Irwin Law, 2000) at 158-9.
[22] *Irwin Toy*, *supra* at 969.
[23] *Ibid* at 970.
[24] Sharpe, *supra* at 159-60.
[25] *Charter*, *supra* at s 1.
[26] *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 [*Oakes*].
[27] *Ibid* at para 69.
[28] *Ibid* at para 70.
[29] Mathiesen, *supra* at 208.
[30] Veale et al., "The mental health of Canadian transgender youth compared with the Canadian population" (2017) 60:1 J. of Adolescent Health 44 at 46-7.
[31] Andreas Vårheim, "Trust in Libraries and Trust in Most People: Social Capital Creation in the Public Library" (2014) 84:3 The Library Quarterly 258 at 259.
[32] Matthew Murray et al., "Breaking Bridges and Destroying Trust: How Communities are Harmed When Libraries Protect Hate Speech" (2020) online: Open Science Framework <https://osf.io/kmujg/>.
[33] *R v Keegstra,* 1990 CanLII 24 (SCC), [1990] 3 SCR 697 [*Keegstra*].
[34] April Hathcock, "White Librarianship in Blackface: Diversity Initiatives in LIS" (2015) online: *In the Library with the Lead Pipe*, <https://www.inthelibrarywiththeleadpipe.org/2015/lis-diversity/>.
[35] *Keegstra*, *supra* at 787.
[36] Jamie Cameron, "A True Canadian Value" (2016) online: Ryerson Centre for Free Expression <https://cfe.ryerson.ca/blog/2016/10/true-canadian-value>.
[37] *Criminal Code*, R.S.C., 1985, c. C-46.