

PROMOTION AND PROMOTION REVIEW IN CANADIAN UNIVERSITIES

by R.L. CAMPBELL*

Il y a peu de doute que, compte tenu du nombre restreint de nouvelles nominations effectuées dans les collèges et les universités canadiennes au cours des dernières années, l'attention des intervenants s'est déplacée de la question de la permanence pour porter sur celle de la promotion. Pourtant, ces deux démarches quoiqu'extrêmement importantes sont mal comprises. Néanmoins, les critères et les procédures de promotion et de permanence ont fait le sujet de conventions collectives et de procédures judiciaires.

Les dispositions de conventions collectives ou d'ententes entre le corps professoral et l'administration, ayant trait à la promotion, comportent des différences frappantes d'ordre procédural. Ces textes existent afin de promouvoir un traitement équitable du candidat. Dans la plupart des conventions, cependant, les critères de promotion sont vagues et peu d'indices sont fournis quant à l'importance relative de chaque critère. Un aspect procédural n'ayant pas été suffisamment exploré par les tribunaux est celui de la confidentialité. Les tribunaux d'arbitrage commencent à peine à se préoccuper des complexités de ce genre de problème.

Les conflits de promotion peuvent être résolus soit par arbitrage, soit par les tribunaux. L'étendue des pouvoirs de révision et de rectification d'un tribunal d'arbitrage peut être établie par les parties à la convention. La plupart du temps, le dossier est retourné au tribunal d'arbitrage pour réexamen, mais le problème du standard à suivre pour la révision d'une décision demeure entier pour les arbitres.

La décision dans Paine énonce clairement la volonté du tribunal de réviser une cause se rapportant au rang académique. Plusieurs causes ont depuis répondu à certaines questions demeurées sans réponse dans Paine. Il se peut que la révision par les tribunaux portera uniquement sur des problèmes de postes comme dans Scholdra. Mais il n'est pas certain jusqu'où les tribunaux vont se rendre afin de contrôler la notion de "fairness" ou justesse.

Malgré l'importance relativement mineure qu'elle revêt dans les conventions et à l'occasion de procédures judiciaires, le sujet de la

*Département of Law, Carleton University.

promotion mérite un examen très attentif. Cela est d'autant plus vrai lorsque le but du processus de promotion est d'évaluer la performance du candidat.

There is little question that with the very limited number of new appointments being made in Canadian colleges and universities during recent years, the focus of attention has shifted from tenure to promotion. Yet both these processes are extremely important but little understood. It is only when one is a candidate for either tenure or promotion that the issue is personalized and interest is aroused. Nevertheless, tenure and promotion criteria and procedures have been very much the focus of collective agreements and judicial proceedings.

Provisions that deal with promotion in association and collective agreements between faculty and administrations have striking differences with respect to procedure. These provisions are tailored to ensure that the candidate is dealt with fairly. In most agreements, however, the criteria with respect to promotion are vague and little guidance is given with respect to the weight to be given to or the standard required for each criterion. One issue concerning procedure that has not been satisfactorily considered by the courts is that of confidentiality. Arbitration boards are just starting to deal with the complexity of this issue.

Promotion disputes can be resolved either by arbitration or the courts. The scope of review and remedial power of an arbitration board may be determined by the parties to the agreement. Most often the case is sent back for reconsideration, but the difficulty facing arbitration boards is the standard by which a decision must be reviewed.

The Paine decision clearly signalled the court's willingness to review a case dealing with academic status. Several cases have followed in response to some of the questions left unanswered by Paine. It may be that the courts review will extend to matters purely concerned with position as in Scholdra. But, it is still not clear what the limits of judicially enforced fairness will ultimately be.

Despite the focus that promotion may have in agreements and judicial proceedings, promotion must be carefully examined. This is particularly acute in terms of the purpose of promotion as a process of performance review.

SUMMARY

INTRODUCTION	392
I. PROMOTION	392
II. CRITERIA FOR PROMOTION	395
III. PROCEDURE	400
IV. PROMOTION REVIEW	413
A. Internal Appeals	413
B. Arbitration	415
C. Judicial Review	419
V. CONCLUSION	430

INTRODUCTION

This paper deals with promotion and promotion review of faculty in Canadian universities. The paper is divided into five parts. Part one defines promotion and states the arguments for and against the retention of promotion. Part two is a detailed analysis of the considerations taken into account when either a promotion recommendation or decision is made. Part three deals with the procedure followed in making these recommendations or decisions. Part four examines the scope of review of a promotion decision by recourse to an internal appeal process, arbitration or the courts. The last part makes several concluding comments.

I. PROMOTION

The promotion of faculty has been defined as the change or transition of rank from Assistant Professor to Associate Professor or from Associate Professor to Professor.¹ This change is important for several reasons. First, it provides a range within which faculty are paid. Second, rank confers a status which in a general way, is acknowledged and respected both inside and outside the academic community.² Third, the Professor rank provides faculty with a goal which when attained affords a sense of accomplishment.

There are, however, several powerful arguments that favour the abolition of academic ranks. Most faculty in Canada are paid according to a salary scale which consists of a number of steps. Each step increment represents the normal rate of progress for faculty whose performance has been satisfactory. Step increments are usually given on a yearly basis. Therefore, why then must

1. For example, see *Collective Agreement between The University of Ottawa and The Association of Professors of the University of Ottawa* (1984), Article 32(1) and *Lakehead University Board of Governors and Faculty Association of Lakehead University* (1984), Article 21.01. Collective Agreements shall henceforth be cited by identifying the relevant University and the date of the Agreement.

2. The *University of Toronto, Policy and Procedures Governing Promotions* (1980) document emphasizes that "status is important to the academic community" by the fact that the Agreement between the Governing Council and the Faculty Association preserves the existing ranks structure. However, there is no empirical evidence to demonstrate that rank confers a status which is acknowledged and respected outside the academic community.

faculty be given rank, and not simply be paid at whatever level they have reached on the salary scale? The step system makes ranks pointless and arbitrary designations from the viewpoint of remuneration unless realistic bars are introduced between them.³

Rank is not related to either academic function or administrative authority. Senior faculty are not assigned graduate students or senior undergraduate students because of rank. The nature of academic work does not require a "chain of command." If rank were to militate against a sense of equality among colleagues within disciplines, then rank by itself would be counter-productive. Likewise, faculty in administrative positions need not hold senior academic rank. It might be argued that there should not be such a wide variation as exists in rank among, for example department chairman and dean, but there seems no reason, given the degree of variation in academic roles, why they should necessarily hold senior academic rank.

A rank system requires a healthy distribution of faculty among ranks. But, however "health" is to be defined here, it can be maintained only with continuous infusion of new blood into the lower ranks and retirement from the upper ones. The present slow-down in recruitment, however, has resulted in a serious imbalance.⁴

3. Moreover, if certain stretches of the scale are assigned to specific ranks, what features distinguish one rank from another? Promotion suggests qualitative differences, and not merely differences of seniority, between each rank and the next. If decisions have to be made at rank thresholds, a negative decision would presumably constitute a bar and if so, what justification is there for obstacles at these points on the scale? If there were to be a bar, would it be permanent until a positive decision was made? Why should a person be barred only at the rank threshold as opposed to any position on the scale? And if there is a barring at any point what need is there for demarcating academic ranks?

4. *The University of Toronto, Policy and Procedures Governing Promotions* (1980) states that promotion should not be influenced by preconceptions about a desirable pattern of rank distribution and that any tendency to protect historical distribution should be resisted. The number of new appointments of full-time professors in Canadian Universities has fallen consistently since the early 1970s.

Year	New Appointments	Year	New Appointments
1970-71	4,039	1976-77	2,659
1972-73	2,788	1978-79	2,400
1974-75	2,895	1979-80	2,160

Source: Statistics Canada. *Education Statistics for the Seventies* (1979), Catalogue 81-569.

Some may argue that the title 'Professor' associated with the present rank system is an excessively formal and pretentious mode of address. To others, it is a source of discomfort both within and outside the University.⁵ Within, it sets up a disagreeable distinction between academic and non-academic staff and an arbitrary distinction between some junior appointees. Outside, it contributes to the insulation of the University from the real world. Few other professions, apart from the medical and military, use their occupation or rank as part of their title.

Despite the force of these arguments, there are compelling reasons for retaining the rank structure for university faculty. There are anomalies and inequities with a rank system. But, in a rankless system there may be even greater anomalies and inequities. Adjustment of individual salaries would become extremely confused if comparisons could be made only with other individuals rather than with members of a whole group of roughly similar qualifications and experience.

The rank system provides a mechanism for some periodic review of performance in early and mid-career phases. By contrast, a rankless system with largely automatic step-increases would remove any effective review once tenure has been acquired. Some would argue that careful granting of tenure should itself be a sufficient check: if an appointee cannot be relied upon to merit continuing step-increases, then tenure should not have been given. There is however, a distinction between reviewing an individual's performance early in a career to decide whether a professor should remain in the University at all, and reviewing it to decide whether an established faculty member deserves continuing or special recognition. It is only the former kind of review that takes place in connection with tenure. A place is still needed for the latter, first, because no tenure procedures, however well devised and followed, can possibly guarantee continuously adequate performance for approximately thirty-five to forty years and, second, because distinctions may still need to be drawn between those whose performance is merely adequate and those who are outstanding.

The total number of new appointments in 1982 was down to 1,369 (Statistics Canada. *Teachers in Universities* (1982-83), Catalogue 81-241).

5. York (1983/84), Article 13 which refers to the Report of the Senate Committee on Tenure and Promotions (1979).

The rank system is also important because it allows faculty to internally administer its own standards of achievement. Criterion for promotion and procedure for granting promotion have been established by faculty. Faculty also makes recommendations for promotion by peer evaluation. This function may be viewed as implicit in the responsibility faculty has as a profession and as a self-governing body.

II. CRITERIA FOR PROMOTION

Historically, the criteria for promotion of faculty members were not defined or at best, vague. Faculty Handbooks which formed part of a professor's contract were purely informative and primarily dealt with faculty benefits, recreation and cultural opportunities and local amenities.⁶ Recommendations for promotion would be made by department heads in consultation with senior colleagues.⁷ Several Faculty Handbooks did state that promotion would be based upon meritorious performance and not granted automatically or for service.⁸ Even though teaching, research, service and general performance of duties would be taken into account, the guidelines for promotion were largely undefined.

During the late 1960s Canadian Universities became "democratized." Faculty associations entered into agreements with University administrations to govern faculty's relationship with its employer, the University. Procedures and decisions were opened up for faculty participation. Association or collective agreements included provisions dealing with the promotion of faculty. In keeping with the policy of openness, the criteria for promotion were for the most part explicitly stated although in the form of fairly broad principles. Thus faculty clearly understood what was expected of them and a formal peer review system enshrined the integrity of any recommendation with regard to promotion. Since

6. For example, Bishop's Faculty Association Handbook, 1960; British Columbia Faculty Handbook, 1960; Guelph Faculty Policies Handbook, 1964; Loyola Faculty Manual, 1965.

7. See, Faculty Handbook, University of British Columbia, 1960; Laurentian Faculty Handbook, 1965; Prince Edward Island Faculty Handbook, 1971; Trent Faculty Handbook, 1970.

8. Saint Mary's Faculty Handbook, 1961; Brock University Faculty Handbook, 1969; University of British Columbia Faculty Handbook, 1962.

first appearing in association agreements, the provisions relating to promotion have been further refined.

Today there are basically four considerations taken into account in formulating a promotion recommendation — academic qualification, teaching, scholarly activity, and service.^{8a}

Academic Qualification

For most disciplines universities require a doctorate as a condition of appointment and promotion. However in “professional” sectors such as fine arts, accounting, law, teacher training, social work and nursing universities generally do not require a doctorate.⁹ Because an academic background, which does not usually include a doctorate, is normal and acceptable in such disciplines, most agreements provide that a candidate for promotion may apply an “equivalence waiver”. This clause provides that in certain sectors a Masters degree together with evidence of “scholarly activity of good quality” or “contributions in a significant manner to the advancement of the academic discipline or profession” will be sufficient to waive the doctoral degree requirement.¹⁰

8a. Collegueship should not and usually is not taken into account. Article 21.04 of The University of Lethbridge Handbook states, “Personal or social compatibility shall not be a criterion of promotion.” The University of British Columbia agreement states that judgments of an individual should be made objectively. However, the Calgary University agreement states, “Elements such as collegueship should be considered only within the context of teaching, scholarship and service.” See further, R.L. CAMPBELL, “Tenure and Tenure Review in Canadian Universities”, (1981) 26 *McGill L.J.* 362, 372.

9. For example, see Laurentian (1984), Article 2.5.7(c).

10. “Equivalence waiver” provisions have to be determined in conjunction with other provisions of an agreement. In *Laurentian University and Laurentian Faculty Association*, (1984) Rights Rep. Vol. 3, No. 6, p. 4, (Mullan) the candidate was denied promotion because the Academic Personnel Committee ruled that he was not entitled to an equivalence waiver. In the committee’s opinion the candidate’s scholarly activity did not meet the required test of good quality because it was not “original research.” The Board concluded that “original research” was not essential as the range of activities that could count as scholarly activity under the agreement was more extensive. Further, ‘extensive publication’ under the agreement did not mean that original research was an absolute requirement. Thus the absence of original research could not be automatically disqualifying but had to be balanced against other “scholarly activities” of the candidate.

Teaching

Some agreements leave teaching undefined or nominally defined by simply stating "teaching," "teaching ability," "teaching effectiveness" or "teaching quality." Others, like Article 4.01 of the University of British Columbia agreement give more direction,

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion, supervision of individual student's work, or other means by which students, whether in degree or non-degree programmes sponsored by the University, derive educational benefit. An individual's entire teaching contribution shall be assessed. Evaluation of teaching shall be based on the effectiveness rather than the popularity of the instructor, as indicated by his command over subject matter, familiarity with recent developments in the field, preparedness, presentation, accessibility to students and influence on the intellectual and scholarly development of students. Consideration shall be given to the ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

The methods of teaching evaluation vary from agreement to agreement but usually include formal student opinion or colleague assessment, calibre of course material, examinations, supervised essays or theses and documented responses from individual students. Most agreements provide more than one method of teaching evaluation. This would seem imperative as teaching is perhaps the most difficult criterion to assess.¹¹

Research

As in teaching, agreements vary as to what is meant by research. Some agreements simply state "research and scholarly activities".¹² However, several agreements have adopted a more uniform definition of research,

Scholarship/Research — refers to the quality and originality of both published and unpublished work. Factors that may be considered include the publication of books, monographs, and contributions to edited books; papers delivered at professional meetings; participation in panels; unpublished research including current work in progress both supported and non-supported; editorial and refereeing duties; creative works and performances; and scholarship as shown by the candidate's depth and breadth of knowledge and general contributions to the research life of the university.¹³

11. For discussion, see, R.L. CAMPBELL, *loc. cit.*, note 8a, 368.

12. For example, Bishop's (1982), Article 8.01; Regina (1983), Article 16.11.

13. Brandon (1984), Article 8(1)(c); Athabasca (1982), Article 4.1.2; Manitoba (1983), Article 20.2.a. What is considered to be "research and scholarly

This clause is very broad in scope and nature and includes more than merely published, works which have been traditionally considered as research.

Service

The final criterion for promotion is service. Most agreements state that service includes contributions to the department, programme, faculty and university community. Some agreements broaden the scope of service to include contributions to a wider community, such as academic or professional bodies.¹⁴ Contributions to the general community such as participation in royal commissions, consultative work, or government organizations which bring distinction to the University are in the service criterion.¹⁵

Assessment of Criteria

These criteria for promotion are invariably assessed by at least one promotion committee. The evaluative function of the

activity" for promotion in certain collective agreements has been the subject of a number of disputes. In *The University of Ottawa and the Association of Professors of the University of Ottawa (Blank)*, (1977) A.A.C. 410 (Robinson) the Joint Committee of the Senate and Board did not recommend Professor Blank for promotion because his participation in clinical psychology at the Queensway Carleton Hospital could not be regarded as scholarly activity. An article in the collective agreement excluded from research contracts and consulting activities for which a professor received remuneration "above and beyond the salary paid by the University." The Board ruled that such work, in itself, could not be used as a basis for consideration but any product, such as written articles based on work at the hospital could be considered research.

In *The University of Ottawa and The Association of Professors of the University of Ottawa (McInnis)*, (1977) A.A.C. 421 (Kruger), the arbitration board ruled that research could include a government report if it had been of high quality and widely distributed.

The precise wording of the collective agreement is the key as to what is included as research. In *The University of Ottawa and the Association of Professors of the University of Ottawa (McCutcheon)*, (1978) A.A.C. 621 (Robinson) the arbitration board drew a distinction between publication and a "product of research." A "product of research" as in the collective agreement included a broader spectrum of work than one would normally expect to find in the traditional refereed journals. This is particularly so if such work is in a medium appropriate to the discipline.

14. Alberta (1982), Article 9.01.2; Athabasca (1982), Article 4.1.3.

15. The University of Lethbridge Faculty Handbook (1983), Article 21.01.3; Calgary (1982), Faculty Appointment Policy, Article 2.4.

committee with respect to any candidate will vary. Some agreements are very explicit as to what is required for promotion from one rank to another.¹⁶ Such a committee will exercise minimal judgment in formulating its recommendation. Other agreements leave it to the promotion committee itself to decide whether, in light of the relevant provisions of the agreement, a candidate has fulfilled the requirements for promotion. In these circumstances, a heavy onus is put upon the promotion committee to carefully weigh each criterion and to determine the appropriate standard. The weight given to each criterion and the standard required will vary with each rank.

Promotion committees are often given assistance by the agreements themselves in determining the weight of and standard for each criterion. For example, the collective agreement at Carleton University provides that for promotion to associate professor, teaching is the first requirement. A balanced effort in teaching and a second activity, scholarly work, would bring about a timely promotion. But for promotion to full professor at Carleton University, scholarship is of paramount importance while teaching and other activities receive less weight.¹⁷ Other agreements provide that the criteria are to be weighted according to duties assigned over the period of reference including administrative duties.¹⁸ Usually the weight given to each criterion is established in the agreement or left to the promotion committee but the agreement at the University of Manitoba provides that the dean or director is responsible for establishing the weighting of criteria after advice from faculty council.¹⁹

The standard to be attained for each criterion is primarily left to the promotion committee to determine. This is particularly so with respect to scholarship for promotion to the rank of full professor. Even though such key words as "intellectual maturity," "outstanding," "widely recognized," "significant contribution" are stated to reflect the standard required, it is fundamentally the judgment of the promotion committee which determines whether the candidate has met the scholarship criterion.²⁰ Cer-

16. For example, Lakehead (1984), Article 2.4; Notre Dame (1977), Article E.11.

17. Carleton (1983), Appendix B.

18. Lethbridge (1983), Article 21.03; Athabasca (1982), Article 4.3.

19. Article 20(2)(b).

20. A promotions committee must, however, have regard for the relevant provisions. The committee's discretion does not extend as far as to im-

tain agreements allow the university to upgrade the standard of scholarship upon notice to faculty, or a university committee to review the standard or even a Faculty Council to develop a supplementary policy with respect to standards.²¹ At York University the onus is on the Senate Committee on Promotions to ensure that the standard is uniformly applied.²² The standard of scholarship for promotion to full professor may become more uniform across Canada because letters of reference which deal particularly with the assessment of a candidate's scholarly contributions are required by most universities. In general, the distinction between a recommendation for full or associate professor is the difference in standard of scholarship required.²³

III. PROCEDURE

Before association and collective agreements came into force, promotion procedure was relatively simple. For example, the 1960 Faculty Handbook at the University of British Columbia stated that the Department Head made recommendations with respect to promotion in consultation with senior colleagues. The Dean

pose any requirement in addition to those established by an agreement. See *Laurentian University and the Laurentian University Faculty Association* (1984), Vol. 3, No. 6, Rights Rep. 4 (Mullan).

21. St. Thomas (1984), Article 8.022; Saskatchewan (1983), Article 16.4.3; Dalhousie (1984), Article 14.06; Trent (1981), Article 3.8.2.
22. York (1984), Senate Committee on Promotions Report, p. 7.
23. The memorandum of agreement at Toronto provides that the same criteria will be applied for promotion to associate professor as to full professor but with a lesser level of accomplishment. However, the University of Toronto agreement also provides that excellent teaching alone, sustained over many years, could justify promotion to the rank of professor. At the University of Ottawa a professor whose teaching is of exceptional quality may be promoted to full professor even though the scholarship criterion continues at the associate level (Article 32.9.b).

It is interesting to note the expectation factor for promotion to full professor. The York University agreement states that the full professorial rank should not be considered a form of apotheosis but should be within the expectancy of all associate professors. The University of Toronto Policy and Procedures Governing Promotions (1980) provides that the majority of full-time tenured faculty at the University of Toronto will continue to attain the rank of full professor. On the other hand, at Notre Dame University it is expected that some professors may not attain the rank of full professor (1980, Article 11.E.111).

forwarded these recommendations to the President as he saw fit. An early American study of promotion confirmed that the locus of decision making rested primarily with the Department Head and secondarily with the Dean.²⁴ Discipline colleagues did have considerable weight as well, but faculty committees had very little influence.²⁵

During the 1960s, faculty associations insisted upon a more open promotion process. Faculty itself would formally participate in the process and have the greatest weight not only in making promotion recommendations but also in formulating the procedure by which these recommendations would be made. This procedure became part of association or collective agreements and thus subject to negotiation. Even though each university was able to tailor the procedure to meet local needs, promotion procedure across Canada has become generally more uniform, but complex and sophisticated. It resembles very much the procedure required of quasi-judicial bodies. Most of the tenets of natural justice and procedural fairness have been adopted. As a result, promotion now consumes more university resources in terms of time and personnel but the existing procedure offers the candidate greater protection and a fairer assessment. This in turn preserves the integrity of the decision to promote.

Apart from smaller universities and colleges, an eligible candidate's application is dealt with at four levels.²⁶ First, at the departmental level the promotion file is assembled by the candidate with the assistance of the chairman. The departmental com-

24. F. LUTHANS, *The Faculty Promotion Process*, Bureau of Business and Economic Research (University of Iowa), 1967, p. 50.

25. *Id.*, 51.

26. Eligibility for promotion varies significantly. Most agreements provide that a faculty member is eligible for promotion after a stated number of years service. In other agreements, eligibility is determined by position on a salary scale (Lethbridge (1981), Article 23.02.2; Saskatchewan (1984), Article 16.1; Trent (1983), Article 3.8). Most agreements provide that unusually gifted faculty may be promoted before they would be normally considered. Usually a candidate will be automatically considered at the normal point for promotion, but after that point a member of faculty must apply for promotion. At Laurentian a faculty member is not eligible for promotion in any academic year in which he/she is on sabbatical, study leave, leave without pay or political leave (Article 2.5.2) and at New Brunswick leave without pay does not count towards eligibility (Article 24A.02). At the Ontario Institute for Studies in Education [(1982), Article 15.821] and Acadia [(1984), Article 18] if a candidate is unsuccessful, he/she may not reapply for two years.

mittee examines all relevant evidence and makes a recommendation to the dean of the faculty. At the second level, a larger committee, usually composed of representatives from all constituents of the faculty meets and reviews the application for promotion. The file at this stage contains letters of reference for candidates to full professor. The faculty committee makes recommendations to the third level, a university-wide committee which is composed of senior administrators and faculty selected either by the University Senate, the President or elected by Faculty Council. The university committee reviews promotion files from all faculties and then makes its recommendation to the President of the University. The President in turn reviews the files and makes his own recommendation to the Board of Governors which makes a decision with respect to the candidate's promotion.²⁷

It is not only the multilevel committee review by colleagues that affords the candidate protection, but also the manner in which the committees are struck that dispels any bias or the apprehension of bias. The departmental committee may be elected, appointed or restricted to senior colleagues or colleagues with tenure, but its members are known to the candidate.²⁸ If a candidate can successfully demonstrate to the departmental chairman that a member is improperly biased or incapable of rendering a fair judgment, then that member is not allowed to sit on the committee.²⁹ Certain agreements provide that no person shall be a member of a promotion committee at another level, that a member shall not attend nor vote if the candidate is a family member and that a person is ineligible if a conflict of interest exists.³⁰

27. Agreements clearly state when each level will be established and when the candidate's application will be considered.

28. Toronto (1980), Policy and Procedures Governing Promotions, p. 8; Algoma (1983), Article 14.02; York (1984), Article 13; Lakehead (1984), Article 18.02.01; New Brunswick (1983), Article 25A.01 which also stipulates the number of members according to the size of the department; British Columbia (1982) which provides that selection may be a procedure agreed to by the department head and the eligible member, Article 5.02.

29. Lakehead (1984), Article 18.03. Difficulties can ensue when this procedure is not followed, see *Paine v. The University of Toronto*, (1982) 34 O.R. (2d.) 770 (C.A.) and for comment see, R.L. CAMPBELL, "Administrative Law-Colleges and Universities-Denial of Tenure-Judicial Review", (1983) 61 *Can.Bar. Rev.* 622.

30. Saskatchewan (1984), Article 16.6.2; St. Thomas (1984), Article 9.027; Acadia (1984), Article 12.33.

The agreements provide ample opportunity for a candidate to be heard. At some universities a candidate has a right to appear and question evidence at any stage of the proceedings, before a negative recommendation is made, or at the next level if a negative recommendation has been made, or may even be invited to appear by the committee to clarify any part of the promotion file.³¹ At other universities the candidate is restricted to writing to the committees or submitting additional information if the candidate believes the case not to be adequately represented.³² Most agreements are silent as to whether a candidate may appear with counsel but others state that a candidate may be accompanied by another faculty member of his choosing or a member of the faculty association.³³

Generally candidates are now better informed of the contents of the promotion file. At York University the candidate is always kept informed of the progress of the application.³⁴ Other agreements are more specific and state that the candidate has the right to know any adverse evidence or documentation on file.³⁵ The candidate receives notice of any negative recommendation and the reasons for such a recommendation must be stated in sufficient detail, be substantive and relate to the criterion of promotion.³⁶ If there is an onus upon the promotion committee

-
31. Brandon (1984), Article 12.6; Manitoba (1983), Article 20.3.e; Dalhousie (1984), Article 14.04; Acadia (1984), Article 12.21; Saskatchewan (1984), Article 16.63; Lethbridge (1983), Article 23.03.6.
 32. Carleton (1983), Article 10.02(e); Alberta (1984), Article 9.06.6.2., but the candidate may be present when the chairman presents his case, Article 9.06.6.3. See also Toronto (1980), Policy and Procedures Governing Promotions, para. 26 where the chairman has the right to appear before the decanal committee.
 33. Lakehead (1984), Article 21.09; Brandon (1984), Article 12.6; Alberta (1984), Article 9.06.9 provides that a candidate does not have the right to counsel but in exceptional circumstances, at the discretion of the Committee Chairman, may be assisted by a law adviser.
 34. York (1984), Article 13 which refers to the Report of the Senate Committee on Tenure and Promotions (1979), p. 18. At Acadia, if the recommendation is negative, the candidate is invited to appear, Acadia (1983), Article 12.21(f).
 35. St. Thomas (1982), Article 9.0347.
 36. Brandon (1984), Article 12.5 and 16.11; Alberta (1984), Article 9.06.5; New Brunswick (1983), Article 25B.06. At Lakehead the Department Chairman must advise the candidate in writing of the numbers supporting and not supporting promotion and supply unattributed typed copies of the reasons given for the support or lack of support, Lakehead (1984), Article 21.08.

to provide a reasoned opinion, any failure to do so will entitle an arbitration board to interfere with a committee's ruling. In *Laurentian University and Laurentian University Faculty Association*³⁷ the candidate applied for an "equivalence waiver" because he did not have a doctorate. The Academic Personnel Committee ruled that he was not entitled to an "equivalence waiver" because in its opinion evidence of "scholarly activity of good quality" required "original research." The arbitration board made the point that it was not obliged to defer the Academic Personnel Committee because no "reasoned opinion" as required by the collective agreement had been given.³⁸ The arbitration board stated,

"Reasons" requirements are adopted for a number of reasons, among them being a form of insurance that decision-makers actually do reason and adhere to the mandate imposed upon them; the provision of a basis upon which a person affected can decide whether s/he has been dealt with properly and whether or not to launch an appeal; and also the provision of a basis upon which appeal bodies can decide whether a decision has been properly made.³⁹

The collective and association agreements are replete with provisions that provide for procedural fairness. Committees must consider all relevant information in the candidate's file which includes information submitted by the candidate.⁴⁰ Any anonymous material is usually excluded except aggregate statistical student evaluations as provided in each agreement.⁴¹ Any other student comments must be in writing and signed. Some agreements require that minutes be kept, attendance be recorded and that committee members familiarize themselves with the candidate's

37. (1984), Vol. 3, No. 6, Rights Rep. 4 (Mullan).

38. The committee at p. 3 of the award ruled,

The committee decided not to grant an equivalence waiver under article 2.20(3)(b) of the Collective Agreement because, in the committee's opinion, the candidate's scholarly activity did not meet the test of good quality. The committee did not agree with the recommendations of the Dean and the FPC that the "ensemble" of the candidate's scholarly activities were of good quality. In the committee's opinion, scholarly activity demonstrating "original research" was necessary for it to be "of good quality."

39. *Id.*, 15.

40. For example, St. Thomas (1983), Article 9.034.

41. York (1984), Article B which refers to Report of the Senate Committee on Tenure and Promotions (1979), p. 20.

file.⁴² Recommendations are based solely on the file contents which include recommendations from other levels together with letters from referees.⁴³ Recommendations and decisions are recorded and determined by majority vote unless a special majority is required by the agreement.⁴⁴ Committee chairman do not always have the right to vote unless there is a tie.⁴⁵

Very few agreements deal with faculty who are cross-appointed. A professor who has a cross-appointment is involved in the work of more than one department. Usually the main appointment is made to a specific department whose promotion committee will deal with the professor's promotion. No recommendation from the departmental level is formulated without consultation between the departments. The recommendation is made, however, by the department in which the candidate has the main appointment.⁴⁶

For promotion to full professor, most agreements require outside references. The referees are selected usually by the dean after consultation with the candidate who has the right to strike names

42. Bishop's (1982), Article 8.03; Acadia (1983), Article 12.45; Brandon (1984), Article 12.7; Algoma (1983), Article 15.04; Acadia (1983), Article 12.21.

43. New Brunswick (1983), Article 25B.05.

44. British Columbia (1982), Article 5.02(b)(viii); New Brunswick (1983), Article 25B.06; Lakehead (1984), Article 18.07 (5 out of 7); Bishop's (1982), Article 8.03 (3 out of 4); at St. Thomas the recommendation is arrived at by open vote (1984), Article 9.0345; at Saskatchewan the University Review Committee shall ascertain minority views, Article 16.6.6(vi). If a special majority for promotion is required, it must be stated in agreement. In *Carleton University and Carleton University Academic Staff Association*, (1980) Vol. 1, No. 4 Rights Rep. 5 (Palmer) the candidate was denied promotion because she did not receive a two-thirds majority in the University Promotions Committee as required by past practice. The collective agreement had no mention of any special majority nor were the union negotiators aware of its existence until after the agreement had been signed. The arbitrator noted that no other group on campus operated on a two-thirds basis and that the rate applied only to the third stage of promotion. The arbitrator was of the opinion that where more persons in a group recommended one course of action than another, it would seem only appropriate to characterize the recommendation as positive.

45. Trent (1984), Article 3.8.3.2.

46. Toronto (1980), Policy and Procedures Governing Promotions, para. 22; Ottawa (1984), Article 35.3; New Brunswick (1984), Article 25B.10.

from the list if the candidate can successfully demonstrate bias.⁴⁷ In most cases the referee is sent a copy of the curriculum vitae, the materials submitted by the candidate, and the criteria for promotion as stipulated in the agreement.⁴⁸ These references assist committees particularly in evaluating the scholarship criterion. Letters of reference may also be useful when committees do not have sufficient evidence to make a reasonable judgment or when a candidate's competency is questioned by a member of the committee.⁴⁹ At New Brunswick a candidate who has already received negative recommendations at the first two levels, has a right to require external references to assist the University Committee in its recommendation.⁵⁰ At St. Thomas the referees are informed that their assessments are not confidential.⁵¹ In most agreements the letters of reference are confidential while others provide that referees' reports are to be edited to remove the identity of the author and then retyped or summarized so that the candidate can determine whether or not to respond.⁵²

The President's options are usually spelled out in the agreements. At Carleton the President must recommend to the Board of Governors those approved by the University Committee,⁵³ at St. Thomas the President cannot unreasonably reject a recommendation of the second level committee⁵⁴ and at Lethbridge if the President does not accept a recommendation, the dean must be notified with reasons and the promotions committee must reconsider its recommendation.⁵⁵ Regardless of option, if the President's recommendation is negative, the candidate must be given the reasons of the area of deficiency or those criteria not met.⁵⁶ A

47. Lakehead (1984), Article 21.04.01; the dean or committee may also initiate assessments by outside referees, Trent (1984), Article 3.8.3.4.4.

48. Lakehead (1984), Article 21.04.02.

49. Trent (1984), Article 3.8.4.9; St. Thomas (1984), Article 9.0344.

50. New Brunswick (1984), Article 24A.11.

51. St. Thomas (1984), Article 9.03443.

52. Lakehead (1984), Article 21.04.04; Acadia (1984), Article 12.45(g).

53. Carleton (1983), Article 10.4(e).

54. St. Thomas (1984), Article 10.4(e).

55. Lethbridge (1983), Article 19.13.

56. Lakehead (1984), Article 19.02.03; British Columbia (1982), Article 5.07(d); Carleton (1983), Article 10.4(d). The President must not take into account any improper considerations, see, *Notre Dame University and the Faculty Association of Notre Dame (Scott)*, (1976) A.A.C. 49 (Williams). Further,

candidate who has received a negative recommendation from the President should be advised as to his right to appeal to either a university appeal committee or the grievance procedure, if available, under the collective agreement.⁵⁷

Confidentiality

As already noted, at least one agreement provides that letters from outside referees may be disclosed to a candidate for promotion.⁵⁸ Invariably the identity of the author is concealed or a summary of the letter is given to the candidate.⁵⁹ If a candidate who has received a negative decision decides to grieve the denial of promotion, then these letters are usually available to a grievance chairman and ultimately, to an arbitration board.⁶⁰

The position with respect to the deliberations of promotion committees, however, appears to be different if there is a clause providing that the proceedings of these committees be confidential. This position can be frustrating particularly to a candidate whose promotion is repeatedly denied. Such was the case of Professor Boyd of the Department of Biomedical Science at the University of Guelph. Professor Boyd had been denied promotion for 10 years and was not able to determine the reasons for the decisions against him under the Guelph promotion procedures.

After considerable efforts by the Canadian Association of University Teachers, the University of Guelph agreed to submit Professor Boyd's grievance to consensual arbitration in 1979. Part of the terms of reference authorized the adjudicator to determine

the President cannot unilaterally set the standards for promotion, see *Notre Dame University and the Faculty Association of Notre Dame (Hurling)*, (1976) A.A.C. 59 (Williams).

57. Saskatchewan (1984), Article 16.6.3.

58. *Supra*, note 51.

59. *Supra*, note 52.

60. The Arbitration Act, R.S.O. 1980, c.25 s.12(2) states,

The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire, on oath in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, documents and things within their possession or power respectively that may be required or called for, and do all other things during the proceedings on the reference that the arbitrators or umpire require.

whether Professor Boyd "had been treated equitably in comparison with his colleagues." The adjudicator was of the opinion that Professor Boyd was entitled to know the reasons for the decision to deny promotion and ordered the university to provide copies of all documentation put before the departmental promotion committee.⁶¹ In his interim award, the adjudicator stated,

The mandate which I have within the terms of reference is one which I can only discharge by examining Dr. Boyd's own treatment as against the treatment accorded to other of his colleagues and the bases upon which his colleagues have or have not been treated different than Dr. Boyd is evidence relevant to the scope of this inquiry. Consequently, Dr. Boyd's Counsel is entitled both to cross-examine on this broad range of matters in issue and to have access to the materials requested.⁶²

The University of Guelph objected and filed a notice of motion to have the interim award set aside on ground that the adjudicator had "misconducted" himself and asked that the documents which the adjudicator requested be deemed privileged and confidential and hence not disclosed.

Mr. Justice Hollingworth agreed with the University and quashed the interim award of the adjudicator.⁶³ The argument that the adjudicator could not carry out his terms of reference if the personnel information was not made available to Professor Boyd was rejected.

The "Wigmore" rules of admissibility were applied to determine the need for confidentiality and it was concluded that if there was a conflict between confidentiality and disclosure, confidentiality should be followed.⁶⁴ The equitable rule of breach of

61. Even though Professor Brandt was called an adjudicator in the agreement under which he was appointed, he functioned in all respects as an arbitrator.

62. *Re University of Guelph and the Canadian Association of University Teachers*, (1980) 29 O.R. (2nd.) 312, 315.

63. *Id.*, 323.

64. The four tenets or privilege cited by *Wigmore on Evidence*, 3rd. ed. (1940), Vol. 8, para. 2285, reads as follows,

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

confidence was also applied. This rule states that when someone receives a confidential communication that person cannot use the same against the interests of the person who gave it. Mr. Justice Hollingworth stated,

The matter as I see it, boils down to whether or not the fourth principle of Dr. Wigmore should be deemed valid, namely, that confidentiality is more important than disclosure. I find in this case that it is. It seems to me that in order to get an honest opinion from colleagues of a person who is appearing before a board set up by the university and particularly when everyone knew (and, indeed, it is admitted in the brief of counsel for the respondent confidentiality was known by the respondent) that the only way one can get this honest and unbiased answer is by assuring people who make submissions that they will be protected by a cloak of confidentiality. In short, to break the rule of confidentiality would be to rupture irretrievably the effective working of a system of peer evaluation of tenure, merit increments and of promotion. By disclosure, witnesses would inferentially and conceivably be held *in terrorem*.⁶⁵

The decision of Mr. Justice Hollingworth is open to challenge both on the basis of law and policy. The mere fact that a

65. *Supra*, note 61, 322. Mr. Justice Hollingworth ruled that Dr. Boyd would have the right to cross-examine witnesses as long as no questions were asked about the proceedings of the promotions committee.

Mr. Justice MacDonald of the Supreme Court of Prince Edward Island arrived at a different conclusion in a promotion denial appeal of several faculty of the University of Prince Edward Island (In the matter of the Appeals of Loucks et al., October 11, 1983). To balance the right of the candidate to know the case that had to be met against the interests of the University in keeping secret confidential information, he concluded at p. 7,

- (a) A candidate for promotion should have the right to know the full contents of his promotion file subject to the right of the President to respect any confidence originating from the evaluator or reporting person.
- (b) The President should, in respecting a confidence, only remove the name, address, institutional affiliation and any other identifying features of the evaluator from the evaluation found in the file.
- (c) If the President is of the opinion that after removal of the items listed in (b), the form, style or other items contained in the letter would identify the evaluator, then he should supply to the candidate a summary of the contents of the report without leaving out any details that those in the promotion process would act upon to the detriment of the applicant.
- (d) If an appellant, after reviewing a file revised under (b) or (c), desires more information, he should be allowed to come to the Appeals Committee which would review the file and determine whether there is a particularized need for additional information.

Mr. Justice MacDonald noted that the candidate should be immediately notified by letter that a document has been placed in his file.

conversation or document, which is relevant to an inquiry before the Court, originated "in confidence" does not of itself effectively establish a legal objection which would then exclude it from an inquiry by a Court.⁶⁶ Communications that are made in confidence will be excluded, however, if the confidential communication would offend the equitable rule of confidence or arises within a relationship which is recognized as privileged at law. The basis for the equitable principle is to preclude the person receiving such information from taking unfair advantage of it.⁶⁷ In this case Professor Boyd was not proposing any use of this information to the detriment of the University or any unfair use, but was attempting to access documents and cross-examine to determine whether he was treated equitably in relation to others.⁶⁸ If the adjudicator had found that Dr. Boyd had not been treated equitably, he was only empowered to make adjustments to Dr. Boyd's rank and salary.

As to exclusion on the basis of the "Wigmore" rules, Mr. Justice Hollingworth felt that the fourth tenet, that injury as a result of disclosure would be greater than the benefit gained by the disclosure, was paramount.⁶⁹ The fourth tenet does not mean, however, that if there is a conflict between confidentiality and disclosure, confidentiality should be followed rather than disclo-

66. *Re Inquiry into the Confidentiality of Health Records in Ontario*, (1979) 24 O.R. (2d.) 545, 557, (C.A.) and *D. v. National Society for Prevention of Cruelty to Children*, [1977] 1 All E.R. 589, 594.

67. *Seager v. Copydex Limited*, [1967] 1 W.L.R. 923, 931; *Slavutych v. Baker et al.*, (1975) 55 D.L.R. (3d.) 224, 230. See also, S.N. LEDERMAN, "Effect of *Slavutych v. Baker et al.* and Judicial Discretion to Exclude Confidential Communications," in *Prominent Evidentiary Issues: Confidentiality and Character Evidence*, the Law Society of Upper Canada, (1979), p. 19.

68. The case of *Slavutych*, *op. cit.*, note 67, is an example of unfairness because the University to whom Professor Slavutych had written a scurrilous letter about a colleague, fired him indicating that the letter had been made in bad faith. See, Arvay, "*Slavutych v. Baker: Privilege, Confidence and Illegally Obtained Evidence*", (1977) 15 *Osg. Hall L.J.* 456, 462.

69. *Re University of Guelph and Canadian Association of University Teachers*, *op. cit.*, note 62. It should be noted that with respect to the second tenet (see note 64) there was no suggestion that the element of confidentiality was essential to the relationship between individual professors and the promotion committee at the University of Guelph. Further, the adjudicator was not insensitive to the need of confidentiality. He felt, however, that his ruling would have no effect on the future practices of the University. There could be the possibility that the adjudicator might hold the proceedings entirely *in camera*.

sure.⁷⁰ Any weighing of benefit or injury begins from the premise that all relevant evidence is admissible. The adjudicator had balanced the interests of confidentiality against those of disclosure and concluded that the injury to the confidential relationship was not sufficient to outweigh the benefit gained by the disclosure for the correct disposal of the matters in dispute.⁷¹

The Boyd decision can be challenged on other than legal grounds. It is not at all clear that damage to the peer evaluation system is greater than damage to individuals who might be denied access to information necessary to present an adequate defence.⁷² The argument that only when confidentiality is assured will full and frank opinions be expressed can be countered by the argument that confidentiality encourages biased and unfair comment although it might be argued that collegiality provides a potential check on this. Further it is difficult to understand why some universities would decline to make comparative information available because it could not be used to the disadvantage of the faculty members concerned but would be used only to make possible equitable comparisons between them and faculty members being considered for promotion.⁷³

A more equitable resolution to the "comparative information" issue occurred at the University of New Brunswick where Professor Waddell, an economist, alleged that he had been unreasonably denied promotion to full professor.⁷⁴ The collective agree-

As to the third tenet (*supra*, note 63), the "community" in the Wigmore test is the community at large, rather than the limited community which was involved with the communications. In various cases, the public interest in arriving at the truth outweighs the private interest of the parties in maintaining confidentiality. For example, no privilege attaches to "confidential communications" between priest and penitent, nor between doctor and patient. It may, indeed, be very difficult to show that a general community interest exists for sedulously fostering this relationship between university colleagues.

70. *Reference Re Legislative Privilege*, (1978) 83 D.L.R. (3d.) 161, 169; *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169, 1182.

71. The adjudicator also noted that disclosure of the confidential communications would not create any potential for a long-term threat to the future operation of these committees. See *supra*, note 69.

72. The CAUT guidelines call for as much openness as possible in academic status decisions.

73. Particularly when some universities make comparative information available to grievance chairmen and arbitration boards.

74. *University of New Brunswick and The Association of the University of New Brunswick Teachers*, (1983) Vol. 3, No. 2, Rights Rep. 1 (Kruger).

ment stated that promotion to full professor was reserved for persons "who have achieved distinction," but "distinction" was not defined.⁷⁵ Professor Waddell had been recommended for promotion by the Level I and Level II committees, but the Level III committee did not recommend promotion. The Association alleged that the Level III recommendation was unreasonable but the only way it could discharge its onus of establishing this was by examining the files of other recently promoted candidates.⁷⁶ From such an examination, it could proceed to show how in practice "distinction" was defined at the University of New Brunswick and to use this yardstick to make its case that the grievor qualified for promotion by any reasonable measure of his qualifications against those who had met the standard.

The arbitration board noted that the New Brunswick Industrial Relations Act clearly gave the Board the power to order the University to make the requested files available to the Association and the Board and thus it was an issue as to whether the Board would exercise its discretion to order that the files be made available.⁷⁷ The Board did exercise its discretion in favour of the Association's request because it was reasonable. The term "distinction" was vague and its meaning could only be derived from the way it was used in practice at the University of New Brunswick in deciding cases of promotion to full professor. The University was ordered to make available the files of those promoted to full professor the same year as Professor Waddell's promotion was denied and the files of the two economists promoted to full professor within the last two years.⁷⁸ The Board was concerned that the confidentiality of these files be preserved and ordered that the parties meet to determine which portions of these files were relevant to the proceedings and cautioned them that the confidential documents be discussed only among those involved in the proceedings.⁷⁹

75. The collective agreement stated, "Official Files and copies thereof shall be clearly marked as confidential." Article 26.01.

76. Article 26 of the collective agreement provided that a member could examine his own file but made no provision for the Association or its members to examine other files.

77. *Supra*, note 74, p. 4.

78. The Board agreed that open-ended access to an unlimited number of unspecified files would be unreasonable.

79. If the parties failed to agree, those files in dispute were to be sent to the chairman of the arbitration board who would decide the matter.

IV. PROMOTION REVIEW

A decision to deny promotion may be reviewed in three ways. First, the agreement with the university may provide for an appeal procedure within the university. Second, the candidate may grieve the denial of promotion through the grievance procedure to arbitration. Third, the candidate may apply to the court for judicial review through one of the prerogative writs or their statutory equivalents.

A. Internal Appeals

Every agreement that does not allow recourse to the grievance procedure and arbitration, does provide that a candidate may appeal a promotion denial to an internal appeal committee. Approximately one-half of the association and collective agreements have a preference for an internal appeal process on the basis that the review procedure involves complex forms of academic judgment.⁸⁰

Invariably the internal appeal procedure is complex and sophisticated and as in the decision-making process, the rules of natural justice and fairness are applied. The appeal committee usually has at least three members, none of whom may have been involved in any other promotion committee which dealt with the appellant's case.^{80a} Some agreements provide for voluntary removal or removal of a committee member by contest to avoid conflict of interest or bias or apprehension of bias.⁸¹ In most

80. Algoma (1983), Article 29.07; Carleton (1983), Article 30.7(a). There is no evidence, however, that access to the grievance procedure and arbitration has not in any way been inappropriate at other universities. For the pros and cons of internal review, see R.L. CAMPBELL, *loc. cit.*, note 8a, 374.

80a. In *Université Bishops et Association des professeurs de l'Université Bishops (Groves)*, (1978) Vol. 1, No. 2, Rights Rep. 6 (Brody) the candidate tried to set aside the dismissal of his case by the University Appeals Committee on the grounds that one of the members on the Appeals Committee had been a member of the Committee on Tenure and Promotion which had dealt with the promotion. The arbitrator dismissed the grievance because there had been a lapse of four years between the recommendation of the promotions committee and the decision of the appeals committee and therefore, there was sufficient distinction between the two files.

81. British Columbia (1982), Article 13.08(b); Saskatchewan (1984), Article 16.6. No agreement provides for an Appeals Committee of less than three members. Most in fact have more. Members of the Appeals Com-

agreements documentation considered by all lower level committees is available to the appellant, thus the proceedings may be *in camera*.⁸² The appellant may appear and be heard but not every agreement provides that counsel be permitted.⁸³ In some universities the appeal committee performs an investigative function as well as appellate.⁸⁴ Internal appeal committees can always review procedural defects and in some cases, the reasonableness of the promotion decision.⁸⁵ Discrimination and denial of academic freedom may also be grounds for appeal.⁸⁶

The remedies available to an internal review committee are usually spelled out in the agreement. If there has been no substantial procedural error, then the appeal is to be dismissed.⁸⁷ Substantial procedural errors usually result in remission to the committee where the error occurred.⁸⁸ In some agreements the appeal committee may reverse the decision to deny promotion if after weighing all the evidence, the appeal committee finds that the decision was unreasonable.⁸⁹ Virtually all agreements provide that the decision of the appeal committee is final and binding on the President and Board of Governors.

mittee are not always faculty of the same institution. For example, the Toronto, Carleton and Notre Dame agreements contain provision for the appointment of a chairman who is from outside the University.

82. Saskatchewan (1984), Article 16.6.6. The British Columbia agreement provides the right to cross-examine, Article 13.08(c), (e), (f);
83. Manitoba (1983), Article 20.D.3.2.; British Columbia (1982), Article 13.08(d); Saskatchewan (1984), Article 15.14.
84. Algoma (1983), Article 15.05; Carleton (1983), Article 10.5(a)(iv); Manitoba (1983), Article 20.D.3.1; Lethbridge (1983), Article 27.02.3.
85. Notre Dame (1977), Article 11.C; British Columbia (1982), Article 13.10(b); the Manitoba agreement does not permit a substantive review, Article 20.D.4.2.
86. Brandon (1984), Article 12.21. The Regina agreement provides that only the Appeals Committee may question witnesses, Article 18.9.6.
87. Alberta (1982), Article 11.04.4; Carleton (1983), Article 10.5(a)(iv).
88. Brandon (1984), Article 12.21. The Alberta agreement provides that a Rehearing Committee may rehear the case, Article 11.05.1. At British Columbia a procedural error which has not been cured at the level where it was made gives the Appeal Board jurisdiction to reverse the decision. Article 13.10(a)(i).
89. Brandon (1984), Article 12.21; British Columbia (1982), Article 13.10(b)(ii).

B. Arbitration

Most arbitration cases dealing with denial of promotion are heard by a board of three members. Some boards must be composed of current or former faculty members of another university.⁹⁰ Arbitration boards invariably have jurisdiction to hear denial of promotion cases on the basis of denial of academic freedom or discrimination.⁹¹ Some agreements only permit review if there has been a significant procedural defect.⁹² Others permit review if the criteria for promotion have not been fully or fairly evaluated or the decision arrived at was unreasonable.⁹³ This jurisdiction is the most taxing on the arbitral system because the board is being asked to do a substantive review without being privy to committee deliberations.

The remedial power of an arbitration board can be one of two types. The first is a general authority to prescribe a remedy as the board sees fit.⁹⁴ This is an unfettered power to dispose of the case in a just and equitable manner. The second is a limited authority which is prescribed in the agreement itself. This is a mandatory direction which the board must follow otherwise it would be altering or modifying the agreement. This limited authority in turn may be divided into three categories. The board may not be authorized to reverse a decision, but simply to quash it on the basis of a procedural irregularity or defect.⁹⁵ Alternatively, the board may remit the matter to be reconsidered by the

90. Acadia (1984), Article 19.42; St. Thomas (1984), Article 15.072.

91. Lakehead (1984), Article 27.03.01; York (1984), Article 13.03(b). Some agreements contain a very broad clause for review. For example, Ottawa (1984), Article 44.1 defines "grievance" as "any difference between the parties to this Agreement arising from the application, interpretation or administration or alleged violation of this Agreement, including denial or natural justice and any question as to whether a matter is arbitrable."

92. York (1984), Article 13.03(a); Lakehead (1984), Article 27.03.01. It should be noted that a candidate does not always have to wait to grieve until a decision is made with regard to the promotion application. Some agreements provide that a candidate may appeal from the level of committee where the error was made, Toronto (1980), Policy and Procedures Governing Promotions, para. 29.

93. New Brunswick (1983), Article 41.29; Toronto, Policy and Procedures Governing Promotion (1980), para. 28.

94. Laurentian (1984), Article 8.3.10; St. Thomas (1983), Article 15; Trent (1983), Article 6.9; Ottawa (1983), Article 44.

95. York (1984), Article 13.03.

promotion committee.⁹⁶ In this case the board does not have authority to order that promotion be granted. Finally the board may, if it finds that the judgment or discretion of the promotion committee has been exercised in an arbitrary or unreasonable manner, substitute its own judgment for that of the committee and order that promotion be granted.⁹⁷ Generally arbitration boards are reluctant to do this unless remission is considered to be inappropriate or the decision was clearly or palpably wrong resulting in a substantial miscarriage of justice.⁹⁸

Most arbitration boards hearing denial of promotion cases favour remission. In *The Association of Professors of the University of Ottawa and the University of Ottawa*⁹⁹ Professor McCutcheon grieved his denial of promotion to full professor by the Joint Committee. Professor McCutcheon had been recommended by the Departmental and Faculty Teaching Personnel Committees and by the Dean on the basis that he had continuously and significantly contributed to the advancement of the profession. The Joint Committee, however, denied this promotion on the basis that he had not, in its opinion, continuously and significantly contributed to the advancement of scholarly knowledge in his specialty. The Board took the position that the only question before it was whether there had been compliance with the provisions of the collective agreement and, in turn, whether the decision on the merits was a reasonable one.¹⁰⁰ The Board noted

96. Saskatchewan (1984), Article 16.6.7; New Brunswick (1983), Article 41.29.

97. New Brunswick (1983), Article 41.29. At Toronto the Grievance Review Committee does not have jurisdiction "to change any of the provisions of a duly enacted policy or established practice of the University or to substitute any new provision therefore, or to alter this Agreement." Article 7, Step 4.

98. Re *The University of Ottawa and the Association of Professors of the University of Ottawa (McCaughey)*, (1978) A.A.S. 562 (Kruger). In *University of Ottawa and the Association of Professors of the University of Ottawa (McCutcheon)*, (1978) A.A.C. 621 (Robinson), the board did not "share the judgment" of the Joint Committee and awarded the grievor a promotion to the rank of Associate Professor.

99. (1981) Vol. 2, No. 1, Rights Rep. 5 (Frankel).

100. The Arbitration Board stated, "A defect in procedure, or an error of interpretation could be grounds for quashing the decision of the Joint Committee without however requiring this Arbitration board to substitute its decision on the merits of his case for that of the Joint Committee." *Supra*, note 99, 3.

that the Joint Committee considered Professor McCutcheon's qualifications on the basis of another criterion in an effort to make standards consistent across campus. The Board set aside the decision of the Joint Committee and instructed it to reconsider the adequacy of recommendations in terms of the specific language of the collective agreement. The Board stated,

A decision of the Joint Committee to refuse a promotion recommended by a faculty implies, in effect, that the reasons given by the faculty for its recommendation were not, in light of the collective agreement, persuasive both in themselves and in relation to standards applied in the University at large. The Joint Committee has the authority to make such a decision subject, however, to review by way of the grievance process for its conformity with the collective agreement and its reasonableness on the merits. In the instant case it is not possible for the Arbitration Board to deal with the merits when it is apparent from the oral evidence adduced at hearing that the recommendations of the faculty and subsequent refusal of the Joint Committee were based on two different and mutually exclusive subclauses of article 32.7(c)(i).¹⁰¹

On the other hand, Arbitration Boards do not hesitate in asserting jurisdiction whenever committees act incorrectly either substantively or procedurally. In *Laurentian University and Laurentian University Faculty Association*¹⁰² it was argued that it was not the board's role to interfere with the decision of the Academic Personnel Committee that "original research" was necessary simply because it was the Board's view that there was an incorrect reading of the relevant provisions of the collective agreement. The board could only interfere, it was further argued, if the decision demonstrated patent unreasonableness or bad faith. The Board quashed the decision of the academic Personnel Committee that "original research" was necessary for it to be "of good quality" on the basis that the committee had not exercised its discretion in light of the proper principles and criteria as established by the collective agreement.¹⁰³ However, the Board remitted the case to the Academic Personnel Committee for reconsideration in light of the Board's ruling.¹⁰⁴

101. *Supra*, note 97, 9.

102. (1984) Vol. 3, No. 6, Rights Rep. 4.

103. Because Professor Bastin-Miller only had a Master's degree, he had to apply for an "equivalence waiver" for promotion to Associate Professor. By the provisions in the collective agreement, the waiver could be granted if there was evidence of "scholarly activity of good quality."

104. The Board noted that it was concerned with only a threshold issue, not the issue of promotion itself. *Supra*, note 102, 5. In *Association des*

Similarly, in *The University of New Brunswick and The Association of the University of New Brunswick Teachers*¹⁰⁵ the arbitration board ordered that the grievor's case be reconsidered by the committee. Professor Waddell had been recommended for promotion to professor by the Levels I and II Promotions Committees and by his dean. The Level III Promotions Committee did not recommend Professor Waddell. The Association argued that this recommendation was unreasonable and ultimately obtained the files of other professors recently promoted to full professor to determine how "distinction" in practice was defined at the University of New Brunswick.¹⁰⁶ At the hearing of the denial of promotion the Association argued that in reaching its decision, the University had not followed the procedures outlined in the collective agreement and that those who reached the decision had exercised their judgment or discretion in an arbitrary or unreasonable manner. It was also the Association's position that the evidence showed an inconsistent standard applied by the Level III Committee. The University argued that the collective agreement strives to preserve the collegial decision-making process for deciding promotions and curtails the authority of an arbitration board to intervene in promotion matters. The board found that the file was incomplete at the Level III Committee and that the President did not consider the recommendations of all three assessment committees nor did he have all the reasons and documentation used by the Committees to assist him in dealing with cases where there had been conflicting advice. The Board concluded, however, it was not in a position to decide whether Professor Waddell had met the standard of distinction for promotion because it did not have the evidence from the files of others promoted to full professor. The board stated,

Bibliothécaires et Professeurs de l'Université de Moncton et Université de Moncton (Clermont), (1982) unreported (Gagnon) it was held that none of the evidence presented allowed the board to doubt the good faith of the University or to contend that it had discriminated against the candidate. The grievance was dismissed. There were, however, significant procedure defects and remission may have been a better remedy. See also, *The University of Ottawa and the Association of Professors of the University of Ottawa (McInnis)*, (1977) A.A.C. 421 (Kruger). The Board ordered the Teaching Personnel Committee to reconsider Professor McInnis' application for promotion.

105. (1983) Vol. 3, No. 2, Rights Rep. 3 (Kruger).

106. *University of New Brunswick and The Association of the University of New Brunswick Teachers (Waddell)*, (1983) Vol. 3, No. 2, Rights Rep. 1. See *supra*, note 74.

It is clear that no Board of Arbitration should decide to intervene in this way unless it is convinced that, not only was an injustice done, but that for some reason it would be inappropriate to refer the matter back for decision to the President and his advisors. In this case, there is no evidence that anyone involved harboured any malice toward Professor Waddell or was for any reason disposed to single him out for unfair treatment.¹⁰⁷

The board ordered that the matter be returned to the Level III Committee whose members had to examine the files of all those promoted to Professor in the prior year.¹⁰⁸

C. Judicial Review

Until recently the Courts have been unwilling to review any decisions relating to academic status including tenure and promotion. Universities were considered to be private institutions, thus prerogative writs were not available because academic status decisions were considered to be made by domestic tribunals.¹⁰⁹ The

107. *Supra*, note 105, 28. Arbitration boards are not always reluctant to substitute their own decision for that of a university committee. For example, in *Re University of Ottawa and the Association of Professors of the University of Ottawa (McCaughey)*, (1978) A.A.S. 562 (Kruger) the University of Ottawa was ordered to grant tenure to the grievor.

108. The Waddell case became a trilogy. The board was requested to reconvene to review the action of the University in implementing the award to determine whether full compliance had been made. The matter had been returned to the level II committee for reconsideration and the committee recommended against promotion. The collective agreement provided that a tentative vote of the committee must be taken and an unfavourable recommendation communicated in writing to the candidate with reasons so that any further evidence could be submitted before a final recommendation was made. However, the previous award requested only reconsideration by the level III committee before making a recommendation to the President. Thus, the issue now was whether this committee was to make a tentative decision and inform the candidate so that he could respond, and then make a final decision, or proceed with only one reconsideration as ordered in the award. The board held that nothing in the previous award was intended to alter the normal procedure of the committee. Even though the previous award requested a "meeting" of the committee, the board stated that a meeting can be adjourned and completed on another day. Therefore, the matter again had to be returned to the level III committee for reconsideration. *The University of New Brunswick and The Association of the University of New Brunswick Teachers (Waddell)* (1984), (Kruger).

109. *Vanek v. Governors of the University of Alberta*, [1974] 3 W.W.R. 167 (Alta.S.C., T.D.), *aff'd.* (1975), 57 D.L.R. (3d.) 595 (App. Div.). See also, FRIDMAN, "Judicial Intervention into University Affairs" (1971) 21 *Chit-*

relationship between professor and university was purely contractual and therefore, any remedy for breach thereof had to be found in the common law contract.¹¹⁰ Besides, a decision of academic status involved peer review by colleagues, a procedure unique to Universities and largely unknown by courts.

The attitude of the courts has changed, however, for several reasons. Universities which at one time were funded by private or eleemosynary sources have become publicly funded. As a result university growth flourished during the 1960s and universities have become large institutions. New legislation which prescribed minimum rules of fair procedure applicable to tribunals created under provincial legislation, provided a means for challenging negative decisions relating to the academic status of faculty.¹¹¹ The common law remedy of damages for breach of contract was inappropriate particularly in a case of tenure denial.¹¹² Finally, university faculty as a group negotiated with university administrations for procedures to be followed in matters of academic status. If the procedures were not followed or were defective by standards usually accorded to similar bodies, then the resulting decision could be set aside on a procedural review without interfering with the merits of the decision which was largely arrived at by the judgment of colleagues.

It is now firmly established that a decision not to grant tenure is subject to judicial review. In *Paine v. The University of Toronto*,¹¹³ the Divisional Court of the High Court of Justice in Ontario declared that the process whereby the applicant was denied tenure was invalid and of no effect. Professor Paine objected to the presence of one member of the tenure committee

ty's L.J. 181 and WADE, "Judicial Control of Universities" (1969) 85 L.Q.R. 647.

110. *Craig v. Governors of University of Toronto*, (1923) 53 O.L.R. 312 (H.C.), *Smith v. Wesley College*, [1923] 3 W.W.R. 195 (Man.S.C., T.D.) but cf. *Ex parte Jacob*, (1861) 10 N.B.R. 153 (S.C.).

111. *Statutory Powers Procedure Act* S.O. 1971, c. 47; *Judicial Review Procedure Act*, S.B.C. 1976, c. 25.

112. *McWhirter v. Governors of the University of Alberta (No. 2)*, (1977) 80 D.L.R. (3d.) 609 (Alta.S.C., T.D.). The Alberta Court of Appeal was of the opinion that there was no breach of contract, (1979) 18 A.R. 145. See also, *Dombroski v. Dalhousie University*, (1975) 55 D.L.R. (3d.) 268 (N.S.S.C., T.D.); aff'd. (1976) 15 N.S.R. (2d.) 299 (App.Div.).

113. (1980) 30 O.R. (2d) 69, 115 D.L.R. (3d.) 461 (Osler, Cory and Gray JJ.).

who had provided a thoroughly negative report of the candidate's suitability for tenure just prior to his appointment to the tenure committee. The Chairman of the department knowing the contents of the report appointed its author to the committee to replace a vacancy three days before the committee met. Professor Paine did not know of the negative assessment, nor that the person who had written the negative assessment was a member of the committee. The negative recommendation of the tenure committee was appealed to the tenure appeal committee which dismissed the appeal on the alleged irregular procedure and bias because an opportunity had been given to Professor Paine to object to any person he did not want to have on the committee. Thereafter, Professor Paine requested the University Ombudsman to investigate his case. After investigating the matter, the Ombudsman recommended that the tenure appeal committee reconsider the case. The tenure appeal committee declined to do so. However, the President of the University requested that the case be reconsidered by the tenure appeal committee. It did so under a new chairman, but declined to reconsider its original decision.

The Court was of the opinion that adherence to essential procedural requirements of fairness was required and that the granting or withholding of tenure involved a statutory power of decision. The Court stated,¹¹⁴

In our view, there is that element of public employment and support by statute that requires us to consider whether or not essential procedural requirements were observed by the University, its president and governing council in carrying out their respective functions with respect to the application of Mr. Paine for tenure.

...

In our view the exercise by the president of the University of the power given to him by the council to award tenure appointments, is the exercise of power conferred under a statute to make a decision deciding the eligibility of a person to receive a benefit and is the exercise of a statutory power of decision within the meaning of *The Judicial Review Procedure Act* and of *The Statutory Powers Procedure Act*.

The Divisional Court held that the appointment of a member to the tenure committee, who had concluded sometime before that Professor Paine was not acceptable for tenure, with prior knowledge of the views that he had expressed, constituted pro-

114. *Id.*, 88. At p. 89, the Court was also of the opinion that the President must be taken to have acted through the tenure and appeal committees and that their actions must be taken as his.

cedural unfairness or the likelihood of unfairness to anyone who knew or became aware of the member's previous statement.¹¹⁵ Further, the court was of the opinion that since there was no *de novo* hearing on appeal, the subsequent appeals or hearing did and could not have the effect of validating the decision of the tenure committee so constituted.¹¹⁶

The University of Toronto appealed to the Ontario Court of Appeal which allowed an appeal from the Divisional Court's decision and dismissed the application for judicial review.¹¹⁷ The Court of Appeal held that a decision as to tenure was amenable to *certiorari*, but noted that courts should be reluctant to intervene in university affairs and declined to do so in this case on the basis that Professor Paine had not been treated with such manifest unfairness as to call for the intervention of the Court.¹¹⁸ The Court of Appeal stated,¹¹⁹

The question is whether, at the end of the day (to use an English expression), Mr. Paine has shown that he was treated with such manifest unfairness as to call for intervention by the court. It may be that a judge would think it wrong and unfair for the chairman to have selected, as a member of the Tenure Committee, a man who had written an adverse assessment of the candidate; but the members of the university community to which Mr. Paine belonged, and to whose judgment he submitted, thought otherwise. I think this is not a case where the court should intervene to substitute its own views for those of the review committee's.

Associate Chief Justice MacKinnon concurred on the ground that the validity of the rejection of tenure rested on the decision of the tenure appeal committee which the parties by their agree-

115. *Id.*, 89.

116. *Ibid.*

117. *Paine v. University of Toronto*, (1982) 34 O.R. (2d.) 770 (C.A.) (MacKinnon A.C.J.O., Brooke and Weatherston J.J.A). Leave to appeal to the Supreme Court of Canada was refused April 15, 1982.

118. The Court of Appeal doubted, however, that the power to "appoint" under *The University of Toronto Act*, S.O. 1971, c.56, was a "statutory power of decision" within the meaning of *The Judicial Review Procedure Act*. This interpretation may be too restrictive. Admittedly the 1971 Act does not confer the power or right to make a tenure decision. But, tenure merely relates to the nature of appointment and the only power to make academic appointments of a term, probationary or tenured nature must be done by the president pursuant to the general power "to appoint."

119. *Supra*, note 117, 776. The Court of Appeal also noted the inadequacy of damages for breach of contract as a possible remedy.

ment and actions had determined to be the acknowledged arbiter of the issues raised, and that there was no manifest error on the part of the proceedings.¹²⁰

It is true that new ground had been claimed with respect to judicial review of tenure decisions, but *Paine* left many questions to be answered. These include, what methods of judicial review are available, what constitutes procedural fairness in academic personnel committees, when do preconceived views of a member of the personnel committee become bias or even the likelihood of bias and should the courts be willing to defer to the judgment of committees and appeal committees of the university?¹²¹

Recent cases have responded to some of these questions. In *Re Ruiperez and Board of Governors of Lakehead University*¹²² Professor Ruiperez was not recommended for tenure by the departmental promotions and tenure committee and the appeals committee dismissed his appeal. He then requested an opportunity to make representations to the Board of Governors before it decided his case. Professor Ruiperez was not given the opportunity of making these representations, nor was he given access to the specific material before the board when it made its decision. An application for judicial review was granted by the Ontario Division Court. The Court noted that the Board of Governors which had the statutory power to make a decision regarding tenure had delegated this power to the executive committee.¹²³ Even though the President had a power of veto, legal responsibility for the decision rested in the executive committee. Thus the executive committee, in the Court's opinion, was bound to make the decision fairly. The Divisional Court felt the failure to be given an opportunity to make representations to the executive committee and not to be advised of nor be given even the substance of all the information considered by those who made recommendations unfavourable to him constituted unfairness and

120. *Supra*, note 117, 777.

121. For a discussion of the questions as they relate to tenure, see, R.L. CAMPBELL, "Administrative Law-Colleges and Universities-Denial of Tenure-Judicial Review", (1983) *Can. Bar Rev.* 622.

122. (1982) 130 D.L.R. (3d.) 427 (Ont. Div. Ct.) (Galligan, Grange and Labrosse JJ.).

123. *Id.*, 430. This power had not been delegated to the promotion and tenure committee or to the appeals committee which merely conducted investigations and made recommendations. Thus the Court did not review their proceedings.

therefore quashed the decision not to grant tenure.¹²⁴ The Court admitted that it would not be an easy thing to maintain a proper balance between the duty to protect the confidentiality promised to people who give information in connection with tenure applications and the duty to be fair to an applicant, but was of the opinion that the difficulty of resolving these conflicting duties did not negate the need to disclose the essence of any detrimental information.¹²⁵

The Ontario Court of Appeal dismissed the appeal of Lakehead University.¹²⁶ The Court of Appeal noted that since refusal of tenure had drastic consequences for the right of Professor Ruiperez to continue in his profession or employment, a high standard of justice was required and held that that standard had not been met in this case.¹²⁷ The Divisional Court's order was varied to quash the recommendations of the promotions and tenure committee and the appeals committee and to provide for a new hearing before the promotions and tenure committee.

The standard of procedural fairness applicable to academic status decisions is not the same as the standard for judicial proceedings. In *Bezeau v. Ontario Institute for Studies in Education*, the applicant alleged unfairness on three grounds.¹²⁸ First, the report of the departmental tenure and promotion committee was not sufficiently explicit to permit him to make a response. Second, a minority view of one of the committee members was not made available to him. Third, he was not allowed to appear in person at the next committee stage but only could make written submissions. The Ontario Divisional court was of the opi-

124. Grange J., held that there was procedural unfairness because of the failure to give the applicant an opportunity to respond to the allegations against him before the executive committee.

125. *Id.*, 431. The Court felt that it was mandatory that the applicant be informed of the essence of the information considered by those who made unfavourable recommendations in order that he be given an opportunity to respond. It would be necessary that the sources of information be identified.

126. *Re Ruiperez and Board of Governors of Lakehead University*, (1983) 147 D.L.R. (3d.) 154 (C.A.) (Holden, Weatherston and Thorson JJ.A.).

127. *Id.*, 156. The Court applied *Kane v. Board of Governors of University of British Columbia*, (1980) 110 D.L.R. (3d.) 311 and agreed with the Divisional Court that while it was unnecessary for the sources of information to be identified, the candidate should be given the essence of the information so that a response could be formulated.

128. (1982) 36 O.R. (2d.) 577 (Ont.Div.Ct.) (Galligan, Reid and Krever JJ.).

nion that even though certain aspects of proceedings could be called unfair, there was not manifest unfairness and dismissed the application. Reid J. noted that the process in respect of tenure was agreed upon by the members of the institution and is quite distinguishable from the conduct of cases in the courts. Thus fairness in this case should be seen not in the same light as a court sees it, but in the light of the difference between the court process and the tenure granting process. One difference is the "grave difficulty facing a member of such a committee as the departmental one involved in the early stages of this process, in expressing explicitly his views of the reasons for his conclusion that tenure should not be granted in any particular case."¹²⁹

The reasons of Galligan J. for dismissing the application are more convincing. He noted that there was a collective agreement of which the candidate was a member between the Board of Governors and the faculty association. This agreement contained provisions relating to the procedure for granting tenure, a grievance procedure and arbitration. The applicant was not satisfied with the results of the grievance procedure and had thus invoked the arbitral process which could have dealt with the merits of his application for tenure. Before the arbitration board was constituted, the application for judicial review was launched. In the opinion of Galligan J. the applicant had available an adequate alternate remedy and thus dismissed the application.¹³⁰

The Courts have insisted, however, that a faculty member be given the substance of adverse allegations and an opportunity to respond when academic status is in issue. In *Re Giroux and The Queen in right of Ontario*¹³¹ the President of Laurentian University struck an ad hoc committee to advise him of the relevancy of Professor Giroux's degree.¹³² The committee considered

129. *Id.*, 579. The Court also approved *Harlekin v. University of Regina*, [1979] 3 W.W.R. 676 (S.C.C.) which made it clear that courts should use restraint and be slow to interfere in university domestic affairs by means of the extraordinary writs.

130. *Id.*, 581.

131. (1984) 43 O.R. (2d.) 552 (Ont.Div.Ct.) (Southey, Saunders and Fitzpatrick JJ.). An appeal was dismissed, (1984) 46 O.R. (2d.) 276 (Thorson, Robins and Tarnopolsky JJ.A.).

132. The university imposed, as a condition of tenure, that each teacher of a college which the university had previously taken over, had to obtain a post-graduate degree in a field of study relevant to the needs of the university's school of education.

the thesis for this degree in his absence and decided it was of minimal relevancy. Thus, the President decided not to submit Professor Giroux for tenure evaluation. Professor Giroux applied for judicial review of the Presidents's decision and the Ontario Divisional Court rescinded it and ordered the President to reinstate Professor Giroux as a member of the faculty. Saunders J. held Professor Giroux was entitled to procedural fairness and that the University fell short of the standard of fairness,

It is not possible to set forth precisely the standard of fairness that is required and dangerous to attempt to do so as each case to a very large extent is determined by its particular circumstances. It is safe to say that a faculty member is entitled to the absence of bias or a reasonable apprehension of bias on the part of those who are making the decision, a knowledge of the substance of any adverse allegations against him and a reasonable opportunity to meet such allegations.¹³³

In the opinion of Southey J. the applicant was entitled not only to fairness but also to have had his academic status decided in accordance with the principles of natural justice.¹³⁴ Professor Giroux was the only one for whom a special committee had been set up to determine the value of his thesis to the university and the one man at the university who seemed to have lost confidence and patience with Mr. Giroux was appointed to the committee. Thus Southey J. set the president's decision aside on the basis of reasonable apprehension of bias.

The courts have gone so far as to apply procedural fairness to an academic status issue even though the candidate would not otherwise have been entitled to consideration for the status. In *Re Bennet and Wilfrid Laurier University*¹³⁵ the applicant's fixed term contract was about to expire. A faculty committee recommended that Professor Bennett be given a tenure-track appointment but the dean refused to recommend such an appointment because of student complaints which were never disclosed to Pro-

133. *Supra*, note 131, 567.

134. *Supra*, note 131, 580. Fitzpatrick J. placed heavy emphasis on the judgment of Dickson J. in *Minister of National Revenue v. Coopers & Lybrand*, (1979) 92 D.L.R. (3d.) who stated at p. 7, "The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process."

135. (1983) 43 O.R. (2d.) 123 (Ont.Div.Ct.) (Steele, Holland and Anderson JJ.).

fessor Bennett. The faculty appeals committee and the president dismissed her appeal. Professor Bennett was heard at all levels but at no level was she given the opportunity to hear the actual evidence that was against her so that she could reply to it. Steele J. held that the applicant must be treated fairly and stated,

While the applicant had no right to be considered for a candidacy appointment, the university decided that she would be so considered by the dean convening the faculty committee, which gave its favourable report. Once having commenced such consideration, the applicant had a legitimate expectation that her case would be heard and that she would have a right to reply to what was alleged against her. This included the right of the applicant to be told the substance of the student grievances in sufficient detail for her to reply thereto. In other words, once the process had been commenced by the university to consider her, she was entitled to the same fairness as would a person have been in the above referred to cases dealing with tenure or discipline.¹³⁶

While noting that a court should be reluctant to intervene in university affairs, Steele J. held that the University did not properly follow its procedure by refusing to let Professor Bennett know the case she had to meet. Accordingly, this was manifestly unfair and the decisions of the dean, faculty appeals committee and the president were quashed and declared invalid.¹³⁷

Holland J. was not persuaded that this was an exceptional case where manifest unfairness or flagrant injustice had occurred so as to warrant the exercise of the court's discretionary supervisory power.¹³⁸

Thus far the Ontario courts have established that tenure proceedings are subject to judicial review and that a candidate for tenure is entitled to procedural fairness. In British Columbia the same considerations apply to promotion proceedings. In *Shue Tuck Wong and Roberts*,¹³⁹ Professor Wong was recommended by the department tenure committee and the dean for full professor at Simon Fraser University. The University tenure committee and the president did not recommend that Professor Wong be promoted. Professor Wong alleged unfairness on three grounds. First, the letters of reference considered by the president were never

136. *Id.*, 126. See also, *Regina v. Minister of Labour, Ex parte General Supplies Co. Ltd.*, (1965) 47 D.L.R. (2d.), 189 (Alta.S.C.).

137. The Court of Appeal has granted the University leave to appeal.

138. *Supra*, note 135, 128.

139. (1983) Vol. 3, No. 4, Rights Rep. 1.

given to him. Second, he received only an abbreviated summary of the report of the university tenure committee while the president considered the full text of the committee's report. Third, he had no access to information received by the president in a meeting he had with the chairman of the departmental tenure committee. Professor Wong applied under the provisions of the Judicial Review Procedure Act¹⁴⁰ and the decision of the president was quashed.¹⁴¹

It is arguable that promotion denials should not be subject to judicial review or procedural fairness because promotion denial does not affect a faculty member as drastically as tenure denial. The faculty member who is denied promotion has the right to continue employment in the profession and, indeed, may reapply in the future. In the alternative, it can also be argued that the standard of fairness need not be as high as in cases of tenure of dismissal — the severity of consequences should normally be more relevant to the content than the scope of procedural fairness review. Even though promotion affects a faculty member's status, it is relatively less in importance because it is a matter of position, not presence.

If denial of position has continuing and serious effects in a faculty member's career, however, the decision to deny that position is reviewable by the court. Such was the case in *University of Lethbridge Faculty Association and Scholdra and The Board of Governors of the University of Lethbridge and Woods*.¹⁴² The applicant, Dr. Scholdra who had been appointed Director of the School of Nursing was informed by the vice-president, to whom she reported, of his dissatisfaction with her as director. She was given reasons for his dissatisfaction, requested to resign but she declined to do so. The president recommended to the Board of Governors that she be replaced as director and she was replaced. This decision, however, in no way affected her academic appointment or her right to remuneration of financial benefits which she would otherwise have had during the balance of the

140. R.S.B.C. 1979, c. 209 (S.C.B.C.) (Murray J.)

141. Murray J. was of the opinion that it would be proper to delete names and any other material which would identify the authors from the letters of reference. The decision of the university tenure committee was not quashed because the committee was not made party to the proceedings and the Board of Governors had been struck out as Respondent in separate proceedings.

142. (1984) Vol. 3, No. 6, Rights Rep. 3.

directorship. The decision only affected her rights to act as Director of Nursing. The applicant applied for *certiorari* on the basis that the president did not give her reasons for his recommendations to the Board of Governors so that she might have an opportunity to respond. Mr. Justice MacDonald of the Court of Queen's Bench of Alberta was of the opinion that the discharge of the applicant from her position as Director of Nursing could have a continuing and serious effect upon her career and therefore was a matter of serious importance to her. The Court was also satisfied that the Board of Governors must obey the duty of fairness and stated,

So the Board of Governors was bound in law to ascertain from the president what his reasons were for making the recommendation. We do not know if in this case the president expressed reasons for his recommendation to the Board of Governors. There is no evidence on that point. If he did, those reasons were not communicated to the applicant. If he did not, then the Board ought to have required him to give reasons and then the Board should have seen that those reasons were communicated to the applicant so that the applicant might have an opportunity, if she so desired, to respond to them.¹⁴³

From *Ruiperez and Bennett* it would appear that the university must advise a candidate of the essence or substance of detrimental information so that the candidate may respond to it. But, it is not clear what the limits of judicially enforced procedural fairness will ultimately be. Much of the current uncertainty flows from the *Paine* decision which imposed a different standard of review for universities from the standard generally applied for judicial review. In *Paine* the standard was not one of "fairness" but one of "manifest unfairness." This difference also appears in *Bezeau* as Reid J. noted that the process used to make a tenure decision differed greatly from that which characterized court procedures. In *Giroux* it was not possible to precisely set forth the standard of fairness because each case is determined by its particular circumstances.

The fact that limits to the standard of procedural fairness may vary from one case to another indicates that the notion of what is fair in the university context will be shaped by the university milieu. In *Paine*, the Court of Appeal was influenced by

143. *Id.*, 10. It made no difference that the vice-president had given reasons for his dissatisfaction because the applicant may have decided to respond once the matter was at the stage of the exercise of the decision-making power. The Board would not be required to give an oral hearing — the procedure could be either formal or informal.

the fact that the University community to which Professor Paine belonged did not find this particular matter to be procedurally unfair. Similarly, in *Ruiperez*, the Court of Appeal relied heavily upon University community standards as it would be a breach of these standards not to be given notice of detrimental information. Not many faculty would probably wish to be heard at an executive committee of the Board of Governors but Boards of Governors which do exercise a power of veto over academic status issues or a power of decision over senior administrators as in *Scholdra*, will be required to apply procedural fairness in making that decision.

So far the cases concerning review of academic status decisions have dealt only with standards of procedural fairness. They have not touched the issue of substantive fairness — a completely unreasonable decision by fair procedures has not yet been heard. The courts do have a limited jurisdiction to deal with cases of this nature but will probably be even more reluctant to intervene in this regard than they are in regard to procedural unfairness.

V. CONCLUSION

It is less than clear in administrative law what impact the presence or absence of a pre-existing right or interest should have on the availability or level of fairness or natural justice. With tenure and promotion, the applicant may fall midway between two extremes: there is no pre-existing right to the interest in question, but usually to consideration for the interest.

Perhaps a more helpful approach is to look at tenure and promotion in terms of the relative impact a denial of tenure and promotion can have on the applicant. With respect to tenure, both the strength and the nature of the interest would seem sufficient to merit at least some procedural review, unless there are strong considerations to the contrary. Tenure secures continuous livelihood for faculty and more importantly, protects academic freedom which is essential to the professorial position. Without tenure, society may not receive the benefits of an academic's research. In a similar manner, the career implications of a promotion decision would also seem to raise a prima facie case for procedural review. Promotion to professor is granted only to those who have distinguished themselves in a particular field. The position of professor, it may be argued, is important to that recognition. Denial of promotion, however, does not have as se-

vere consequences a denial of tenure. Thus, the standard of fairness required may not necessarily be as high as for tenure or dismissal proceedings.

The task of setting appropriate standards of procedural review of tenure and promotion decisions is complicated by the issue of confidentiality. These decisions require candid and often delicate assessments by all people involved in the process, especially the peers of the candidate who work with him or her on a day-to-day basis. A strong case may be made for protecting the confidentiality of committee deliberations and the contents of the applicant's file. It may also be argued that the tenure and promotion process would be reduced to a charade if colleagues merely went through the motions without confidentiality. If confidentiality is not protected then colleagues may be inhibited from saying anything at all and indeed, if there were disclosure, the collegiality itself could be in danger. On the other hand, the candidate can argue that knowledge of the contents of the file is vital to enable him to meet the case against him.

It would seem that there has to be a compromise, not a perfect result, but one that best balances the interests of the applicant and integrity of the process. In at least one case, the applicant was given the contents of his file either with the identity of the evaluators removed or, if impossible, a mere summary of the contents of the file.¹⁴⁴ In theory, this procedure seems to balance both interests. But who should be responsible for drawing this balance and how can the identity of an evaluator be kept confidential when the applicant knows who the evaluators are? Would in camera consideration, restricted to the applicant's counsel, be preferable? Alternatively, are fair procedure and peer review so incompatible in this respect that a satisfactory compromise is impossible?

Like other academic status decisions, promotion of faculty has become a sophisticated process within the university structure. Provisions in collective and association agreements have become elaborate and complex. Administrative expediency has given way to greater procedural protections for the applicant. There is greater uniformity not only in the promotion process, but also in the standard required due to the requirement of outside references, particularly, for promotion to full professor.

144. *Supra*, note 65.

Raising the standards of research for promotion during the 1980s has been an inevitable by-product of tight fiscal policies of government. New appointments of faculty have significantly decreased, while the number of graduate students has increased. If the standard of research is increased to reflect a corresponding increase in the academic excellence of an institution, then, in principle, faculty should have no objection. But, some universities now have salary ceilings on ranks which cannot be lifted until promotion. Further, once promotion is finally granted, there is no catch-up provision. If increases in the standard of research for promotion are justified on the basis of an institution's fiscal policy, then they are unacceptable because this reason bears no relation to academic excellence.

Is, then, the promotion of faculty through ranks worth retaining? It is true that a great deal of time and energy is spent on the promotion process. Promotion can also create a great deal of stress in the workplace if faculty who have been previously promoted have not done as much research as those who are being presently denied. On the other hand, the promotion process provides a mechanism for review of a faculty member's performance over a period of time.

With respect to promotion to the associate professor level, several observations may be made. First, this review of a candidate's performance usually follows a tenure consideration by only one or two years. Second, the same considerations are taken into account for promotion as for tenure. Why then, have a second review of the candidate's performance at this time? Surely it would make more sense to make promotion automatic upon the granting of tenure.¹⁴⁵ Such a step would reduce the workload of promotion committees and give tenure even greater visibility and importance within the university. More importantly, the linking of promotion to associate professor to the granting of tenure would remedy the anomaly of denying promotion after having recently granted tenure. This is even more incongruous because the considerations for each is the same, thus giving the impression that one of the decisions may have been incorrect.

Promotion to full professor, however, may be viewed from another perspective. This decision is made many years after

145. Article 24A.07 of the University of New Brunswick agreement (1983-85) now states that when a faculty member has been granted tenure, s/he shall simultaneously be promoted to the rank of Associate Professor.

tenure, thus there is a definite period of performance review. Time, energy and stress of colleagues do not negate the necessity of undertaking performance review of other colleagues. Individual faculty members who are promoted to full professor are rewarded primarily for outstanding contributions to research. Also promotion to full professor encourages faculty who have not yet been promoted to undertake research programmes with the ultimate goal of being promoted.

But these reasons give way to other questions. Is promotion to full professor an effective performance review? Need there be or should there be a special distinction for faculty whose research contribution is greater than that of their colleagues? Does the possibility of being promoted to full professor actually encourage faculty to undertake research? Finally, what effective form of performance review will encourage a continuation of outstanding research and teaching after promotion?

For many Canadian universities, promotion and promotion review may well be retained as a troublesome, time-consuming necessity. If the benefits are going to outweigh the drawbacks, though, academics will have to spend proportionately more time out of the promotion review room and more in discussions on reconsidering the general role and structure of promotion, and on re-designing its procedures.