New Developments in Natural Justice: Their Application to Tenure Decisions

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Introduction

Tenure reflects and guarantees the fundamental place of the scholar-teacher in the university's unique contribution to the common good of society: the free pursuit and exposition of truth. Given this, the commitments, rights, and responsibilities of faculty members involve three major, related roles: to participate in the search for basic truths, and openly to communicate the results of this search; to develop creative scholarship in specific disciplines, within which students participate in the process of rational inquiry;

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> to encourage where feasible the generalized application of scholarship and research, to the benefit of the university community and for the common good of society.[1]

Historically, the granting of tenure to university faculty members after a period of five to eight years seemed akin to acceptance in a prestigious and private men's club.[2] However, this idyllic world no longer exists. Women have demanded entrance to the club; students are now involved in assessing teaching competence; governments are increasingly questioning the role of universities; collective bargaining has come into prominence and tightening budgets have forced cutbacks. Finally, and most relevantly for this paper, unsuccessful tenure candidates are questioning the denial of tenure and, like dismissed employees in other occupations, are seeking legal recourse.

Currently, certified trade unions are representing the faculty on many Canadian campuses, and the collective agreement, arbitration provisions and relevant provincial labour code determine the rights and obligations of the parties. In some instances, although the faculty is not unionized, faculty associations have negotiated a "group contract" under some form of special plan relationship; this has been done at the Universities of Alberta, British Columbia, Calgary and Toronto. Even in those cases where there is only a private contract between the professor and the university, the terms of that contract have come under public review.[3] The winds of change are blowing across the campuses.

> It may well be that the notion of the university as a collegial community of scholars was never more than an ideal, and that the reality was more like that of a community based on a benevolent but hierarchical paternalism. Be that as it may, it was possible in such a community, not regulated by a written code, to have a good deal of flexibility—whether for good or for ill. With formalized collective bargaining, even the fiction of collegiality must give way to a legally defined employer/employee relationship, the details of which are embodied in a collective agreement.[4]

Until recently the courts have had little to do with these issues in a direct way. However, that is quickly changing and this paper proposes to

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[1] Concordia University (Montréal), *Document on Tenure Policy*, (unpublished, 1980).

[2] We use the word "seemed" advisedly since the legal status of tenure is unclear. Professor Mullan thus points out that: "It should not,... be at all surprising that the general legal incidents of 'tenure' are so unclear when the very legal basis of the relationship which the word purports to describe is the subject of ongoing debate." D. Mullan, *Tenure: Employment for Life on an Uncertain Future?* (unpublished paper, Queen's University, Faculty of Law, 1980, 3).

[3] For a more extensive discussion of these various relationships, see I. Christie, *University Employment Law: The Canadian Experience* (unpublished paper, Dalhousie University, Faculty of Law, 1980) and the comment thereon by D. McRae (unpublished, University of British Columbia, Faculty of Law, 1980), both delivered at the *Conference on Universities and the Law in the 1980s*, University of Victoria, 2 March 1980.

[4] *Re: Association of Professors of the University of Ottawa and the University of Ottawa (Valero)* (1978) Canadian Association of University Teachers, Academic Arbitration Binder Service 544 [hereinafter cited as C.A.U.T., A.A.B.S.].

investigate the shift to increasing judicial review and its implications for the academic community.

In the last few years several important cases have had a major impact on the development of natural justice in Canada and, consequently, on the procedural aspects of tenure review. These cases have, and will continue to have, a major impact on many kinds of quasi-judicial and administrative processes. Specifically, recent cases directly on the subject of tenure (*Paine* v. *University of Toronto*,[5] *Stephenson* v. *McMaster University*[6]) on related academic topics (*Kane* v. *Board of Governors of the University of British Colombia*[7]), and on the nature and extent of natural justice (*M.N.R.* v. *Coopers and Lybrand*,[8] *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police*[9]), have all, we argue, considerably altered and expanded the role that natural justice plays in tenure proceedings.

This analysis is divided into two parts. Part I reviews the genesis of the new natural justice doctrine, culminating with those cases that signal its "infusion" into tenure applications. Part II describes and categorizes the major procedural safeguards that a natural justice approach to tenure applicants implies. The conclusion is that in many of the tenure documents in place in universities in Canada, the existing procedures can be challenged for breaching the requirements of natural justice.

I. The New Natural Justice

A. *Background*

In the recent development of natural justice much of the case law and academic debate has focused on two central questions. First, is the distinction between judicial (or quasi-judicial) acts and administrative acts relevant to the duty to act with natural justice? Secondly, to what extent does the source of the act influence the applicability, nature and scope of natural justice? There are two sub-questions within this second question. First, is it necessary that the administrative decision either involves state action, results from the exercise of statutory powers, contains some element of "publicness" or results from a purely private contractual relationship? Secondly, what is meant by "a decision"? As we shall see, the recent English cases have tended to concentrate on the first major issue, while recent Canadian cases have dealt with both issues.

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[5](1980) 30 O.R. 69 (Div. Ct), *rev'd* (Ont. C.A.) 910/80, 21 December 1981 *per* MacKinnon A.C.J.O., Brooke and Weatherston JJ.A.

[6](1980) Ont. S.C. (unreported).

[7][1980] 1 S.C.R. 1105.

[8][1979] 1 S.C.R. 495.

[9][1979] 1 S.C.R. 311.

In order to examine current Canadian legal thinking on natural justice — most particularly in the context of tenure proceedings — this section of the paper is divided into four parts: (1) the new English view; (2) the traditional Canadian position; (3) the new Canadian law on natural justice; and (4) the courts and recent tenure decisions.

B. *The English View*

The English view of "natural justice as fairness" or "quasi-natural justice" as it might be called — has been recently described by both Professors Mullan[10] and Schauer[11]. However, the rush of recent events has been such that judicial decisions have already partially overtaken their analyses. As Professor Mullan points out, the traditional common law view, in both the United Kingdom and Canada, was that a distinction should be made between judicial decisions, or quasi-judicial decisions which "involved not only good faith but also the application of the rules of natural justice",[12] and purely administrative decisions of statutory decision-making bodies, which have not been seen as having any procedural content except in relation to decisions which could be classified as judicial or quasi-judicial. Over the last quarter century the attitude of the English courts has changed considerably. A line of cases including *Ridge* v. *Baldwin*,[13] *In re H.K. (an infant)*,[14] *Schmidt* v. *Secretary of State for Home Affairs*,[15] *R.* v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida*,[16] *In re Pergamon Press Ltd*,[17] *R.* v. *Liverpool Corporation*,[18] *Breen* v. *Amalgamated Engineering Union*,[19] *Pearlberg* v. *Varty*[20] and *Furnell* v. *Whangarei High Schools Board*[21] have established the principle that the judicial-administrative dichotomy is no longer of major substantive importance. Most other Commonwealth countries have been quick to adopt the English view.[22] While there have

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[10] Mullan, *Fairness: The New Natural Justice?* (1975) 25 U.T.L.J. 281.

[11] Schauer, *English Natural Justice and American Due Process: An Analytic Comparison* (1976) 18 W. and M. L. Rev. 47.

[12] Mullan, *supra*, note 10, 283.

[13] [1964] A.C. 40 (H.L.), *rev'g* [1963] 1 Q.B. 539 (C.A.).

[14] [1967] 2 Q.B. 617 (D.C.).

[15] [1969] 2 W.L.R. 337 (C.A.); petition for leave to appeal dismissed [1969] 1 W.L.R. 338 (H.L.).

[16] [1970] 2 Q.B. 417 (C.A.).

[17] [1971] Ch. 388 (C.A.).

[18] [1972] 2 Q.B. 299 (C.A.).

[19] [1971] 2 Q.B. 175 (C.A.).

[20] [1972] 1 W.L.R. 534 (H.L.).

[21] [1973] A.C. 660 (P.C. (N.Z.)).

[22] See Mullan, *supra*, note 10, 287. See, *e.g.*, in New Zealand *Lower Hutt City Council* v. *Bank* [1974] 1 N.Z.L.R. 545 (C.A.); *Pagliara* v. *A.-G.* [1970] 57 A.I.R. 150 (S.C.).

been skeptics, some pointing out the pervasive influence of Lord Denning, and while there is still controversy over the genesis of the doctrine,[23] the new principle now seems well established. Although some commentators are still reluctant to accept the total demise of the distinction,[24] a review of *Ridge* v. *Baldwin* (1963) suggests that if it were the final and definitive case on natural justice, such a cautious view would hardly seem supportable. It is our view that in that decision a majority of the Court — Lords Evershed, Morris and Hodson — expressly did away with the dichotomy between quasi-judicial acts and administrative or executive acts. First of all, Lord Evershed stated:

> I am, however, content to assume that... [natural justice] should not be limited to cases where the body concerned, whether a domestic committee or some body established by a statute, is one which is exercising judicial or quasi-judicial functions strictly so called; but that such invocation may also be had in cases where the body concerned can properly be described as administrative... .[25]

Secondly, Lord Morris of Borth-y-Gest approvingly quoted Lord Parmoor in *Local Government Board* v. *Arlidge*[26] in which he had concluded that, if an order of a local government board was regarded as either administrative or quasi-judicial in character and the order affected the rights and property of the respondent, then he was "entitled to have the matter determined in a judicial spirit, in accordance with the principles of substantial justice."[27] Finally, Lord Hodson held that "[t]he cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the courts to be subject to the principles of natural justice."[28]

Professor Mullan, concentrating on the opinion of Lord Reid, doubts that *Ridge* does away with the distinction.[29] We submit that a better reading of Lord Reid's judgment is that he did not accept a distinction between quasi-judicial and administrative decisions, but rather was concerned to emphasize that natural justice would not apply to *certain types* of administrative decisions. Lord Reid distinguishes between administrative decisions which affect whole classes or groups of people, *i.e.*, policy decisions, and administrative decisions involving the rights of particular individuals:

> Sometimes the functions of a minister or department may also be of that [individual] character, and then the rules of natural justice can apply in much the same way. But

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[23] Several of the Lords in *Ridge* v. *Baldwin*, *supra*, note 13, claimed that the doctrine can be traced at least to *Bagg's Case* (1615) 11 Co. Rep. 93, 77 E.R. 1271 (K.B.).

[24] Shauer, *supra*, note 11, 57, says: "this rigid categorization of proceedings as administrative, judicial or quasi-judicial, largely, *but not completely*, has passed into disfavour" [emphasis added].

[25] *Supra*, note 13, 86.

[26] [1915] A.C. 120 (H.L.).

[27] *Ibid.*, 142.

[28] *Supra*, note 13, 130.

[29] *Supra*, note 10, 285, fn. 22.

> more often their functions are of a very different character. If a minister is considering whether to make a scheme for, say, an important new road, his primary concern will not be with the damage which his construction will do to the rights of individual owners of land. He will have to consider all manner of questions of public interest and, it may be, a number of alternative schemes. He cannot be prevented from attaching more importance to the fulfilment of his policy than to the fate of individual objectors, and it would be quite wrong for the courts to say that the minister should or could act in the same kind of way as a board of works deciding whether a house should be pulled down.[30]

It is our view, then, that *Ridge* v. *Baldwin* can be construed as abolishing the judicial, quasi-judicial and administrative trichotomy, and as suggesting that the requirement of natural justice will also exist in certain kinds of administrative processes.

Following the House of Lords' decision in *Ridge*, two new concepts began to take shape: (1) the concept of quasi-natural justice or "fairness", which applies to administrative decisions (as opposed to "full" natural justice which lies in judicial or quasi-judicial contexts), and (2) the substantial miscarriage of justice as a test of the appropriateness of a court's intervention.

In 1972 the House of Lords in *Pearlberg* v. *Varty* attempted to retreat somewhat from its position in *Ridge* and indicated that although there is no requirement of natural justice in administrative decisions, the courts will still require "fairness". In particular, Lord Dilhorne said: "[w]hether the commissioner's function in deciding to give leave is to be described as judicial or administrative, he must obviously act fairly".[31]

Lord Pearson more explicitly put forward the distinction between natural justice and fairness:

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[30] *Supra*, note 13, 72.

[31] *Supra*, note 20, 542. It is arguable that "*Pearlberg*-type" cases are not really concerned with the administrative-judicial dichotomy, but are more appropriately treated under the second sub-category of question discussed in this article, *i.e.*, what is meant by a decision? The question in these cases is usually whether the process is actually "a decision" or the preparation of a *prima facie* case. Many cases have pointed out the difficulty of applying rules of natural justice where, in fact, the process is the preparation of a *prima facie* case. As Lord Reid pointed out in *Wiseman* v. *Borneman* [1971] A.C. 297, 308 (H.L.): "Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him." It is submitted that the test should be one of substance, not of form; *i.e.*, is the process the preparation of a *prima facie* case with subsequent processes constituting "the decision", or is the process, in fact, the decision with any subsequent process providing "an appeal"? Of course the decision to proceed with a *prima facie* case is "a decision", in one sense, but it is not a decision where natural justice lies. The question of whether this *prima facie* decision is judicial or administrative in character would seem to be irrelevant.

> But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as "Parliament is not to be presumed to act unfairly", the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply.[32]

The distinction had previously been most clearly argued by Megarry J. in *Bates* v. *Lord Hailsham of St Marylebone*:[33] "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."[34]

The potential inflexibility of a dichotomy between natural justice and fairness, however, was quickly recognized by the English courts. More recent cases have stressed the existence of a continuum of circumstances which require varying degrees of procedural safeguard. The emerging consensus seems to derive from the spirit of Lord Reid's judgment in *Ridge* v. *Baldwin*, although most courts seem unwilling to go as far as Lord Reid did in making *a priori* distinctions as to which type of administrative action will call forth natural justice, *e.g.*, between policy decisions and decisions affecting individual rights. Rather than allowing each new case to further fragment the law, the English courts now appear to have made a commitment to broad principle — which, as we will see, has been recently influential in Canada — allowing individual cases to fall where they may, on the facts. The roots of this approach can be found in *Russell* v. *Duke of Norfolk*.[35] In *Furnell* v. *Whangarei High Schools Board*, Lord Morris, speaking for the majority of the Privy Council, commented:

> Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker L.J. in *Russell* v. *Duke of Norfolk*, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration.[36]

A similar approach has been taken by Lord Denning M.R. in *R.* v. *Race Relations Board, Ex parte Selvarajan*[37] where he concluded:

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or

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[32] *Supra*, note 20, 547.
[33] [1972] 1 W.L.R. 1373 (Ch. D.).
[34] *Ibid.*, 1378.
[35] [1949] 1 All E.R. 109 (C.A.).
[36] *Supra*, note 21, 679.
[37] [1975] 1 W.L.R. 1686 (C.A.).

> proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.[38]

Thus, the impact of this approach has been to build a bridge between natural justice and fairness, creating a flexible continuum rather than an uneasy new dichotomy. The dichotomy suggested by *Pearlberg*, then, appears to have been bridged.

The second approach to natural justice, that requiring "a substantial miscarriage of justice", was also raised in *Pearlberg*. Several members of the House of Lords have been prepared to make a determination of the applicability of natural justice only after a substantive review of the results of the procedures followed. They have only been willing to demand procedural protection where, on the facts of the case, there has been a substantive miscarriage of justice. Thus Lord Evershed, in his dissenting judgment in *Ridge* v. *Baldwin*, was unwilling to allow relief, noting "I conclude justice was here done — or, at least, there was no 'real substantial miscarriage of justice'".[39] Similarly, in *Pearlberg*, Lord Hailsham felt there had been no "substantial injustice".[40] This is potentially a very different approach to the issue of procedural safeguards although it appears never to have become a dominant theme in the English decisions. However, it is of particular interest in Canada because it is a view that has been strongly argued in several cases and has recently been addressed by the Supreme Court of Canada.[41]

The second major problem in the development of natural justice has concerned the issue of who is a "statutory decision maker". In *Ridge* v. *Baldwin*, Lord Reid presented the traditional trichotomy of cases, namely: "dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal."[42] Lord Reid was of the opinion that in the first two categories of cases natural justice was an irrelevant consideration.

This whole question of the scope of natural justice was treated exhaustively by the House of Lords in *Malloch* v. *Aberdeen Corp.*[43] The appellant, Malloch, was employed by the Aberdeen education authority as a teacher. In 1969 the authority served notice of dismissal on Malloch. The notice followed a meeting of the education committee held in March 1969 at which the committee had passed a resolution dismissing the appellant from their employment on the grounds that he was unregistered, as required under

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[38] *Ibid.*, 1694.

[39] *Supra*, note 13, 97, *aff'g Osgood* v. *Nelson* (1872) L.R. 5 H.L. 636, 646 *per* Baron Martin.

[40] *Supra*, note 20, 537.

[41] *Infra*, note 82 and accompanying text.

[42] *Supra*, note 13, 65.

[43] [1971] 1 W.L.R. 1578 (H.L.).

the *Teaching Council (Scotland) Act, 1965*,[44] and thus his continued employment was no longer lawful by virtue of the *Schools (Scotland) Code, 1956*.[45] *The Public Schools (Scotland) Teachers Act, 1882*,[46] provided that, among other things, a notice of the motion for his dismissal must be sent to the teacher not less than three weeks previous to the meeting and that a majority of the full members of the Board must pass the resolution. Section 3 of the *Act* also contained an explanation of their purpose which was "to secure that no certificated teacher appointed by and holding office under a School Board in Scotland shall be dismissed from such office without due notice to the teacher and due deliberation on the part of the School Board." Malloch sought the reduction of the resolution of the education committee and the notice of dismissal on the ground that, contrary to natural justice, the education committee had refused to receive his written representations or to afford him an opportunity to be heard before the resolution had been passed. The education authority contended: (1) that since, by virtue of s. 82(1) of the *Education (Scotland) Act, 1962*,[47] Malloch's appointment was during the Board's pleasure, he was not entitled to be heard before being dismissed; (2) that, even if in general a teacher had a right to be heard before being dismissed by an education authority, to have afforded the appellant a hearing would have been a useless formality because whatever he might have said, they were nonetheless legally bound to dismiss him; and (3) that even if the appellant was entitled to a hearing, he was not entitled to have their decision to dismiss him reduced or annulled.

The House of Lords in *Malloch*, while reaffirming or at least paying lip service to the trichotomy presented by Lord Reid in *Baldwin*, served notice that they would construe narrowly any attempt to exclude an individual's case from the purview of natural justice. The majority of the Court held that had the status of such Scottish teachers been governed purely by common law, a teacher, like the appellant, holding public office during the pleasure of a public authority would not be entitled to a hearing before being dismissed. They argued, however, that this was not the position in Malloch's case as the common law position had been fortified by additional statutory protection. The House of Lords concluded that in such a case the court would examine the framework and context of the employment to see whether elementary rights were conferred on the employee—either expressly or by necessary implication.

All three of the majority of the Court made strong statements on the scope of natural justice, especially in regard to the master and servant relationship and offices held "at pleasure". Lord Reid pointed out:

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[44] 13 & 14 Eliz. II, c. 19.
[45] S.I. 1956 No. 894.
[46] 45 & 46 Vict., c. 18.
[47] 10 & 11 Eliz. II, c. 47.

> An elected public body is in a very different position from a private employer. But many in higher grades or "offices" are given special statutory status or protection. The right of a man to be heard in his own defence is the most elementary protection of all and, where a statutory form of protection would be less effective if it did not carry with it a right to be heard, I would not find it difficult to imply this right.[48]

The limitations that Lord Reid placed on the exceptions to the reach of natural justice can be critically compared with his own statement less than ten years earlier in *Ridge* v. *Baldwin*:

> I fully accept that where an office is simply held at pleasure the person having power of dismissal cannot be bound to disclose his reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action.[49]

The new, broader reach of natural justice was also strongly argued for by Lord Wilberforce. He provides the broadest rationale for the expanded reach of the doctrine:

> The appellant's challenge to the action taken by the respondents raises a question, in my opinion, of administrative law. The respondents are a public authority, the appellant holds a public position fortified by statute. The considerations which determine whether he has been validly removed from that position go beyond the mere contract of employment, though no doubt including it. They are, in my opinion, to be tested broadly on arguments of public policy and not to be resolved on narrow verbal distinctions.
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> The appellant is entitled to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation in the public service under the respondents, have not been observed and, in case of non-observance, to come to the courts for redress.[50]

Wilberforce concluded that the requirement of natural justice is included only in those situations which can be characterized as

> 'pure master and servant cases', which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationship may be called that of master and servant, there may be essential procedural requirements to be observed, and failure to observe them may result in a dismissal being declared to be void.[51]

Given the broad scope of natural justice posited in *Malloch*, it would now seem inappropriate to characterize the required decision as one of "statutory decision making". For example, it seems quite clear that the range of decisions that the House of Lords perceived as being reviewable in terms of

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[48] *Supra*, note 43, 1582.
[49] *Supra*, note 13, 66.
[50] *Supra*, note 43, 1594.
[51] *Ibid.*, 1596.

natural justice is much broader than the American conception of the scope of due process that is limited to "state action".[52] Rather, the emerging test seems to be one of "publicness".

C. *The Traditional Canadian View*

Until very recently the Canadian courts have refused either to accept the demise of the judicial-administrative dichotomy or to broaden the reach of natural justice. Writing on the Canadian law as recently as 1976, Professor Mullan concluded:

> As in many other areas of common law growth, it is indeed beginning to seem already that our real leads in the area of fairness are going to come from the English courts. All this is not to say, however, that even the English decisions have made much of an impact in Canada so far. They have not.[53]

On the judicial-administrative dichotomy itself Mullan concludes that there is "a sea of decisions accepting without question the notion that the writ of natural justice only runs in the world of the judicial and the quasi-judicial".[54] Indeed, in his review of the new natural justice in 1976 Mullan could find only two Canadian judges who had made unequivocal statements in favour of the view that such a dichotomy did not exist.

Given the comprehensiveness of Professor Mullan's study it would be inappropriate to review extensively the traditional Canadian view on natural justice; however, three cases — the so-called "Alberta trilogy" — will be reviewed because of their relevanee to the tenure issue. These cases deal with both the judicial-administrative dichotomy and the interpretation of "statutory" and "decision-maker". It is certainly arguable that the three cases, *Re Elliot and Governors of University of Alberta*,[55] *Re Vanek and Governors of University of Alberta*[56] and *McWhirter* v. *Governors of the University of Alberta (No. 2)*[57] show the Canadian courts, at their most traditional, restrictive and contradictory.

Re Elliot (1973) essentially follows *Ridge*, although Lieberman J. took a rather narrow view of the extent of procedural protection. The applicant, an Associate Professor of Sociology, applied for an order of *certiorari* to quash a faculty tenure committee's decision to deny him tenure and an order of prohibition to prevent the tenure appeals committee from proceeding with his termination. The applicant argued that he had been denied natural

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[52] See *Jackson* v. *Metropolitan Edison Co.* 419 U.S. 345 (1974); *Goss* v. *Lopez* 419 U.S. 565 (1975); *Dixon* v. *Alabama State Board of Education* 294 F. 2d 150 (5th Cir. 1961), *cert. denied* 368 U.S. 930 (1961).

[53] Mullan, *supra*, note 10, 291.

[54] *Ibid.*

[55] (1973) 37 D.L.R. (3d) 197 (Alta S.C., T.D.).

[56] (1975) 57 D.L.R. (3d) 595 (Alta S.C., App. Div.).

[57] (1977) 80 D.L.R. (3d) 609 (Alta S.C., App. Div.).

justice because his departmental chairman, who had recommended denial of tenure, was a member of the faculty tenure committee and that he was denied the right to be heard before the faculty tenure committee or to cross-examine its members. He also argued that both committees were quasi-judicial in nature.

The Court refused to quash the decision on the basis of the chairman's role, arguing that the chairman had merely made a recommendation to the committee and had not made a final decision. Additionally, Lieberman J. held that, although both committees could be properly characterized as quasi-judicial, the duty to act fairly required a minimum of procedural content. The Court did reject the University's claim that neither committee was a statutory body, although holding that this finding did not materially affect the Court's jurisdiction: "[t]his Court also has the inherent right of jurisdiction to question and, if the circumstances warrant, to quash the award of tribunals whether they are statutory or non-statutory".[58] In making such a finding the Court relied upon, among other cases, Lord Denning's statement in *Lee* v. *The Showmen's Guild of Great Britain* that "I see no reason why the powers of the court to intervene should be any less in the case of domestic tribunals."[59]

In *Re Vanek* (1974) the applicant professor applied for *certiorari* to quash the negative decision of a faculty tenure committee. Cavanagh J. dismissed the application arguing, contrary to *Re Elliot*, that a faculty tenure committee was not a statutory body and thus *certiorari* did not lie to review the committee's decision. The applicant appealed unsuccessfully to the Alberta Supreme Court, Appellate Division. Clement J.A. agreed with the lower Court that the committee was non-statutory, claiming "[t]he committees and their functions were established not as bodies prescribed by statute as a matter of public policy, but rather as a matter of choice in the exercise of a discretion granted by statute relating to affairs internal to the university."[60] Additionally, the Court also held that these committees were not, in law, the "decision makers":

> The tribunals and officials with which we are concerned are not empowered directly to affect Vanek. Their function is described but by the operation of the statute their conclusions can only be a recommendation to the president; and in the end it is the Governors of the University alone who must determine the engagement of Vanek. The procedures under discussion, in form approved by the general Faculty Council, have no legalistic effect in themselves on the decision of the governors.[61]

McWhirter (1977) confirmed the approach taken in *Re Vanek* and indeed expressly rejected *Re Elliot*. McWhirter made two claims: first, that

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[58] *Supra*, note 55, 200.
[59] [1952] 2 Q.B. 329, 346 (C.A.).
[60] *Supra*, note 56, 600.
[61] *Ibid.*, 607.

he had a contract with the University, *i.e.*, the Board of Governors, which was breached, and secondly, that the rules of natural justice had not been followed in two respects: (1) the criteria utilized in the tenure proceedings were inappropriate, and (2) certain members of the two tenure committees were biased.

The trial Court again held that both tenure committees were non-statutory tribunals. It additionally held that neither committee was the "decision maker":

> It is also clear that the role of the Faculty Tenure Committee is advisory only. It merely makes a recommendation with respect to tenure to the Board through the President. The Board is in no way limited by the recommendation as to the decision it ultimately makes on the question of the member's tenure... , and it follows that the Board could refuse to grant tenure even in the fact of a favourable recommendation without committing a breach of contract.[62]

The Court held that tenure proceedings were governed by the contractual arrangements between the parties, rather than administrative law. This, of course, determined the available remedies: "[i]f the dismissal is a breach of contract, it is unlawful but can only sound in damages."[63] Thus the Court held to the general principle that courts will not grant specific performance of contracts of service.

The Court, however, citing *Roper* v. *The Executive Committee of the Royal Victoria Hospital*,[64] held that although the committees were "non-statutory, non-decision makers" they did have a duty to act impartially and fairly. Apparently relying on this principle, the Court held that processes used by the various committees were in breach of contract. The "fairness" requirement would be a relevant question in contract only when fairness can reasonably be implied as a term.

Both parties appealed to the Alberta Supreme Court, Appellate Division, which held that there was no such breach of contract as the particular procedures were implicitly delegated by the faculty handbook to the departmental head. Additionally, the Court of Appeal held that the relevant test in deciding whether there is an implicit breach of contract is the presence of the invidious "substantial miscarriage of justice".[65]

These cases present several conflicting conclusions on the relevance of natural justice to tenure proceedings. *Re Elliot* suggests that although a tenure committee is a statutory body, it is not necessarily the decision-

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[62] *Supra*, note 57, 616-7.

[63] *Ibid.*, 618.

[64] [1975] 2 S.C.R. 62.

[65] *McWhirter* v. *Governor of the University of Alberta (No. 2)* (1979) 103 D.L.R. (3d) 255, 266 (Alta C.A.). The decision is discussed in Campbell, *Tenure and Tenure Review in Canadian Universities* (1981) 26 McGill L.J. 362.

making body; hence, a statutory decision maker must be both statutory and make the decision. Even if some procedural protection was to be afforded, it would be very much less than "full" natural justice. *Re Vanek*, on the other hand, concludes that tenure committees are not statutory bodies. *McWhirter*, following *Re Vanek*, concludes that tenure committees are not statutory bodies and that the relevant test is a contractual test of "substantial miscarriage of justice" rather than either a breach of natural justice, or of quasi-natural justice.

At the time of the Alberta trilogy, then, Canadian courts had effectively excluded tenure proceedings from the purview of natural justice. Writing as recently as 1980, after a review of the Alberta trilogy, Professor Campbell was forced to conclude, "[j]udicial review of tenure denials has been frustrating for aggrieved faculty members because of difficulties in establishing the court's jurisdiction in a tenure matter and the inappropriateness of the remedy given."[66]

D. *The New Canadian View*

Even as Professor Campbell was writing, however, the courts had begun a swing back to an administrative law/natural justice approach to these matters and away from a contract law approach. The seeds of this approach can be found a few years earlier in two important decisions of the Supreme Court of Canada, *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* (October 1978) and *M.N.R.* v. *Coopers and Lybrand* (November 1978). *Nicholson* is, in many respects, a watershed case as it represents the explicit adoption of the "English view" on the reach of natural justice. The appellant was a probationary constable in a municipality which was incorporated into a new regional municipality. The regional board of commissioners attempted to dismiss him without a hearing within his 18 month probationary period. *The Police Act*[67] and its Regulations[67a] expressly state that while no constable with more than 18 months' service can be dismissed without both a hearing and an appeal, a constable with less than this period of service can be dismissed without such a hearing. Following his dismissal the constable instituted proceedings to quash the dismissal. The Divisional Court upheld the constable's case, following *Ridge* v. *Baldwin*, with Hughes J. holding that as the dismissal decision was of a statutory nature and consequently the constable was not a mere servant and further could not be held to be holding office "at pleasure", the principles of natural justice would run. The Ontario Court of Appeal, however, reversed the decision, holding essentially that the constable was employed only "at pleasure". That decision was appealed.

[66] Campbell, *ibid.*, 378.
[67] R.S.O. 1970, c. 351.
[67a] O. Reg. 680/70, s. 27(b).

Speaking for a majority of the Supreme Court, Laskin C.J.C. clearly adopted, in the main, the English view on the courts' right of review, although he did not make it clear whether the Court accepted a distinction between natural justice and fairness or adopted the continuum approach:

> In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than 18 months' service, he cannot be denied any protection. He should be treated "fairly" not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in *Bates* v. *Lord Hailsham...* , "that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness."
>
> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question... .[68]

The Chief Justice also expressly approved the English decisions which had limited the exclusionary aspects of offices at pleasure, having already held in *obiter* that the constable did not hold office at pleasure. Indeed, it could be said that the Chief Justice went even further than the House of Lords:

> I would observe here that the old common law rule, deriving much of its force from Crown law, that a person engaged as an office holder at pleasure may be put out without reason or prior notice ought itself to be re-examined. It has an anachronistic flavour in the light of collective agreements, which are pervasive in both public and private employment, and which offer broad protection against arbitrary dismissal in the case of employees who cannot claim the status of office holders.[69]

In reaching its decision the majority of the Court expressly cited *Malloch* v. *Aberdeen Corporation*, *Ridge* v. *Baldwin*, *Bates* v. *Lord Hailsham*, *Pearlberg* v. *Varty*, *Furnell* v. *Whangarei High Schools Board* and *Russell* v. *Duke of Norfolk* as well as the various judgments of Lord Denning.

M.N.R. v. *Coopers and Lybrand*, although a very different kind of case, further delineated the approach of the Supreme Court, giving clear evidence of an emerging dominance of a fusionary, continuum approach to natural justice. Dickson J., speaking for the Court, again follows the English view. The Court rejected the judicial/administrative dichotomy and expressed a view congruent with Lord Reid's in *Ridge* v. *Baldwin*, namely, that the crucial issue is the type of administrative process:

> Accordingly, administrative decisions must be divided between those which are reviewable, by certiorari... or otherwise, and those which are non-reviewable. The former

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[68] *Nicholson, supra*, note 9, 324-5.
[69] *Ibid.*, 322-3.

> are conveniently labelled "decisions or orders of an administrative nature required by law to be made on a judicial or quasi-judicial basis", the latter "decisions or orders not required by law to be made on a judicial or quasi-judicial basis." It is not only the decision to which attention must be directed, but also the process by which the decision is reached.[70]

The Court also made it clear, however, that whether such an administrative decision requires the exercise of natural justice is dependent on several factors, and that the degree of natural justice will depend on the presence of these conditions. In other words, Dickson J. held that there is no neat distinction between natural justice and quasi-natural justice, or fairness.

The Court suggested that four criteria are relevant in making a determination on the extent and nature of procedural safeguards:

> Whether an administrative decision or order is one required by law to be made on a judicial or non-judicial basis will depend in large measure upon the legislative intention. If Parliament has made it clear that the person or body is required to act judicially, in the sense of being required to afford an opportunity to be heard, the courts must give effect to that intention. But silence in this respect is not conclusive. At common law the courts have supplied the legislative omission... in order to give such procedural protection as will achieve justice and equity without frustrating parliamentary will as reflected in the legislation... .
>
> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?[71]

The Court concluded:

> These are all factors to be weighted and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially... .
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah* v. *Fernando*.[72] 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... .

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[70] *Supra*, note 8, 501.
[71] *Ibid.*, 503-4.
[72] [1967] 2 A.C. 337 (P.C. (Cey.)).

> Administrative decision does not lend itself to rigid classification of function. Instead, one finds realistically a continuum. As paradigms, at one end of the spectrum are rent tribunals, labour boards and the like, the decisions of which are eligible for judicial review. At the other end are such matters as the appointment of the head of a Crown corporation, or the decision to purchase a battleship, determinations inappropriate to judicial intervention. The examples at either end of the spectrum are easy to resolve, but as one approaches the middle the task becomes less so. One must weigh the factors for and against the conclusion that the decision must be made on a judicial basis. Reasonable men balancing the same factors may differ, but this does not connote uncertainty or *ad hoc* adjudication; it merely reflects the myriad administrative decision-making situations which may be encountered to which the reasonably well-defined principles must be applied.[73]

Coopers and Lybrand thus represents the full intrusion of the English view into Canadian administrative law. Indeed, it is arguable that the principle had not been as comprehensively or succinctly stated by the English courts. The broad conceptualization presented by the Supreme Court is undoubtedly intended to avoid sterile and artificial factual distinctions. In 1976 Professor Clark had concluded that the Supreme Court of Canada's decisions in administrative law "had been weak and fitful".[74] In the arena of natural justiee after *Coopers and Lybrand* it would certainly now be inappropriate to castigate the Court as "weak"; only time can reveal whether its decisions will be "fitful".

E. *The Courts and Recent Tenure Decisions*

What is the impact of these trends in administrative law on tenure proceedings? A cursory observation would be that the criteria laid down by the Supreme Court in *Coopers and Lybrand* suggest relatively "strong" procedural protection for tenure applicants, most clearly in terms of criteria (2), (3) and (4). Criterion (1) is the most problematic, especially given the Alberta trilogy, because it addresses the "statutory" nature of the process, and implicitly, to the question of who is the "decision-maker".

Three recent cases have addressed these issues in terms of their impact on the academic world: *Stephenson* v. *McMaster University*, *Paine* v. *University of Toronto* and *Kane* v. *Board of Governors of the University of British Columbia.*

In the case of *Stephenson* v. *McMaster University*[75] a faculty committee had refused tenure to the plaintiff and that decision was appealed to a review committee within the University. The preliminary conclusion on review was that tenure should be granted; this was secretly communicated to the original faculty committee which responded that such a reversal would have

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[73] *Supra*, note 8, 505.

[74] Clark, *The Supreme Court of Canada, The House of Lords, The Judicial Committee of the Privy Council, and Administrative Law* (1976) 14 Alta L. Rev. 5, 7.

[75] *Supra*, note 6.

devastating academic consequences. The review committee then changed its mind and, despite praising the plaintiff for the quality of her teaching and her pioneering work in women's studies in Canada, they indicated that her scholarly research was inadequate. O'Leary, Dupont and Linden JJ. of the Supreme Court of Ontario ruled that this secret communication affected the final decision, quashed the original decision and remitted the matter back to a differently constituted University committee.

The *Paine*[76] case was first heard in January 1980 before the Ontario Divisional Court. Paine, an assistant professor at the University of Toronto, had been denied tenure in 1976 and brought an action claiming that the tenure committee had not acted fairly. Specifically, Paine argued:

1. A member of the applicant's department sat on the tenure committee after having previously submitted a negative assessment of the candidate.
2. The chairman of the department — not the Dean as specified by the Governing Council rules — appointed the tenure committee.
3. The tenure committee sat in the absence of the candidate who was not given an opportunity to be heard. It was further claimed that the candidate was not fully informed of the material required to be put before the committee.
4. The candidate was not given the opportunity to seek an adjournment to supplement his material as had been the case with two prior candidates.
5. The department chairman conducted the matter in such a manner as to give the impression of bias.
6. The criteria upon which the tenure committee purported to make its decision were not clearly stated nor were they communicated to the candidate.
7. The tenure committee acted upon a wrong principle and drew inferences improperly when it treated the brevity of the reports from the external references as a ground for judging that the candidate should not be tenured.[77]

After reviewing, among other cases, *Re Vanek*, *McWhirter*, *Nicholson* and *Malloch*, the Court of first instance essentially held that the President's "decision" was sufficiently statutorial — using the "Wilberforce test" argued in *Malloch* and adopted by the Supreme Court in *Nicholson* — for natural justice to run.[78] The Court imputed the same duty to the tenure committees, in effect holding that in this situation the committees were the agents of the

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[76] *Supra*, note 5.
[77] See *ibid.*, 77-8 (Div. Ct).
[78] *Ibid.*, 88.

President, and then held that those committees had not acted with procedural fairness.

The Court not only distinguished *Re Vanek*, and therefore implicitly *McWhirter*, but also suggested the decision was bad law. It was distinguished on two grounds: first, there is no *Judicial Review Procedure Act*[78a] in Alberta and therefore, by implication, tenure decisions in Alberta may not be similarly statutorial—which, of course, has implications for other provinces without similar legislation. Secondly, the Court argued that the Alberta decisions "dealt directly with the actions of a committee rather than with those of a person or body, such as the president or Governing Council... whose authority stems directly from statute".[79] This particular ground for distinction seems arcane given that the Court held that such committees were essentially agents of the University; it simply seems to be an indirect restatement of the first grounds for distinguishing *Re Vanek, i.e.*, the presence of a *Judicial Review Procedure Act*. Furthermore, the Court suggested that *Re Vanek* had in fact been incorrectly decided as *Malloch* had not been brought to the attention of the Alberta court. The Court noted that *Re Nicholson* had now clearly established this new position as law in Canada.

The new Canadian view of natural justice in tenure proceedings was reiterated in the conclusion of the Court:

> In our view, there is nothing inconsistent with the concept of judgment by one's peers in a requirement that proceedings must be fair... . A trial is no less a trial by one's peers if those among them who are obviously biased have been previously eliminated. In the circumstances, the proper remedy is... a declaration that the process whereby the applicant was denied tenure and his appointment terminated, was invalid and of no effect.[80]

On appeal to the Ontario Court of Appeal *Paine* has been overturned. While, as we will demonstrate, the *ratio decidendi* of the case is somewhat unclear, the Court basically affirmed the new view of natural justice. Weatherston J.A., for the Court, expressly cites the *Nicholson* continuum approach[81] and approvingly quotes from the recent Supreme Court case of *Martineau* v. *Matsqui Institution Disciplinary Board (No. 2)*[82] which reiterated that "the application of a duty of fairness does not depend upon proof of a judicial or *quasi*-judicial function."[83]

The ambiguity in the case stems from several sources. First, Weatherston J.A. "doubted" whether the Governing Council in appointing

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[78a] R.S.O. 1980, c. 224.
[79] *Supra*, note 5, 88 (Div. Ct).
[80] *Ibid.*, 90.
[81] *Supra*, note 5, 7 (Ont. C.A.).
[82] [1980] 1 S.C.R. 602.
[83] *Ibid.*, 622.

staff is acting with a "statutory power of decision".[84] But he goes on to say in his next sentence "[i]n any event, a mere declaration as to Mr Paine's rights is of no avail to him."[85] Therefore, it is not immediately clear whether the Court held that the various bodies of the University are, or are not, statutory decision makers. Implicitly, however, the subsequent concentration on appropriate remedies suggests that the Court of Appeal was acting as if the various bodies *are* statutory decision makers. Indeed, the Justices expressly approved of the "element of public employment" argument of the lower court.[86]

The second problem is more serious. Weatherston J.A. perceived the issue to be: under which conditions does *certiorari* lie? He concludes that the remedy should only lie when there is "manifest unfairness".[86a] This is, in effect, a new version of the "substantial miscarriage of justice" test, already discussed,[87] now applied to the remedy issue.

The third problem with the decision is directly associated with the second. McKinnon A.C.J.O., in a supposedly concurring judgment, resurrects the same test but applies it in its original, and it is submitted, now discredited form.[88]

Both these latter positions seem to be in direct contradiction to the Supreme Court of Canada's position in *Kane* — which interestingly was not cited in the Court of Appeal's decision.

It is our view that, despite the reversal, the Court of Appeal's arguments in *Paine* have confirmed the main thrust of this analysis, although several parts of the case are ambiguous. To the extent that portions of the decision might be used and interpreted restrictively, they would only establish the parameter for court intervention at a slightly higher level.

Finally, of course, this decision (or future ones based upon it) may be appealed and thus assessed in light of the Supreme Court of Canada's decisions in *Nicholson*, *Martineau (No. 2)* and *Kane*. It is to the latter that we will now turn our attention.

The Supreme Court of Canada decision in *Kane* v. *The Board of Governors of the University of British Columbia*[89] concerns the suspension hearing of a tenured faculty member. Certain aspects of that case are of critical importance to this discussion.

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[84] *Supra*, note 5, 5 (Ont. C.A.).
[85] *Ibid.*, 6.
[86] *Ibid.*, 10.
[86a] *Ibid.*, 13.
[87] *Supra*, note 39 and accompanying text.
[88] *Supra*, note 5, 14-5 (Ont. C.A.).
[89] *Supra*, note 7.

The facts of *Kane* are relatively simple. The main complaint was that following a formal appeal hearing from a suspension imposed by the University President for disciplinary reasons, the President and other members of the Board of Governors, acting in their role as members of the suspension appeal board, reconvened and, among other issues, discussed Kane's appeal. Although the President did not participate in these discussions or vote on the matter he did answer questions concerning the case. As neither Kane nor his counsel were present at this meeting, the appellant claimed that these procedures amounted to a breach of natural justice.

Dickson J. delivered the judgment for six members of the Supreme Court, with Ritchie J. dissenting. The Court reaffirmed that quasi-judicial proceedings need not adopt the trappings of a court, but that it is necessary "that the case [be] heard in a judicial spirit and in accordance with the principles of substantial justice".[90] Mr Justice Dickson specifically endorsed the "continuum" approach of Tucker L.J. in *Russell* v. *Duke of Norfolk* and held that this kind of proceeding required a high standard of procedural justice.

> A high standard of justice is required when the right to continue in one's profession or employment is at stake [*Abbott* v. *Sullivan*,[91] *Russell* v. *Duke of Norfolk*]. A disciplinary suspension can have grave and permanent consequences upon a professional career.[92]

It seems likely that if the Court holds that a suspension hearing requires a "high standard of justice", it would require no less a standard for tenure hearings which carry even graver, and equally permament, consequences.

The Court also finally laid to rest any likelihood that it will ever approve the "substantial miscarriage of justice" standard:

> The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so... . We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.[93]

Apart from delineating some of the procedural safeguards that are required in such kinds of hearings the Court implicitly made it clear that they place little weight on the presumption that acts will be exempted if they are of an official nature and specifically authorized by the legislature, *i.e.*, *omni praesumunter rite acta esse*.

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[90] *Ibid.*, 1113.
[91] [1952] 1 K.B. 189 (C.A.).
[92] *Supra*, note 7, 1113.
[93] *Ibid.*, 1116.

II. Existing Tenure Procedures

A. *Introduction*

Proceeding from the proposition that the courts are prepared to intervene in the world of academe, we are of the opinion that the promotion and tenure mechanisms in place at many Canadian universities are deficient. In this part of the paper we will examine some of those areas with a view to their compliance with the rules of natural justice and "fairness". To repeat, it is our view that the courts have not, as yet, really distinguished between the two tests in any substantive way.[94]

B. *The Importance of Tenure*

The tenure decision in a university is unique. In one sense, it is an employment contract for an indefinite term with severe restrictions on the right of the employer to cancel, *i.e.*, there is no implied term allowing the university to sever the contract by giving reasonable notice. However, the tenure decision also controls entry into the academic profession. In this respect, it performs a licensing function. Further, the public nature of the university differentiates it from the employer making private employment decisions. Society has a definite interest in university research and teaching; otherwise it would be hard to justify public funding. On the other hand, academics are best qualified to judge other academics. In making these difficult tenure decisions, some discretion is obviously necessary and desirable; however, discretion must be exercised such "that something is to be done according to the rules of reason and justice, not according to private opinion... ; according to law, and not humour. It is to be not arbitrary, vague and fanciful but legal and regular."[95]

Some control is necessary, for the dangers of abuse are great when human beings wield much power. As Davis puts it:

> If all decisions involving justice to individual parties were lined up on a scale, with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and most frequent injustice?... I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.[96]

Debates about teaching and research competence are constant in a university. With this background, and the tendency of decision-makers to

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[94] W. Pue, *Natural Justice in Canada* (1981), 1-15, 32-7.

[95] *Sharp* v. *Wakefield* [1891] A.C. 173, 179 (H.L.) *per* Lord Halsbury citing *Rooke's Case* (1598) 5 Co. Rep. 99, 77 E.R. 209 (C.P.).

[96] K. Davis, *Discretionary Justice, A Preliminary Enquiry* (1969), v.

attempt to "clone" themselves, it is not surprising that promotion and tenure decisions are often made in a highly contentious environment with considerable room for error.

It is our opinion, then, that courts have a legitimate protectionist role in the review of promotion and tenure decisions. Precisely, what is that role?

C. *Substantive Review*

In the course of making the tenure decision, the appropriate bodies must examine the candidate's record in relation to his or her accomplishments: in research and publishing, teaching, service to the community, and administrative service to the faculty and university (the importance of these two latter factors vary within each university). Anyone who has had any association with universities is aware of the serious difficulties encountered in attempting to assess research and teaching competence. Simple criteria such as the number of articles published or student evaluation scores tell only part of the story. Additionally, individuals with particular strengths will tend to emphasize those measurement devices which favour them.

There is no doubt that these evaluations are extremely difficult ones to make; it is equally obvious that any body which is put in the position of hearing appeals from them will be reluctant to interfere on the basis of the substance of the decision.

However, in cases where the decision-making body has clearly disregarded substantive criteria, there is a growing tendency to intervene. This is particularly true under collective bargaining regimes where arbitrators are appointed under the provisions of provincial labour codes.[97] These arbitrators are normally prepared to deal with the merits of the case. Inevitably, even in cases where the appeal is based on procedural grounds, there is a tendency to look at the substantive issues. Courts, on the other hand, either by way of appeal from arbitrators or by direct suit on the part of the unsuccessful candidate, have been less likely to delve into the substance

[97] See, *e.g.*, *Re: Association of Professors of the University of Ottawa and the University of Ottawa (Valero)*, *supra*, note 4; *Re: Association of Professors of the University of Ottawa and the University of Ottawa (Goreloff)* (1977) C.A.U.T., A.A.B.S. 366, *aff'd* (1978) 19 O.R. (2d) 271 (Div. Ct); *Re: University of Ottawa, and the Association of Professors of the University of Ottawa, concerning Dr A.M. Blank* (1977) C.A.U.T., A.A.B.S. 409; *Re: Association of Professors of the University of Ottawa and the University of Ottawa in the case of the refusal of tenure to Professor S.L. Jansen* (1978) C.A.U.T., A.A.B.S. 516; *Re: University of Ottawa and the Association of Professors of the University of Ottawa (McInnis)* (1977) C.A.U.T., A.A.B.S. 420; *Re: University of Ottawa and the Association of Professors of the University of Ottawa, concerning Dr W. McCutcheon* (1978) C.A.U.T., A.A.B.S. 621; *The President of the University of Western Ontario* v. *Dr L.W. Chamberlain* (1974) C.A.U.T., A.A.B.S. 16; *St Mary's University and Dr D.A. MacFarlane* (1980) 36 N.S.R. (2d) 304 (S.C., T.D.).

of the tenure decision itself although intervention may be more likely if it is an action for breach of contract.[98]

In any event, in cases where the tenure criteria have not been clearly proscribed and/or applied (although this could be described as a procedural question), there seems to be evidence of an increasing judicial willingness to get involved, particularly in cases of obvious erroneous decisions in the same way as labour arbitrators will interfere with decisions of management in cases where clear errors have been made.[99]

Therefore, it would be wise for tenure documents to clearly set out:

a) the factors to be considered, *e.g.*, research, teaching, service, administration;

b) the precise definitions of each of these factors to be used in the evaluation including the importance of the various measuring devices;

c) the "relative" importance of each factor, *i.e.*, are some more important than others?

Further, it is critical that these documented positions be consistent with practice. There could be clear grounds for appeal in cases where university committees give lip service to the importance of the various factors and then make decisions on other grounds, *e.g.*, if a document states teaching and research are of equal importance and then a decision places far greater emphasis on one or the other.

D. *Procedural Requirements*

In this section, we will examine some of the potential procedural pitfalls in the tenure process which, we suggest, are the primary sources of difficulty. Despite a number of arbitration and court decisions on these matters, the law in this area is still very unsettled. It is our view that over the next decade the interventionist philosophy is likely to grow and therefore our concerns reflect future as well as existing areas of likely criticism.

Procedural requirements are particularly critical where there is little opportunity for review of the substantive issues,[100] *i.e.*, where procedural safeguards are the only protection; this is often the case with tenure decisions. Let us examine these procedures under the two criteria normally associated with natural justice, *i.e.*, freedom from bias (*nemo judex in causa sua*) and the right to be heard (*audi alteram partem*).

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[98] Mullan, *supra*, note 2, 9.

[99] See, *e.g.*, *U.E.W. Local 523 and Union Carbide Canada Ltd* (1967) 18 L.A.C. 109, 117-8.

[100] S. de Smith, *Judicial Review of Administrative Action*, 4th ed. (1980), 228.

1. Bias

One obvious safeguard against unfair treatment is to ensure that all decision-makers are unbiased and disinterested — and are seen to be unbiased and disinterested. Where peer group evaluation occurs, there will be, by definition, people who must take sides. Once an individual has taken a position on an issue, he or she should then be precluded from sitting in judgment at later stages of the process.

If there is a "*probability*" or reasoned apprehension of "biased appraisal and judgment, unintended though it may be",[101] then the decision is flawed. According to the Supreme Court, there is no need for proof of actual bias; it is enough if there is a "possibility or the likelihood of prejudice in the eyes of reasonable persons."[102] Justice must be seen to be done.

Conflicts of interest can arise in a number of ways. If an individual member of the faculty submits a written opinion, which becomes part of the record, concerning the advisibility of granting tenure to a candidate, then that individual should be precluded from sitting on the adjudicative body above the first level of decision-making, *e.g.*, the division meeting where all the senior peers in the immediate, or closely related field present their views.

The Supreme Court in *Ringrose* v. *The College of Physicians and Surgeons of the Province of Alberta*[103] indicated some of the issues they will look at in determining prior involvement:

> All of the surrounding circumstances must be investigated. What is the function of each of the committees? Does the first body merely find facts, or does it make a preliminary adjudication? What is the effect of one body's decision on the second's decision-making? Is one of the committees sitting in appeal, expressly or in effect, from the decision of the other committee? Is the member in the second committee defending, perhaps unconsicously, a decision of the first committee which he helped to make? Did the first committee initiate the proceedings or lay charges with the result that a member of that committee, who later sits on the other committee to hear evidence, is both accusor and judge? What is the size of the respective committees? What was the degree of participation in each committee by the member whose presence on both committees is impugned.[104]

Once a departmental or divisional decision is made, then the opinions of all individuals who have participated are on record. Therefore, other committees, *e.g.*, faculty promotion and tenure committees, university-wide senior appointment committees, should be staffed with faculty members who did not participate at lower levels. All appointees to the senior committees should refrain from taking part in prior deliberations[105] and not

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[101] *Szilard* v. *Szaz* [1955] S.C.R. 3, 6-7 [emphasis added].
[102] *Supra*, note 7, 1116.
[103] [1977] 1 S.C.R. 814.
[104] *Ibid.*, 817.
[105] *Supra*, note 5, 89.

submit any personal opinions on a decision which they will later influence.[106] The Court of Appeal in *Paine* seems to disagree on this particular point but the evidence would seem to suggest that the Supreme Court is of the opposite view.

This requirement may obviously pose a problem in smaller departments where the number of senior people available for committee work is limited. So be it. In the case of small departments, where the senior people are needed for senior committees, the initial review should perhaps be conducted by the senior committee. The alternative is for an individual (even in the case of large departments) to remove himself from the deliberations of the higher body where he chose to participate in the formation of recommendations. As Pue notes,

> this may all be part of a larger principle that 'where an adjudicator acquires special knowledge of a matter prior to adjudication, there is a reasonable possibility... of the risk that he might prejudice the matter'.[107]

2. The Right to be Heard

Whether the test is part of the requirement of natural justice or merely one of fairness, there is an obvious requirement that candidates be given an opportunity to present their cases to the decision-making bodies. This involves a number of separate elements.

First, although there is no common law authority for the proposition that a candidate has a right to a formal hearing,[108] if there is either a statutory provision or a section in the governing collective agreement to that effect, they obviously must do so.

Secondly, candidates must be permitted to submit any evidence they wish to the committees, the Dean or the President. To be meaningful, this right must naturally also include the right to hear the case against them[109] and the opportunity to rebut any other evidence presented to those bodies or individuals. Therefore, a number of subsidiary protections are in order.

Candidates deserve a complete, written explanation of any decisions forwarded by the lower levels of the decision-making process in order that their own submissions can contain reasonable responses to any contentious points,[110] *i.e.*, full reasons along with the actual decisions.[111] Further, this

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[106] *Ibid.*

[107] *Supra*, note 85, 122, citing Alexis, *Reasonableness In The Establishing Of Bias* (1979) Public Law 143, 155.

[108] *R.* v. *Race Relations Board, Ex Parte Selvarajan, supra*, note 37.

[109] *Nicholson, supra*, note 9.

[110] *Ibid.*

[111] See the discussion in Rabin, *Job Security and Due Process: Monitoring Administrative Decisions Through a Reasons Requirement* (1976) 44 U. Chi. L. Rev. 60.

protection obviously only has practical effect if candidates are given enough time to form a reasonable reply.

However, this right of reply will not automatically involve a right of cross-examination unless the procedures require a full formal hearing. In that event, the tribunal, depending on the circumstances, may nonetheless dispense with the right;[112] however, it would probably be wise to allow for such participation where personal appearances are involved.

An important issue is the right of access to materials submitted for decisions at all levels. Included in this category are student evaluations, the opinions of faculty colleagues and the opinions of external referees. The courts have always taken the basic position, reiterated in *Kane*, that all parties to a dispute should have the opportunity "for correcting or contradicting any relevant statement prejudicial to their view."[113]

Therefore, the presumption is that the applicant faculty member should see or hear all the evidence against him or her. Submissions from formal groups, *e.g.*, departments or divisions, student bodies, *etc.*, must be presented to the candidate. This should discourage oral presentations by groups (*e.g.*, students meeting with the committee to explain their report) when a candidate is not present[114] and prevent the admittance of evidence after the hearings are concluded.[115]

A more difficult issue concerns the right of access to opinions that have been submitted by individual students, colleagues and most importantly, external referees. It might be argued that in the interest of full disclosure, candidates should have the right to know the identity of the writer and the content of each opinion filed for the committees. However, opponents argue that from a practical point of view, such a right of access would be fatal to the peer evaluation system. How many students would risk offering a personal opinion with the possibility of facing that professor in future years? How many colleagues would offer negative opinions, beyond those expressed in departmental meetings, in lengthy, written form if they knew they could be read in detail by the candidate with whom they may have to work for thirty ycars? In the case of external referees, why make an unnecessary enemy merely to preserve some ill-defined level of competenee at another university in which you have no direct interest?

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[112] *Re County of Strathcona No. 20 and Maclab Enterprises Ltd* (1971) 20 D.L.R. (3d) 200 (Alta S.C., App. Div.).

[113] *Board of Education* v. *Rice* [1911] A.C. 179, 182 (H.L.) *per* Lord Loreburn, cited with approval in *Kane*, *supra*, note 7, 1113 *per* Dickson J.

[114] The Supreme Court's decision in *Kane*, *supra*, note 7, is directly on point here; see also *Stephenson*, *supra*, note 6.

[115] *Stephenson*, *supra*, note 6.

The courts have often upheld the need for confidentiality in administrative processes. Lord Denning has stated that there is no need for the disclosure of a source if it would put the informant in peril or otherwise be contrary to the public interest but that the "accused" must be provided with "sufficient indication of objections raised against him such as to enable him to answer them."[116]

This issue was recently addressed in the academic context in the *Boyd*[117] decision in Ontario. Unfortunately, from the point of view of this discussion, the case was settled while on appeal. The lower court upheld the university's arguments concerning the need for confidentiality. Mr Justice Hollingworth decided, in summary:

1. that the information which the adjudicator had ordered be provided had originated with the understanding that it would not be revealed;
2. that the element of confidentiality was essential to the satisfactory maintenance of relations between the parties (presumably faculty and administration at the University);
3. that the relationship was one which, in the opinion of the (academic) community, should be fostered, and;
4. that the injury as a result of disclosure would be greater than the benefit gained by the disclosure.

Therefore, it appears for the moment that some confidentiality is permissible, but it also seems certain that this rule will be the focus of continued challenges.

In light of these concerns, many universities explicitly make the anonymity of individual opinions a term of the employment arrangement. In that event, it would be very difficult to argue that the subsequent refusal to permit access would be a denial of natural justice. Conversely, it can be held that a university has waived the right of confidentiality by either express wording or past practice.

A further safeguard against a breach of natural justice is to provide the candidate with a "full and fair summary" of the contents of any individual opinions received.[118]

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[116] *R.* v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417, 431.

[117] *Re University of Guelph and Canadian Association of University Teachers* (1980) 29 O.R. 312 (H.C.).

[118] *Stephenson, supra*, note 6; see also, *The Association of Librarians and Professors of the University of Moncton (Fournier)* (1980) 1 (no. 1) Rights Reporter, 4; *University of Saskatchewan Faculty Association and the University of Saskatchewan (Mukkur)* (1980) 1 (no. 1) Rights Reporter, 9.

E. *The Nature of the Tenure Decision*

A final issue concerns the actual nature of the tenure decision. A frequently repeated complaint is that the ultimate decisions in tenure cases are often totally unexpected given the evaluations of previous years, which have undoubtedly been carried out, as in any organization, with an eye not only to evaluation but to motivation and direction.

From the university's point of view, there are many reasons for these "unexpected" occurences. The primary argument is that the tenure decision is of a totally different nature from the decisions which preceded it, at which the candidate was re-hired for one, two or three year periods. Those were short-term contracts for a definite period; in many cases, particularly during the first two or three years, the decision was based on limited information. The tenure decision differs in many regards. First, it is based on a longer record and is fortified by outside opinions. Secondly, there are normally other committees involved, such as a university-wide tenure committee. Thirdly, the composition of the faculty committees changes periodically with the result that different decisions will be made. Finally, and most importantly, the tenure decision is a permanent commitment, qualitatively different from a mere contract renewal for two or three years.

These are all plausible arguments, but it is still arguable that they do not vitiate the need for consistency. If the tenure decision is "unexpected", it should be based on "unexpected" material, *e.g.*, the reports of external referees or a dismal final year performance. A university is on far less secure ground when, on the basis that the nature of the decision is different, they appear to change their opinion on material that has already been evaluated positively. Earlier promotion and renewal decisions are to some extent different but they are part of a continuing evaluation process and their existence and relevance cannot be denied.

There is a difference between the requirement for peer evaluation and discretion which borders on arbitrariness. It may be no defence today to indicate to an unsuccessful candidate that all the indications he or she received for four or five years were meaningless. It is incumbent upon universities to develop proper evaluation mechanisms which are consistent and instructive.

Conclusion

This analysis has attempted to demonstrate that the courts are now in a position to intervene in at least the procedural aspects of tenure decisions. The evidence suggests that universities, faculties and departments have not yet taken this possibility very seriously. A casual survey suggests that most

academics are loathe to view the tenure process as one involving legalism and, concomitantly, formalism. A major policy question is therefore whether the university governments will pre-emptively review their tenure procedures in terms of meeting the requirements of natural justice. It is our opinion that, unless there is considerable reorganization of current procedures in many Canadian universities, litigation in this area is likely to be increasingly frequent. Although the number of cases which might arise involves mere speculation, it is safe to say that those that do occur will be emotional and will likely have a profound effect on the university community.