Tenure and Tenure Review in Canadian Universities

I. The meaning of tenure

To many people tenure denotes the holding of land. In feudal times tenure described the manner by which a tenant occupied land under his lord, but in general usage it simply means a mode of holding or occupying. Thus there is tenure of office, meaning the manner in which that office is held, particularly with regard to time.

Judicial tenure refers to the duration and conditions of office for judges. Until the end of the seventeenth century most judges were appointed during the royal pleasure. There were many instances of judges being dismissed. When the *Act of Settlement, 1701*, came into force in 1714, judges were appointed during good behaviour. Thus an independant judiciary was created by a tenure of office which was adequate to ensure freedom from political and economic pressure. Today, superior, county and district court judges in Canada are guaranteed tenure by section 99 of the *British North America Act, 1867*, which provides that judges "shall hold office during good behaviour, but shall be removable by the Governor General on address of the Senate and House of Commons."[1]

Unlike judicial tenure, academic tenure was created not by statute but, in true collegial fashion, by custom, which the courts refused to incorporate into individual contracts of employment. Until recently, tenure of office for members of the academic community was assured by the generosity of universities rather than by enforceable rights, and it was important to such people for three reasons. First, it represented a type of communal acceptance into a professional guild. Second, it provided job security and reward for individual service and accomplishment. Third, and most important, it protected a professor's rights to academic freedom and free communication without fear of reprisal.[2]

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[1] 30-31 Vict., c. 3 (U.K.) as am. Despite the view of several federal governments that s. 99 guaranteed tenure for life, the *British North America Act* was amended in 1960 to provide for the compulsory retirement of judges at age 75 (*The British North America Act, 1960*, 9 Eliz. 2, c. 2 (U.K.)).

[2] Indicating that academic freedom is the basic justification for tenure, Professor Machlup says:

> The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work *consists* of his thought and speech. If he loses his position for what he writes or

There are very few reported decisions on tenure in Canadian courts, and on the whole they do not recognize tenure as the legal right of a university professor to remain in service until retirement. The earliest case, *Ex parte Jacob*,[3] dealt with the dismissal of a professor from the University of New Brunswick who held appointment during pleasure. Dr Jacob applied for *certiorari* to bring the dismissal proceedings of the University Senate before the New Brunswick Supreme Court. Carter C.J. held that the exercise of powers given to the Senate could not be considered judicial acts and dismissed the motion.[4] However, he did state that the governing body of the University

> may, if [it sees] fit, remove any of the officers, without any formal proceeding in the nature of a trial, in the same way that a private individual may dispense with the services of a clerk or other servant, and are not liable to be called to account for their proceedings in any other tribunal.[5]

In *Re The University of Saskatchewan and MacLaurin*[6] the Court of King's Bench, while exercising its visitorial powers, reviewed the action of the President in dismissing three professors who had been employed during pleasure. The Court agreed with *Ex parte Jacob*, that professors might be removed without notice and without a hearing, but qualified the discretion to dismiss by stating that this power must not be exercised in an aggressive manner or with a corrupt or indirect motive.[7] Because the relevant statute and by-laws had been observed, the Court concluded that it had no power to interfere with what had been done and maintained the action of the President.

In *Craig* v. *Governors of University of Toronto*[8] the University retired a professor against his will at sixty-eight years of age. The plaintiff claimed that his appointment was permanent, alleging that a full professorship meant "an appointment for life, subject

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> says, he will, as a rule, have to leave his profession, and he may no longer be able effectively to question and challenge accepted doctrines. And if some professors lose their positions for what they write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced.

On Misconceptions Concerning Academic Freedom (1955) 41 A.A.U.P. Bull. 756.

[3] (1861) 10 N.B.R. 153 (S.C.).

[4] It is clear that Carter C.J. would have dismissed the motion on the alternative ground that Dr Jacob should have appealed to the Visitor rather than the Court (*ibid.*, 161).

[5] *Ibid.*, 163.

[6] [1920] 2 W.W.R. 823 (Sask. K.B.).

[7] *Ibid.*, 827.

[8] (1923) 53 O.L.R. 312 (H.C.).

only to the appointee's good behaviour and his ability to perform his duties efficiently".[9] To this Orde J. replied:

> This is surely a startling proposition, and Mr. Arnoldi was unable to give me any authority for it. I think the argument can be met very easily if we keep in mind that, if this contention were correct, the contract for a life-appointment must necessarily be mutual. It could not be binding on the University without at the same time binding the professor. And it would be rather disturbing to the whole professorial body, if it were suggested that, upon an appointment not limited as to time, none of them could, after due notice, without the consent of his employer, accept a more remunerative offer of employment either in some other university or elsewhere without committing a breach of contract involving liability to heavy damages. It should be only necessary to state this contention to shew its absurdity.[10]

Although the plaintiff tried to prove that full professorships were appointments for life according to custom in universities generally, and particularly at the University of Toronto, *The University Act* stated that tenure was held "during the pleasure of the Board".[11] Accordingly, the Court dismissed Craig's plea on the ground that custom could not supersede statutory powers vested in the Board.[12] Thus the Board could terminate the employment contract at any time, subject only to reasonable notice of its action.

The last reported case to consider the tenure of a professor's individual contract of employment was *Smith* v. *Wesley College*.[13] The Board of Directors of Wesley College had decided that it was in the best interests of the College to dismiss the plaintiff professor. By statute, the Board had the power to "define ... tenure of office or employment, which unless otherwise provided shall be during the pleasure of the board".[14] Due to disagreement over the terms of employment, the Court was asked to imply the terms of the contract from correspondence between the plaintiff and the President of Wesley College. It decided that there was no definite agreement as to the duration of the contract. Instead of following earlier authorities, the Court concluded that the contract's term was from year to year, subject to termination on one year's notice, and that it could not be terminated "unless and until, in the honest opinion of the board, the best interests of the college so demanded".[15] The best

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[9] *Ibid.*, 319.

[10] *Ibid.*

[11] R.S.O. 1914, c. 279, s. 32(b).

[12] The mere fact that the University had not exercised its statutory right of dismissal over a long period of time would also not allow such a custom to be incorporated into the plaintiff's contract (*supra*, note 8, 320).

[13] [1923] 3 W.W.R. 195 (Man. S.C., T.D.).

[14] *Ibid.*, 197, quoting S.M. 1919, c. 131, s. 18(b).

[15] *Ibid.*, 202.

interests of the college meant what the directors *bonâ fide* considered them to be.[16] With respect to the tenure of professors, Dysart J. stated:

> The reason for so qualifying the right to terminate such employment is both just and apparent. College professors are men specially trained for special work. Their opportunities for suitable employment are rare, and if lost are not easily substituted by other congenial employment. Their special training unfits them for general service. In their chosen field, the material returns are relatively small. In order, therefore, that this noble profession may still attract recruits, it is wisely acknowledged both in theory and practice that the employment of professors by colleges should be characterized by stability approaching to permanence. This involves fair, considerate and even indulgent treatment in all matters relating to general behaviour. Whatever is not inconsistent with its welfare is generally allowed by the college.[17]

Except for the limited form of tenure recognized in *Smith* v. *Wesley College*, courts have not implied tenure as a term in a professor's contract of employment.[18] Thus, unless permanency is expressly stated in the contract, or conferred by the university through some overt act, only one year's notice, or a year's pay in lieu of notice is required for dismissal. But no notice is required where there is cause, such as incompetence, neglect of duty or grave misconduct.

Collective bargaining in the universities developed in the late sixties and early seventies. Many existing practices and procedures were set down in writing between faculty associations or unions and the management of the university. The resulting agreements were incorporated into each professor's contract of employment. Established practices were written and frequently revised, prescribed procedures became mandatory, and the customary powers of deans and administrators were re-examined in light of these agreements. As one arbitrator has stated:

> The advent of collective bargaining in the university sector engenders a qualitative change in the relationship of the professoriate to the university. 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

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[16] *Ibid.*

[17] *Ibid.*

[18] In *Re Wilson* (1885) 18 N.S.R. 180 (S.C.), a dismissed professor made an application for *mandamus* to compel the Governors of King's College to restore him to certain offices. Professors at King's College held their offices during good behaviour. Professor Wilson had published a letter "incompatible with the relation of a Professor to the governing body [of the College]" (p. 181) and was consequently dismissed without notice. The Court held that the office of professor was one in relation to which *mandamus* would lie and granted the application.

> 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.[19]

How has tenure been affected by the advent of faculty association or union agreements with universities?[20] Before being considered for tenure, a faculty member must serve a probationary period, during which teaching ability, scholarly promise and diligence are reviewed. This period may last from three to five years, and a candidate may thereafter become eligible for tenure consideration by the relevant departmental committee, the composition and procedures of which are fixed in the agreement. After the departmental tenure committee makes its recommendation, the faculty tenure committee takes up the matter and makes a further recommendation according to a procedure which is also set down in the agreement. In most agreements the "legal" decision is finally made by the Board of Governors upon recommendation by the President.

Not only is the procedure for granting tenure spelled out, but some agreements have defined tenure as well, generally as a continuing or permanent appointment up to the age of retirement.[21] Some agreements stipulate that tenure is not a right of faculty who have served the required probationary period.[22] However, tenure is now subject to other provisions of the agreement, such as dismissal for cause or lay-off in the event of financial stringency.

Although some agreements state that the purpose of tenure is to guarantee academic freedom,[23] tenure is largely a code-word for employment security.[24] All agreements contain an article guaranteeing academic freedom for every faculty member, including

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[19] *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Valero)* (1978) A.A.S. 544, 556 *per* Frankel.

[20] Faculty association agreements do not have the same permanence as collective agreements. Senate by-laws and resolutions may be incorporated into faculty association agreements by reference. These terms can be unilaterally altered with reasonable notice by the Senate, whereas in collective bargaining terms are fixed for the duration of the collective agreement and cannot be altered by resolution or by-law of an internal body such as the Senate.

[21] See, *e.g.*, Carleton, App. A; Dalhousie, Art. 5.2.1; McGill, Art. 1.3.4; Regina, Art. 14.2.3; Saint Mary's, Art. 10.11; Saskatchewan, Art. 15.1.

[22] *E.g.*, Alberta, Art. 6.07.1.

[23] *E.g.*, Dalhousie, Art. 5.2.1; Saskatchewan, Art. 15.2.

[24] See also Adel & Carter, *Collective Bargaining for University Faculty in Canada* (1972), 13.

those without tenure. Further, if tenure is not granted at the end of the probationary period, or after a fixed number of term appointments, no further offers of employment can be made. But Professor Winegard describes tenure in a different light:

> In deciding in favour of granting tenure the university makes a significant commitment to the individual faculty member. It is in the nature of a university appointment that a faculty member is virtually free from supervision. This is in part due to the impossibility of constantly monitoring and assessing the work of an academic and, in larger part, due to the notion of academic freedom. For these reasons the granting of tenure represents a high degree of trust in the faculty member and it is only upon being satisfied that this trust is warranted that the university will grant tenure. It is no doubt precisely because the granting of tenure entails a long term commitment without close supervision and review that such a long probationary appointment (as compared to the length of probationary appointments in industry) is required.[25]

II. The criteria for tenure

The considerations to be taken into account for granting tenure can easily be identified in the respective agreements, but neither these considerations nor their application are by any means consistent from institution to institution. In some agreements the considerations are spelled out for the tenure committee's direction, while in others the tenure committee must provide its own definitions. However, there are basically four criteria which must be considered: academic qualifications, teaching, research and service to the university.

A. *Academic qualifications*

Most agreements provide that a faculty member must have the required academic credentials before tenure can be granted. These requirements vary among universities, and presumably are known at the time of hiring. However, academic credentials which have been traditionally acceptable to one faculty may not be acceptable to another for the granting of tenure. Such was the case in *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Valero)*.[26] In this case Professor Valero was teaching in the Faculty of Administration and had an LL.M. degree. The Teaching Personnel Committee and his dean recommended him

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[25] *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Goreloff)* (1977) A.A.S. 366, 371 *per* Winegard: *aff'd* (1978) 19 O.R. (2d) 271 (Div. Ct). For limits of the "trust", see *Re The President of the University of Western Ontario and Chamberlain* (1974) A.A.S. 17, 21 *per* L'Heureux.

[26] *Supra*, note 19.

for tenure. However, the Joint Committee for the Senate and Board refused tenure on the ground that Professor Valero did not hold a doctorate. The relevant article in the collective agreement stated that a professor must

> [hold] a Doctorate, it being understood that the University will consider as an equivalent in this regard any work judged by his peers as having contributed in a significant manner to the advancement of a science, of an art or of a profession.[27]

The Joint Committee felt that the equivalence had not been fulfilled because Professor Valero's research had received only indifferent assessment from external referees. The Arbitration Board concluded that, on construction of the article, the Joint Committee had not acted unreasonably or capriciously because of the even-handed and consistent manner with which tenure historically had been granted at the University.[28]

B. *Teaching*

Some agreements stipulate teaching as the paramount consideration for granting tenure, while others consider teaching on an equal basis with research.[29] Teaching is undoubtedly the most difficult factor to assess and in most agreements it is undefined or nominally defined.[30] For example, "teaching ability", "teaching effectiveness", "teaching performance" and "teaching quality" are given as criteria

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[27] Ottawa, Art. 33-10(b)(2).

[28] The Joint Committee did not accept the Dean of Law's contention that for law professors an LL.M. is equivalent to a doctorate for purposes of tenure.

[29] Art. B.3 of the Western Ontario agreement provides that outstanding ability in teaching alone may be sufficient reason for granting tenure. Likewise under Art. 33.11(a) of the Ottawa agreement a candidate can obtain tenure for exceptional quality of teaching where there is less research than normally required.

[30] *E.g.*, Art. 13(b) of the Toronto agreement defines teaching effectiveness as

> the degree to which he or she is able to stimulate and challenge the intellectual capacity of students; the degree to which the candidate has an ability to communicate well; and the degree to which the candidate has a mastery of his or her subject area.

Not only is the means of measuring undefined, but also there is no indication of what is satisfactory ability for tenure purposes. Art. 4.02 of the University of British Columbia agreement states that the methods of teaching evaluation include student opinion, assessment by colleagues, outside references and the calibre of supervised essays and theses. The opinions of students and colleagues are taken through formal procedures. Consideration is also to be given to the candidate's willingness and ability to teach a range of subjects at various levels. Excepting this last point, no means of measurement is given. In *McWhirter* v. *Governors of the University of*

for granting tenure. But what do these words mean and, more important, how can they be measured or assessed for tenure consideration?

Some universities use student evaluations, but it is difficult to determine exactly what they measure.[31] One of their purposes is to provide a teaching score relative to one's colleagues. However, it is uncertain whether the form used can adequately measure the candidate's teaching ability for the purpose of tenure. Further, should the form be used across campus? While one instrument may be less expensive to administer, and provides a uniform measure, it may be inappropriate to use the same evaluation form for all purposes.

Peer evaluation can also measure teaching ability, but one problem with it is that there is no guidance as to the criteria to be considered and the method of evaluation to be used. Course materials and competence in their presentation may be considerations, but are they appropriate or sufficient for the purpose of tenure? Further, how much notice should be given, how often must a peer attend lectures before reporting, and what form should the evaluation take? If the report is written, should the candidate be given an opportunity to respond? Although formal teaching evaluation is relatively new to Canadian universities, one hopes it will be given the attention it needs to help ensure that student and peer evaluations can provide useful evidence of teaching ability for tenure consideration.

C. *Research*

While teaching ability may be difficult to assess, tenure committees seem to have little difficulty in assessing a candidate's research. Academics are skilled in assessing research and on this basis many agreements do not permit arbitral review of academic judgment. However, the meaning of research varies from agreement

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Alberta (No. 2) (1977) 80 D.L.R. (3d) 609 (Alta S.C., T.D.), Steer J. was critical of the evidence given with respect to teaching ability. He stated:

> the evidence given at trial showed that, in fact, there was no system in the university, except rumour, whereby a committee could get any satisfactory evidence of a candidate's teaching ability. ... With regard to the expressions of the staff, ... there was nothing to indicate that any had ever heard him teach although some may have heard him speak at a seminar (p. 630).

[31] Art. 26.3(a) of the Carleton agreement spells out the content of the student evaluation form. This form is used across campus and cannot be altered. The difficulty with employing this inflexible evaluation is that differences in faculty, class size, course level and programme requirements are completely overlooked.

to agreement. Some agreements simply define it as "creative scholarship", "research and scholarly work", "publication", "contributions to an academic discipline", "research ability", or "scholarly or professional productivity and activity". But the University of Toronto agreement is very elaborate:

> Achievement in research or creative professional work is evidenced primarily, but not exclusively, by published work in the candidate's discipline; in this context, published work may include books, monographs, articles and reviews and, where appropriate, significant works of art or scholarly research expressed in media other than print. It may also be evidenced by various other types of creative or professional work, including community service, where such work is comparable in level and intellectual calibre with scholarly production and relates directly to the candidate's academic discipline. Research also encompasses unpublished writings and work in progress. Scholarly achievement may be demonstrated by consideration of theses or other material prepared or written under the candidate's direct supervision. In some exceptional cases, weight should be given to "unwritten scholarship" of the type displayed in public lectures, formal colloquia and informal academic discussion with colleagues.[32]

If an agreement merely identifies research as a consideration in granting tenure, it permits a tenure committee great latitude in determining what is to be included, as well as the required quantity and quality of research, and this exercise may reflect the university's expectations on a general level and for the specific programme. By contrast, although the Toronto definition recites at length what is to be considered, it does not state the standard required for the granting of tenure. There have been criticisms of both approaches, and the denial of tenure for deficiency in research has often resulted in grievances and arbitrations. For example, in *Re The Association of Professors of the University of Ottawa and The University of Ottawa (Goreloff)*,[33] the arbitration board had to decide what "competence in research" meant:

> It is something more than the simple equivalent to the question "can he do research?" What is required is evidence of capacity and will to engage in meritorious research, to organize a research program effectively, to complete research projects and to produce research output — all of this on a scale and with results in terms of quality and quantity which can be regarded as normal for his/her sector of activity.
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> It is clear from the evidence that Professor Goreloff can do some research. It is less clear that he has done what is and can be normally expected of a professor in Slavic Studies at the University of Ottawa.[34]

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[32] Toronto, Art. 13(a).

[33] *Supra*, note 25.

[34] *Ibid.*, 381. This definition was followed in *Re The Association of Professors of the University of Ottawa and The University of Ottawa (Jansen)* (1978) A.A.S. 515 *per* Smith.

It is arguable that the Board's statement applies only to the Ottawa agreement. However, because of the generality of the term "competence in research", the Board's statement may be apposite in tenure considerations elsewhere.

We have noted that tenure committees must consider the quality and quantity of a candidate's research, but what standard of comparison is appropriate to determine the qualities required for tenure? In *Re The President of The University of Western Ontario and Chamberlain*[35] the Hearing Committee held that it was the relevant sector of the University to which the complainant belonged, namely, the Department of Psychology. The *Goreloff* decision refined the relevant-sector test to a relevant subsector of the department. The University of Ottawa placed heavy emphasis on its graduate programme in Slavic Studies and thus the professors in that department had to have a level of research to support the graduate programme.[36]

As to what is considered research for tenure purposes, monographs and published contributions to refereed journals are uniformly acknowledged, and unpublished research or work produced in a medium appropriate to the discipline may also be considered.[37] With respect to paid research, very little direction is given in the agreements, and there are few reported decisions on disputes arising from such research. However, under an agreement which stated that research and scholarly activity would not normally include "research contracts and consulting activities for which the member receives a remuneration above and beyond the salary paid by the University", a psychology professor had been retained by a local hospital as a clinical psychologist, and the Board in this case held that while such work could not be considered by itself as research,

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[35] *Supra,* note 25.

[36] Ottawa's Art. 33.10(a) states that a candidate must have "the kind of qualifications required to support effectively the programmes of study and of research that the University has decided to pursue". The Board concluded that in order to comply with this requirement Dr Goreloff had to be capable of supervising graduate students, and in order to do so, he had to "complete good research within reasonable time limits and be capable of producing a steady flow of completed research" (*supra,* note 25, 386). By contrast, in *Re the University of Manitoba and Stevens* (1976, unreported) *per* Dunlop, research output was compared to that which is expected from the professor's field in a "ranking Canadian university".

[37] See Art. 13(a) of the Toronto agreement, *supra,* note 32. See also *Re The University of Ottawa and the Association of Professors of the University of Ottawa (McInnis)* (1977) A.A.S. 420, 430 *per* Kruger and *Re The University of Ottawa and the Association of Professors of the University of Ottawa (McCutcheon)* (1977) A.A.S. 621 *per* Robinson.

any product or article from it which was available to the public could be considered.[38]

D. *Service*

The final consideration for tenure is service. Most agreements state that service includes contributions to the department, faculty and university community. Some agreements broaden the scope of service to include contributions to a wider community, such as academic and professional bodies.[39] Generally, the service component for tenure is not given any significant weight, unless performance is outstanding and there are no substantial reservations with respect to teaching and research ability.[40]

E. *Other*

Some agreements stipulate that the expectations for a candidate be favourable before tenure is granted, such as Article 13 of the Toronto agreement, which provides that a candidate must show "clear promise of future intellectual and professional development". Similarly, Article 4.01(c) in the British Columbia agreement requires not only that a candidate have maintained a high standard of performance in teaching, research and service, but that he show promise of continuing to do so.[41] Neither agreement indicates how such promise is to be measured and assessed.

Because judgments should be made impartially and objectively, incompatibility with colleagues is usually only considered in tenure

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[38] *Re The University of Ottawa and the Association of Professors of the University of Ottawa (Blank)* (1977) A.A.S. 409 *per* Robinson: this provision has since been abandoned.

[39] *E.g.*, Art. 12.91(c) of the Acadia agreement and Art. 6.07.1(f) of the Alberta agreement. Art. 7.10(i) of the Bishop's agreement states that service includes contributions to the Faculty Association committees.

[40] There are two notable exceptions. Art. B.3 of the Western Ontario agreement provides that outstanding service, by itself, may be sufficient for tenure and Art. 33.11(c) of the Ottawa agreement provides that extensive administrative service may compensate for a lesser research activity.

[41] This article states further that "[t]he decision to grant such an appointment will take into account the interests of the Department and the University in maintaining academic strength and balance". Art. 11.22(b) of the Saint Mary's agreement states that a candidate must be "a person who will contribute to the growth and stature of the University, and will promote its objectives as set out in the Saint Mary's University Act, 1970": see *Re Saint Mary's University and MacFarlane* (1979, unreported) *per* Nunn; *rev'd* (1979) 103 D.L.R. (3d) 470 (N.S.S.C., T.D.).

matters when it disrupts the operation of the department.[42] Only two agreements mention incompatibility. The Dalhousie agreement provides that a candidate must have "ability and willingness to work with colleagues so that the academic units concerned function effectively".[43] The McGill agreement takes a more draconian approach: "[i]ncompatibility with colleagues sufficiently serious to interfere with the proper functioning of the department or other parts of the University"[44] may be grounds for denying tenure.

A recent case concerning incompatibility was *Dombrowski* v. *Dalhousie University*.[45] The plaintiff seriously objected to the administration of his department and openly expressed a low regard for the competence of his colleagues. The faculty tenure committee unanimously recommended the plaintiff for tenure but the Dean refused to so recommend because of the plaintiff's clashes with his colleagues. The Vice-President and President, who had ultimate discretion in this matter, agreed with the Dean that the work of the department had been seriously affected and that the department could not work together effectively if the plaintiff had tenure. The plaintiff's action was dismissed because there had been no improper application of the requirements for tenure by the administration.

Because of significant differences among disciplines within a university, tenure considerations will be varied.[46] The extent of the variation is reflected by the tenure committee and administration's expectations of a candidate's discipline. Few agreements provide that standards required for tenure be made known to the candidate at the time of appointment.[47] However, some agreements do provide that if the standard of performance required for tenure changes,

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[42] *E.g.*, Victoria, Art. 10.5, states that incompatibility is not to be considered except where it seriously disrupts one's colleagues:

> Since it is most important that the University insure that the criterion of lack of compatibility not be applied because of personal antipathy, negative recommendations founded on or supported by evidence relating to the lack of compatibility must be fully documented. Such documentation as is consistent with the principles of natural justice shall be made available to the faculty member concurrent with its availability to the Dean or Director or the Faculty or School Advisory Committee.

See also British Columbia, Art. 4.0.1(b).

[43] Dalhousie, Art. 5.3.2.

[44] McGill, Art. 5.18.2.

[45] (1975) 55 D.L.R. (3d) 268 (N.S.S.C., T.D.); *aff'd* (1976) 15 N.S.R. (2d) 299 (App. Div.).

[46] See, *e.g.*, Saskatchewan, Art. 15.12; Regina, Art. 16.1.1; Alberta, Art. 6.07.02; Toronto, Art. 12.

[47] A notable exception is Saskatchewan, Art. 15.12.1.

the candidate must be given notice of that change.[48] Further, two agreements provide that changes in standards subsequent to a probationary appointment do not apply retroactively.[49]

The agreements give little guidance regarding the weight to be attached to each of the tenure considerations. Some agreements provide that the candidate must have competence or superior performance in both teaching and research, or in two of teaching, research and service.[50] Consequently, the tenure committee must devise its own balancing scheme, which could lead to uneven application of the criteria and possible abuse. This is particularly so because the evaluation of a candidate's research is, for the most part, subjective.

III. Methods of tenure review

A decision to deny tenure can be reviewed in three ways. First, the candidate may apply to the court for a prerogative writ or equivalent statutory order. Second, the agreement with the university may provide for an appeal procedure within the university. Third, the candidate may grieve the denial of tenure through the grievance procedure to arbitration.

A. *Application to the court*

Court action has never been a favoured remedy, due to cost, delay and jurisdictional difficulties. Further, judicial remedies tend to be inadequate because of the court's reluctance to reverse academic decisions made by the plaintiff's peers.[51] On the other hand, decisions of arbitrators may be more responsive to the needs of the university because their decisional standards and remedies are fashioned by the faculty and administration. Further, the arbitrator is jointly selected, presumably because of his special competence.

B. *Internal appeals*

Appeal to an internal review body is an informal and expeditious method of challenging a tenure denial. It can be argued that

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[48] St Thomas, Art. 8.02. This change may result from changing needs in programmes: see Dalhousie, Art. 5.3.1.

[49] Alberta, Art. 6.07.3; Saskatchewan, Art. 15.13.1.

[50] British Columbia, Art. 4.01 and McGill, Art. 5.17 respectively. A notable exception is Western Ontario, Art. B.3, which allows the tenure committee to determine the relative significance of teaching, research and service.

[51] See *McWhirter, supra,* note 30. The Court awarded only $12,000 in damages. The plaintiff had asked for a declaration that the rules governing tenure had not been followed, $75,000 in damages and/or specific performance.

since tenure is purely an internal matter, it should ultimately be determined by faculty and, if need be, reviewed by faculty. Further, there may be special circumstances which an outside arbitrator cannot understand. On the other hand, the possible proximity of the appeal committee to the appellant may affect the objectivity of the reviewers. Also, an internal appeal committee may not be as capable as an arbitrator in determining the consequence of procedural violations.

Approximately half of the universities in Canada have an internal tenure appeal system. Some agreements provide that the decision of an internal appeal system can be grieved to arbitration.[52] For the most part, the agreements have adopted the tenure appeal system in existence prior to the agreement. Accordingly, the composition, jurisdiction, powers and procedures vary from agreement to agreement. Both the Toronto and Carleton agreements give the tenure appeal committee investigative powers.[53] It is impossible to assess how effectively the internal appeal system works because most agreements state that hearings will be held *in camera* and that decisions are confidential, final and binding on the parties.

C. *Arbitral review*

Arbitral review of denial of tenure has become more frequent since the advent of collective bargaining. Unlike an internal appeal procedure, arbitration employs an outsider for the resolution of a challenged decision. However, despite the merits of having an objective third party resolve a tenure dispute, arbitral review may offend existing processes within the university system which are based on the doctrine of self-governance. Faculty not only share decisional authority with the university but also have primary responsibility for formulating decisional standards and in making initial decisions with respect to tenure by peer evaluation, although tenure decisions finally rest on subjective assessment by peers of such vague criteria as the quality and quantity of a candidate's research. If the merits of a tenure decision were subject to review, full and free discussion of a candidate's performance or ability

[52] *E.g.*, Manitoba, Art. 19.11(a); Notre Dame, Art. 11.C, Regina, Art. 18.8 and Saskatchewan, Art. 15.19.

[53] Toronto, Art. 27, Carleton, Art. B.10. The Carleton agreement provides that "The Committee may call for, and is entitled to receive, any other information that is relevant to the appeal" (Art. B.10). Toronto's agreement provides that the Committee "shall be empowered to obtain such information and to interview such persons as it may judge to be useful to its reaching a judgement of the case" (Art. 27). This investigative role no doubt is exercised for the benefit of the appellant.

might be impeded, and the possibility of review might induce tenure committees to grant tenure to marginal candidates. Conversely, it might be argued that the possibility of arbitral review would encourage frank and fair assessments. The dilemma of striking a balance between the interests of the aggrieved faculty member and the existing institutional processes must be met. Some collective agreements have tried to resolve this problem by restricting the scope of the arbitrator's jurisdiction to a review of mandated procedures for making tenure decisions. For example, the Manitoba agreement states that:

> a faculty member shall not grieve any substantial decision made pursuant to the provisions of this article but shall have the right only to grieve procedural defects in the tenure committee or appeal committee process.[54]

By this method, committee decisions on the merits of the case are preserved while procedures which are the only guarantee of fairness to the candidate are closely examined. The provisions which spell out the procedure/substance dichotomy are usually skeletal and do not resolve challenges that substantive considerations were misapplied, wrong considerations were applied or that the decision was based on irrelevant or even prohibited considerations.[55] Further, such provisions do not protect a candidate from tenure committees or administrations which have carefully followed procedural requirements but have rejected tenure for personal or political reasons.

On the other hand, an arbitrator's jurisdiction may be broadened beyond procedural review if there is a violation of provisions governing academic freedom or non-discrimination, in which case the substantive decision will be reviewed on its merits.[56] Some agreements also permit review of substantive decisions in certain circumstances, such as a President's reversal of a positive recommendation for tenure.[57] The St Thomas agreement provides that "the president shall not unreasonably reject a recommendation of the committee on academic staff".[58] This allows arbitral review of the merits of the President's decision, but limits substantive review of the committee's recommendation.

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[54] Manitoba, Art. 19.11.a. Similar provisions are found in Windsor, Art. 13.03; York, Art. 13.03; Regina, Art. 18.8 and Saskatchewan, Art. 15.19.

[55] See Finkin, *The Arbitration of Faculty Status Disputes in Higher Education* (1976) 30 S.W.L.J. 389, 411.

[56] See Weisberger, *Grievance Arbitration in Higher Education: Recent Experiences with Arbitration of Faculty Status Disputes* (1978), 3.

[57] York, Art. 13.03 and Saskatchewan, Art. 15.19(iv). The Saint Mary's agreement provides that in such a situation, the matter be submitted to an *ad hoc* review committee (Art. 11.46).

[58] St Thomas, Art. 9.042.

Another technique of restricting arbitral review is to limit the broad array of remedies for contractual violations. The Saskatchewan agreement states that:

> The arbitrator shall have the power to prescribe such remedies as he sees fit, subject to the following limitations:
>
> (i) in the event that the arbitrator determines that proper procedures have not been followed, he may order that the matter of tenure be reconsidered but shall not award tenure on this ground;
>
> (ii) in the event that the arbitrator determines that Article 6 (Academic Freedom) or Article 7 (Non-Discrimination) has been violated, he shall so declare and so report, and he may order that the matter of tenure be reconsidered but shall not award tenure on these grounds;
>
> (iii) in the event that the Board has reversed a positive recommendation from the University Review Committee or Tenure Appeal Committee, the arbitrator may order the award of tenure;
>
> (iv) the arbitrator shall be empowered to extend a candidate's probationary period by a reasonable length of time to permit reconsideration of his candidacy for tenure, if so ordered under the provisions of this section.[59]

Guidance in remedies not only simplifies the arbitrator's role but also allows the faculty and administration to fashion the outcome of tenure challenges in ways which are acceptable to both parties. On the other hand, some remedial flexibility is required, because an arbitrator may be confronted with a finding of contractual violation, but no meaningful remedy.[60]

Some agreements have abandoned the doctrine of faculty self-governance and allow unrestricted review of institutional processes, including peer evaluation. The Ottawa agreement defines grievance to mean "any difference between the parties to this Agreement arising from the application, interpretation or administration or alleged violation of this Agreement, including denial of natural justice and any question as to whether a matter is arbitrable".[61] Not only is the arbitrator's jurisdiction unrestricted, but there are no limitations on the remedies available. This type of unrestricted arbitral review places a heavy stress on arbitrable standards because the arbitration board may have to substitute its decision for a peer evaluation without the benefit of committee deliberations. Further, unrestricted arbitral review also places a greater onus on arbitrators who have to deal with a highly subjective decision.

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[59] Saskatchewan, Art. 15.20.

[60] In *Re Saint Mary's University and MacFarlane, supra,* note 41, the arbitrator made a clear finding of bias and ordered a two-year deferral, but on judicial review the Court held that the arbitrator exceeded his jurisdiction and ordered that the matter be remitted for reconsideration by the appropriate tenure committee.

[61] Art. 44(1)a: see also Art. 15.01 of the St Thomas agreement. The Ottawa agreement has produced by far the most arbitrations.

All collective agreements state that arbitrators do not have any power "to alter or change any of the provisions of this Agreement nor to substitute any new provisions for any existing provisions, nor to give any decision inconsistent with the terms and provisions of this Agreement".[62] Finally, in order to relieve tension over external arbitration, most agreements provide a selection process of arbitrators by means of predetermined lists for specific issues, qualification in the disciplinary area under review, or by requiring that arbitrators hold or have held an academic appointment.[63]

IV. Tenure review

It is impossible to evaluate cases which deal with the internal appeal system because, as noted above, the hearings are usually *in camera* and the decisions are confidential. Accordingly, this section will deal with judicial control and arbitral review of tenure denials.

A. *Judicial control*

Collective agreements must contain an arbitration clause; thus an aggrieved tenure candidate usually must go to arbitration to challenge an institutional decision. The candidate and the university will be bound by the arbitrator's decision unless the arbitrator has exceeded his jurisdiction. However, if a collective agreement precludes arbitral review of tenure or if an association agreement provides for an internal appeal procedure only, the candidate may apply to the court for common law judicial review through one of the prerogative writs or their statutory equivalents, or may commence an action for wrongful dismissal. In Ontario, a candidate can apply for judicial review under *The Judicial Review Procedure Act*;[64] in British Columbia he can apply under the *Judicial Review Procedure Act*.[65]

B. *Common law review*

Judicial 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

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[62] *E.g.*, Ottawa, Art. 44.12(i). See also St Thomas, Art. 15.091; York, Art. 9.24.

[63] Art. 19.42 of the Acadia agreement provides that "[i]n cases requiring academic judgment, the members of the Arbitration Board shall be current or former members of a faculty of a Canadian university other than Acadia University".

[64] *The Judicial Review Procedure Act, (1971)*, S.O. 1971, c. 48.

[65] *Judicial Review Procedure Act*, S.B.C. 1976, c. 25.

of the remedy given.[66] In *Re Elliot and Governors of University of Alberta*[67] a faculty member applied for an order of *certiorari* to quash a Faculty Tenure Committee's decision to deny tenure and prohibition to prevent the Tenure Appeals Committee from proceeding. The applicant argued that he had been denied natural justice because his departmental chairman, who had recommended denial of tenure, was a member of the Faculty Tenure Committee and because he was denied the right to be heard before the Faculty Tenure Committee and to cross-examine its members. He contended further that both committees were quasi-judicial in character and function. The Court refused to quash the decision since the chairman had made merely a recommendation and not a final decision.[68] Further, although the Court agreed that the Faculty Tenure Committee and the Tenure Appeals Committee did exercise quasi-judicial functions, the Court felt that it was necessary for the Faculty Committee to be able to discuss freely in private, and that on the facts the denial of the right to cross-examine was not a denial of natural justice. The application for prohibition was dismissed because there was no real apprehension or likelihood of bias, only a hypothetical possibility.

The assumption that the Faculty Tenure Committee and Tenure Appeals Committee were bodies subject to common law review by remedies such as *certiorari* was weakened in *Vanek* v. *Governors of the University of Alberta*.[69] In this case the applicant professor applied for *certiorari* to quash the negative decision of the Faculty Tenure Committee on the ground of a procedural defect. Cavanagh J. dismissed the application because the Faculty Tenure Committee was not a statutory body and thus *certiorari* did not lie to review the committee's decision.[70]

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[66] There was no reported case in Canada concerning tenure between 1923 and 1973.

[67] (1973) 37 D.L.R. (3d) 197 (Alta S.C., T.D.).

[68] *Cf. Re Kane and Board of Governors of University of British Columbia* (1977) 82 D.L.R. (3d) 494 (B.C.S.C.), where it was held that the President's presence during and participation in the deliberations of Board of Governors' proceedings raised a presumption of bias; *rev'd* [1980] 3 W.W.R. 125 (S.C.C.).

[69] [1974] 3 W.W.R. 167 (Alta S.C., T.D.), *aff'd* (1975) 57 D.L.R. (3d) 595 (App. Div.).

For a discussion as to whether a university is a private institution or a public body, see Fridman, *Judicial Intervention into University Affairs* (1971) 21 Chitty's L.J. 181. The application of the prerogative writs to university decisions has received criticism in England: see, *e.g.*, Wade, *Judicial Control of Universities* (1969) 85 L.Q.R. 647.

[70] However, Cavanagh J. noted in *obiter* that "if the faculty tenure committee was a statutory tribunal, I would likely have quashed its proceedings for procedural errors" (*ibid.*, 173).

In appeal, Clement J.A. agreed that the committee was non-statutory. He held that the Visitor had exclusive jurisdiction in all internal matters relating to administration of the university such as academic decisions regarding status, and that the Court was not empowered to act as the Visitor's delegate.[71] However, the Court did comment that it would have jurisdiction if the issue had concerned a breach of contract.

C. *Actions for damages*

In *McWhirter* v. *Governors of the University of Alberta (No. 2)*,[72] the plaintiff was an associate professor in the department of genetics at the University and was originally hired to do interdisciplinary work. According to procedure, the departmental chairman had to make a specific recommendation to the Faculty Tenure Committee after wide consultation. Because the plaintiff's colleagues had sharply divided views about his tenure, and because the departmental chairman had little personal knowledge of the plaintiff or his work, a departmental meeting was called to conduct a secret ballot. The vote was against tenure. The result of the secret ballot was the main element in the chairman's recommendation to the Faculty Tenure Committee, which also decided against tenure. The Tenure Appeals Committee agreed with the Faculty Tenure Committee that the plaintiff was to be judged primarily as a geneticist and dismissed the appeal. The plaintiff alleged that the rules of

[71] *The Universities Act*, R.S.A. 1970, c. 378, s. 5, states: "The Lieutenant Governor is the Visitor of each university, with authority to do all those acts which pertain to Visitors". The Visitor's position is in nature like a domestic tribunal and in this capacity he ensures that the adopted procedures are followed. See *Vanek* v. *Governors of University of Alberta, supra,* note 69, 606 (App. Div.). *The Universities Amendment Act, 1976,* S.A. 1976, c. 88, s. 5 abolished the office of Visitor.

For a discussion of the origins, jurisdiction and concerns of the Visitor's position, see Ricquier, *The University Visitor* (1978) 4 Dal. L.J. 647. One author describes the Visitor's function as a "safeguard against indiscriminate use of authority and as a guardian of the liberal and humane values professed and practiced by universities" (Bridge, *Keeping Peace in the Universities: the Role of the Visitor* (1970) 86 L.Q.R. 531, 551). See also McConnell, *The Errant Professoriate* (1973) 37 Sask. L.R. 250.

[72] *Supra,* note 30. The plaintiff's first case, *McWhirter* v. *Governors of the University of Alberta* (1976) 63 DLR. (3d) 684 (Alta S.C., T.D.) was not a success. The plaintiff brought an action against the defendant for breach of contract but the Court dismissed the action on the ground that the Visitor had exclusive jurisdiction. Before the plaintiff's appeal was heard, the Alberta Government abolished the office of Visitor by statute and thus the Appellate Court ordered the trial judge to reconsider the case: see note 71, *supra.*

natural justice were not followed and brought an action against the defendant for breach of contract on the grounds that proper procedures were not followed. The plaintiff further alleged that the terms under which he came to the university ought to have been considered in his tenure proceedings.

While Steer J. did not find the Faculty Tenure Committee to be a statutory body exercising quasi-judicial functions, he did hold that the relevant University bodies must follow the prescribed University procedures and deal fairly and impartially with the applicant's case. This had not happened. Referring to the departmental deliberations before the secret ballot, Steer J. noted that:

> They were not discussions for the purpose of getting the view of the person interviewed and the basis for that view with the object of assessing the validity of the individuals' [*sic*] opinion as to the contribution which Mr. McWhirter and his work were making to the University. This, in my opinion, is what the handbook required the doctor to do, and further to interview the candidate himself in order that he may make a fair and informed recommendation. He must, of course, also use his own personal knowledge, if he has any, which was not the case here. It also required, in my opinion, that he consult in the same manner with the persons with whom Mr. McWhirter was working in the other departments. These things were not done. What was substituted for this was the secret ballot in which the opinions of the departmental members were expressed on most important aspects of Mr. McWhirter's ability, his work and his teaching, and were accepted by the doctor at their face value without any inquiry as to whether or not the individuals casting the ballot had the necessary factual background to express a valid opinion on the subject-matter of any or all of the questions. ... I have concluded that the method adopted by Dr. von Borstel to reach his recommendation, although it might be said to be a form of consultation, was not the kind of consultation envisaged by the handbook. The correct form of consultation to satisfy the requirement of the handbook is, in my opinion, the kind I have discussed above, *i.e.*, frank, face-to-face interviews with a view not only to eliciting an opinion, but also with a view to ascertaining whether or not there is a valid basis for the opinion. This was not done.[73]

Accordingly, Steer J. held that the Chairman's recommendation and the committee's decision were invalid because the recommendation had been so influential in the committee's deliberations. These defects could not be cured by the Tenure Appeals Committee, which only reviewed procedural matters. Further, the Faculty Tenure Committee had used the wrong standard to assess the plaintiff in that he should have been judged on an interdisciplinary basis and not solely as a geneticist. Thus the plaintiff was awarded damages for breach of contract. In assessing damages the Court noted that the plaintiff's contract provided for two event-

[73] *Ibid.*, 626.

ualities: if the decision with respect to tenure were negative, the plaintiff must be offered a terminal appointment of one year, but if tenure procedures were not followed, he would be offered a one-year extension and tenure reconsideration without prejudice. The Court felt that even if the plaintiff were successful in his tenure reconsideration, he would not likely have stayed long at the defendant University and awarded $12,000 to compensate him for that loss of chance.[74]

The Alberta Court of Appeal was of the opinion that there had been no breach of contract.[75] Considerable weight was given to the fact that tenure procedures in the Faculty Handbook resulted from negotiations between the Association representing the Faculty and the Board of Governors. Even though there were no provisions respecting the manner in which tenure information was to be gathered, the Court of Appeal felt this was a decision which the parties had accorded to the Head of the Department and the Faculty Tenure Committee:

> It may well be that a person could, in a number of ways, gather the required evidence. This is left flexible in the Faculty Handbook, and I do not believe that a court should dictate a particular procedure. Different circumstances might well suggest different procedures. In the present case, the Head of the Department adopted a procedure which he felt was particularly appropriate in dealing with an issue which had created an extreme schism in the Department. It may well be that the secret ballot permitted the members to express honest opinions without becoming embroiled in the controversy. Those who lived in the community thought it was appropriate. I cannot conclude that the Head of the Department failed to discharge any duty imposed upon him.[76]

Further, the Court of Appeal felt that the decision of the Tenure Appeals Committee concerning the propriety of the procedures should not be interfered with unless that decision was "so erroneous that a failure to interfere would amount to a substantial miscarriage of justice".[77] The appeal by the plaintiff was dismissed because there had been no such miscarriage and no breach of contract. The University's cross-appeal was allowed.

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[74] The plaintiff's contempt for the department was emphasized by the Court (*ibid.*, 634).

[75] *McWhirter* v. *Governors of the University of Alberta* (1979) 18 A.R. 145 (C.A.).

[76] *Ibid.*, 156. The Court of Appeal noted that those involved in the procedures acted honestly and in good faith.

[77] *Ibid.*, 160. Because there was an agreed-upon tribunal consisting of peers, the Trial Judge could only interfere on the grounds that "the tribunal exceeded or declined jurisdiction, or failed to apply the rules of natural justice, or failed to comply with the procedures set out in the Handbook" (*ibid.*, 156).

A claim for damages for wrongful dismissal was dealt with in *Dombrowski* v. *Dalhousie University*,[78] where the plaintiff had been unanimously recommended for tenure by the Faculty Tenure Committee.

However, there had also been serious disagreements between the plaintiff and his colleagues, who maintained that the planning of the department's graduate programme would be rendered impossible if the plaintiff were granted tenure. After consulting members of the department, the Dean refused to recommend the plaintiff for tenure because of his personality clashes with his colleagues.[79] The Vice-President (Academic) and President agreed with the Dean, but after an *ad hoc* committee's report the administration made a final offer of a terminal two-year appointment, which the plaintiff accepted. In the final year of his contract, the plaintiff made an application for *mandamus* to direct the President to place the plaintiff's application for tenure before the Board of Governors and for damages for wrongful dismissal. The Court held that there was no statutory or contractual duty on the President to place any faculty member's name before the Board of Governors for tenure consideration. The plaintiff's claim for wrongful dismissal also failed because "in agreeing to the final contract the plaintiff abandoned any rights he might have had to a tenured position within the university".[80]

D. *Procedural review in Ontario*

In Ontario, any procedural requirements which may be imposed on tenure decisions by virtue of the common law rules of natural justice may be superseded or supplemented by the *Statutory Powers*

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[78] *Supra*, note 45.

[79] Tenure criteria were (1) academic and professional qualification, (2) teaching effectiveness, (3) contribution to the academic discipline, (4) *ability and willingness to work effectively with colleagues* [emphasis added] and (5) personal integrity (*ibid.*, 286). The fourth criterion must have been given little weight in the Faculty Tenure Committee in light of Hart J.'s statement:

> I am further satisfied that he carried the dispute beyond a difference of opinion among scholars, which is desirable in the academic world, and converted it into a personal vendetta. I believe it was the attacks on the personalities of his colleagues that finally lost him the support of those who had shared the same academic views as Professor Dombrowski at the beginning of the dispute (*ibid.*, 282).

[80] *Ibid.*, 291: *cf. Ayre* v. *University of Manitoba* (1976) 65 D.L.R. (3d) 747 (Man. C.A.) where the Court held that the right to tenure may be waived by agreement.

Procedure Act.[81] The Act prescribes minimum rules of fair procedure applicable to most tribunals created by or under an Act of Ontario. Section 3 of this statute states that:

> Subject to subsection 2, this Part applies to proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceedings an opportunity for a hearing before making a decision.

There are several issues which must be resolved in favour of the aggrieved candidate before relief can be granted. First, is a tenure decision an exercise of a "statutory power of decision"? The governing statutes of Ontario's universities provide no uniform power for the granting of tenure, but the power for doing so is invariably vested in the Board of Governors or its equivalent. Some statutes are specific and state that the Board of Governors has the power to "grant tenure to a member of faculty".[82] Other statutes are more general and provide a power to "appoint, promote, suspend and remove the members of the teaching and administrative staffs".[83] The *Carleton University Act*[84] vests supervision and direction of the teaching staff in the President subject to the will of the Board of Governors. But none of these statutes provide the procedures for granting tenure or the considerations which should be taken into account. These procedures have been created either by Senate or by bargaining between faculty associations and the university, and they vary structurally from university to university.

Although the case law in Ontario has not yet determined whether a tenure decision is an exercise of a statutory power, there have been two cases outside Ontario which decided whether a tenure committee is a statutory body.[85] While the decisions are by no

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[81] S.O. 1971, c. 47.

[82] *E.g., The University of Waterloo Act, 1972*, S.O. 1972, c. 200, s. 14(1)(b); *The Wilfrid Laurier University Act, 1973*, S.O. 1973, c. 87, s. 12(b): *The University of Western Ontario Act, 1974*, S.O. 1974, c. 163, s. 21(d) provides that the Board of Governors has the power to "fix and provide ... the tenure of office" of faculty.

[83] *E.g., The University of Toronto Act, 1971*, S.O. 1971, c. 56, s. 2(14)(b).

[84] S.O. 1952, c. 117, s. 20(2).

[85] In *Vanek* v. *Governors of the University of Alberta, supra*, note 69, 600, Clement J.A. stated that

> The 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 the statute relating to affairs internal to the university.

Clement J.A. stressed that the Faculty Tenure Committee's purpose was "private to the university and applicable only to full-time faculty members" (*ibid.*, 606): see also *Re Elliot and Governors of the University of Alberta, supra*, note 67.

means conclusive, it would appear that two factors which may induce a court to conclude that a tenure committee is not a statutory body are (i) the lack of any mention of the tenure committee in the governing Act and (ii) the internal nature of the subject-matter of such a committee.

Assuming that an Ontario tenure committee were held to constitute a statutory body and were not required by statute to hold hearings, the next question would be whether such a committee were required "otherwise by law" (*i.e.* at common law) to afford "an opportunity for a hearing".[86] If "opportunity for a hearing" means simply "an opportunity to be heard", as required by the rules of natural justice, then the question here is merely whether the rules of natural justice would apply to the tenure committee in the circumstances. If so, the procedural requirements of the *Statutory Powers Procedure Act* would apply. If, however, the question is whether, in the circumstances, the rules of natural justice would have required a full oral hearing, then only if the rules of natural justice would have applied and required such a hearing, would the procedural rules of the *Statutory Powers Procedure Act* apply. Finally, it should be noted that if the decision of a tenure committee were recommendatory only, it would not be subject to the procedural rules of the *Statutory Powers Procedure Act.* Section 3(2)(g) provides that:

> This Part does not apply to proceedings, ... of one or more persons required to make an investigation and to make a report, with or without recommendations, where the report is for the information or advice of the person to whom it is made and does not in any way legally bind or limit that person in any decision he may have the power to make.

If, for some reason, the procedural rules of the *Statutory Powers Procedure Act* do not apply, it is possible that, as elsewhere, an Ontario tenure committee might be required to comply with the common law rules of natural justice.[87]

E. *Arbitral review*

A preliminary difficulty which arises in arbitral review is to determine who carries the onus of proof? Does the university have to show that, on the balance of probabilities, its decision was

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[86] The purpose of this part is to determine whether the provisions of the *Statutory Powers Procedure Act* apply. For a discussion of the standards of natural justice required, see Atkey, *The Statutory Powers Procedure Act, 1971 (Ontario)* (1972) 10 Osgoode Hall L.J. 155 and Mullan, *The Federal Court Act: A Misguided Attempt at Administrative Law Reform?* (1973) 23 U.T.L.J. 14.

[87] *Cf. Roper* v. *Executive Committee of the Medical Board of the Royal Victoria Hospital* [1975] 2 S.C.R. 62 and *Re Nicholson & Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311.

correct in the circumstances or does the tenure candidate have to demonstrate his tenure worthiness? In *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Goreloff)*[88] it was argued that a decision not to grant tenure under the collective agreement was tantamount to dismissal for just cause, in which case the onus would be on the University to justify its decision not to grant tenure. The Board noted the freedom and trust which results from the granting of tenure and concluded that the completion of the probationary period created no right not to be dismissed.[89]

Another problem which has arisen, particularly with repect to the review of peer evaluation, is what review standard is to be used by arbitration boards? In *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Valero)*[90] the Board adopted the position enunciated in *Re U.E.W., Local 523, And Union Carbide Canada Ltd*:

> first, the judgment of the company must be honest and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling. Yet the managerial discretion to decide has been limited by the terms of the agreement and it is the duty of the arbitration board to ensure that it is exercised in the light of proper principles and criteria, that all relevant considerations have been adverted to, and that all irrelevant factors have been excluded from the process of decision.[91]

Thus, the arbitration board in *Valero* concluded that the proper test was whether, "[h]aving regard to the collective agreement and to all of the evidence ... the decision of the Joint Committee to deny tenure [was] wrong in terms of the collective agreement, or unreasonable on the merits".[92] The application of this standard is not easy. In *Re The University of Ottawa and the Association of Professors of the University of Ottawa (McCaughey)*[93] the complainant had applied for tenure in 1976, but the Joint Committee

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[88] *Supra*, note 25.

[89] *Foll'd* in *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Valero), supra*, note 19.

[90] *Ibid.*

[91] (1967) 18 L.A.C. 109, 118 *per* Weiler.

[92] *Supra*, note 19, 558. The standard may now be correctness rather than unreasonableness: see *Re Philips Cables Ltd and International Union of Electrical, Radio & Machine Workers, Local 525* (1977) 16 L.A.C. (2d) 345 *per* Adams.

[93] (1978) A.A.S. 562 *per* Kruger.

refused to grant or deny tenure and offered a one-year contract at the end of which his tenure application would be reconsidered. As required in the collective agreement, the Joint Committee had to state exactly what conditions had to be fulfilled. These were to obtain a doctorate or its equivalent, and to have his work evaluated so as to demonstrate his competence in research.[94] In 1977, Professor McCaughey again applied for tenure and his research was evaluated by three external appraisers. The Teaching Personnel Committee did not recommend Professor McCaughey for tenure because it felt that his work did not contribute in a significant manner to the advancement of a science, an art or a profession as required by the collective agreement. The Joint Committee agreed with the Teaching Personnel Committee and refused Professor McCaughey tenure.

Professor McCaughey filed a grievance and the matter went to arbitration. There were no restrictions on arbitral jurisdiction nor limitations on remedies. The arbitration board made the following comments concerning the review of peer judgments:

> We must begin with the assumption that a group of peers like those on the Teaching Personnel Committee are competent and honourable scholars attempting to reach their conclusions based on the evidence and consistent with the guidelines of the collective agreement. A board of arbitration should be most reluctant to substitute its judgment for that of such a peer body. It should intervene only where either the procedures were faulty or the decisions cannot be supported on the basis of the available evidence assessed in the light of the relevant clauses of the agreement. The assumption that the peers will carry out their assigned tasks properly is subject to challenge and if successfully challenged, then a board of arbitration must intervene.
>
> Even in those instances where such deficiencies are disclosed, an outside arbitration board normally should consider reference back to the peer group rather than assume to itself the peer group's role. Only where the board is convinced that justice will not be served by that process should it take unto itself the function normally better undertaken by internal bodies closer to the situation and, therefore, generally more

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[94] Art. 33.9(b) states that the Joint Committee can make a recommendation "in favour of delaying or refusing tenure and offering a final limited-term contract at the end of which tenure will be granted or employment terminated. In such a case, the Committee must specify the reason(s) for this decision and, if necessary, exactly what condition(s) the professor personally must fulfill in order to comply with the requirements of 10(b) below when the Teaching Personnel Committee will examine his file for the second time relative to the granting or the refusal of tenure". Art. 33.10(b)(2) states, "holds a Doctorate, it being understood that the University will consider as an equivalent in this regard any work judged by his peers as having contributed in a significant manner to the advancement of a science, of an art or of a profession."

> suited to making the required judgments. Where a board of arbitration does not refer back but makes the substantive judgment itself, it is carrying out the functions normally conducted by bodies like the Joint Committee rather than those of the Teaching Personnel Committee.[95]

The arbitration board found that the Teaching Personnel Committee in 1977 was deficient in its procedures, because it virtually ignored the Joint Committee's statement of 1976,[96] and that its interpretation of the collective agreement did not stand up under scrutiny and was questionable on the evidence. The Board concluded that Professor McCaughey had produced publishable work that was favourably assessed by outside reviewers and had no option but to grant him tenure.

The remedial powers of an arbitration board stem either explicitly or implicitly from the agreement itself,[97] and thus any departure from those expressly stated in the agreement may be quashed on appeal to the court on the ground that the arbitration board exceeded its jurisdiction. In *Re Saint Mary's University and MacFarlane*,[98] the Nova Scotia Supreme Court quashed an award which gave the grievor a two-year deferral and ordered that the matter be remitted for reconsideration by the appropriate tenure committees. In this case the complainant alleged that procedures in the collective agreement had not been properly followed and that bias had rendered the procedures defective. The chairman of the departmental Tenure Committee had influenced its members and made improper approaches to members of the University Review Committee concerning the grievor's application for tenure.[99] Professor MacFarlane's dean recommended him for tenure but the

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[95] *Supra*, note 93, 608.

[96] The Arbitration Board commented that candidates who came under Art. 33.9(b) are entitled to know what must be done in order to correct previous deficiencies and to expect that if the conditions prescribed by the Joint Committee are met, they will be granted tenure.

[97] See *Association of Radio & Television Employees of Canada* v. *Canadian Broadcasting Corp.* [1975] 1 S.C.R. 118.

[98] *Supra*, note 41.

[99] With respect to the allegation of undue influence the arbitration board stated, "[i]f the Department is entitled to be involved, then one is faced with the luck of the draw at the time of his hearing and, while allegations of undue influence or impropriety may always be made, the procedure itself enables all members of the Department to participate and presumes academic integrity, and any Board must be cautioned against findings of impropriety or undue influence on such a basis in the absence of substantial evidence which would support such an allegation" (*supra*, note 41, 8). The arbitration board further noted that even though a high degree of subjectivity was built into the Committee process, the decisions had to be arrived at fairly.

University Review Committee unanimously voted against tenure on the ground that Professor MacFarlane's contributions to the discipline through research and publication were deficient. The arbitration board found actual bias at the departmental hearing because the decisions

> were made on erroneous information, incomplete information and remote and unreliable hearsay, all of which appears to have been orchestrated by the Chairman of the Committee out of motives of open hostility.[100]

Consequently, the departmental report which was available to members of the University Review Committee lacked the degree of fundamental fairness which any tribunal of such a nature would be expected to possess.[101] The recommendation of denial of tenure was set aside because of bias in the process. However, the arbitration board did not feel that under the circumstances it was fair to remit the grievor's application for tenure because time was "necessary to level the situation" and instead granted a two-year deferral.

The University successfully appealed this deferral.[102] Hallett J. found that the effect of the Board's decision was to impose on the University a two-year deferral of Professor MacFarlane's tenure hearing. The collective agreement provided that a decision on tenure was for the President to make and that any fettering of this right would compel the University to do something it was not by contract obliged to do. By imposing the two-year deferral on the University, the arbitration board had in effect altered the agreement and accordingly, the Court quashed the two-year deferral and ordered that the matter be remitted for reconsideration.

V. Conclusions

It would be folly to speculate at this time whether tenure provisions in association or collective agreements have been more beneficial to faculty or to university administrations, because tenure is only one of many aspects which regulate the faculty-administration relationship. However, several observations may be made from the limited experience Canadian universities have had with tenure

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[100] *Ibid.*, 21.

[101] Counsel for the University at the arbitration hearing argued that bias at the departmental level was removed from the University Review Committee because tenure was rejected on grounds of deficient research and publication. Nevertheless, the arbitration board concluded that the approach of the Chairman of the Departmental Tenure Committee to members of the University Review Committee tainted the whole process.

[102] *Supra*, note 41. The University did not contest the arbitration board's findings that the hearings were unfair.

review. First, the language in the agreements should be as specific as possible. General terms can prove to be obstacles to challenged institutional decisions. The *McWhirter*[103] decision has placed the onus on the parties to define proper procedures. On the whole, the agreements do not effectively inform tenure candidates and Tenure Committees of the standard of research and teaching required for tenure. Second, if an arbitration board is not to have unrestricted power to prescribe an appropriate remedy, then the agreement should clearly specify the remedies. In the *MacFarlane* case the arbitration board noted that it could not order tenure and decided to grant a deferral because in its opinion it would have been unfair, in the circumstances, for the Tenure Committee to reconsider the application until a later time. Finally, tenure procedures, particularly appeals, should be simplified.

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[103] *Supra*, note 30.

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