Academic Freedom and Tenure Committee

Report of the Committee of Inquiry in the Case of Professor Leo Johnson at the University of Waterloo

June 1986

CAUT ACPPU

Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université
www.caut.ca

Shortly after Professor Leo Johnson of the Department of History, University of Waterloo, was convicted on charges of indecent assault involving female children in November, 1982, the University moved to dismiss him from his tenured position. Representations were made to the University administration to ensure that the hearing - to determine whether dismissal was justified by the circumstances - was conducted fairly and in accordance with CAUT guidelines. These were unsuccessful. The internal University committee established under the Waterloo procedures recommended to the President of the University, Douglas Wright, that Johnson be dismissed. President Wright endorsed the recommendation and it was approved by the Board of Governors.

Because it was not satisfied that Johnson had been treated fairly, the Academic Freedom and Tenure Committee established a committee of inquiry consisting of Pamela Smith (Sample Survey, University of Regina) and Joseph Rose (Faculty of Business, McMaster University) to examine the dismissal procedures in use at Waterloo and to make recommendations for a settlement of the dispute. The AF&T Committee made no judgement on whether or not the charges on which Johnson was convicted warranted termination of a tenured appointment.

When the report of the committee of inquiry was completed, further efforts were made to persuade President Wright to submit the case to binding arbitration. These efforts were also unsuccessful. Because of the significance of the case, the CAUT Board, at its meeting in February, 1986, authorized publication of the report of the committee of inquiry. It appears below.

Leo Johnson is presently awaiting trial on new charges of a similar nature arising out of events in the summer of 1985.

Preface

The Committee of Inquiry was established by the Academic Freedom and Tenure Committee for the purposes of determining whether Professor Leo Johnson "was treated fairly and whether he was treated in accordance with CAUT Guidelines".

Professor Johnson had been dismissed from the University of Waterloo by the Board of Governors on June 22, 1983.

We visited the University of Waterloo on March 7-13, 1984 and conducted interviews with:

1. D.T. Wright: President, University of Waterloo;
2. R.K. Banks: Dean, Faculty of Arts (Dean Banks made his interview contingent upon receiving written questions in advance. Although this posed some potentially difficult problems, we agreed to this procedure after lengthy discussions with Dean Banks);
3. J.W. Walker: Chairman, History Department;
4. Four members of the Committee to Investigate the Adequacy of Cause (hereafter the Policy 53 Committee) and E.J. Barnes, Secretary to the Policy 53 Committee. The four faculty members we met with were: J.B. Moffatt (Chairman), J.E. Ashworth, J.A. Schey, and R.P. Schlegel;
5. W.R. Needham: President of the Waterloo Faculty Association;
6. Professor R.D. Lambert: Professor Johnson's representative before the Policy 53 Committee;
7. Mr. G. Flaxbard: Mr. Johnson's lawyer; and,
8. Two members of the Waterloo Faculty Association's AFT Committee: Professor L.J. Cummings and Professor L. Kapur.

As well, we interviewed Professor Johnson on March 10, 1984 at the Archibald Correctional Centre in Concord, Ontario.

Unfortunately we did not interview everyone directly associated with this case. The Vice-President Academic, T.M. Brzustowski, declined to grant two requests for an interview.

This report is based on the documentation provided by the CAUT AFT Committee, our interviews and supplementary documentation provided by interviewees. We are indebted to all members of the

University of Waterloo community and others who gave of their time. Without their cooperation, this report would have been even more difficult to prepare. We would like to give special thanks to Jean Spowart for her assistance in setting up interviews and performing other support activities.

CAUT inquiries are difficult under the best circumstances; we wish it to be noted that our task may have been rendered more difficult than usual. Prior public disclosure of the Baar Report, a preliminary CAUT AFT Committee report which led to this inquiry, undoubtedly contributed to the difficulty. Vice-President Brzustowski cited the Baar Report as his reason for not meeting with us; in his view, Baar's report represented CAUT's position with respect to this case. We wish to note we find Brzustowski's explanation less than satisfactory since Vic Sim, Associate Executive Secretary of CAUT, reported to a local newspaper that the Baar Report did not represent CAUT's position. In addition, we assured him it did not represent CAUT's position. Dean Banks also expressed deep concerns about the Baar Report as did others.

Clearly, Baar's Report does not purport to analyze all the facts, nor did Baar interview all persons involved with the case. This is acknowledged on page one. Nevertheless, Baar's analysis generalizes widely and is unremittingly critical of those involved in this matter, with only a few exceptions. We believe that Baar has substituted rhetoric for knowledge; for example: "In summary, the University took on the role of institutional exorcist, casting out the devil from its midst". Such hyperbole is unnecessary and unwarranted. Sweeping condemnations are to be avoided by investigators relying largely on reports provided by one party to a dispute. It has been our experience that CAUT inquiries can be jeopardized by such reports. Accordingly, we respectfully urge that the AFT Committee institute measures to ensure that preliminary reports are balanced, discreet and do not become public.

Introduction

The University

The University of Waterloo is located on a 1,000 acre campus in the City of Waterloo. Waterloo is situated next to Kitchener, and the two cities have a combined population of approximately 200,000. Classes at the University of Waterloo began to be offered in 1957; the University was incorporated as a degree-granting institution offering courses at the undergraduate and the graduate levels in 1959. The University, which is co-educational and non-denominational, offers programs in Arts, Engineering, Environmental Studies, Human Kinetics and Leisure Studies, Integrated Studies, Mathematics, and Science. The University is a member of The Association of Universities and Colleges of Canada and the Association of Commonwealth Universities. Total undergraduate full-time enrolment is currently 15,088 students while full-time graduate enrolment is currently 1,340 students.

All faculty holding regular appointments and all librarians holding full-time positions are eligible for membership in the University of Waterloo Faculty Association. In addition, "anyone engaged in academic activities but not having a regular appointment" may also seek to be a member of the Association, according to the 1982 Faculty Handbook. Membership in the Association is voluntary and the Association is not certified as a bargaining agent for its members. Terms and conditions of employment are governed by a set of policies which have developed over the years and been approved by Senate, where appropriate, or the Board of Governors. Since 1971, such policies have been established by committees of 7 persons, of whom 2 are appointed by the Association, 2 by Senate and 2 by the President; the President also appoints the Chairman.

Overview of the Case

Before dismissal proceedings were initiated, Johnson was a tenured Associate Professor in the Department of History. He had been employed at the University of Waterloo for 16 years. His teaching evaluations were favourable and he was a productive researcher.

On August 19, 1982, Professor Johnson was arrested and charged with several sexual offences against children. Subsequently, he pleaded guilty to nine

charges of indecent assault (female) and one charge of having intercourse with a female under the age of 14. On November 30th, Judge Reilly sentenced him to a prison term of two years less one day and three years parole. At that time, Johnson would have become eligible for parole on July 31, 1983. The Ontario Attorney General appealed Johnson's sentence on December 23, 1982; the Court of Appeal decision of June 25, 1983 increased Johnson's sentence to four years.

Within five weeks of his conviction, Dean Banks recommended that Johnson's employment be terminated. Vice-President Brzustowski formally notified Johnson of the invocation of Policy 53 which specified procedures for dismissing tenured faculty members (hereafter referred to as Policy 53). On January 12, 1983, Banks advised Johnson his salary was being discontinued because he was unavailable to take up his duties.

Policy 53 requires that a 5 person Committee advise the President whether there are adequate grounds for dismissal; that Committee was established in January, 1983. On January 28th, Dean Banks wrote to the Committee citing two grounds for his recommendation to dismiss Johnson. The first ground was that the consequences of Johnson's criminal behaviour and imprisonment rendered him incapable of fulfilling his contract of employment. That Johnson's criminal behaviour constituted gross misconduct was given as the second ground. Beginning its work in February, the Committee issued a report on May 30, 1983. It unanimously recommended the dismissal of Johnson to President Wright. President Wright made the same recommendation to the Board of Governors on June 22nd, which was accepted. Professor Johnson was notified subsequently by letter of the Board's decision.

Policy 53

Policy 53 consists of four sections: (I) categories of appointments; (II) types of appointments, e.g., fixed term, probationary term and tenure; (III) reduction in academic appointments for budgetary or redundancy reasons; and (IV) policy review. Our principal concern is with Part II, Section C (hereafter termed II-C) which outlines tenure policy at the University of Waterloo. Subsection 8 establishes a procedure for the termination of tenure or the dismissal of a tenured faculty member. It is reproduced as Appendix A. (Editor's note: appendices have not been printed here; they are available on request.)

To engage in a lengthy discussion of the meaning of tenure or its purpose as outlined in Policy 53 is not our purpose. However, it is noted that the Policy defines tenure in II(C)(2); "Tenure shall mean a condition of employment whereby the University relinquishes the right to terminate the appointment prior to the normal period of retirement, *except for adequate cause and in accordance with the procedures outlined in this policy*" (our emphasis). Standards to be used for the granting of tenure are provided by Senate Guidelines appended to Policy 53; the factors to be considered include teaching, scholarship, professional conduct and service. Section C, paragraph 4 of the Addendum to Policy 53 explicitly notes that the candidates' personal lives are not to be considered in tenure decisions and that candidates' political opinions, national backgrounds "- and anything else not at the heart of their professional conduct" are also irrelevant.

Section II-C-8 of Policy 53 specifies that dismissal of faculty with tenure shall occur only when there is adequate cause. Recognizing that its true meaning "can usually be reached only in the context of a particular case", Policy 53 does not define adequate cause. Where it is believed that adequate cause exists, the Policy 53 Committee is to investigate. The Committee is drawn from a standing list of 9 tenured faculty members appointed every two years by the Senate, from which the Academic Vice-President and the affected faculty member each exclude two names.

The most significant requirements of Policy 53 are:

- Before invoking any formal procedure, the V.P. Academic is required to convene a meeting with the faculty member and the Dean of the Faculty. The "meeting shall be to clarify the issues and attempt to resolve them." Should the V.P. Academic then decide that formal proceedings are necessary, the Policy 53 Committee is to be established.

- The Dean of the Faculty shall inform the Policy 53 Committee in writing "of all the grounds and evidence supporting the recommendation to dismiss the faculty member." Upon receipt of a copy of the Dean's letter, the faculty member shall provide a written statement of the member's case to the Policy 53 Committee.
- The Policy 53 Committee shall commence proceedings within 30 days of being struck. A preparatory meeting shall be held with the faculty member and the Dean. The preparatory meeting is to plan the investigation and consider scheduling and procedural matters. The Policy recognizes that the "affected faculty member will be provided with every opportunity to present a full defense."
- The report of the Policy 53 Committee "shall be relevant to, and restricted to, the alleged cause or causes advanced for the dismissal of the faculty member in question, as set forth in the statement of the Dean." The report shall be sent to the President of the University. Both the faculty member and the Dean shall receive copies of the report.
- The President's recommendations, if any, shall be presented to the Board of Governors.
- A faculty member who is unavailable to participate in the proceedings, may designate a faculty member to act on his behalf.

Several aspects of Section II-C-8 merit attention. Most features of this section are mandatory rather than discretionary; the term "shall" is used repeatedly. Nevertheless, the Committee does have discretion to adopt its own procedures in the conduct of its hearings. Finally, the Committee is advisory to the President; it does not have the authority to issue a final and binding decision, but is limited to reporting its findings and recommendations concerning whether there is adequate cause to dismiss.

Nature of CAUT Inquiry

Our terms of reference require us to determine two broad issues, the first of which is whether Johnson was treated fairly. While the Committee's procedures and operation are a central aspect of this investigation, there are other aspects of this case which bear on whether Johnson was treated fairly. Representations he made or that were made on his behalf in the period prior to the formal Committee hearings, as well as the actions of the President and the Board of Governors subsequent to the submission of the Committee's report, must also be considered.

With respect to the second issue, there is *prima facie* evidence that Policy 53 does not conform with CAUT Guidelines, which suggest that all dismissal cases be the subject of final and binding arbitration. In our opinion, lack of comparability between Policy 53 and the CAUT guideline in this respect does not mean automatically that a faculty member cannot obtain a fair hearing at the University of Waterloo. Whether the decision to dismiss Johnson was arrived at in accordance with the "CAUT-preferred-procedure" is not disputed; clearly he was not. Nevertheless, a question remains. It is whether the procedure at the University of Waterloo conformed to the premises of fairness which have been established by arbitral precedent and are implicit in the CAUT Guideline. The relative merits of different dismissal procedures could be debated endlessly. Our task is not to determine the optimal model. Rather, we are to ascertain whether the University of Waterloo procedures, as they were applied in the Johnson case, satisfy the principles of natural justice and fairness upon which CAUT Guidelines are based.

The Johnson Case

Events Prior to December 17, 1982

The period August 19 - December 17, 1982 represents the elapsed time between Johnson's arrest and the visit by Brzustowski and Banks to Johnson at the Ontario Correctional Institute in Brampton. The first matter we wish to consider is what took place during this time period. In particular, what options, if any, did representatives of the University Administration consider with respect to Johnson's future status? What were Johnson's thoughts or actions regarding continued employment? Were there any discussions or negotiations between Johnson and the University administrators?

From the beginning, there was little doubt about Johnson's guilt concerning the criminal charges; Johnson himself confessed his guilt to Department Chairman Walker and others. Johnson had been scheduled to teach during the 1982 Fall term, following a paid research term. Despite his guilt, Johnson felt perfectly capable of discharging his normal teaching duties. He also informed Walker that he could seek several adjournments of his trial and the case might not be heard before May, 1983. Walker, however, felt Johnson was being unrealistic. In his opinion, Johnson's behavior indicated that Johnson was overestimating his ability to continue to teach. Furthermore, Walker believed that the matter might not simply "blow over" and there would likely be too many distractions, such as court appearances. Accordingly, one week prior to the commencement of September classes, Walker insisted that Johnson take a research term without prejudice. No decision was taken with respect to the remainder of the academic year. Johnson was scheduled for a second teaching term in the Winter and a research term in the Spring of 1983.

Walker met again during the Fall term with Johnson; at that time Johnson proposed that he receive another unscheduled research term commencing in January. Johnson believed that if he entered a guilty plea, he would receive a light sentence. Under these circumstances, he felt it would be possible to continue his research while he was incarcerated and be available for teaching in the Fall term of 1983.

Johnson says that the timing of his guilty plea was influenced by his conversation with Walker. He believed that Walker was not only sympathetic but was supportive and that Walker saw no problem with this proposal. Walker says he personally favoured another research term, but was skeptical. While it is disputed whether Walker disclosed his skepticism to Johnson, he did tell Johnson he would raise the research term proposal with Banks. Walker also states that he reported to Johnson that Banks was reluctant to make a commitment. While we are prepared to accept the fact that Johnson believed another research term would not pose a problem, in our view the University Administration did not make any formal commitments in this regard. While Johnson may have concluded that imprisonment would not adversely affect his employment status, we are persuaded this conclusion was based on his perceptions and did not result from explicit University encouragement. What Johnson might have done if the University had discouraged him explicitly is entirely hypothetical at this stage.

In summary, prior to Johnson's sentencing and imprisonment, a first unscheduled research term had been granted and Johnson had informally proposed that he receive a second unscheduled research term. It should also be emphasized that up to this point neither Johnson or the University had pursued other options, such as disability leave or an unpaid leave of absence. Moreover, there were no informal or formal discussions of these possibilities with representatives of the University Administration.

Following Johnson's incarceration, Walker visited him at the Gait Detention Centre in early December. Johnson told Walker he had prepared three letters. The first requested that he be granted a second unscheduled research term in lieu of his Winter teaching term. This was delivered to Walker on December 7, 1982. If the request was denied, then a second letter would be delivered. Similarly, the third letter would be delivered if the second request were turned down. The second and third letters (both dated December 7th) were never sent; they contained requests for an unpaid leave of absence in the Winter term and a one-year unpaid leave of absence, respectively.

All three letters provided as a reason the fact that Johnson was undergoing "intense psychiatric therapy"; no other reason was given. Walker was invited to consult with Dr. Mausberg, Johnson's psychiatrist. The letters requesting leave emphasized the importance of leave and treatment assisting Johnson to "return to my classes better able to perform my functions."

The second and third letters were never sent because there was never a direct and formal response to Johnson's request for the research term. Although decisions regarding research terms are normally made

by Walker, he wrote Johnson and advised him the letter had been referred to Banks. (Walker indicated to us he had told Johnson he would follow this procedure.) Banks advised Walker he would look after the request. It is not entirely clear to us why Johnson and his representative, Lambert, embarked on this three-letter strategy, instead of presenting all three options to Walker at the same time, except that Johnson was confident Walker would support the research term proposal. We wish to note there was some disagreement among Walker, Johnson and Lambert as to the origin of the three-letter strategy. Johnson stated to us that the alternatives to a research term were less satisfactory because they involved a loss of salary.

Prior to December 17th, there was no formal decision regarding Johnson's request for a research term. As far as we can determine, the issue was not raised on December 17th. Neither Brzustowski nor Banks advised Johnson that his request had been turned down. For his part, Johnson made no inquiry about the status of his request at the December 17th meeting.

The December 17th Meeting

The December 17th meeting was initiated by Brzustowski in accordance with the Policy 53 procedure. Specifically, under Section IIC-8-d(l), Brzustowski, Banks and Johnson were required to meet in an effort lo clarify issues and resolve them. According to Johnson, there was no prior notice of the meeting; apparently, Banks and Brzustowski arrived unannounced at the Ontario Correctional Institute in Brampton.

Generally, it is agreed the purpose of the meeting was to inform Johnson that Banks would be initiating proceedings under Policy 53. Brzustowski read to Johnson pertinent sections of Policy 53. According to Banks, Johnson's criminal behaviour warranted dismissal because he was unable to perform effectively and not fit to do so. Johnson states that Banks' case was based on his being guilty of a breach of public trust. Johnson's incarceration and unavailability for scheduled classes were also discussed. Johnson characterized this discussion as an aside, not forming the basis of Banks' recommendation, which in his view was based solely on the trust issue. On the other hand, Banks indicates that he did not consider Johnson's unavailability as a mere aside. These issues and Johnson's reply, which included a discussion of the charges, Senate Guidelines on tenure, a lengthy discourse on his medical condition - pedophilia - and treatment, the University's responsibility to rehabilitate employees and other matters consumed the entire meeting.

Two conclusions can be drawn from the December 17th meeting. First, we believe the scope of a meeting held under Section II-C-8d(l) is sufficiently broad to allow the parties to resolve a dispute which appears destined for the Policy 53 Committee. A possible result of discussing and clarifying issues is that the parties may choose to negotiate a settlement rather than refer a case to the Policy 53 Committee. Thus, options such as leaves of absence, resignation and research terms could have been discussed. In this instance, the discussion was limited mainly to the University's charges. Perhaps if Johnson had been given sufficient notice of this meeting (see below), a wider range of issues could have been discussed. Banks appeared quite uncomfortable when we asked if Johnson had been given adequate notice. He deferred to Brzustowski, observing it was the Vice-President who convened the December 17th meeting. Brzustowski, it will be recalled, declined to meet with us.

Second, such a meeting is intended to function as an informal forum, in much the same way as union-employer meetings try to informally resolve grievances without prejudice. Ideally, it should provide a full and frank exchange of views, including the Dean's rationale for initiating dismissal proceedings. Johnson expressed deep concern that Banks' December 17th rationale changed when he: (1) wrote to Brzustowski on December 23rd setting out his case for dismissal and (2) presented formal charges to the Policy 53 Committee on January 28, 1983. While it is true Banks modified the grounds for dismissal, the subsequent grounds for his recommendation do not constitute entirely new grounds. Banks is by no means limited to the discussion of December 17th which was informal, general (e.g., public trust was never defined) and

exploratory. Indeed, Section II-C-8d(l) explicitly recognizes that one purpose of such a meeting is to clarify the issue. In our view, the December 17th meeting served this purpose. Ironically, Johnson's lengthy argument that the "breach of public trust" charge could not be substantiated may have led to the modification of the grounds for dismissal.

In conclusion, we are persuaded that the December 17th meeting served the purpose outlined in Section II-C-8d(l). Nevertheless, we do have two reservations about the December 17th meeting. These are that (1) Johnson was not given sufficient notice of the time and purpose of the meeting and therefore was unable to prepare for it and (2) Johnson was unable to designate a representative to attend the meeting. Ensuring sufficient notice and the opportunity to be represented seem to us to be sensible procedural safeguards. Both of these are central to the clarification and informal resolution of the issues. Without proper notification and representation, a faculty member is at a decided disadvantage to try and resolve matters at this stage. Johnson was entitled to such consideration. However, the matter would have proceeded to the Policy 53 Committee in all likelihood. We base this conclusion on Banks' assessment that there was a strong case for dismissal and Johnson's equally strong, but contrary, belief.

Events Subsequent to December 17th

Following the meeting with Johnson, Banks wrote to Brzustowski on December 23rd and outlined his case. The letter reads as follows:

> *Professor Johnson has pleaded guilty to criminal charges involving sexual misconduct with minors, including having sexual intercourse with a child under the age of 14 years. He has been sentenced to a term of two years less a day in an Ontario Reformatory.*
>
> *It is my conclusion that Professor Johnson's criminal behaviour constitutes gross misconduct, has made him unable to discharge his duties as a professor effectively and indicates that he is unfit to do so. I recommend that the steps outlined in Policy 53 ("Faculty Appointments - Tenure") - be undertaken to terminate his tenure and his employment.*

On December 23rd, Brzustowski wrote to Johnson seeking a reply to Banks' letter. Johnson sent a lengthy response, dated December 28th, expressing his deep concern about Banks' memorandum. Specifically, he complained Banks had "substantially altered the thrust of his charges" outlined on December 17th from breach of trust to gross misconduct. Johnson also reiterated many of the points he made in the December 17th meeting. After considering the respective positions, Brzustowski formally advised Johnson, by letter dated January 7, 1983, that he was initiating dismissal procedures, including the establishment of the Policy 53 Committee.

On January 12th, Banks advised Johnson by letter that his salary was being discontinued.

> *Because you are not available to take up your duties, I have today directed that, effective immediately and until further notice, your salary payments are to be discontinued.*
>
> *The normal University benefit program will be continued until further notice.*

The appropriateness of this action was disputed, with Flaxbard arguing in favour of salary continuance persuant to H-C-8d(II). The provision states:

> *Either at the faculty members' request or at the Dean's request, the President may temporarily relieve the faculty member of duties pending the outcome of the proceedings. The faculty member's salary and fringe benefits shall continue during this period.*

Haney, the University's solicitor, took a contrary position in a letter to Flaxbard dated February 16th.

> *Section 8d(II) of Policy No. 53 quite obviously deals with the situation where proceedings are taken to terminate tenure of a faculty member who is on campus and who is being relieved of his duties pending the outcome of the dismissal proceedings. With respect, this is not Prof. Johnson's situation, and have advised the University that this Section has no application in the present circumstances.*
>
> *The position of the University is that Prof. Johnson is not entitled to receive his salary, as he is in no position to carry out his usual duties at the University. I trust you will advise him accordingly. Finally, we wish to note that CAUT favours salary continuance for faculty members facing dismissal proceedings (CAUT Handbook, page 17).*

> *C9. The president of a university may, by written notice for stated cause relieve a faculty member of some or all university duties and withdraw some or all university privileges, provided that dismissal or other procedures to determine the propriety of such action have already been initiated or are initialed simultaneously. The suspension should terminate with the conclusion of the dismissal or other proceedings or at such earlier time as the president may deem appropriate. The stated cause must involve an immediate threat to the functioning of the university, or to any member of the university. Salary and other benefits should continue throughout the period of suspension.*

According to II-C-8d(3) Banks must inform the Policy 53 Committee "of all the grounds and evidence supporting the recommendation to dismiss the faculty member." On January 28, 1983, he provided the Policy 53 Committee with the following letter.

> *In accordance with University of Waterloo Policy 53 (II-C-8). I am writing to you to present the evidence and grounds supporting the recommendation that the tenure of Professor Leo Johnson be terminated and that he be dismissed from his position at the University of Waterloo.*
>
> *Professor Johnson has pleaded guilty to criminal charges of sexual misconduct with minors, including children for whom he was legal guardian. The criminal charges consist of nine counts of indecent assault and one count of sexual intercourse with a female under the age of 14. He has been sentenced to a term in an Ontario Reformatory of two years less a day. (The evidence concerning these matters is, of course, set out more fully in the proceedings of his trial and sentencing.)*
>
> *The following grounds exist for terminating the tenure of Professor Johnson and dismissing him from his position.*
>
> *The consequences of Professor Johnson's criminal behaviour and imprisonment have rendered him incapable of discharging the responsibilities of his position and thus, of fulfilling his contract of employment.*
>
> *Professor Johnson's criminal behaviour represents gross misconduct, is inconsistent with the position of trust and responsibility bestowed on a Professor and is inconsistent with continuing his employment.*

The application of Section II-C-8d(3) generated controversy. In our opinion, the intent is not to require the production of every piece of evidence upon which a dismissal recommendation is based. Rather the intent must be to identify the specific grounds for dismissal and to outline the evidence which supports each ground. Furthermore, the purpose of this requirement is to inform the faculty member of the nature of the case against him or her in order that he or she can prepare an adequate defense. The principal shortcoming of Banks' letter was its failure to specify what consequences he had in mind with respect to the first charge. What consequences aside from Johnson's unavailability to meet classes were being considered by Banks? Unquestionably, Bank's letter of January 28th did not satisfy Johnson or his representative, Lambert. Their principal concerns were that Banks had failed to produce all his evidence and that he had "changed" the grounds for his recommendation of dismissal. These concerns and requests for clarification led to delays in Johnson's response to the charges. The time limits specified in Section II-C-8d(4) required Johnson to respond within 30 days of the formation of the Policy 53 Committee. To avoid forfeiting the case, Johnson responded to Chairman Moffatt on February 19th as follows:

Under protest, and only because the Committee has ruled that unless I respond to the Dean's memorandum of 28 January 1983, my appointment shall be terminated by the University, I shall attempt to respond to the ambiguous memorandum of the Dean as follows:

1. I deny that any adequate cause exists for termination of my tenure and for my dismissal;
2. I deny that the consequences of my behaviour in my personal life resulting in my conviction and the resulting imprisonment have rendered me incapable of discharging the responsibility of my position, and thus, of fulfilling my contract of employment;
3. I deny that such behaviour represents gross misconduct in relation to my position at the University;
4. I deny that such behaviour is inconsistent with any position of trust and responsibility that may be proven to be bestowed on me as a professor, and I

further deny that it is inconsistent with the continuation of my employment;

5. I deny that the Dean's memorandum of 28 January 1983 complies with the requirement of Part II, Section C, Item 8, or University of Waterloo Policy 53, and ask that the proceedings pursuant thereto be terminated immediately.

Policy 53 Committee Deliberations and Findings

The Committee proceedings can be divided into two parts: (1) preparatory meetings to discuss and decide procedural issues and (2) meetings to hear testimony and receive other evidence. The following persons gave evidence: Banks, Walker, Johnson and Donald Savage, Executive Secretary of CAUT. The Committee met over a four month period and issued its report on May 31st. It held a total of 16 meetings, of which four were devoted entirely to procedural matters, 9 to largely hearing evidence and 3 to in camera report preparation.

At its first meeting, held February 4th, two representatives authorized by Johnson appeared - Lambert and Gary Flaxbard, legal counsel to Johnson. Between February 4th and May 31st, Lambert raised numerous objections (both at meetings and subsequently in letters to Chairman Moffatt) about the Policy 53 Committee's decisions and conduct. These alleged procedural irregularities formed part of Johnson's defense to both the President and the Board of Governors.

At this juncture, we do not wish to assess the merits of these allegations (that analysis appears in Part IV). However, we do wish to list, in no particular order, a number of concerns raised by Lambert over the course of the proceedings.

1. The manner in which the Policy 53 Committee was established was unfair to Johnson.

2. Committee decisions barring legal counsel, not requiring sworn testimony and not allowing direct and cross-examination of witnesses were unfair to Johnson.

3. Banks was never compelled to specify all the charges and evidence he would rely on as required by Section II-C-8d(3).

4. The Committee was incapable of conducting an independent, quasi-judicial inquiry and compromised its independence by seeking legal advice from the University's lawyer on critical matters.

5. The Committee turned down the request of the Waterloo Faculty Association for observer status at Committee meetings.

6. The Committee engaged in ex parte fact finding and thereby violated the principles of natural justice. This included a "secret" meeting with Walker and an examination of trial transcripts and a medical report.

7. The Committee split the charges against Johnson and only considered the first charge.

8. The Committee failed to consider relevant evidence, namely past practice and precedents and denied Lambert's request to have expert witnesses give psychiatric evidence.

9. The Committee was subjected to external pressures as evidenced by the fact the Committee received a petition from the outside community.

To capture the atmosphere of the Committee's hearings is difficult, but words and phrases such as "tense", "formally civil" and "uncomfortable" were used to describe the proceedings. Given the number of objections raised by Lambert, it is fair to conclude the meetings were contentious, frequently adversarial and anything but relaxed. Some, but not all, of the tension might have been alleviated if the Committee had given Lambert written reasons for its rulings in every instance. Committee members indicated this was one thing they would do differently if they were to repeat their experience.

On May 31, 1983, the Committee issued a 26-page report to President Wright. The report summarizes the Committee's handling of the case, Lambert's objections about procedural irregularities and the

evidence; it includes the Committee's findings, conclusions and recommendations.

Since the Committee confined itself to examining the first ground for dismissal, Banks' case can be quickly summarized. Johnson's criminal behaviour and imprisonment rendered him incapable of performing his normal duties and therefore he failed to fulfill his contract of employment. The Winter 1983 term was a scheduled teaching term for Johnson and he was unable to meet his classes. As a result, the Department of History had to cancel classes, hire another professor and rearrange graduate supervision. On February 25th, Banks told the Committee he was unaware "of any scholarly activities Johnson had carried out this term". He doubted Johnson could conduct research in his present circumstances, but conceded he could not be certain of this.

Lambert's defense of Johnson was based on several considerations. He charged the Committee with having made so many procedural errors that it was impossible for Johnson to get a fair hearing. He also emphasized there were no academic grounds for dismissal; if the Committee insisted on confining itself to the first charge, Lambert argued that it should consider mitigating circumstances. In particular, he pointed to Johnson's psychiatric problems and proposed that the University had a responsibility to treat Johnson compassionately and assist in his rehabilitation. Lambert concluded that the grounds for dismissal did not exist. He also suggested the Committee consider recommending binding arbitration or some modification of Johnson's contract of employment, such as assigning alternative duties or returning to probationary status.

The Committee's summary of the evidence included the following determinations. First, Johnson was convicted of criminal behaviour and sentenced to prison. One Committee member read and summarized for the entire Committee the transcript of the trial. All Committee members read Judge Reilly's sentencing, which described the gravity of the criminal behaviour. Second, Johnson's criminal act did not involve any of the following elements: (a) a faculty member maintaining his innocence; (b) a foreign court with dissimilar legal practices; (c) a criminal act involving conscience, religion or politics; or (d) an unduly harsh sentence relative to similar offenses. Third, Johnson was capable of performing "some limited academic duties in prison", such as, research, writing and seeing graduate students, but not the full range of normal duties. Fourth, the Committee, while agreeing that Johnson needed extensive psychiatric help, felt this mitigating factor should not be given greater weight than Judge Reilly gave it. Fifth, the Committee concluded the only relevant precedents would be cases involving '"the enforced absence of a faculty member by virtue of criminal behaviour resulting in a prison sentence..."

At pages 23-26, the Committee summarized its conclusions with respect to the first charge; these are reproduced as Appendix B. The Committee rejected Lambert's complaints of procedural irregularities and determined that neither the medical nor compassionate grounds advanced were sufficient to outweigh Johnson's criminal behaviour. Accordingly, the Committee found there was adequate cause and unanimously recommended "that the tenure of Johnson be terminated and that he be dismissed from his position at the University of Waterloo." The report, which was discussed by President Wright and Lambert on June 2nd, subsequently formed the basis of Wright's recommendation to the Board of Governors. In their meeting, Lambert reiterated his concerns about Committee procedures. After considering Policy 53 and the Committee's report and meeting with Lambert, Wright was satisfied the Committee had conducted a fair hearing.

The Board of Governors Meeting

The Johnson case was not decided at the June 7th Board meeting, but was deferred to a special meeting on June 22nd. The meeting was chaired by J. Trevor Eyton, Chairman of the Board of Governors. Eyton limited the discussion to Banks' charges and the President's recommendation. President Wright recommended that Johnson be de-tenured and dismissed from the University. His recommendation was based on the Policy 53 Committee report and his own reflection on the case. As far as can be determined, Wright did not read the minutes of Committee meetings, Dr. Mausberg's report or the

trial transcript. Johnson was represented by his lawyer, Flaxbard, and gave evidence in his own behalf. Other Johnson witnesses included Savage, Lambert and David Cooke, Johnson's criminal lawyer.

Just prior to the June 22nd meeting, Haney showed Flaxbard a copy of Wright's recommendation to the Board. Flaxbard objected to the reference to embarrassment in the original recommendation, which read:

> *Not only was Professor Johnson unable to fulfill his contractual obligations to this University by reason of his conviction and subsequent prison sentence, but as well, he has caused embarrassment to the University and to his profession. His actions, in my opinion, render him unfit to be a tenured member of, or be employed by, the University.*

Flaxbard stated this reference constituted a new charge against Johnson. The provision was modified as follows:

> *Professor Johnson has been unable to fulfill his contractual obligations to this University by reason of his conviction and subsequent prison sentence. His actions, in my opinion, render him unfit to be a tenured member of, or be employed by, the University.*

The board meeting began with a statement by President Wright outlining the case and his recommendation. Subsequently, he was questioned by Flaxbard. There was no sworn testimony and witnesses could be questioned, but not cross-examined. While Flaxbard was given ample latitude to question Wright, this was not true of all witnesses. Lambert, for example, was only permitted to answer questions pertaining to Johnson's academic reputation.

In response to questions, Wright stated that the nature of Johnson's criminal behaviour was relevant to the disposition of the case. He stated Johnson's conviction on these charges rendered him unfit to continue teaching at the University. While indicating that his judgment reflected a moral judgment, he emphasized that the Committee report played a larger part in his decision. However, when queried what evidence supported Banks' second charge, he responded: "his guilty plea and conviction". At the end of President Wright's testimony a Board member asked whether the mandate and procedures outlined in Policy 53 had been followed in establishing the Committee and by the manner in which the Committee fulfilled its responsibilities. Eyton's response was "our legal advice is we have followed all of the legal procedures to this time". Presumably, the legal advice came from Haney.

Flaxbard then proceeded to call his witnesses. Savage explained the role of CAUT, CAUT guidelines favouring arbitration in dismissal cases and the meaning of tenure. He noted tenured faculty are subject to dismissal for cause, such as, persistent neglect of duty, incompetence or moral turpitude. In cases involving moral turpitude, it must be shown that the behaviour is related to the performance of academic duties. Savage cited the examples of falsifying research findings or the soliciting of sex for grades as illustrations of moral turpitude.

Lambert gave evidence of Johnson's reputation as a historian and submitted a letter from Professor W. Clement on the quality of Johnson's academic work. Cook provided an outline of Johnson's criminal behaviour and various aspects of the trial. Johnson reviewed his academic career at the University of Waterloo, his background, the nature of pedophilia and the University's failure to treat him compassionately. He argued the University was aware of his medical problems yet never offered him a medical leave. Flaxbard also requested an adjournment so that Dr. Roper could give evidence. This request was refused on the basis that the Board was prepared to accept the fact of Johnson's medical problem.

It is not possible to determine the reasons for the board's decision to dismiss Johnson. Information before the Board consisted of Banks' charges, Wright's recommendation, a six-page critique of the Policy 53 Committee report prepared by Flaxbard and the witnesses' testimony. Since Flaxbard was prohibited from re-trying the case that went to the Policy 53 Committee, Johnson's defense centered on mitigating factors - medical and compassionate. The Board's deliberations were held in closed session. We were told by Wright that because the session was confidential, he was not at liberty to discuss it. In any

event, the Board's decision was communicated by Wright to Johnson in a letter dated June 22, 1983. No reasons for the decision are available from this letter; it reads:

> *I wish to inform you that at its special meeting on June 22, 1983, the Board of Governors of the University of Waterloo terminated your tenure and dismissed you from employment with the University, effective immediately.*

Conclusions

Johnson's Request For A Research Term

We wish it to be noted that the question of whether or not this request ought to have been granted does not fall within our investigation's ambit. Accordingly, we will not comment on either the reasonableness of the request, nor the ultimate response to it. As is the case throughout this report, we provide observations and conclusions only with respect to the procedures employed in Johnson's dismissal.

Normally, research term decisions are made by the department chairman. However, given that Johnson was imprisoned and that the request involved a second unscheduled and third consecutive research term, we are not of the opinion that it was inappropriate for more senior university administrators to be involved in the decision. Walker had suggested to the Committee that if the decision had been left to him, he might have granted Johnson's request. He also stated that; because he had felt uncomfortable about making the decision, he had expressed his discomfort to Banks and passed Johnson's written request forward to him.

It is a matter of record that there was never a response to Johnson's request. As a matter of courtesy and certainly as a good procedure, Johnson's application for a research term warranted a formal response. His request was made in writing and someone representing the University Administration had an obligation to make a decision and provide reasons for it.

Before the Committee, Banks testified that: (1) within the Faculty of Arts, faculty members normally receive one research term annually; (2) if a professor expects to be absent for a research term, there must be a proper academic reason (i.e., to pursue research); (3) a professor on research term would be expected to be around to perform service duties and assist graduate students; and (4) a research term must normally be earned. While these surely constitute relevant considerations, they do not inform us whether the research term application was in fact considered.

Banks argues that the meeting of December 17th and the initiation of the Policy 53 procedure represent an "implicit" rejection of Johnson's application for a research term, thereby constituting a response to Johnson's December 7th letter. There is considerable force to this position. While Johnson continues aggrieved that there was no direct response to his application, it cannot be argued seriously that the December 17th meeting and subsequent events convey a meaning other than that his application had been rejected. There is no basis for reaching any other conclusion. Johnson's failure to raise the matter on December 17th suggests he had reached the same conclusion. But it is to be noted that, rather than transmitting the remaining two letters dated December 7th as originally planned, the emphasis shifted to preparing a defense against dismissal.

While we accept Bank's position that Johnson's application was rejected implicitly, we are not persuaded that Johnson's request was handled reasonably. In our opinion, once the request was made there was a positive obligation on Bank's part to give it fair consideration, and to respond to the application directly, giving reasons for the response.

The failure to respond directly to Johnson's request does raise questions about whether the request was considered and, if considered, whether it was dealt with in good faith. It may have been that, at the time of Johnson's application, different options were being considered by Banks or others. For example, dismissal under Policy 53 may have been under active consideration. Nevertheless, Banks' responsibility as the initiator of dismissal under Policy 53 did not relieve him of the responsibilities of considering and deciding Johnson's research term request on its merits. As noted in Brown and Beatty, *Canadian Labour Arbitration*, 2nd edition (at page 401), an employer does not have an unfettered right to deny a request for a leave of absence and discharge an

employee because the employee was obliged to serve a jail sentence. The employer must "attempt to balance its own interest in production against the employee's interest in continued employment".

Role of the Policy 53 Committee

To describe the role of the Policy 53 Committee or its standing under the Statutory Powers Procedures Act is by no means easy. A cursory review of the Act suggests it does not govern the Policy 53 Committee proceedings. While the Committee can make recommendations, it does not have the final authority to decide disciplinary matters; therefore, it cannot be regarded as a court or an arbitration board. Its responsibility is limited to conducting an investigation and to making a recommendation to the President. Thereafter, the President may make a recommendation to the Board of Governors. Ultimately, the Board must decide whether to dismiss. Thus, in a sense, the Policy 53 Committee operates as an "academic grand jury"; it determines whether or not there is just cause to dismiss, but the penalty is left to the Board.

Since it is required to make recommendations which subsequently may form the basis of a Board of Governors' decision, there would appear to be an onus on the Committee to conduct a full and fair inquiry. Rules of evidence are not as rigorous in arbitration as they are in courts; it is clear the Committee operated even more informally than an arbitration hearing would, with respect to rules of evidence. While there are many virtues inherent in informal proceedings, informality and efficiency should not be ends in themselves. Moreover, careful consideration must be given to the issue of natural justice. Although the Committee has discretion under Policy 53 to establish its own rules and procedures, it is to be hoped and expected that these would satisfy the requirements of procedural fairness and natural justice.

The participants in the Committee proceedings occupied the following roles. Banks can be compared to a prosecutor in that he presented the charges against Johnson and bore the onus of establishing adequate cause. Lambert's principal role was that of defense counsel.

The Committee's principal role was to conduct meetings, hear evidence and issue a report containing its findings and recommendations; it can be compared to a "grand jury". Functioning as an independent body, it was expected to render an impartial judgment. Unlike an arbitration board, however, it could independently collect evidence and call and question witnesses. This particular function caused some controversy, but it is not precluded by Policy 53 and may not be inconsistent with the role of an "academic grand jury".

Significance of Procedural Irregularities

As indicated earlier, Lambert objected to various procedural decisions made by the Committee. The major objections will be considered individually. We wish to note the list is not all-inclusive, but covers those objections most salient to determining whether Johnson was treated fairly.

1. **The manner in which the Policy 53 Committee was established was unfair to Johnson.**

At the outset, Lambert and Johnson had different expectations regarding the Policy 53 Committee. Lambert was pessimistic, assuming the outcome was predetermined by the nature and composition of the Committee. Drawn from a panel nominated by the Vice-President, Academic, the Committee did not have representatives directly chosen by Johnson. Despite his concerns, Lambert felt there was no alternative but to participate in the proceedings and record all procedural shortcomings in the event court action became necessary. On the other hand, Johnson was optimistic initially. Based on the December 17th meeting, it was his opinion that the University did not have strong grounds for dismissal. Johnson was confident he could "win" since the dismissal would not be found to have cause. Moreover, he did not perceive the Committee to be biased, as constituted.

We are satisfied the Committee was established in accordance with Policy 53. The panel of 9 members of the Standing Committee was established well in advance of the initiation of dismissal proceedings and as part of the normal procedures at the University.

Furthermore, there is no evidence Committee members had prejudged Johnson's case.

2. Committee decisions barring legal counsel, not requiring sworn testimony and not allowing direct and cross-examination of witnesses was unfair to Johnson

The Policy 53 Committee felt it was deciding an academic matter and it did not wish to get bogged down in "legal hassles". Banks argued that if the Committee allowed Johnson to be represented by legal counsel, he would also want legal representation. The Committee felt it too would require legal counsel, if both Banks and Johnson had it. Chairman Moffatt threatened to resign if lawyers became directly involved. The Committee decided against direct involvement of counsel for any of the parties. In a letter to Lambert dated February 8, 1983 Moffatt conceded the Committee was not equipped "to deal with such questions as the admissibility of evidence and arguments on points of law", but indicated it intended to provide "ample opportunity to all parties concerned to present all information which the parties consider to be relevant to the investigation. " Additionally, the Committee felt it should direct all questions to witnesses as a matter of convenience. If Lambert or Banks wished to question a witness, their questions should be directed through the Committee's Chairman.

Lambert fell that Section II-8-d(5) not only permitted but contemplated the participation of legal counsel in the Committee proceedings and that Johnson was entitled to legal counsel in order to prepare a "full defense". Sworn testimony and direct and cross-examination of witnesses were required as a matter of fair play and were consonant with our legal traditions, Lambert argued.

In our opinion, The Committee had wide discretion to decide procedural questions such as these. Had this matter been referred to arbitration, it would have proceeded differently. As a matter of course, witnesses would be sworn and subject to direct and cross-examination and each party would be free to seek legal representation. While this is the procedure favoured by CAUT, the Policy 53 procedure does not preclude this. In practice, Lambert was an able advocate for Johnson and had access to Flaxbard. Lambert was able to put most of his questions to witnesses and, in some cases, did so directly. Moreover, there is no suggestion that the absence of sworn testimony produced unreliable evidence.

However, as we shall outline below, both parties would have been better served if the Johnson case had been handled by persons with greater experience or a greater appreciation of quasi-judicial proceedings. On their face, the ground rules developed by the Policy 53 Committee are not necessarily antithetical to a fair hearing. However, the results of the Committee's deliberations demonstrate that it would have been preferable to have required witnesses to give sworn evidence and to have subjected them to cross-examination in a matter as serious as this dismissal case. Cross-examination of witnesses permits better judgment of the evidence and the credibility of witnesses. As described by Brown and Beatty in *Canadian Labour Arbitration*, 2nd edition (at page 142):

> *Three purposes are generally attributed to cross-examination: to weaken, qualify or neutralize an opponent's case, to support one's own case through the testimony of the other party 's witnesses, and to discredit a witness. To accomplish these ends a cross-examiner is permitted a wide latitude in questioning. Generally, any question, including a leading question, relevant to the issues or to the witness's credibility is allowed.*

In our opinion, this kind of rigour and scrutiny is preferable in matters as grave and final as dismissal. At a minimum, Banks's reasons for rejecting Johnson's request for a research term could have been determined. In addition the term "consequences", used by Banks as one of the grounds for his dismissal recommendation, could have been defined and specified through cross-examination. Answers to both questions were important to the fabric of this case and to determining the adequacy of cause.

3. Banks was never compelled to specify all the charges and evidence he would rely on as required by Section II-C-8d(3).

Lambert complained Banks had not disclosed all the grounds and evidence he would present and this had

hampered preparation of Johnson's defense. While Bank's letter of January 28th is brief, we are of the opinion that Lambert and Johnson were not left in the dark. We observed earlier that Section II-C-8d(3) should not be interpreted literally because it imposes an obligation which is impossible to meet. Johnson did seek clarification of Bank's letter of January 28th which outlined the grounds. Thus, he delayed submitting his response to the Policy 53 Committee. Undoubtedly this behaviour was related to what Johnson saw as the "changing grounds" for dismissal. While the grounds may have been modified, we find no basis for concluding Lambert and Johnson failed to grasp the general nature of Bank's case or failed to appreciate what type of defense was required to meet Bank's case. We noted earlier that Banks should have identified the consequences he was referring to in the first charge. At the very least, Johnson and Lambert realized that Johnson's unavailability for classes was a consequence to which they would have to respond. We also believe that Johnson and Lambert had sufficient time to prepare a defense.

As noted earlier, Banks based his recommendation on two grounds. The first was "the consequences of Professor Johnson's criminal behaviour and imprisonment have rendered him incapable of discharging the responsibilities of his position and thus, of fulfilling his contract of employment". It was also noted earlier that the term "consequences" is quite vague. Lambert's protest of inadequate disclosure is correct with respect to this issue. Committee minutes suggest that "consequences" was translated to mean imprisonment. The Committee's decision not to require further written documentation about the meaning of consequences, and the decision not to permit further clarification of this plural term means that the protest has force as a substantive and procedural irregularity.

4. **The Committee was incapable of conducting an independent, quasi-judicial inquiry and compromised its independence by seeking legal advice from the University's lawyer on critical matters.**

There is compelling evidence the Committee was uncertain of its legal status and unsure about some procedural decisions it had to make. On more than one occasion, it discussed matters with the University solicitor, Mr. R.A. Haney. Two issues discussed with Haney were the applicability of the Statutory Powers Procedure Act and entitlement to legal counsel. On another occasion, the Committee solicited Haney's views about "splitting" the grounds advanced by Banks and about whether it could consider only one. Although the Committee told us it made its own decisions, and although Banks was not being counselled by Haney, the Johnson case essentially involves two parties - the University, through Banks as the initiator of dismissal, and Johnson. Consultation between the Committee, which was intended to be an independent body, and counsel for one of the parties of interest raises a fundamental issue of fairness. Specifically, it raises a reasonable apprehension about the Committee's independence and impartiality. Haney was not only involved in this capacity, but he corresponded with Flaxbard concerning the suspension of Johnson's salary. Later, he appeared on behalf of the University at the Board of Governors. The Committee naively and erroneously treated Haney's advice as that of a disinterested lawyer.

If the Committee was to have functioned and was to be seen as having functioned as a neutral body, then it should have been independent of the parties of interest. If it lacked the ability to decide procedural issues on its own, it should have had access to independent legal counsel.

We are not suggesting that Committee members ought to have borne the costs of legal counsel. To ensure fair treatment, the Committee ought to have had access to independent legal counsel; costs could have been borne by a special fund or general revenues. For example, independent legal counsel advise faculty "student appeals" committees at McMaster University and the costs have been financed in this manner. The University solicitor does not get involved with such committees because he may have to represent the University if cases are appealed to Senate. This, in our opinion, is a sensible approach and one which the Committee should have followed.

5. It turned down the request of the Waterloo Faculty Association for observer status at Committee meetings.

Alleged procedural irregularities apparently prompted the Waterloo Faculty Association to formally request observer status on March 10th. Until then, the Association had limited itself to maintaining a "watching brief". This was based on an Executive decision that the Association would not act as an advocate on Johnson's behalf.

We find it peculiar that the Association is not a party of interest in dismissal proceedings under Policy 53. Notwithstanding the prevailing climate of opinion in the University and the broader community, it is even more surprising the Association did not seek observer status at the outset. Since Johnson was a member in good standing, it seems he was entitled to this minimal level of service.

Furthermore, we hold that the initial Executive decision also was in error. Under the terms of Policy 53, advocacy is not to be confused with condonation; there is nothing in the Policy which suggests that it would be. Ensuring that the dismissal recommendation was investigated properly should have been recognized by the Association as its obligation.

The Committee denied the request for observer status; it felt that granting the request halfway through its investigation would not provide an adequate basis for assessing the investigation. Committee members did indicate they may have reacted differently had the request been made at the beginning. We concur with the Committee's reasons for its decision. The decision was practical and expedient; by itself, it was not unreasonable. The consequences of that decision were less benign, however. Further questions were raised about the Committee's conduct. Our conclusion is that the denial of observer status did not materially affect the fairness of the process.

6. The Committee engaged in *ex parte* fact finding and thereby violated the principles of natural justice. This included a "secret" meeting with Walker and an examination of the trial transcript and a medical report.

On March 3, 1983, the Policy 53 Committee met with and received testimony from Walker without Bank's or Lambert's participation. The Committee believed Walker to be in a "delicate position" and felt it would learn more from Walker if Banks and Lambert were absent. The intent was to ensure that Walker's testimony was unimpeded.

A prerequisite for a fair hearing is to allow the full participation of parties to a dispute. *Ex parte* fact finding is an affront to natural justice; it jeopardizes the right found in Section II-8-d(5) of Policy 53 to be "provided with every opportunity to present a full defense". Brown and Beatty in *Canadian Labour Arbitration*, 2nd edition, observe (at page 29) that hearing procedures must satisfy the requirements of natural justice.

> *Apart from requiring that such procedural norms as permitting all interested parties to participate in the arbitration hearing are satisfied, including the right to be represented by counsel, generally the courts have recognized and affirmed that such procedural decisions as determining the order of proceedings, requiring particulars, and granting adjournments fall within the power of the arbitrator to determine. However, ex parte fact finding by an arbitrator will result in "error of law" and the quashing of an award, unless, of course, this is done by "taking a view" in accordance with the proper procedure.*

At page 144, Brown and Beatty note: "Where an arbitrator radically departs from a procedure and, for example, takes a view by himself and questions a number of people without counsel being present, however, his award will be liable to be quashed".

While the Committee operated as an academic grand jury rather than an arbitration board, the implications of having met privately with Walker were not lost on the Committee. In an attempt to control the damage, Walker was asked subsequently to re-appear before the Committee, in the presence of Banks and Lambert. Minutes of the earlier meeting were distributed to Banks and Lambert. These unusual steps may have corrected a major procedural defect. Although it

cannot be conclusively determined whether they provided a complete remedy, we have no reason to believe that the minutes of the private meeting were inaccurate or that Banks and Lambert did not have a full opportunity to question Walker.

However, the Committee's *decision* to engage in *ex parte* fact finding raises serious concerns. An inquiry should not only be fair, but it should also appear to be fair. Appearing casual in its decision making, the Committee put itself at risk of future criticism. We speak not of conformity with minute legal details, but rather of a fundamental aspect of a fair hearing.

We are less concerned by the Committee's independent examination of the trial transcript or Mausberg's medical report. Hearings committees, such as this one, must have discretion to determine the admissibility of evidence. At the urging of Lambert and Johnson, the Committee examined these documents and concluded they contained no new and relevant information. Furthermore, we accept the Committee's view that they had no bearing on its deliberations. Lambert complained he never had an opportunity to see the Committee's summary of the trial transcript or to question the court findings. We cannot imagine how the questioning of the Court findings would have been accomplished or to what end, but he should have been given the opportunity to review the trial summary and to comment on it.

7. The Committee split the charges against Johnson and only considered the first charge.

It will be recalled that Banks specified two grounds for dismissal and the Committee decided to split its consideration of the grounds. The Committee's rationale was that if there were sufficient evidence on the first ground to warrant dismissal, there would be no need to consider the second.

On March 28th, Lambert protested the decision to split the grounds as follows: "In the absence of both policy and precedent to justify dismissal, it is my position that the Committee cannot intelligently and fairly recommend on the first charge without hearing evidence on the remaining charges." Further, Lambert argued that both grounds had to be considered if Johnson were to receive the full hearing contemplated by Policy 53. The Committee disagreed, but failed to provide written reasons to Lambert.

Limiting its inquiry to the first ground may have been justifiable in pragmatic terms; nevertheless, practicality must be balanced against the requirement to conduct a full and fair inquiry. Splitting the grounds had a direct bearing on the substantive issues in the Johnson case. Both grounds dealt with the consequences of Johnson's criminal behaviour on his position as a professor. By not considering the second ground, the Committee failed to discharge fully its mandate to determine whether there was adequate cause for dismissal. We do not feel the Committee asked itself the right question.

Unquestionably, criminal behaviour and imprisonment would constitute adequate grounds for dismissal in some cases, for example, where a person is imprisoned for life with no parole opportunity. It is also true that criminal behaviour leading to imprisonment is not *quid pro quo* for dismissal. Surely, no one would suggest that an anthropologist convicted and imprisoned for political treason in a foreign dictatorship should be dismissed automatically from a university. The nature of the criminal behaviour, the length of imprisonment and the impact of these factors are inseparable from determining the adequacy of cause and an appropriate remedy. The facts of the Johnson case are clearly distinguishable both from a person serving a life term and from the hypothetical anthropologist. Indeed, we would expect each case involving a faculty member's criminal behaviour and imprisonment to be unique. Accordingly, the appropriateness of dismissal would have to be determined on a case-by-case basis. The Committee acknowledged the importance of these considerations in its report.

Unfortunately, it did not pursue the matter far enough. The second ground also merited the Committee's careful consideration. Were dismissal proceedings instituted because Johnson's behaviour constituted gross misconduct or because Johnson was unavailable to discharge his normal duties, in particular teaching? Or, was it because Johnson

embarrassed the University, as suggested by President Wright's original recommendation to the Board of Governors? There is no dispute Johnson was unavailable to teach. In fact, it was known as early as December that this would be the case. That is why Johnson requested a research term. As noted, the reasons for Bank's failure formally to respond and for the implicit rejection are not clear. However, it is clear from the December 17th discussion and Banks's letter of December 23rd that dismissal was more closely related to the issues of gross misconduct and/or a breach of public trust.

Having failed to consider the second ground, are we to assume that Johnson's unavailability to teach was the sole basis for dismissal? Alone, this ground is unconvincing. Whether or not Johnson ought to have been dismissed should have been answered by a thorough and proper examination of the second ground.

8. The Committee failed to consider relevant evidence, namely past practice and precedents and denied Lambert's request to have expert witnesses give psychiatric evidence.

Although one might hope and expect that professors rarely are involved in criminal activities, they are also a relatively small occupational group. Consequently, locating precedents for this group alone would be difficult. There are, of course, cases in which faculty members are incapacitated and are unable to discharge their normal duties, including teaching. For example, a professor might have to enter a drug and alcohol treatment centre or a psychiatric institution. Events such as these may arise suddenly and could easily limit the ability to meet classes, carry out research and other university service requirements. While these events might produce the same result, that is, they incapacitate a professor, clearly there are qualitative differences between criminal and noncriminal behaviour, just as there are qualitative differences in criminal behaviour.

In deciding the adequacy of cause, a relevant consideration is the manner in which similar cases have been handled. The two grounds advanced by Banks lead to two definitions of "similarity": cases involving criminal behaviour and cases involving involuntary absence and an inability to perform duties. In this case, the Committee expressed the view that evidence related to past practice and precedents within the University should not be heard unless it involved criminal behaviour. In a letter to Moffatt of February 28th, Lambert protested this decision.

> *Precedents establish the standards which prevail within the University. The Dean bears a heavy onus of responsibility to demonstrate that his recommendation to de-tenure and dismiss Professor Johnson is not arbitrary and does not arise from personal prejudice. To do this, it is imperative that the Dean show that his recommendation and his grounds for same do not depart from past practice. To say that previous decisions may have been "in error" begs the question and prejudges the outcome of the present inquiry.*

In our opinion, the Committee should have received two forms of evidence which would have been arguably relevant to the first ground. That ground, as worded in Bank's letter, does not simply state Johnson should be dismissed for his criminal behaviour and imprisonment, but for the consequences of these events. Accordingly, the existence of other cases of those who have been rendered incapable of discharging their responsibilities and fulfilling their contracts of employment is arguably relevant. Such evidence should have been admitted.

In our view, evidence with respect to employees in other occupational groups was also relevant. There is no reason to believe that standards and procedures governing university teachers' employment or dismissal should differ dramatically from those of other occupational groups involving interaction with teenagers or adults, such as social workers or high school teachers. Examination of standards, procedures and decisions for individuals in groups such as these may have assisted the Committee considerably.

Lambert also complained about the Committee's decision not to hear expert testimony from Dr. Roper (professional psychologist) and Mr. Yantzi (social worker). We feel the Committee's decision was not improper in the circumstances. The Committee already was aware of Johnson's medical and psychological condition. Such evidence does not

appear to be as relevant to the question of just cause as it is to the mitigation of penalty. Given the Committee's narrow jurisdiction, its decision was not unreasonable. The Committee was urged by Lambert and Johnson to study the trial transcript and a report by Dr. Mausberg. We are satisfied it did so and that its review was sufficient. Nevertheless, we assert that Lambert ought to have had an opportunity to review the Committee's transcript summary as noted earlier.

9. The Committee was subjected to external pressures as evidenced by the fact the Committee received a petition from the outside community.

The controversial nature of Johnson's criminal behaviour did not go unnoticed in the community. Indeed, one manifestation of community sentiment was an "anti-Johnson" petition which was delivered to the Committee by Brown, Secretary to the University Senate. While Brown apparently felt obliged to show the petition to the Committee, we feel this was improper and in poor judgment. By its very nature, the Committee should have been insulated from external pressures in order to avoid legitimate concerns about fairness. Nevertheless, as a result of our discussion with Committee members, we hold that the petition had no bearing on its deliberations or recommendation to President Wright.

The Policy 53 Committee: Final Thoughts

We would like to begin by examining the Committee's responsibility under Policy 53. While the Committee perceived itself as a body deciding an academic issue, it was created for the purpose of recommending whether adequate cause existed for dismissal. By its terms of reference, therefore, the Committee was constituted to advise on a disciplinary matter. Its role is distinguishable from that of a tenure committee judging faculty performance according to academic criteria. The failure to award tenure is not a disciplinary decision, but reflects only an unsuccessful effort to complete a probationary period. In this case, the Committee is required to determine whether there is cause and whether a disciplinary penalty - dismissal is warranted.

There is no dispute the Committee has the authority to establish its own procedures. We concur with the Committee's conclusion that "it would have been quite inappropriate for it to re-try the case by submitting the criminal behaviour itself to detailed investigation". Indeed, this would have put the Committee at risk of engaging in double jeopardy. At the same time, Lambert made numerous allegations of procedural irregularities. We have concluded that some of them have merit and prevented Johnson from being treated fairly. In a case as important as this one, both parties should have insisted that it be investigated by skilled persons, not novices, and that procedural fairness be ensured. Such precautions were not taken here and the consequences have arisen; the matter continues to fester. Arbitration, on the other hand, would have provided a final and binding decision. Furthermore, we believe that both parties would have been well served had the grounds for dismissal been assessed by an independent body, constituted in such a manner that its impartiality could not have been doubted reasonably.

We feel *both* parties would have been better served by a procedure such as arbitration. For one thing, an arbitration board could consist of persons with knowledge and experience in dealing with disciplinary issues. It also would consist of persons familiar with quasi-judicial proceedings. If the parties wanted an arbitration board made up of academics, this could have been arranged. An arbitration board would also be independent of both parties and therefore would have been seen to be impartial. The Committee at times was too casual and made procedural and substantive rulings which prejudiced Johnson's right to fair treatment. While the Committee's decisions may have been innocent errors reflecting inexperience, the consequences were not benign. Even where the consequences appeared benign, such as *ex parte* fact finding with Walker, they conflicted with fundamental principles such as natural justice. The totality of the Committee's conduct raise serious questions about whether it conducted a full investigation which was fair to both parties.

Consequently, we have doubts about the Committee's conclusions regarding the adequacy of cause. The

depth and breadth of the Committee's investigation were not sufficient to resolve the matter unequivocally. In effect, the Committee's conclusions are based on an incomplete analysis of the facts. We wish to make it perfectly clear that we are not saying there was not adequate cause for dismissal. This is not the question before us. However, our findings are that;

1. The Committee failed to determine why Banks denied Johnson's request for a research term. Specifically, it failed to determine whether Banks considered the request, why he did not give explicit reasons or whether the decision was arbitrary, discriminatory or made in bad faith. For whatever reason, the Committee did not pursue this issue fully and its rules governing the questioning of witnesses prevented Lambert from pursuing it. Only after satisfying itself that Johnson's request was dealt with fairly and in a reasonable manner should the Committee have proceeded with Banks' January 28th charges.

2. The Committee decided to limit its investigation and thereby made it difficult to determine conclusively whether adequate cause existed. By first splitting the grounds and then refusing to consider arguably relevant evidence the Committee failed to conduct a complete investigation. On the first matter, only a full examination of the charges and evidence would reveal the true basis for dismissal and the adequacy of cause. As matters stand, a reasonable suspicion remains that dismissal was motivated by what the University considered moral turpitude. Second, the appropriateness of dismissal as a penalty requires consideration of cases possibly involving past practice or precedents.

3. By consulting with the University solicitor, the Committee compromised its standing as an independent and impartial body. What effect these discussions had on Committee decisions is unknowable. Nevertheless, the fact that discussions were held raise apprehensions about the Committee's neutrality.

4. The Committee's "totality of conduct" failed to respect some of the fundamental principles of natural justice and due process upon which the CAUT Guidelines are based.

For these reasons, we are not satisfied Johnson's dismissal was considered properly and fairly by the Committee.

The Board of Governors' Decision

We are not privy to what the Board considered in its closed session and therefore cannot say on what basis it reached its decision. It is evident, however, that an attempt was made to change the grounds for dismissal at this level by stating Johnson had caused embarrassment to the University and to his profession. Flaxbard objected to this charge and it was dropped from President Wright's recommendation to the Board. Thus, while the President's recommendation was based primarily on the Committee report, we cannot conclude unequivocally that the Board's decision rested solely on the recommendation. Given the substantive and procedural concerns already raised we feel it is unlikely the Board probed any further. Tape recordings of the Board's open session suggest our concerns were not overcome at this level of decision-making. There was no sworn testimony, no cross-examination of witnesses, Banks did not appear as a witness, and there was no evidence against Johnson other than the President's recommendation and Banks' charges. A special meeting of the Board, with perhaps 30 or more members in attendance, does not provide a hearing similar to arbitration.

Summary of Findings

We have reached the conclusion that Johnson was not treated properly and fairly by the University. Our findings are summarized below.

1. We have reservations about the discontinuance of Johnson's salary. While Johnson's situation was somewhat unique, his salary should have been continued in light of his lengthy service to the University, CAUT Guidelines, Policy 53 itself and the fact that his employment was under review until June. We have some difficulty with Banks' position that Johnson was unable to take up his duties. Before the Policy 53 Committee, Banks conceded he made no attempt to determine if

Johnson was engaged in academic duties such as research. Johnson, on the other hand, gave uncontradicted evidence that he was engaged in research. Even though he was not paid, there is no dispute that Johnson continued to be an employee of the University.

2. Johnson was granted a research term "without prejudice" for the Fall term. Banks' handling of his request for a Winter research term raised serious questions about whether Johnson was treated fairly. We were unable to determine if the request was considered and, if so, on what basis it was rejected. The failure to provide explicit and written reasons raise serious questions about whether the request was handled reasonably, that is, in a manner that was not arbitrary, discriminatory or in bad faith.

3. The Policy 53 Committee failed to conduct a full investigation of the charges against Johnson and failed to conduct the proceedings in a manner which would ensure fair treatment. It is painfully obvious that the Committee was not equipped to deal with this matter and was a poor substitute for impartial and binding arbitration. Its handling of substantive matters and its procedural rulings prejudiced Johnson's right to a fair hearing.

4. We are not satisfied that the deliberations of the Board of Governors overcame the serious problems encountered at the Committee level.

Recommendation

Certainly Johnson's dismissal was not conducted in accordance with CAUT Guidelines. Furthermore, it is our conclusion that there were sufficient procedural irregularities to raise serious concerns. These concerns are of two types. First of all, the procedural irregularities do appear to have violated the principles of due process, natural justice and impartiality upon which CAUT guidelines are based. Secondly, these procedural irregularities have resulted in controversy about the motives of all those involved in the dismissal decision. Any recommendation to resolve these concerns requires consideration of a just and equitable remedy which is sensitive to the circumstances of the case. Although we find that there were significant procedural irregularities we wish to emphasize that we have made no judgment about the merits of the University's case for dismissal. Accordingly, to recommend reinstatement, an extended leave of absence or a financial settlement as a remedy would be most inappropriate. Moreover, we recognize that the passage of time has altered circumstances since the decision was made. In particular, the successful appeal of Johnson's original sentence resulting in an extended period of incarceration is noted.

As independent investigators benefiting from hindsight, it is manifestly apparent that this type of case should have been resolved by private negotiations and settlement between the parties of interest. Evidently, this option was forsaken by both; the University felt there was adequate cause for dismissal and Johnson held a contrary and equally strong view. We believe these views remain intact. Given these divergent views and our assessment of the case, we recommend that the dispute be submitted to final and binding arbitration as outlined in the CAUT Guidelines.

That this recommendation will serve the best interests of all of those affected by this unfortunate case is our belief. Considered together, the grounds for dismissal advanced by Dean Banks required careful and rigorous examination. It was not inappropriate for the University of Waterloo Administration to consider whether Johnson's employment ought to terminate as a result of the particular criminal charges and the fact of his incarceration. The question of whether there was adequate cause to dismiss and the procedures required to answer that question would have tested the skills and experience of any group of individuals charged with the responsibility of reaching a decision. Their task would have been eased had they enjoyed an impartial position, free from the possibility, or appearance of that possibility, of influence and had they the necessary skills and experience. This endorsation of arbitration is aimed at finally determining whether adequate cause for dismissal exists.

Committee:
Joseph B. Rose
Faculty of Business
McMaster University
Hamilton, ON

Pamela Smith
Sample Survey and Data Bank Unit
University of Regina
Regina, Saskatchewan

Originally published in the CAUT Bulletin
(June 1983 edition, pages 14 to 18).
This report has been redesigned.