

Report and Recommendations
of the
CAUT Academic Freedom and Tenure Committee
on the Matter of the
Tenure Applications of
Dr. James Kepron
at Brandon University
July 10, 2001

1. INTRODUCTION

At its December 1999 meeting, the CAUT Academic Freedom and Tenure Committee (the Committee) passed a motion to:

undertake a fact-finding visit to Brandon University to investigate possible unfairness and violations of CAUT policies, including, but not limited to, conflict of interest in the tenure process as it affected Dr. James Kepron, up to and including the University President's decision in the matter.

Two fact-finding visits were made to Brandon University (the University), the first by Professors Glenna Knutson and Ian McKenna, in January 2000, the second by Professors McKenna and Tom Booth, in April 2000.

On each occasion the team had conversations with Brandon University faculty members and administrators who were suggested by the Brandon University Faculty Association (BUFA), and by the University President, Dr. Dennis Anderson (the President). The team further initiated meetings with the President, Vice-President Carrabre, Dean of Education, Ron Common, Dr. Lorraine Frost, and Board of Governors Chair, Mr. Jacob Jensen. The team also reviewed documents provided by BUFA, the President, Dr. Kepron, and several other persons with whom it met.

At its September 2000 meeting the CAUT Academic Freedom and Tenure Committee (the Committee) studied, and endorsed, the report of the fact-finding team. Subject to alterations of style and format, the Committee approved distribution of the report to the University, BUFA, and Dr. Kepron.

The Report is structured as follows. Section 2 summarizes the sequence of events leading to the denial of tenure to Dr. Kepron. The Committee's conclusions based on the evidence gathered by the fact-finding team are summarized in section 3. Section 4 presents both the evidence obtained by the fact-finding team and the Committee's conclusions drawn from the evidence, including the reasons for its conclusions. Section 5 offers recommendations to the parties. Two appendices provide respectively a short professional profile of Dr. Kepron, and a summary of the tenure procedures at Brandon University, as specified in the Collective Agreement between the University and BUFA (the Collective Agreement).

2. SUMMARY OF EVENTS PERTAINING TO THE DENIAL OF TENURE

In September 1991, Dr. Kepron took up a Special Education position in the Department of Educational Psychology and Foundations (the Department), in the Faculty of Education at the University. Dr. Kepron's initial three-year term contract, convertible to a probationary (tenure track) appointment, was so converted in 1994. The process of conversion consisted of both the Central Appointments Committee's (CAC) ratification of a Special Education tenure track position, and the Department's endorsement of Dr. Kepron as meriting conversion to the tenure track position.

In October 1996, Dr. Kepron made application for tenure, in accordance with the Collective Agreement between the University and BUFA. This first (1996) application for tenure was supported by the Department, with one dissent, and by the Faculty of Education Tenure Committee (FTC). Dean Common opposed the granting of tenure, recommending, instead, to the University Tenure Committee (UTC), a one-year extension of probation. President Anderson rejected the UTC's recommendation of a one-year extension of probation. Upon appeal, the Tenure Appeal Committee (TAC) overruled the President's decision as arbitrary and capricious and awarded Dr. Kepron a one-year extension of probation.

Dr. Kepron made a second application for tenure in October 1997. That application was supported by a narrow (4-3) majority of his Department and not supported by a narrow majority (4-3) of the FTC. It is in dispute between BUFA and Dr. Kepron on the one hand, and the University administration on the other whether a valid majority of the FTC did oppose Dr. Kepron's application, because one faculty member cast negative votes in both the Departmental committee and the FTC. Dean Common recommended against tenure.

The UTC recommended to the President that Dr. Kepron be granted tenure, a recommendation that the President rejected. The TAC was asked by Dr. Kepron to review the President's decision as allegedly arbitrary and capricious. The TAC found the decision not arbitrary or capricious but recommended that the President review his decision to reject the UTC's recommendation. President Anderson's letter of termination to Dr. Kepron is dated three days after the date of the TAC's decision and accompanying recommendation. The fact-finding team found no evidence that the President reviewed his decision in accordance with the TAC's recommendation. The termination of Dr. Kepron's employment took effect on August 31, 1998.

Subsequently, BUFA brought an application for judicial review of the TAC's decision. The Manitoba Court of Queen's Bench rejected BUFA's application as out of time, ruling that the TAC was a board of arbitration within the meaning of the Manitoba Labour Relations Act, and subject to the thirty-day time limit for applications for judicial review under that Act. Accordingly, the Court did not address the substance of BUFA's application for judicial review.

3. SUMMARY OF THE COMMITTEE'S FINDINGS

The Committee finds that there was unfairness in the process of Dr. Kepron's second (1997) application for tenure. The bases of the Committee's finding of unfairness are:

- (a) there is a reasonable apprehension of bias on the part of the then Dean of Education, Dr. R. Common, in his recommendation to the University Tenure Committee (UTC);
- (b) in refusing to allow Dr. Kepron to add to his tenure application dossier an article submitted for publication, Dean Common was in breach of the Collective Agreement; this breach may have influenced President Anderson's decision to deny tenure and the Tenure Appeal Committee's (TAC) review of that decision;
- (c) in his denial of tenure to Dr. Kepron, President Dennis Anderson:
 - a. relied, at least in part, on the recommendation of Dr. Common.
 - b. rejected the recommendation of the UTC on the basis of irrelevant considerations; and
 - c. failed to provide substantive reasons, as required by Article 13.8 of the Collective Agreement, for rejecting the UTC's recommendation.

4. REASONS FOR THE COMMITTEE'S FINDINGS

(A) Supporting evidence of alleged apprehension of bias and unfairness on the part of Dean Common

In this sub-section, we consider matters under section 3 (a) and (b), above.

(i) The Dean's role in the hiring of his spouse

It is alleged by BUFA, and by a number of faculty members, who provided evidence to the fact-finding team that Dean Common acted improperly and in conflict of interest with respect to the appointment of his spouse, Dr. Lorraine Frost. It is alleged, further, that Dean Common's negative recommendation on Dr. Kepron's tenure application served the purpose of advancing his spouse's career at the expense of Dr. Kepron.

Dr. Roger Neil informed the fact-finding team that, in spring 1996, Dr. Common asked him to alter the specifications of a job posting for a position in the Department of Educational Psychology and Foundations (the Department), of which Dr. Neil was Chair. At that time, Dr. Common had accepted the offer of appointment as Dean but had not yet assumed his duties. The job posting had been requested by the Department and approved by the Central Appointments Committee (CAC) to replace a deceased faculty member, Professor Hurlburt, a specialist in Guidance and Counselling.

Dr. Neil informed the fact-finding team that Dr. Common's reason for asking him to alter the job posting to remove the *requirement* of a specialty in Guidance and Counselling was to facilitate the hiring of his spouse, Dr. Frost, whose specialty is Special Education. Dr. Neil informed us that his refusal to accede to Dr. Common's approach was met with what he saw as rancour and hostility on the part of Dr. Common.

The fact-finding team was informed by Drs. Neil and McQuarrie, and other members of the Department that, after taking office, in Fall 1996, Dean Common proposed that the Department alter the requirements of the position, although it had already been nationally advertised, and applications received. Those Department members informed us that they agreed to Dean Common's proposed alterations solely because of his warning that, without the change, the Department was in danger of losing the position altogether. The CAC approved the requested alteration, which called merely for an *interest*, rather than a specialty, in Guidance and Counselling.

Drs. McQuarrie and Neil informed the fact-finding team that, within three weeks of the CAC's ratification of the altered job posting, the Appointment Committee interviewed Dr. Frost for the position. The fact-finding team was informed, further, that the revised position was not advertised beyond posting on a University notice board and that no applicant for the position originally advertised was called for interview. The Chair of the Appointment Committee, Dr. Roger Smith, indicated to the fact-finding team that, as Dr. Frost was the outstanding candidate for the revised position, the Appointment Committee considered it unnecessary to interview any of the applicants for the position originally advertised. Dr. Smith indicated, further, that Dean Common had no involvement whatever in the Appointment Committee's decision to hire Dr. Frost.

Professor Jack Lam informed the fact-finding team that, while the Appointment Committee was impressed with Dr. Frost's qualifications, he and one other member agreed to Dr. Frost's appointment, only on condition that she agree to upgrade her qualifications in the area of Guidance and Counselling, following her appointment. Dr. Frost disputes that such an upgrading requirement was imposed or suggested. Chair, Dr. Smith could recall no such requirement.

The University has documented Dr. Frost was hired to fill the position left vacant by the sudden death of Dr. Hurlburt, a specialist in Guidance and Counselling, not Special Education. The fact-finding team found no evidence that Dr. Frost undertook any upgrading courses in Guidance and Counselling. The Department provided to the fact-finding team documentation of Dr. Frost's course assignments subsequent to her appointment. It suggests that Dr. Frost undertook no teaching within the specialty of Guidance and Counselling.

BUFA alleges that, following Dr. Kepron's dismissal in 1998, Dr. Frost assumed immediate responsibility for a significant number of the courses previously taught by Dr. Kepron. A course assignment list provided to the fact-finding team indicates that, following Dr. Kepron's dismissal, Dr. Frost assumed responsibility for a substantial number of Special Education courses previously taught by the former.

Dean Common, the President, and Vice-President Carrabre met collectively (at their insistence) with the fact-finding team and denied that there was any connection between the hiring of Dr. Frost and the denial of tenure and dismissal of Dr. Kepron. In a separate meeting with the fact-finding team, Dr. Frost voiced a similar opinion. All four advanced the opinion that Dr. Frost was hired to fill the (revised) position vacated by Dr. Hurlburt and that she began employment in January 1997, more than a year before Dr. Kepron was denied tenure. The three administrators emphasized that the University took pains to avoid a conflict of interest on the part of Dean Common by requiring Dr. Frost to report to Vice-President Carrabre, rather than to her spouse, Dean Common.

(ii) Dean Common's role in Dr. Kepron's first (1996) tenure application

Dean Common recommended against tenure for Dr. Kepron in his 1996 application. Such recommendation was contrary to the respective positive recommendations of the Faculty of Education Tenure Committee (FTC) and the Departmental Committee.

Dean Common brought to the UTC a recommendation that he described as "essentially positive" that Dr. Kepron be awarded a year's extension of probation, in order to meet what he stated to be the necessary standard of scholarly and research activity.

Two main concerns were raised before the fact-finding team, with respect to Dean Common's role in the first (1996) tenure applications.

(a) Dean Common's influence on the UTC's deliberations.

Dr. Dale Hayes stated that the UTC meeting to discuss Dr. Kepron's case was scheduled at short notice for a time when he was unavailable. Dr. Hayes was the sole Faculty of Education representative on the UTC.

Dr. Hayes stated that, in his absence, the UTC received from Dean Common what Dr. Hayes judged to be a limited and one-sided picture of custom and practice in the Faculty of Education with respect to the definition of scholarly and research activity. Dr. Hayes attributed this, in part, to the recency of Dr. Common's presence in the University and the Faculty.

The UTC Chair, Dr. Rice, shared with the fact-finding team his observations about the role that Dean Common played in the UTC's proceedings on Dr. Kepron's case. Dean Common was a full member of the UTC during deliberations on other cases before the UTC but was replaced by an alternate for Dr. Kepron's case. Nevertheless, after presenting his written decanal recommendation to the UTC, Dean Common remained present throughout that committee's proceedings, including its deliberations and vote.

While Dr. Rice informed us that Dean Common's role in the UTC's proceedings was more than he, as Chair, had anticipated, he did not consider that the Dean's opinions influenced the vote. Indeed, Dr. Rice indicated that he felt Dean Common's recommendation was more a reflection of, than an influence upon, the UTC's decision.

(b) Dean Common's letter of recommendation to the UTC

The fact-finding team's conversations with several University deans, and former deans, reveal a clear and established practice for decanal tenure recommendations. While deans at Brandon are expected to communicate their own assessments of a candidate, it is customary to provide the UTC with a balanced review of the candidate's file. The fact-finding team received the following evidence of alleged lack of balance in Dean Common's recommendation to the UTC.

In his 1995 evaluation of Dr. Kepron's performance, Acting Dean of Education, Dr. Gerald Richards, suggested that Dr. Kepron might submit for publication some of his ongoing research and scholarship. At various stages of Dr. Kepron's two tenure applications, Dr. Richards made a point of putting on record that his remarks were not intended to convey the opinion that Dr. Kepron *must* publish as a condition of receiving tenure. Dr. Richards indicated that he would not voice such an opinion because he did not, as Dean, believe that it was necessary for Dr. Kepron to publish. Rather, it was Dr. Richards' intention to encourage Dr. Kepron to submit for publication a particular piece of scholarship because he had something important to say.

In spite of Dr. Richards' clear explanation of what he intended to communicate in his decanal evaluation of Dr. Kepron, Dean Common persistently maintained in his own evaluations of Dr. Kepron that it was former Dean Richards' opinion that Dr. Kepron *must* become involved in publishing articles.

Dean Common's 1996 letter of recommendation makes no reference to the remarks of Dr. Robin Enns, Chair of the FTC, in its letter recommending tenure for Dr. Kepron. In that letter, Dr. Enns makes specific reference to his personal influence on the direction of Dr. Kepron's career strategy, while he was Dean of the Faculty of Education. Dr. Enns notes the weight that he, as Dean, placed on teaching and curriculum development as an important aspect of "scholarship" as required by the Collective Agreement. Dr. Enns informed the fact-finding team that his view of the scope of the term "scholarship" influenced his decanal advice to Dr. Kepron in his career at the University prior to his tenure application. Such view also influenced Dr. Enns' support of Dr. Kepron's application in his role as Chair of the 1996 FTC.

Neither Dean Common's letter of recommendation, nor his oral address, to the UTC made reference to the evidence of two former Deans of Education that indicates plainly their respective belief, as communicated to Dr. Kepron, that, in the Faculty of Education, scholarship through teaching and curriculum development met the scholarship/research requirement of tenure, laid down in the Collective Agreement.

Also absent from Dean Common's letter of recommendation to the UTC was reference to the fact that Dr. Kepron's application was supported by all but one of the Departmental Committee and by the FTC.

Dean Common's letter of recommendation did contain positive remarks about Dr. Kepron's performance. The Dean recognized that Dr. Kepron had in progress some research that, "given time, might yield publications". Dean Common's recommendation of a one-year extension of probation was designed to allow Dr. Kepron "to demonstrate and develop the scholarship and research activities necessary for eligibility for tenure". The Dean indicated further, in his letter to the UTC, that he would be "pleased to support Dr. Kepron in his efforts to extend his contributions in the area of scholarship and research".

Absent from Dean Common's recommendation for extended probation was specific reference to what he would require of Dr. Kepron by way of peer-reviewed publication at the conclusion of the extended period of probation, in order to support his 1997 tenure application.

(iii) Dean Common's role in Dr. Kepron's second (1997) tenure application

(a) *Incident with Dean Ross*

Dean Linda Ross informed the fact-finding team that, shortly before her assuming the position of Acting Dean of Health Studies, she reviewed, at Dr. Kepron's request, drafts of two articles that he intended to submit for peer-reviewed publication. Professor Ross, as she then was, commented

favourably on the articles, considering each potentially publishable in peer-reviewed journals. Dr. Kepron used the positive comments as support for his tenure application. Dr. Ross informed the fact-finding team that she reviewed the articles as a colleague having an *interest* in Reading Recovery, not as an expert in the field.

Professor Ross informed the fact-finders that, thereafter, Dean Common confronted her (by then Acting Dean of Health Sciences) about her positive assessment of Dr. Kepron's work. Professor Ross stated that Dean Common expressed the view that such comments "pitted Dean against Dean". Dean Ross stated that she considered Dr. Common's action an unacceptable questioning of her professional integrity.

In his response to the preliminary draft of this report, Dr. Common acknowledged that the "confrontation" with then Acting Dean Ross took place, and explained his concern to be the inappropriateness of the latter's "writing a letter out of 'friendship' for a faculty member in my faculty".

In his written recommendation to the UTC, Dean Common made no reference to Dean Ross's evaluation of Dr. Kepron's work. According to Dr. Clifford Anderson, the UTC placed "significant weight" on Dr. Ross's assessment of the articles. One of the two articles was subsequently published in a peer-reviewed journal.

(b) *Lobbying Department members*

Two members of Dr. Kepron's Department (Drs. Neil and Henley) informed the fact-finding team that Dean Common insisted that they attend the Departmental meeting to review Dr. Kepron's application. Both faculty members indicated that their respective views of the inadequacy of Dr. Kepron's scholarship were well known. Each considered the Dean's insistence that they attend, and vote at, the meeting was founded on his belief that they would vote against Dr. Kepron's tenure application, on grounds of alleged lack of scholarship. Drs. Henley and Neil had voiced their negative opinions of Dr. Kepron's allegedly inadequate scholarship during the process of Dr. Kepron's 1996 tenure application, and Dr. Neil's was the sole Departmental vote against the award of tenure. Each expressed the belief that Dean Common expected him to vote against Dr. Kepron's candidacy in the 1997 tenure application. Each indicated that such decanal pressure was contrary to established practice in the Faculty of Education.

Dr. Roger Neil was on sabbatical leave at the time of Dr. Kepron's 1997 tenure application and had resolved, in accordance with Departmental custom and practice, that he would not attend departmental meetings while on leave. Dr. Neil characterized as inappropriate and intimidating the pressure Dean Common placed on him to attend and to cast a vote. Dr. Neil bowed to the pressure to attend, and cast his vote against Dr. Kepron's application. It should be emphasized that the Dean's pressure did not influence Dr. Neil's decision to vote against Dr. Kepron's application. Rather, it caused him to attend, participate in, and vote at, the meeting, when his preference would have been

not to attend, in accordance with Departmental convention regarding faculty members on sabbatical leave.

Dr. Henley informed the fact-finding team that, prior to the Departmental tenure meeting to consider Dr. Kepron's tenure application, Dean Common informed him, during a visit of the latter to Cranberry Portage, that it was vitally important that Dr. Henley attend, and vote at, that meeting. Dr. Henley indicated to the fact-finding team that his low opinion of Dr. Kepron's scholarship was well-known within the Department.

Dr. Henley shared with the fact-finding team his feelings of anxiety about both the Dean's pressure on him to attend the meeting and the expectation of how he should vote. As indicated in his letter of abstention, Dr. Henley was well aware of the dependence of his tenure at the University on the continuing availability of funding and on Faculty of Education support for BUNTEP. Dr. Henley indicated he was acutely aware of the importance of the good will of Dean Common and his Departmental colleagues for his job security at the University.

Dr. Henley informed the fact-finding team that, while he was genuinely ambivalent about how or whether to cast his vote (as indicated in his letter of abstention to Dr. McQuarrie), his ultimate decision to abstain was influenced by his concern not to "make enemies" in what he considered to be the rival Departmental "camps".

Dr. Henley's hopes for such a "neutral" strategy were not fulfilled. He informed the fact-finding team that, following his decision to abstain from voting, Dean Common directed toward him open, verbal hostility. Dr. Henley could find no explanation other than his failure to vote against Dr. Kepron's tenure application.

In his response to a preliminary draft of this report, Dean Common denied that he exhorted Dr. Henley to attend the Departmental meeting to consider Dr. Kepron's tenure application. Dean Common indicated that he simply assumed that Dr. Henley would perform his professional duty and attend the Departmental meeting.

Dean Common explained the alienation alleged by Dr. Henley as due to other differences between himself and Dr. Henley.

(c) *Double voting on the FTC*

Dr. Beverley Bailey participated, and voted, in both the Departmental and the FTC proceedings. This permitted her to cast two votes against Dr. Kepron's candidacy, and to influence the opinions of faculty members on both committees. BUFA lodged an objection but the FTC Chair ruled that such double voting conformed with past practice in the Faculty of Education. In his response to the preliminary draft of this report, Dean Common noted that double-voting had worked in Dr. Kepron's favour in 1996, when Dr. Halimandaris supported Dr. Kepron's tenure application in both the

Departmental and FTC meetings.

Subsequent to Dr. Kepron's 1997 application the Collective Agreement was amended to eliminate double voting in such circumstances. There is no evidence that Dean Common used his decanal influence to prevent double voting in either of Dr. Kepron's applications. The fact-finding committee noted that, while the double vote of Dr. Halimandaris in 1996 had no influence on the virtually unanimous support for Dr. Kepron's tenure application at both the departmental and the Faculty level, Dr. Bailey's double voting in the 1997 committees was decisive in the FTC.

(d) *Exclusion of additional material from Dr. Kepron's dossier*

There is evidence that Dean Common blocked Dr. Kepron's attempt to add to his dossier the draft of a third article, almost ready to be submitted for publication. The excluded article, entitled *Off-campus Delivery of Graduate Studies Programs to First Nations Students*, was published subsequently in the peer-reviewed *Canadian Journal of Native Studies*. Dean Common sent Dr. Kepron a memorandum on October 31, 1997, indicating that he would not be permitted to add material to his dossier while it was in the Dean's office. It is unclear by what authority Dean Common refused to allow Dr. Kepron to add the draft article to his dossier. The Collective Agreement states, inter alia: "It is the candidate's responsibility to see that the dossier includes all information to be considered. All information on which tenure recommendations and decisions are to be based, including substance and sources, shall be added to the dossier".

As the Collective Agreement specifies November 1 as the date by which the Departmental recommendation and letters of dissent must reach the Dean, the FTC and the UTC, it is not clear upon what authority Dean Common acted in preventing the FTC from considering an additional piece of research submitted for peer review, and available to the FTC by November 1.

(e) *Dean Common's letter of recommendation to the UTC*

Dean Common's letter of recommendation to the UTC (Nov. 12, 1997) criticized the favourable Departmental letter of recommendation for its failure to incorporate the views of the minority, who opposed tenure for Dr. Kepron. The Dean's letter also referred, with approval, to the majority opinion of the FTC, which opposed tenure for Dr. Kepron. Such references stand in marked contrast to Dean Common's failure, in his letter to the 1996 UTC, to make any reference to the virtually unanimous support that Dr. Kepron's candidacy received from the FTC and the Departmental Committee.

Dean Common's letter contained his negative assessment of two articles submitted by Dr. Kepron for publication. (As noted above, Dean Common declined to allow inclusion of a third article in Dr. Kepron's Dossier). Dean Common described both pieces as "very weak", recognizing that one was in a field not in his area of expertise. In his letter, Dean Common proceeded to criticize the positive opinions passed on the articles by Dean Ross and Professor Hayes. In his response to the preliminary draft of this report, Dr. Common indicated that he excluded reference to the opinions of Drs. Ross and Hayes because they were not experts in the area.

Dean Common's 1997 letter of recommendation contained further reference to the alleged statement of former Dean Richards to Dr. Kepron that he must have peer-reviewed publications as a condition of receiving tenure in his prospective 1996 application. As noted above, Dr. Richards had already denied and continues to deny that he made, or would make, such a statement, as it was never his opinion that Dr. Kepron was required by the Collective Agreement to have peer-reviewed publications. Dr. Richards has maintained that his encouragement to Dr. Kepron to publish was merely a suggestion because he considered that Dr. Kepron had something important to say in his academic work. While the first **written** record of Dr. Richards' denial appears to have been in a letter to the President (copied to Dean Common), dated November 17, 1997, to our knowledge, Dean Common has never acknowledged his erroneous interpretation of Dr. Richards' remarks.

Dean Common's letter of recommendation contained an allegation that, in one of his articles submitted as evidence of scholarship/research, Dr. Kepron had breached academic convention and etiquette by listing himself as first author in a co-authored piece submitted for publication. The UTC Chair, Dr. Clifford Anderson, indicated to the fact-finding team that, at Dr. Kepron's request, he contacted the co-author (Ms. Hamilton), who expressed to him the views that there had been no breach of etiquette by Dr. Kepron, and that she felt privileged to have worked under Dr. Kepron's guidance. In spite of the co-author's express repudiation of Dean Common's allegation, the fact-finding team traced no record of a correction, retraction, or apology by Dean Common.

The substance and tone of Dean Common's 1997 recommendation for Dr. Kepron is in marked contrast to a letter of recommendation submitted by him in support of a tenure application by another member of the Faculty of Education. The fact-finding team obtained the consent of the faculty member and BUFA to view, and make reference to, this letter, on the condition of the faculty member's anonymity.

Dean Common's letter of recommendation on Dr. Kepron's application insisted on the necessity for peer-reviewed publications as evidence of progress in research and scholarship. In marked contrast, the Dean's letter pertaining to another applicant for tenure accepted, as evidence of progress in scholarship/research, work that had not been peer-reviewed. In this case, the absence of peer-reviewed work or publications was not a barrier to the Dean's recommendation of tenure.

Finally, Dean Common's letter of recommendation on Dr. Kepron's 1997 application contrasts with his letter on the 1996 application in its clear and specific demand for published, peer-reviewed articles as a condition of receiving tenure. The Dean's 1996 letter did emphasize the need for Dr. Kepron to produce work for submission for peer review. It nowhere suggested that, by the end of his extended probationary period, Dr. Kepron must have published peer-reviewed articles. Nor does the Dean's 1996 letter suggest that Dr. Kepron would have to have peer-reviewed work accepted for publication to obtain tenure at the end of his extended probation.

B. Conclusions from the evidence of an apprehension of bias on the part of Dean Common.

It is the Committee's opinion that the evidence gathered by the fact-finding team supports the conclusion that Dean Common was biased against Dr. Kepron in the process of the latter's 1996 and 1997 applications for tenure. The Committee concludes also that Dean Common acted on such bias. The Committee perceives that the Dean's bias in the 1997 application had significantly greater impact on Dr. Kepron's academic career, because that recommendation was one of the factors relied upon by the President in his decision to deny tenure.

The evidence of decanal bias in the 1997 tenure application consists of Dean Common's:

- (a) insisting to faculty members who were critical of Dr. Kepron's work that they attend the Departmental meeting to vote on Dr. Kepron's application;
- (b) confrontation with a decanal colleague because she provided a positive internal review of Dr. Kepron's work;
- (c) failure to assign weight to the reviews of Dr. Kepron's scholarly work by Dean Ross, and Professor Hayes; this was contrary to established decanal practice in the Faculty;
- (d) exclusion of crucial material from Dr. Kepron's dossier in violation of the Collective Agreement;
- (e) statements in his 1996 and 1997 letters of recommendation that former Dean Richards informed Dr. Kepron that he must publish peer-reviewed articles in order to receive tenure; Dean Common continued to make such statements in spite of Dr. Richards' repudiation;
- (f) claim that Dr. Kepron had breached convention and etiquette in identifying himself as primary author in a co-authored work; such claim is denied by the co-author, as indicated to the Committee by UTC Chair Dr. Clifford Anderson;
- (g) application to Dr. Kepron of the requirement of peer-reviewed publication as evidence of progress in scholarship, when such standard was not applied by him to at least one other member of the Faculty of Education; such requirement was not specified in Dean Common's 1996 recommendation for an extension of Dr. Kepron's probation;

- (h) assigning greater weight to negative minority opinions of the Departmental Committee than to the majority opinions, in his 1997 decanal evaluation of Dr. Kepron; assigning greater weight to the negative, than to the positive, opinions of the equally split 1997 FTC; this was in contrast to the Dean's 1996 recommendation for extended probation rather than tenure, which did not acknowledge positive Departmental and FTC recommendations to grant tenure to Dr. Kepron;
- (i) not advising the 1997 FTC of a possible breach of due process, arising from the participation and vote of a faculty member in both the Departmental Committee and the FTC;
- (j) participation in the deliberations and decision process of the 1996 UTC (as the only member of the Faculty of Education present) in spite of having formally recommended to the UTC against tenure; the Dean's formal recommendation, and his remarks to the UTC during its deliberations, were contrary to the virtually unanimous opinions of both the department committee and the FTC.

The Committee concludes that there is evidence of apprehension of bias on the part of Dean Common against Dr. Kepron. That is, a reasonable person would apprehend bias, particularly when aware that Dean Common departed from the custom and practice of University Deans to present a balanced profile of evidence and opinion, even when they do not coincide with the Dean's personal assessment of the candidate.

It was suggested to the fact-finding team that Dean Common's alleged bias against Dr. Kepron was motivated by his desire to establish and advance, at Brandon University, the career of his spouse, Dr. Lorraine Frost. The Committee recognizes there is evidence to support such a perception.

It must be said at the outset, that the Committee concludes, without reservation, that Dean Common in no way influenced the selection process of Appointment Committee, once it commenced its work under the chairmanship of Dr. Roger Smith.

Evidence of Dr. Common's involvement in the hiring of his spouse precedes the advertisement of the revised position for which the latter applied. Dr. Roger Neil's statement to the fact-finding team indicates that, even before he took office, Dean Common sought to have Dr. Neil "bend the rules" by altering the specifications of a vacant position, in order to facilitate the employment of his wife. There is evidence that, when such strategy failed, Dean Common influenced the Department to alter the description of the already advertised position to facilitate the employment of his spouse.

The Committee finds Dr. Neil's evidence persuasive particularly as the latter indicated, in each of the tenure applications, that he considered Dr. Kepron's research performance below the required standard. It is clear to the Committee that Dr. Neil was not motivated by any partiality toward Dr. Kepron but by his judgment of appropriate standards of fairness and due process.

The revised position was advertised neither nationally nor regionally, though the original advertisement was advertised nationally. Instead, the revised position was posted only within the University. One application was received, that of Dr. Frost.

Those events raise concerns for the Committee, and for a number of faculty members at the University, that Dean Common departed from proper and established process at the University, and pressured others to do so, in order to facilitate the appointment of his spouse. Such concerns are amplified by the statements of two members of the Appointment Committee that they agreed to Dr. Frost's appointment only if she undertook to upgrade her qualifications in Guidance and Counselling, in order to meet the position requirement that the successful candidate have an interest in Guidance and Counselling. There appears to be no evidence that such upgrading ever took place.

The fact-finding team heard evidence from Dr. Frost, and from the Chair of the Appointment Committee, Dr. Smith. Neither recalls any stipulation that Dr. Frost must undertake such upgrading in Counselling. The fact-finding team received no documentation on the matter. Accordingly, the Committee cannot conclude that such a stipulation was made prior to Dr. Frost's appointment.

Following her appointment, Dr. Frost did not assume responsibility for courses in the Guidance and Counselling specialty, although the University administration has acknowledged, in writing, that she was a replacement for Dr. Hurlburt, the Guidance and Counselling specialist within the Faculty. Instead Dr. Frost taught general Education courses, until Dr. Kepron's dismissal, whereupon she assumed responsibility for his courses in Special Education, Dr. Frost's own area of specialization.

As Dr. Frost informed the fact-finders, and Dean Common noted in his response to the preliminary draft of this report, the retirement of Dr. McQuarrie coupled with Dr. Kepron's departure produced a staffing crisis that required the use of sessional instructors, and regular faculty members, as well as Dr. Frost, in the field of Special Education.

The evidence before the Committee does not support the conclusion that Dean Common's conduct during the process of Dr. Kepron's tenure applications was motivated by a desire to advance his wife's career at the University in her area of expertise. Nevertheless, the Committee acknowledges there is sufficient evidence to justify the **perception** communicated to the Committee by a significant number of Brandon University faculty members that the Dean's conduct was so motivated. On the evidence presented to it, the Committee finds such a perception reasonable.

Dean Common's conduct had a negative effect on Dr. Kepron's career and on due process at the University. Dean Common's refusal to admit into Dr. Kepron's dossier evidence of a third article submitted for publication (and subsequently published) deprived the FTC of a vital piece of evidence that might have affected the outcome of an extremely close vote. The Dean's conduct may have affected the President's decision as he indicated his partial reliance on the opinions of FTC members who opposed Dr. Kepron's tenure.

The Committee notes, further, that the impact of Dean Common's actions extends beyond the President's decision, to that of the Tenure Appeal Committee (TAC). In determining the President's denial of tenure was not arbitrary or capricious, the TAC relied, in part, on the negative recommendations of Dean Common and the "majority" of the FTC. The validity of such majority is in dispute because of the double vote of a faculty member in the Departmental committee and the FTC.

(C) The President's decision to deny tenure

(i) The President's reasons

The President received from the 1997 UTC a recommendation that Dr. Kepron be awarded tenure. In accordance with custom and practice, no reasons were provided for the positive recommendation. The Collective Agreement requires that reasons be provided only for a decision that has a negative impact on a candidate.

The Collective Agreement requires the President to provide "substantive reasons" for the rejection of a recommendation of the UTC. The reasons provided by President Anderson were as follows:

- (a) The President based his decision to deny tenure on the absence of peer-reviewed publications by Dr. Kepron at the time of his 1997 tenure application. This is consistent with the President's reason for denial of tenure in the 1996 application.
- (b) President Anderson supports his requirement that there be peer-reviewed publication at the date of the 1997 application by reference to a remark in the recommendation of the 1996 UTC about *the importance of scholarship/research productivity, including successful peer-review* (emphasis ours).
- (c) Further support for the President's requirement of peer-reviewed publication at the time of the application is the statement by the 1996 TAC, *while the Committee acknowledged that there was evidence of some research, it felt that peer-reviewed publication was essential to demonstrate a record of progress* (emphasis ours).
- (d) President Anderson's letter to Dr. Kepron denying tenure refers also to the President's agreement with the opinions of Dean Common and those of "a number of members of [your] Department and the Faculty Tenure Committee".

(ii) Assessment of the President's reasons

The standards by which we assess President Anderson's decision to deny tenure are whether they were (a) fair and reasonable, and (b) arbitrary or capricious. The President's duty of fairness and reasonableness is embodied in the Collective Agreement, which provides that a negative decision on tenure be accompanied by substantive reasons. Furthermore, the Committee assumes that, in the exercise of any power to dismiss a faculty member under the terms of the Collective Agreement, there is an implied duty to exercise the power fairly and reasonably.

It is our conclusion that the President's decision to deny tenure in Dr. Kepron's case did not meet the standards for being fair and reasonable. We base our conclusion, first, on an understanding that, while the President has authority to reject a recommendation of the UTC, the breadth and prestige of the membership of the latter clothes it with an authority that would demand compelling reasons for a Presidential rejection of its recommendations.

The Committee notes that the President, himself, appoints three members of the UTC, including its chair. The Committee notes, further, that the UTC comprises five tenured faculty members, one elected from each of the four University Faculties and one from the group of Professional Associates not affiliated with any of the four Faculties. It is this prestigious and expert academic body that is designated by the Collective Agreement as responsible for formulating opinions and recommendations on academic matters, such as the award of tenure.

The Committee notes, also, that the UTC is unique in its position as the only body or individual within the University (including the President) that has at its disposal, in rendering its decision, oral evidence from the candidate and expert witnesses, all of whom are subject to cross examination. The UTC also has before it the documentary evidence provided by the candidate, the Dean, the Department and the FTC. This serves to increase the heavy onus on the President to justify with substantive reasons his rejection of the opinion of the expert, University wide academic body.

The President rejected the recommendation of the UTC by reference to remarks of two bodies (the 1996 UTC and the 1996 TAC) that had no involvement or jurisdiction in the matter of Dr. Kepron's 1997 tenure application. Yet, the President relied on the matter of jurisdiction in his defence of Dr. Roddy's membership of both the 1996 UTC and the 1997 TAC (see below).

The President does not provide *any* reasons, let alone substantive ones, for rejecting the recommendation of the UTC in the matter of Dr. Kepron's 1997 tenure application. The President does not explain why the recommendation of the 1997 UTC should command less weight than selected remarks of the 1996 UTC, which had no jurisdiction in the 1997 application and no access to the full range of evidence before the 1997 UTC. The President's preference for the remarks of the 1996 UTC is all the more puzzling in light of the remarks of that body's Chair, Dr. Rice. Dr. Rice

informed the fact-finding team that the 1996 UTC took great pains, in fashioning its recommendation with respect to the 1996 tenure application, to avoid being seen as fettering the discretion of the 1997 UTC in its recommendation on Dr. Kepron's 1997 application for tenure.

The President's reliance on remarks by the 1996 TAC is equally difficult to comprehend. That body was not considering the substantive issue of Dr. Kepron's 1996 tenure application but merely determining whether President Anderson had been arbitrary or capricious in rejecting the recommendation of the UTC. The fact that the 1996 TAC overturned the President's decision as arbitrary and capricious renders it all the more curious that he should rely on that body's remarks to support his 1997 rejection of the UTC's recommendation.

In his reliance on the respective remarks of the 1996 UTC and TAC, the President appears to take them out of context. The 1996 UTC did emphasize the importance of peer-reviewed publication for the award of tenure. However, the 1996 UTC did not stipulate what Dr. Kepron must accomplish during his extension of probation.

Two passages of the UTC's 1996 letter to Dr. Kepron suggest that it saw the need for peer-reviewed publications by Dr. Kepron at some foreseeable future date. However, the passages suggest strongly that the 1996 UTC contemplated something less than actual publications by Dr. Kepron during the relatively short (less than one year) period of his extended probation. The UTC's letter refers to Dr. Kepron's scholarship/research record as *not quite sufficient* to constitute a "record of progress" in that area (emphasis ours).

Furthermore, the 1996 UTC stated:

The Committee felt that at least some of the activities presented as evidence of scholarship/research should be *written up and submitted for publication, so that the work could be evaluated by external reviewers in Dr. Kepron's specialty* (emphasis ours).

For the reasons specified above, the 1996 UTC sought not to be specific in its expectations of Dr. Kepron with respect to the period of extended probation. The letter, as a whole, suggests the UTC's expectation of something less than actual publications by the date of Dr. Kepron's 1997 tenure application. Such an expectation would be consistent with the Collective Agreement, which specifies the need for "*a record of progress*" in scholarship/research, not actual peer-reviewed publications. The letter does not support the President's claim that the 1996 UTC mandated actual peer-reviewed publications by Dr. Kepron, during his period of extended probation.

Of course, the foregoing discussion begs the question that remarks of the 1996 UTC have any relevance at all to the assessment of Dr. Kepron's performance in his 1997 tenure application. The Chair, Dr. Rice, emphasized that he saw this as the task of the 1997 UTC not the 1996 UTC. Dr. Rice's view reinforces the clear language of the Collective Agreement.

In relying on the views of *some* of the Department members and *some* of the FTC, the President appears to assign more weight to opinions of the **minority** of the Department than to those of the majority.

Dr. Bailey's votes in both the Departmental Committee and the FTC raises doubts about the validity of the majority vote in the FTC. In light of this, we are concerned about President Anderson's assigning greater weight to the votes of one half of the members of the FTC over the other half.

The Committee observes as well that, in his decision on Dr. Kepron's 1996 tenure application, President Anderson appeared to assign no weight to the *unanimous* recommendation of the FTC. The President also appeared to ignore the virtually unanimous voice of the 1996 Departmental Committee.

Finally, the President's decision is tainted by his reliance on Dean Common's recommendation, which the Committee finds biased, as discussed above. The President may claim that he had no knowledge of Dean Common's bias at the time he made his decision. Yet, as we discuss below, the 1997 TAC made a point of informing the President that,

“had the appeal been based on other grounds (faults in the process or perhaps even ‘arbitrary or capricious’ decisions of others), our decision might have been different”.

The fact-finding team asked members of the TAC to identify the “decisions of others” that it may have considered arbitrary or capricious. The team received no response. Accordingly, it cannot be assumed that the TAC had in mind the decisions of any particular individual, relevant to the tenure process in Dr. Kepron's case.

Nevertheless, the TAC's suggestion that the decisions of “others” in the tenure process may have been arbitrary or capricious causes the Committee anxiety. The President appears to have made no inquiry of the TAC as to whether its concern about the potentially arbitrary or capricious decisions of others extended to Dean Common, who played a significant role in the tenure review process. The fact that the President placed weight on Dean Common's recommendation against tenure renders it all the more troubling that he appears not to have sought clarification from the TAC.

In view of the flawed evidence presented to the President and no record of any substantive reasons for his decision to reject the UTC's recommendation, the Committee cannot escape the conclusion that Dr. Kepron was denied a fair and reasonable process in his tenure review.

D. The Tenure Appeal Committee's review of the President's decision

(i) The TAC's decision

Dr. Kepron, assisted by BUFA, appealed to the TAC on grounds that the President's decision was "arbitrary or capricious". The Committee was informed by BUFA that the restriction of the appeal to the alleged grounds of "arbitrary or capricious" was to allow the TAC to use its power under Article 13.16 of the Collective Agreement to overturn the President's decision and to substitute its own judgment to award tenure. While it was open to Dr. Kepron to base his appeal on other grounds, such as "breach of process", the remedy available to the TAC would have been only to order a repeat of the appropriate procedures. In its advice to Dr. Kepron, BUFA sought not to subject him to further alleged breaches of process by Dean Common. BUFA judged the best course to be an appeal on the "arbitrary and capricious" ground.

The TAC noted further that, by the date of its decision, two of Dr. Kepron's articles, submitted for publication, had been accepted for publication in refereed journals. While the TAC found the President's decision not to be arbitrary or capricious, it did indicate, "*it would not be inappropriate for the President to review his decision now*". The TAC's letter was dated May 1, 1998, and President Anderson's letter of termination to Dr. Kepron dated May 4, 1998.

Prior to the TAC's review of the President's decision, BUFA raised an objection to its composition. The President's nominee on the TAC was Dr. Roddy, who had served as a member of the 1996 UTC, which recommended an extension of probation for Dr. Kepron. Dr. Roddy placed on record in the 1996 UTC proceedings, in the presence of Dr. Kepron, his opinion that the Collective Agreement required that a candidate have peer-reviewed publications to obtain tenure.

The TAC did not exercise its jurisdiction to rule on the matter of Dr. Roddy's eligibility. By default, that question was decided by the President, who took the view that there was no apprehension of bias in Dr. Roddy's membership on the TAC. The President ruled that Dr. Roddy should not be disqualified simply because it was notorious that he demanded high standards of scholarly achievement for the award of tenure.

In subsequent legal proceedings, the University contended, and the court agreed, that the TAC was the equivalent of a board of arbitration within the meaning of the Manitoba Labour Relations Act.

In his affidavit sworn July 12, 1999, respecting judicial review of the TAC's decision to uphold President Anderson's rejection of the 1997 UTC's recommendation, Academic Vice-President Carrabre acknowledged that, during the proceedings of the 1997 TAC, he raised an objection to the scope and relevance of submissions made to the TAC on behalf of Dr. Kepron. Vice-President Carrabre indicated that, on March 26, 1998, he discussed his objection with the TAC at a meeting in which Dr. Kepron and his advisor, Dr. Gosselin, were not present. The affidavit notes that the Chair of the TAC asked Dr. Kepron and his advisor, to leave the room. They did so, and the TAC heard the Vice-President's objections in the absence of Dr. Kepron and his advisor.

At the time of their exclusion from the TAC's proceedings, neither Dr. Kepron nor his advisor raised an objection. Upon their return to the TAC meeting, Dr. Kepron and his advisor were not provided with information on the substance of Vice-President Carrabre's evidence or argument.

(ii) Observations on the TAC's decision

(a) *The eligibility of Dr. Roddy*

The TAC declined to rule on the matter of whether there was an apprehension of bias in Dr. Roddy's membership on the Committee. It was clearly the exclusive jurisdiction of the TAC to make that decision. Furthermore, in light of the subsequent judicial ruling that the TAC has legal status equivalent to that of an arbitration board under the Labour Relations Act, a high standard of due process is placed on it. In particular, it is clear that, as the arbitral body under the Collective Agreement, the TAC is bound by principles of natural justice, including the requirement that it not have as a member anyone with respect to whom there is a reasonable apprehension of bias.

It was the President's view that a prospective member of the TAC should not be ineligible for office merely on the basis of public knowledge of his or her views about appropriate standards of scholarship in the institution. The Committee recognizes the right and freedom of academic staff to hold and communicate academic opinions about the research and scholarship of colleagues. Indeed, the very *raison d'être* of the Committee and of CAUT is the protection of academic freedom and the collegial process.

That said, the matters of Dr. Roddy's academic freedom and scholarly opinions are not at the root of his eligibility to serve on the TAC in this case. The task of the TAC under the Collective Agreement was not to judge the merits of Dr. Kepron's tenure application but to rule on whether the President's decision to deny tenure was arbitrary or capricious. In order to discharge its function, the TAC was required, *inter alia*, to choose between conflicting interpretations of the Collective Agreement, that of the President, on the one hand, and of BUFA and Dr. Kepron on the other.

Dr. Roddy made it widely known in the 1996 UTC that he interpreted the Collective Agreement as requiring peer-reviewed publications as a condition of tenure. The President appointed Dr. Roddy in the knowledge that the latter's interpretation of the Collective Agreement coincided with his own, and conflicted with BUFA's, interpretation.

It is the Committee's view that Dr. Roddy's already formed and notorious interpretation of the Collective Agreement, along with his apparent belief that his own "high" standards of scholarship were relevant to the mandate of the TAC, cast doubt over his perceived impartiality.

In view of the high standard of due process required of the TAC as an arbitral body, the Committee considers that it was a serious breach of due process for the TAC to decline jurisdiction to review the eligibility of Dr. Roddy, and to leave the decision on eligibility in the hands of the President, the very person whose conduct the TAC was reviewing.

In declining to exercise its jurisdiction to rule on Dr. Roddy's eligibility as a member, the TAC left the decision by default to the President. It is the Committee's view that the President should have been aware of the high standard of due process applied by law to arbitral bodies such as the TAC.

The Committee concludes that Dr. Roddy's membership on the TAC was in breach of the standard of due process applied to such arbitral bodies as the TAC. We conclude, further, that the President could have avoided the breach by appointing a qualified person who had no notorious, pre-formed interpretation of the Collective Agreement.

With respect to the President's assertion that his decision to deny tenure was justified by the normal expectation in other universities that peer-reviewed publication is a prerequisite of tenure, the Committee notes that practices differ across disciplines and universities throughout Canada. At issue in Dr. Kepron's case is purely the application of the terms and procedures of the Brandon University Collective Agreement, and adherence to standards of fairness accepted throughout the academic community in Canada.

(b) *The Academic Vice-President's private meeting with the TAC*

The TAC was arbitrating a dispute between Dr. Kepron and the University as to whether the President's decision was arbitrary or capricious. As a deputy of the President, Vice-President Carrabre was permitted by the TAC to present evidence or argument in the absence of Dr. Kepron and his advisor. Dr. Kepron informed us that he was given no advance notice of the TAC's intention to hear Vice-President Carrabre's evidence in their absence.

It is true that Dr. Kepron or Dr. Gosselin could have objected to their exclusion. On the other hand, it was the TAC's responsibility to uphold the accepted standards of natural justice applicable to adjudicative bodies. It is the Committee's judgment that the TAC failed to uphold such standards by excluding Drs. Kepron and Gosselin and, thereby, infringed Dr. Kepron's right to a fair hearing. In particular, Dr. Kepron was denied the right to respond to the evidence and argument presented *ex parte* to the TAC by Vice-President Carrabre.

(c) *Was the President's decision arbitrary or capricious?*

The TAC found the President's decision was not arbitrary or capricious, on the basis of what he knew at the time he rendered the decision. As discussed above, it is our conclusion that the President's decision was arbitrary and capricious. The main reasons for those differing opinions appear to be the following.

- (i) Our test of "arbitrary" draws on the decision of the 1996 TAC. That found the President to have been arbitrary because, without substantive reasons, he rejected the recommendations of both the UTC and the Dean.

In the 1997 application, the President again rejected the UTC's recommendation, without substantive reasons. While, in this case, the President concurred with the Dean's recommendation, the Committee's finding of apprehension of bias and unfairness in the Dean's decision leaves open to question any decision that relied on it.

As the evidence is compelling that Dean Common's actions were arbitrary and capricious, the TAC could have held that the President's reliance on the Dean's recommendation was arbitrary and capricious, particularly because the recommendation was contrary to the informed and expert opinions of the UTC, with respect to which there was no apprehension of bias or improper conduct. The Committee differs from the TAC in this matter.

- (ii) The TAC judged the President's decision on the basis of what he knew at the time he made his decision. Our conclusion is based on what the President ought to have known. For example, in his written reasons for denying tenure, President Anderson maintains that Dr. Kepron knew he must have peer-reviewed publications as a condition of tenure. The President based his view on his interpretation of remarks by former Dean of Education, Dr. Gerald Richards, in his 1995 evaluation of Dr. Kepron.

The President was informed by Dr. Richards in his letter, dated Nov. 17, 1997, that he rejected emphatically the President's interpretation of his remarks. Indeed, Dr. Richards makes it clear that he did not interpret the Collective Agreement as requiring peer-reviewed publications as evidence of "*progress in scholarly activity*".

Dr. Richards' opinion on the type of scholarship required for tenure in the Faculty of Education is corroborated by the statement of Dr. Robin Enns, also a former Dean of Education, in his memorandum to the 1996 UTC, dated November 15, 1996. Indeed, Dr. Enns takes responsibility for shaping the direction of Dr. Kepron's scholarship *away* from publication of peer-reviewed journal articles.

The President had available to him evidence of the scholarship performance standards placed on Dr. Kepron by former Deans of Education. The statements of both former Deans were in Dr. Kepron's dossier and Dr. Richards communicated his message directly to the President.

The Committee concludes that it was arbitrary and capricious of the President to base his decision on statements and actions attributed to former Deans of Education when those persons made a point of placing on record in Dr. Kepron's dossier, including a direct letter to the President, clear evidence that contradicts the President's allegations as to what previous deans communicated to Dr. Kepron.

(d) *The TAC's recommendation to the President*

While the TAC did not find the President's decision arbitrary or capricious, it stated, "***it would not be inappropriate for the President to review his decision now***". This recommendation recognized that, prior to the TAC's decision, two of Dr. Kepron's articles submitted for publication during his extended probation were accepted for publication in peer-reviewed journals.

While we do not concur with the TAC's view of the arbitrary and capricious nature of the President's decision, we applaud its recommendation. We do so particularly in light of the dates of the publishers' communication to Dr. Kepron of acceptance of his articles. The McGill Journal of Education article was accepted for publication in a letter from the publisher dated February 9, 1998, while acceptance of the Canadian Journal of Native Studies article was dated March 13, 1998.

The President communicated his letter of denial of tenure to Dr. Kepron on January 13, 1998 more than two weeks before January 31, the deadline specified by the Collective Agreement (Art. 13.8) for communicating decisions on tenure. It is not clear why President Anderson chose to dismiss Dr. Kepron when he did when the minimal steps of checking with the publishers would have revealed that the reviewers' decisions on his articles were pending. A delay of a few weeks would not have been prejudicial to the University and certainly not to Dr. Kepron.

The fact that the President did not delay his decision and that the publishers' acceptances arrived before the TAC had concluded its review fuels the mystery of why the President did not respond to the TAC's advice that he review his decision in light of the evidence of peer-reviewed publication. Indeed, the speed with which the President communicated his letter of dismissal to Dr. Kepron (May 4, 1998, three days after the TAC decision) left him little time to consider, or seek clarification of, the TAC's advice.

It is the Committee's opinion that a Presidential review of his decision to deny tenure was warranted by the acceptance for publication of Dr. Kepron's peer-reviewed articles, shortly after the President's denial of tenure and before the TAC's decision. The Committee considers that a further reason for a Presidential review is the TAC's concern about possible arbitrary and capricious decisions of "others" involved in the tenure process.

In the circumstances, it is the Committee's view that, in the interests of fairness, the President ought to have complied with the TAC's suggestion that he review his decision to deny tenure. The Committee found no evidence that the President even inquired of the TAC Chair, that committee's particular concerns about the possibility of arbitrary or capricious decisions of "others". It is the Committee's concern that the decisions of such "others" might have influenced the President's decision.

4. RECOMMENDATIONS

The Committee's finding of substantial unfairness in this matter would normally prompt further action by the Committee. The Committee notes, however, that, recently, a new President has been installed at Brandon University. Accordingly, the Committee recommends that the new President of Brandon University adopt the TAC's suggestion of a Presidential review of the decision to reject the recommendation of the UTC to award tenure to Dr. Kepron. The Committee recommends that, in conducting such review, the President take account of the following matters:

- (a) Two former Deans of Education have given evidence that they acknowledged or encouraged Dr. Kepron's pursuit of scholarship other than through peer-reviewed publication;
- (b) When the 1996 UTC informed Dr. Kepron of his need to publish, he used his year of extended probation to produce three articles, two of which were subsequently published in good quality peer-reviewed journals;

- (c) The 1997 UTC recommended tenure on the basis of Dr. Kepron's scholarship/research achievements, and his continuing high quality teaching and service during his extended probation;
- (d) Much of the negative opinion of Dr. Kepron's scholarship was fueled by Dean Common, whose actions prior to, and during, the tenure application process, gave rise to a reasonable apprehension of bias on his part. In Dr. Kepron's 1996 tenure application, all but one person at the Departmental level, and everyone on the Faculty Tenure Committee supported the award of tenure.
- (e) The fact finders encountered, on their visits to Brandon University, many faculty and administrators, within and outside the Faculty of Education, who consider it imperative that this matter be settled, once and for all, in a fair and equitable manner.

The Committee anticipates that the suggested Presidential review will provide the opportunity for a negotiated settlement that will provide a full and fair remedy for the losses suffered by Dr. Kepron. Should such a negotiated settlement not occur in a reasonable length of time, the Committee will pursue its normal course in cases where faculty members have been subjected to unfairness in the denial of tenure.

Appendix 1

A short profile of Dr. Kepron

Dr. Kepron obtained his Ph. D in Special Education at the University of Alberta in October 1991. He has a Master of Education degree (1983), a Certificate of Education (1971), and a Bachelor of Arts degree (1969), all from the University of Manitoba. From September 1985 to May 1987, Dr. Kepron trained as a student clinician in the Department of Clinical Services, University of Alberta, in the Developmental Disabilities Centre, University of Alberta, and in the Department of Psychology, Edmonton General Hospital. Dr. Kepron's primary duties in all three establishments were the assessment of academic or general functioning of individuals, and the development of treatment plans, where warranted.

In September 1991, Dr. Kepron took up a Special Education position in the Department of Educational Psychology and Foundations (the Department), in the Faculty of Education at the University. Dr. Kepron's initial three-year term contract, convertible to a probationary (tenure track) appointment, was so converted in 1994. The process of conversion consisted of both the Central Appointments Committee's (CAC) ratification of a Special Education tenure track position, and the Department's endorsement of Dr. Kepron as meriting conversion to the tenure track position.

Appendix 2

Summary of the Process for Awarding Tenure at Brandon University

The procedures for applying for and awarding tenure are specified mainly in Article 13 of the Collective Agreement. Candidates must apply to their Dean by October 1 and provide a supporting dossier. The Collective Agreement does not mandate a date for submission of a candidate's dossier but Article 13.3 of the Collective Agreement implies that the dossier be submitted in sufficient time to allow members of the candidate's department to meet him or her before October 15, and to formulate departmental recommendations with respect to the candidate's application for tenure. Each department member must sign the departmental recommendation (with the exception of the candidate) and abstentions and dissenting opinions must be supported by written reasons. The departmental recommendations must be sent by November 1 to the relevant Dean, the FTC, the UTC and copied to the candidate.

By October 7, faculties with candidates for tenure must each form a Faculty Tenure Committee composed of five tenured members. (We note that, in Dr. Kepron's second (1997) tenure application, the FTC had seven members). The FTC elects a chair from its members and must meet the candidate by November 7. The FTC must send its recommendation to the UTC by November 15, with copies to the candidate, the Dean and the department. A negative recommendation requires written reasons.

Candidates must meet with their Dean before November 7 and copies of the Dean's recommendation must be sent to the candidate, the department, the FTC and the Chair of the UTC by November 15.

The UTC must be struck by October 15, comprising a Chair appointed by the President from tenured faculty or Professional Associate IVs, one tenured member elected by and from each of the faculties of Arts, Education, Music, and Science, one tenured member elected by and from those Professional Associates who are not members of the above Faculties, two Deans/Directors appointed by the President. The decision is by simple majority and recommendations must normally reach the President by December 15, copied to the candidate, the Dean, the department and BUFA.

At each stage of the tenure process, reasons must be provided for negative recommendation or decisions. Reasons must be substantive, clearly related to the qualifications by rank and the criteria for tenure, and sufficiently specific to enable the candidate to know the basis for the recommendation or the decision. Recommendations and decisions must also take into account the candidate's progress in professional preparation, teaching, scholarship/ research and service to the University and to the Community. Recommendations and decisions must carefully examine the candidate's performance and progress in the above criteria, in accordance with accepted norms of scholarly and creative activity and of teaching. Recommendations and decisions must also take into account the context of teaching and scholarly activity at Brandon University.

A decision by the President to deny tenure may be appealed to the Tenure Appeal Committee (TAC), whose decision is final and binding. BUFA and the President each appoint a member, and those appointees select the Chair. Neither members of the UTC nor candidates for tenure may serve on the TAC. The TAC may overturn the decision of the President only if it finds in favour of the candidate on grounds that the President's decision: (a) was arbitrary or capricious; (b) was discriminatory (per Article 4 of the Collective Agreement); or (c) violated the appellant's academic freedom (per Article 5 of the Collective Agreement). In such a case, the TAC may grant tenure or a one-year extension of probation. In the event of successful appeals on grounds other than (a) through (c) above, the TAC may not overturn the President's decision but may order the appropriate procedures to be repeated.