
Academic Freedom and Tenure Committee

University of British Columbia Final Report

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Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université
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In the late summer of 1985, the CAUT Academic Freedom and Tenure Committee appointed a Committee of Inquiry to examine the circumstances surrounding the unilateral termination of twelve faculty appointments at the University of British Columbia. Professor Archie Malloch (then a member of the Department of English at McGill University) and Ken Norman (Law, Saskatchewan) prepared the report which appears below. By the time the report was completed, it had been possible for the UBC Faculty Association to negotiate settlements of the grievances of each of the faculty members involved. The UBC Faculty Association and the Academic Freedom and Tenure Committee feel, however, that the events of the spring and summer of 1985 at UBC are sufficiently important to warrant a report to the Canadian academic community. The Malloch-Norman report is published with the approval of the CAUT Executive Committee.

This Committee of Inquiry was established by the CAUT Academic Freedom and Tenure Committee in July 1985, and given the following terms of reference:

To examine the circumstances surrounding the actions of the: administration, Senate and Board of Governors of the University of British Columbia which led to the termination of the appointments of tenured and untenured faculty members;

To determine whether the procedures used to formulate, approve and implement the policy under which the appointments were terminated were fair and appropriate in the circumstances, having in mind the standards established in the appropriate CAUT policy statements, the provisions of the Agreement on the Framework for Collective Bargaining and the provisions of the Agreement on Conditions of Appointment between the UBC Faculty Association and the University;

To determine whether those persons whose appointments have been terminated were treated fairly and in accordance with the principles of natural justice and, if they were not, to indicate in what way they were disadvantaged;

To make, in confidence to the Academic Freedom and Tenure Committee, any recommendations thought to be appropriate for the resolution of the dispute.

The members were formally advised of their appointment by letters dated September 6, and the President pro tem of the University of British Columbia and the President of the Faculty Association were advised by letter of the same date of the composition of the Committee, of its terms of reference, and of the investigational procedures which would govern the inquiry. Just before the Committee's first visit to Vancouver, one of the members, Professor Ursula Franklin of the University of Toronto, had to withdraw, and so the inquiry was conducted in the end by a committee of two.

The Committee visited the campus of the University of British Columbia on October 10-12 and again on December 12-13, and interviewed the following persons: P. Arlin, G.S. Beagrie, D.R. Birch, C.B. Bourne, G. Crampton, J. Dybikowski, J. Elder, P. Goldstone, L. Koroluk, B. Long, D. McKie, A.J. McLean, R. Merriam, S. Mindess, P. Montgomery, E. Ogryzlo, I. Ozier, D. Pavlich, G. Rosenbluth, R.W. Schutz, R.H.T. Smith, R. Spencer, E. Slradiotti, D. Strangway, P. Trent, J. Voris, B. White, R. Wyman, and D.J. Yeo. The members of the Committee are grateful to all of these persons for their help, and particularly to the President of the University and his officers, and to the President and Executive Officer of the Faculty Association for furnishing us with the documents we requested.

With a series of events as complex as those identified in our terms of reference, it may be best to begin with a sharp focus on the central events of May and June 1985. At a special meeting of the Senate of the University, convened on May 25 and resumed on May 27, resolutions were moved and carried to discontinue certain academic programs and courses of instruction. The Senate resolutions were transmitted as recommendations to the Board of Governors of the University, and were approved by the Board at a meeting on June 6. On June 19 the Executive Committee of the Board approved a policy on the termination or non-renewal of faculty appointments consequent on such actions as those taken by the Senate on May 25 and 27. On June 25 the President pro tem of the University wrote to twelve faculty members in the Faculties of Dentistry and of

Education informing them that he would be obliged to recommend to the Board that their appointments be terminated (in the case of the nine holding appointments without term) or that their appointments not be renewed (in the case of the three holding appointments with review). On June 27 the President pro tem wrote to these same faculty members giving them formal notice that the Executive Committee of the Board, empowered by the Board, had decided to terminate (or not to renew) their appointments. The faculty members were informed that their present appointments would continue for a further year and expire June 30, 1986.

In that one-month period between the end of May and the end of June 1985 there converged what had been two relatively distinct series of actions: (1) steps to define the academic priorities of the University in the face of an anticipated retrenchment of the operating budget; (2) attempts by the University and by the Faculty Association to reach agreement by negotiation on the criteria and procedures that would govern terminations or non-renewals of faculty appointments in circumstances of financial exigency and of redundancy.

As early as 1981-82 a committee chaired by the Vice-President (Academic) conducted a review of the academic programs of the University with an eye to possible budgetary retrenchment. In February 1982 the Senate Budget Committee, empowered by the University Act (36e), "to meet with the president and assist him in the preparation of the university budget", was further empowered by the U.B.C. Senate, "to make recommendations to the President and to report to Senate concerning academic planning and priorities as they relate to the preparation of the University budget". Acting under its enlarged mandate, the Senate Budget Committee made a first report on academic priorities in February 1983, and then a further and more specific report in September of the same year: both reports were approved by Senate. During the 1983-84 academic year, a committee advisory to the Vice-President (Academic) conducted a detailed review of academic programs, considering submissions from the deans of the various faculties. The findings of this committee were to be the point of

departure for the Vice-President (Academic) in developing the proposals brought to Senate in May 1985.

At the same time that the viability of academic programs in the University was being reviewed by these several committees, the possible impact on faculty appointments of a reduction or discontinuation of programs was being discussed in a different forum. In 1979 an Agreement on the Framework for Collective Bargaining had been concluded between the University and the Faculty Association of the University of British Columbia (a body which had been incorporated under the B.C. Societies Act in 1976). This agreement (henceforth the Framework Agreement) made provision for other collective agreements between the two parties on a range of issues, including "matters concerning the criteria and procedures for appointment, reappointment, promotion, appointment without term, termination of appointments, and appeals of faculty members" (Section 8.d), matters which already formed part of a (1975) agreement between the University and the Faculty Association. In the spring of 1980 a revised version of the 1975 agreement on Conditions of Appointment for Faculty (henceforth the CAF Agreement) was ratified, and remains in force as this report is written. Certain sections of the CAF Agreement are of particular relevance. Section 12, dealing with financial exigency and redundancy, declares that the criteria and procedures for any alteration in the conditions of appointment of any faculty member because of financial exigency or because of redundancy will be negotiated by collective agreement between the parties in accordance with the provisions of the Framework Agreement, provided that the Agreement is in force. In Section 2, which defines the types of academic appointments, there is explicit reference to the termination of an appointment without term for reason of financial exigency or redundancy: and in Section 4, which sets out criteria for appointment, reappointment, appointment without term, and promotion, there is explicit reference to the denial of reappointment (or of appointment without term) for the same reasons. There has been some disagreement within the membership of the Faculty Association as to whether

the CAF Agreement gives the University a right unilaterally to terminate appointments for financial exigency or redundancy (conditioned only by whatever criteria and procedures might be agreed upon under the terms of Section 12), or whether the right of the University to terminate appointments in fact waits upon an agreement (under Section 12) on criteria and procedures. In any case, the negotiations foreseen in Section 12 of the CAF Agreement began in the autumn of 1981, but without success. Negotiations were resumed in November 1983 and concluded with an agreement in March 1984 between the two negotiating teams. The draft agreement, however, was not ratified by the membership of the Faculty Association in the subsequent mail ballot.

In the early spring of 1984 when agreement on a financial exigency document seemed likely, President Pedersen implemented a provision in the draft agreement and established a President's Advisory Committee on Financial Matters for 1984-85 (with two members appointed by the Faculty Association), asking it to advise him "whether it agrees that the University faces a financial deficit of such a magnitude that it cannot reasonably be met without the termination of some term appointments with review or appointments without term, or without the non-renewal of some term appointments with review" - a mandate which followed verbatim the definition of a financial exigency in the draft agreement. The Committee, however, was unable to give the President clear advice on the matter he put to them, and concluded that, "Only the President can decide whether it is absolutely necessary for the University to terminate tenure-track appointments in 1984-85". The President in turn recommended to the Board of Governors at its meeting on April 12, 1984 that it defer a decision on the declaration of a state of financial exigency until the meeting of the Board in early May: and in the event, the Board made no such declaration. The question of a financial exigency was not formally addressed again at any time between the meeting of the Board in May 1984 and the events of June 1985.

In both the rounds of negotiation between the University and the Faculty Association (1981-82,

1983-84), the focus of attention was on the termination of appointments in a state of financial exigency, though there were on each occasion exchanges of documents on the subject of redundancy outside of financial exigency. Thus, in the spring of 1984, nearly four years after the amendment to the CAF Agreement which had introduced provisions for negotiating criteria and procedures on exigency and redundancy, there was still no agreement. Furthermore, there had not been resort to the sole mechanism available under the Framework Agreement for breaking a deadlock in negotiations. And here some historical background is required.

A 1977 amendment to the University Act of British Columbia (Section 80) stipulates that, "the Labour Code does not apply to the relationship of employer and employee between a university and its faculty members". The Framework Agreement excludes strikes and lockouts (Section 13), but did in its original version provide for a form of interest arbitration (Section 10) which obliged the parties to submit to a committee of six tenured U.B.C. faculty members any matter relating (inter alia) to criteria and procedures for reappointment and termination of appointment on which agreement had not been reached within one year of the receipt of notice to commence negotiations. Decisions of the Committee of Six supported by at least four members were to be binding on the parties, though not in the case of procedures and criteria for termination of appointment, or layoff, for reasons of financial exigency - in which case, the decision was to have the force only of recommendation. Negotiations on exigency and redundancy had been commenced at the end of October 1981, and exactly eleven months later the chief negotiator for the Faculty Association confirmed in a letter to the chief negotiator for the University that they had agreed that the running of time under the Framework Agreement was suspended, and that the suspension would remain in effect until either the Faculty Association or the University gave notice that it no longer agreed to the suspension (J. P. Taylor to C.B. Bourne, 27 September 1982). This agreement meant effectively that the parties had agreed to forego the only help available to them under the Framework Agreement for resolving

a deadlock in negotiations: consequently, during the period of more than a year between this agreement to suspend, and the resumption of negotiations in November 1983, during the negotiations of 1983-84, during the period between the ratification vote in the spring of 1984 and the resumption of negotiations in October 1984. The parties were under no pressure to reach agreement other than from their conjectures as to what the other party might do if agreement were not to be reached. In the event, this agreement to suspend the running of time under Section 10 of the Framework Agreement ran out itself in early February 1985 when an amendment to the Framework Agreement eliminated Section 10 altogether.

The third round of negotiations on terminations and non-renewals of appointment in conditions of financial exigency commenced in October 1984 and were discontinued in March 1985 without agreement.

Thus, at the beginning of April 1985, nearly five years after the amendment to the CAF Agreement which had called for such negotiations, the only document in force was a collective agreement so worded as to make it possible for the University to argue that it enjoyed an unqualified right unilaterally to terminate (or not renew) appointments for reasons of financial exigency and redundancy.

During the course of the final, abortive negotiations between the Faculty Association and the University, President Pedersen was developing plans for meeting what he anticipated would be a \$6.6 million shortfall in the 1985-86 operating budget of the University. In early November 1984 he wrote to all members of the U.B.C. community to inform them of the steps he was taking, and to describe the tasks he had assigned to the Vice-President (Administration and Finance) and to the Vice-President (Academic). He had asked the latter to identify academic programs which might be discontinued, and to develop by December 21, 1984 a plan for such an eventuality. On January 9, 1985 President Pedersen wrote again to members of the U.B.C. community to inform them that it had not proved possible to meet the December 31 deadline, but that the planning by the two Vice-Presidents was proceeding.

On February 5, 1985 the Vice-President (Academic), Dr. R.H.T. Smith, wrote to the Deans of the Faculties, asking them to examine their program and course offerings, and to describe the basis on which instructional duties to faculty members were allocated. This review was to be conducted within the terms of the report of the Senate Budget Committee of September 1983. In addition, the Vice-President directed the attention of each Dean to specific programs in his Faculty which had been identified by the Vice-President's advisory committee during the 1983-84 session. He asked for responses as soon as possible and in any event no later than March 8. One day before the date due, Dr. Pedersen, who had accepted appointment as President of the University of Western Ontario, resigned as President of U.B.C. Dr. Smith, the author of the February 5 letters to the Deans, was immediately appointed President pro tem. Shortly afterwards one of the recipients of the letters, Dean D.R. Birch of Education, was appointed Acting Vice-President (Academic).

After the replies from the Deans had been received and considered, Dr. Birch formulated tentative proposals for the discontinuation of certain programs and courses, and discussed these with the Deans concerned and with the Senate Budget Committee. These proposals, after some revision, were then communicated to the respective Deans, who were invited to meet with Dr. Birch in the Presence of the Senate Budget Committee, and accompanied by the Heads and Directors of units which would be directly affected, in order to respond to the proposals. These meetings took place in late April and early May, and from them Dr. Birch formulated the recommendations which were subsequently presented to the special meeting of the Senate at the end of May.

The notices of termination (or non-renewal) of appointment sent in June 1985 to the twelve faculty members stated that redundancy was the sole ground for the action, and were accompanied by copies of the Board of Governors' policy on termination and non-renewal of appointments for redundancy. The policy addresses redundancies which result from the actions of Senate. Senate is the body vested by the B.C. University Act with the academic governance of the

University, and the body which is specifically empowered "to consider, approve and recommend to the board the revision of courses of study, instruction and education in all faculties and departments of the university", and also to "recommend to the board the establishment or discontinuance of any faculty, department, course of instruction" (Section 36 f and i). If the terminations and non-renewals of appointments in June 1985 did indeed result from actions taken by Senate, then it becomes crucial to ask if those actions were taken in a regular and orderly manner.

When President Smith issued the call to the special meeting of Senate in late May, he reminded members of Senate that while they were accustomed to approve new academic initiatives, they were now to be asked to consider the discontinuance of units or programs. The possibility of such an action had been contemplated as far back as January 1982, when the mandate of the Senate Budget Committee was expanded to enable it "to make recommendations to the President and to report to Senate concerning academic planning and priorities as they relate to the preparation of the University budget". Acting under its expanded mandate, the Budget Committee (as we have seen) submitted reports to Senate in February and September 1983. These reports had provided a general set of priorities identified as "core academic activities", "core related activities" and "non core activities". In the final section of its September 1983 report the Budget Committee stated what it regarded as two self-evident principles: first, that if the University should accept the proposals as a framework for an academic plan, it should then immediately set to work to apply those proposals to the situation in which it found itself; and second, that whatever the exact process of implementation, it would need to be done with the due involvement of the academic bodies of the University, "in particular the faculties and the Senate". The application of the first of these two proposals began immediately with the formation of the committee advisory to the Vice-President (Academic) in the autumn of 1983. The application of the second proposal began with President Pedersen's directive to the Vice-President (Academic) in October 1984 to prepare a plan for the discontinuance of programs. However, when the process which began

with President Pedersen's directive, and ended with the passage of resolutions in the special Senate meeting in May is examined, it seems clear that the fundamental condition set out by the Budget Committee in 1983 was not observed, namely, "the due involvement of the academic bodies of the university, in particular the faculties and the Senate". The proposal to discontinue the diploma program in Dental Hygiene was considered twice in meetings of the Faculty of Dentistry. But in the Faculty of Education, where the discontinuance of programs and courses led to the termination or non-renewal of nine faculty appointments, the proposals for discontinuance were considered only by an ad hoc committee appointed by Dean Birch. They were not taken to either of the Faculty curriculum committees, nor to a meeting of the Faculty of Education itself. Furthermore, none of the proposals for the discontinuation of programs and courses was considered by the Senate Curriculum Committee, which is the established mechanism for assessing curriculum proposals before they come to a plenary meeting of Senate.

In short, the curricular proposals initiated by the Acting Vice-President (Academic) did not go through the regular process of collegial deliberation. They were considered instead by administrative officers who report to the officer who initiated the proposals. They were considered also by the Senate Budget Committee, but that Committee - even with its expanded mandate - was not authorized to make academic judgments of programs and courses, nor had it claimed the right to do so when it reported to Senate in 1983.

It is the case that on May 25 and 27 Senate debated and approved a number of motions to discontinue academic programs and courses. But to a significant degree, the authority of Senate decisions on the curriculum depends on the process of deliberation which has led up to them, and which they in turn complete. When that process is radically abridged, when the motions to be debated come to a body of some 85 members (from many diverse constituencies) on barely three days' notice, with a single page of information for each program to be discontinued, and

the information about the programs mere page references to the University calendar, it is difficult to regard the Senate "decision" as other than a thumbs up/thumbs down procedure - difficult not to call its legitimacy in question.

The more closely we examine the process which began in President Pedersen's directives to the Vice-Presidents (Academic and A&F), and culminated in the votes in Senate, the more clearly it presents itself as a hybrid of the academic and financial. There was a significant budgetary deficit anticipated. Certain reductions in expenses could be effected with little delay in the non-faculty areas, but the major reductions would have to occur in the faculty budgets (the greater part of which is academic salaries), and since a decision had been made - whether consciously or by default - not to declare a financial exigency, the reduction in academic salary expenses would have to come through the discontinuation of programs and courses, and a consequent elimination of academic appointments centred in those areas. In that scenario there was an ultimate deadline which had to be met, and which controlled the entire prior sequence of events. It was June 30, the last day in the contract year for faculty appointments. If there was to be a financial saving effected through the termination (with a year's notice) of faculty appointments, the Board of Governors would have to take and communicate its decisions by that date. And to open the door to such decisions, Senate would previously have had to recommend discontinuation of programs in which those appointments lay. And to make such action by Senate possible, proposals for discontinuing programs would in turn have had to be developed.

The ultimate deadline was met, but the prior schedule imposed by that deadline was so tight that for most of the proposals all the normal curricular deliberations that precede a Senate decision were omitted and were replaced by ad hoc executive procedures.

But the problem with the decisions taken by Senate was not simply that they were defective considered as academic decisions; they were defective because they were an attempt to deal simultaneously with two distinct questions, only one of which lay properly within Senate's jurisdiction: (1) Is there a financial

deficit of such magnitude that it cannot reasonably be met without the termination or non-renewal of faculty appointments? (2) Given that there is a financial deficit of such a magnitude, are the following academic programs and courses the areas in which those terminations and non-renewals should fall? The President, in his call to meeting of Senate, said that the proposals of the Acting Vice-President (Academic) were "designed to enable the University to cope with its financial shortfall". But when the meeting of Senate began, it had not yet been established that the shortfall was of such an order as to warrant the termination or non-renewal of appointments. That question had been put to a specially appointed committee over a year earlier, but, as we have seen (*supra*, pp. 6-7), the committee, after its enquiries, passed the question back to the President without a clear finding; the President recommended to the Board that it defer a decision on the matter; and in the end, the Board made no finding on the matter, one way or the other. How then could Senate be asked to approve the discontinuation of specific programs and courses with the avowed purpose of reducing expenditure through the elimination of faculty positions, when the Board of Governors (which exercises authority over budget and faculty appointments) had not yet determined that such drastic action was required? In terms of institutional authority Senate could not be asked to take such action, but in fact it did, and on the basis of its action, the Board of Governors moved promptly to terminate and non-renew a number of appointments. The phenomenon becomes intelligible, though not reasonable, only if we hypothesize that what Senate was really being asked to do in May 1985 was to acknowledge that a state of financial exigency already existed. The means by which it made that acknowledgement was to pass a series of resolutions intended to cope with the exigency. This hypothesis cannot do away with the circularity of the action itself, but it can explain certain features of the whole process in the winter of 1984-85 which would otherwise remain puzzling, e.g. the almost complete neglect of established procedures of curricular deliberation, the central role of the senate Budget Committee in the preparation of the proposals that came to Senate, the emphasis in the materials circulated to Senate on the total sums to be saved by the approval of the package

of proposals, and the perfunctory, undocumented judgments of academic quality which dot the proposals.

During the summer of 1985 the terminations and non-renewals were defended by President Smith as "a consequence of recommendations for the discontinuance of academic programmes by the University Senate, the senior academic governing body of the University" (v. R.H.T. Smith to the President of CAUT, 5 July 1985; to the General Secretary of the Irish Federation of University Teachers, 31 July 1985; to the General Secretary of the Association of University Teachers, 31 July 1985). But that argument is tendentious, for when the recommendations of Senate are examined, they prove to have been neither essentially nor properly academic, but rather a hybrid financial/academic judgment.

If the process leading to the Senate decisions was seriously flawed, as we find it to have been, then the decisions themselves were inevitably also flawed, and in turn the consequent decisions of the Board. In this respect the decision of the Board in June 1985 to terminate (or not renew) appointments is open to challenge. Nevertheless, under our terms of reference, we are to consider whether the persons whose appointments were terminated were treated fairly, and therefore we now examine the Board decision itself, apart from any questions of the validity of the Senate action.

The Board decisions were taken in accordance with the "Policy on the termination or non-renewal of faculty appointments for redundancy resulting from Senate action", which was adopted by the Board on June 19, copies of which were sent to the twelve faculty members as attachments to the June 27 letters of notice. Section 1 of the policy reads as follows:

1. Redundancy

The University may terminate the appointment of a faculty member holding an appointment with review or an appointment without term, or not renew the appointment of a faculty member holding a term appointment with review, on the

ground of redundancy when on the recommendation of the Senate, the Board of Governors has decided to discontinue:

- a. the administrative unit in which the faculty member holds an appointment (Faculty, Department, School, Institute, or Centre); or,
- b. within an administrative unit, a diploma, a degree, a division, or a set of courses of instruction to which a substantial part of the faculty member's duties has related during a period of years.

The pertinent subsection for the twelve faculty members was, of course, subsection (b).

The only recourse available for a faculty member affected by a decision taken in accordance with this policy is a process of review advisory to the President (Section 3.04). The grounds for such a review are set out in Section 3.01:

A faculty member whose appointment is being terminated or not renewed under Section 1(b) above shall have the right to have the decision reviewed by a review panel, provided that the only ground of review shall be whether a substantial part of the faculty member's duties has been related to the diploma, degree, division, or set of courses of instruction in question.

We find this review process fundamentally deficient. In a matter as serious as termination of appointment there needs to be a genuine appeal procedure which leads to a conclusive decision. What this policy provides is a process leading merely to a reconsideration by the officer who made the decision to recommend termination in the first place. But the terminations which took place under the terms of this policy pose a more specific problem. The implication of Section 3.01 is that the ground of review is the same as the ground on which the decision to terminate rested, namely that a substantial part of the affected faculty member's duties related to an administrative unit, or diploma, or division, or set of courses of instruction which has been discontinued by the Board of Governors on the recommendation of Senate. If it were to transpire that not all faculty members belonging to such a group had their

appointments terminated, then it would be inescapable that some further consideration had supervened to identify those who were to stay and those who were to go. And, in that further consideration would be found the immediate, effective reason for the terminations. To put it another way, if such a situation were to be found, then Section 1(b) would be revealed, not as the reason for the termination, but merely as a condition of eligibility to be considered for termination.

In fact, just such a situation came to our notice. The appointments of five tenured faculty members teaching in Industrial Education were terminated; the appointment of a sixth tenured faculty member, whose duties in the previous two years had been substantially the same as those of the other five, was unaffected. The Acting Dean of Education told us that he and the Head of the Department of Mathematics and Science Education had reviewed the six appointments, and on the basis of such criteria as professional qualifications, scholarly activity, seniority, and administrative experience, had identified five who were to go and one who was to stay. We do not challenge the relevance of these criteria, but if they were decisive (as we were told they were), then it is clear that the five faculty members were not in fact given the reasons for their terminations, when they were told in the letters of June 27 that the decision of the Board did not imply any criticism of their academic qualities nor any dissatisfaction with their performances, and were assured specifically, "The only reason for this decision is redundancy". Redundancy affected all six equally; yet not all six appointments were terminated. Thus, redundancy cannot be invoked as a sufficient reason for the terminations; rather it served to mask the stage of deliberation in which the decisions were actually made, and on grounds never communicated to the five faculty members.

We conclude therefore that in two respects the faculty members whose appointments were terminated (or not renewed) were not treated fairly; (1) because the Senate action on which the Board decision to terminate was explicitly based was itself flawed; and (2) because under the Board policy those faculty

members were not afforded an adequate appeal against the decision. For the five faculty members in Industrial Education the unfairness was compounded by the fact that the effective reasons for the decision to terminate were not communicated to them.

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