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Tenure in Canadian Universities

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*The general part of Professor Soberman's paper is believed to have general application to Universities in Canada, whether English or French speaking, but the legal part is confined solely to the Common Law.

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Part I: Tenure in Perspective

Significance of Tenure

The word *tenure* conjures up various vague ideas and ideals, both to members of the academic community and to those outside it. To some it means the necessary security to engage wholeheartedly in their profession without fear of repression through dismissal or loss of salary imposed by authorities who control the purse-strings. Others may think of the acquisition of tenure as an excuse for abdicating responsibility, for retreating behind ivied walls and for eccentric conduct and unreal values. Still others may equate it to a sinecure—the end of hard work, the beginning of a lazy life. In truth it is a Pandora's box, as I discovered in originally preparing this article as a report to the C.A.U.T. Committee on Academic Freedom and Tenure.

The reaction to the report was uniform in one respect only: all agreed that tenure involved far more than I had put down; but to satisfy all opinions proved impossible. After striving—and failing—to arrive at a comprehensive definition and setting for tenure, I have settled for a modest description to put the subject in focus. It is that given by Professors Byse and Joughin in their study *Tenure in American Higher Education.*

> *. . . the essential characteristic of tenure ... is continuity of service, in that the institution in which the teacher serves has in some manner - either as a legal obligation or as a moral commitment - relinquished the freedom or power it otherwise would possess to terminate the teacher's service.*[1]

The views and criticisms of others concerning the content of tenure as a concept are ably stated elsewhere in this issue of the *Bulletin.*

Why is security of tenure important? It does not rest merely on self-interest by university teachers, nor does it rely on solicitude and charity toward them by the general community. Unfortunately, some judges have reflected a patronizing attitude toward university teachers—poor unfortunates—who must be handled gently and patiently.

We find an example in a judgement of Mr. Justice Dysart of Manitoba:

1. Byse and Joughin, *Tenure in American Higher Education*, p. 2. Ithaca, N.Y.: Cornell University Press, 1959.

> *The reason for so qualifying the right to terminate employment is both just and apparent. College professors are men specially trained for their work. Their opportunities for suitable employment are rare, and if lost are not easily substituted by other congenial employment. Their special training unfits them for general service. In their chosen field, material returns are relatively small. In order, therefore, that this noble profession may still attract recruits, it is wisely acknowledged both in theory and practice that the employment of professors by colleges should be characterized by stability approaching to permanence. This involves fair, considerate and even indulgent treatment in all matters relating to general behaviour…*[2]

Professors Byse and Joughin give quite different reasons for the importance of tenure:

> *… Teachers in colleges and universities in our society have the unique responsibility to help students to develop critical capacities. Teachers must also strive to make available the accumulated knowledge of the past, to expand the frontiers of knowledge, to appraise existing institutions, and seek their correction or replacement in the light of reason and experience. If they are to perform these indispensable tasks, there must be free inquiry and discussion …* [The text then contains the following quotation from Professor F. Machlup.] *With regard to some occupations, it is eminently in the interests of society that men concerned speak their minds without fear of retribution … The occupational work of the vast majority of people is largely independent of their thought and speech. The professor's work* ***consists*** *of his thought and speech. If he loses his position for what he writes or says, he will, as a rule, have to leave his profession, and he may no longer be able effectively to question and challenge accepted doctrines. And if* ***some*** *professors lose their positions for what write or say, the effect on many other professors will be such that their usefulness to their students and to society will be gravely reduced.*
>
> [The text then continues:] *The lasting damage brought about by infringements of academic freedom and tenure thus is not only to the very small group of teachers directly affected. It is also to society as a whole, because the ultimate beneficiaries of academic freedom are not those who exercise it but all the people. This deserves emphasis: Academic freedom and tenure do not exist because of a peculiar solicitude for the human beings who staff our academic institutions. They exist, instead, in order that society may have the benefit of honest judgment and independent criticism which otherwise might be withheld because of fear of offending a dominant social group or transient attitude.*[3]

Some critics doubt whether tenure is a requisite of academic freedom. In the United States some writers have claimed that tenure perpetuates mediocrity and indifference in those who attain it[4]; but on the whole the weight of opinion is strongly in support of the position quoted above. In Britain there is almost no written discussion of the problem, and in Canada what little published thought we have on the subject has assumed that security of tenure is a good thing.

We cannot, however, ignore the fact that scholars of questionable quality do obtain sinecures in our universities. Such situations do not result primarily from security of tenure but from poor hiring practices, from shortages of qualified teachers and from failure to dismiss second-rate teachers at the end of a probationary period. To minimize the hiring and retaining of incompetent teachers is difficult; it is likely to remain an unsolved problem in universities as it is in government and in other large institutions. It would be unfair to blame university presidents, deans and department heads for being timid in taking action to get rid of intellectual deadwood—indeed we should have good reason to fear if university presidents decided to act as new executive heads of business corporations sometimes do when they take over and revamp their companies. Perhaps society must pay the price for maintaining large collective institutions where seniority and formal processes take precedence over merit and flexibility.

One method suggested for assuring high standards among teachers obtaining tenure is to do away with automatic acquisition of tenure by length of service alone and to require, in addition to a minimum probation period, either that a teacher desiring tenure apply for it or that, when probation is completed, a formal meeting be held by those responsible for granting tenure. The object is to make a rehiring after such a meeting a deliberate act. For example, a compulsory meeting of a tenure committee consisting

2. Smith v. Wesley College (1923) 3 W.W.R. 195, at 202.

3. Byse and Joughin, p. 3, containing quotation from Fritz Machlup, "On Misconceptions Concerning Academic Freedom", *AAUP Bulletin* 41: 756 (1955).

4. See, for example: Edgard F. Borgatta, *The Annals of the American Academy of Political and Social Science,* Vol. 325, p. 142 (1959).

of senior members for the teaching staff might be held no later than the first term in the third year of a probationary appointment. The meeting should result in a formal notice given to the probationary appointee: (a) that he has been granted tenure, or (b) that his contract will be terminated at the end of the academic year, or (c) that his probationary contract, at his option, will be renewed for a further two years and that before the renewal period ends, he will be informed of either (a) or (b). In other words, there should be no further extension of the probationary period. Such a procedure would require a committee to make an active decision rather than merely to acquiesce in a re-appointment; with a little courage it might eliminate many of those who ought not to receive tenure. Assuming that tenure once granted would conform to acceptable standards, it is worthwhile considering the adoption of such a procedure for obtaining tenure in a positive way. It is important that university teachers should want not only to protect themselves from arbitrary dismissal, but also to protect their universities from becoming refuges for mediocrity.

Relation of Tenure to University Government

The relation of tenure to other aspects of academic freedom is perhaps where the greatest divergence of opinion lies. There is general agreement, however, that tenure in the terms of our definition is only one aspect of this larger question. Freedom from dismissal, important though it may be, is a narrow concept of a teacher's relationship with his university. He is equally if not more concerned with his teaching assignments, facilities for research, relationship and proportion of time spent with graduate and undergraduate students, character and ability of his colleagues, plans for expansion in his department, and administrative duties, not to mention salary, prospects of promotion and opportunities for sabbatical leave.

It is evident that that academic freedom can be effectively destroyed in ways other than by dismissing a teacher. A university administration, finding itself unable legally to dismiss a professor with tenure, may choose various methods to make professional life for him humiliating, if not intolerable. For example, it might make it difficult for him to obtain funds for research purposes, for hiring tutors, and marking assistants. It might relieve a teacher of all teaching assignments in his field of special knowledge and confine him to teaching remedial classes to first year students. Or he might find other members of his department overtaking him on both salary and rank, despite the acknowledged fact that he is performing his assigned duties very well indeed. It is evident from the animosity found in the few reported legal decisions on tenure in Canada that such tactics are not remote or even highly unlikely.

It is not my purpose however to suggest that university administrations regularly indulge in these abuses, but only to stress that tenure, rather than being an isolated problem, is part of a larger issue of working conditions and university life in general. Inevitably we must conclude that academic freedom and tenure are closely bound to university government, that to create security of tenure in a wider sense academic staff must have an important voice in the government of their institutions at all levels.[5] So long as the university teacher is excluded from university government, he will remain at the mercy of university administrators who do not like what he says. There is no practical way of widening the scope of legally protected tenure so as to prevent such abuse. The only way to prevent such tactics from being used is for university teachers to share substantially in university government—to keep a hand on the controls.

This argument, concerned with the academic freedom of the individual teacher, is separate from and in addition to the more general but equally valid contention that a university does not consist of an employer and a number of employees, nor is it simply a body corporate like a business firm. Without relying on historical fact to show that mediaeval institutions were "communities of scholars"—there are grave dangers in seeking support for a contemporary argument in circumstances that existed six hundred or more years ago—important facts exist today to show that universities are much more complex institutions than trading companies. See the excellent discussion by Professor J. L. Montrose of Belfast on this point.[6] For example, in our Canadian universities the board of governors does not function like the board of

5. In this respect "A Modest Proposal", by Murray S. Donnelly, deserves study and strong support. See: *A Place of Liberty*, p. 143. Ed. Whalley. Toronto: Clarke, Irwin & Company Limited, 1964.

6. J. L. Montrose, "The Legal Relation between a University and its Professors", *Universities Review*, Vol. 29, p. 44 (Feb. 1957).

directors of a company, nor does it have the same powers. First, the governors are in some respects more powerful since they need not refer important decisions to a large body equivalent to share-holders as in a business company. In matters over which they have control their decisions are final. Secondly, governors are less omnipotent than directors for their powers do not cover every facet of university life. Perhaps the most important facet—qualification of students and recommendations for degrees—is almost invariably vested in an academic body. The board of governors cannot award "earned degrees" without such recommendation. In addition, control of curricula ordinarily rests not with the board but with the senate or some other academic body. Here we see an important divergence from the employer-employee relationship: It would be strange indeed to find a group of employees in our capitalist system wielding legislative power, as in setting out degree requirements, and administrative and judicial power, as in deciding who passes and who fails.

Furthermore, students are not mere customers. They are the end product, the prime purpose of the university; as the beneficiaries of its efforts and the repositories of its future they form the society whom the university serves.

A university then does not consist of an employer and employees. The academic staff are an integral part of the university; they have the first-hand knowledge, the skills and the interest needed to participate fully and effectively in the government of the university. So long as they are denied this right, a grave disservice is done to the university community: effective and informed government is difficult and in some cases impossible; academic freedom, even at institutions where it exists as a legal fact, is highly vulnerable in conditions of crisis; a stake in the university—a sense of participation—especially in younger members of the staff is hardly felt, if at all, and morale and efficiency of the staff suffer generally.

Despite the conclusion that participation in university government is at least as important as security of tenure and that in the long run security of tenure is not very meaningful without a voice in government, we may still find it worthwhile to consider the problems of tenure separately. Tenure would remain important to the freedom of the individual teacher even at institutions where academic staff did participate in university government. And effective tenure regulations form an important part of the whole scheme of academic freedom.

Should Tenure be Legally Protected?

The definition of tenure at the outset of this paper stated that an institution may relinquish its freedom to dismiss, either legally or morally. In tenure as in most other matters the law is merely one of the tools for regulating men's conduct in society; often it is a poor tool, and in almost all circumstances it functions best when legal sanctions are used only as a last resort. Legal remedies are most useful when they remain in the background, when contending parties are each aware that the other may resort to the courts if one side maintains an unreasonable position without possibility of settlement. These observations apply with more than usual force to problems of academic tenure. Tenure is most effective when university authorities recognize it as a strong moral obligation and respect that obligation.

Indeed, it is sometimes contended that legal sanction has no place in the realm of tenure, that university teachers should be satisfied to rely on the goodwill and common sense of the university governing bodies, and that resort to the courts can only lead to unhappy publicity both for the teacher and the institution.[7] Such a position leads to two main difficulties. First, it is precisely in those few cases where goodwill and common sense have been lost and replaced by bitterness and vituperation that the teacher needs protection. Secondly, the teacher becomes servient, one who must rely on the benevolence of his masters and who cannot oppose them. The very presence of legal sanction in the background would permit a teacher to negotiate on fair ground with a hesitant or cantankerous board. Professors Byse and Joughin suggest that when a teacher has legal protection a sympathetic board is better able to oppose the howls for the head of the contentious teacher by a militant group.

Even so, we should observe that most teachers would prefer tenure recognized only as a moral obligation without legal sanction in a university with a long and honourable history of liberal toleration and defence of

7. See, for example, the report of a faculty committee of the State University of South Dakota School of Law, 5 *South Dakota Law Review*, pp. 31-35 (1960).

its more controversial staff members, than tenure legally protected at an institution with a questionable record of academic freedom. The choice is invidious, for the happiest combination is to have legally protected tenure at an institution that strives to live up to its moral obligations.

Part II: The Legal Effect of Tenure

United States and English Experience

In Canada we have had very few legal decisions on the subject of tenure; by contrast United States decisions on the subject are legion. Unfortunately, American experience is not very useful to us. To delve into the American cases is to find oneself in a morass of technical decisions, depending to a large extent on United States constitutional law, both federal and state. Unhappily too, the decisions for the most part are reactionary and would be of little assistance in an argument made in favour of tenure before a Canadian court. Accordingly, I shall make only occasional brief references to the United States experience.[8]

There are no reported English decisions on the subject and little editorial comment.[9]

Informal Tenure

Until the last ten years or so, and with one or two exceptions, neither the statutes nor the regulations of Canadian universities recognized tenure expressly as a legal right of the university teacher to remain in service until retirement. In the absence of an express agreement on tenure, what is the legal significance of a contract of employment with a university with respect to tenure? A preliminary question that we may ask is whether the character or statutes of a university permit it to grant tenure to a university teacher. In other words, has it the "power" to bestow tenure, even if it wished to do so expressly? This question arises because many of the charters of institutions in both the United States and Canada contain words to the effect that the governing body may appoint teachers "during pleasure" or that the positions are held "during the pleasure of the Board". It has been contended, sometimes successfully in the United States, that such words *limit* the power of the Board to appoint staff, except during pleasure. That is, at all times the Board retains the arbitrary power to dismiss because the charter does not permit the Board to give up that power. Accordingly, so the argument goes, no customary or implied term in the contract of employment can arise whereby the university authorities surrender the freedom to dismiss at will. Indeed, an express term to that effect would be invalid.

There are only six reported decisions on the subject of tenure in the Canadian courts and on the whole, they are not helpful. The over-technical argument made in the above paragraph does not enter directly into any of the Canadian cases and there is no reason to believe that it would have much weight in a Canadian court. In the first place, our courts do not imply restrictions on the contracting powers of corporate bodies such as universities unless such restrictions would reasonably follow from the objects of the corporation as stated in its charter or statutes. On the contrary, our courts tend to permit corporations to do anything ancillary or incidental to their main objects. It would be difficult to contend that granting tenure as a condition of employment is not at the very least incidental to the main objects of the university in helping to assure academic freedom; especially is this so in a competitive market where granting tenure might assist in obtaining the best university teachers. It would seem then that most Canadian universities, if they chose to do so, could grant a legal right to tenure as an express term of the contract of employment.

The earliest Canadian case,[10] in New Brunswick in 1861, stated that the professor there dismissed *was* in fact appointed "during pleasure" by Kings College. Its successor, the University of New Brunswick, did not vary the conditions of his employment, and accordingly it had the power to dismiss him at any time. In all the remaining reported cases the governing board was expressly given wide powers to hire at pleasure or upon any other terms, so that the issue did not arise. The report of the New Brunswick case does not set out the circumstances leading to the

8. For the most recent exhaustive discussion of the United States position, see the symposium: "Academic Freedom", *Law and Contemporary Problems*, Vol. 28, No. 3, pp. 429-635 (Summer 1963).

9. Lord Chorley discusses the present state of academic freedom in the United Kingdom in the issue of Law and Contemporary Problems cited above, page 647.

10. Ex parte Jacob (1861) 10 N.B.R. 153.

dismissal or the nature of the dispute between the professor and the university.

Assuming that no absolute bar to the creation of tenure exists in the institution's charter, will tenure be implied as a term of employment by custom and usage? The second case, which arose at Queen's University shortly after the New Brunswick case, seemed to deny that tenure might be so created. At an early hearing of the case Vice-Chancellor Esten considered that the plaintiff's appointment was "during good behaviour, while the duties of his office were performed." In other words, he had tenure and could be dismissed only for adequate cause. Since there was no express contract of employment making the appointment "during good behaviour" the Vice-Chancellor must have found it arose by custom. On appeal, however, the court said:

> *As to tenure of office the charter gives no express directions on this point ... we see nothing in the evidence of any contract for any engagement of plaintiff beyond a general hiring, . . . determinable as such in the usual manner [by giving reasonable notice].*[11]

A similar position was taken by another Ontario court in 1923 on a different problem. The University of Toronto retired a professor at age 68 against his will. He claimed that his appointment was a permanent one, that is without limit of time, "for life, subject only to the appointee's good behaviour and his ability to perform his duties efficiently." In giving judgment Mr. Justice Orde said:

> *... [plaintiff] endeavoured to adduce evidence of a custom or usage in universities generally and the University of Toronto in particular, that appointments to professorships were appointments for life; ... I considered any such plea inadmissible and futile in view of the express terms of the University Act that the tenure of office or employment of the Board's appointees should be "during the pleasure of the Board" [unless otherwise provided]. I am unable to see how evidence that the Board had in fact always treated its appointments as life-appointments, or that other universities had done so, could curtail the powers vested in the Board ...*[12]

Although this case was concerned with the power of a board to enforce retirement *at* a specified age, the same argument might be made against implying tenure *until* retirement age. A board could argue that unless tenure were expressly granted it could not become a term of the employment contract.

One possible implied limitation on the power of dismissal was suggested in a Saskatchewan case in 1920. We shall return to this deplorable case later, but for the present we may note that the court said in commenting on the dismissal of three professors:

> *The statute and by-laws having, therefore, been complied with, we have, in our opinion, no power to interfere with what has been done,* ***unless the president or the governors exercised their discretion of removal in an oppressive manner or from corrupt or indirect motive ...*** *[emphasis added]*[13]

And in the last reported case in Canada—in Manitoba in 1923—the court held that the contract of hiring with neither "at pleasure" nor was it a "permanent hiring". The court decided that the hiring was from year to year, subject to being determined by a year's notice, but that the board could not terminate the contract unless "in the honest opinion of the board, the best interests of the college so demanded ... "[14] This limited form of tenure, leaving the board a discretion based upon honest belief, turned upon the peculiar facts of the case. There had been a long correspondence between the dismissed professor and the president of the college; the court gleaned the terms of the contract from these letters and not from custom and usage.

Even if all courts agreed that a board could only dismiss a member of the faculty if it honestly believed that the dismissal was in the best interests of the university the effect would be negligible. Dismissal by a board having some corrupt motive or intent to oppress is too remote to be worth considering. A dismissal, no matter how foolish, is likely to be done by a board with righteous indignation and a firm belief in the rectitude of its course of action. It is precisely in these circumstances that a university

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11. Weir v. Mathieson (1866) 3 Grant's E.&A. 123, per Hagarty, J. at 151-52.

12. Craig v. Governors of University of Toronto (1923) 53 O.L.R. 312, at 320.

13. In re The University Act, In re The University of Saskatchewan and Maclaurin et al. (1920) 2 W.W.R. 823, at 824.

14. Smith v. Wesley College (1923) 3 W.W.R. 195, at 203.

teacher needs protection, and it is here that the courts would refuse to interfere.

It seems, therefore, that there is little hope of establishing legal tenure by custom and usage in Canada. The attempts before the courts have failed. Only in one case in Nova Scotia has a court recognized tenure, and in that case, it was expressly granted by the statute which created the college.

Tenure Expressly Created

The Nova Scotia case mentioned above, *Re Wilson*[15] decided in 1885, is interesting in a number of ways. First, it shows clearly that the idea of academic tenure was recognized and legally protected more than one hundred years ago. In the Nova Scotia statute which recognized the college in Windsor in 1853, it is stated:

> *... The President and Professors shall hold their offices* ***during good behaviour*** *[emphasis added], but they shall be liable to be removed for neglect of duty, inefficiency, or other just cause, if nine members of the Board vote for such removal.* [16]

Admittedly, the words "other just cause" are vague, but it would be difficult to phrase reasons for dismissal without using general words. And some qualification on tenure is essential; even the tenure of judges is subject to limitation—tenure is granted not for all purposes but to ensure that the holder of the office will be able to carry out his duties to the best of his abilities, for the public good. There will always be an area of difficulty where reasonable people will disagree on whether a holder of a position with tenure has acted outside the bounds of his protection. The grounds for dismissing a teacher with tenure, even if the same words were used in all institutions, would probably mean different things in different places. A distinction that most readily springs to mind is between sectarian and non-sectarian institutions. It may be quite reasonable to expect a Roman Catholic or a Methodist college to require its teachers not to promote another faith among the students in opposition to the professed objects of the college charter.[17] Yet similar views expressed in a non-sectarian university may be quite acceptable and would not amount to a just cause for dismissal.

Typical grounds for dismissal stated in tenure regulations in American colleges, and copied in Canada recently, are "inefficiency (presumably meaning incompetence), neglect of duty, grave misconduct or moral turpitude and extreme financial exigency of the college." The question of competence or neglect of duty may indeed be difficult: the standard required will vary according to the age, qualifications, experience and rank of the teacher, the obligations he has voluntarily undertaken and the standards of performance within the institution itself. It is difficult to say more about this ground except to point out again that competence should be a matter stressed more at the time of appointment to tenure. No one would doubt that a professor who subsequently becomes indolent and uninterested in his work should be subject to removal. This ground has rarely been raised in dismissal proceedings in the United States and has not entered into any of the Canadian decisions.

The last ground, extreme financial exigency, is of even less importance, and would arise only upon the closure of a department, a faculty or an entire institution. If such a remote possibility occurred in Canada today the most a teacher could hope for would be some financial settlement or adequate notice.

The most common and troublesome cause for dismissal concerns grave misconduct or moral turpitude. These phrases divide into two aspects. The first concerns personal moral wrongdoing, sometimes involving a breach of the criminal law. In the unhappy event that a teacher commits a major crime such as murder, robbery or embezzlement the grounds are clear-cut. But more difficult problems may arise: suppose a married teacher is involved in a sexual affair with a student as was alleged in the *Orr* case;[18] or he spends his summers printing fascist leaflets; or he advocates free love or the violent overthrow of the Canadian government in his mathematics lectures? At some institutions the climate of opinion might find

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15. Re Wilson (1885) 18 N.S.R. 180.

16. Ibid. at 196.

17. While we may concede that such a requirement is reasonable, nevertheless a sectarian institution should set out limitations expressly; otherwise, one is entitled to expect an institution calling itself a university to grant full freedom of expression to its faculty members.

18. For discussion of the *Orr Case*, see: C.A.U.T. *BULLETIN*, Vol. II, No. 3, p. 29, Dec. 1962.

all such conduct sufficient cause for dismissal—at others only some of these activities or none at all might be considered sufficient cause. However frequently such activities may come to light the question of consequent dismissal has arisen rarely if at all.

The second aspect of grave misconduct or moral turpitude has only a tenuous connection with the words themselves. This aspect concerns loyalty to the institution, or rather loyalty to the men in authority within the institution, especially the president. Of the six reported decisions in the Canadian courts four centered upon lack of loyalty by the professors in question—their criticisms led to their dismissals. The worst example occurred in the Saskatchewan case mentioned earlier. The three professors who were dismissed showed a "spirit of contumacy to the board and disrespect for its authority" but more important still they lacked a loyalty to the president that the court presumed all faculty members should have:

> *It is difficult to understand why a man who is loyal to the president of his own institution should fail him at a time of need or hesitate to vote loyalty* ***to his chief*** *if the loyalty exists. [emphasis added]*[19]

The concept of a university president as a professor's chief is, to say the least, startling. It suggests a hierarchy of authority and command similar to an army rather than to a community of scholars.

The facts of the case were that the university director of extension had accused the president of serious misconduct in the financial affairs of the university. The three professors believed that the allegations might be warranted and wished to have them fully investigated. Referring to their attitude toward the allegations the court said:

> *... The written reasons signed by the three professors amount to an assertion that the charges of [the director of extension] were such as should be investigated ... We consider that the failure to vote confidence in the president's management of the university and loyalty to the president, in the light of the written reasons which were filed, constitute such [an acceptance of the charges made against the president] that it became essential that their services with the university should be dispensed with in case the charges were not substantiated ...*[20]

The court does not say why dismissal should follow; we can conclude only that it was because they were disloyal. The vote referred to presented no alternatives: failure to vote for the president led to dismissal.

This case represents the crux of the problem of tenure in Canada. It is doubtful in our present Canadian political climate that a university teacher would be dismissed for expressing opinions on matters of general politics. Unfortunately, the United States has suffered from such inroads on academic freedom in the recent past and we are not necessarily immune to such attacks. Nevertheless, it is university politics rather than general politics that has formed the critical area in the past and is likely to remain so. A teacher who devotes most of his life to teaching at an institution becomes deeply involved in its policies and its future. To criticize either the policies adopted or the persons who make the policies, no matter how bitter and unwarranted the opinions may be, should be the prerogative of one so deeply committed to the institution. Yet in four of the cases in question it was the exercise of just such a prerogative that led to dismissal.

Loyalty to the institution should also be distinguished from loyalty to those temporarily managing it. It is doubtful whether loyalty to an institution should be a requisite of tenure at all; certainly, to require loyalty to its officers is completely unjustified. It should be made clear that neither "grave misconduct" nor "moral turpitude" includes disloyalty to the administration or board of a university. Indeed, the issue of loyalty is irrelevant if a teacher is carrying out his duties properly. Of course, a responsible teacher must exercise his judgment in making criticisms either public or private – but surely poor judgment and lack of restraint reflect more upon a teacher directly than upon those he criticizes. University authorities should be content to rely on the same defences as other individuals have, the law concerning libel and slander. One may observe that if faculty members participated fully in university government the frustration that often generates intemperate criticism would be greatly lessened.

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19. In re The University Act (1920) 2 W.W.R. 823, at 829.

20. Ibid.

Remedies for Wrongful Dismissal

In the *Wilson*[21] case the court held that Professor Wilson had been wrongfully dismissed. What kind of remedy ought he to have for the injury suffered? In our legal system the ordinary remedy for a wrong suffered is an award of money damages as compensation. Such a remedy is not always adequate: a professor dismissed from his position is more interested to have the wrong undone as far as possible than to receive a sum of money. He would prefer to be reinstated to his position and receive his rightful salary.

Generally speaking, when a person is wrongfully deprived of a public office, say a town clerk, the court readily grants an order for reinstatement. In effect the court holds that the attempt to remove him was a nullity because the authorities acted beyond their powers. Accordingly, a declaration by the court that the clerk was not removed and continues to hold his office is sufficient; he retains both his position and his salary. The same reasoning would apply to a teacher holding a position in a publicly owned university.

The problem is somewhat different in a private institution. A teacher's right to his position is based not upon the fulfillment of certain statutes and regulations but upon his contract of employment. Ordinarily a court will not order *specific performance* (reinstatement) of a contract of personal service. The reason makes good sense in many circumstances: an order for specific performance is backed by threat of imprisonment for contempt of court should the defendant refuse to carry it out—he does not have the alternative to pay compensation instead. To order personal performance of a contract would be tantamount to servitude, as for example, by forcing a man to work on a job for six months as he had previously agreed, under pain of imprisonment for refusing. In these cases, the court holds that even though the plaintiff has been wronged by the willful refusal of the defendant to carry out his obligation the plaintiff must be content with money damages. Further, it has sometimes been held that this rule is mutual in its effect: if an employee cannot be forced to work for his employer, his employer cannot be forced to employ him. Universities have raised this argument in the United States with some success, and it was also raised in the *Wilson* case. The argument may make sense in situations where the relationship is personal, as between a craftsman and his apprentice, but it is without merit in a large institution like a university. There is no legal principle that demands that a remedy must always be mutual; the law contains many instances where remedies are not mutual. It is quite reasonable that a man should not be forced to work for a corporate institution but only be made to pay damages, while the institution may be forced to reinstate him if he has been wrongfully dismissed. The *Wilson* case so decided:

> *Then it was said that the applicant [Wilson] had another remedy,—that he could sue for damages for wrongful dismissal;—a remedy of that kind does not seem to have been considered so adequate, certain and specific as to induce the court to refuse reinstatement in the cases which I have cited.* [22]

Accordingly, the court ordered the reinstatement of Professor Wilson.

It may be argued that the college at Windsor was a public institution and that the case does not assist the situation at private institutions. But all our colleges and universities today are more "public" than was the college at Windsor. Practically all are incorporated by statute, as was the college at Windsor, or have received a charter from the Crown, and all receive substantial public funds. It is doubtful that any Canadian university could carry on for one term without the extensive provincial and federal grants it receives. In any event the court in the *Wilson* case did not base its decision upon Professor Wilson holding a public office but upon his having tenure. It said simply that since he had been wrongfully removed and that damages would be inadequate compensation he ought to be reinstated. There may be some doubt, but on balance I believe that in Canada a university teacher who has express tenure and is wrongfully dismissed from his institution, whether public or private, could obtain an order for reinstatement.

Summary

"Informal tenure", that is, tenure implied by custom and usage has not been recognized by our courts; and it is unlikely to be recognized. Accordingly, teachers at universities without formal tenure agreements probably have no legal protection whatever and may be removed at any time by receiving reasonable notice

21. Re Wilson, footnote 15, supra

22. Ibid., at 200-1.

or payment of salary in lieu of notice. The maximum period the courts would probably require would be one clear academic year for senior professors and less time for teachers with only a few years of service. In other words, the "tenure" of university teachers in most universities in Canada amounts roughly to a right to the same notice as any salaried yearly employee of a big business would be entitled to receive.

There is little to suggest, however, that Canadian courts would seriously entertain an argument that an institution's charter prevented it from granting tenure expressly.

Even so, there is no general rule; each charter would have to be studied separately, but the courts would not favour a restrictive approach. And once tenure has been granted and a teacher has been wrongfully dismissed, he has a good chance to obtain reinstatement from the courts.

On the whole, the picture of our legal rights is an unhappy one. Indeed, if the legal picture were the whole story, the state of academic freedom in Canada would be intolerable. Happily, it is not the whole story. In most universities, a permanent appointment is considered by both staff and administration to give a security in practice that is absent in law. As with university government, however, the fact we have stumbled along without many serious crises does not make the present situation satisfactory. Far from it—those incidents that have occurred have in the end almost invariably turned out unhappily for the teacher involved. And as Professors Byse and Joughin have said, it takes very few instances of repression to poison the academic atmosphere and stifle freedom. The dangers inherent in the present situation, especially in view of the growing dependence on government grants and the inevitable temptation to interfere with university government and life, justify what might otherwise be a presumptuous proposal of certain reforms in the next part of this paper.

Part III: Creation of Tenure

Value judgments on the specific requisites for attaining tenure are beyond the scope of this paper. Opinions vary greatly on whether two, three, five or seven years is the proper length for a probationary period. A wide divergence of opinion exists also on whether the length of the probationary period should vary according to the rank at the time of hiring or when promotion occurs within the probationary period. I have already expressed my opinion on the need for a positive act to acquire tenure as opposed to mere acquiescence in the re-hiring of a teacher.

Two other aspects of the creation of tenure remain to be discussed. First, who should make the decisions concerning tenure? In acquiring tenure, a teacher attains a permanent place on the university staff and a long-term interest in the welfare of the university. Accordingly, a decision on his acquiring tenure should not be made by a purely administrative committee. A committee that decides whether to grant tenure should be composed principally of other members of his department already holding tenure, or, if the department is relatively small, then of teachers holding tenure within the same faculty.

Secondly, where should the regulations concerning tenure be found? There are at least three possible answers: (a) Regulations could be set out in detail as part of the terms of the original contract of hiring, although each contract may vary in salary and length of probationary period for a teacher according to his status at the time of hiring. This contract would govern his relations with the university during both the probationary period and after acquiring tenure. (b) Locally faculty associations might bargain with the university administration to agree upon a uniform employment and tenure agreement. Such an agreement, like a collective agreement in Canadian industry, would be brought to a teacher's attention and would apply to him automatically when he is hired. It could be varied in the individual contract only to give additional benefits to the teacher hired, but not in any way to detract from the rights set out in the collective agreement. (c) After appropriate consultation with its staff a university could arrange either to have its charter or statutes amended, or under its existing charter or statutes, to pass a series of regulations containing a comprehensive set of employment and tenure regulations. Again, these would apply automatically to each teacher as he is hired, subject only to extra benefits for which he may bargain as a condition of coming to the university.

Method (a), while having the advantage of simplicity, has the disadvantage of not being subject to any form of supervision or public record; through the years it could disintegrate under various pressures and

changes in the administrative staff. Method (b), while meeting this objection, operates in a manner similar to industrial agreements and may be opened to the objection by a substantial number of teachers and institutions of being inappropriate to a university community. My own preference is for method (c). It has been suggested that method (c) comes close to creating the "status" of a university teacher, that is, that simply by accepting a teaching or research position a teacher automatically acquires the rights and duties set out in the university regulations. It is relatively unimportant, however, whether a university teacher feels he acquires his rights by status or simply by entering into a contract. The result is substantially the same.

What should be the substance of such regulations? In the first place, they should contain a detailed statement concerning the length of the probationary period and the method by which a teacher will be considered for tenure. They should state such things as whether a committee will automatically consider his application at the end of a probationary period or whether he must apply. Secondly, they should state the period of notice required by a teacher if he should decide to leave his position at the university either during the probationary period or after he has acquired tenure. Thirdly, the regulations should set out the rules concerning such matters as sabbatical leave, leave of absence, independent research and publication, and the use of university facilities for research and publication. Fourthly, they should set out the rights and duties both of the teacher who has acquired tenure and of the university. These rights and duties should be set out as clearly and in as much detail as possible without, however, creating too rigid a scheme. In particular, the reasons that a university may invoke to dismiss a teacher who has tenure should be set out as precisely as possible. We have already noted some of the problems in this respect; it would be idle to claim that it is a simple task to set out the reasons for dismissal. The regulations should also state clearly and comprehensively the procedures that must be followed if the university's administration should decide to proceed with dismissal of a teacher who has acquired tenure. I am particularly concerned with this last aspect and believe that dismissal procedures *must* be set out in great detail. The next part of this paper is devoted entirely to the subject. I believe that a careful reading of it will make its importance self-evident.

Part IV: Procedure to Safeguard Tenure

Once a university administration decides to proceed with dismissal of a teacher, a grave situation exists: the career of the teacher may well be in jeopardy. In these circumstances he is entitled, indeed, he ought to be able to rely on the protection of the law. But legal protection has real meaning only in terms of the procedural safeguards available to him. For example, a right not to be dismissed except for just cause is of little value if the party that decides what is just cause is given an absolute discretion in reaching its decision. Once the discretion is exercised adversely to the teacher, the courts may be powerless to interfere. Indeed, such unfair procedures are worse than no procedure at all: if tenure is granted and no procedure is set out, a court will lay down what is necessary itself. Failure to meet the standards set down by the court will make a dismissal improper. On the other hand, good procedures properly followed obviate the need for interference by the courts. A court will not substitute its opinion for that of a properly constituted and functioning body within the university. And in most cases both sides will accept its decision more willingly.

The focal point of any process of dismissal is a hearing. The simplest description of it is that it should be a *fair hearing*. This phrase includes several basic qualities and is rooted deep in our legal tradition and development, with good reason. As we stated in the *Wilson* case, the many English decisions there reviewed had established that before a man may be deprived of his property or of a position of tenure, he has a right to be heard in his own defence. The result in the *Wilson* case was based on a finding that a proper hearing had not been held. The court did not decide whether Professor Wilson had been guilty of conduct which would justify the board in dismissing him; it simply ordered his reinstatement because he had not had a fair hearing.

The requirements of a fair hearing have been painstakingly worked out over many years in Anglo-American law. I have attempted only to adapt them to our needs and in so doing have used as a basis the best model available, the procedures recommended by the American Association of University Professors. In substance my commentary follows their procedure

with appropriate changes in terminology and emphasis for Canada.

The Hearing

What amounts to a fair hearing? There are eight main characteristics, three of which are absolutely essential. I shall defer consideration of the most important one—who should sit in judgment—until the end of this part, because it is best discussed in terms of several of the other characteristics.

1. *Notice of the charges against the teacher and of the time and place of the hearing.* This information is obviously necessary, but there is room for argument about how fully the charges should be set out, and how much time should be given a teacher to prepare for the hearing. The charges, and the evidence upon which they rest, should be set out clearly enough to enable the teacher to collect evidence to refute them; he should have a minimum of, let us say, two weeks in which to do so. It follows that those making the charges should be limited at the hearing to adducing evidence and giving reasons for dismissal based on those charges and on no others. Until the charges are proved the teacher must not be suspended or dismissed unless the nature of the charges discloses a situation where he may endanger himself or others by continuing to work. In any event he should retain his right to salary until such time as the charges are proved.

2. *Right to appear at the hearing and to confront his accusers.* A hearing without the accused person present is not a hearing but merely an investigation. Similarly, a charge brought without the accuser being present or identified is not a charge but a rumour. A person who feels strongly enough about charges to bring them in order to have a teacher dismissed must make the charges himself at the hearing, unless it is physically impossible for him to do so. In any case he must be named at the hearing in the document containing the charges. To keep the name of the complainant secret for reasons of embarrassment or awkwardness is inexcusable when the professional career and livelihood of the teacher are at stake. Inevitably there are pressures from complainants to remain in the background and to have others do the unpleasant work for them. But charges may appear in a different light when the accuser is known. The knowledge that he must make his statements personally at the hearing will make a complainant consider more carefully the making of the charges. Most important, it is more difficult to refute charges without knowing their source.

3. *Right to counsel.* Arguments are sometimes advanced that if lawyers are allowed in they will turn the hearing into a technical battle and the real issues will be obscured. Even if this danger exists, it is difficult and unfair to require an accused teacher to espouse his own cause. He is too involved emotionally—too much is at stake for him to make his case properly. The very qualities of personality that may have led to the charges may also lose him the sympathy of the hearing committee. A more detached approach is necessary. Some United States colleges restrict counsel to persons other than lawyers. Such a provision is better than not permitting counsel at all, but it contains a strange reluctance towards complete fairness. Good lawyers are trained to argue relevant issues and to protest when irrelevancies are introduced solely to prejudice the position of the accused teacher.

   If lawyers are excluded it may be difficult for an accused teacher to find a suitable person to act as counsel. A complete outsider to the university without legal training would probably not appreciate the issues at stake and would certainly be ill-equipped to cope with them. A fellow member of the staff may be embarrassed to undertake the defence—the prejudice of his own position at the university would loom large to him. Lawyers are more accustomed to defending unpopular causes. In any event a teacher should not be precluded from having the best counsel possible when his career hangs in the balance.

4. *Right to cross-examine.* This right is closely related both to confrontation of the accuser and the right to counsel. Cross-examination of adverse witnesses, especially the person making the accusation, gives the opportunity to expose contradictions and to elicit further facts which may explain the accused teacher's conduct in a more favourable light. Even the most truthful witness may subconsciously suppress aspects of his evidence which would weaken its effect. The impartial approach of counsel, especially if he is legally trained to look for bias and for failure to

disclose the whole truth, is more likely to succeed than an anxious attempt by the accused teacher.

5. *Written statement of findings of fact and reasons for the decision.* If a teacher obtains a favourable decision, it may be important to him to have a statement that the charges have not been substantiated. Otherwise, it might appear that he was merely forgiven. If he is found guilty of the charges but the committee has decided that they are not so serious as to warrant discharge, then this finding too should be made known, for it will help to clarify the bounds of permissible conduct.

   Most important, if a teacher is found guilty and is discharged, he is entitled to know why; the reasons may not be precisely the same as those in the charges. The committee's reasons may be critical when the teacher seeks re-employment. A particular cause of dismissal which may be sufficient, let us say at a sectarian college where adherence to certain articles of faith is important, may have little significance at another institution. A dismissal without findings may lead prospective employers to fear the worst about the dismissed teacher. And where the reasons cast serious aspersions on the abilities or fitness of a teacher, then he receives only justice; if a prospective employer inquires of the institution which dismissed him, it is better that they should be aware of the reasons. Lastly, if there is an appeal procedure, findings of fact and reasons for the decision at the hearing are essential if either side is to have an opportunity to dispute them.

6. *Right of teacher to appeal.* There is always a risk that the atmosphere of the hearing may be tense and trying; it may distort the judgment of the committee and its procedures. As a result, the hearing may be improperly conducted without due regard for the rights of the accused teacher, or the committee may misinterpret the scope of the grounds for dismissal. A subsequent calm argument on appeal may restore perspective to the dispute and limit the argument to the true issues. For such an appeal to be effective it must be based only on the record-on the charges made, the reply by the teacher, the evidence presented at the hearing, the argument, and the reasons for the decision of the hearing committee. Accordingly, it is necessary to have as a seventh element, to carry on an appeal, a full transcript of the hearing.

7. *Right to a full transcript of the hearing.* The university should provide a full stenographic record of the hearing and make it available to the teacher at the time the committee makes its decision. He should be free to take it away with him and study it, although it might be quite proper to require him not to disclose its contents to anyone except his counsel, until the appeal is heard.

   The question of privacy is an important one, but it is difficult to lay down any general principles. In most cases it is probably wise to hold the hearing in private. Only the parties, their counsel and witnesses should be permitted to attend, except by agreement among the parties and the committee. If after the final disposition of the matter the teacher is cleared, then all parties should be bound to secrecy. If, however, the teacher is dismissed he should have the right to use both the transcript of the hearing and the reasons for dismissal in his best interests to obtain new employment. Since these procedures assume that a fair hearing has been held, it would be just to bind the teacher to silence as far as the press and other news media are concerned. The teacher has had his chance to clear himself; to drag the issue into public view afterwards could only harm himself and the institution.

8. *Composition of the hearing committee.* A basic principle of law is that a man should not be judge in his own cause. If a judge is an interested party, he is necessarily disqualified for he cannot give an impartial decision. In most circumstances dismissal charges are brought by the president who is usually supported by his board of governors. If the president, deans or members of the board of governors comprise the hearing committee, or even part of it, the whole careful procedure outlined above goes for naught. Despite all the other procedural safeguards, if these men sit in judgment, the process becomes one of an employer listening to an appeal for mercy from his employee.

   The hearing committee should be composed of the teacher's peers—a committee of professors having tenure, chosen by the local faculty association. The detailed composition of the committee and whether it should be a standing or *ad hoc* body is a matter for individual decision within each

institution. The cardinal principle is that it should not contain members of the university administration or governing body. Unfortunately, as we shall see when we examine the tenure provisions in several of our universities, not one institution yet observes this precept.

The composition of the appeal body is less clear. A strong argument can be made that the governors, who must take ultimate responsibility for the decisions of the institution, must also make the final decisions. Even assuming no appeal were requested by the teacher, a decision of the hearing committee to dismiss him would require formal approval by the board. Thus, the argument goes, a final appeal must be to the board itself or to a committee of the board. Undoubtedly, it would be more just for the appeal to be heard by an arbitrator appointed from outside the university, but it is probably unrealistic to expect any of our institutions to give up the ultimate power of decision of the board. If so, then it is all the more important that the board should contain adequate faculty representation in order to give impartial judgment.

Even in the absence of so desirable an arrangement, however, if the original hearing has complied substantially with the requirements suggested, and if the appeal is based strictly on the record, the board will be well insulated from the influence of the administrative complainants—provided, of course, that the administrative officers observe the spirit of the procedures and do not seek the ear of the governors privately. If these conditions are observed the teacher will be reasonably well protected at the appeal. The appeal committee should overrule the decision of the hearing committee only if the hearing was improperly conducted, if the charges were not proved, or if the hearing committee did not understand the grounds for dismissal.

Informal Mediation

One may object after this lengthy resumé of procedural safeguards that the resultant hearing resembles a criminal trial. It does, and the reason is simple—to dismiss for a cause a teacher who has tenure is as serious for him as a criminal conviction. In all probability it will destroy his professional career and perhaps even make it difficult for him to obtain a position in a different vocation. Accordingly, he is entitled to every reasonable opportunity to meet the charges against him and to clear himself.

If we may assume that no one favours such a hearing with all its unpleasantness and implications, we should try to avoid the need whenever possible. To this end we should insist upon preliminary procedures for informal mediation and settlement. Either before formal charges are made against a teacher or, at the latest, after he receives them but before a hearing is arranged, a meeting should be required between the teacher and a senior member of the administration. A mediator, a senior professor without any interest in the dispute, should also be present. Settlement is much more flexible than formal judgment by a hearing committee. A committee can decide only whether dismissal is justified or not. In a settlement, other alternatives are available. When his sins are brought directly to his attention a teacher may express willingness to reform and to give an apology if required, or he may agree to a lesser form of punishment than dismissal, such as loss of seniority or the surrender of extra duties which provide additional income. On the other hand, if the administration is determined to have the teacher removed it may agree to give fair compensation and reasonable references if the teacher will resign. In any event, such a meeting can do no harm and may avoid a full-scale hearing.

Effects of a Formal Hearing

One final observation about a formal, full- scale hearing: once it has been set in motion and a teacher is found guilty of grave charges, the consequences for him are far more serious that if he were simply dismissed without any procedural safeguards. Without a formal finding he could claim that his dismissal was "political", that he was a scape- goat for others, and similar excuses. These safeguards, which assist the wrongly accused teacher, help condemn the guilty prevaricator who might otherwise never be found out in a clear-cut manner. It follows that a teacher who is guilty of serious misconduct will be better off, when confronted with the charges, to go quietly than to put into motion the machinery to find him out. Formal procedures destroy the questionable advantage of having only a vague stigma accompany dismissal.

Part V: Review of Some Current Tenure Regulations

In the light of our discussion on procedures we may examine several current sets of regulations to see how they measure up to the desirable standards for protection of tenure.

Institution "A"

The provisions of this institution are terse. The appointment of a teacher "without term" creates "tenure in the sense that his services shall be terminated thereafter only for adequate cause, except in the case of retirement for age, total disability or under extraordinary circumstances because of financial exigencies." If proceedings for termination are stated against a teacher with tenure, he "shall be officially informed before the hearing of the charges against him and shall have the opportunity to be heard in his own defence by those concerned with the case. He shall be permitted to have with him an adviser of his own choosing, who may act as counsel. There shall be a full stenographic record of the hearing available to the parties concerned."

The statement above, though brief, contains some of the essential elements of a fair hearing. Noticeably missing however are the right to confront his accuser, to cross-examine, to bring in witnesses on his own behalf (although the right to do so might be implied from the words "to be heard in his own defence") and to receive the reasons for the decision. Most important, however, the hearing body is the Board of Governors and there is no appeal. A hearing by the Board of charges brought by the president could be little more than a foregone conclusion.

Institution "B"

The "Staff Handbook" published by the institution states, "Appointments without definite term are assumed to be tenable as long as the duties to be performed continue to exist and the person appointed is judged to be discharging them satisfactorily, until the normal retiring age is reached." On dismissal it states, "Though the President must listen to reports on ... its staff, from any quarter, neither he nor any other administrative official should make such reports the basis of action against a staff member without requiring that the report be put in writing and signed by the responsible person. Moreover, the staff member should be given an opportunity to reply and to appear before a Committee of the Board if he desires." The vagueness of the words used, particularly the word "should", leaves us in doubt whether the statement creates contractual rights or merely suggests a procedure for the president to follow if he so chooses. In any event the rights set out are not as clear as those in the first example.

Institution "C"

"Administrative Regulations and Practices" published by the university states "Appointments to the ranks of Associate Professor, Professor and Dean are made without term. They are tenable as long as the duties continue to exist and the person appointed is performing them satisfactorily, until the normal age of retirement is reached." Under the heading "Resignations" there is a final sentence: "The University undertakes to give at least three months' notice of the termination of any appointment." If this last sentence means literally what it says, the university may dismiss any teacher without cause upon giving three months' notice; tenure receives no legal protection under these regulations. On the other hand, the sentence may refer only to term appointments that are not to be renewed (although the wording is inapt for this purpose); if so, then no dismissal procedure is provided for teachers with tenure and the situation is rather like that in the *Wilson* case. If a wrongfully dismissed teacher chose to press his legal rights, he would have to convince the court that he had not had a fair hearing or was dismissed for inadequate cause.

Institution "D"

According to a 1958 report of the local C.A.U.T. branch at this institution, all persons are subject to dismissal by the Board of Governors "upon grounds of immorality, inefficiency, or for any administrative cause which in the opinion of its members affects adversely the general well-being of the university." In effect, no tenure.

Institution "E"

This institution has made a serious attempt to create tenure protected by procedural safeguards. The provisions are too long to reproduce in full. In summary they set out the usual causes for dismissal and the following procedure when dismissal is contemplated: 1) The principal convenes a Faculty Consultative Committee comprised of the deans, the senior academic member of the senate and the department head of the teacher involved unless they are one and the same person. 2) If it is satisfied that

there are grounds for proceeding further (the statement does not say what happens if the committee does not wish to proceed further but the principal does), the principal *as chairman* shall notify the teacher and the president of the faculty association and invite them to appear before the committee. 3) If the committee decides to proceed yet further it then presents formal charges, which the teacher may choose to contest before a second committee, the Faculty Tenure Committee comprised of the principal, the deans, all department heads, the president of the faculty association and two members of the teaching faculty named by the accused teacher. This committee elects its own chairman and sets its own procedure. 4) The teacher has the right "to present relevant evidence and to examine witnesses, and to address the Committee after all evidence has been presented." 5) There must be a record of the proceedings. 6) The committee must present its report within seven days. 7) "If the Principal takes the matter to the Board of Regents he must furnish the Board with copies of the report, in which case the faculty member shall be invited to attend the meeting for the purpose of making such representation as he may wish."

This interesting document falls short on several accounts. First, there is no right to counsel. Secondly, the right to appeal seems to be one-sided. Although the principal may take the issue before the Board there is no suggestion that the teacher may do so. It is not clear whether a dismissal proceeding must go to the board eventually or not. Thirdly, the second committee, the Faculty Tenure Committee, contains almost the whole of the first committee, the Consultative Committee, and particularly the dominant personalities of the principal and the deans. If there was any intention that the second body should hear the dispute afresh its composition makes it impossible to do so. Fourthly, the appointment to the Tenure Committee of two members chosen by the teacher changes the committee from a judicial character to one of a mixed arbitration board. Arbitration in the mixed form, often used to settle labour disputes—an "arbitrator" who is really a protagonist, for each party, and a third impartial member who really casts the deciding vote—may be suitable to the kind of compromise needed in such circumstances but has no place in a judgment on academic freedom. Even as a mixed arbitration board it is improper; the teacher can expect two champions nominated by him, at most three, if we include the faculty association president, whereas the administration has many representatives. Fifthly if, despite its nonjudicial composition, the committee is to be considered as a judicial body we are back to the fundamental failing that the principal and his fellow administrators are judges in their own cause.

Not withstanding these criticisms, the attempt to provide for a fair hearing should be commended—it tries to do so in details and with care. It does not, however, succeed.

Institution "F"

The Faculty Association of this university is negotiating with its Board of Governors for a comparatively detailed set of regulations following more closely the American Association of University Professors' model. It also includes a preliminary conciliation procedure. There are, unfortunately, several features which fall short of the desirable standard.

First, the hearing committee decides whether the parties may be assisted by counsel. The committee is not the proper body to make such a decision; it is a decision for the accused teacher and for him alone to make. Otherwise, the committee is in a sense prejudging the issues in the case by stating whether there is a need for counsel. Almost invariably an accused teacher would choose to have counsel. In my opinion a denial by the hearing committee of a request by the accused teacher to have counsel represent him would be a denial of a fair hearing.

Secondly, although a complete transcript of the hearing "will be made" there is no statement on its availability to the teacher, and the right to a copy is not necessarily implied; it could be argued that the university requires the transcript for its own purposes for examination by the Board of Governors before making a final decision. This failure to give a dismissed teacher a right to the transcript of the hearing would handicap him severely in any right of appeal that he might have or perhaps in obtaining a new position.

Thirdly, the proposed plan contemplates independent action by the president, regardless of the decision of the hearing committee. The last clause of the regulations states, "If the President proceeds to make a recommendation regarding dismissal to the Board of Governors, he will transmit to the Board the full

report of the Hearing Committee. If the final recommendation of the President to the Board of Governors is not in accord with the findings of the Hearing Committee, the Board will meet with the Hearing Committee before coming to a decision." As a result of this clause, the whole procedure and decision of the committee is reduced to a mere recommendation to the board, rivalling that made by the president; the board makes the first and only decision on the case, from which there is no appeal. Thus, the elaborate framework for a fair hearing is emasculated. Since this procedure is recommended by the faculty association itself it comes as a great surprise.

I suggest the following changes: the president should have no power to make recommendations to the board before the teacher has had his hearing. If the hearing is adverse to the teacher and he does not wish to appeal then the president takes the decision to the board to make the dismissal formal. If the teacher wishes to appeal to the Board, he should receive a further hearing before it, based solely upon the transcript and the decision of the hearing committee. The president should have no right to make representations to the Board on the matter except at the hearing of the appeal, when he would be entitled to oppose the appeal. If the Hearing Committee decides favourably for the teacher, the president should not be able to make independent recommendations to the Board. At most he should be able to appeal from the decision of the hearing committee to the Board;[23] again, his representations should be confined to the hearing itself, where the teacher should be permitted to defend the decision of the hearing committee. There is no need to bring the hearing committee before the board for it is not a party to the dispute. Any attempt to get it to reverse its decision would be highly improper.

Institutions "G" and "H"

These two new sets of regulations seem to show an absence of contact with the outside world. They are unaware even of the relatively unsatisfactory attempts made by other Canadian universities. University "G" states "members of faculty will become eligible for appointment 'without term' three years after initial appointment as professor, four years after initial appointment as associate professor and seven years after initial appointment as an assistant professor. Appointments 'without term' will not be given automatically ... "

Proposals for university "H" state, "A person who remains on the Faculty of ... after the required probationary period is deemed to have tenure. The committee on academic activity (consisting of members appointed from the administration and faculty) will investigate all complaints concerning infractions of tenure and make recommendations to the President."

Here again since tenure is expressly created in both universities and since no description or procedural rights are set out, the extent of protection available to a dismissed teacher would have to be decided by the courts.

Institution "I"

The Faculty Association of this university is, to the best of my knowledge, the only one in Canada that has recommended to its Board of Governors the adoption of a dismissal procedure that substantially meets all the requirements of a fair hearing. The submission to the Board of Governors was made in 1959. Since that time the institution has undergone a change in status and organization and there is no indication whether these recommended procedures have been adopted.

* * *

The regulations we have examined, especially those drafted by faculty associations as their desirable ideal, display a confusion of ideas and functions concerning dismissal procedures. In particular, the confusion of roles of the university administrators and boards of governors—acting as both prosecutors and judges—suggests a certain timidity in facing up to an open contest between teacher and university authorities. In some ways this attitude is admirable, for it suggests a basic unity of purpose and trust. But it also indulges in wishful thinking. Once a dispute reaches the point where the administration seeks to dismiss a teacher with tenure, the battle *is* joined. If the teacher is to have his tenure safeguarded properly, if the battle is to

23. If the president has any right to appeal it should be limited to cases where the teacher has been found guilty of the charges, but the hearing committee has decided that the conduct does not amount to adequate grounds for dis- missal. The president could then appeal the committee's interpretation of adequate grounds. If the hearing committee finds that the teacher has not committed the acts charged, their decision should be final and should close the matter, as would happen in criminal proceedings.

be a fair one. he is entitled to *all* the elements of a fair hearing. The battle is never an equal one; the resources in power, money and political acumen of the board are always in overmatch for a teacher,[24] unless he is able to resort to foul tactics through rumour or yellow journalism—or he receives a fair hearing. Surely the latter is preferable.

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24. The CAUT has on a number of occasions assisted individual teachers in their difficulties, and will no doubt continue to do so.