

What Is Fair?



Q&A

ON PROCEDURES &
STANDARDS IN PEER REVIEW

 **CAUT**
Canadian Association of
University Teachers

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FOREWORD

The Canadian Association of University Teachers (CAUT) has long argued for the primacy of peer review procedures in decisions affecting academic careers. These arguments have prevailed, and our institutions generally make academic career decisions based on the advice of peer committees.

The purpose of peer evaluation is to combine expertise in the subject with fairness in judgment so that such decisions will be made for sound academic reasons, will follow appropriate criteria, and will be made by persons qualified to evaluate academic performance.

Peer evaluation must be free of bias, and not discriminate against marginalized groups who have historically been excluded from full participation in the academy. This requires that the composition of peer committees are inclusive of diversity and equity, and that members receive appropriate information and training to assist in understanding and achieving equity.

The following Q&A is intended to assist academic staff to carry out their roles on peer committees, especially those concerned with tenure, renewal, and promotion decisions. This document does not provide a complete discussion of the procedures used in making academic status decisions, nor should it substitute for advice received from a local association. “What is Fair?” provides general guidance focused on the typical procedural components of peer review as well as the comportment of those who participate in peer evaluations. Academic staff associations and unions, should consult relevant CAUT policies, bargaining advisories, and model clauses to ensure that appropriate procedures are in place at their institutions.

This document should not be relied upon to arrive at a decision in any particular case. Legal advice on individual cases should be sought from the local academic staff association.

Terminology differs from one institution to the next. The term “candidate” is used throughout this document to denote an individual being considered for tenure, renewal, or promotion, but it should be noted that this usage has been deliberately rejected in some institutions.

1. SELECTION OF COMMITTEES

1.1.

Who should select faculty peer committees?

Members of the committee should be elected by, and from, the full constituency of peers. At a minimum this should include all full-time members of the academic unit. Part-time and contract academics who are part of the bargaining unit, or included in accord with university policy, should be afforded the same opportunities to participate in the selection process as tenured and tenure-track faculty. To reflect equity and diversity, a range of perspectives should be sought and steps taken to ensure adequate representation by rank and equity-seeking groups. In small institutions, a whole department may sometimes be an appropriate committee. Some faculties do not have departments and, in such cases, faculty peer committees should be elected from the most appropriate unit (analogous to a traditional academic department) within which the candidate works.

1.2.

Should faculty peer committees be restricted to the department?

Every effort should be made to ensure that peer committees have sufficient expertise to make an informed judgment. This is especially important in situations where the candidate's specialty is not shared by other members of the department. Some collective agreements require, or explicitly permit, the election of peers from other departments where such expertise exists. Where sufficient expertise or equity representation to assess a candidate is lacking at the institution, particular attention should be paid to the opinions of external reviewers, who may satisfy that role.

1.3.

Should non-tenured faculty serve on tenure committees? When considering promotion to a specific rank, should faculty of a lower rank serve on the promotion committee?

Yes. Such faculty perform the same functions as the candidate, and are true peers. Untenured faculty often bring the latest

approaches, techniques, and theories to their subject. They should, therefore, not be excluded as such exclusion might result in important perspectives being omitted from the discussion.

1.4.

What about part-time or contract academic staff (CAS)? May they serve on peer committees?

Yes. Part-time and contract academic staff who are part of the bargaining unit or included as part of a university policy could serve on such committees. Nevertheless, CAUT recognizes that some collective agreements regulate the proportions of full-time, part-time and contract academic staff members of specific committees. If CAS are excluded completely, the tenure system can too easily become a restrictive guild, reflecting an administrative and hierarchical--as opposed to scholarly and egalitarian--view of collegiality.

1.5.

Is it not the case that CAS are more vulnerable than other faculty and, therefore, more likely to be manipulated by their tenured colleagues?

It is important to insulate CAS from retribution and manipulation; however, this does not necessitate their exclusion from collegial processes. Rather, faculty should insist upon the confidentiality of the committee's deliberations (to lessen concern about retribution). The coercion of any faculty member violates academic freedom and should be opposed vigorously, regardless of the employment status of the individuals involved.

2. CONFLICT OF INTEREST & APPREHENSION OF BIAS

2.1.

What are the most likely sources for conflicts of interest?

Conflicts of interest can arise where there is a family or other close personal relationship with a candidate; where there has been significant conflict or collaboration; or where there is co-authorship or some financial relationship with the candidate.

2.2.

If I believe that I can divorce my personal prejudice or bias toward the candidate from an objective consideration of their scholarship, should I serve on the committee?

Generally, no. Not only must justice be done, but it must be seen to be done. Whichever way the committee decides you may be suspected of being more or less charitable, and you should avoid putting yourself in such a position. The intent here is not to exclude from peer committees those individuals whose collegial engagement does not rise above a normal level with the candidate in question. For instance, faculty members in a science department who see many co-written (multiple author) papers may not consider a fourth, fifth, or sixth author to be in a "significant" collaboration with a candidate. Nor for that matter, would it necessarily follow that the ideational gulf between a Marxist labour historian and a conservative intellectual historian constitutes a significant conflict unless their disputes cross from the academic to the personal.

As a British judge, in turn quoted by a Canadian court in a case involving a tenure application, said:

I would just add a few words on the question of bias. . . . If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion a real likelihood of bias.

*Of course, someone else with inside knowledge of the characters of the members in question might say: 'Although things don't look very well, in fact there is no real likelihood of bias'. **But that would be beside the point, because the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased.** [Emphasis added].¹*

2.3.

I am a member of the same department and know the candidate quite well. Does this mean I should resign?

No. Peer evaluations at the departmental level and frequently at the faculty level involve critical assessment by faculty members who know each other. The purpose of the fairness requirement is not to require peers who are completely unfamiliar with the candidate. Rather it is to ensure that those who make recommendations about an individual scholar are themselves competent to judge the professional fitness of the candidate, will assess all the evidence on the basis of its academic merits, and have not made up their minds about the candidate in advance of the deliberation process. In the pithy words of an arbitrator working on a case at Saint Mary's: "Because subjectiveness is included in the process, fairness is not excluded."² Only those with a serious conflict with the candidate, those who cannot approach the matter with an open mind, or those with a personal prejudice toward the candidate must withdraw from the process.

2.4.

Should an academic staff member who also has an appointment as a senior academic administrator be eligible for election to a peer committee?

No. There is an inherent tension between these roles and people in such a category should disqualify themselves from serving on any such committees. Administrators must not sit on committees if they themselves are part of the formal review or decision-making structure at a later stage (see 8.1). The collective agreement should not allow a senior administrator to participate in both the assessment and any review at a higher level.

Chairpersons, however, may be members of such committees unless excluded expressly by institutional policies, governing documents, or collective agreements. That said, chairpersons

should not place themselves in questionable positions and should certainly recuse themselves from departmental committees if they have to review the departmental decision at a later stage. Nor should chairpersons (or anyone else for that matter) exploit vague or imprecise procedures in order to give one opinion publicly to the department and/or the candidate and a different one privately to a senior administrator.

2.5.

What should I do if I become aware that I am in a conflict of interest situation?

You should resign from the committee.

2.6.

What should I do as a candidate if I can reasonably show that a member of the committee should resign because of a conflict of interest?

You should formally challenge that person's membership on the committee with reasons as soon as you become aware of their membership on the committee. If this is done at a meeting of the committee, it should be raised as the first order of business. Such allegations, if made after a judgment has come down, have the odour of sour grapes.

2.7.

Is it legitimate for me as a member of a peer committee to make private representations to the president of the university or the person or body responsible for the final decision?

No. If you are a member of a peer committee and disagree with the substantive decision of the majority, some peer review process may allow you to attach a written dissent to the decision, but as someone with access to privileged information you should not make an end run around the system itself. If your collective agreement does not provide for a dissenting opinion, then make your dissent known in the written record of the proceedings.

As a rule of thumb, any form of bypassing the set process contained in the collective agreement could be a breach of the terms of the collective agreement and procedural fairness.³

2.8.

Is it ever legitimate to set up an ad hoc outside peer evaluation where it seems likely that the normal procedures will produce a biased committee?

Yes, but this would require that both the academic staff association and the university or college administration agree.

3. THE DUTY TO BE FAIR: DUE PROCESS & NATURAL JUSTICE

3.1.

What should due process and natural justice mean in the university context?

"Natural justice" is a term that refers to the elementary conditions of procedural fairness. It is not a fixed concept, but has evolved over time. In the context of tenure and promotion, the Supreme Court has stated that six principles of natural justice are important to consider:

1. Institutions are to be given a large amount of deference when making tenure and promotion decisions
2. As a decision-making body, the university or college must demonstrate natural justice throughout its process
3. The level of fair procedure required increases with the level of impact on the person's profession or employment
4. The decision-maker(s) must listen to both sides
5. All evidence that is considered must be divulged to the candidate
6. For a successful review of a procedurally unfair decision, it is not necessary to show proof of prejudice or harm, but only that the flawed process might result in prejudice or harm. (Kane v. Board of Governors of the University of British Columbia, [1980] 1 SCR 1105)

Specifically, natural justice and due process means that candidates have the following rights:

- a. **Right to Notice:**
The candidate and the academic staff association should receive reasonable notice of any hearing or meeting, the

particulars of the case, and the mode of operation of the committee or tribunal.

b. Right of Disclosure:

Candidates have the right to see and/or hear all evidence presented in their case. This means that all written evidence and documentation submitted to any committee or decision maker should be made available to the candidate in full (see 3.1.d). Summaries are not satisfactory since they are likely to produce arguments about the fairness of the summary. If there is oral evidence, the candidate should either be present to hear it or should receive an audio recording. This does not mean that the candidate has the right to be present or to have a recording of that section of the meeting when the committee deliberates on its conclusions. The candidate should also have the right to respond to any oral representations, written evidence or documentation introduced at any other level of consideration or review within the university. At the level of an appeal or arbitration, the candidate and their representative or counsel should be present for all testimony.

c. Right to confront and challenge evidence:

At the departmental level this means that the candidate should have the right to make a written and/or oral submission on the substance and the procedures involved in regard to any evidence prior to the deliberations of the committee. In addition to this hearing, a committee that intends to make a negative recommendation should offer the candidate an opportunity to meet with the committee to discuss that recommendation and the reasons for it before finalizing a report. At an appeal, the candidate or their representative/counsel should have the right to cross-examine all adverse witnesses.

d. Right to invalidate anonymous evidence:

Unattributed individual opinions cannot be fairly considered by peer committees. Similarly, anonymous student questionnaires and comments should not be used as a determining factor for any career or professional decisions. Research shows that such tools are not effective methods for assessing teaching ability, and produce biased

results against women and members of other equity-seeking groups.⁴

All letters of reference, including the signatures, should be supplied to the candidate in full. It should be noted that some academic staff agreements provide for open files but others only permit access if there is a formal grievance launched. Referees should know the rules of the game in advance.

If the rules of your institution or the relevant collective agreement do provide for confidentiality of referees' assessments, fairness nevertheless demands that the candidate be given the letters of the referees without attribution. It should be noted that this frequently leads to additional difficulties and unfairness. It may be necessary to know the background of a referee in order to challenge a letter. It is surely important to know if a negative letter comes from someone who a priori rejects the approach of the candidate or is otherwise *parti pris*. This is why CAUT discourages the use of anonymous materials. Even worse is the use of summaries (see 3.1.b).

e. Right to be assisted:

At the departmental committee level, the candidate should have the right to be assisted by an academic representative from their academic staff association or by a colleague of their own choosing. It would ordinarily be inappropriate at this level for the academic staff member to be represented by legal counsel. It is important that there be no confusion over who is representing an appellant.

f. Right to be given detailed reasons for the committee's decision:

The committee must provide the candidate notice of any impending decision, and a substantive and comprehensive explanation for the decision as well as any written dissents provided by individual committee members.

g. Right to a fair tribunal:

Members of peer committees must insist on the application of the principles of natural justice, and, if necessary, record an objection in writing when they are violated. They should

also ensure that the rules and procedures governing the operation of the committee are observed.

3.2.

What should a member of a peer committee do if they believe that a candidate's rights are being or have been violated and/or that the procedures in place to protect the candidate have been compromised?

The committee member in this situation should continue to serve under protest and then issue a report about the problem to their colleagues on the committee, the candidate, the candidate's Dean, and the academic staff association's president. This report should confine itself to any procedural problems and issues relating to the integrity of the process. It should not offer any opinion on the merits of the candidate except where such information is germane to the analysis of procedural failings. For instance, the report might mention the individual's production of peer-reviewed articles if the committee had refused to consider them.

4. THE DUTY TO BE FAIR: DEMOCRACY & THE JUDICIAL PROCESS

4.1.

Our department/departmental committee weighed this decision carefully and voted against the candidate. Surely that is democratic and all that needs to be said?

No. A democratic majority is not a guarantee that a decision has been fairly and reasonably made. Indeed, majorities can be as arbitrary as any individual administrator. CAUT recommends due process and quasi-judicial procedures to ensure that academic decisions are based on academic criteria only and not on extraneous ones. Academic staff should also ensure that an appeal process is in place to review both the conduct and decision of the peer committee and that the matter be grievable.

4.2.

Doesn't collegiality mean that we should proceed as informally as possible and dispense with legalities and rules?

No. Collegiality does not mean vaguely structured or informal committees. In this context, it means bringing the academic judgments of peers to bear on academic matters such as appointments, tenure, renewal, and promotion. This should be done by the proper and formal weighing of the evidence. It is precisely the integrity of the process that makes the outcome fair and legitimate.

5. THE DUTY TO BE FAIR: EXAMINATION OF THE EVIDENCE

5.1.

What does “fair” mean in looking at the evidence?

1. It means that any judgments must be made on academic grounds precisely related to the issue at hand. Furthermore, the committee should base its judgments on the material before it, that material should be relevant to the case. The committee's recommendations must relate the evidence to the criteria. The process must not become a venue for personal vendettas. Consider the following comments from an arbitrator in a tenure denial case:

Obviously, decisions were made on erroneous information, incomplete information and remote and unreliable hearsay, all of which appears to have been orchestrated by the Chairman of the Committee out of motives of open hostility. . . . [T]here is no doubt that the Department Hearing and Report lacked the degree of fundamental fairness any tribunal of such a nature would be expected to possess.⁵

On a related point, assessors and evaluators should consider the possibility of cluster effects in which clusters or patterns of evidence might be interpreted unfairly and unreasonably to justify complaints about faculty members. For instance, evidence that an academic staff member was rude or not well prepared for class on multiple occasions, might become a ground for professional penalty. Yet racist, sexist, or homophobic perceptions might have led one or more persons to make such charges, or to have encouraged evaluators to take seriously those charges when other evidence suggests they are irrelevant or weak.

Chairs must exercise restraint and good judgment to avoid directing the committee to a particular outcome. The

decisions of a peer committee may be overturned if there is evidence that the chair intimidated the committee, coerced any of its members, or otherwise subverted the deliberative process by calling successive votes until arriving at a preferred decision or by insisting on special or onerous requirements for a particular candidate.

2. Fairness in the evaluation of colleagues means recognizing differences and similarities among them.

Fundamental grounds of equity include race, Indigeneity, national origin, class, gender, gender identity, sexual orientation, ethnicity and dis/ability. Care must be taken to ensure that the possibility of systemic inequity has been considered in assessing a candidate for appointment or preferment/promotion. A diversity of forms and methods of scholarship and service should be considered when dealing with candidates from equity-seeking groups. This is especially important for Indigenous scholars.

Assessors of scholarship must recognize the diverse experiences of marginalized groups, remembering that systemic discrimination may creep into evaluations through received ideas about what counts as correct or "best" scholarly methods, or about who are the most reputable publishers or grantors. Similarly, assessors should remember that systemic discrimination is embedded in teaching evaluations.

3. Fairness means that a department must follow procedures consistent with the procedures followed for others. "Fairness and consistency require that like cases be treated alike. Accordingly, comparisons must be made among similar cases, that is, among candidates from analogous disciplines with similar duties."⁶ If a department does not follow its own normal procedures, any variations should be fair, agreed to by the academic staff association, approved in a constitutional manner by the senior administration, and known to the candidate in advance.

It is not proper to make up new procedures or new standards to advantage or to disadvantage a candidate. For instance, an arbitrator held that it was not proper for a president to insist

on a 2/3 voting rule in promotion decisions when no such rule had been negotiated as part of the collective agreement.⁷ Similar reasoning should apply to committees and unique or peculiar conditions should not be set for any individual.⁸ Committees should not, for example, arbitrarily insist that publications may only be considered if they are the result of sole authorship, use an abbreviated list of publications, or only review a candidate's publications since the last promotion. With respect to co-authored works, a committee should certainly not "reject a candidate's collaborations as inconsequential without sufficient evidence to warrant that conclusion."⁹

4. Fairness means that the department must conduct a thorough and deliberate evaluation of all the information relevant to the case or in its possession. This requires a reasonable period of discussion, particularly in controversial cases or where a negative recommendation is likely. The committee should ensure that all relevant information is supplied to them, and that the candidate has been formally asked, preferably in writing, to supply all information that they wish to have considered. There is also an obligation on the chair of the department and on the administration to supply to the candidate all the information that it has that is relevant to the issue, especially evaluations which might not be in the hands of the candidate. If the file is not adequate, the committee should request that the candidate, the chair of the department, or the senior administration supply the missing documentation. A committee should not make a negative recommendation based on a technicality relating to the sufficiency of information since it should insist on being provided with the information necessary for a full and complete consideration of any relevant issues of law and fact.
5. Fairness means that if consultation is required in the peer assessment process, it should be thorough, systematic and recorded. It should not be carried out by chance meetings in the corridor or by the collection of second-hand gossip. It is, therefore, fine for a committee to consult with external experts, but it must do so openly and provide the candidate with the same opportunities to respond to the results of such

consultation as they are afforded to respond to other evaluations.¹⁰

6. Fairness means that the departmental peer committee must address the real and complete issue at hand. It should not restrict its discussion and judgment to evidence that buttresses a pre-conceived position. Nor should it decide to exclude certain areas of study on the grounds that they are not sufficiently traditional (social work, nursing, and qualitative sociology, for example). The decision to sanction particular areas of study belongs to the department, the faculty and the senate, not to peer committees. The committee should not improperly segment the decision in such a way as to prevent evidence being given or to hide the real issue by deciding on the basis of one aspect of a candidacy and then refusing to consider other evidence.
7. Fairness means that if the department alleges a lack of scholarly publication or characterizes a candidate's scholarship as second-rate, there must be demonstrable proof, based on criteria universally applied and known in advance. Experts in the field must read and evaluate the work if those judging do not have the requisite expertise to do so themselves. The experts should not all represent a single position, or school of thought. The candidate must have a determining say in the choice of some of the assessors, and should be able to challenge assessors on the grounds of bias. The candidate must know the names of the assessors and the process by which they were chosen. The letters sent to assessors should be neutral in tone and should be available to the candidate. There should be a summary procedure in place to adjudicate challenges to particular assessors or to the procedure followed in soliciting their feedback.
8. Fairness means that if the department alleges that a candidate's scholarly interests do not coincide with the academic plans of the department, then there must be (to justify a decision on such grounds) an academic plan showing a substantive change in academic priorities. The relevant faculty unit and the administration must have approved the plan, consistent with the institution's by-laws or collective agreement. The candidate must have been made aware of the

plan sufficiently far in advance of the decision to allow them to conform to the objectives of the plan. This must not be an ad hoc reason used to exclude a particular candidate and justified by vague references to the good of the department. Nor should the plan itself involve a violation of academic freedom.

9. Fairness means that if the department alleges that the candidate's teaching is ineffective, the decision must be substantiated on the basis of evidence other than anonymous student evaluations (e.g. direct observation, review of instruction materials selected by the instructor, grading practices, and so forth). As one arbitrator has concluded: "The fact of the matter is that results [of anonymous student questionnaires] have demonstrable limitations that raise real issues about their use as a measure of teaching effectiveness in tenure and promotion decisions."¹¹ Student evaluations should not be used as an indicator of teaching effectiveness, nor should decisions be based on student gossip, hearsay or unsigned comments. Any adverse comments respecting the candidate should be made available to him or to her. The criteria for judgement should be consistently applied and known in advance.
10. Fairness means that a department cannot rule against a candidate for financial reasons. Probationary appointments to the tenure stream assume that the university has made provision for an ongoing appointment. A subsequent financial crisis may require lay-offs of untenured or tenured academic staff, but this process should be distinct and part of a procedure for financial exigency negotiated by the academic staff association.
11. Fairness means that all judgments should be consistent with the collective agreement and Canadian law on non-discrimination. Peer committees should be sensitive not only to the disciplinary inroads made by historically disadvantaged groups (Women's studies, Black studies, Indigenous studies, Queer studies, etc.), but also to the non-traditional research questions and methods that scholars from socially marginalized groups may bring to the academic enterprise.

12. Fairness means that a candidate is fully informed, in writing, of the reasons for a peer committee's decisions and is afforded an opportunity, and appropriate length of time within which to appeal the decision.

6. THE DUTY TO BE FAIR: CRITERIA AND STANDARDS

6.1.

What criteria should apply?

Criteria that are consistent with the principles of academic freedom should be specified in the collective agreement and their application in individual cases should be measured as far as is possible by objective standards. Candidates must be able to assess beforehand the extent to which they meet the criteria.

At the beginning of proceedings, peer committees should review the criteria and make sure that there is an expressed consensus as to their meaning and application.

6.2.

Can standards change?

Yes. Standards of scholarship and teaching can be changed, but only after a negotiated agreement between the academic staff association and the university or college. Moreover, clear notice of changed standards must be given in such a way that those who will be expected to meet them have the opportunity of doing so: "If standards are to be raised, fairness and reasonableness require that proper notice be given to parties who are likely to be adversely affected by the change. Parties must not be caught by surprise and thereby harmed; notice must be adequate so that an affected party may have time to respond in order to meet new standards."¹²

7. THE DUTY TO BE FAIR: REASONS FOR THE DECISION

7.1.

Why should a peer committee give reasons in writing?

Providing reasons for decisions is an important part of procedural fairness in Canadian law. Without written reasons, it is impossible to know whether fair procedures have been followed. One tenure decision from Laurentian University described such requirements as "a form of insurance that decision-makers actually do reason and adhere to the mandate imposed upon them."¹³

7.2.

What amount of detail is necessary?

A peer committee's reasons for a negative decision must not be simply a restatement in the negative of the grounds on which positive decisions are made. Reasons for a negative decision should be detailed enough that the candidate can decide in an informed way on the likely success of an appeal, or use the criticism to improve their performance and likelihood of success on a subsequent application. The decision and related evidence should be clearly related to the criteria provided for in the collective agreement.¹⁴ Reasons for a positive decision should be specific enough to withstand subsequent challenges and to provide guidance for future candidates.

7.3.

Are comparisons with the performance of successful (current or former) candidates reasonable grounds for a negative recommendation?

Tenure and promotion should be based on specific and known criteria. In these circumstances, comparison with successful candidates is relevant when it is used to illustrate the attainment of these criteria. However, the candidate should be able to make comparisons on grounds of equity either before the committee or, more feasibly, at a subsequent appeal level. This means that

those adjudicating appeals and arbitrators should have access to all the relevant files.

7.4.

What happens if a peer committee cannot reach a unanimous decision?

The view of the majority should prevail. One person among the majority should write the majority opinion in consultation with the other members of the majority. Minority views may be put in writing by dissenters if they wish to do so.

7.5.

Should peer committees vote by secret ballot?

In principle, no. Since the purpose of peer evaluations is to ensure free, full, and fair discussions of a candidate's academic merits, secret voting tends to negate this process. It also makes it difficult to give reasons. In circumstances where strong concerns to limit intimidation do result in secret ballot voting, the chair is still obliged to compile and provide the reasons and rationale for the committee's recommendations.

7.6.

Can members of peer committees be sued for giving reasons?

Yes, but members of peer committees should be protected by the doctrine of qualified privilege which affirms that statements are not libelous if made in the context of fulfilling a responsibility and are only made to those who have a need to receive them (i.e. the other members of a committee and the candidate).

8. REVIEW COMMITTEES

8.1.

What are review committees?

At some universities and colleges, the recommendations of departmentally based peer committees are reviewed by faculty-wide and/or institution-wide committees. These secondary bodies are nonetheless still part of the original decision-making process and not normally appeal bodies. Such review committees are often composed of both academic administrators (or their appointees) and regular academic staff members.

In the context of review committee work, the academic staff members serving on such committees are acting as peers at the broader level of the whole faculty and should be particularly concerned with the uniformity and consistency of standards in terms of both procedure and substance. Review committees should be elected by department/faculty councils and reflect the same equity principles in composition as described above for peer committees, and those elected should form the majority of voting members of any such committee.

8.2.

What is the difference between a review committee and an appeal committee?

A review committee is part of the hierarchy of decision-making. Faculty review committees can, for instance, judge a departmental recommendation on whether or not it meets general institutional standards and whether due process procedures have been followed. But such committees are advisory to the person or group that makes the final decision. Appeal committees hear the appeals of grievors against that final decision. These two functions should be kept separate.

8.3.

What procedural standards apply to review committees?

The above guidelines concerning fairness, natural justice, criteria and the provision of reasons for recommendations and decisions apply to the procedures of review committees.

A review committee's recommendation should not be substituted for the initial peer committee's recommendation but should be added to it. The recommendation should be confined to commenting on the correctness of the procedures and the standards used by the departmental committee. Any additional evidence gathered by such a committee, as well as its recommendations, should be supplied in full to the candidate and to the departmental peer committee. The candidate should have the right of reply to any substantive issues raised by the review committee.

8.4.

Who makes the final decision following a peer assessment?

It varies from institution to institution, and indeed within a particular institution depending on the nature of the decision. It may be a dean, a vice-president (academic), a committee, a president or a governing board. However, the person or group making the final decision--subject to grievance and arbitration procedures in any collective agreement that may pertain at that institution--should not arbitrarily assign more weight to the review committees than to the initial peer committees when the committees conflict in their advice. Such persons or groups should read and review all the decisions and the evidence from the beginning and not simply rely on the last in the hierarchy. They must follow fair procedures in rendering a judgment including making available to the candidate all the information involved in the decision and the reasons for that decision. Arbitrators have found it unreasonable for a decision maker to act contrary to, ignore, or fail to fulfil the criteria set out in a collective agreement and any statutory authority. A decision is unreasonable when evidence that the parties have agreed should be considered is ignored or excluded from consideration.¹⁵

8.5.

Should the governing boards hear and consider recommendations from others besides the peer committee or committees?

The governing board's members should rely on the advice they have received through the institution's peer review process. They too are bound by the rules of fair procedure. The Supreme Court of Canada has held that a candidate should be able to challenge any and all evidence presented to a board and so should be present, with or without a representative, at the board meeting to hear and to respond to such evidence. "The tribunal must listen fairly to both sides giving the parties to the controversy a fair opportunity for correcting or contradicting any relevant statement prejudicial to their views."¹⁶ The same should apply *mutatis mutandis* to others making final decisions. Because the board of governors is the legal employer of academic staff, CAUT does not regard hearings before the board as a substitute for an impartial and independent appeal.

9. APPEALS

9.1.

Why should appeals be allowed?

Peer committees sometimes do make mistakes or poor decisions even when acting in good faith. As well, it is important that standards across an institution be generally consistent. For these reasons, there must be recourse to appeal. Good faith does not negate errors or bad judgment, but the certainty of procedural fairness and the right to appeal increase confidence in the institution and its academic processes.

9.2.

Why not simply return a case to the original committee if a mistake is involved?

Peer committees seldom admit to mistakes or poor judgment. Rather, there is the likelihood that they will simply come to the same conclusion, albeit in a more elegant fashion, the second time around. As a general rule, natural justice does not allow a decision-maker to sit in appeal of their own decision.

9.3.

What are the grounds on which appeals can be filed?

Appeals should be permitted on both substantive issues and procedural issues.

9.4.

Who should hear appeals?

CAUT recommends an appeal to an arbitrator or arbitration board external to the institution. The decision of the arbitrator or arbitration board must be final and binding on all parties.

9.5.

Why are internal committees not appropriate bodies to hear appeals?

At the point where a decision is appealed, it is no longer necessary to have the matter deliberated by peer experts. In fact, any individuals hearing the appeal should not have participated (in any capacity) in previous considerations of the case in question. An appeal may be likened to a court case where evidence, including expert evidence, is placed before an impartial judge. In such circumstances a fair hearing can only be guaranteed if it is conducted by individuals with no vested interest in any particular outcome, and who are competent to decide on issues of fairness and procedure as well as to apply applicable human rights legislation. Since those hearing an appeal cannot escape the issue of comparability, it is useful to charge individuals who have broad experience over time and across several institutions.

It is also desirable, if not absolutely necessary, to have an appeal chaired by someone who is familiar with the conduct of proper hearings, the standards of procedural fairness, and rules of evidence. The chair will be required to draft a final recommendation that squarely addresses the arguments of the parties. Moreover, failure to address legal issues may be grounds for overturning a decision and so the chair must be competent to address preliminary legal issues as they are raised.

10. REFERENCES

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2. Saint Mary's University v. MacFarlane, 1979 CanLII 2719 (NSSC), p. 787.
3. University of Prince Edward Island Faculty Assoc. v. University of Prince Edward Island, 2014 CanLII 62854 (PELA), at para. 191.]
4. see the decision in Ryerson University Faculty Association v. Ryerson University, 2018 CanLII 58446 (ON LA)
5. Saint Mary's University v. MacFarlane, 1979 CanLII 2719 (NSSC), p. 788.
6. Association of University of New Brunswick Teachers v. University of New Brunswick (Union grievance), 1985 SOQUIJ AZ-51123364 (LA), p. 25.
7. Carleton University v. Carleton University Academic Staff Association (K. Marwah),1980 SOQUIJ AZ-51123457 (LA).
8. University of Prince Edward Island and UPEIFA (Aburto) 2016, 128 C.L.A.S. 80, paras. 70-71.
9. Queen's University and Dawes, Re, 1990 CarswellOnt 4353 (OA).
- 10 Dalhousie University v. Dalhousie Faculty Association (Mathieson), 2002 NSCA 1, at paras. 73-74; and University of Windsor v. Windsor University Faculty Association (Wang) 2014, 122 C.L.A.S. 22, at para. 99.
11. University of Regina v University of Regina Faculty Association, 1993 CanLII 14630 (SKLA), p.20. Ryerson University Faculty Association v. Ryerson University, 2018 CanLII 58446 (ONLA).
12. Association of Professors of the University of Ottawa and University of Ottawa (Dr. Norman Chouinard),1985 SOQUIJ AZ-51123387 (LA), p.16. University of British Columbia v. University of British Columbia Faculty Association, 2007 BCCA 201 (CanLII), at para. 36.
13. Laurentian University and Laurentian University Faculty Association (Kenneth Bastin-Miller),1983 SOQUIJ AZ-51123407 (LA), p.15. Dalhousie University and Dalhousie Faculty Association (Mathieson), 2002 NSCA 1, at para. 84

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14. *Dalhousie University v. Dalhousie Faculty Association (Mathieson)*, 2002 NSCA 1, at para. 77.
 15. *Université Laurentienne c. Association des professeures et professeurs de l'Université Laurentienne*, 2011 CarswellOnt 6014, at paras. 286 & 288.
 16. *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105.).