

CAUT Academic Freedom and Tenure Committee Discussion Paper
on
Peer Review: What is Fair?

*This paper is to promote discussion within CAUT and does not necessarily reflect
the views of the Canadian Association of University Teachers*

Foreword

CAUT has long argued for collegiality in university governance. In particular, the primacy of peer review procedures in decisions affecting a person's career in the university has been strongly advocated. In most, if not all universities, these arguments have prevailed, and to a large extent the institutions make career decisions based entirely or largely on the advice of peer review committees.

The purpose of peer evaluation is to combine expertise in the subject with fairness in judgment so that decisions in the university will be made for academic reasons and not for extraneous ones. It is the CAUT view that properly conducted peer evaluations will increase the likelihood that academic status decisions will be made according to appropriate criteria by persons qualified to evaluate academic performance.

But problems can and do arise. We sometimes hear the opinion that academic staff have more to fear from arbitrary and unreasonable peers than from dictatorial administrators. Academics are frequently innocent of any knowledge of their own collective agreements/by-laws to say nothing of the principles of natural justice and may well, therefore, dispense injustice with an even hand.

The following guidelines are intended to assist academic staff to fairly carry out their roles on peer review committees. We have in mind, in particular, tenure, renewal and promotion committees. This document does not address itself to a complete discussion of the procedures used in making academic status decisions but to the comportment of academics who serve on peer evaluations. Faculty associations and unions have a duty to try to negotiate fair procedures, and they should be guided by CAUT policies and model clauses. Decisions which are made using unfair procedures may be overturned in the courts.¹

The standards set out in this document are to be found in the policies and practice of the Academic Freedom and Tenure Committee of CAUT. This document is not intended to be a legal treatise on the developing doctrine of legal fairness although a number of court and arbitration decisions are quoted to illustrate particular points. Nor is this document to be relied on in arriving at a decision in any particular case. Legal rights and obligations may vary as a result of particular contracts and specific fact situations. Legal advice on individual cases should be sought from the local faculty association which may in turn request advice from CAUT.

This document also assumes that there is a different level of formality between departmental peer review committees and university-wide appeal committees, although there remains a basic requirement in both cases to be fair and to make academic decisions on academic grounds.

Selection of Committees

1.1

Q. Who should select departmental peer review committees?

A.

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. The role of part-time and contract academic staff is mentioned below. Where appropriate and feasible, it may be necessary to ensure representation by category (e.g. rank, sex). In smaller institutions the department may be the committee. Some faculties do not have departments. In this case faculty committees make the primary decision and should be elected and act in a manner similar to departmental committees.

1.2

Q. Should departmental review committees be restricted to the department?

A.

Not necessarily. Some collective agreements and by-laws either require or permit the election of peers from other departments where such expertise exists. Your collective agreement or university by-laws will tell you the local situation. Where these are silent, efforts should be made to ensure that peer committees are constituted in such a way that they have the expertise to make an informed judgment. This is particularly important, if the applicant's specialty is not shared by other members of the department.

1.3

Q. 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?

A.

Yes. Such faculty perform the same functions as the applicant, and are true peers. It is CAUT policy that both tenured and untenured staff should serve on tenure and promotion committees. Untenured faculty often bring new approaches to a subject. They should, therefore, not be excluded as such exclusion might result in important new perspectives being omitted from the discussion. If they are excluded, the tenure system may be transformed into a guild system defending the status quo rather than a judgmental system based on merit and open to new ideas, new interpretations, and new subject areas.

1.4

Q. What about part-time or contract academic staff? Should they be eligible to serve on committees?

A.

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 committees. Nevertheless, CAUT recognizes that in some collective agreements, rules may regulate the proportions of full-time, part-time and contract academic members of the Committee.

2

Conflict of Interest

2.1

Q. Are there possible conflicts of interest?

A.

Yes. Such conflicts of interest would arise, for example, where there is a family or other close personal relationship with an applicant, where there has been serious conflict with an applicant,² or where there is co-authorship or a business or financial relationship.

2.2

Q. If I can divorce my personal prejudice or bias for/against the applicant from an objective consideration of his/her scholarship, should I not serve on the committee?

A.

No. Not only must justice be done, but it must be seen to be done. Whichever way the committee decides you will be suspected by the less charitable, and you should not be put in such a position.

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

I would 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)³

2.3

Q. But as a member of the department, I do know the candidate. Does this mean I should resign?

A.

No. Peer evaluations at the departmental level and frequently at the faculty level involve decisions by faculty members who know each other. The purpose of the fairness requirement is not to require peers who are devoid of all information about a candidate. Rather it is to ensure that those who make the decisions assess all the evidence with an open mind and have not made up their minds in advance. This is why those with a serious conflict with the applicant or those who cannot approach the matter with an open mind, such as those who announce in advance that they have made up their minds, should withdraw from the process. "Because subjectiveness is included in the process, fairness is not excluded."⁴ The purpose of peer evaluation is to combine expertise in the subject and fairness in judgment.

2.4

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

A.

No. There is a strong possibility of a conflict of interest and people in such a category should disqualify themselves from serving on the committee. In particular administrators should not sit on committees if they themselves are part of the formal review or decision-making structure at a later stage. (See 8.2 below)

However, chairpersons may be members of such committees unless excluded expressly by the by-laws or the collective agreement. Nevertheless, chairpersons should not place themselves in questionable positions. For instance, chairpersons should excuse themselves from departmental committees if they have to review the departmental decision at a later stage. Nor should chairpersons 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 the senior administrator. Nor should anyone else.⁵

2.5

Q. What should I do if such a conflict of interest arises?

A.

You should resign from the committee.

2.6

Q. 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?

A.

You should formally challenge that person's membership on the committee with reasons as soon as you become aware of her/his 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. If the person so challenged remains on the committee despite strong evidence of conflict of interest, this provides you with grounds either for internal appeal or legal action or both.

2.7

Q. Is it legitimate for me as an interested third party or 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?

A.

No. Representations by any member of the academic community or by anyone else should be made to the peer evaluation committees or appeals committees, as the case may be, and discussion should be conducted therein. End runs of this type should not be permitted. If you are a member of a peer review committee and if you disagree with the decision of the majority, you can, if you wish, attach a written dissent. However, some agreements permit a formal appeal to the president. In this case, the appeal should be conducted in the same way as an appeal to an

appeals committee.

2.8

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

A.

Yes. But only if the faculty association and the university administration agree. In the case of collective agreements, the permission of the faculty association is a legal requirement. The parties to a collective agreement can, of course, agree to modify that agreement at any time. Outside arbitration is, in fact, the procedure most frequently suggested by the CAUT Academic Freedom and Tenure Committee in intractable cases. It is particularly relevant in cases arising from financial exigency since all members of the university community in question are in a certain sense a party to the case.

3

The duty to be fair: due process and natural justice

3.1

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

A.

The following should be regarded as elementary components of natural justice in the university context:

a) notice

The applicant or grievor and the faculty association should receive reasonable notice of any hearing including the particulars of the case and the mode of operation of the committee or tribunal.

b) the right of applicants to see and/or hear all evidence presented in their case

This means that all written evidence and documentation submitted to the peer committee should be made available to the applicant in full. (See 3.1(d) below) Summaries are not satisfactory since they are likely to produce arguments about the fairness of the summary. If there is oral evidence, the applicant should either be present to hear it or should receive an audio tape. This does not mean that the applicant has the right to be present or to have a tape of that section of the meeting when the committee deliberates on its conclusions. The applicant 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 the university appeals committee or of arbitration, the applicant and his/her representative or counsel should be present for all testimony.

c) the right of applicants to confront and challenge negative witnesses or evidence

At the departmental level this means that the applicant should have the right to make a written and/or oral submission on the substance and the procedures involved in regard to

any negative evidence prior to the deliberations of the committee. In addition to this hearing, if the committee intends to make a negative decision, it should offer the applicant the opportunity to meet with the committee to discuss the negative recommendation and the reasons for it before they make a final decision and pass it on to the next level. At the university appeals level the applicant or her/his representative/counsel should have the right to cross-examine all adverse witnesses.

d) the invalidity of anonymous evidence

The dolorous history of the use of confidential letters of reference to denounce the political views of colleagues in the McCarthy era underlines the importance of this provision.⁶ Unattributed individual opinions cannot be fairly considered by peer committees. This does not prevent the use of aggregated statistical evidence such as student evaluations although it would exclude anonymous comments attached to such evaluations. Some universities conduct student evaluations in two parts — a statistical section for peer committees and a commentary which is provided only to the academic staff member. CAUT recommends this practice.

All letters of reference, including the signatures, should be supplied to the candidate in full. It should be noted that some faculty 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.

However, if the rules of your university or the relevant collective agreement still 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 this approach. Even worse is the use of summaries (see 3.1 b) above).

e) the right of the candidate to be assisted by the person of his/her choice

At the departmental committee level the applicant should have the right to be assisted by an academic representative from the faculty association or by a colleague of her/his own choosing. It would ordinarily be inappropriate at this level for the academic staff member to be represented by legal counsel but he/she should be free to consult the faculty association or counsel. It is important, however, that there be no confusion over who is representing an appellant. (See 9.7 below on appeals.)

f) the right of the applicant to be given detailed reasons for the committee's decision (See 7 below.)

g) the right to a fair tribunal (See 2 above.)

Members of peer committees should insist on the application of these principles, 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. When they believe that rights have been violated, they should continue to serve under protest and then issue a report about the problem to the parties. Furthermore, if a procedure or policy seems to be unfair, it should not be used simply because it has always been used. A Nova Scotia court, for instance, found the tenure procedures of a particular university unfair and thus not operable. It would have saved much anguish and cost if they had been changed in advance through negotiation with the faculty association.

In the legal context natural justice is a term for elementary conditions of procedural fairness. It is not a fixed concept; it changes over time. Academic staff involved in particular cases should consult their faculty association about current court interpretations. The faculty association may then consult CAUT.

4

The duty to be fair: democracy and the judicial process

4.1

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

A.

No. A democratic majority is not a guarantee that a decision has been fairly and reasonably made. Democratic majorities can be as arbitrary as any individual administrator. That is why CAUT recommends due process and quasi-judicial procedures rather than drum head court-martials. Such procedures are designed to ensure that academic status decisions are based on academic criteria only and not on extraneous ones. Constitutional democracies accept that the rule of law limits the power of majorities. So too should pluralistic universities.

4.2

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

A.

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 tenure, renewal and promotion. This should be done by the proper and formal weighing of the evidence.

4.3

Q. But the other members of the department belong to CAUT too. Won't the national organization defend their interests?

A.

Membership in CAUT is not a charter to make biased judgments or to conduct unreasonable procedures. Academic staff through collective agreements and special plans have imposed on themselves the legal obligation to participate in academic decisions and to do so fairly. This contrasts with many industrial contracts where such decisions are made by management alone. We must live up to these obligations.

5

The duty to be fair: examination of the evidence

5.1

Q. What does “fair” mean in looking at the evidence?**A.**

a)

It means that the decision must be made on academic grounds precisely related to the issue at hand. Furthermore the department should base its judgment on the material before it. That material, in turn, should be relevant to the case. The decision should relate the evidence to the criteria. The process must not be a personal vendetta. For instance in one case an arbitrator concluded: "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....There 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."⁷ In another case the courts overturned the decision of an appointments committee because the chair had intimidated the committee, threatened one of its members, kept calling votes until he got the decision he wanted, and insisted on special and onerous requirements for the candidate he was intent on excluding.⁸

Furthermore, the decision must not be made because the candidate has a difficult personality. The university is not a club; it is dedicated to excellence. The history of universities suggests that its most brilliant members can sometimes be difficult, different from their colleagues, and unlikely to win a popularity contest. "The university is a community of scholars and it is to be expected that the scholars will hold firm views and wish to follow their convictions. Tension, personality conflicts and arguments may be inevitable by-products."⁹

On the other hand CAUT recognizes that a department can be placed under trusteeship if a tribunal which follows quasi-judicial procedures and due process finds the department to be ungovernable . This may happen because of the physical disruption of departmental operations by a member. An arbitrator has held that actual physical disruption by an individual is grounds for dismissal although he did add that even physical disruption might be permissible on grounds of conscience in matters of major concern if the university did not provide an appeal procedure.¹⁰

b)

Fairness means that the department must follow procedures consistent with the procedures followed for others. "Fairness and consistency require that like cases be treated alike."¹¹ If a department does not follow its own normal procedures, any variations should be fair, agreed to by the faculty 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 in a particular case to eliminate someone a department does not like. 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.¹² Similar reasoning should apply to committees. In another case an arbitrator overturned a decision in which the committee had imposed a non-existent rule that publication could only be considered which was the result of sole authorship, had

considered only publications since the last promotion, and had used an abbreviated list of publications.¹³

- c) 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 decision is likely. An arbitrator held that it was improper for a review committee in a highly contentious case simply to meet and vote.¹⁴ The committee should ensure that all relevant information is supplied to them, and, in particular, that the applicant has been formally asked, preferably in writing, to supply all information that she/he wishes to have considered. There is also an obligation on the chair of the department and on the university administration to supply to the candidate all the information that it has that is relevant to the issue, in particular evaluations which might not be in the hands of the applicant. If the file is not adequate, the committee should request the candidate, the chair of the department or the senior administration, as the case may be, to supply the missing documentation and not make a negative decision based on this technicality. An arbitrator overturned the decision of a Vice-President (Academic) to deny sabbatical leave because the Vice-President had alleged, in part, that there was insufficient documentation in the request. The arbitrator held that the Vice-President should have requested more documentation. The same reasoning should apply in regard to departmental committees.¹⁵
- d) 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.
- e) 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 those items of evidence which buttress a pre-conceived position. Nor should it decide to exclude certain areas of study on the grounds that they are not real research, e.g. women's studies, social work, nursing, etc. The decision to sanction particular areas of study belongs to the department, the faculty and the senate, not to peer evaluation committees. It 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 only and then refusing to hear evidence about the rest.¹⁶
- f) Fairness means that if the department alleges an absence of scholarly publication or second-rate scholarship, there must be demonstrable proof, based on criteria universally applied and known in advance. It is not proper to allege, as in one case that came to CAUT, that there had been little publication and that was second-rate when, in fact, the applicant had a better publication record than anyone in the department, including the chair, both in quantity and quality as measured by outside assessors. Experts in the field must read and evaluate the work if those judging do not have the expertise or only partial expertise. If the field is controversial, the experts should be chosen from both sides of the controversy. The applicant 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. He or she must, therefore, 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.

- g) Fairness means that if the department alleges that the applicant's scholarly interests do not coincide with the academic plans of the department, there must be in existence, to justify a decision on this ground, a departmental academic plan involving a substantive change in academic priorities approved constitutionally by the department and the university administration, consistent with the university by-laws or collective agreement, and known to the candidate sufficiently far in advance of the decision to allow him/her to conform to the objectives of the plan. This must not be an ad hoc reason dreamed up 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 or be inconsistent with CAUT.
- h) Fairness means that if the department alleges that the applicant's teaching is ineffective, there must be organized data, such as student evaluations over a number of years to substantiate this judgment.¹⁷ Any adverse comments respecting the candidate should be made available to him or to her.¹⁸ Decisions should not be based on student gossip, hearsay or unsigned comments. The criteria for judgement should be consistently applied, known in advance and informed by CAUT policy.
- i) Fairness means that a department cannot rule against a candidate and then invent a vague financial reason to try to justify the decision. An arbitrator overturned 21 non-renewals in a case where the university administration, in part, made spurious allegations of financial exigency.¹⁹

The granting of tenure and promotion are matters which should be kept separate from financial exigency. 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 part of a procedure for financial exigency negotiated by the faculty association and consistent with the CAUT policy.

- j) Fairness means that all judgments should be, as a minimum, consistent with CAUT policy on non-discrimination. This should not be treated as a formality. Harvard, for instance, was found in 1980 to have discriminated against a woman in a tenure hearing. If it can happen in Harvard, it can happen elsewhere.²⁰
- k) Fairness means that a candidate should not be denied because she/he has offended the powerful in the university or the community. Conversely favourable decisions should not be made because the candidate has ingratiated himself/herself in such milieus. Not all departments and their committees have been willing to stand up for faculty who discover that drugs are unsafe, pesticides lethal, logging practices destructive, and political systems corrupt or to repulse the friends of politicians, members of the board of governors or of the administration. Such frailty should not play a part in academic decisions.²¹

6 The duty to be fair: criteria and standards

6.1 Q. What criteria should apply?

A.

Criteria should be specified in the collective agreement and should ensure that their application in individual cases can be measured as far as is possible by objective standards. Applicants 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 on their meaning and application.

6.2**Q. Can standards change?****A.**

Yes. Standards of scholarship and teaching can be changed but only after a negotiated agreement between the faculty association and the university and with the approval of the senior academic body as recommended by CAUT. 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. This principle is a fundamental one, not limited to labour relations."²²

7**The duty to be fair: reasons for the decision****7.1****Q. Should a peer committee give reasons in writing?****A.**

Yes. Without written reasons, it is impossible to know whether fair procedures have been followed. Two decisions illustrate this principle: "This is ...a form of insurance that decision-makers actually do reason and adhere to the mandate imposed on them."²³ "...failure (to provide reasons) is not merely one of form but one of substance. Over and above the explicit wording in the agreement to provide for reasons, the underlying rationale is that a clear indication be given to the professor concerned of what exactly is being held against him and provide him with a fixed reference point of what he has to improve. This is very important as the reasons held against him will be the benchmark against what he will be judged if the disciplinary process was to escalate. ... Secondly, the grievor is entitled to know before he grieves what is the case against him."²⁴

7.2

Q. What amount of detail is necessary?

A.

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. The reasons should be specific, e.g. not a sufficient number of research papers, negative teaching evaluation in a named course over a number of years, etc. As a minimum, reasons for a negative decision should be detailed enough that the applicant can decide in an informed way on the likely success of an appeal, or use the criticism to improve her/his performance and hence the chance of success of a subsequent application. Furthermore the decision and the evidence for it should be related to the criteria.

Reasons for a positive decision should be specific enough to withstand subsequent challenges and to serve as guidance for future applicants.

7.3

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

A.

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 university appeals committees or arbitrations should have access to all the relevant files.

7.4

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

A.

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. Those who dissent can add dissents in writing if they wish.

7.5

Q. Should peer committees vote by secret ballot?

A.

Generally no. Since the purpose of peer evaluations is to ensure free, full, and fair discussions of the academic merits, secret voting tends to negate this process. It also makes it difficult to give reasons. However, an arbitrator has held that where a committee is chaired by a departmental chairperson with a particularly dominant personality, voting should be by secret ballot.²⁵

7.6

Q. Can members of peer committees be sued for giving reasons?

A.

Members of peer committees are protected by the doctrine of qualified privilege which states that

peers cannot be found responsible for libel as a consequence of statements made carrying out normal university duties, such as evaluation, unless they are knowingly malicious or act with a reckless disregard for the truth.²⁶

8

Review committees

8.1

Q. What are review committees?

A.

At some universities the decisions of departmentally-based peer committees are reviewed by faculty-wide and/or university-wide committees. These committees are part of the original decision-making process and are not normally formal appeal bodies. Such review committees are often composed of both academic administrators (or their appointees) and regular faculty members.

In this context the academic staff members are acting as peers in the broad sense of faculty at the same institution concerned with some uniformity of standards in procedure and substance. Review committees should be elected by department/faculty councils, and those elected should form the majority of voting members of the committee.

8.2

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

A.

A review committee is part of the hierarchy of decision-making. Normally the purpose is to add a further dimension. Faculty review committees can, for instance, judge a departmental recommendation on whether or not it meets general faculty 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. Where this is not done, the committees in question should be treated as appeals committees and should accept both substantive and procedural representations from the parties. (See 9 below.)

8.3

Q. What procedural standards apply to such committees?

A.

The above guidelines concerning fairness, natural justice, criteria and the provision of reasons for decisions apply to the procedures of such 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. (See 6 above on criteria and standards.) The review committee should, however, allow the right to secure additional external appraisals, if necessary, subject to the safeguards noted above in regard to referees. This evidence and the recommendations should be supplied in full to the candidate and to the departmental peer committee. The candidate should have the right of reply

and should have the right to legal counsel if substantive issues are raised.

8.4

Q. Who makes the final decision following a peer assessment?

A.

It varies from university to university and indeed within a particular university depending on the nature of the decision. It may be a dean, a vice-president (academic), a committee, a president or a governing board. Various appeals with or without binding powers may intervene.

However, the person or group making the final decision should not arbitrarily assign more weight to the review committees than to the departmental 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.²⁷ They should also bear in mind that they must follow fair procedures in rendering a judgment including making available to the candidate all the information involved in the decision.

8.5

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

A.

In cases where governing boards are required to make final decisions, they are free to hear evidence from anyone before making a decision unless, of course, the collective agreement or by-laws state otherwise. 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 same should apply mutatis mutandis to others making final decisions.²⁸ Since 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

Appeal Bodies

9.1

Q. Why should appeals be allowed?

A.

Peer committees and review committees sometimes do make mistakes or poor decisions even when acting in good faith, and there must, therefore, be recourse to appeal. Good faith does not negate errors or bad judgment.

9.2

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

A.

CAUT has found that peer committees seldom admit their mistakes or poor judgments. They simply come to the same conclusion in a more elegant fashion the second time around.

9.3

Q. What are the grounds on which appeals can be filed?

A.

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

9.4

Q. Who should hear appeals?

A.

The appeal process may take one of two forms. The quickest, cleanest and preferable route is an appeal to an arbitration board which is external to the university. The arbitration board must have the power to dispose of the application, and its disposition must be final and binding on all parties. An alternative policy is to have a university-wide appeal committee.

9.5

Q. Who should sit on a university-wide appeal committee?

A.

The committee should be composed of elected academic staff members. Normally a membership elected by each faculty or group of faculties is mandated to protect the interests of smaller faculties. Members of the appeal committee should not have participated in any capacity in lower level considerations of a case that comes before them. If that occurs, such members of the appeal committee should step down because of the conflict of interest. University-wide appeals committees should be standing committees and not ad hoc arrangements for particular cases in order to avoid the suggestion that the judges were chosen with a particular verdict in mind. Appellants should be able to challenge committee members on the grounds of conflict of interest or other bias.

9.5.1.

Q. Who should chair the appeal committee?

A.

Chairing an appeal committee requires skill and experience. Cases that come before appeal committees are often as complex as those decided by arbitrators. The committee chair should be familiar with how to conduct a proper hearing, with the rules of procedural fairness and the rules of evidence, and with how to draft a final decision so as to squarely address the arguments of the parties.²⁹

9.5.2.

Q. How should the appeals committee address legal issues that come up during the course of the hearing?

A.

The committee cannot ignore legal issues that come up from time to time during the course

of the hearing (e.g. evidentiary issues). Failure to address legal issues may be grounds for overturning a decision. Preliminary legal issues must be addressed once they are raised before the committee. The committee should address these issues by issuing interim decisions. This underscores the need for an experienced chairperson. The committee should not wait until the end of the proceedings to issue preliminary decisions. The final decision of the committee should be in writing and should squarely address the arguments raised by each party with respect to the main issues of the case. Failure to do so will inevitably leave disputes unresolved, create a perception of injustice, and may even result in the decision being overturned on judicial review.

9.5.3

Q. What about human rights?

A.

Appeal committees should be competent to apply human rights legislation (not charter legislation). This further underscores the need for an experienced chairperson.

9.6

Q. Surely logic suggests that an appeal committee should be composed of immediate peers.

A.

No. An appeals committee can be compared to a court where evidence, including expert evidence, is placed before an impartial judge. Furthermore negative decisions at the initial level of peer review can polarize and certainly raise the emotional temperatures in a department, and, in smaller institutions, the university as a whole. In these circumstances a fair hearing can only be guaranteed outside the immediate peer group.

9.7

Q. What procedures are required in an appeal?

A.

The appeals committee or arbitration panel should follow the same procedures as laid down earlier in this guideline for departmental committees. However, certain procedural matters take on additional importance at this level.

a) Expertise

It is unlikely that the appeal committee will have expertise in the discipline of the appellant. It is therefore, crucial that expert testimony be available. It is the duty of the faculty association to ensure that the appellant understands this and that such testimony is given if it is available.

b) Comparability

Comparability of standards is essential to any just appeal mechanism. An arbitration board laid down the following standards in regard to comparability for a university-wide appeals committee.

...assessment committees cannot escape the issue of comparability; it is essential to requirements of fairness and consistency...In summarizing the question of comparability, we make the following observations:

1. 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.
2. The group need not be large; there may be no more than several cases in any group, although some cases may overlap between two groups.
3. Continuity over time is an important element of consistency and fairness. Thus, the criterion of fairness would not be satisfied, for example, merely by treating three similar cases in one year alike and reaching adverse decisions in all three, if to do so would be a sharp break with the standards of the immediately preceding year. Accordingly, it is especially important to make comparisons with the most recent cases, when the candidate under consideration appears likely to receive an unfavourable recommendation.
4. In reporting on its recommendations a committee should note that it has made the appropriate comparisons...

We do not believe that this requirement creates an excessive burden on assessment committees. On the contrary: it will make it easier for committees to direct their minds to the central issues and it will help them arrive at consistent recommendations."³⁰

c) Legal counsel

At this level the appellant should have the right to be represented by legal counsel.

In general the procedures of a university-wide appeals committee should approximate those of a legal arbitration.

9.8

Q. What happens if an appeal committee itself needs legal counsel?

A.

If legal questions arise, the committee itself should be empowered to engage legal counsel. This counsel should not be the lawyer who advises the university administration or the board of governors.³¹ The university should pay the costs involved. Another possibility is to arbitrate disputed legal questions. However, university appeal committees do not normally need their own lawyer present throughout the hearing. The academic staff members chosen to serve are the appeal committee, and they are responsible for making the judgments. They must write their own reasons for their judgment. They cannot devolve this responsibility on a lawyer.

9.9

Q. How long do appeal committees sit?

A.

Becoming a member of an appeal committee is a time-consuming commitment. Some proceedings may continue to be heard on and off throughout a period of several months. Committee members must be available to attend every hearing date. The committee cannot continue hearings in the absence of committee members. This is grounds for overturning a decision. Some thought, therefore, should be given toward personal and academic commitments before one agrees to sit as a committee member.

Approved by the Academic Freedom and Tenure Committee, October 1986; rRevised by the CAUT Board, November 1986; editorial revisions, July 1988; revised by the CAUT Collective Bargaining and Economic Benefits Committee and the CAUT Executive Committee, February 2002; received by CAUT Council, April 2002.

NOTES

All endnotes refer to arbitration cases except where court references are cited. References to the CAUT Arbitration Index is cited as A.I.

1. Thomas v. Mount St. Vincent University, [1986] N.S.J. no 256, pp. 24-25.

See also University of Wilfrid Laurier Faculty Association v. University of Wilfrid Laurier, Harvey grievance, [1993] A.I. 0007; grievance where the arbitration board ruled that University must give professor a fair chance to meet tenure criteria.
2. Saint Mary's University Faculty Union v. Saint Mary's University, MacFarlane grievance, [1979] A.I. 0200 ; Queen's University v. Dr. Arthur E. Zimmerman, [1981] A.I. 0122.

See also FAUST v. St. Thomas University, Rathor grievance, [1991] A.I. 0470; involved bias of member on Appeal Panel - when determining bias must ask how closely identified is the nominee with the matter before the panel - where panel has direct interest in matter in issue bias will be found - membership in CAUT and Faculty Association does not create apprehension of bias - membership on Board of Governors of University does create reasonable apprehension of bias.

See also LUFA v. Laurentian University, Brassard grievance, [1995] A.I. 0455.
3. *Op. Cit.* Note 1.
4. Saint Mary's University Faculty Association v. Saint Mary's University, MacFarlane grievance, [1979] A.I. 0200.
5. But note that an arbitrator held that a chairperson with a dominant personality should not require an open vote. Prof. G. Snewing v. Queen's University, [1983] A.I. 0106. For dual track recommendations, see report of CAUT investigating committee, 1970, which resulted in the censure of the University of Victoria, CAUT Bulletin, v.9, no.4, 1971.
6. E.W. Schrecker, No Ivory Tower: McCarthyism and the Universities, Oxford University Press, 1986.
7. *Op. Cit.* Note 4.
8. Aleksandra Vinogradov v. The Governors of the University of Calgary et al, [1987] A.J. no 164. Reversed on appeal on other grounds.
9. Zimmerman *Op. Cit.* Note 2.

See also QUFA v. Queen's University, Zarowski grievance, [1995] A.I. 39. Grievor's troublesome, inconsiderate and counterproductive attitude, personality and political style was not relevant to issue assessing grievor's contribution in terms of university service.
10. Zimmerman *Op. Cit.* Note 2. For a discussion of disruption, see McGill University v. Stanley Gray, [1969] A.I. 0176.

11. Association of University of New Brunswick Teachers v. University of New Brunswick, Thompson grievance, [1985], A.I. 0031, p. 25.
12. Carleton University Academic Staff Association v. Carleton University, Marwah grievance, [1980] A.I. 0154.
13. Laurentian University Faculty Association v. Laurentian University, Mahant grievance, [1985] A.I. 0089.

See also QUFA v. Queen's University, Dawes grievance, [1990] A.I. 0050. A Tenure Committee cannot reject candidate's research collaborations as inconsequential without sufficient evidence to support that conclusion.

14. *Op. Cit.* Note 11.
15. University of Windsor Faculty Association v. University of Windsor, Rozsnyai grievance, [1981] A.I. 0133. But note that at Simon Fraser University, when the administration refused to produce the documentation, Arbitrator Johnston awarded the decision to the professor (Simon Fraser University v. Professor Prudence Wheeldon, [1971] A.I. 0175).

See also UBC Faculty Association v. UBC, Grenberg grievance, [1994] A.I. 0404 where arbitrator held that Appeals Board must direct matter of tenure review back to dean's Advisory Committee for reconsideration where Committee fails to consider relevant evidence. Evidence is "relevant" if it bears upon, relates to or is pertinent to the candidate's application. To be relevant, evidence must meet sufficiency test. Test is whether Committee had enough information to "enable full and complete consideration of all the issues of law and fact at each stage throughout the tenure procedure."

16. Case of Leo Johnson, CAUT Bulletin, v.33, no.6, 1986.
17. See URFA v. University of Regina, Jalan grievance, [1993] A.I. 0298 where teaching is to be seriously evaluated for career purposes, it is incumbent upon faculty to rely on more than just classroom administered evaluations. Faculty must broaden the base of its assessment by including other methods to evaluate the candidate's teaching abilities such as direct observations, review of instructional material selected by instructor, grading practices, etc.

See also UBC Faculty Association v. UBC, Kramer grievance, [1992] A.I. 0245; a department should also consider teaching evaluations beyond the start of tenure period.
18. Ivy Bennett v. Wilfrid Laurier University et al, [1983] A.I. 0100.

See also Jeffrey Sack and Donald C. Savage *Collegiality and Confidentiality: Secrecy and Openness in the Tenure and Promotion Process*, CAUT, 1992.
19. Sean Kelly et al v. Loyola College, [1970] A.I. 0172.

20. Case of Theda Skocpol, Chronicle of Higher Education, 1 October 1986. A grievance committee held that the Department of Sociology had been biased in its tenure judgment. The president then overturned the department and awarded tenure. Professor Skocpol has returned to Harvard.
21. See, for instance, the report of the CAUT committee of inquiry, September 1978, which led to the censure of Memorial University, CAUT Bulletin, v.26, no.4, 1979. Also see "The Good Old Days", CAUT Bulletin, v.30, no.6, 1983. The most detailed scholarly study of the failure of the academic community to defend political liberty and dissent can be found in *Op. Cit.* Note 6
- See also Zarowski *Op. Cit.* Note 9.
22. Association of Professors of the University of Ottawa v. University of Ottawa, Chouinard grievance, [1985] A.I. 0069, pp.16-17.
- See also URFA v. University of Regina, Cohnstaedt grievance, [1994] A.I. 96. Grievor entered into agreement with University to undergo a one-year probationary period. Arbitrator held that University breached the agreement by not giving the grievor sufficient duties to permit a thorough assessment. Decision upheld by the Supreme Court of Canada. (See A.I. 0353 and A.I. 0548)
23. Laurentian University Faculty Association v. Laurentian University, Bastin-Miller grievance, [1983] A.I. 0090, p.15.
24. Association of Professors of the University of Ottawa v. University of Ottawa, Altosaar grievance, [1994] A.I. 0343.
25. Snewing *Op. Cit.* Note 5.
- See also Jeffrey Sack and Donald C. Savage *Op. Cit.* Note 18, wherein the authors note at p. 13: "Voting ... should be by a show of hands and not by secret ballot."
26. Slavutych vs. Board of Governors, University of Alberta et al, 75 CLLC, 14, 263.
27. Association of New Brunswick Teachers v. University of New Brunswick, Waddell grievance, [1983] A.I. 0110, pp.30-31.
28. Kane v. Governors of the University of British Columbia, [1980] 1 S.C.R. 1105 and Ruiperez v. the Board of Governors of Lakehead University, 1984, 147 D.L.R. (3d) 154 (C.A.).
29. For a comprehensive guide to practice before administrative tribunals see Macaulay & Sprague, Hearings before Administrative Tribunals (Toronto: Carswell 1996) and J. Sack, Winning Cases at Grievance Arbitration, Lancaster House, 1994.
30. *Op. Cit.* Note 11.
- See also MUNFA v. Memorial University, Voigt grievance, [1990] A.I. 0395; no claim of

privilege can be reasonably asserted on evidence of faculty appointments similar to appointment sought by candidate. Material is relevant to issue of comparable practice.

31. *Op. Cit.* Note 16.