Academic Freedom and Tenure: Protections for the Tenure Candidate

Roger D. Batchelor

A thesis

submitted to the Faculty of Graduate Studies and Research of Carleton University in

partial fulfillment of the requirements for the degree of

MASTER OF ARTS

Department of Law

Carleton University

January 1998

© Roger D. Batchelor 1998

National Library of Canada
Bibliothèque nationale du Canada

Acquisitions and Bibliographic Services
Acquisitions et services bibliographiques

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

Our file Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-32358-7

Canada

Abstract

The purpose of this study was to investigate the tension between academic freedom and tenure and to examine how the law has developed in Canada in the area of faculty-institutional relationships with regard to tenure award. Traditional historical-legal research methodology was used. Reported judicial decisions involving disputes between universities and disappointed candidates for tenure from the common law provinces of Canada from 1861 to 1996 were located and briefed. The case law was synthesized with the secondary literature. A closer look was taken at the tenure decision-making process at Carleton University. The study found that although the courts are becoming less deferential to academic decision-makers, academic freedom is now generally protected by collective agreements between faculty unions with universities. This means that collective bargaining has become important in the protection of academics, especially those without tenure.

Acknowledgments

I would like to acknowledge and sincerely thank all of those who provided assistance and support to me during the last two years. My supervisor, Jane Dickson-Gilmore has been a mentor and a friend. She provided a thoughtful sounding board for me throughout the process of writing this thesis, particularly in the final stages. Thanks also to her husband Kevin, for his wise suggestions and encouragement. Thanks to Lynn Campbell who took great interest in my topic and assisted in the final revisions of the thesis by providing valuable feedback from the Defence to the final copy.

Brettel Dawson provided me with a great deal of assistance in the formative stages of my thesis, especially my initial research proposal. I also wish to thank Robin Farquhar for his insightful suggestions which assisted me in the final copy. I was in the United States pursing a Ph.D. in the final stages of this thesis and I am grateful to Barry Wright and Sandy Rochon for the flexibility and consideration they both demonstrated for my circumstances.

Thanks to my wife Vivianne Sergianidis who has given up so much during my graduate studies. I will never be able to repay her for the sacrifices she has made. I could have never completed this thesis without her caring and support.

Table of Contents

ABSTRACT ii

ACKNOWLEDGMENTS iii

INTRODUCTION 1

CHAPTER ONE: THE RELATIONSHIP BETWEEN ACADEMIC FREEDOM AND TENURE 6

I. DEFINING ACADEMIC FREEDOM AND TENURE 6
II. THE AMERICAN EXPERIENCE 10
III. CRITICISMS OF TENURE 11
IV. THE NEED FOR TENURE 15
V. TENURE AND INCLUSIVITY 16
VI. LIMITS ON TENURE 18
VII. THE CONSTITUTION 19
VIII. FREEDOM OF SPEECH AND TENURE 20
IX. THE PEER REVIEW PROCESS 22

CHAPTER TWO: HISTORICAL ORIGINS 27

I. THE EARLY YEARS 27
II. TENURE DEVELOPMENT IN CANADA 31

III. DEMOGRAPHIC CHANGES IN THE LAST TWENTY FIVE YEARS 33

CHAPTER THREE: THE ROLE OF THE COURTS 37

I. TRENDS 37

II. THE EARLY CASES 39

III. JUDICIAL REVIEW 42

VI. DISCRIMINATION 44

IV. JUDICIAL DEFERENCE 50

V. HAZY DEFINITIONS OF TENURE 53

VI. THE INTERNAL APPEAL 55

CHAPTER FOUR: OTHER CONSIDERATIONS 58

I. UNIONIZATION 58

II. COLLEGIALITY 63

III. THE *ONTARIO STATUTORY POWERS PROCEDURE ACT* 65

CHAPTER FIVE: TENURE AT CARLETON UNIVERSITY 70

CHAPTER SIX: CONCLUSIONS 76

TABLE OF CASES 82

BIBLIOGRAPHY 84

Introduction

Historically, tenure has been perceived as one of the primary protections for academic freedom and continues to be a jealously guarded right in Canadian universities. For over a century, universities have been debating the meaning of academic freedom. If it is interpreted too broadly the definition becomes too general and if interpreted too narrowly, the protection of tenure become useless. Part of the difficulty surrounding this issue has stemmed from the tendency of writers to seek clear lines that separate those situations where the protection of tenure should prevail from situations in which tenure should not provide protection for appeals to academic freedom by faculty.

Tenure does not fit neatly into a conceptual package. This difficulty is compounded by society's failure to acknowledge the complexity of the primary protection of tenure and to resist frameworks that distort the very issue they are trying to define. Many processes adopted by universities to safeguard tenure protections may themselves change the way that tenure protects candidates for tenure. Only by recognizing that tenure has traditionally not been clearly defined can we address the ideal scope of protection for academic freedom. Much of the lack of clarity has its sources in misconceptions about the ways in which law does, can, and should assist academic decision-makers and disappointed candidates for tenure.

In this thesis I will look at the protections for the candidate for tenure. This involves an understanding of the activities that are actually carried out in the decision whether or not to grant tenure, and of the legal and quasi-legal framework within which a

challenge to the decision not to grant tenure takes place. My focus on tenure speaks to a theoretical concern with the balancing of rights and responsibilities and the power of the individual versus the institution. A primary objective of this analysis is to examine how the concept of tenure reflects, reinforces, or challenges academic freedom and to examine the legal relationship between Canadian universities and candidates for tenure at these institutions. I will accomplish this task by analyzing the process for determination of whether or not to award tenure. This relationship is examined through a review of the historical foundations of tenure and academic freedom, an analysis of the major judicial rulings involving tenure decisions, and a review of the academic legal analysis of tenure award. I do not question the need for tenure as a necessary protection, but I was concerned that it was a sufficient protection when a clear definition and application of tenure had not been articulated in Canada. I suspect that we need a better sense of how tenure works, and what it is that we are trying to protect.

I explain the relationship between the concepts of tenure and academic freedom in chapter one. Here I present discussions of academic freedom and tenure issues most frequently addressed by supporters and critics of tenure. Tenure and academic freedom need to be understood against the backdrop of trends such as the development of collective bargaining, the reality of collegiality, and the approach by the courts to disputes regarding denial of tenure. Therefore, the trends and debates about academic freedom and tenure are also presented in subsequent sections from different perspectives.

In chapter two, I describe the role of the courts and the evolution of the significance of law in universities. I examine the historical treatment by the courts of decisions involving challenges to university decisions involving tenured faculty members and the decision not to award tenure. I then turn to more recent developments in Canada and conclude the chapter with a discussion of some of the demographic changes that have lead to a renewed focus on tenure and academic freedom in Canada.

I take a closer look at the case law and the legal environment in which decisions about whether or not to award tenure are made and challenged in chapter three. These cases specifically involve challenges to universities where a decision has been made not to award tenure to a faculty member. I conclude that judicial review and natural justice have been used by the courts as a way of interfering in university decisions. I provide an overview of these two concepts and discuss how they have been important to faculty members and the courts.

In chapter four I examine other circumstances involved in the university decision-making process on tenure. I discuss how the *Statutory Powers Procedure Act (S.P.P.A.)* affects the decision-making process in Ontario and I illustrate the point that the decision-making process has changed since the organization of faculty collective bargaining units. I examine the role that collegiality and the social milieu in which the decision is made may affect the decision-making process.

In chapter five, I use a case study involving the tenure decision-making process at Carleton University to examine the process more closely. Carleton University was chosen

because of my familiarity with the culture, climate, regulations, and operating procedures through my involvement as an undergraduate and graduate student, and senior manager at this institution.

The problems of academic freedom occur within the context of a larger society undergoing major changes. The potential dangers to academic freedom may be broader than threats to tenure. Therefore, in the final chapter, I focus on these potential future threats to academic freedom, and examine situations where tenure has been threatened to be institutionally removed.

It appears that the majority of tenure decisions are now subject to arbitration. However, this is not the case at Carleton University since the collective agreement explicitly excludes grievances about tenure and promotion under Article 30.9a. The collective agreement recognizes the "Procedures Concerning Tenure Dismissal and Related Matters" (Appendix A) as the relevant procedures to follow in the event of a conflict over tenure award. Therefore, I have not considered the significant number of arbitration decisions that exist in relation to tenure decisions at other universities. This would be an important issue for further research considering that most appeals from university decisions now go to arbitration because of the development of collective agreements. My investigation was limited to the courts, and the institutional processes at Carleton. Therefore, I have excluded the arbitration and grievance process.

The use of tenure to protect the academic freedom of scholars also generates questions about approaches to tenure in the Canadian university culture and climate. The

notion of culture is a label used as a short form; many influences are involved. The complexity of this term is captured by Hancher and Moran when they refer to culture as the "rules of the regulatory game" (1989, p. 4). Like these authors, I use the term culture to "signal an interest in the recurrent tension between common structural forces" (p. 277). It is the recognition of this variation between settings which is at the root of my thesis, which examines the legal approach to tenure in Canadian universities through an investigation of tenure protections at Carleton University in Ottawa, Ontario. I intend to extend my focus beyond the rationality of means, the legitimacy of ends, and the guarantee of rights and focus on how conflicts arising from tenure refusal are resolved by Carleton University and the courts. This commitment will make possible a more sensitive and better understanding of the harms, benefits, and complexity of tenure in contemporary Canadian society.

To this end I will examine the following five questions;

1. How have academic freedom and tenure developed historically?
2. How has the law developed in Canada in the area of faculty-institutional relationships with regard to tenure award ?
3. Under what circumstances have the courts intervened in conflicts arising out of the denial of tenure?
4. What are the culture, climate, regulations, and operating procedures involved in the tenure decision-making process at Carleton University.
5. How does the collective agreement and institutional policies at Carleton University provide protections for disappointed candidates for tenure?

Chapter One: The Relationship Between Academic Freedom and Tenure

I. Defining Academic Freedom and Tenure

Scholars in Canadian universities are said to enjoy academic freedom in their professional lives. Yet, as it is unclear precisely what this statement entails, the term academic freedom is subject to widely variant usage. Some writers apply it loosely to all forms of protection for speech, research, and teaching at institutions of higher learning (Savage, 1995). Others define it as "the right of each individual member of the faculty of an institution to enjoy the freedom to study, to inquire, to speak his or her own mind, to communicate ideas, and to assert the truth as he or she sees it." (Fellman, 1973, p.9).

Tenure developed as a protection for academics against the fettering of church and state in their teaching and research. Hence, academic freedom was the original target for the developing of tenure. Tenure and academic freedom have been historically tied to each other and tenure has been the primary protection for the academic freedom of faculty at universities. In order to protect academic freedom, faculty members who are judged as being competent by their peers are granted continuous tenure. Tenure ensures that the faculty's service is only terminated for adequate cause, financial exigency, or redundancy. This means that tenure does not provide an absolute protection against dismissal.

Organizations representing academics in the United States were responsible for the initial policy development of academic freedom and tenure in North America. The most prominent of these organizations, the American Association of University Professors (AAUP) defined academic freedom as comprised of four essential rights:

1. the right to teach without adherence to any prescribed doctrine
2. the right to research without reference to prescribed doctrine
3. the right to publish the results of one's research
4. the right to criticize the government of the day, or the administration of one's institution.(American Association of University Professors, 1940)

Although the Canadian conception of academic freedom academic freedom is founded on the AAUP principles and draws heavily on American traditions, the Canadian Association of University Teachers (CAUT) created principles distinct from its American counterpart:

> Academic freedom is the freedom enjoyed by the academic staff to teach and conduct research without hindrance from persons or groups inside or outside the university. Academic freedom and tenure exist in order that society will have the benefit of honest judgment and independent criticism which might be withheld because of fear of offending a dominant social group or transient social attitude. Academic freedom is not, however, absolute any more than the freedom enjoyed by other citizens in a democracy is absolute. It must be exercised with responsibility and appropriate restraint. (Canadian Association of University Teachers, 1988, p. 3-1)

Carleton University defines academic freedom in the collective agreement as:

> (a) freedom in carrying out research and in publishing the results thereof,
> (b) freedom in carrying out teaching and in discussing his/her subject and,
> (c) freedom from institutional censorship
>
> Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for truth. (Carleton University, 1997, Article 4).

Within this framework, tenure developed out of the perception of a need for a prophylactic against challenges to speech related to academics' area of expertise. (Horn,

1975). However, a lack of a national standard or definition of tenure and academic freedom has created a situation where there are different types of protection from one university to another. Such protections depend on the vehicle for protection whether it be through tenure or by the collective agreement.

The Canadian Association of University Teachers (CAUT) defines tenure as:

> the category of continuing, permanent appointment held by a member of the academic staff following successful completion of a probationary period. The word tenure implies that the appointment can be terminated (i.e. the member can be dismissed or laid off) only for appropriate reasons by procedures which ensure fairness. (CAUT Policy University Tenure Appointments and Their Purpose, 1991, p. 3-2)

"Appropriate reasons" and "procedures which ensure fairness" are general terms that are left to the individual institution to define and warrant closer scrutiny. The lack of a clear definition creates a flexibility that allows universities to address the specific facts of each case. Policy implementation is a complex and difficult task. In reporting on the language and philosophy of policy implementation, the Law Reform Commission of Canada found that implementation of policy does not necessarily follow policy statements (1986, p.10). The flexibility versus clarity dilemma highlights two important aspects of developing policies and procedures with regard to academic employment. First, implementation of policy may be different from the stated or normative policy. Secondly, the written procedures may not adequately describe the real policy. This can have detrimental consequences for the university, or the faculty member. The relation between the written procedures and the process in action is a difficult one. On the one hand,

clearly defining the process creates consistency and reduces discrimination. On the other hand, a clearly defined process reduces the flexibility for administrators and committees who may need to react to new circumstances.

Ross argues that the CAUT policy statement on academic freedom and tenure is clear but he points out that investigations, findings, and recommendations by the CAUT have no legal authority. He explains that the CAUT has the tool of censure, but in many cases it is ignored by offending universities. In any case, he argues that some of the CAUT reports are biased in favor of the needs of tenured faculty members and lack clarity. Ross is concerned with the question of whether there are areas of inquiry that should be placed off limits (1976). In spite of Ross's skepticism, this policy statement has become very important for the development of tenure in Canada in the last twenty years. Several faculty associations have used it to develop their contractual agreements with universities and an arbitrator in the *Kane Case* (1980) has ruled that where there was no definition of academic freedom, the definition of the CAUT would be used by the tribunal (Savage, 1994).

The resounding message seems to be that academic freedom is pivotal and critical to an academic. However, there is not a consensus on how much freedom, or what kind of freedoms should be included under the auspices of academic freedom. On one end of the continuum it could include the freedom to do anything within the law, on the other end it would be nothing more than the freedom to be dismissed only with adequate cause. Tenure has historically been important in determining which end of the continuum

academic freedom lies. Since tenure was the primary vehicle for protection for academic freedom, the institutional policies and practices concerning academic freedom and tenure were key in determining whether faculty would enjoy protection in each case.

II. The American Experience

The investigation of academic freedom and tenure has also largely been concerned with exploring and understanding the tension in an American context, and has generated a large amount of literature. Yet this literature is marked by a number of limiting features. Academic freedom in the United States has protections that are rooted in the American Constitution. The United States Supreme Court discussed academic freedom in *Sweezy* v. *New Hampshire* (1965) where Chief Justice Warren says:

> the essentiality of freedom in the community of American universities is almost self evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our nation. Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die (p. 250).

Quoting this paragraph, the Supreme Court in *Keyshian* v. *Board of Regents* (1967) declared that academic freedom is a "special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom" (p. 589). This development is very different from the approach by the Canadian courts where the *Charter of Rights and Freedoms* has been found not to generally apply to universities. However, this does not mean that academic freedom goes unprotected in Canada. Tenure

and the associated processes for the granting and removal of tenure have traditionally been the main line of defense for academics.

III. Criticisms of Tenure

Inevitably, tenure has become the focus of criticism of the academic community. Critics argue that tenure creates a barrier to sanctioning inappropriate behavior or dismissing incompetent faculty members. On the other hand, writers like Lynn Campbell have argued that although tenure creates artificial and arbitrary distinctions between faculty members, it provides an opportunity for a rite of passage into a permanent university appointment (1988, p. 394). Campbell's concerns are echoed by increasing public concern that tenure is merely a mask for professors making demands for job security. This is occurring at a time when many traditionally secure positions have been redefined. The Worth Commission in Alberta criticized tenure and pointed out the distinct divide between the concepts of tenure and academic freedom in its report, *A Choice of Futures*:

> unlike academic freedom, tenure is not crucial to the idea of the university, it is an individual privilege. It is also difficult to view tenure as any great benefactor of the learning transaction-tenure is a recognition and a reward of advanced professionalism. As such, it helps to perpetuate the idolatry of conventional subject matter, scholarly respectability, and the institutional mode of program operation. Indeed, cynics might say that tenure is a life-time guarantee against having to respond to learners' needs. Consequently, the Commission recommends that tenure be abolished and that it be replaced by limited term renewable appointments (1972, p. 250).

In recent years these challenges to the need for tenure emphasize the growing pressure on Canadian universities to change their structures so that they more closely

reflect the norms in society. This suggests two important consequences. First, the public misperception on the absolute nature of tenure as a protection for academic freedom encourages us to search for an accurate definition that may be conveyed to the public. One which emphasizes the responsibility of tenure and which clearly communicates that faculty members can be dismissed for adequate cause. Secondly, the public should be informed on the rationale for academic freedom. We should make them aware of the benefits of academic freedom so that they can make an informed choice about the significance of tenure.

The legal, practical, and ideological consequences of tenure as a protection for academic freedom in North America have been vigorously debated over the past three decades. To a striking extent, the resurgence of the debate over academic freedom paralleled the original development of academic freedom a century earlier. Both movements were in part the outgrowth of a reaction to the established social thought that laid the groundwork for challenges to the status quo. Such responses were also fostered by a climate of general social reform. The involvement of the university communities in twentieth-century civil rights campaigns not only inspired egalitarian demands, but also provided experiences of attempts to limit the freedoms claimed by academics that encouraged the sentiments of supporters for academic freedom. In spite of the historical foundation of tenure as protection for academic freedom, Campbell argues that it has become "a code-word for employment security" (Campbell, 1981, p. 366). Regardless of whether it is seen as a form of job security for individual professors or as a more noble

protection that keeps society in check by challenging the status quo, the traditionally isolated academic in the ivory tower has been further isolated. Increased hostility has developed by the general public toward the perception of job security that academics have upon achieving tenure, even though they have no greater job security than any other unionized employee. This hostility filters back to the academics and subtly adds to their isolation. The political process is guided by perception as well as reality. Thus the cultural distance between the ivory tower and the masses lies as much in the social assessment of what it is that academics do, as what they actually do. Understandably then, academics have had to become defensive in support of tenure.

Tenure has incited considerable debate about the problem of the retention of incompetent teachers or researchers and the abuse of power by holders of this privileged position. For this reason the public has been generally unconcerned with the plight of a disappointed tenurial candidate. Public misperception may be one of the greatest challenges to the security of tenure in academia. The misunderstanding seems to fall into two parts:

> 1) an impression that the average university teacher doesn't work very hard during the academic year, and then does nothing at all for a long spring and summer holiday, and
>
> 2) the belief that in his "spare time" the professor does research which in most cases is of little direct benefit either to his students or to society at large (Trotter, McQueen & Hansen, 1972, p. 1).

In actuality, the professoriate appears to be busy at work. In a 1987 study by Lennards (1987) of the professoriate across Canada, the average professor produces one or two

books as a single author, two books as a joint author, thirty scholarly chapters, thirteen published reports and two patentable inventions over a professor's academic career. Lennards points out that the typical list of professorial duties includes at a minimum 1) scheduled classes such as lectures, seminars, labs; 2) unscheduled tutorials, review sessions; 3) individual counseling related to specific courses; 4) graduate student thesis supervision; 5) research; 6) other scholarly work and study; 7) administration including services to students not related to specific courses, departmental administration, faculty administration; 8) inter-university administration, and; 9) service to the discipline (professional societies).

Who benefits from leveling attacks on this profession? The group with the most to gain would appear at first glance to be those in political power. On this basis, it is not difficult to understand why former Deputy Minister of Colleges and Universities, Bernard Shapiro (1993), challenged tenure on the basis that individuals' capacity to contribute to their field of inquiry will vary over time, and therefore the paying public has a right to have the performance of tenured faculty reviewed periodically. It would seem that the political party in power could gain considerable influence over an academic who is responsible to the paying public.

Although tenure has been the professorial vehicle for academic freedom and has received almost universal acceptance, Over thirty years ago Soberman (1965) argued that a university administrator may use strategies other than the interference with tenure to affect the freedom of academics. Although some of Soberman's concerns have been

addressed through policy development and collective agreements at individual institutions, others have not. Administrators can still make it difficult to obtain funds for research purposes and hire help. They may prevent the professor from teaching courses in his or her field of specialization, or force him or her to teach only introductory courses. These more subtle threats are difficult barrier for a faculty member who is inexperienced in the loosely structured university political system. Carleton faculty have bargained for protections from such abuses in their collective agreement. Therefore, we can see that faculty unions and associations can protect academic freedom and tenure through collective bargaining and individual representation. These unions will quickly recognize when an administrator has done something that is "out of the ordinary" and not within the university custom.

IV. The Need for Tenure

In spite of growing public concern, virtually all universities in Canada and the United States have systems which provide for granting of tenure to duly appointed teaching staff on a continuing full-time appointment. Stephen Waddams (1993) has suggested that the principal purpose of this appointment is to encourage original thought and research by professional scholars. Aside from the way in which tenure tends to protect academic freedom, it is important to scholars for other reasons (Campbell, 1981). It represents the academic's acceptance by peers into a professional guild, it provides job security, and it rewards individual service and accomplishment. It also provides economic security to make the academic profession attractive to people with ability. Economic

security may contribute to institutional stability by establishing a long term commitment from faculty to the institution.

Waddams (1993) argues that tenure helps the universities move towards their goal of fostering original research by questioning the wisdom of the past, and exposing innovative research that may be initially unrecognized. However, since both faculty members and universities may be considered to have forms of academic freedom, the question becomes: Is the purpose of tenure to protect the academic freedom of the institution or the faculty member? The *Ontario Council on University Affairs Task Force on Resource Allocation* (1995) summarized the arguments for and against a distinction between the protection of academic freedom by tenure and university autonomy. The report concludes that the academic enjoys academic freedom and the university enjoys institutional autonomy. The problem with this report is that the arguments for institutional academic freedom are drawn from examples from the U.K. and therefore not directly applicable to the forms of governance existent in Canada.

V. Tenure and Inclusivity

Much rhetoric has assumed that tenure entails an absolute right to protected speech in the academic's area of expertise. Bernice Schrank offers an impassioned criticism of that ideology but remains a supporter of academic freedom. She explains that "an adherence to the principles of academic freedom does not always translate into the kinds of practices that ensure its success" (1994, p. 8). She offers the argument that professors may have difficulty in publishing unorthodox or unpopular theories as an

example. She defines inclusivity as a concept that involves "increasing diversity, openness, and tolerance within the university in relation to the curriculum and to the academic work environment" (1994, p. 9). Schrank focuses on the relationship between academic freedom and "inclusivity" and suggests that they are mutually reinforcing concepts, and that restrictions against speech are effectively enforced only on the groups these codes are aimed at protecting: the weak, the vulnerable and the marginal. Thus, she argues that the protection of tenure comes with corresponding responsibilities to ensure that diversity and tolerance are supported through research and speech. I would argue that in some cases tenure is conditional on the adherence to institutional rules and standards that protect these vulnerable groups from the abuses of academic freedom in situations where the rules afford reasonable protections. Some collective agreements may even refer to harassment or discrimination policies (University of Victoria, 1995, Article 4.02). The fact that the security of an academic's employment is qualified protects the climate and culture at the institution. If allegations are made that an individual has violated these institutional rules and standards, then the faculty member will have support from a union representative who has experience operating in the informal and fluid culture typically existent in the university. This protection demonstrates how the collective agreement can meet the unique institutional needs at specific universities.

In the Fall of 1993 the Government of Ontario announced some guidelines on anti-harassment and anti-discrimination to encourage greater representation of traditionally underrepresented groups in colleges and universities. The Minister of Education requested

that universities use the *Framework Regarding the Prevention of Harassment and Discrimination in Ontario Universities* as a guide for either updating existing, or formulating new, anti-discrimination and anti-harassment policies and procedures. The purpose of the *Framework* was to encourage and assist institutions in creating environments that are free of harassment and discrimination. In response to the *Framework*, a group of university professors in Ontario signed a petition which came to be known as the "The Right to Offend" document. This document represents the views of those who argue for unrestricted academic freedom. It argues that the regulation of any expression contravenes the principle of free expression and stifles debate. The Right to Offend Document seems to have lost sight of the fact that if tenure is to protect academic freedom, there may have to be qualifications to this protection. The University of Victoria has recognized the importance of this connection in their collective agreement (University of Victoria, 1995, Article 4.02). In theory, freedom of expression is a liberating principle; however in reality, the courts and politicians in Canada have realized that freedom of expression for one group may create harmful consequences for another (Salhany, 1986).

VI. Limits on Tenure

It would appear in reality that there are limits to tenure protections. Although tenure is not indifferent to the circumstances, a university administrator at Carleton University claims that in most circumstances the university will first offer the opportunity to resign prior to engaging in a formal inquiry into the tenure of a professor

(McEown, 1996). Therefore, public concerns about tenure offering unreasonable protections may have a foundation in reality. Although serious education must assume a critical and sometimes radical approach toward the society in which it exists there are limits to what society will accept in the process of criticism. I am not arguing that every act for or against the behavior of academics is or should be regarded as an interpretive act on the necessity of tenure. I am saying that once we grant intellectuals special rights in society we need to ensure that the status has clear qualifications.

VII. The Constitution

Law is the construction of boundaries which are always over- and under-inclusive. Context, history, identity, audience, relationship, and motive can invert the intentional quality of speech. From a constitutional perspective, the protection of tenure for academic freedom may be perceived as a part of the constitutionally guaranteed fundamental freedoms in 2(b) of the *Canadian Charter of Rights and Freedoms*, i.e. "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." However, academic freedom antedates freedom of speech by centuries, and its development has been separate and independent. Therefore, academic freedom is not a constitutionally protected right in Canada. Infringements on tenure can only be protected when discrimination is an issue, or by appealing to courts or tribunals for review when collective agreement or contractual relations are involved.

The Supreme Court rulings in a trilogy of cases in 1990 clarified that the *Charter* does not apply to Canadian universities. In *McKinney, Harrison, and Stoffman,* the

Supreme Court found that since universities are legally and operationally independent from provincial government they are not subject to the *Charter*.

VIII. Freedom of Speech and Tenure

A professor's work is based on the foundation of thought and speech. Professors need a guarantee that they will not be punished by the state or the institution for the expression of the results of their inquiry. Tenure and collective agreements provide protection against administrative sanctions. The threat of dismissal destroys the possibility for continued employment in other institutions. If a professor has to leave the profession, this individual can no longer effectively challenge other ideologies or defend unpopular thoughts. Colleagues, both in the original institution and elsewhere, will observe the consequences for writing and thinking, and in certain ways will be less likely to threaten their job security by either supporting the dismissed professor's arguments or challenging the status quo.

A recent Canadian incident involving a faculty member at the University of Western Ontario, Professor Philippe Rushton, shows the difficulty that we may have confidently applying protections to academic freedom. The Premier of Ontario demanded that Rushton be terminated on the basis of public claims Rushton made about differences between races. Rushton performed studies on the size of brain cavities and IQs of blacks, whites, and Asians. He concluded that there were significant differences between the races. The University President defended Rushton's right to make public statements that genetic science supported the intellectual inferiority of blacks to whites and Asians. Even

the London City Council became involved and censured the university for Rushton's actions. Although Western did not have a collective agreement, Rushton was protected by having academic freedom protections in the policies at the university. This was key to Rushton escaping the potential consequences. An essential strand of academic freedom is that academics should not be penalized within the university because of what they say in their area of expertise within the university. This case example goes a long way in demonstrating how important academic freedom is to faculty members and how collective agreements can work to maintain this freedom. Rushton knew that he could speak with the backing of job security.

Most academics are guided by deeply held ideologies that frequently conflict with those held by others. The focal question is how to harness the potential of the diversity in these intellectual pursuits without curbing academic freedom by making decisions whether something is politically acceptable or not. It would be a very dangerous move to attempt to restrict the expression of these individuals. It is better to be aware of their arguments and engage in public academic debate by constructing cogent arguments based on factual premises. The creation of restrictions on speech may mean less protection in the future for those who create the restrictions if the trend of the revival of religious and political right wing movements in North America continues. Therefore, I would argue that we need significant protections for faculty members who engage in research approved by university ethics committees, even when we find it politically offensive. Who will be there to defend the rights of untenured faculty who managed to create politically sensitive

situations for the university? The faculty union would appear to be in the best position to advocate on their behalf during the unfolding of a crisis and later on when the crisis is rehashed during a tenure review committee.

Authors like Derrick Bell (1993) have recommended that we create regulations and policies that restrict academic freedom. His recommendations resemble the practice of tenure in Canada, where in some institutions tenure protection is subject to the policies of the institution. For example, at the University of Victoria (1995/98), Article 4.02 states:

> The University and the Association share a mutual desire to prevent harassment in the workplace. "Harassment" shall include conduct in the forms listed in the University's Harassment Policy. That policy shall not be altered without consultation with the Association. Harassment does not include actions occasioned through the exercise, in good faith, of the University's managerial/supervisory rights and responsibilities.

Bell supports the idea that sexual and racial harassment and discrimination policies, and codes of conduct should serve as boundaries to academic freedom. He warns that the creation of regulatory frameworks to control tenured faculty members may serve only to support the dominant thought then in fashion. A recent example of this is the climate of political correctness of the early 1990s which created a chilling effect on speech by faculty. Building from Bell's argument, what we need are more clearly articulated limits to job protection for academics. Yet many institutions like Carleton University use "adequate cause" as determined by the President as the official limit (Carleton, Appendix A (C2), 1991/94).

IX. The Peer Review Process

Although theoretically all academics have the right to academic freedom, the dynamics of politics and interpersonal relations result in less protection of academic freedom for professors until they have been granted tenure through the peer review process. Candidates may be evaluated in light of student evaluations and complaints or peer concerns. After several years of preliminary appointments, a professor is reviewed by a set of peers, usually members of the department or faculty. During this probationary period the individual's teaching ability, scholarly promise, and diligence are reviewed. Campbell (1981) identifies four considerations which are taken into account for granting tenure:

1. *teaching*
2. *research*
3. *academic qualifications*
4. *service to the university community*

These criteria are equally complex in their application to the final decision-making process. There appears to be no set weighting of the criteria, and they serve only as a general guideline.

It makes sense that academics are judged by their peers. For academic freedom to function in universities, it is essential that teachers not be judged solely by outsiders. Outsiders like the government, the church, or corporate donors all of whom would tend to impede questioning, experimentation and expression of opposition to the status quo. Rather, I agree that scholars should be judged on their professional competence alone. However, the concept has emerged that only a professor's peer group should judge his or

her professional competence. A peer review system has evolved wherein the evaluation of a scholar's academic competence is carried out by qualified insiders before the university grants tenure. This notion, which was enunciated in the *American Academy of University Professors 1940 Statement of Principles*, has been endorsed by virtually every major university in the United States and Canada. Within this peer review system, it is expected that the individual scholar has freedom to research, question, and conclude as he or she pleases and be judged only on the grounds of professional competence. The problem is determining what is competence and how it will be measured.

Tenurial decision-making can be easily compared to the decision-making procedure accompanying admission to the Bar. Both decisions have a significant impact on the income potential of the individual. However, universities have developed specialized procedures particular to each institution for peers to evaluate tenurial candidates. The peer review process at Carleton University typifies the process at other Canadian Universities. It begins with a determination of the academic department making a recommendation which is then submitted to a Departmental Review Committee. This Review Committee then makes a recommendation to the Faculty Committee. The Faculty Committee has the candidate's dossier assessed by three external referees and after consideration of the candidate's file, a recommendation to award or deny tenure is made. A copy of this recommendation is made available to the candidate and the university President. If the decision is not to award tenure and the candidate appeals the decision, it is then reviewed by an Appeal Committee. Each committee in the process prepares a

candidate record which is essentially a copy of all documents submitted to the committee. At Carleton University the review is conducted *in camera*. This means that should a decision be appealed to a court, investigation of the substantive decision-making process may be impeded since it is difficult to capture all of the words and context within the discussion that may have taken place in evaluating the candidate. A process that has no formal record in the most important first decision invites protection, and it appears that such protections have been instituted through collective agreements.

In addition to these formal criteria the concept of collegiality may affect the way in which the candidate is perceived and evaluated. Collegiality is generally referred to as the ability of the individual to form adaptive relationships with peers in the organizing unit. Sim warns that:

> Academic colleagues now have the power to recommend (by arguments more or less persuasive) that a colleague be denied tenure whose only fault may be that he or she is unpopular or whose approach to the discipline has fallen out of favour. The evaluation of academic performance is, after all, an inexact process an it is easy to allow inappropriate criteria to tip the balance one way or the other when the application of objective criteria make a recommendation difficult. Once a recommendation has been made the members of the initiating committee have a vested interest in defending it validity. Only when there is an opportunity to review the substance of a recommendation is it possible to determine whether there has been bias or discrimination. Even then this may be difficult to do. Fortunately arbitrators have been prepared to consider the substance of cases, including tenure cases, and to reverse unfavourable decisions when they find cause to do so (1982, p. 83).

Sim argues that the relationship between the four formal and one informal criteria and the granting of tenure is a real one, and the light that they can shed on the final decision may

be quite illuminating. These criteria may become distinguishing features in which each one draws attention to itself. The final decision may not be the sum of all of the parts, but a response to the synergy among them. Arbitration may be the most effective process for dealing with the elusive concept of collegiality.

It seems that there are obstacles to developing a review procedure that would work. Campbell (1985) reports that teaching ability can be a very subjective factor to assess. He points out that student and peer evaluations of teaching ability may have ethnic or racial biases and therefore support each other. Often there is no consensus on what counts as outstanding scholarship. At least peer review has the appearance of fairness. Sim argues that academic freedom is defined by the times and the circumstances (1982, p. 95). If he is correct, then the way that evaluations are interpreted may also be affected by the times and circumstances. It will be up to the appeal committees and arbitrators to ensure that the circumstances do not include discrimination.

Tenure is similar to the employment relationship enjoyed by unionized members of the workforce. It is not absolute, but provides protections against malicious, arbitrary, and capricious behavior towards faculty members. Although tenure and academic freedom have been distinguished in collective agreements. However, tenure has become directly connected to academic freedom through two separate clauses in collective agreements which have become the thread which joins these two concepts and collective bargaining has forced the universities and faculties to think more closely about how faculty should be protected in their research, inquiry, and expression.

Chapter Two: Historical Origins

I. The Early Years

It is essential that we look at the protection of academic freedom in its historical context if we are to understand the continuing significance of tenure. We need to understand how and why tenure has been repeatedly challenged and how it has been perceived as being necessary to make possible the production of truth discourses at institutions of higher learning.

Claims to freedom of thought can be traced back to Socrates in ancient Greece (Metzger, 1973). However, the concept of institutional academic freedom to pursue unpopular theories dates back to the eleventh century in Western Europe (Metzger, 1973). Teaching at institutions of higher learning has always been an occupation that heads of state and church see as a significant resource or, in some contexts, a threat. Academic freedom was recognized in Europe as early as 1158, when Frederick Barbarossa promised protection for the academics in the Schools of Bologna in his proclamation *(Authentica Habita).* He promised physical security in their travels, protection against their enemies, and compensation for unlawful injury. Other state and church rulers followed this example and promised physical protection for academics in their jurisdictions. Economic protection soon developed as an important part of this benefit for scholars. Church leaders awarded important positions to clerical academics and allowed them to hold office for long periods in abstentia. Scholars were additionally compensated through student fees, endowments, and academic salaries. French and English monarchs

extended these benefits to include the right not to serve in the military, and the right not to pay taxes. City councils offered relief from tolls and duties, good housing at fair prices and even protection against "disturbing noises and distressing smells" (Metzger, 1973, p. 97). Although these medieval scholars enjoyed special freedoms that did not apply to others in society at the time, the church and state retained the right to remove these protections. Almost every eighteenth and nineteenth century college and university had a religious purpose and the dominance of the church ensured that the free expression of ideas depended on the conformity to religious ideals from the fifteenth to nineteenth centuries (Metzger, 1973).

Later a conflict developed at the University of Paris that would change the concept of academic freedom. The schools were staffed with academics who had a strong dedication to Catholic faith. Most importantly, these academics were expected to engage in research and promote ideas that reflected the assumptions of the Catholic Church. This meant that the academic staff were expected to swear oaths of loyalty to heirarchs in the church, and thus could only teach the doctrine being promoted by those in power (Manne, 1993). The chancellor at the church was responsible for awarding a necessary license to lecture and only awarded this valuable opportunity to those of whom he approved. If the chancellor did not approve of the behavior of any academic, the position of chancellor had authority to revoke a faculty member's license to lecture. After several appeals from the academics at these institutions, the Pope proclaimed a decree that chancellors could only award the license to lecture to persons certified by the faculty, and

that the oath of allegiance had to be sworn to the university rather than to individuals. The power of revocation by church officials was eventually removed (Metzger, 1973). The university faculty were on their way to increasing their autonomy from the operation of the church by increasing the jurisdictional control of the university courts. They effectively played the state against the church, and local clerical rulers against distant potentates (Metzger, 1973). According to Walter Metzger, tenure as protection for academic freedom in these medieval universities eventually developed into a "declaration of opposition to any academic sanction from any non-academic source" (1973, p. 101). There were, however, no protections from within. Every faculty swore allegiance to universities that had common rules, detailed regulation, and strong religious affiliations. Expulsion was used to punish refusals to join in a strike, failing to protect university secrets, and adherence to fallacious dogma. Therefore, university officials gradually gained control over the teaching content at universities (Ross, 1976, p. 192).

Faculty were eventually successful in being recognized as a corporate body, which enabled them to avoid jurisdiction in many criminal and legal actions (Metzger, 1973). In spite of this corporate identity, teaching and governing became dissociated in the 1600s. A consequence of this development was that the relationship between the university and the faculty became contractual. This contractual relationship implied that there was an agreement that resulted in obligations which are enforceable and recognized by law (Treitel, 1987). The contractual nature of the corporate faculty relationship changed the concept of academic freedom from that of economic and physical protection, to

protections based on the contractual dimension of time. Therefore, the concept of entering into the contractual agreement suggests that there is a beginning and end to the relationship at some point in time.

The first time that term appointments were established in North American universities was in 1716 when Harvard University decided that all faculty would be appointed for "no longer than three years" on a renewable basis. Prior to 1696 university fellows were tenured for life. In 1696 proposals were made to reduce tenure at Harvard to ten years and in 1697 to seven years. This policy was changed in 1860 when Harvard "increased the tutorial appointment to a maximum of eight years" (Metzger, 1973, p. 119). In the mid-eighteenth century Harvard created a new faculty position of professor which reestablished the protection of tenure. The incumbents for these distinguished positions operated under a different set of assumptions and rules than their tutor counterparts. They were allowed to marry and live off campus, and were appointed to office without limitations on time.

In the eighteenth century the concepts of *Lehrfreiheit*- "the freedom of professors to carry out research, and to publish their findings in the lecture hall, the seminar room or in published form" and *Lernfreiheit*-

> the freedom of students to move from one university to another, taking courses in the order they chose and [attend] class at their pleasure, subject only to a final examination set by the state; and the freedom to live in their own quarters, unsupervised by the university authorities (Horn, 1994, p. 6).

were recognized in Germany as essential for the German universities to "forward research and train researchers" (Metzger, 1955, p.112). However, the concept of *Lehrfreiheit* included a duty of professors to "observe the law of the land and the rules of good taste in academic discussion" (Metzger, 1955, p.112). There was an unstated but well understood obligation to remain politically neutral. Therefore, as Michiel Horn puts it, "German professors enjoyed the freedom boldly to express conventional views" (1994, p. 8).

Darwin's *Origin of the Species* introduced a new chapter in the development of academic freedom, not only by questioning the theoretical assumptions of the church, but also by enunciating the new principles of evolution theory (Metzger, 1955). Evolutionary theorists began to extend their role as academics to strengthen protections of unpopular ideas, the encouragement of questioning of traditional religious assumptions, and a renewed preference for peer review over administrative decision-making (Metzger, 1955). The empowerment of these academics increased the autonomy of the professorial ranks, since in some situations they found that academic freedom could extend beyond what had been established as the status quo of acceptable thought and teaching (Hendrickson, 1990).

II. Tenure Development in Canada

Policy development involving tenure in Canada was rooted in the *1915 Declaration of Principles of the American Association of University Professors*, but since they only adopted the *Lehrfreiheit* component of academic freedom it applied to

professors and not to students or institutions (Metzger, 1988). Metzger explains that the 1915 *Declaration* recognizes that faculty members could be disciplined for talking and writing unprofessionally, just as they could for behaving unprofessionally (Metzger, 1988).

A relatively new tone was identifiable in the 1940 report of the AAUP, *Statement of Principles on Academic Freedom and Tenure*. The revised 1940 document changed the focus of the duty of tenured professors exercising academic freedom. It was added that academics should strive to be accurate, exercise restraint, show respect for others, and make it clear that he or she is not speaking on behalf of the institution (Metzger, 1988).

The formation of the Canadian Association of University Teachers (CAUT) created a counterpart for the AAUP. Although its inception was heavily influenced by its American counterpart, the Canadian association grew out of interest in national rates of salary. After the depression professors found that they could manage well on a relatively low salary, but the post-war inflation eroded their economic position (Savage & Holmes, 1975). This is why only one appeal was recorded in the minutes of the CAUT prior to 1958 on the issue of tenure and academic freedom.

The American *1915 Declaration of Principles of the American Association of University Professors* had a significant influence on the development of tenure in Canada. Note that they did not recommend that tenure be a protection for boundless academic freedom. They explained that "there are no rights, without corresponding duties," and that the scholars' conclusions should be "set forth with dignity, courtesy, and

temperateness of language" (Savage & Holmes, 1975, p. 2).

The legal focus on civil rights in the 1950s and 1960s was crucial to changing the concept of tenure once more (Horn, 1975). The focus of the debate on providing protection for academics turned to I.Q. studies and other research that were said to be potentially dangerous to society, and therefore not subject to investigation. Members of the public complained that the social responsibility that academics were supposed to demonstrate was frequently ignored. Several faculty adopted the strategies of the so-called radicals in the civil rights movement by supporting sit-ins, strikes and other forms of social activism. These equity regulations have been overshadowed by concerns that tenure protections have supported the status quo and prevented the entry of traditionally underrepresented groups into academia.

III. Demographic Changes in the Last Twenty Five Years

There were demographic changes in Canadian society that acted as catalysts for the changes which occurred in Canadian universities. The university degree became a more important social icon representing success and opening doors to economic prosperity (Thistle, 1994). An increasing proportion of the population sought university degrees, and came with increasing expectations of quality. Students and their supporting parents began to arrive on campus with a consumer mentality (Ross, 1976). This translated into increased expectations in the qualifications required for tenure. Likins (1979) argues that this consumerism eventually led to the alteration of the perception of the courts of the university as having a unique role in society. The courts started to see universities as the

provider of services for a fee like other consumer driven services in Canadian society.

Increases in the level of public funding led to the accountability movement of the 1980s and 90s. The assumption of the need for autonomy of universities from interference by the public started to be questioned internally and externally. Public concerns led to two major examinations of universities by the Royal Society (Canada, 1991) and the Smith Commission (Smith, 1991). It is not surprising that the consumer movement, the increased public scrutiny, and the recession of the 1980s led to the increase in collective agreements on campus.

In a historical context, academic freedom was profoundly conservative; academics in Canada held tenure at pleasure. From a contemporary vantage point, certain aspects of the concept have less regressive implications. Tenure is now typically protected in collective agreements between faculty associations and universities, with procedures for grievance and conflict resolution. The historical status of tenure seemed out of place in a society that no longer seemed to support the need for universities as institutions "on a pedestal of 'finer' education"(Devine, 1987, p. 2) as universities began focusing on developing vocational programs.

Canadians in the 1980s also experienced the debate and final passing of the *Canadian Charter of Rights and Freedoms*. Thistle (1994) claims that the *Charter* had a significant impact on attitudes of Canadians which led to expectations of protection for individual rights. Whether or not the *Charter* applies to university decision-makers is not as important as how it has affected the perception of members of the university

community that they will be dealt with in a way that respects the freedoms and rights contained in the *Charter* (Dickinson, 1988).

Universities have become sensitive to the need for the clarification of ethical behavior in research that is perceived as potentially harmful to human subjects or that may invade the privacy of individuals. Universities have also recognized the need to eliminate sexual harassment in society throughout the development of complex procedures for the investigation of allegations of sexual harassment of students by professors. However, most supporters of academic freedom appear to be relatively unconcerned with linking these potential harms directly with tenure. We continue to struggle with the older tradition of tenure as a protection for academic freedom and the need for a new Canadian definition. Even as collective bargaining redefines the legal landscape, it would appear that tenure continues to provide context for the collective agreements. Whether or not universities have organized their academic staff, they continue to use a tenure system. Academic freedom and tenure are usually defined in the collective agreement and the way the collective agreement links these two concepts together will determine how tenure operates in the context of sexual harassment or discrimination. For example the Carleton University Collective Agreement relies on the President finding "adequate cause" (1996, Appendix A, Article C7), yet the University of Victoria Collective Agreement refers to the harassment and discrimination policies (University of Victoria, 1995, Article 4.02).

Claims of financial exigency and declarations of program redundancy may once again fundamentally change the way faculty have interpreted their job security. Many Canadian university contracts contain clauses which generally state that if the university is able to demonstrate financial exigency or program redundancy, the university administration may terminate tenured positions. On the advice of the Carleton University Staff Association executive, faculty traded off new language on program redundancy for other concessions. In response to the recent declaration of program redundancies at Carleton, the President of the Carleton University Staff Association said:

> We were wrong. Had we maintained the financial stringency clauses unaltered, Carleton's administration would have faced a much graver decision in order to proceed with layoffs of tenured staff. Of course, given the extent of the university's financial problems, there is no guarantee that even those clauses would have prevented layoffs. We are obliged to admit that there is merit to the administration's case that targeted, vertical cuts will be less disruptive than the alternative of across-the-board dismissals (and awful publicity) that would follow a declaration of financial stringency. Nevertheless the fact remains that our decision in 1996 made it significantly easier for the administration to bring forward a financial plan that included the dismissal of tenured faculty. (Fitzgerald, 1998, http://198.166.47.4/English/Bulletin/98_jan/bullframe.htm)

The current economic environment facing universities in Canada may be the catalyst required to form a Canadian consensus on what tenure means, and what it is that it is supposed to be protecting. Faculty unions and associations and the collective bargaining grievance process will be put to the test as universities face increased pressure by government cutbacks and public criticism, and universities will restructure and redesign their administrative and academic frameworks.

Chapter Three: The Role of the Courts

I. Trends

The developments in Europe and at the newly developing academic institutions in the United States provided a foundation on which academic freedom in Canada was based. It is important to recognize that the academic freedom associated with the protection of tenure developed through a different process in England, Canada, and the United States. While Canadian academic institutions have imported the idea of tenure from their European and American counterparts, it becomes meaningless if this protection is not supported by the courts. Therefore, legal protection for academic freedom is a necessary but not sufficient requirement for its operation.

Dismissal or threat of dismissal has historically been a method of controlling teachers who speak out on controversial or politically sensitive issues. In reality, the history of academic freedom in Canada reveals several incidents that serve as indicators that tenure has not protected the academic freedom of faculty members. Contrary to public perception, a considerable amount of institutional interference has taken place. Courts have been reluctant to establish a definition, preferring instead to focus on whether the process followed the principles of natural justice. Only recently have the courts started to develop the legal principles that will allow tenure to provide protection from institutional interference (Gillespie & Blight, 1996).

Law is an important social text, which illumines and influences the cultural construction of tenure. In spite of several predictions by academics, there has not been an

opening of the floodgate of cases from members of the university community to the courts. As early as 1975, Whyte warned university administrators that a growth in the number of cases where the courts applied natural justice principles would affect the way in which they went about making decisions. In 1985 Lewis concluded that the courts were paying closer attention to the process of decision-making at universities. In 1989 Baker noted that Canadian courts "are reluctant to consider or rule on university affairs, and few students or faculty turned to the courts for the redress of alleged wrongs" (p. 939). To demonstrate the increasing significance of law in the administration of universities he pointed out the development of the position of Associate Director and Legal Counsel at the Association of Universities and Colleges of Canada, and the increasing tendency of universities to appoint in-house counsel. The development of this position was not in direct response to tenure and academic freedom issues, but demonstrates that universities were more concerned with the way in which they handled legal affairs in general. Although the position no longer exists at the AUCC, Baker claimed that the increasing encroachment of law into the administration of universities was fueled by the development of the administrative law concepts of natural justice and due process. A year later, Devine (1990) observed that the tradition of judicial deference to academic decision-makers was starting to change, and Hennessey (1991) predicted that there would be increasing intervention by the courts in the operation of universities. This prediction has not been realized, and there have only been a handful of cases where the courts have reviewed the decisions of universities on issues of tenure. This may be due to the

development of a parallel alternative dispute resolution mechanism through the collective agreement. Faculty members now have access to a legal procedure within the university as well as access to the courts. It could also be due to reluctance on the part of faculty to turn to the courts based on the signals that the courts have sent that they will generally defer to university decision-makers.

II. The Early Cases

The Canadian courts have been historically inconsistent in supporting the protection of tenure. The earliest recorded Canadian case involving the dismissal of a professor involves the 1861 case of *Ex parte Jacob* (1861) at the University of New Brunswick. Most professors in Canada held office during pleasure of the governing body of the university. The Supreme Court of New Brunswick said that the university Senate could remove any of the professors without any formal proceedings. Later, in the *Wilson* case (1885), a tenured faculty member was dismissed at King's College in Nova Scotia in 1885, and the Nova Scotia Supreme Court held that the professor was entitled to a hearing and to benefit of the rules of natural justice prior to dismissal. However, in 1920 the Saskatchewan Appeal Court followed the pleasure principle previously enunciated in *Jacob*, in *Re The University of Saskatchewan and Maclaurin* (1920), but added that the Visitor, a now outdated function, could interfere with the dismissal decision if discretion was practiced in an oppressive manner or from corrupt or indirect motives. The Visitor derives from the old European institutions. Anyone who sought assistance from outside courts was likely to be expelled. The university Rector was a member of the clergy and

took on the role of the Visitor. This role could not be delegated. Where it was created by statute, the position was ultimately responsible for the internal operation of the university. Many Canadian university Acts originally incorporated this position. There visitorial powers were within exclusive jurisdiction of the university Visitor and therefore *ultra vires* of the courts. In *Maclaurin* (1920), the court conceded that decisions internal to the university are subject to judicial review where the law is violated or where the principles of natural justice or fairness are not respected, except in exceptional cases. However, they did not provide guidance as to what these exceptions might be. Two years later Dysart J. supported the pleasure principle, in the case of *Smith* v. *Wesley College* (1923). He recognized that faculty employment should have a character of stability approaching permanence.

The University of Toronto forced a faculty member to retire at the age of sixty-eight in the *Craig* v. *the Governors of University of Toronto* (1923). Craig argued that a full professorship should translate into an "appointment for life, subject only to the appointee's good behavior and his ability to perform his duties efficiently" (p. 319). The Court responded by pointing out that if it were a contract for an appointment for life it must be mutual. Such a mutual contract not time limited would mean that faculty could not accept other positions without the consent of the employer university without committing a breach of contract. Craig claimed that appointments for life had become a customary practice at universities. However, the Court determined that since the Board's statutory powers originated from the *University Act* (1914) which stated that faculty held

tenure at the pleasure of the Board, any custom that might have developed was nullified and the Board had legal authority to terminate the employment of a faculty member with reasonable notice.

Two important Canadian cases involving academic freedom and tenure arose between the early 1930s and 1960. The first involved Frank Underhill who spoke out against the Ontario mining corporations. Underhill was in serious trouble because of his ties to socialism and his British loyalty was in doubt. His troubles were related to the central role he played in the organization of the League for Social Construction, a socialist group dedicated to reforming Canadian Society and his public criticism of the government. Underhill also publicly criticized Sir Edward Beatty, then president of the Canadian Pacific Railway. Underhill accused him of being a "traffic cop" (Francis, 1976, p. 5). This enterprise was one of the important financial contributors to the University of Toronto during this time. A Committee appointed by the Board of Governors threatened to fire Underhill if he did not resign. In commenting on this case, Michiel Horn points out that:

> Professors did not become noticeably more outspoken in the two decades following Underhill's well publicized troubles in 1939-41. His difficulties in fact may have deterred others from claiming the full extent of academic freedom (1981, p.3).

Therefore, according to Horn, this well publicized incident at the university of Toronto may have slowed down the development of academic freedom in practice at Canadian universities. Although the eventual decision of the Board not to take action against

Underhill was seen as a victory for tenure, it did not result in a consistent definition of tenure in Canada.

The second case involved Professor Harry Crowe who was publicly critical of the university administration and Board of Regents at United College. (Savage & Holmes, 1975). The CAUT investigated the dismissal of Crowe in 1958 and found that he had "been a victim of injustice, violative of academic freedom and tenure" (Savage & Holmes, 1975, p. 208). The central issue was that Crowe was involved in the formation of a delegation to the university Board of Regents to protest the diversion of money from a public fund to improve faculty salaries to the "cosmetic flourishes of the administration" (p.209). A letter he had written to a colleague, in which he attacked the attempts of the board to force faculty to contribute to the building fund, and in which he had made some derogatory comments about the management, was forwarded to the president. Crowe was terminated and reinstated during public debate over the employment contract and the intrusiveness of the university's actions. This case involved the first CAUT investigation of such a grievance. The extensive media coverage of the issue forced many Canadian academics to think about the meaning of academic freedom and tenure, and eventually led the CAUT to make policy statements on academic freedom.

III. Judicial Review

Judicial review is the power of a superior court to review the decisions of an inferior court or tribunal to ensure the their decision was properly made. According to

Jones and de Villars (1994) "the superior courts have the inherent power to review the legality of administrative actions. As a result, there is considerable judicial review of administration action in Canada" (p. 6). However, judicial review is limited to the determination of whether an administrator acted within the powers designated under the applicable legislation (Jones & de Villars, 1994). The courts have no jurisdiction to determine whether or not the right decision was made.

Campbell (1983) points out the importance of judicial review of tenure decisions based on the recognition of the public character in the employment of a professor and concludes that the decision of the Court of Appeal to dismiss the application for judicial review may be a signal from the Court that it will defer to the decisions of university tribunals. He suggests that it is appropriate for the courts to take on the role of reviewing procedures that deny natural justice, especially since the Supreme Court of Canada decision in *Nicholson* (1979). In *Nicholson* the court decided that a probationary constable should have an opportunity to respond to the reasons for his dismissal, although the court did not order re-employment of Nicholson and referred the matter back to the decision-maker to hold a hearing. The result of *Nicholson* was the development of a duty to be fair. The duty to be fair may be seen as an extension of the principle of natural justice (Jones and de Villars, 1994).

Natural justice is made of two main components. The first is the *audi alteram partem* rule which essentially says "let the other side be heard." This rule translates into the need to provide notice of hearings, notice of the case to be met and an opportunity to

respond (Devine, 1987). Blake (1992) suggests that this rule requires that at a minimum the appellant should be told the case against him or her and be given an opportunity to respond.

The second part is the *nemo judex in causa sua* rule, which means that a person cannot be a judge in his or her own cause. This translates into the need for a decision-maker to be free from bias or having an interest in the decision. Dickinson (1988) explains that procedural fairness recognizes that university tribunals owe a minimal duty of fair treatment to people whose rights are affected by their decisions. The Supreme Court of Canada in *Martineau* v. *Matsqui Institution* (1980) suggested that natural justice and procedural fairness should not be distinguished and that the courts will use both concepts according to the facts of each case. The court warns that the main question that courts should consider is whether or not the tribunal, on the facts of the case, acted fairly toward the complaining person.

Professor Campbell points out that:

> Until recently the Courts have been unwilling to review any decisions relating to academic status including tenure and promotion. Universities were considered to be private institutions, thus prerogative writs were not available because academic status decisions were considered to be made by domestic tribunals. The relationship between professor and university was purely contractual and therefore, any remedy for breach thereof had to be found in the common law contract. Besides, a decision of academic status involved peer review by colleagues, a procedure unique to Universities and largely unknown by courts (1985, p. 419).

In accounting for the change in attitude by the courts, Campbell makes several observations. First, that universities have developed from small privately funded

institutions to large publicly funded institutions. Secondly, the development of the *Statutory Powers Procedure Act*, and the *Judicial Review Procedure Act* created easier access by faculty to the courts by the development of "minimum rules of fair procedure applicable to tribunals created under provincial legislation (Campbell, p. 420). Thirdly, that the courts had made several decisions which determined that damages for breach of contract was not an appropriate remedy where denial of tenure was involved (p.420). Finally, Campbell argues that the development of procedures for the determination and appealing of decisions regarding tenure opened the door for faculty to challenge such decisions if the procedure was not followed or was "defective by standards usually accorded to similar bodies (p. 420). This allowed the courts to set aside academic decisions on procedural grounds and avoid interfering with the substantive decision by peers.

The American experience with intervention by the courts in academic decisions may be instructive. Peter Byrne argues that American courts are not appropriate bodies for the enforcement of academic freedom claims by professors against their institutions (Byrne, 1989). Byrne stresses that judges themselves may provide potential threats against academic freedom and putting the courts as the final arbiters of these disputes may according to Byrne "put the department or school into intellectual receivership, with the court determining the appropriate paradigms of thought." (p. 349). However, there have been very few legal decisions on the issue of tenure in Canada, and the courts have

been reluctant to second guess the decision-making of the university administration in the few cases that have been judicially reviewed.

Professor Campbell argues that "it is now firmly established that a decision not to grant tenure is subject to judicial review (1985, p 420). In an earlier article, Campbell (1983) argues that judicial review of tenure denials based on peer review has not been favorable for the affected faculty members (Campbell, 1983). Campbell provides an analysis of the Ontario Divisional Court and Court of Appeal decision in *Paine v. The University of Toronto* (1982), where after discovering a faculty member had a negative view of Paine, the department chairperson appointed him to the tenure committee. Paine was not informed that this member had such critical views of his work and did not know that the author of the critical appraisal was on the committee, nor did he have an opportunity to defend himself against the critical comments in the faculty member's appraisal before the committee decided to deny tenure. An appeal by Paine was then dismissed by the tenure appeal committee at the university. The case was then investigated by the University Ombudsperson who recommended that the Tenure Appeal Committee reconsider the case. Following a request by the university President, the case was reconsidered by the Tenure Appeal Committee which affirmed its original decision. The decision of the tenure appeal committee was reviewed by the Ontario Divisional Court on the basis that decisions about tenure involve statutory powers. They held that the process in which Paine was denied tenure constituted procedural unfairness. The university appealed the decision of the Ontario Divisional Court and the Ontario Court of

Appeal disagreed with the lower court and proclaimed that the power to appoint did not involve statutory power of decision. However, both courts disagreed with the decision in *Re Vanek v. Governors of the University of Alberta* (1974) that certiorari is not an available remedy to a disappointed tenure candidate. Campbell notes the dicta by the Court of Appeal which suggested that damages for breach of contract would not be not an appropriate remedy. He argued that this comment was important since it dispels the age-old myth that tenure is a mere contractual right established between the university and its academic staff.

In the case of *Re Ruiperez and Board of Governors of Lakehead University* (1982), the Ontario Divisional Court found that the university had acted with manifest unfairness where they did not give a candidate for tenure the opportunity to make representations to the executive committee of the Board of Governors and did not inform him of all of the information that had been considered in denying him tenure. The Departmental Promotions and Tenure committee did not recommend Ruiperez for tenure and his appeal was dismissed by the appeals committee. The Board of Governors denied a request by Ruiperez to make representations to the Board prior them hearing his case. Ruiperez was not advised of the substance of all of the information considered by the Board. In quashing the Board of Governors decision, the Court recognized the difficulty in balancing the need for confidentiality of those who forward important information to assist in the decision-making process and the duty to act fairly. However, the Court felt that at the very least the Board could have disclosed the substance of the information in a

way that did not reveal the source of the information. The appeal by the university was dismissed and the Court of Appeal pointed out that the court would apply a high standard of natural justice since the decision involved the right of Ruiperez to continue in his employment.

In *Re Giroux and The Queen in right of Ontario* (1984), the applicant was required to obtain a post graduate degree prior to applying for tenure. The university President appointed an ad hoc committee to advise the President of the relevancy of the degree. The President followed the committee recommendation that the thesis was of minimal relevancy and that Giroux not be entitled to tenure evaluation. The committee did not provide Giroux with the opportunity to respond and did not inform him of the hearing date. The Ontario Divisional Court found that Giroux was entitled to natural justice including notice of the case and the opportunity to respond. In addition, since the President had previously demonstrated that he had concerns about Giroux and had acted as a member of the committee, the Court found that there had been a reasonable apprehension of bias.

In *Archer* v. *Universite de Moncton* (1992), the court commented that restraint should be used before intervention by the courts in decisions of public universities. The court also noted that they would not hold universities to the same standards as those expected of a person before a court of law. The court recognized that the university's decisions may be subject to judicial review, but limited court intervention to cases were there was manifest unfairness. In Archer's case, the court determined that since he was

given a hearing in which the university had allowed him to be present and gave him the right to call and cross examine witnesses that the procedure was fair and therefore there was no manifest unfairness.

A British Columbia Supreme Court held that courts should exercise the very highest of deference to university decisions in *Wade* v. *Strangeway* (1994). Wade applied for judicial review of the university President's decision not to recommend tenure. The applicant had been through two level of appeals leading up to the final decision as set out in the collective agreement. The Court pointed out that Wade was essentially complaining about the system that the bargaining units had chosen to determine tenure and that this was a matter in which the Court did not have jurisdiction to interfere.

Judicial solicitude is not surprising, considering that the process leading to the decision not to award tenure is quite extensive. The issue has most likely been dealt with by quasi-legal committees at two levels and, in most cases, by an arbitration panel. In *Bezeau* v. *Ontario Institute for Studies in Education* (1982), the Board of Governors at O.I.S.E. refused to allow Bezeau to see the departmental report which contained negative comments by one of the committee members. He was also denied the opportunity to make submissions in person before the Appeal Committee although he was permitted to make written submissions. The Court dismissed Bezeau's application for judicial review on the basis that there had not been an exercise of manifest unfairness by the university. In doing so they also recognized that there is a lower standard of fairness at the first stage of the process when the Departmental Committee was considering Bezeau's request for

tenure than the Appeal Committee where Bezeau had already had a chance to appear before a committee. In the case of *Diamond* v. *Hickling* (1988), Diamond applied for judicial review in an attempt to set aside an appeal Board's decision to uphold the university's determination that tenure should not be granted. Diamond's application was based on the proposition that several errors of law had been made in the process which he argued constituted a fundamentally flawed process. The Appeal Board dismissed his appeal and the Court found that the collective agreement had provided that issues as to correctness and fairness of process in the denial of tenure should be adjudicated by an appeal Board. The Court suggested that it should not interfere with such an agreement.

In *Thomas* v. *Mount St. Vincent University* (1988), a Nova Scotia Court found that where an appeal committee did not have power to make a final decision and could only make recommendations to the President whose decision the appeal had been made, there had been procedural unfairness. The Court quashed the President's decision since he had in effect been sitting on appeal from his own decision.

IV. Judicial Deference

Traditionally, the relationship of law to universities was much different than it is now. There were few administrative tribunals within the institution, and most decisions were made by administrators carrying out their institutional responsibilities. The academics viewed themselves as removed from the world of the courts. Universities were seen as a unique operation that could regulate itself through a reliance on tradition and collegiality. They operated best by working independently. Sibley (1975) noted that "in

that now remote age, the [university] authorities were, for better or for worse, the custodians and exemplars of the university's traditions, the arbiters of its conflicts, and the molders of its future " (p. 16).

The operation of universities was also seen to be delicate and complex. An outsider would be ignorant of the special arrangements and sensitivities of this environment. The academics had knowledge and training that was far beyond the general population, and they were charged with the guardianship of knowledge for future generations. In 1988 Dickinson observed that the courts were deferential to the decisions made at universities and they considered academic judgments regarding appointment, promotion, and tenure to be expert judgments that are more suitably governed by the academics.

There is good reason for courts to defer to academic decision-makers on substantive issues. Evaluating candidates may be a very complex task. The *Policy Statement on Academic Appointments and Tenure* (1988) states that the essential functions of a university are the pursuit and dissemination of knowledge and understanding through research and teaching. Academic freedom is essential to the carrying out of these functions. Related to these policies is the freedom to choose teaching materials. This was addressed by the CAUT Academic Freedom and Tenure Committee which suggested that the freedom to choose teaching materials must be exercised "in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge" (p. 14). The freedom to choose teaching materials is directly related

to the assessment of those materials by the primary consumers of higher education; the students. The students are responsible for the evaluation of professors, and their evaluations can play an important role in the tenure decision-making process. Student evaluations may affect untenured faculty in a significant way. It may be that academics who put controversial topics on the course curriculum will potentially affect their teaching evaluations negatively. Professors who insist on high academic standards may also be singled out by disgruntled students, while those who are perceived as giving higher marks for average work will be more popular. Campbell (1983) questions whether student teaching evaluations are an adequate measure of teaching ability, and he raises concerns about the arbitrariness of the criteria to be considered and the method of evaluation when peer evaluation is used to make the decision whether or not to award tenure. He uses the example of the decision in *McWhirter v. Governors of the University of Alberta* (1977), where Justice Steer questioned the process for assessing teaching ability:

> the evidence given at trial showed that, in fact, there was not a system in the university, except rumor, whereby a committee could get any satisfactory evidence of a candidate's teaching ability...there was nothing to indicate that any (of the peers) had ever heard him teach although some may have heard him speak at a seminar (p.630).

McWhirter was an associate professor of genetics, but was also hired on an interdisciplinary basis at the University of Alberta. According to university procedure, the recommendation for tenure was made by the Departmental Chair after consultation with the faculty. However, the Chair felt that he did not have much personal knowledge about McWhirter's performance and the faculty were divided in their assessment of his

capabilities. Tenure was denied based on the results of a secret ballot which was held during a departmental meeting. Having representation on a decision-making body like the one that McWhirter faced would increase the accountability of the committee and be a potent reminder of the importance of ensuring a fair and reasoned decision. This is especially important since the procedures that are in place may be vague and informal.

The *Preamble to the CAUT Policy Statement on Initial Appointments* says:

> Collective agreements and faculty handbooks have been noticeably vague with regards to setting out the procedures to be followed and criteria to be used in making initial appointments of academic staff. Inclusion of such procedures and criteria is important as they define the rights and responsibilities of all those involved in the selection process from the recruiting stage through to the formal offer of appointment. Tenure promotes a consistency within the university that is independent of the individuals involved and protects those involved against accusations or arbitrary, discriminatory or unfair behavior (1988, p. 1).

Tenure is affected most by the preceding initial appointment process. Tenure is not useful to the person who doesn't even get the job in the first place.

V. Hazy Definitions of Tenure

There appears to be two different vehicles for protection of academic freedom. It may be protected by tenure accompanied with an internal process involving peer decision-making with appeals to internal bodies, or by a collective agreement involving peer decision-making with appeals to an arbitrator. However, it appears that several academics have raised concerns about the clarity of the former process. David Mullan's (Mullan & Christie, 1982) argument that there is not one law of tenure applied at Canadian universities supports Campbell's concerns about lack of clarity. Mullan

analyses the decisions in *Elliott v. Governors of University of Alberta and Allen* (1973), and *Vanek v. Governors of University of Alberta* (1974), to demonstrate how the courts claim jurisdiction in the tenure granting process. He also examines the decision in *Dombrowski v. Board of Governors of Dalhousie University and College* (1976) and concludes that we may not have devised very effective methods of protecting the process of granting tenure and the positions of tenured staff. This case demonstrates the potential dangers of the peer review process and judicial intervention. Dombrowski publicly criticized his colleagues and the university administration. The peer review committee unanimously recommended that tenure be granted, but the Dean of the Faculty denied tenure on the basis of incompatibility because of the conflict between Dombrowski and the rest of the faculty. The university administration supported the decision of the Dean and agreed that the department could not effectively work together. This concern has been raised in the process of the reconsideration of tenure. The authors also describe a 1979 case at Laurentian University where the University considered the removal of tenure from a faculty member because she was suing a student for libel. The Faculty Association had applied for recertification during this time period and the Board held that the University could not reconsider tenure during a certification application, but they were not concerned with the legality of the University's actions. Mullan concludes that the legal dimensions of tenure are "hazy," especially the administrative law principle of judicial review of the decisions on granting and removal of tenure. The haze appears to be clearing as the number of collective agreements that include processes for tenure award increases. The

evolution of faculty handbooks and the development of collective agreements has put more reliable procedures in place for dealing with academic freedom and job security.

VI. The Internal Appeal

Sim warns that:

> Whether their appointment are governed by private contract or by collective agreements there are inherent threats to academic freedom arising from peer review... Experience working with the CAUT Academic Freedom and Tenure Committee has provided numerous examples of the ingenious ways in which colleagues can be unfair to each other. Academic freedom must now be protected against the carelessness or willfulness of peers. These may by the anonymous peers who serve on national grant selection committees or the personal colleagues who serve on tenure or promotion committees. The threat from this direction is probably as great as that from autocratic administrators in years gone by or as that from governments or an ill-informed public may be (1982, p. 89).

Therefore, the appeal process is an important safeguard to the disappointed candidate. Appeals to an internal appeal body or through the use of an arbitrator are the most common methods of access to appeal. The relationship of the internal appeal committee to the applicant may, however, affect the ability of an appeal body to remain unbiased since most universities have procedures where the hearings are held *in camera* and the committees' decisions are confidential, final, and binding. This makes it difficult to determine exactly how decisions are being made and even more difficult to determine the extent to which attitudes and behavior has affected a decision. Several universities require a level of diversity on the original departmental committee that should solve the potential problem of collusion on the committee, but:

> Once a recommendation has been made the members of the initiating committee have a vested interest in defending its validity. Only when there is an opportunity to review the substance of a recommendation is it possible to determine whether there has been bias or discrimination. Even then this may be difficult to do. Fortunately arbitrators have been prepared to consider the substance of cases, including tenure cases, and to reverse unfavorable decisions when they find cause to do so (Sim, 1982, p. 89).

University autonomy is another potential threat against both academic freedom and tenure. Carleton University is not unlike other universities in Canada having been created by provincial statute (Board of Governors, 1993). Therefore the universities do not fit neatly into the definition of a private employer. They enjoy specially regulated powers that are defined by a specific statute. In 1988 the Association of Universities and Colleges of Canada included in its definition of institutional autonomy the freedom to:

> select and appoint faculty and staff; to select and admit and discipline students; to set and control curriculum; to establish organizational arrangements for the carrying out of academic work; to create programs and to direct resources to them; to certify completion of a program of study and grant degrees (Association of Universities and Colleges of Canada, 1988, p. 3).

Tenure is not directly addressed in this statement, but there is an implication that universities have the autonomy to make the substantive decisions with regard to tenure. This approach to institutional autonomy may be one of the reasons that although universities are operating with specially regulated powers, the courts have historically abstained from interfering with institutional decisions. With the development of collective agreements, more of these decisions will remain within the university through use of the dispute resolution process defined by the agreement. Since the decision in *Paine,* the

courts will grant them this autonomy as long as the process meets the requirements of fairness.

Chapter Four: Other Considerations

I. Unionization

Unionization of academic workers in Canada began in Quebec in the early 1970s (Axelrod, 1982). It appears that collective bargaining occurred in response to the perception by academics that their working conditions were worsening. Former President of the Canadian Association of University Teachers, Roland Penner claimed that:

> Collective bargaining seems to have appeared in Canadian universities for the same reasons as in United States. Namely, the poor academic job market, the erosion of rights and perquisites lacking legal protections, budgetary cutbacks, the increase in size and remoteness of university administrations, and the growth of unionism in the public sector (1978, p.372).

Adell and Carter (1972) suggest that market factors such as a changing job market, threats to job security and the increased tendency of universities to use limited term appointments were the root of interest by faculty in collective bargaining. Savage (1994) argues that:

> There was also a precipitation incident for CAUT. At St. Mary's some of the faculty decided to try to certify, with the Canadian Union of Public Employees (CUPE) as the bargaining agent. The CAUT executive decided to fight. In the end there were two successive ballots and CAUT was the victor. That meant, of course, that it had to give real collective bargaining services...
>
> From the point of view of CAUT, one of the main reasons for adopting the collective bargaining approach was to create a regime on each campus where grievances could be handled effectively and fairly through independent arbitration or the equivalent. This has continued to be one of the major thrusts of academic collective bargaining (p. 57).

Unionization involves the collective bargaining by faculty to negotiate with

representatives from the university. Collective bargaining generally occurs in employment situations where workers feel that they could gain advantages by bargaining as a group over the terms and conditions of employment. An individual worker may feel that they are at a disadvantage when attempting to bargain with his or her employer. It appears that this principle applies to faculty at Canadian universities. By the 1980s, over half of the faculty in Canada were unionized. Axelrod (1982) argues that reduced financial support by government for universities, decreased relative wages and the growing threat of layoffs to untenured faculty fueled the trend toward unionization. Adell and Carter (1972) identified the increasing use of limited term academic positions by universities as the major catalyst for increasing faculty unionization. Although collective bargaining by faculty may be seen as a rational response to perceived threats to the security of academic positions it has become the contemporary vehicle for the establishment of faculty rights and responsibilities.

Collective agreements clearly reveal the control relations and establish procedures of decision-making and an orderly system of resolving disputes within the university. The rights and responsibilities of administrators and administrative bodies are specified. In contrast to the partnership between faculty and administrators in senate, faculty, and administration relations are expressed in adversarial terms. The Canadian labour law extends the exclusive bargaining rights to one union. Most collective agreements have outlined procedures for making and reviewing decisions not to award tenure and even allow for grievances on the basis of academic freedom for tenured and untenured faculty

members. In most cases, arbitration boards have jurisdiction to hear disputes that deal with tenure denial or infringements to academic freedom. This is an important factor in relation to the consideration of the judicial treatment of denials of tenure. Collective bargaining has become an important method for defining faculty rights and responsibilities, and the conditions of work for faculty members. The collective agreement has become the most important document with relation to procedural protections. A number of existing practices were set down in writing between faculty associations and university management. Once established practices were written and revised, procedures became mandatory. Although decision-making at the university was evolving to the point where academic policy decision-making would have to go through Senate before going to the Board of Governors at Queen's University, McMaster University and the University of Western Ontario, at Carleton the Senate was removed from all decision-making in relation to personnel matters (Board of Governors, 1993).

Generally speaking the collective agreement between faculty and the university will have provisions spelled out to deal with cases where faculty members feel that the process has not been carried out fairly. The arbitration process is much less formal and faster than the process of judicial review. All documents that were considered at the committee levels may be considered by the arbitrators (Campbell, 1986, p. 33). Usually the dispute is heard by an arbitration board which consists of a mutually agreed upon chairperson and two nominees.

The collective agreement usually ensures that the process is rigorous and appears to be fair, and provisions in the process lend themselves well to preventing these decisions from moving into the traditional legal system. Thus, collective bargaining allows the parties to negotiate an agreement that is a match with the culture of the institution. There is a range of different types of agreements. Campbell (1986) noted that the arbitrator is limited in the scope of jurisdiction to a procedural review in Manitoba, Windsor, Saskatchewan, and Lakehead. This method involves preserving "committee decision on the merits of a case" and "closely examining procedures relating to fairness" (Campbell, 1986, p. 32). Agreements at Lakehead and York give jurisdiction to the arbitrator beyond consideration of the procedure to include substantive review to look at "violation of provisions governing academic freedom or non-discrimination" (p. 32). Campbell points out that at the University of Ottawa, an arbitrator is unrestricted in jurisdiction and the arbitration board may even substitute its decision for the decision by a peer review committee (p. 32). According to Campbell disappointed tenure candidates "have had greater success with the arbitral process than with the courts" (p. 33).

Ever since the *Polymer Case* (1962), the Supreme Court of Canada has affirmed the right of the arbitrator to award damages for breach of a collective agreement. In this landmark case, a collective agreement entered into by a union and a company provided a dispute resolution procedure where grievances not settled could be referred to an arbitration board. Under the agreement, the board could not change any of the provisions of the agreement or make a decision that was inconsistent with such provisions. The

Board determined that union had breached a no-strike clause in the agreement. The Board decided that the union was responsible and liable for damages. The union challenged the authority of the Board to award and assess damages. The Supreme Court dismissed the appeal and affirmed the judgment by the Appeal Court that the arbitration board had the authority to assess and award damages. Later, In *St. Anne-Nackawic Pulp and Paper Co. Ltd.* v. *Canadian Paper Workers Union* (1986), the Supreme Court went one step further by unanimously determining that courts have no jurisdiction to hear claims for damages that arise out of rights created by a collective agreement. The court proclaimed that there must be an attitude of deference to the arbitration process. They determined that the law had evolved and that the grievance and arbitration procedures provided for by the Act should provide exclusive recourse for the parties to the collective agreement. In *Bezeau* v. *Ontario Institute for Studies in Education* (1982), the Ontario Divisional Court pointed out that Bezeau had not availed himself of the arbitration procedure that was provided for by the collective agreement relating to the tenure granting process. The Court supported their decision to dismiss the application for judicial review on the basis that Bezeau had an alternative remedial process which he could use. The Manitoba Court of Appeal also heard a case involving the denial of tenure where a collective agreement applied. In *Polimeni* v. *University of Manitoba* (1987), an arbitrator had been appointed under the collective agreement. The Arbitrator decided that the university was bound under the agreement to consider the application for tenure. Polimeni brought a civil action against the university claiming damages for breach of contract. In consideration of the conflict

between the traditional right of free access to the courts and the emerging right to rely on the finality of a labor arbitrator's award in an employment dispute, the court decided that the policy of legislatures was to encourage resolution of labor disputes without recourse to the courts. Therefore, where the collective agreement provides for arbitration for the resolution of a dispute on the issue of tenure award, judicial review will be very difficult to access. This means that in such situations the collective agreement and arbitrator become important protectors of tenure and academic freedom.

II. Collegiality

Collegiality is the idea that prospective tenured faculty members will have to be accepted by the faculty as a social group. Collegiality is not written as one of the criteria with which departmental tenure committees are supposed to guide their assessment of a tenure candidate. Soberman argues that collective bargaining works against the concept of collegiality:

> The idea of a community of scholars has always hovered somewhere between myth and fact. I do not believe that it is entirely a myth. A central element to the idea of a community is collegial responsibility, shared responsibility among students, administrators and faculty members. But collegiality cuts two ways against the union/management model. In a university, administrators must, unlike management, be governed by collegial decisions of a majority of their academic colleagues in many matters. In the same way, professors must, unlike members of industrial unions, participate in critical evaluations of their fellow workers and in making hard decisions about their future. For these reasons, I find it difficult to support the unionization of faculty on an industrial model within a system of collegial decision-making (1978, p. 10).

It is possible that collegiality really means gaining the favor of the most powerful

decision-makers in a unit. Weaker peers may not be comfortable challenging stronger ones. Chait and Ford argue that their experience shows that "there is some truth, as well as considerable paternalism, in the statement that the best protection for the academic freedom of the nontenured is a strong tenured faculty" (1982, p. 376), but this assertion does not take into consideration the characteristics of this strong group. Those faculty seeking tenure who are from different race, class, gender, and sexual orientations may find that this strong group becomes a formidable obstacle to tenure where there is not a transparent decision-making process. McConnell (1973) argues that university senates used to foster collegiality by providing a vehicle for self government. They now favor those who exert a high degree of influence in the faculty and administration. He further identifies the elites as those people who are elders and who are intimately involved in policy formation. He concludes that senates have lost much of their former power and they are controlled by the administrators and faculty elites. These faculty elites on departmental committees would be those who have the strongest voices in the department or faculty. These would be the members with the most political power or the most experience in the unit.

The arbitrator in *Re the Association of Professors of the University of Ottawa and The University of Ottawa (Valero)* (1978) has stated:

> The advent of collective bargaining in the university sector engenders a qualitative change in the relationship of the professoriate to the university. It may well be that the notion of the university as a collegial community of scholars was never more than an ideal, and that the reality was more like that of a benevolent but hierarchical paternalism. Be that as it may, it was

> possible in such a community, not regulated by a written code, to have a good deal of flexibility - whether for good or for ill. With formalized collective bargaining, even the fiction of collegiality must give way to as legally defined employer/employee relationship, the details of which are embodied in a collective agreement (p. 544).

Therefore, the development of arbitration has whittled away at the effect of collegiality. The employment relationship as defined through the collective agreement becomes paramount and the arbitrator or arbitration board serves as a safeguard against abuse of the collegial process. The way in which collegiality matters is the product of complex processes. The creation of collective agreements will not completely dissolve the operation of this traditional concept unless the university also removes the peer review process. Sim (1982, p. 83) suggests that understanding of the way collegiality works will be enhanced by further investigation at the social spaces created by the intersection of class, race, gender, culture, and political ideology. I would agree, and further emphasize that the process of considering a candidate for tenure may operate within a subtle framework of collegiality although this criteria has not been officially stated.

III. The *Ontario Statutory Powers Procedure Act*

The Ontario *Statutory Powers Procedure Act* (S.P.P.A.) was enacted in Ontario in 1971. The *S.P.P.A* was essentially created to:

> provide certainty through a codification of the minimum rules of natural justice which govern proceedings before tribunals that are authorized by statute to make decisions deciding or prescribing rights following a hearing. In addition, the Act specifically confers certain powers on these tribunals such as the calling of witnesses and compelling their attendance, or the requiring of production of documents. (Atkey, 1972, p. 155)

Most of the procedural rules set out in the Act were "simply a codification of procedures which the common law already required tribunals holding hearings to follow" (Gillese & Hawkins, p. 3-1). The Act provides parties with the right to reasonable notice of time and place of hearing, the right to be represented by counsel, the right to call and examine witnesses, the right to present arguments, and the right to cross-examine the opposing party's witnesses. It also recognizes the right of the participants to be informed of the tribunal's final decision with reasons.

There is currently a debate over whether the Act applies to university tribunals within Ontario. The Tribunal Training Program at the University of Western Ontario Law School advises that:

> There has always been difficulty in knowing to which tribunals the S.P.P.A. applies. The Act itself says it applies to any tribunal which must exercise a "statutory power of decision." A statutory power of decision is defined as a decision which an Act requires a tribunal to make and which will affect the "legal rights, powers, privileges, or liabilities" of any person. Courts have had difficulty interpreting these words. Consequently it is difficult to know which tribunals are bound by *S.P.P.A.* procedures. Many university committees have said that even though they may not be required in law to follow the procedures set out in the *S.P.P.A.*, they will do so in order to be completely fair to the parties and in order to be safe from having their decisions overturned by the courts on procedural grounds (Gillese & Hawkins, p. 3-2).

Tribunals must follow any procedural rules that have been established by legislation or rules establishing the tribunal (Gillese & Hawkins, p. 3-2). Like many other university tribunals, the Senate Appeals Committee at Carleton University follows the provisions of the *S.P.P.A.*

The *S.P.P.A* was amended on April 1, 1995, and the university tribunals have accounted for these amendments which deal with motions, pre-hearing conferences, and disclosure rules. These amendments have increased the efficiency in time and cost of the tribunal process.Where the *S.P.P.A* applies to the Tenure Appeals Committee, the Act imposes Minimum Rules of Procedure. It is always open to the parties to waive any formal requirements of these Minimum Rules or to vary them by agreement if they consider it desirable to permit the proceedings to carry on more informally. If the university Act does not specifically give the power to override or exclude the Minimum Rules, no rules, regulations, or by-laws may be made to this effect (Gillese & Hawkins, 1995, p. 1-6).

Whether or not the decision is made carefully, a disappointed candidate always has the option of applying for judicial review to challenge a committee's finding or an arbitrator's decision. In hearing an application for judicial review, the courts would not look at the merits of the Tenure Appeal Committee decision, but ask whether the Committee had the authority to do what it purported to do. Therefore the courts would be concerned with legality, jurisdiction and procedural correctness. On judicial review, the courts would examine the decision-making process to determine whether the decision-maker acted within jurisdiction and if it followed proper procedures when deciding the issue before it. The question of proper procedure will equally depend upon whether the decision-maker followed any explicit procedures set out in the Minimum Requirements

under the *S.P.P.A.*, whether or not the parties consented to waive any of the procedural requirements of the Act or the university by-laws, and whether they have followed the basic principles of fairness and natural justice.

The courts remain concerned about making the most efficient use of resources. The amendments to the *S.P.P.A.* have increased efficiency in time and cost. Committees following the guidance of the S.P.P.A. may make up their own rules of procedure. Gillese & Hawkins (1995) suggest that:

> It can be inferred from several provisions contained in the *S.P.P.A.*, as amended, that the rules made by tribunals should be published. In addition, subsection 4(2) states that, "any provision of a tribunal's rules made under section 25.1 may be waived in accordance with the rules." In order to exercise this right at all and to do so in a manner consistent with the tribunals rules, applicants must be informed of such rules (p. 1-7).

The committee may also use written hearings on the condition that all parties consent. These hearings are conducted with the use of document and submissions alone (Gillese & Hawkins, 1995). Under section 5.3 of the *S.P.P.A*, a tribunal may order the parties to participate in a prehearing conference to deal with preliminary matters such as "settlement, narrowing of issues, agreement on some or all of the evidence and the scheduling of the hearings" (Gillese & Hawkins, 1995, p. 1-8). Although the chair may designate any person to preside at the conference subsection 5.3(4) states that if they do, they may not participate in the main hearing without the consent of both parties. Finally, provided their rules allow it, tribunals may reconsider their own decisions. Therefore, they may uphold, vary, suspend or cancel their decision.

Where a collective agreement has provided a dispute resolution by arbitration, the arbitrator will be guided by the procedures that have agreed upon by both parties. The arbitrator will be less concerned with the provisions of the *S.P.P.A.* However, should tenure decisions not be subject to arbitration the principles of the *S.P.P.A.* will be an important consideration if the dispute ends up in the court arena.

Chapter Five: Tenure at Carleton University

At Carleton and most universities with collective agreements, the procedure for granting tenure is spelled out. Some agreements define tenure, usually as a continuing appointment up to the age of retirement. This answers the concerns of Fridman, Mullan, and Campbell that tenure needs more precise definition. However, tenure is subject to other provisions in collective agreements, including dismissal for cause or lay-off due to financial cutbacks. The CAUT document *University Tenured Appointments and Their Purpose* (1991) points out that tenured faculty "can be terminated" (i.e., the member can be dismissed or laid off) "only for appropriate reasons by procedures which ensure fairness" (p. 3-2). "Appropriate reasons" and "procedures which ensure fairness" are general terms that are left to the individual institution to define.

Tenure is defined in the *Collective Agreement between Carleton University and Carleton University Academic Staff Association* as a

> permanency of appointment including the right to fair consideration for increases of responsibility and salary, and for promotions in rank, and the right of a faculty member to continue as such until age 65 subject only to dismissal for just cause (1991, p. 175).

Dismissal of an academic staff member at Carleton University is described in the collective agreement as the "termination of an appointment by the University without the consent of the appointee before the end of a stated period, or in the case of appointments with tenure, before retirement (1991, p. 175). This job security can only be taken away by the President, through the Review Chair or Review Committee. The Review

Chairperson or Review Committee are appointed by joint agreement by the Staff Association and the President. Either a Review Chair or a Committee are responsible for conducting an investigation to determine whether adequate cause for dismissal of a faculty member exists.

The *Carleton University Collective Agreement* between the Academic Staff Association and the University acknowledges that tenure and academic freedom are related to each other (Appendix A). The agreement further recognizes the importance of noninterference in the faculty member's academic freedom. This agreement defines this right of academic freedom to include

> the right to criticize the university in any respect in which it is an environment unfavorable to these ends, to advocate changes which will make it a more favorable one, and to oppose changes which will make it a less favorable one. It also includes the right of a faculty member to investigate, to teach and to publish as well as to criticize any aspect of learning or society insofar as doing so is compatible with his academic obligation to discharge the academic role in a responsible way. The principle of appointments with tenure is an important safeguard of the right to academic freedom, thus understood (p.174).

The aforementioned difficulty in clearly determining the legal position of the parties in the professorial contract is reflected in the operation of the Tenure Appeal Committee at Carleton.

The *Collective Agreement between Carleton University and Carleton University Academic Staff Association* includes an appendix entitled *Procedures Concerning Tenure, Dismissal and Related Matters as Approved by the Board of Directors of Carleton University on June 27, 1972, and as Amended by the Board of Governors on October 4,*

1972. This Appendix and the Collective Agreement are the only official documents which describe structures and processes related to tenure and dismissal of teaching staff at Carleton University. This document anticipates that from time to time cases will occur involving disputes between the university and a faculty member. It is not possible to formulate a set of rules or of criteria the mechanical operation of which will guarantee a simple and correct decision in every case. The procedures set out in this document are designed to ensure that the decision made will be rendered by an impartial body which has no interest either in the silencing of unwelcome opinions or in the protection of incompetence or neglect.

One strength in the *Carleton University Collective Agreement* is that its definition of tenure includes not only job security but also provision for promotion and improved benefits, and it specifically outlines the conditions for dismissal. According to the agreement, by September 30 of each year every department is to establish its committee on tenure, which includes the department's chairperson and at least four other faculty members, both tenured and non-tenured. To make an informed decision on a candidate's tenure, the committee is expected to consider that person's curriculum vitae, published work, teaching work, and the departmental chairperson's recommendation on the award of tenure. The candidate may present to the committee orally or in writing and may invite a representative of the Carleton University Academic Staff Association to attend any committee meeting to which the candidate is invited. The committee on tenure is expected to prepare a statement of its recommendation and reasons for it, and any disagreements

within the committee must be described in the statement. This statement is to be forwarded to the department's Dean, and at the same time a copy is given to the candidate and to the university President.

Each faculty or division must also establish a Committee on Tenure and this committee must consider documents submitted by Departmental Tenure Committees and any other submissions from candidates. The Faculty Tenure Committee then recommends to the President whether or not tenure should be granted to the candidate. In the case where tenure is not being recommended, the Faculty Tenure Committee recommends whether or not a further appointment without tenure should be made. This committee must inform the candidate of its decision and, if its decision differs from the relevant Departmental Tenure Committee, the Faculty Tenure Committee must inform the Departmental Committee of their decision and their rationale. The President must inform the candidate of his or her decision in a written statement. If the President's decision differs from either the Departmental Tenure Committee's, or the Faculty Tenure Committee's recommendation, the President must inform those committees of the rationale for his or her decision. All of the decisions described in this process are to be made by December 21 of the last year in the candidate's term.

The *Carleton University Collective Agreement* states that the Senate will establish a Tenure Appeal Committee made up of five members who are as representative as possible of the major divisions within the University. Deans, Directors and Departmental Chairs are not eligible to serve on this committee. If a candidate who has been denied

tenure wishes, he or she may appeal this ruling by giving written notice of appeal to the Tenure Appeal Committee within ten days of receiving the President's written decision. The appellant is then allowed what the Collective Agreement calls "a reasonable time to prepare his appeal" and the Appeal Committee must hear any evidence that the appellant wishes to present as long as the appeal is not unduly prolonged. In addition, the Committee may call for any other information that it feels is relevant. *The Collective Agreement* describes decisions of the Tenure Appeal Committee as "final and binding" (p. 181) on the University. *The Agreement* also states that all parties, including the appellant and the President, must be informed of the Tenure Appeal Committee's decision in writing by January 31 each year. This appears to leave them with little time to reach their decisions. However, in every case to date, where extra time has been required all parties have consented to a time extension (Campbell, 1997). It is interesting to note that the documents and deliberations of every committee dealing with tenure cases must be treated as confidential to its members.

The composition of the Senate and its Faculty Boards are defined in the Board of Governors by-laws. The by-laws also define the process and composition for the establishment and function of tribunals dealing with student academic appeals, and allow the Senate to establish specialized committees to act on behalf of the Board. However, in the *Carleton Collective Agreement* the by-laws are silent on the establishment of the Tenure Appeal Committee.

The fact that the Committee's decision may have dire consequences for the parties before it does not mean that those parties may sue the members of the tribunal. The only liability that may arise through participation on the Tenure Appeal Committee is such liability that could arise in any normal university activity. Acting dishonestly or publicly defaming someone would be actionable, whether or not it took place in the context of Senate proceedings. The findings of fact, honestly made on the basis of evidence presented, cannot give rise to a successful action for defamation just because they lead to conclusions that affect the character and integrity of a party or witness before the Tenure Appeal Committee.

Chapter Six: Conclusions

Many would argue that every profession and vocation has a probationary period, and five years does not seem too long a period in a job for life. The concern of this thesis is not with the length of time for the probation, but with the decision-making process itself. Byrne (1989) argues that academic freedom cannot be furthered by substituting the peer review process for other forms of decision-making that would "ignore both the historical basis of, and the actual structures that protect, faculty rights" (p. 286). From the historical perspective dealt with earlier in this thesis, it is clear that academic freedom has not remained static, and the protections for it have changed throughout history. Tenure may have to transform in order to meet some of the new threats to academic freedom.

The issue of the award of tenure may not seem material when at most universities it is quite unusual for a candidate to be denied tenure. Beyond the obvious importance of scrutinizing the decision process for abuse, the serious impact the decision can have on an individual's life, and the issues of access and diversity, it is very significant for several reasons that affect the entire tenure system. Tenure is currently being challenged in academia and the general population. It is likely that in the next few years there will be some changes to tenure. One of the most frequently suggested changes is to have a process of term tenure or periodic tenure review. Term tenure essentially is a cycle of the pretenure years. Brown and Kurland describe it as "the substitution of a series of fairly long term appointments-say five or seven years-with no assurance of continuation" (p.

342). Although it is not often that candidates are denied tenure, there is no way to know how many tenurial candidates are subtly forced out of the system. Candidates who are faced with colleagues they do not get along with, or an administrative head that sends signals that tenure is unlikely, will most likely move on to other institutions before facing tenure decision day.

There is no question that institutions can survive without tenure. Evergren State College and Hampshire College have instituted special due process protections in cases involving academic freedom as a substitute for tenure, and have never seen a case through the entire process. These institutions were studied in 1982 and the authors concluded that tenure was not a necessary protection for academic freedom (Chait & Ford, 1982). However, in 1988 the United Kingdom attempted to abolish security but retain academic freedom by an Act of Parliament (*Education Reform Act*, Ch 40, ss202(2)(a) (1988). This legislation sought to replace tenure with five university commissions which were responsible to

> ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges that they may have at their institutions.

Opposition to the Act was founded on the argument that it was too vague. Significant powers to change tenure were eventually included in the *Education Reform Act.* The powers of the Commission were restricted so that security remained for academic staff who already had attained tenure. However newly appointed or promoted staff are no

longer granted tenure since the passing of the legislation. The consequences of this model are that the employer university and watchdog commission have increased powers over the gatekeeping function of entry to academia.

The tenure decision-making process should remain as a form of academic gatekeeping; otherwise, tenure loses its meaning. I argue that this gatekeeping is best moderated by the specific agreements that the professoriate are able to negotiate with each institution through the collective bargaining process. This allows for cultural and climatic differences between institutions and allows institutional personalities to be reflected in the process. The collective bargaining process appears to be the most appropriate way to counterbalance the power of the established university structures. Since the courts have deferred in most cases to the decisions made by university committees, faculty unionization has become a more material protection from threats to tenurial protection of the professoriate. These unions are the contemporary watchdogs over academic freedom. Tenure has been dissected from academic freedom and now acts as job security. However, tenure and academic freedom mean have become more clear through definition in the collective agreements. This approach has allowed for different definitions at different institutions which creates variety and autonomy at individual institutions.

Collective bargaining may have resulted in gains for administrators who face a process and procedures that are better defined. A better defined process has the appearance of fairness which may depersonalize conflicts. In such an environment, when

a candidate is denied tenure, they know that they will have internal representation (the union representative) and that they can have a hearing by an unbiased arbitration panel at little or no cost. This is the opposite to the situation in which a disappointed tenure candidate has to retain legal counsel and use the courts to challenge a university decision. All this in the face of a judicial tendency to defer to academic decision-makers.

A more satisfying approach will require a different analytical focus than the current research offers. Less effort should center on the institutional processes, and more on determining the subtle and informal concepts that affect the process, such as collegiality. Too much emphasis has centered on institutional practices and too little on individual intent. Academics now have job security and academic freedom as two distinct strands joined together in the collective agreement. The question remains whether or not they still need tenure. It may have become an outdated custom that needs to be discarded. Faculty no longer serve at the pleasure of the Board. Faculty no longer have to rely on the tradition and custom of tenure and academic freedom. Collective agreements have the force of law and may not be unilaterally changed by either the faculty or administration.

As more and more faculties unionize across Canadian campuses the judicial intervention into tenure decisions will be increasingly rare. This is a favorable development for faculty members since they have not fared well throughout the history of cases in which they have challenged the decisions of their employers not to grant tenure. The arbitration panels can perform the same function as the court, but they may operate in a more formal environment to get to the essence of why tenure was denied. The

hope is that more universities will allow arbitration panels to review the substantive decision to ensure that the committees have indeed been fair in their judgments. The parties should ensure that panels are selected from lists of peers from other institutions so that peer review may be maintained. The judgment on whether an academic is fit to teach can only realistically be made by colleagues evaluating the professional qualifications and the facts relevant to specific professional activities.

This thesis has worked from the theoretical premises just outlined. It has focused on the historical and social foundations of academic freedom, rather than construct abstract analytical models. The objective has been to understand the concept of tenure protection of academic freedom through the examination of the award of tenure at Carleton University and the exploration of theoretical and policy alternatives.

We may expect tenure to continue to operate in spite of the change over the last three decades from protection based on custom and usage to those protections specified in a collective agreement. If we hope to evade the destiny of the newly appointed faculty in the United Kingdom we will have to think ahead and plan strategically. Collective bargaining may not be the most attractive protection for academic freedom as funding cuts and government pressure may reduce the bargaining power of faculty unions. As we approach the threshold of the next millennium, it is important that we pause and recognize that what lies beyond the threshold will be the incarnation of today's visions of academic freedom and tenure. Academics are a diverse group, and the visions of academic

freedom and tenure reflect this diversity. But it seems clear that we are poised for a revolution in higher education generally, and in tenure specifically.

TABLE OF CASES

Page

Archer v. *Universite de Moncton* (1992), 9 Admin. L.R. (2d.) 200, 129 N.B.R. (2d.) 289, 325 A.P.R. 289 (N.B.Q.B.)....48

Bezeau v. *Ontario Institute for Studies in Education* (1982), 36 O.R. (2d.) 577, 134 D.L.R. (3d) 99 (Div. Ct.)....49, 63

Craig v. *the Governors of University of Toronto* (1923) 53 O.L.R. 312 (H.C.)....40

Diamond v. *Hickling* (1988), 36 Admin. L.R. 129, 56 D.L.R. (4th) 467 (B.C.C.A.)....50

Dombrowski v. *Board of Governors of Dalhousie University and College* (1975), 55 D.L.R. (3d.) 268 (N.S.S.C., T.D.); *aff'd* (1976) 15 N.S.R. (2d.) 299 (App. Div.)....54

Elliott v. *Governors of University of Alberta and Allen* (1973), 4 W.W.R. 195 (Alta. S.C.)54

Ex parte Jacob (1861), 10 N.B.R. 153....39

Harrison v. *University of British Columbia* (1990), [1991] 1 W.W.R. 681, 52 B.C.L.R. (2d.) 105, 77 D.L.R. (4th) 55, [1990] 3 S.C.R. 451....19

Kane v. *University of British Columbia*, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124....9

Keyshian v. *Board of Regents* 385 US 589 (1967)....10

Martineau v. *Matsqui Institution*, [1980] 1 S.C.R. 602, 13 C.R. (3d.) 1, 15 C.R. (3d.) 315, 50 C.C.C. (2d.) 353....44

McKinney v. *University of Guelph* (1986) 57 O.R. (2d.) 1, [1990] 3 S.C.R. 229....19

McWhirter v. *Governors of the University of Alberta* (1977), 80 D.L.R. (3d.) 609 (Alta S.C., T.D.)....52

Paine v. *The University of Toronto* (1980), 30 O.R. (2d.) 69, 115 D.L.R. (3d.) 461, *Paine* v. *The University of Toronto* (1982), 34 O.R. (2d.) 770 (C.A.)....................................46

Polimeni v. *University of Manitoba* 1987 (1987) 39 D. L. R. (4th) 354, (1986) 46 Man. R. (2d) 220 62

Polymer Case (*Imbleau* v. *Laskin*) [1962] S.C.R. 338...61

Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, 88 D.L.R. (3d.) 671..43

Re Giroux and The Queen in right of Ontario (1984), 43 O.R. (2d.) 552 (Ont. Div. Ct)..48

Re Ruiperez and Board of governors of Lakehead University (1982), 130 D.L.R. (3d.) ..47

Re the Association of Professors of the University of Ottawa and The University of Ottawa (Valero) (1978)..65

Re The University of Saskatchewan and Maclaurin [1920], 2 W.W.R. 823 (Sask. K.B.) .39

Re Vanek v. Governors of the University of Alberta (1974), 3 W.W.R. 167 (Alta. S.C.)..47

Re Wilson (1885), 18 N.S.R. 180 (N.S.S.C.)...39

Smith v. *Wesley College* (1923), 3 W.W.R. 195 40

St. Anne-Nackawic Pulp and Paper Co. Ltd. v. *Canadian Paper Workers Union* 62

Stoffman v. *Vancouver General Hospital* (1990), 52 B.C.L.R. (2d) 1, 76 D.L.R. 94th) 700, [1990] 3 S.C.R. 482...19

Sweezy v. *New Hampshire* (1965) 354 US..10

Wade v. *Strangeway* (1994), 94 B.C.L.R. (2d.) 354, 116 D.L.R. (4th.) 714 (S.C.)...........49

Bibliography

"A Dialogue on Tenure: An Interview with Dr. Bernard Shapiro." Dialogues (September 10, 1993):5.

American Association of University Professors Statement on Academic Freedom and Tenure. American Association of University Professors, 1940.

Association of Universities and Colleges of Canada Statement on Academic Freedom and Institutional Autonomy. Ottawa, Canada: Association of Universities and Colleges of Canada, 1988.

Atkey, R. G. "The Statutory Powers Procedure Act, 1971." Osgoode Hall Law Journal 10 (1972): 158-175.

Axelrod, P. Scholars and Dollars: Politics, Economics, and the Universities of Ontario 1945-1980. Toronto, Canada: University of Toronto Press, 1982.

Baker, R. J. "The Universities of Canada." In T. Craig (ed). Commonwealth Universities Yearbook: Vol. 2. (pp. 937-945). London, UK: Association of Commonwealth Universities.

Baglione, F. M. "Title VII and the Tenure Decision: The Need for a Qualified Academic Freedom Privilege Protecting Confidential Peer Review Materials in University Employment Discrimination Cases." Suffolk University Law Review XXI (1987): 690-721.

Bell, D. A. "Diversity and Academic Freedom." Journal of Legal Education 43 (1993): 371-84.

Blake, S. Administrative Law in Canada. Toronto, Canada: Butterworths, 1982.

Boucher, P. Y. "Legal Challenges Facing Universities and Colleges in the 1990's." Universities and Colleges and the Law: More of What You Need to Know. Ottawa, Canada: Canadian Society for the Study of Higher Education, 1990.

Brown, R. S., & J. E. Kurland. "Academic Tenure and Academic Freedom." Law and Contemporary Problems 53 (1990): 335-359.

Byrne, P. "Academic Freedom: A Special Concern For The First Amendment." Yale Law Journal 99 (1989): 45-76.

Campbell, L. R. "Tenure and Tenure Review in Canadian Universities." McGill Law Journal 26 (1981): 362-390.

Campbell, L. R. "Academic Status and Judicial Review." Interchange 17 (1986): 28-41.

Campbell, L. R. "Administrative Law-colleges and universities-denial of tenure judicial review." The Canadian Bar Review 61 (1983): 622-637.

Campbell, L. R. "Promotion and Promotion Review in Canadian Universities." Revue de Droit Universite de Sherbrooke 16 (1985): 389-433.

Campbell, L. R. Presentation to the Committee of Canadian Law Deans on Tenure. Personal Communication from Lynn Campbell to Don McKeown, (June 11, 1981).

Campbell, L. R. Personal Communication with Lynn Campbell, January 8, 1997.

Canadian Association of University Teachers. Policy Statement on Academic Appointments and Tenure (Handbook No. 4). Ottawa: Canadian Association of University Teachers, 1988.

Canadian Association of University Teachers. University Tenured Appointments and Their Purpose. Ottawa: Canadian Association of University Teachers, 1991.

Carleton University. Collective Agreement between Carleton University and Carleton University Academic Staff Association for the period May 1, 1991 to April 30, 1994.

Chait, R., & A. Ford. Beyond Traditional Tenure. San Francisco, CA: Jossey-Bass, 1982.

Devine, S. "Fair Procedures for Students in Universities and Colleges." Universities and Colleges and the Law: Not all You Need to Know. Ottawa, Canada: Canadian Society for the Study of Higher Education, 1987.

Devine, S. "Contract Law & Post-secondary Educational Institutions: An Overview of the Student-Institutional Contractual Relationship. In Universities and Colleges and the Law: More of What You Need to Know. (pp. 278-290). Ottawa Canada: Canadian Society for the Study of Higher Education, 1990.

Dickinson, G. M. "Academic Autonomy and Legal Prescription: An Investigation of the Intrusion of Law into Decision-making within Universities." Ph.D. Dissertation. University of Toronto, 1988.

Fellman, D. ed. Academic Freedom. 2 ed. Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas. New York: Charles Scribner's Sons, 1973.

Fitzgerald, P. "A Cautionary Tale from Carleton University." CAUT Bulletin: January 1998, http://198.166.47.4/English/Bulletin/98_jan/

Francis, D. "The Threatened Dismissal of Frank Underhill From the University of Toronto: 1939-1941." CAUT Bulletin: December 1980: 7.

Fridman, G. H. L. The Nature of a Professorial Contract. Ed. Paul Thomas. Legal Research Institute of Manitoba, 1976.

Gillespie, N., & S. M. Blight. "A Survey of Legal Issues For Universities in Dealing with "Disruptive Behavior." Colloquium on Management of Disruptive and Threatening Behavior in the University (1996).

Government of Ontario. Framework Regarding the Prevention of Harassment and Discrimination in Ontario Universities. Toronto, Canada: Government of Ontario, 1993.

Hancher, L., & M. Moran, ed. Capitalism, Culture and Regulation. Oxford, U.K.: Claredon Press, 1989.

Hendrickson, R. M. "The First Amendment, Academic Freedom, and Access To Promotion And Tenure Files." Education Law Reporter 61 (1990): 89-123.

Hennessey, P. C., & S. Devine. "An Ontario Update of Legal Issues." In Running Universities and Colleges: A Roller Coaster of Risks. (pp. 278-290). Ottawa Canada: Canadian Society for the Study of Higher Education, 1991.

Horn, M. "The History of Academic Freedom in Canada: A Comment." CAUT Bulletin: December 1975.

Horn, M. "A Measured Freedom." Canadian Association of University Teachers: Ottawa, Canada, 1994.

Jones, D. P., & A. S. de Villars. Principles of Administrative Law. Second ed. Toronto, Canada: Carswell, 1994.

Lennards, J. L. The Academic Profession in Canada. Scarborough, Canada: Glendon College, York University, 1987.

Lewis, C. B. "Procedural Fairness and University Students: England and Canada Compared." Dalhousie Law Journal 9 (1985): 313-346.

Likins, J. M. "Six Factors In The Changing Relationships Between Institutions of Higher Education and the Courts." Journal of NAWDAC 42 (1979): 17-23.

Manne, H. G. "Comment on Peter Byrnès Academic Freedom and Political Neutrality." Journal of Legal Education 43 (1993): 101-105.

McConnell, W. H. "The Errant Professoriate: An Inquiry Into Academic Due Process." Saskatchewan Law Review 37 (1973): 250-280.

Metzger, W. P. "Academic Freedom in the Age of the University." Texas Law Review 46 (1955): 44-57.

Metzger, W. P. "Profession and Constitution: Two Definitions of Academic Freedom in America." Texas Law Review 66 (1988): 67-80.

Metzger, W. P. Academic Tenure in America: A Historical Essay. In Faculty Tenure (pp. 93-159). San Francisco: Commission on Academic Tenure in Higher Education, 1973.

Mullan, D. J., & I. M. Christie. "Canadian academic tenure and employment: An uncertain future?" Dalhousie Law Journal 7 (1982): 72-121.

Ontario Ministry of Education and Training. "Framework Regarding the Prevention of Harassment and Discrimination in Ontario Universities." Toronto, Canada: Ontario Ministry of Education and Training, October 7, 1993.

Penner, R. "Faculty Collective Bargaining in Canada: Background, Development and Impact" Interchange 9 (1978) : 370-381.

Realizing the Potential: A Strategy for University Research in Canada. Ottawa, Canada: The Royal Society of Canada, 1991.

Ross, M. "Academic Freedom." In The University: The Anatomy of Academe New York, USA: Rumford Press Inc., 1976.

Salhany, R. The Origin of Rights. Toronto, Canada: Carswell, 1986.

Savage, D. Personal Communication to Dr. Claude Lajuenesse. Ottawa, Canada: Canadian Association of University Teachers, October 6, 1994.

Savage, D. email: "Tenure." Ottawa, Canada: Canadian Association of University Teachers, 1995.

Savage, D. "How and Why the CAUT Became Involved in Collective Bargaining." 1994 Interchange 25 (1) 1994: 55-63.

Savage, D,. & C. Holmes. "The CAUT, the Crowe Case, and the Development of the Idea of Academic Freedom in Canada." The CAUT Bulletin December 1975.

Schrank, B. "Academic Freedom and the Inclusive University. The CAUT Bulletin. May 1994: 9.

Secretary to the Board of Governors. Board of Governors Book Ottawa, Canada: Carleton University, 1993.

Sibley, W. M. "Modes of University Governance." In H. N. Janisch (ed.), The University and the Law (pp. 14-22). Halifax, Canada: Dalhousie University Press, 1975.

Sim, V. W. "Campus Bargaining at the Crossroads." In Douglas, Joel M., (ed.) Proceedings of the Annual Conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions (pp. 83-96) 10th, New York, New York, April 1982.

Smith, S. L. Commission of Inquiry on Canadian University Education. Ottawa, Canada: Association of Universities and Colleges of Canada., 1991.

Soberman, D. (1965). "Tenure in Canadian Universities." The CAUT Bulletin March 1965.

Task Force on Resource Allocation. Some Perspectives on Academic Freedom, Autonomy and Accountability. Ottawa, Canada: Ontario Council on University Affairs, 1995.

Thistle, W. Major Legal Issues Facing Canadian Universities in the 90's. St. John's Newfoundland, 1994.

Treitel, G. H. The Law of Contract (7th ed.). London, United Kingdom: Sweet & Maxwell, 1987.

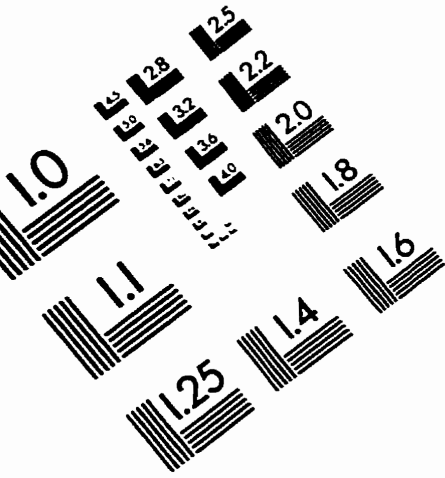
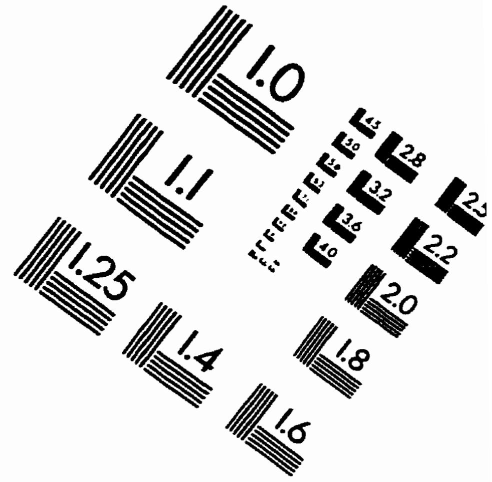
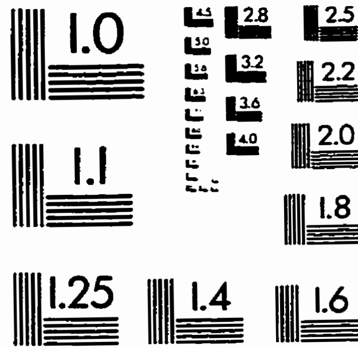
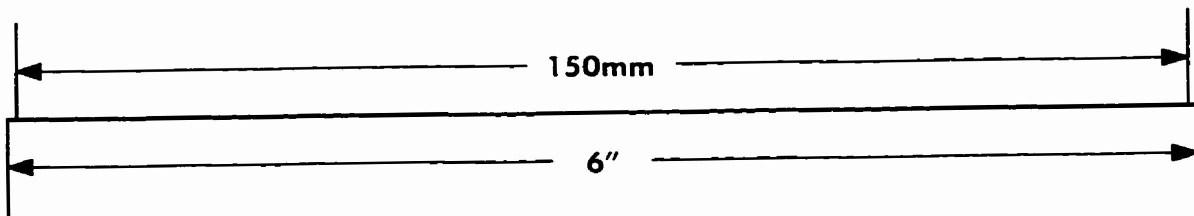
Trotter, B., McQueen, D., & B. Hansen. The "Ten O'clock Scholar": What a Professor Does for His Pay. Toronto, Canada: Council of Ontario Universities, 1972.

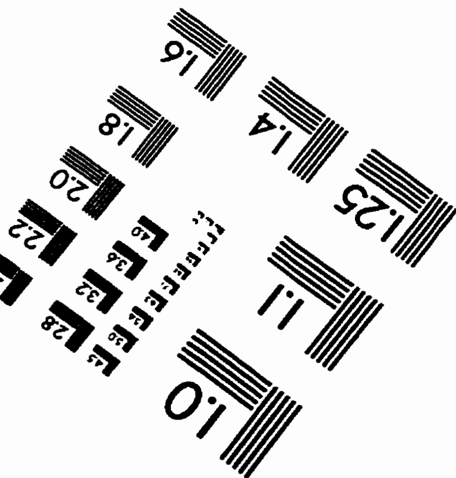
Waddams, S. "In Defence of Tenure." Dialogues September 10 1993: 2.

Whyte, J. D. "Dispute Adjudication in the University." In P Thomas (ed.) Universities and the Law (pp. 81-89). Winnipeg, Canada: Legal Research Institute of the University of Manitoba, 1975.

Worth Commission. "A Choice of Futures." Alberta, Canada: Government of Alberta, 1972.

IMAGE EVALUATION TEST TARGET (QA-3)



APPLIED IMAGE, Inc
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716/482-0300
Fax: 716/288-5989

© 1993, Applied Image, Inc., All Rights Reserved