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3-1-1982

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### Recommended Citation

Innis M. Christie & David J. Mullan, "Canadian Academic Tenure and Employment: An Uncertain Future?" (1982-1983) 7:1 DLJ 72.

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### *I. Introduction*

Canadian academic employment relationships can be said to fall into three categories:

- 1) The traditional "contract-statute" relationship
- 2) The collective bargaining relationship, and
- 3) The "special plan" relationship.<sup>1</sup>

What is the legal nature of each of these relationships and what are the implications of each? Which issues have proved, or could prove, sensitive in the "contract-statute" setting? Can collective agreements or special plans provide better solutions? These are the fundamental legal questions, but tenure issues loom so large that they tend to swallow up the other questions and answers.<sup>2</sup>

What follows is organized generally as, first, consideration of the legal nature of each of the three "categories" of academic employment relationships; second, discussion of the sensitive issues in the traditional relationship and, third, assessment of special plans and collective bargaining. That organization breaks down somewhat because the legal nature of the traditional contract-statute relationship necessarily involves an extended consideration of tenure, the most sensitive issue in that relationship. Finally, because a very significant feature of collective bargaining for academics will be its impact on tenure, tenure becomes an important part of the concluding section as well.

The concern here is not with the law relating to any particular university or of any one province, although the setting in which this material was originally presented is, perhaps, reflected in the extent

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1. A phrase coined originally at U.B.C. apparently, and now widely used by the CAUT in its official literature. For example, see G. England and I. McKenna, "Special Plan Collective Agreements" (1977), 25(4) CAUT Bulletin.

2. This paper is an amalgam of two; "University Employment: The Canadian Experience" by Professor Christie and "Tenure: Employment For Life or an Uncertain Future?" by Professor Mullan. They have been stitched together by Professor Christie, who takes responsibility for the seams, and for the non-tenure aspects of the product. Credit for the tenure aspects belongs to Professor Mullan.

of the references to British Columbia legislation.<sup>3</sup> References to particular collective agreements are illustrative only, and may not be in accord with the most recently negotiated amendments.

## II. *Legal Nature of the Relationship*

(1) *The Contract-Statute Relationship.* Market and other social forces dramatically changed Canadian universities in the 1960s<sup>4</sup> but the general principles of law that governed the employment of academics did not change with the move from the authoritarian era of apparent stability and tranquility<sup>5</sup> into the post Duff-Berdah<sup>6</sup> period of greatly increased faculty participation in university government until the advent of collective bargaining for faculty members. The rights and obligations of academic employees and their employer universities were determined by individual contracts of employment, modified in incidental ways by provincial employment law statutes of general application, and, more significantly, by the special or general university acts establishing the universities and empowering their boards of governors and, possibly, other organs and officers, to do particular things in particular ways. In universities where no union has been certified as

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3. The two original papers were first presented at a conference on *Universities and the Law* sponsored by the Faculty of Law, University of Victoria in the spring of 1980. Copies of all papers presented are available from the faculty offices. Our thanks to the Faculty, particularly the organizer, Professor W. A. W. Neilson and former Dean Murray Fraser, for support and permission to publish here.

We are grateful to Vic Sim of CAUT and to Professor Geoffrey England, Faculty of Law, University of Alberta (Lethbridge) for access to materials held by CAUT. Professor Mullan received helpful comments from his colleagues Dan Soberman and John Whyte. Previous Canadian writing to which we are in some debt includes, particularly: Bora Laskin, "Some Cases at Law" in *A Place of Liberty* (ed. George Whalley) (Toronto: Clarke, Irwin, 1964) at 177; Daniel A. Soberman, "Tenure in Canadian Universities" (1965), 13 CAUT Bulletin 5; Yves Ouellette, "Le contrôle judiciaire sur l'université" (1970), 48 Can. B. Rev. 631; G.H.L. Fridman, "Judicial Intervention Into University Affairs" (1973), 21 Chitty's L.J. 181 and "The Nature of a Professorial Contract" in *Universities and the Law* (ed. Paul Thomas) (Legal Research Institute of Manitoba, 1976) at 7; R. Lynn Campbell, "Tenure and Tenure Review in Canadian Universities" (1981), 26 Mc G.L.J. 362.

4. B.L. Adell and D.D. Carter, *Collective Bargaining for University Faculty in Canada* (1972), at 3-4 and 15 ff.

5. Sibley, *Modes of University Government* (1976), Can. J. Higher Ed. 19, quoted in O. Carrigan "Unionization in Canadian Universities" (1977) (unpublished).

6. *University Government in Canada: Report of a Commission Sponsored by the CAUT and the AUCC* (Toronto: U. of T. Press, 1966). See Adell and Carter, *supra*, note 2 at 20.

collective bargaining agent for the faculty those are still, essentially, the three sources of law governing the academic employment relationship.

In Alberta and British Columbia there are general University Acts applying to all universities: In British Columbia, for example, the *Universities Act*<sup>7</sup> sets out the powers of the Board of Governors, the Senate, the President and the Faculties at the University of British Columbia, the University of Victoria and Simon Fraser University.

In other provinces each university has its own enabling statute. The Act relating to Dalhousie<sup>8</sup>, for example, sets out the powers of the Board of Governors and the Senate. It empowers the Board to "appoint and to determine the duties of the . . . professors . . . and from time to time make statutes and by-laws for the regulation and management thereof." On the face of it, each university acting through its president and board of governors<sup>9</sup> has the power to hire faculty, to administer the employment relationship and to terminate faculty, just as any other employer has. Those powers are, of course, subject to provincial labour standards, workmen's compen-

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7. R.S.B.C. 1979, c.419; and R.S.A. 1970, c.378 (as am.)

8. S.N.S. 1863, c.23, as am. by S.N.S. 1935, c.104 and 1958, c.121. See also, for example, *University of Manitoba Act*, R.S.M. 1970, c.U60 (as am.). Queen's University is in a somewhat peculiar position, however. Queen's College, now Queen's University, was established by Royal Charter issued at Westminster in 1841. Subsequently, statutory confirmation, amendments and reconstitutions have been effected by federal legislation, in particular S.C. 1882, c.123; S.C. 1912, c.138. Stuart Ryan has argued, in an unpublished paper on whether Queen's University is subject to the *Ontario Judicial Review Procedure Act*, R.S.O. 1980, c.224, that these have not really changed the domestic character of the university's tenure-granting functions which remain unaltered from the original Charter. Nevertheless, in *R. v. Aston University Senate, ex parte Roffey*, [1964] 2 Q.B. 138 (D.C.), public law remedies were held available with respect to a university established by Royal Charter and, though criticized subsequently [see *Herring v. Templeman*, [1973] 3 All E.R. 569 (C.A.) at 584-585 (per Russell L.J.) and *H.W.R. Wade, Note* (1969), 85 L.Q.R. 868 and *Administrative Law* (Oxford: Clarendon Press, 4th ed., 1977) at 478-480], it must be regarded as having some weight. Of course, even if public law remedies are applicable, the Queen's faculty member contemplating litigation against the University still has a problem. Because of the federal statutes governing the university's affairs, the *Ontario Judicial Review Procedure Act*, R.S.O. 1980, v.224, probably does not apply and, if he wants public law relief, he may have to seek relief from the Federal Court under either section 18 or 28 of the *Federal Court Act*, S.C. 1970-71-72, c.1. (The Federal Court has virtually exclusive judicial review authority with respect to federal statutory authorities.) On the other hand, if he sues in contract or tort the courts of Ontario will have jurisdiction.

9. In B.C. by virtue of the *Universities Act*, R.S.B.C. 1979, c.419, s.27(f) and s.56(2) (a).

sation and similar legislation,<sup>10</sup> but, with rare exceptions, general legislation of that sort does not affect academics directly because it sets minimum standards which even the most put-upon academic will exceed by a good margin.

What then is the legal nature of the relationship between the university as employer acting under its governing legislation and its academic staff, where there is no certified faculty union? The threshold question is whether the relationship constitutes a contract; and the crucial issue is whether "tenure" is a purely contractual notion defined by the private law of contract and the terms of a contract between the university and its faculty member or a status akin to that of a "public office" subject to the public law developed by the courts in relation to office-holders? This uncertainty arises from, on the one hand, the now statutory basis of all Canadian universities, accompanied sometimes by a reference to the status of tenure in the empowering Act itself,<sup>11</sup> and, on the other hand, the purely contractual features of the relationship, evidenced particularly by dickering over salary and conditions of employment and the making of "offers of employment" by the university to individual faculty members.<sup>12</sup>

A not unnatural first reaction is to ask whether this distinction really matters in a practical sense. The answer, quite clearly, is that it does, although its practical significance has been diminished at many universities by collective bargaining.<sup>13</sup>

10. The law of tort and property, and federal law like the *Unemployment Insurance Act* will also be part of the legal employment relationship, in the broadest sense. See generally, I.M. Christie, *Employment Law in Canada* (Toronto: Butterworth, 1980).

11. See *supra*, note 8 and e.g., *Universities Act*, R.S.B.C. 1979, c.419, s.28(f), which gives the Board of Governors of British Columbia universities authority to fix the *tenure* of office of professors "which unless otherwise provided shall be during the pleasure of the board". Compare *University of Regina Act*, S.S. 1973-74, c.119, c.62(f), which refers to "*terms of office or employment* . . . which unless otherwise provided shall be during the pleasure of the board."

12. For a more extensive discussion of the mixed public and private aspects of universities generally, see G.H.L. Fridman, "Judicial Intervention Into University Affairs", *supra*, note 3, at 181-182.

13. Of course even within collective bargaining regimes certain university faculty may be excluded from the bargaining unit (e.g. some members of the medical faculty at Dalhousie) and they will come within the general law. There may also be a possibility that general procedural statutes such as the *Statutory Powers Procedure Act* (R.J.O. 1980, c.484) will be read into or even prevail over the collective agreement if a university professor is regarded as a public officeholder. (This is suggested in an internal CAUT memorandum by Ted Bartley, formerly one of the Association's professional officers.) At this point, "special plan collective

If a tenured faculty member is a public office holder, dismissal contrary to the rules of substance or procedure prescribed for or adopted by his university under its empowering Act may give rise to typical public law remedies,<sup>14</sup> the effect of which will be reinstatement to the tenured position, at least until fair procedures are followed or proper cause is shown.<sup>15</sup> In contrast, if the tenured faculty member is a mere employee his chances of reinstatement through the vehicle of a decree of specific performance are very slim unless, as is happening more commonly nowadays even in non-collectively organized universities, reinstatement is specifically provided for as a remedy in the university rules and individual contracts.<sup>16</sup> Absent such provision; specific performance is seldom

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agreements" should also be noted. See *infra*, note 75ff. and accompanying text.

14. The most important common law remedies in this area are *certiorari* and prohibition. The effect of granting relief in the nature of *certiorari* is to quash the dismissal decision, a step which in law means that the successful applicant still is and always has been a faculty member of the university. Prohibition comes at an earlier point and, as the name suggests, it operates to prevent the university from taking a decision contrary to the rules of substance or procedure which govern the relationship between a university and the faculty member. Also available in some situations is *mandamus*, a remedy which compels the university to perform its legal duty. In both British Columbia and Ontario, by virtue of the *Judicial Review Procedure Acts* of those provinces (R.S.B.C. 1979, c.209; R.S.O. 1980, c.224), these three types of relief are now all sought by a simplified application for judicial review, while in Quebec *certiorari* and prohibition since 1965 have been combined into a single remedy: evocation. See generally D.J. Mullan, *Administrative Law* (Toronto: Carswell 2nd ed. 1979) at 197-214 ff.

15. See, however, the discussion below of the *Kane* case, note 35 and accompanying text, for a situation in which a successful application for judicial review did not result in reinstatement. Note also *Bellechasse Hospital Corporation v. Pilote*, [1975] S.C.R. 454, discussed *infra* at note 139.

16. There is some question whether the courts will give automatic effect to such attempts at remedy stipulation. Penalty clauses or clauses which seek to enforce higher than actual loss damages for breach have traditionally been held to be void as contrary to public policy. It is possible to argue that the same principles which lie behind this rule will undermine attempts to stipulate for specific performance in situations where the courts would not generally award it; that it is in the public interest that the courts (and not the contracting parties themselves) devise remedies for breach. Nevertheless, such remedy stipulation seems to be accepted where it is developed in the context of a clause requiring disputes to be submitted to arbitration, at least where specific performance is specified as an available option rather than a mandatory remedy, and this, of course, will be the usual situation in the university context. (See Richard Brown, "Contract Remedies in a Planned Economy: Labour Arbitration Leads the Way", Chapter 4 in Barry J. Reiter and John Swan, *Studies in Contract Law* (Toronto: Butterworths, 1980) at 100-107; Donald J. M. Brown and David M. Beatty *Canadian Labour Arbitration* (Toronto: Canada Law Book Co. 1977 at 64). For general discussion of this issue and the uncertainties surrounding it, at least outside of the arbitration clause context, see

available for personal services contracts, damages generally being regarded as the appropriate remedy.<sup>17</sup>

As a mere employee it will be very difficult, if not impossible, for a university faculty member to argue for procedural protections, including the right to a hearing, if the rules of the university do not make express provision for procedures to be followed. Courts have not implied procedural requirements into silent contracts of employment.<sup>18</sup> As a public office-holder, on the other hand, the

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Robert J. Sharpe, "Specific Relief for Contract Breach", Chapter 5 in *Studies in Contract Law*, *id.*, at 135-136; Anthony T. Kronman, "Specific Performance" (1978), 45 U. of Chi. L. Rev. 351 at 370-76; Ian R. MacNeil, "Power of Contract and Agreed Remedies" (1962), 47 Cornell L.Q. 495 at 520-24; Allan Schwartz, "The Case for Specific Performance" (1979), 89 Yale L.J. 271 at 273-274. Surprisingly, specific performance is not even mentioned in the one English-Canadian article on remedy stipulation: Roger Brownsword "Remedy Stipulation in the English Law of Contract — Freedom or Paternalism?" (1979), 9 Ott. L. Rev. 44. Note, however, the judgment of Laskin, C.J.C., speaking for the Court in *Red Deer College v. Michaels* (1975), 57 D.L.R. (3d) 386 (S.C.C.) at 399, in which a collective agreement purported to give the court authority to order reinstatement for a wrongful dismissal:

One thing is certain, the provision in the collective agreement . . . has no effect on the Court's jurisdiction, it exists without any assistance from a private agreement.

Finally, for empirical work on the content of appeal and arbitration clauses, see Campbell, *supra*, note 3.

17. *McWhirter v. Governors of the University of Alberta* (No. 2) (1977), 80 D.L.R. (3d) 609 (Alta. S.C., T.D.); (rev'd (but not on this point) (1979), 18 A.R. 145 (S.C.A.D.)) — reflects the generally accepted common law position established originally in *Priestly v. Fowler* (1837), 3 M. & W. 1; 150 E.R. 1030. See also *I.B.E.W. Local Union 2085 v. Winnipeg Builders Exchange* (1967), 65 D.L.R. (3d) 242, at 250 (S.C.C.); *Red Deer College v. Michaels id.*, at 400. However, the attitude of the English courts to the availability of specific performance, at least at the suit of an employee, seems to be changing: *Hill v. C.A. Parsons & Co. Ltd.*, [1972] Ch. 305 (C.A.); *C. H. Giles and Co. Ltd. v. Morris*, [1972] 1 W.L.R. 307 (Ch.D.) at 318-319 (per Megarry J.); *Price v. Strange*, [1978] Ch. 337 (C.A.) at 359-360 (per Goff L.J.), but compare 369 (per Buckley L.J.). It now seems to be accepted that there is no absolute prohibition against such relief in personal service situations, though it will require an exceptional case for the remedy to be awarded. The American courts may indeed have gone even further as evidenced by the college case of *A.A.U.P. v. Bloomfield College*, (1974), 322 A. 2d. 846 (N.J.S.C., Ch.D.) See generally Christie, *Employment Law in Canada*, *supra*, note 10 at 385 ff.

18. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence; it depends on whether the facts emerging at the trial prove breach of contract.

Lord Reid in *Ridge v. Baldwin*, [1964] A.C. 40 (H.L.(E)), at 65. See also G. England, "Recent Developments in Wrongful Dismissal Laws and Some Pointers for Reform" (1978), 16 Alta. L. Rev. 470 at 485 ff for a critical evaluation of the common law position.



tenured professor, at least to the extent that he can be dismissed only for cause, has strong legal authority to support an argument for a hearing before removal from office even when the statute and the university regulations are silent.<sup>19</sup>

Indeed, it is worth noting that there is some support in Canadian decisions for a measure of implied procedural protection even for someone who is seeking tenure, as opposed to having it removed.<sup>20</sup> This is further strengthened by the decision of the Supreme Court of Canada in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* in which it was held that implied procedural fairness obligations may be present in a much wider range of situations than was previously thought to be the case.<sup>21</sup> There the Court held that a probationary police constable was entitled, notwithstanding legislative silence, to certain procedural decencies before he was dismissed. The analogies to the dismissal of a probationary professor are obvious, and there may also be some comfort here for those under consideration for tenure.

There may, however, be corresponding difficulties for the tenured professor viewed as a public office-holder. As such his claim is to observance of the Act itself and those rules of the university which have status as subordinate legislation. The difficulties lie in drawing parallels between a university's rules and

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19. *Ridge v. Baldwin*, *id.*, is the most famous case in support of this proposition. See also *Malloch v. Aberdeen Corporation*, [1971] 1 W.L.R. 1578 (H.L. (Sc)); *Re McCleery and the Queen*, [1974] 2 F.C. 339 (C.A.); and *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, for some indication that, even where the statutory office is held at pleasure, or where "cause" need not exist before there is a dismissal, there may in some situations be implied procedural requirements.

20. See *Re Paine and University of Toronto* (1980), 115 D.L.R. (3d) 461 (Ont. H.C., D.C.) (holding the tenure granting process at the University of Toronto to involve a "statutory power of decision" subject to the procedural obligations of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484) and *Elliot v. Governors of University of Alberta and Allen*, [1973] 4 W.W.R. 195 (Alta. S.C., T.D.). Contrast, however, *Vanek v. Governors of University of Alberta*, [1974] 3 W.W.R. 167 (Alta. S.C., T.D.); *aff'd* (1975), 57 D.L.R. (3d) 595 (Alta S.C., A.D.). *Elliot* is discussed critically by Fridman, "Judicial Intervention Into University Affairs", *supra*, note 3 at 182-187 and in "The Nature of a Professional Contract", *supra*, note 3 at 19-21, he talks about both *Elliot* and *Vanek*.

21. *Supra*, note 19. In *Nicholson* the Supreme Court accepted that procedural fairness claims were not confined, as had been generally thought up until then, to judicial or quasi-judicial bodies but could also be made with respect to at least some categories of purely administrative decisions. See D.J. Mullan, "Fairness: The New Natural Justice?" (1975), 25 U. of T. L.J. 281, cited by Laskin C.J.C. in *Nicholson*, at 325.

regulations and the by-laws of a municipality or regulations promulgated by Cabinet. If the rules or regulations in question had been made by the university's central legislative organ, the Board of Governors or the Senate, the analogy to a municipality's by-laws would be relatively clear, but a court could regard such rules as being simply internal rules of the university, not conferring any judicially enforceable rights.<sup>22</sup> With rules not formally promulgated by the university's central legislative organ this possibility becomes a likelihood. Indeed this type of reasoning has recently appealed to the Supreme Court of Canada in the context of prison disciplinary rules, which the Court refused to categorize as "law" in denying relief for their non-observance in *Marineau and Butters v. Matsqui Institution Inmate Disciplinary Board (No. 1)*.<sup>23</sup>

To further complicate the picture, there may be other very real advantages for the tenured faculty member in arguing for tenure as a contractual concept rather than as a statutory status. If it is contractual the university may have a much harder job imposing modifications of tenure on those who already have it. Contracts cannot be changed unilaterally but statutory authorities are generally held not to be prevented from exercising their rule-making powers even in the face of representations to the contrary made to those affected.<sup>24</sup> In other words if the university is regarded simply as a

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22. *Wheeldon v. Simon Fraser University* (1970), 15 D.L.R. (3d) 641 (B.C.S.C.) suggests this possibility, although the peculiar facts of the case limit its general applicability. See *infra* notes 52-55 and accompanying text.

23. [1978] 1 S.C.R. 118. The holding in this case was notwithstanding the fact that the directives were authorized directly in the empowering Act itself. However, note *Martineau and Butters v. Matsqui Institution Disciplinary Board (No. 2)* (1979), 30 N.R. 119 (S.C.C.), in which the Supreme Court held that it was still possible for the applicants to argue for a measure of procedural protection on a common law basis even though the hearing rules were not themselves "law". For a trenchant criticism of the first decision, see H.N. Janisch, Comment (1977), 55 Can. B. Rev. 576.

24. For a recent discussion of estoppel by representation as it applies generally to statutory authorities in Canada, see Patrick McDonald, "Contradictory Government Action: Estoppel of Statutory Authorities" (1979), 17 Osgoode Hall L.J. 160. A nice problem arises in what is in a sense the converse situation. What if a university exercises its powers improperly in relation to a faculty member. If the relationship is merely contractual this may be excused by the faculty member or be the subject of settlement or compromise [*Dombrowski v. Board of Governors of Dalhousie University* (1975), 55 D.L.R. (3d) 268 (N.S.S.C., T.D.), *aff'd* (1976), 79 D.L.R. (3d) 355 (N.S.S.C., A.D.), *Ayre v. University of Manitoba* (1976), 65 D.L.R. (3d) 747 (Man. C.A.)]. If, however, the professor is, viewed as an office-holder with public law rights, it may be much more difficult for the University to set up an effective waiver or compromise. Jurisdiction cannot be

statutory body exercising its statutory power it may be able to change tenure rules in existence when the tenure in question was granted and thus affect the legal incidents of tenure for any member of faculty. On the other hand, if tenure is a purely contractual notion a change in the rules will at the very least require the consent or acquiescence of those affected by it. There will have to be fulfillment of one of the recognized ways of modifying a contract, considered below,<sup>25</sup> each of which necessarily involves the other party; who in this case would be the tenured professor or, possibly, even a person employed on a tenure stream contract subject to certain existing procedures for tenure consideration.<sup>26</sup>

Another possible advantage for the faculty member of a purely contractual analysis relates to the role of the courts. If tenure is a public statutory office, decisions about it will reach the courts only in judicial review proceedings, where the courts have very limited authority to overturn a decision on the merits, their main concern being procedural deficiencies and lack of jurisdiction.<sup>27</sup> If tenure is contractual then the action is not for judicial review but generally for damages for breach of contract, and in that context the courts are far more likely to determine the merits. In judicial review proceedings involving a dismissal for cause the courts would generally be unwilling to determine whether there was in fact cause. Provided the decision did not reveal a clear error of law or a totally unreasonable view of the facts there would be no review of the merits. In a breach of contract action, on the other hand, the court would be willing to decide the question afresh, to substitute its view

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conferred on a public body by consent, it is sometimes asserted. See J.M. Evans, *de Smith's Judicial Review of Administrative Action* (London: Stevens, 4th ed., 1980) at 153-154 and 422-423. However, *Ayre* may have been decided on public rather than private law principles. See judgment of Hall J.A. (with which Matas J.A. concurred) at 752.

25. See *infra*, notes 56-62 and accompanying text.

26. For American discussion of this doctrine in the tenure context see Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context" (1977), 6 *Journal of Law and Education* 279 at 288-291 and 285-286; Matthew W. Finkin, "Contract, Tenure and Retirement: A Comment on *Rehor v. Case Western University*" (1975), 4 *Human Rights* 343.

27. Error of law on the face of the record is a ground of review, absent a privative clause. Patent unreasonableness and a total absence of evidence to support a decision may also give rise to judicial intervention. However, those instances aside, the message of recent Supreme Court of Canada decisions has been that the courts should be very circumspect in intervening in the merits of statutory decision-making. See particularly, *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation* (1979), 97 D.L.R. (3d) 417 (S.C.C.).

of the law and the facts for that of the dismissing university.<sup>28</sup>

However, even if the relationship is purely contractual, where the parties have established their own remedial regime, either in the form of internal appeal committees or external arbitration, the courts may be as reluctant to interfere with the disposition of the matter (particularly in the case of external arbitration) as they are on judicial review.<sup>29</sup>

In sum, from the perspective of the university professor, either tenured or applying for tenure, sometimes it will be advantageous to assert one view of the status and sometimes the other. The issue remains: What is the present Canadian position?

The early Canadian case law in this area, while generally going against the complaining professor, gives some support to the proposition that tenured academic employment is a statutory office, at least in some senses of that word.<sup>30</sup> However, in all but one case,

28. See, for example, Steer J's judgment in *McWhirter v. Governors of University of Alberta* (1975), 63 D.L.R. (3d) 684 (Alta. S.C., T.D.) and the full consideration he gives both to the meaning of the contract and whether there had in fact been a breach. Nevertheless, even if tenure is regarded as contractual in nature the scope for court intervention may narrow considerably where dispute resolution has been committed to internal university bodies. See *infra*, notes 35 and 40 and accompanying text, and *McWhirter v. Governors of University of Alberta* (No. 2) (1979), 18 A.R. 149 (A.D.). In an American context, see also *Krotoff v. Goucher College* (1978), 585 F. (2d) 675 (4th Circ.) in which the Court adopted a judicial review, limited intervention stance in a breach of contract action to the College's determination of a state of financial exigency.

29. For a detailed discussion of the relationship between the law relating to judicial review of statutory authorities (including statutory arbitrations) and that relating to consensual arbitrations, see the judgment of Estey J. in *Douglas Aircraft Co. of Canada Ltd. v. McConnell* (1979), 99 D.L.R. (3d) 385 (S.C.C.).

30. The six early cases are *Ex parte Jacob* (1861), 10 N.B.R. 153; *Weir v. Matheson* (1866), 3 U.C. E. & A. 123 (Ont.); *Re Wilson* (1885), 18 N.S.R. 180; *In re University of Saskatchewan and MacLaurin*, [1920] 2 W.W.R. 823 (Sask. K.B.); *Craig v. Governors of University of Toronto* *supra*, note 18; *Smith v. Wesley College*, [1923] 3 W.W.R. 195 (Man. S.C.). There was then a hiatus of almost fifty years before the next reported case. The early decisions are well discussed by Laskin, Soberman, Ouellette, Fridman, Campbell and Ryan, *supra*, note 3.

Most strongly supportive of the proposition in the text is *Re Wilson* in which the applicant secured *mandamus* to compel his reinstatement as a professor because his dismissal had been effected without proper notice and the opportunity to be heard — the office of professor was stated to be held during good behaviour in the empowering statute. *Weir v. Matheson*, in a quite different legislative context, held clearly that the professor-university relationship was a regular servant-master one.

The other four cases are all complicated by the intrusion of visitorial jurisdiction and/or the existence of a statutory provision to the effect that professors hold office

it was a statutory office that accorded very little protection, as it was generally seen simply as a status held "during the pleasure" of the governing authorities as opposed to being an office from which the incumbent could only be removed for cause. This meant that the courts would not intervene for absence of fair procedures nor would they scrutinize the merits of the decision in any way, save where bad faith or corrupt motive was established.<sup>31</sup>

Support for the point of view that tenure is a statutory office can also be found in a number of much more recent decisions in which public law remedies were used either with explicit approval or without question by the courts to challenge various aspects of university decision-making, including not only those affecting tenure and professors generally, but also students.<sup>32</sup> Of special

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during pleasure (though for example, in *MacLaurin*, *Craig*, and *Smith* this was unless otherwise provided by the governing authorities). In *Craig*, Orde J. (at 321) was, however, prepared to acknowledge the possibility "that the Board comes within that class of *quasi-public* bodies possessing the power of summary dismissal similar to that possessed by the Crown" but did not feel it was necessary to decide that point. In *Jacob*, the Court doubted the availability of *certiorari*. In *Smith*, an action for damages for breach of contract, much emphasis was placed upon the "private" nature of the institution, a fact that was held to give the college less latitude than that possessed by the institutions in *Jacob*, *Craig* and *MacLaurin* in which the contract governed.

31. The relevant statutes in *Jacob*, *MacLaurin*, *Smith* and *Craig* all contained wording to this effect. Indeed, such language can still be found in university statutes to this day. See *Universities Act*, R.S.B.C. 1979, c.419, s.28(f) (unless otherwise provided). In *MacLaurin*, the judges of the Saskatchewan King's Bench Division sitting in their visitatorial capacity stated (at 827):

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

32. With regard to professors see, for example, *Chamberlain v. Board of Governors of University of Western Ontario*, unreported decision of Donnelly J. of the Ontario High Court, delivered June 27, 1974, holding the dismissal proceedings brought against Chamberlain to be subject to both review under the *Judicial Review Procedure Act*, R.S.O. 1980, c. 224, and the procedures laid down in the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484; *Re Brendon and Board of Governors of University of Western Ontario* (1977), 81 D.L.R. (3d) 260 (Ont. H.C.) and particularly *Re Paine and University of Toronto*, *supra*, note 20. With regard to students see *Re Schabas and Caput of University of Toronto* (1974), 52 D.L.R. (3d) 495 (Ont. H.C., D.C.); *Re Polten and Governing Council of University of Toronto* (1975), 59 D.L.R. (3d) 197 (Ont. H.C., D.C.), in each of which certain university decision-making in relation to students was held to be subject to review under the *Ontario Judicial Review Procedure Act*, R.S.O. 1980, c.224; *King v. University of Saskatchewan*, [1969] S.C.R. 678 at 683-684 (*per* Spence J.), approving on this point (1968), 1 D.L.R. (3d) 721 (Sask. C.A.) at 723;

significance is *Re Elliot and Governors of University of Alberta*, a 1973 decision of the Alberta Supreme Court, Trial Division, in which Lieberman J. held that the University's faculty tenure committees and tenure appeals committee, which derived their authority from the statutorily-designated general faculty council and Board of Governors, were themselves statutory bodies amenable to public law remedies.<sup>33</sup> Also very important is the recent decision of the Supreme Court of Canada in *Kane v. Board of Governors of University of British Columbia*.<sup>34</sup> This was a successful application for judicial review, a public law remedy under the *British Columbia Judicial Review Procedure Act*,<sup>35</sup> involving an appeal from the suspension of a tenured faculty member conducted contrary to the rules of natural justice. In neither the British Columbia courts nor the Supreme Court of Canada was there ever any suggestion that he should have been suing for damages for breach of contract rather than for judicial review.

On the other hand, there have been occasions on which professors have pursued the regular breach of contract route without objection by the courts or by the defendant university to the form of the proceedings. Indeed, in *Re Vanek and Governors of University of Alberta*, decided shortly after *Elliot*, both the trial court judge,

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*Re Harelkin and University of Regina* (1979), 96 D.L.R. (3d) 14 (S.C.C.). It is, however, interesting to note that in *Polten*, Weatherston J. suggests that as opposed to the student matter before the Court, "disputes over tenure or terms of employment between members of the teaching staff and the university . . . can probably only be resolved in an action for breach of contract" (*id.*, at 212). For a recent Canadian discussion of the issue in a different context, see *McCarthy v. Board of Trustees of Calgary Roman Catholic Schools School District No. 1* (No. 2) (1979), 101 D.L.R. (3d) 48 (Alta. S.C. T.D.) See also *Anderson v. Director General of Education*, [1978] 2 N.J.W.L.R. 423 (Admin. L.D.)

33. *Supra*, note 20.

34. (1980), 110 D.L.R. (3d) 311 (S.C.C.), reversing (1979), 98 D.L.R. (3d) 726 (B.C.C.A.), which had affirmed (1977), 82 D.L.R. (3d) 494 (B.C.S.C.).

35. S.B.C. 1976, c.25. As noted previously, this statute, as with the Ontario *Judicial Review Procedure Act* R.S.O. 1980, c.224, created a new, virtually comprehensive public law remedy out of a combination of most of the important common law remedies — *certiorari*, prohibition, *mandamus*, declaration and injunction. Two points deserve to be made about *Kane* in this regard:

1. Not only did Kane obtain judicial review (the new remedy) from the Supreme Court of Canada but, when at the lower court levels he was denied relief, it was on the basis of substance and not because he had sought the incorrect remedy.
2. However, the end result of the case was not a quashing of the suspension itself but only of the appeal from the suspension. The defect was in the conduct of the appeal so that Kane's right was to a proper appeal hearing — not to a quashing of the suspension.

Cavanagh, J., and Clement J.A. (delivering the judgment of the Appellate Division) disagreed with Lieberman J. and held that the faculty tenure committee was not subject to public law remedies because it was not a statutory body.<sup>36</sup> Subsequently, Steer J., in *McWhirter v. Governors of University of Alberta* (No. 2), approved this aspect of Clement J.A.'s judgment in *Vanek* and held that an applicant for tenure's recourse for failure to follow the rules found in the Faculty Handbook rested in contract, not public law.<sup>37</sup> In doing so, he spoke of the distinction between

. . . employment and the resultant status conferred by virtue of a statute and employment under a contract of employment. In the former situation, the discharge is a nullity. In the latter situation, there is never a nullity. If a dismissal is a breach of contract it is lawful but it can only sound in damages.<sup>38</sup>

His Lordship then went on to state that, in exceptional

36. [1974] 3 W.W.R. 167 (Alta. S.C., T.D.) at 170-172, aff'd (1975), 57 D.L.R. (3d) 595 (Alta. S.C., A.D.) at 600 and 607. Both also held that the appropriate step in that case was for *Vanek* to invoke the aid of the university's Visitor rather than pursuing his grievance through the regular courts. This latter aspect of the decision was followed by Steer J. in *McWhirter v. Governors of University of Alberta*, *infra*, note 37 (and accompanying text). However, Steer J. did draw a distinction between allegations of unfairness in the tenure granting process which he held came within the exclusive jurisdiction of the Visitor and other allegations of breach of contract which were pleaded by the plaintiff. These included such matters as suppressing his courses and not describing them fully in the calendar. Subsequently, as a result of the difficulties that were encountered in invoking the jurisdiction of the Visitor, the Lieutenant-Governor of the Province, in *Vanek's* case, the *Universities Act* was amended and the office of Visitor abolished (see *Universities Amendment Act*, S.A. 1976, c.88, s.2, amending *Universities Act*, R.S.A. 1970, c.378, s.5). The abolition of the Visitor took place while *McWhirter* was on appeal and the Appellate Division sent the case back to Steer J. for consideration of the fair procedures issue. The office of Visitor continues to be retained at many universities across Canada. See *Universities Act*, R.S.B.C. 1979, c.419, s.3; *Universities of Regina Act*, S.S. 1973-74, c.119, s.9. However, universities in Ontario do not appear to be subject to visitorial jurisdiction. (See, e.g., *Re Polten and Governing Council of University of Toronto*, *supra*, note 32 at 219-20.) For recent discussions of the role of the Visitor, see J.W. Bridge, "Keeping Peace in the Universities: The Role of the Visitor" (1970), 86 L.Q.R. 531; Yves Ouellette, "Le Contrôle judiciaire sur l'université", *supra*, note 3; W. H. McConnell, "The Errant Professoriate: An Enquiry Into Academic Due Process" (1973), 37 Sask. L. Rev. 250 at 250-259 and 277-280; William Ricquier, "The University Visitor" (1978), 4 Dalhousie L.J. 647; *Patel v. University of Bradford Senate*, [1978] 3 All E.R. 841 (Ch.D.) (commented on in W.T.M. Ricquier "Failed Students and Access to Justice", [1979] Public Law 209); *Riddle v. University of Victoria* (1978), 84 D.L.R. (3d) 164 (B.C.S.C.), aff'd [1979] 3 W.W.R. 289 (B.C.C.A.).

37. (1977), 80 D.L.R. (3d) 609 (Alta. S.C., T.D.) at 616-617.

38. *Id.*, at 617-618.

circumstances, of which this was not one, reinstatement or specific performance might be awarded for breach by the employer of a contract of service.<sup>39</sup> Damages for breach of contract were therefore awarded but, on appeal, even this was overturned on the basis that there had not in fact been a failure to follow the rules resulting in a breach of contract.<sup>40</sup>

To this has to be added the further uncertainty resulting from the fact that tenure and dismissal powers are created in very different ways in Canadian universities. Sometimes, as with the British Columbia *Universities Act*, tenure is given express recognition as a status in the empowering statute itself.<sup>41</sup> In *Kane*, the power to suspend which was in issue was specifically conferred by the statute.<sup>42</sup> On other occasions matters of hiring and discipline are mentioned only in the most general terms by the empowering Act and left to be filled out by the legislative and executive organs of the university as they see fit.<sup>43</sup> Arguments can therefore be made that the status of tenure may vary between Canadian universities depending on whether it is actually created by the empowering statute itself, in which case it will be a public office, or is left by the statute to be developed (if at all) at a legislative or executive level, in which case it will be a creature of contract.

Apart from tenure it seems safe to treat the university

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39. *Id.*, at 618.

40. (1979), 18 A.R. 149 (A.D.). An interesting aspect of the case is the Court's unwillingness to interfere with the new way in which the Faculty Tenure Committee dealt with the evidence. At 155, McGillivray C.J.A. states:

The Faculty and the Board of Governors have agreed upon a Tribunal, chosen because those persons have a particular expertise and knowledge of the matters coming before it and their views should not be lightly set aside. This is not a case where a trial judge has jurisdiction to resolve a dispute between parties — that is for the forum which they have selected in their agreement.

In terms of previous discussion on this paper, it is interesting to speculate whether this preference for party-selected modes of dispute resolution would also have led McGillivray C.J.A. to accept an entitlement to reinstatement if that remedy had been stipulated and was appropriate. See *supra*, note 16.

41. R.S.B.C. 1979, c.419, 24(f) (albeit held at pleasure unless the contrary is provided); *University of Waterloo Act*, S.O. 1972, c.200, s. 14(1) (b); *Wilfred Laurier University Act*, S.O. 1973, c.87, s.12 (b). The latter two are identified by Campbell, *supra*, note 3, and give the Board of Governors power "to grant tenure to a member of faculty".

42. *Universities Act*, R.S.B.C. 1979, c.419, s.58(1). The section then goes on to provide that the President shall forthwith report the matter to the Board (subs. 2) and the person suspended then has a right of appeal to the Board.

43. *Universities Act*, R.S.A., 1970, s.19.



employment relationship as one of contract like other employment relationships.<sup>44</sup> It is perfectly consistent with this that the form taken by university contracts of employment varies widely. There need be no single document, nor indeed any document at all. The contract may consist only in an exchange of letters, or in a combination of letters and a signed document. There may, of course, be a single signed document, but most probably there will be letters, a signed document and other standard documents referred to in the letter or the formal signed contract. In the common law provinces other than British Columbia the *Statute of Frauds* requires that there be a "memorandum or note" of the contract if it is for a fixed period of longer than one year<sup>45</sup> but for indefinite hirings, which would include appointments with tenure, the statute does not apply and there is no requirement of a signed document at all.<sup>46</sup> Failure to comply with the *Statute of Frauds* renders a contract "unenforceable".

The more serious issue is: What terms will be considered to be incorporated into a contract of employment? The answer is clear where there is express incorporation, as exemplified by a University of Alberta contract that was the subject of the *Vanek* litigation:

All the provisions, terms and conditions set forth in Part I of The University of Alberta Handbook as amended from time to time shall apply to and be treated as part of the contract of appointment. A copy of the Handbook is enclosed herewith and should be carefully read.<sup>47</sup>

44. The general proposition itself has been the subject of academic debate. See G.H.L. Fridman, "Who is an Employee" (1965), 16 New L.J. 11, at 11-12 but the prevailing view in Canada is that in the private sector the employment relationship arises out of and is based on contract. See Christie, *Employment Law in Canada*, *supra*, note 10 at 12 and authorities cited there.

45. The ancient English *Statute of Frauds*, 1677, 29 Car. 2, c.3, is in force as received law in Alberta, Saskatchewan, Manitoba and Newfoundland, and in Prince Edward Island at least insofar as it affects interests in land. *Delima v. Paton* (1971), 1 Nfld. and P.E.I. Reps. 317 (P.E.I.S.C.); *MacKenzie v. Champion* (1885), 12 S.C.R. 649. The P.E.I. *Statute of Frauds*, R.S.P.E.I. 1974, c.6 does not contain the relevant section. New Brunswick, Nova Scotia and Ontario have their own statutes: R.S.N.B. 1973, c. s-14; R.S.N.S. 1967, c.290; R.S.O. 1970, c.444. In British Columbia prior to March 1981 the archaic *Master and Servant Act*, R.S.B.C. 1960, c.234, s.5 (for one year incorporated as ss. 62-79 of the *Employment Standards Act*, R.S.B.C. 1979, c.107) would appear to have applied until the enactment of the *Employment Standards Act*, S.B.C. 1980, c.10 which repealed it by s.107.

46. *Cemco Electrical Manufacturing Co. Ltd. v. Van Snellenberg*, [1947] S.C.R. 127; *Campbell v. Business Fleets Ltd.*, [1954] 2 D.L.R. 263 (Ont. C.A.).

47. *Supra*, note 36. The contract is quoted in (1976), 57 D.L.R. (3d) 595, at 597.

Where there is no such express incorporation the court will be forced to interpret the words used by the parties in an attempt to give effect to their apparent intent, bearing in mind that if the contract lacks essential terms or is too vague it will be void for uncertainty. On this basis the court may invoke the “officious bystander” test<sup>48</sup> to give the contract business efficacy.<sup>49</sup> That test, somewhat popularized, involves asking whether, if an officious bystander had interrupted the parties in the course of their negotiations by saying “Don’t you intend this or that term to be part of your contract?” they would almost certainly have silenced him with a testy “of course.”<sup>50</sup> In other words, the court will treat the parties as having intended to draw in at least enough of their past practice and any documents relating to employment that are public on the campus to make their apparent contract viable.

Even where the primary contractual documents on their face are complete enough to constitute a contract, the courts will often be prepared to attribute to the parties an intent to incorporate by reference employment-related documents of which they are both obviously aware.<sup>51</sup> Thus the law allows considerable scope to any particular judge in the determination of whether or not a given document will be treated as part of the contract of employment. In this context *Wheeldon v. Simon Fraser University*<sup>52</sup> deserves attention as a case in which a “statement on academic freedom and tenure . . . considered acceptable by the acting President of the University and accepted by a referendum of the Faculty members” was held not to be incorporated in the plaintiff’s contract of employment. This conclusion is contrary, it is submitted, to the readiness of the courts in employment cases generally to treat relevant documents as incorporated.

The issue in the *Wheeldon* case was, in fact, more difficult than the simple one of whether a particular known document was to be treated as incorporated into a new employee’s contract. The “statement on academic freedom and tenure” had been adopted after the plaintiff was employed, so, in theory, it could only have become part of her contract of employment if it could be said that the contract had been amended or renewed taking the statement into

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48. *Shirlaw v. Southern Foundries*, [1939] 2 K.B. 206.

49. *The “Moorcock”* (1889), 14 P.D. 64 (C.A.).

50. *Supra*, note 48 at 227.

51. *Sagar v. Ridehalgh*, [1931] 1 Ch. 310 (C.A.)

52. *Supra*, note 22.

account. Hinkson J. held, on the evidence, that the Board of Governors had made it clear that the statement “was not to have any binding contractual effect in respect to the Faculty Association or any individual”<sup>53</sup> and that the Faculty Association had obtained the approval of its members on that basis.

In determining whether the document was part of Wheeldon’s contract of employment the Faculty Association’s perception of its nature should have been irrelevant. The proper question was whether, on the evidence, the plaintiff, as a reasonable person, would have thought that she was being offered an amendment or renewal of her contract on terms that included the statement of tenure and academic freedom.<sup>54</sup> The courts normally do look to the document to be incorporated to see if it is “appropriate” or “suitable” for incorporation, but that should not be a question of the intent with which it was produced but rather a question of whether it contains terms of a kind that the parties can reasonably be supposed to have intended to incorporate by reference.<sup>55</sup>

The important point is that changed understandings and new documents relating to the employment relationship can be and are, almost as a matter of course, treated as being incorporated into ongoing employment relationships. That, after all, is what happens every time a new benefit plan is introduced or an employee takes on new duties. Theoretically, these changes in the contract can be justified in either of two ways: first, on the basis of a term, usually implied<sup>56</sup> but sometimes express, to the effect that reasonable changes can be made by the employer. An example of an express provision of this kind is that found in the Dalhousie contract of employment in use several years ago:

I agree to abide by the general terms of academic appointment, as they are now defined or may in the future be revised by the Board of Governors of the University.<sup>57</sup>

Second, where no such broad term is expressed or can realistically be implied, as might well be the case where the

53. *Id.*, at 646.

54. We would think it fair to conclude that even by this standard Hinkson J. would have found against the plaintiff.

55. See *supra*, notes 48-50 and accompanying text.

56. See M.R. Freedland, *The Contract of Employment* (Oxford: Clarendon, 1976), at 42 ff. and Christie, *Employment Law in Canada*, *supra*, note 10 at 257-259. 257-259.

57. Quoted in *Dombrowski v. Dalhousie College and University* (1978), 79 D.L.R. (3d) 355, at 357.

employee's terms were changed for the worse, the theory is that by continuing in employment under the changed terms the employee has manifested his intent to accept them.<sup>58</sup> Legal consideration may be said to consist in the fact that in exchange the employer has foregone his right to terminate the employee with due notice.<sup>59</sup> In effect there has been a novation, or new contract.

There is, in other words, ample theoretical basis for treating the employment relationship as a contract, but normally a changeable one,<sup>60</sup> although it must be borne in mind that there is an increasing number of cases in which it has been held that for the employer to make significant changes in the employment relationship without the employee's approval by either words or conduct entitles the employee to quit and bring an action for constructive dismissal.<sup>61</sup> Most employers can avoid this result by giving the same notice of any significant change in the contract of employment that they would be obliged by law to give for termination, but a university dealing with tenured faculty, who can be terminated only for particular cause and not merely upon reasonable notice, may confront serious theoretical difficulties similar to that recognized by Schroeder J.A. of the Ontario Court of Appeal in *K.M.A. v. Howie*.<sup>62</sup> In that case, because there was a collective agreement under which the employee was entitled to continued employment unless he was terminated with just cause or in order of seniority, the Court held that retaining him in employment did not constitute consideration flowing from the employer in exchange for the employee's acceptance of a change for the worse in his employment

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58. Where the changed terms are to the employee's benefit, consideration for the new promise from the employer is the employee's foregoing the giving of due notice, as is his right, and continuing to work: *Sloan v. Union Oil Co. of Canada Ltd.*, [1955] 4 D.L.R. 664, at 679 (B.C.S.C.).

59. *Peerless Laundry and Cleaners Ltd. v. Neal*, [1953] 2 D.L.R. 494 (Man. C.A.); *K.M.A. Caterers Ltd. v. Howie*, [1968] 1 D.L.R. (3d) 588 (Ont. C.A.), *per* Schroeder J.A., at 559.

60. See Freedland, *supra*, note 56

61. *Brown v. Canada Biscuit Co. Ltd.*, [1935] S.C.R. 212. Such actions for "constructive dismissal" are being brought with apparently increasing success. See e.g., *Johnston v. Northwood Pulp Ltd.* (1968), 70 D.L.R. (2d) 15 (Ont. H.C.); *O'Grady v. U.I.C.B.C.* (1975), 63 D.L.R. (3d) 370 (B.C.S.C.); *Allison v. Amoco Production Co.* (1975), 58 D.L.R. (3d) 233 (Alta. S.C., T.D.); *Burton v. MacMillan Bloedel Ltd.*, [1976] 4 W.W.R. 267 (B.C.S.C.).

62. *Supra*, note 59. Labour lawyers will recognize the more fundamental objection, not adverted to by the Court, that the arrangement in question did not respect the union's exclusive right to bargain on behalf of employees in the bargaining unit.

terms. The same would appear to be the case with a tenured faculty member, whether his pre-existing right to continued employment flowed from a collective agreement, a contract or a statutory instrument. By merely retaining him in employment the university would give a tenured faculty member nothing to which he did not already have a right. This suggests that universities cannot make legally enforceable changes that affect such people adversely unless there is an advantageous change, such as an increase in salary, made at the same time.<sup>63</sup>

In reality, of course, the faculty member faces the difficulty that if he does not like a change imposed by his employers his only recourse at common law is to quit and sue for damages for constructive dismissal, since he probably cannot get specific performance of his contract of employment.<sup>64</sup> Even then, his damages may be seriously limited by his obligation to mitigate<sup>65</sup> and in any event he probably will not want to give up his job. Of course if the change itself produces a quantifiable economic loss the faculty incumbent might simply sue for damages.

One final point on the common law contract; the bare terms of the contract will not only be fleshed out through incorporation by reference, expressed or implied, but also by interpretation of ambiguous and "open" terms of the contract, words like "fair", "usual", or "reasonable", in light of the practices and traditions which make up the context in which the contract was made. Thus, for example, it could be argued that a dean's letter advising a new appointee that he would have a "light" teaching load or would be expected to do his "fair share" of committee work would call for consideration of the practice in that faculty if it were alleged that the university made a demand which constituted breach of contract. It is clear that even if that dean, as direct delegate of his Board of Governors, had statutory power to "determine the course load" of faculty members, like any other statutorily endowed person, a municipal corporation, for example, he is bound by contract, including a contract of employment, in the exercise of that power as long as the contract was not beyond the power of the person who made it.<sup>66</sup>

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63. See also *supra*, note 26.

64. See *supra*, note 17 and accompanying text.

65. *Red Deer College v. Michaels*, *supra*, note 16 at 400.

66. See the discussion of this same general point in connection with special plans *infra*, notes 76ff. and accompanying text.

## (2) *The Collective Bargaining Relationship.*

The faculties of some thirty-five Canadian universities, including the major universities in each province except Alberta, British Columbia, Ontario and Prince Edward Island, have opted for collective bargaining under their provincial labour relations legislation. In Alberta and British Columbia the law has been amended to make the provincial labour relations legislation inapplicable to universities.<sup>67</sup> Discussion of the merits of these amendments is reserved for the assessment of academic collective bargaining and its impact on tenure with which this paper concludes. Ontario is in the list of exclusions only because the University of Toronto has not gone the statutory collective bargaining route, but, at least, Carleton, Lakehead, Laurentian, Ottawa and York have done so. There is now no question that, where permitted by law, collective bargaining is the prevailing type of academic employment relationship. Nor is there any real doubt, notwithstanding an early Alberta decision and the ruling of the U.S. Supreme Court to the contrary, that general labour relations legislation applies to faculty members as employees of their

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67. This was accomplished in Alberta in the course of passage of the 1977 *Public Service Employer Relations Act* (S.A. 1977, c.40). That Act, by its own terms, does not apply to "the board of governors of each university under *The Universities Act* while it is acting as the employer of the academic staff as defined in *The Universities Act*" nor to "the academic staff as defined in *The Universities Act* of each university. (See section 2(1) (a) and Schedule, s.2). Section 111 of that Act also provides:

III. *The Universities Act* is amended

- (a) as to section 19 by striking out subsection (5) and substituting the following:
- (b) the *Alberta Labour Act*, 1973 does not apply to the Board or academic staff.

The effect of this amendment of *The Universities Act* is unaltered by the new *Alberta Labour Relations Act*, S.A. 1980, Bill 79, which by s.2(2) "does not apply to"

- (c) employers and employees in respect of whom this Act does not apply by virtue of a provision of another Act.

The reference to the 1973 Act will be deemed to be a reference to the 1980 Act by virtue of S.L4(1) (b) of the *Interpretation Act*, R.S.A. 1970, c.189.

The means of rendering the British Columbia *Labour Relations Act* inapplicable appears even more oblique. By the *Miscellaneous Statutes Amendment Act*, S.B.C. 1977, c.76, s.38 a new section 80A was added to the *Universities Act* of British Columbia. Now appearing as R.S.B.C. 1979, c.419, s.80, it provides simply:

- 80. *The Labour Code of British Columbia* does not apply to the relationship of the employer and employee between the university and faculty members.

universities in Canada.<sup>68</sup>

The incidents of the collective bargaining relationship are, in brief: (i) certification or voluntary recognition of a union as the exclusive bargaining agent of employees in an appropriate bargaining unit, which has generally been held to include all faculty of lecturer rank and above;<sup>69</sup> (ii) an obligation on both the certified or recognized union and the university to bargain in good faith; (iii) where bargaining is successful, a collective agreement which is binding on the collective parties, that is, the union and the university, and on each individual in the bargaining unit; (iv) arbitration as the means of ultimately settling disputes arising under the collective agreement; (v) a duty of fair representation on the union;<sup>70</sup> and (vi) the right to strike or lockout when no collective agreement is in force and after government conciliation services and statutory waiting periods have been exhausted.

In a collective bargaining relationship the duties and obligations of the university and the faculty members are those set out in the collective agreement, which will be a single document except where it has been specifically amended by the parties or elaborated through letters of understanding, which are technically part of the collective agreement. The collective agreement will be interpreted by labour

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68. See *National Union of Public Employees, Local 862 v. Board of Industrial Relations* (1963), 43 W.W.R. 560 (Alta. S.C., T.D.), which was based on the notion that collective bargaining was inconsistent with the statute which put power to regulate the affairs of the university, including the terms and conditions of employment of faculty members, in the hands of the Board of Governors. In *N.L.R.B. v. Yeshiva University* (1980), 100 S.Ct.856, on the other hand, the Supreme Court of the U.S. emphasized the collegial nature of academic employment, which in the opinion of the majority, made faculty members managers. Neither view is shared by labour relations boards in Nova Scotia, New Brunswick, Quebec, Ontario, Manitoba and Saskatchewan, where university faculty are certified, nor by the courts in British Columbia and New Brunswick. See *Re Labour Relations Board and A.G. of B.C.; Re Simon Fraser University* (1966), 57 W.W.R. 504 (B.C.S.C.) and *Faculty Association of the University of St. Thomas v. St. Thomas University* (1975), 60 D.L.R. (3d) 176 (N.B.S.C., A.D.).

69. Except in the case of Osgoode Hall Law School at York University and University of Manitoba.

70. Canadian courts have been prepared to imply such a duty under provincial labour relations legislation. See *Fisher v. Pemberton* (1969), 8 D.L.R. (3d) 521 (B.C.S.C.); *Binder v. Halifax County Municipal School Board* (1978), 84 D.L.R. (3d) 494 (N.S.S.C., A.D.), at 504. British Columbia and Ontario labour relations legislation explicitly imposes a duty of fair representation on unions: *Labour Code of British Columbia*, R.S.B.C. 1979, c.212, s.7; *The Labour Relations Act*, R.S.O. 1970, c.232, ss.60 and 60a, as am. by S.O. 1975, c.76, s.16.

arbitrators with reference to an established jurisprudence of labour arbitration, and the tradition of labour arbitration would suggest a greater sympathy to the customs and practices of the particular employment situation than would normally be found in the courts. That does not mean the formality and precision of the collective agreement should or will give way in the face of evidence of a different pre-certification approach, but with sensitive arbitrators a "common law of academe"<sup>71</sup> may emerge to which reference may be had where the collective agreement is "open" or ambiguous.

In *Re University of Ottawa and Association of Professors at the University of Ottawa*<sup>72</sup> arbitrator S.J. Frankel quoted the classic statement of Professor Bora Laskin (as he then was) in the *Peterboro Locke* case:

The introduction of a collective bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in an employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist.<sup>73</sup>

The arbitrator then went on to say:

The advent of collective bargaining in the university sector engenders a qualitative change in the relationships 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 community based on a benevolent but hierarchial 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 a legally defined employer/employee relationship, the details of which are embodied in the collective agreement . . . the employer has agreed that in certain personnel areas . . . it would be bound by the decisions of the Joint Committee of the Senate and Board of Governors. These decisions cannot be arbitrary or capricious, they must conform to the provisions of the collective agreement. They are ultimately subject to review in accordance with procedures set out in the collective agreement.<sup>74</sup>

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71. Weisberger, *Grievance Arbitration in Higher Education: Recent Experiences with Arbitration in Faculty Status Disputes* (1978), at 12.

72. (1978), 20 L.A.C. (2d) 132.

73. *Peterborough Locke Manufacturing Co. Ltd.* (1954), 4 L.A.C. 1499, at 1502.

74. *Supra*, note 72 at 140.



(3) “*Special Plans*”.

At the universities in Alberta and at University of British Columbia and Simon Fraser the statutory amendments precluding collective bargaining under provincial labour relations legislation have not led to a return to the traditional “contract-statute” type of relationship. At those universities faculty employment is now governed by what the C.A.U.T. refers to as “special plans.”<sup>75</sup> Essentially, the Faculty Association negotiates a “structural” agreement with the university which contains many of the non-monetary aspects of a standard collective agreement. The agreement also provides for the annual negotiation of salary and benefits, with some form of arbitration replacing the right to strike in the event of an impasse at the bargaining table.

The same suggestion made in respect of collective bargaining — that the statutory mandate of a university’s Board of Governors and officers does not permit them to “abdicate” the function of setting terms and conditions of academic employment — has been made in relation to the commitment to arbitrate under special plans. The issue has not been decided directly by any Canadian court but it would appear that the reasoning of the courts which have upheld collective bargaining by Canadian universities is applicable. In both the *Simon Fraser* case and the *St. Thomas* case<sup>76</sup> the courts relied on the decision of the Supreme Court of Canada in *I.B.E.W., Local No. 1432 v. Summerside and A.G.P.E.I.*<sup>77</sup> where Ritchie J. ruled that the Town of Summerside could exercise its statutorily bestowed powers to make by-laws respecting employment and to hire people in a manner consistent with its obligations to make binding collective agreements. By the same token, to enter a special plan with an arbitration provision is not to abdicate from or act contrary to such powers but to exercise them. It might also be noted in passing that in dealing with its non-academic employees a university is acting under the same or similar statutory powers. It would be a surprising conclusion indeed that a university could bargain collectively but is precluded from adopting arbitration as a means of peacefully settling its labour disputes.

It does not matter particularly what the “special plan” arrangement is called; it may be part or all of the faculty handbook

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75. See *supra*, note 1.

76. See *supra*, note 68.

77. (1960), 23 D.L.R. (2d) 593, at 601.

or simply identified as an agreement between the faculty association and the university. It may have virtually all the terms of a full-fledged collective agreement, or it may be quite limited. At Calgary, for instance, it applies only to the negotiation of the monetary package. Other aspects of the employment relationship there are governed by common law contract, most of the terms of which are to be found in a faculty handbook unilaterally promulgated by the employer.

Note that the critical distinction between a "special plan", as the term is used here, and a simple contract-statute relationship is that the former is negotiated with the faculty association and may be enforced by the faculty association.

While the Alberta universities have turned to "special plans" because collective bargaining is unavailable, the faculties of the University of Toronto and University of Prince Edward Island have adopted them as a matter of choice.<sup>78</sup> Legally, the situation is the same, except that if the aim is not to have a true collective agreement it is important, in provinces where faculty bargaining *could* be carried on under the labour relations legislation, to make sure by specific wording that acceptance of the "special plan" does not constitute voluntary recognition of the faculty association as a union. If it does then the "special plan" will not only *look* like a collective agreement, it will *be* a collective agreement! There is, of course, another very important difference between "special plans" in Alberta and British Columbia and those elsewhere. Elsewhere, if there is any problem with enforcement or if there is an ultimate impasse in negotiating the structural agreement faculty can always seek certification. That may be perceived by the university administration as a real threat, perhaps even a more effective threat than the threat of strike itself.

What then is the legal nature of these "special plans"? In a nutshell, they have about the same effect in law as collective agreements did before the advent of modern collective bargaining legislation. If either party must resort to law to enforce such a plan there will undoubtedly be problems.<sup>79</sup> The issues are not easily compressed.<sup>80</sup> The question of enforceability must be addressed on both the collective and individual levels.

78. At U.B.C. the choice of a "special plan" preceded the B.C. legislative amendment.

79. *Young v. Canadian Northern Railways*, [1931] 1 D.L.R. (645) (P.C.)

80. For a fully elaborated legal opinion see B.G. Hansen, *The Status of the Alberta*

On the collective level the threshold problem for enforcement by the faculty association is that, absent the effect of the labour relations legislation, the association itself may not be a legal entity, unless it is registered under the provincial societies act or incorporated. Once this hurdle is cleared the next one is the question whether the "special plan" will be held to have been made with the requisite "intention to create legal relations" to make it an enforceable contract. "Pre-labour relations legislation" agreements were held by the Judicial Committee of the Privy Council to be unenforceable on that basis,<sup>81</sup> but that hurdle too can be cleared if the university and the faculty association insert in the plan a clause to the effect that it is intended to be legally binding. However, most such plans provide that the agreement is to be enforced by an arbitration mechanism, and, since at the time of signing neither party is likely to have contemplated any unwillingness to comply with an arbitrator's order, it may be difficult to get a mutual statement of legal enforceability beyond that. Moreover, as has already been pointed out, there could be some difficulty with the specification of remedies other than damages.<sup>82</sup>

Also at the collective level, because labour relations legislation does not apply there is no legal obligation to bargain in good faith and thus nothing to preclude either party from taking the stance upon renegotiation of the basic or "structural" agreement that a new topic is simply not negotiable. This lends added significance to the fact that in British Columbia and Alberta faculty will not be able to force negotiations through strike action unless they are prepared to do so without the protections afforded to trade unions and their members by the unfair labour practice provisions of labour relations legislation. Without those protections faculty unions and their leaders might well be successfully sued and striking faculty members would probably be subject to discharge for breach of their contracts of employment.<sup>83</sup>

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*Faculty Associations under the Public Service Employee Act* A Report to the Alberta Affiliates of CAUT (1978).

81. *Young v. Canadian Northern Railways*, *supra*, note 79.

82. See *supra*, note 16.

83. In other words the union and its leaders might well be liable for inducing breaches of the faculty members' contracts of employment and they, and the faculty members themselves, might be liable for inducing breaches of other contracts to which the university was party and which could not be performed because of the strike — most obviously the university's contracts with its students, but also research contracts and the like. Quite possibly the tort of intimidation,

Strikes at "special plan" universities in other provinces give rise to a different set of legal problems. Essentially, where universities and their employees are subject to provincial labour relations legislation the union would face the added difficulty that the union itself, its officers and members would be involved in an illegal strike because the labour relations legislation of every province provides that those to whom it applies cannot strike unless, to begin with, a union has been certified on their behalf. The individual union members would have the protection of the provincial labour relations legislation, to the extent that their illegal strike would not of itself terminate the employment relationship, but that would not prevent the employer from dismissing them for cause; that is for participating in an illegal strike.

The right of an individual faculty member to enforce the terms of a "special plan" in the courts is dependent on whether or not its terms can be said to be incorporated into his private contract of employment. The common law applies, so this will depend on the terms of his contract.<sup>84</sup> If the "special plan" contains arbitration provisions the faculty member will be able to have his grievance taken to arbitration by the association. Moreover, the "special plan" may provide that some, or possibly all, types of grievance can be taken to arbitration by an individual employee. If not, the faculty member will be more at the mercy of his union (the faculty association) than if collective bargaining legislation applied, for it is difficult to see that the association would owe him any duty of fair representation such as that expressed or implied in provincial labour relations legislation.<sup>85</sup>

If a "special plan" provided for arbitration and the employer refused to comply with an arbitrator's award (which would be unlikely), the employee could either rely on the faculty association to enforce the award by bringing an action on the contract to his benefit,<sup>86</sup> which would be subject to the difficulties of enforcement at the collective level already referred to, or he would have to rely on his individual contract of employment, treating the "special

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intentional interference with economic advantage or tortious conspiracy could give rise to actions against the union and its officers. (See I.M. Christie, *The Liability of Strikers in the Law of Tort* (1967), and Tacon, *Tort Liability in a Collective Bargaining Regime* (1980).

84. See *supra*, notes 47-55 and accompanying text.

85. See *supra*, note 70 and accompanying text.

86. *Beswick v. Beswick* [1968] A.C. 58 (H.L.(E)).

plan'' terms, including the arbitrator's award, as incorporated by reference.<sup>87</sup>

All of this is, of course, "lawyer talk". The "special plan" may be entirely satisfactory where, from the outset, it is broad in scope and based on a solid relationship between the university and the faculty association, so that the association and its members are not presented with problems of enforcement or lack of good faith in negotiations.

### III. *Significant Employment Issues in the Contract-Statute Context*

Tenure is probably the most significant employment issue in the traditional academic employment relationship but others, relating to hiring and the obligation of the parties to one another, are also important.

#### (1) *Hiring.*

The major legal consideration in the context of hiring is the avoidance of discrimination contrary to provincial human rights legislation. This does not differ, essentially, whether there is a contract-statute, "special plan" or collective bargaining relationship. A collective agreement will probably reiterate or incorporate the "no discrimination" provisions of the provincial legislation, which simply means the employer may face a grievance as well as a complaint to the human rights commission. As well, according to the recent decision of the Ontario Court of Appeal in *Bhadauria v. Seneca College*<sup>88</sup> there may be a civil suit based on the tort of discrimination.

The issue of discrimination is not, of course, confined to hiring. It relates to all aspects of the employment relationship, including promotion, tenure and termination. Allegations of differential treatment of female faculty members and problems with compulsory retirement will probably loom large in university employment relationships of all kinds.

In all provinces, other than Alberta and British Columbia, where the labour relations legislation does not apply to academic

87. He probably would have little difficulty in persuading the court to treat the terms of the arbitrator's award as incorporated but might be unable to get specific performance (see *supra*, note 16). Particularly in the case of a denial of promotion, denial of tenure or discharge damages would be unlikely to be a satisfactory remedy.

88. (1980), 105 D.L.R. (3d) 707 (Ont. C.A.).

employment in universities it would, of course, be an unfair labour practice for a university to refuse to hire a person because of his union activities.<sup>89</sup>

Finally in the context of hiring, disregard for the proper functioning of arrangements for peer evaluation could give rise to difficult problems. A prospective appointee would have no basis for any action, except possibly if the process were to be considered statutory. Under a "special plan" the faculty association might be able to grieve and proceed to arbitration, although, of course, the ultimate enforceability of the arbitrator's order in specific terms would be doubtful.<sup>90</sup> Under a collective agreement, on the other hand, it would probably be quite clearly provided that the union had the right to bring a policy grievance, or grievance on behalf of the applicant, that could result in an enforceable order by an arbitration board to hire the applicant, or, more likely, to go through the procedure properly.

## (2) *Employer Obligations.*

The general problem with employer obligations is one of remedy. Even if the various obligations of the university to its academic employees are spelled out clearly — and often they are not — in the absence of an explicit right to specific performance, and perhaps even in the face of such remedy specification, the only remedy readily available in the courts is damages.<sup>91</sup> Realistically, therefore, in the university employment context as in any other unless the employee has access to a grievance procedure he will probably not go to law to try to enforce his employment rights. He will complain and fuss and eventually seek another job if he can find one. Only if

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89. A person who was refused employment on such grounds might have a neat (but probably ineffective) argument to make before the British Columbia Labour Relations Board, to the effect that his complaint was not about a matter within "the relationship of employer and employee between a university and [one of] its faculty members" and therefore that section 80 of the *Universities Act*, R.S.B.C. 1979, c.419 did not apply to preclude the application of the *Labour Code* in the case of a refusal to hire. A similar argument would not appear to be available under the Alberta legislation. For the relevant legislation, see *supra*, note 67.

90. What would be being enforced would be the Special Plan itself so, assuming the association was a legal entity, the serious question would be one of intention to create legal relations. See *supra*, note 78, and accompanying text. If that requirement were satisfied, the arbitrator's award would be like any other contract but the court might balk if the effect of enforcing the arbitrator's award was to specifically enforce an employment arrangement. See *supra*, note 16.

91. See *supra*, note 16 and accompanying text.

he can maintain that the university in effect forced him to quit in failing to fulfill its obligations to him will he have a remedy in the form of an action based on constructive dismissal.

Problems of uncertainty of terms and lack of an adequate remedy can arise in relation to a broad range of matters, from sabbaticals to the provision of support facilities, such as the right to have the use of a private telephone, the guarantee of a private office or adequate research facilities and library support. These are matters that may or may not be dealt with specifically in a "special plan" or collective agreement, but they are matters about which a faculty union can insist on negotiations and about which it will probably in the end get clear terms that are enforceable by grievance and arbitration if it comes to that.

More serious will be issues relating to re-appointment and promotion. Like tenure, in the traditional contract-statute setting these matters are usually addressed by the university's "legislation" and both substantive and procedural arrangements are frequently set out in faculty handbooks, and they are virtually always covered by "special plans" and collective agreements. Our discussion of the legal nature of tenure is, therefore, generally applicable to procedures for promotion or re-appointment. Whether they are "statutory" or "contractual" matters is similarly uncertain.<sup>92</sup>

The pervasive employer obligation in this context is the guarantee of academic freedom. To some, academic freedom means the right to think what they wish to think and to write and say in the classroom and elsewhere, what they think to be true, within the limits of the laws of libel and slander, without fear that their employment situations will be adversely affected. To others it apparently extends to the right to decide what to teach, how to teach, how to examine, the right to be involved in collegial decision-making and to be the subject thereof, in all aspects of one's academic career.<sup>93</sup> Small wonder then that allegations of infringements upon academic freedom are loud and frequent. Faculty handbooks often contain some statement<sup>94</sup> and where there

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92. See *supra*, notes 11-43 and accompanying text. And fns. 97 ff and accompanying text, *infra*.

93. *Vancouver City College and the Faculty Association of Vancouver City College* (Langra), [1974] 1 Canadian L.R.B. Reps. 298 (B.C.L.R.B.).

94. See the *CAUT Handbook*, (ed. W. Goode) (Ottawa: CAUT, 3rd ed., 1979). The guidelines therein have been adopted at least in part by many universities.

is a "special plan" or a collective agreement it will almost certainly include a statement of academic freedom, probably based on the model clause in the CAUT Handbook.<sup>95</sup> Such statements, although broad, have the great advantage of introducing some degree of specificity into this aspect of the relationship.

### (3) *Employee Obligations.*

Every bit as nebulous as the obligation of the university to ensure the academic freedom of its employees are their obligations to their employer. Indeed, it may well be precisely because of the uncertain limits of academic freedom that there is so much uncertainty about employee obligations. At common law an employee is obliged to obey the lawful orders of his employer<sup>96</sup> with regard to any task within the scope of the job for which he was hired. In employment generally, the common law has become more sensitive to the employee's position, to the point where deliberate breaches of an employer's order will not justify dismissal if the employee appears to have had some real justification for thinking that he was not obliged to obey.<sup>97</sup> What then is the basic obligation of the academic as employee?

Surely the trade-off for the quite unusual freedom involved in an academic employment relationship is a legitimate expectation on the part of the university that its academic employees will conscientiously fulfill the purpose of the university "in the search for knowledge, in the communication of knowledge to students, colleagues and society at large."<sup>98</sup> Ideally what is involved is a commitment to those purposes on the part of the faculty member to the same degree that the university is expected to be committed to the ideals of academic freedom. Of course legally enforceable norms very often, and perhaps properly, fall far below the ideals!

The employment obligations of the academic are commonly broken down into four: to teach, to research and publish the results thereof, to do his share in the decision-making and administration of

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95. *Id.*

96. *Robinson v. Estella Mines Ltd.* (1953), 10 W.W.R. (N.S.) 374 (B.C.S.C.); *Lucas v. Premier Motors Ltd.*, [1928] 4 D.L.R. 526 (Alta. C.A.); and see Christie, *Employment Law in Canada*, *supra*, note 10 at 274 ff.

97. *Laws v. London Chronicle Ltd.*, [1959] 2 All E.R. 285 (C.A.), and see Freedland, *The Contract of Employment* (1976), at 217. Citation (Oxford: Clarendon 1976).

98. From the first Dalhousie Collective Agreement, article 3.01.



the university and to serve the public as he is fitted to do by his special training, knowledge and academic freedom. Just as the implied obligations of employees in general have been worked out by the courts in the context of dismissal cases so have these obligations of the academic been elaborated in tenure cases.<sup>99</sup> But the acquisition of tenure does not in any way lessen the academic's obligations, though abuse of tenure may, all too often, lead to a lessened effort.

Gross failure to meet his obligations may, of course, result in the dismissal of a tenured faculty member, and there are good reasons why if tenure is to serve its purposes the failure must, indeed, be gross. It is not, however, legally correct to say that the faculty member's obligation is to only meet the minimum required to avoid dismissal. In the context of a "special plan" or a collective agreement this may be spelled out.

#### (4) *Tenure and Termination.*

The main concern here is with the substantive law relating to tenure. The procedural or due process questions have been canvassed elsewhere,<sup>100</sup> so only passing reference will be made to them.

There is much uncertainty surrounding the grounds upon which tenure can be granted and taken away. Key criteria such as "research", "cause", "financial exigency" and "program redundancy" have no generally-accepted meaning. Sometimes the relevant university regulations or provisions in a collective agreement attempt to define them with some measure of precision but clearly not with total success. Not uncommonly these words simply stand on their own. While it has been argued that procedural protections are not of much use where there is no precision in these criteria to which evidence and arguments must be addressed, and while, obviously, a hearing can be more efficiently conducted if the issues are narrow and well-defined, procedures do advance other values. To the extent that they achieve open decision-making they serve as a check not only on arbitrary and malicious behaviour, but also on unthinking and inconsistent decisions. This is particularly so if the procedures include an obligation to give reasons, a

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99. See *infra*, notes 100 ff. and accompanying text.

100. See D.J. Mullan, "The Modern Law of Tenure" in *The University and the Law* (ed. H.N. Janisch) (Dalhousie Continuing Legal Education Series, No. 8, 1975); at 102.

requirement which also has the potential to provide definition to uncertain criteria such as "cause", "research" and "financial exigency." The more these terms are thought about and applied openly in particular cases the sooner they will come to have an accepted and relatively definite meaning.

There is some comfort in the fact that, prompted by bodies such as CAUT, faculty associations and various university committees, universities have moved during the last five years to accept not only greater openness in tenure decision-making, but also in many instances external review in the form of binding arbitration. There are severe dangers in over-judicializing the system, of opening the doors to lawyers, but some of those costs are well worth it when the interests affected are very important and when the standards to be applied are susceptible to vast interpretative differences. The channelling function of procedures where the substantive law is unclear should not be underrated.

Turning now to the substantive law relating to tenure, doubts about its legal nature must be reiterated, and it must be acknowledged that whether tenure is to be viewed as a public office or as a purely contractual status by no means settles all of its legal incidents. Nevertheless, whichever way it is categorized, it has certain commonly accepted features.

The early Canadian court decisions on tenure inclined to hold that university professors, whether viewed as public office-holders or not, could, irrespective of rank and length of service, be dismissed at any time. This was bolstered in most instances by statutory provisions to the effect that, unless otherwise specified, professors held their positions "at pleasure".<sup>101</sup> In other words, whatever the understandings that may have existed among university teachers, whatever the informal talk of tenure or permanence, the concept really had no clear legal acceptance at all. To quote Orde J. in the 1923 decision of *Craig v. Governors of the University of Toronto*:

I am unable to see how evidence that the Board had in fact always treated its appointments as life-appointments, or that other universities have done so, could curtail the powers vested in the Board . . .<sup>102</sup>

101. *Supra*, notes 30 and 31.

102. (1923), 53 O.L.R. 312, at 320. In dealing with the argument that Craig had an appointment for life subject to good behaviour and continued ability to perform his duties, His Lordship stated, at 319;

This is surely a startling proposition, and Mr. Arnold, was unable to give me

Indeed, he was not moved from this position by a statement of the President to the applicant in the letter of appointment that it was to be "permanent."<sup>103</sup>

Since 1923, things have changed radically. Even outside of collective bargaining, virtually all university regulations have become much clearer as to the legal existence of tenure;<sup>104</sup> contracts with tenure are very commonly made expressly with professors;<sup>105</sup> courts in the United States have clearly recognized tenure as a legal creature.<sup>106</sup> Notwithstanding Orde J.'s reluctance in *Craig* to use custom as a springboard for the recognition of a legal right, it is reasonably clear that today the prevalence of tenure and the near universal acceptance of its importance in the academic community would give it some substantive legal content (notwithstanding the 1975 judgment of the Supreme Court of Canada in *Red Deer College v. Michaels and Finn*).<sup>107</sup> This would be true even in

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any authority for it. I think the argument can be met very easily if we keep in mind that, if this contention were correct, the contract for a life-appointment must necessarily be mutual. It could not be binding on the University without at the same time binding the professor. And it would be rather disturbing to the whole professorial body, if it were suggested that, upon an appointment not limited as to time, none of them could after due notice, without the consent of his employer, accept a more remunerative offer of employment either in some other university or elsewhere without committing a breach of contract involving liability to heavy damages. It should be only necessary to state this contention to show its absurdity.

Note, however, the rejection of the mutuality argument in *A.A.U.P. v. Bloomfield College*, *supra*, note 17 at 859-60.

103. *Id.*, at 320-321.

104. A good example in a university without collective bargaining is provided by the October, 1979, Queen's University *Regulations Governing Appointment, Renewal of Appointment, Tenure and Termination for Academic Staff*, approved by the Board of Trustees after an extensive drafting exercise by the Senate and a committee of Senate.

105. Generally evidenced by a formal offer or letter of appointment from the University Principal or President at the successful conclusion of the tenure consideration process.

106. See, in particular, W.S. Griggs and H. W. Rubin, "Legal Ramifications of the Tenure Crisis" (1977), 6 (2) *Journal of Collective Negotiations* 119; Alan A. Matheson, "Judicial Enforcement of Academic Tenure: An Examination" (1975), 50 *Washington L. Rev.* 597; Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context", *supra*, note 26.

107. *Supra*, note 16. Here two "tenured" faculty members recovered damages for wrongful dismissal. They also contended that they should be treated as though they had never been dismissed because the procedures laid down in the collective agreement were not followed, i.e., they should be given salary up to the date of the trial and be declared still to be members of the College's teaching faculty. Laskin C.J.C. for a number of reasons held that this was not appropriate.

relation to situations where there were no formal rules; where, as happened in many institutions until comparatively recently, a faculty member was simply told by the university, in effect, "If things work out in the next couple of years, you can stay permanently."<sup>108</sup>

Most frequently tenure is defined as the right to employment at a university until the specified retirement age (though this qualification is now under some attack) unless the university has or establishes "cause" to dismiss.<sup>109</sup> Stated in this form, it is a deceptively comforting concept. The extent of the deception only

1. The collective agreement had expired.
2. It was a consensual rather than statutory arrangement anyway (i.e., it was not governed by the Alberta Labour Act, R.S.A. 1970, c.196).
3. The plaintiffs had not attempted to invoke the protection of the collective agreement procedures before coming to court.

It was also clear that "tenure" was not used in the agreement in its regular sense in that the College seemed to have the option not to renew an appointment before the beginning of any following contract year. Laskin C.J.C. did, however, acknowledge (at 400) the possibility of reinstatement in a breach of personal services contract action (relying on *Hill v. C.A. Parsons & Co. Ltd.*, *supra*, note 17) although in this case there was a lack of subsisting confidence between employer and employee. He also commented that reinstatement was for the court to decide upon and could not be forced upon it as a remedy. (The collective agreement provided for court-ordered reinstatement in the event of breach) (at 399). (See *supra*, note 16).

108. Of course, if not in writing difficulties may arise. See the consideration of the various provincial *Statutes of Frauds*, *supra*, notes 45 and 46 and accompanying text. For a discussion of informal or *de facto* tenure in the United States context, see Alan A. Matheson, "Judicial Enforcement of Academic Tenure: An Examination" *supra*, note 106 at 598-599; Matthew W. Finkin, "Toward a Law of Academic Status" (1972-73), 22 *Buffalo Law Rev.* 575, at 592-597; Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context" *supra*, note 26 at 281-282. The leading authority is *Perry v. Sindermann* (1972), 408 U.S. 593.

109. For a discussion of the definition of tenure, see Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context", *id.*, at 280-281. The *CAUT Handbook*, *supra*, note 94 provides a couple of definitions. In its Primer on Tenure at 2 the following statement appears: —

A professor who has been granted tenure has an appointment without term, which may be terminated only through resignation, retirement or dismissal for good reasons as established by a proper hearing.

Then Clause II(8) of the Policy Statement on Academic Appointments and Tenure defines "tenure" (at 9): —

... permanency of appointment, the right of a faculty member not to be dismissed except for cause. Permanency of employment includes the right during the appointment to fair consideration for increase of responsibility and salary, and promotions in rank.

becomes apparent once the vagueness of the "cause" qualification is understood.

At first blush, "cause" might be thought to involve such conduct as gross moral turpitude, participation in criminal activities, persistent failure to fulfill reasonable teaching and administrative demands and perhaps physical or mental incapacity.<sup>110</sup> This is certainly consistent with the common law notion of cause for dismissal, which must be found in the conduct of the employee, not the economic needs of the employer.<sup>111</sup> It must be borne in mind,

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110. "Cause" in the sense of personal misconduct may not be as narrowly circumscribed as is generally supposed. Residual management rights have recently been exercised at a then non-unionized Maritime university to remove a tenured faculty member for personal conduct seemingly amounting to far less than the kind of blameworthiness normally associated with cause in its sense of matters personal to the individual viz. insufficient research in a faculty where a premium had always been placed on teaching; lack of attendance during the summer months where, until a year previously, absences during such times were generally accepted and only one warning had been given.

At Laurentian University an even more troubling situation developed recently as the University attempted to put in train procedures for considering the removal of tenure from a faculty member because she was suing a student for libel. The facts are detailed in *Laurentian University Faculty Association v. Laurentian University of Sudbury*, [1979] O.L.R.B. Rep. 767, in which the Ontario Labour Relations Board held that the attempt to reconsider tenure during a period when the Faculty Association had applied for certification was a breach of section 79 of the *Labour Relations Act*, R.S.O. 1980, c.228 (a provision, in effect, preventing the parties changing the employment relationship during the certification proceedings) and the University was ordered to reinstate. The Board was not, however, concerned with the general propriety or legality of such a move by the University.

For a recent discussion of the parameters of "cause", see Note, "Dismissing Tenured Faculty: A Proposed Standard" (1979), 54 New York University L.R. 827. See also Comment, "Developments — Academic Freedom" (1967-68), 81 Harvard L.R. 1045 at 1094-99; Alan A. Matheson, "Judicial Enforcement of Tenure: An Examination", *supra*, note 106 at 604-607. An interesting Australian case is *Orr v. University of Tasmania* (1957), 100 C.L.R. 526, in which the grounds for dismissal were seduction of a student. The court held that there was ample evidence that this constituted cause and that even though "cause" was not mentioned in the statute it was nevertheless a proper basis for dismissal. In other words, in the face of cause a university professor could not rely upon a tenure until retirement age provision. See also *Robertson v. North Island College Technical & Vocational Institute* (1980), 119 D.L.R. (3d) 17 (B.C.C.A.) in which it was held that a disagreement between a teacher and a headmaster of a school over issues of policy did not in the circumstances constitute cause. This decision has potentially important ramifications for the scope of "cause".

111. *Gillespie v. Bulkley Valley Forest Industries Ltd.* (1973), 39 D.L.R. (3d) 586, at 589, *aff'd* 50 D.L.R. (3d) 316 (B.C.C.A.) is a recent decision confirming this long established proposition. See generally, Christie, *Employment Law in Canada*, *supra*, note 10 at 362 and the cases cited there.

however, that the general law of wrongful dismissal has been developed in the context of an obligation to give due notice of termination or pay in lieu, not in the context of a right to a permanent job. Under collective agreements also "just cause" is held not to refer to the difficulties of the employer,<sup>112</sup> but that is always in the context of an employer's right to lay off, provided he respects seniority rights. In a few cases where the courts have faced statutory provisions which, in effect, granted "tenure" to employees in local government or industry they have avoided the implications of the common law definition of "cause", where economic reality demanded it, by characterizing the termination as something other than "dismissal" or "discharge."<sup>113</sup>

Moreover, in some United States cases,<sup>114</sup> without any special

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112. See Brown and Beatty, *Canadian Labour Arbitration*, *supra*, note 16 at para. 7:3000 and ff.; and E. E. Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworth. 1978) and *Supplement* (1980). Part II "Protection of Employment (passim).

113. E.g. *Town of Yarmouth v. Manser* (1977), 72 D.L.R. (3d) 285 (N.S.S.C., A.D.); *C.I.L. Inc. v. Porter* (1980), 7 Nova Scotia Law News 36 (N.S.S.C., A.D.). In both cases the court was applying s.67A of the Nova Scotia *Labour Standards Code*, S.N.S. 1972, c.10 (as am. by S.N.S. 1975, c.50, s.4 and 1976, c.41 s.15), which entitles an employee of ten years seniority who has been dismissed without just cause to reinstatement, not just to damages. Among Canadian jurisdictions only the *Canada Labour Code* provides a similar right, in that case after one year of employment. See R.S.C. 1970, c.L-1, s.61.5 (as am. by S.C. 1977-78, c.27, s.21).

114. E.G. *Krotkoff v. Goucher College*, *supra*, note 28. Note, however, contrary to *Goucher*, *McClelland v. Northern Ireland General Health Services Board*, [1957] 1 W.L.R. 594 (H.L.(N.J.) and *Placsto v. Board of Humboldt School Unit No. 47 of Saskatchewan* (1971), 18 D.L.R. (3d) 374 (Sask. Q.B.) to the effect that dismissal from statutory employment for redundancy is invalid absent statutory authorization. For a discussion of the legal issues relating to financial exigency in the United States context, see John C. Tucker, "Financial Exigency — Rights, Responsibilities and Recent Decisions" (1974), 2 *Journal of College and University Law* 103; James B. Wilson, "Financial Exigency: Examination of Recent Cases Involving Layoff of Tenured Faculty" (1977), 4 *Journal of College and University Law* 187; James L. Petersen, "The Dismissal of Tenured Faculty for Reasons of Financial Exigency" (1976), 51 *Indiana L.J.* 417; Comment, "Financial Exigency as Cause for Termination of Tenured Faculty Members in Private Post Secondary Educational Institutes" (1976), 62 *Iowa L. Rev.* 481. The issue is also discussed in the general articles. See Note, "Dismissing Tenured Faculty: A Proposed Standard", *supra*, note 110 at 846-49; Alan A. Matheson, "Judicial Enforcement of Academic Tenure: An Examination", *supra*, note 106 at 611-13; Ronald C. Brown, "Tenure Rights in Contractual and Constitutional Context", *supra*, note 26 and 286-88. For Canadian discussion, see "Tenure and Cutbacks" (1973), 22(1) *CAUT Bulletin* at 4-17; "U. of T. report opposes termination of tenured faculty for budgetary reasons" (1980), 27(2) *CAUT Bulletin* 15. See also *CAUT Handbook*, *supra* note 58 at 31 ("Guidelines

provision, in an academic contract of employment "cause" has been held to cover situations of financial exigency, or even program redundancy because of declining enrolment or loss of other forms of support for particular courses and disciplines; situations, in other words, having nothing to do with the qualities of the particular professor. Effect has thus been given to the overriding powers of the university government to manage the institution in what it perceives to be the most efficient and effective manner, notwithstanding clear recognition of tenure.

In an era of near drastic financial restraint at most institutions and declining enrolment at many others this suggests that, while the struggle to beget tenure as a legal concept may have been won, the ultimate product may have some of the qualities of a paper tiger.

#### IV. *Assessment: Special Plans and Collective Bargaining for Faculty*

##### (1) *Special Plans.*

With regard to special plans in general there is little to add to what has already been said in outlining their legal nature. The main problem from a legal point of view is that of ultimate enforceability and, realistically, there is good reason to think that in many settings that will not be a problem at all.

One common characteristic of the special plans is that in the event of an impasse in the negotiation of the monetary package they provide for settlement by arbitration. Indeed, it seems that the whole reason for their existence is that the strike weapon, and the threat thereof, has been considered inappropriate either by the legislature or by faculty where the special plan has been voluntarily chosen over union certification. Three different impasse resolution mechanisms that have been adopted merit consideration.

Under the University of Toronto plan, if the parties have reached an impasse by the 1st of February in each year a pre-agreed mediator meets with them over the course of the following three weeks and attempts to get them to agree. If they fail he then writes their collective agreement, which goes for approval to the Governing Council, the unicameral governing body of the University, the employer in fact, for approval. Thus far in the operation of that special plan, the first three monetary agreements were written by the mediator and accepted by the Governing

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Concerning Reductions in Academic Appointments for Budgetary Reasons").

Council. The fourth was successfully negotiated without assistance and the fifth was again written by the mediator.

One difficulty with the University of Toronto arrangement is, of course, that there is no provision whatever for the situation where the Governing Council rejects the settlement suggested by the mediator. Presumably at that stage there would be a renewed demand for certification, a threat of which the Governing Council is no doubt aware. Another is that the nature of the process may suggest different criteria for consideration by the mediator, wearing his arbitrator's hat, than those taken into account by interest arbitrators in the public sector, where virtually all "interest" arbitration in Canada has occurred. In the most recent Toronto report the mediator<sup>115</sup> stated:

My natural inclination is to turn to the criteria evolved by interest arbitrators in the public sector, particularly where they have been acting without explicit statutory criteria. See Swan, *Criteria in Interest Arbitration* (1978) and Adams, *The Ontario Experience with Interest Arbitration: Problems in Detecting Policy*, (1980, C.L.E. Society of B.C., at 59). Most commonly invoked is comparability; comparisons with wage rates or increases granted in the same industry or to those engaged in similar work in other industries. The cost of living is also assumed to be very important, and productivity and the inequity of requiring public sector employees to subsidize the community by accepting sub-standard wages and working conditions have been invoked . . . .

Interest arbitrators in the Canadian public sector have, apparently, universally rejected the legitimacy of an "ability to pay" argument. They have not allowed governments as employers to hide behind their own skirts, in their role as the source of funds, to escape pay increases indicated by the other criteria. This has been so even where, as in the Ontario hospital sector, the employing body and the funding body are legally and formally different. . . . The real point surely is that arbitrators in the public sector, where "ability to pay" has been held not to be an appropriate criterion, have been empowered or mandated by law to determine, in effect, how many public resources should go to pay the employee group whose pay is being arbitrated. That is not the case here. I have no statutory mandate. I am merely empowered by the Memorandum of Agreement to make a recommendation that becomes binding unless rejected by the Governing Council of the University of Toronto.

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115. Since "the mediator" was Professor Christie no comment on this passage would appear to be in order.



Of the other five universities with special plans, three, University of Alberta, University of Prince Edward Island and Lethbridge have opted for "final offer selection", the other two, University of British Columbia and Calgary for conventional interest arbitration.

In conventional interest arbitration, the arbitrator simply imposes a collective agreement that he thinks is fairest and best. Because it is highly likely that in making such an inherently standardless decision the arbitrator will split the difference between the parties, at least to some degree, the prospect of arbitration has a "chilling effect" on the parties' negotiations. That is, unless there is a good prospect of a settlement, the tendency is for each party to maintain a polar position in the hope of maximizing what it will get from the arbitrator.

In order to avoid this readily observable "chilling effect", final offer selection arbitration has been suggested. In this process the arbitrator cannot split the difference. He must pick the final proposal by one party or the other. Thus neither party will want to come before the arbitrator in an obviously unreasonable stance. The effect, of course, is to enhance negotiations.<sup>116</sup> Cautions have been entered, however, about the desirability of a system that forces the parties into a relationship which may include terms that, although minor in the overall scheme of things, are almost impossible for one of the parties to live with. That concern is obviously much more relevant to issues of principle than to fungible monetary benefits.<sup>117</sup>

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116. There is a very considerable literature on the undesirable effects of conventional interest arbitration and suggested alternatives. See for example Weiler, *Reconcilable Differences* (Toronto: Carswell, 1980) at 229 ff. and Downie, *The Behavioural, Economic and Institutional Effects of Compulsory Interest Arbitration* (1979), Discussion Paper No. 147 prepared for the Economic Council of Canada.

117. *Haldimand Board of Education v. Ontario Secondary School Teachers Federation, District 53* (Swan, Arbitrator), quoted in Hansen, *supra*, note 80.

When process is enhanced in final offer selection, the very characteristic of the mechanism which increases the costs of disagreement (the threat of losing totally) decreases the possibility of a *result* which is reasonably acceptable to the parties and which therefore will conduce to a stable and harmonious relationship during the currency of the agreement based on the selection. Although there are methods of easing this effect, such as provision of alternate offers from each side or use of issue selection, the statutory mechanism available in Ontario teaching negotiations is limited to the selection of "all of one of the final offers on all matters remaining in dispute"; this is the model most likely to stress the process of effective selection and to exacerbate its result deficiency.

If this analysis is correct, final offer selection is most likely to be effective in disputes where process is critical and the result is less important. For the most

Whichever method of arbitration is adopted there may still be room for concern about the criteria adopted by the arbitrator. In an era in which, measured against the rate of inflation, universities are being consistently underfunded whether or not "ability to pay" is to be taken seriously into account is a policy issue of the first importance. If it is not addressed by the parties in their special plan, or in legislation, each individual arbitrator will have to settle it, whatever the intricacies of the process of which he is a part.

## (2) *Collective Bargaining.*

With no very strong conviction for or against collective bargaining for university faculty, our starting position is that if the majority of a faculty want collective bargaining they should be allowed to have it. Certainly there is no room for doubt that collective bargaining is firmly entrenched as the norm in Canada for university faculty.

That said, it should be recognized that a very important aspect of the collective bargaining system in this country is that a union and a collective agreement enhance the dignity of employees as human beings by giving them vehicles through which they have somewhat more control over a very important aspect of their lives. Reality falls short of that ideal, often far short; but the pursuit of that ideal is, to a significant degree, the point of the system; and that point is not very significant in the university context. Collegiality and self-government, even if they too fall far short of the ideal, already give faculty members a large measure of what collective bargaining was to bestow.<sup>118</sup>

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part, these will be circumstances where the parties are far apart on matters where incremental movement is still possible. Most such cases will involve economic issues — salaries, fringe benefits and related terms of employment which can be reduced to dollar value. Such disputes are really disputes of interest, and only the naive would suggest that any real questions of principle are involved in what is essentially a matter of quantifying and bargaining and costing out its impact. There is, therefore, no room for a principled refusal to compromise, and no reason why the imposition of process costs of disagreement through final offer selection are thought to produce, if not a settlement, at least a movement toward settlement that will bring both final offers within the range of acceptable solutions.

On the other hand, final offer selection is less likely to be effective where the parties are far apart on matters where no incremental movement is possible — matters of principle or of fundamental importance for only two positions (often "yes" or "no") are available . . .

118. This sort of consideration apparently loomed large in the thinking of the majority in the recent decision of the Supreme Court of the U.S. in *N.L.R.B. v.*

University collective agreements, even more than most others, are enormously complex documents. They must address complex problems and often they attempt sophisticated solutions, which are frequently achieved, but the result is complicated; a document which requires a great deal of committee time for administration, and one which even the average university faculty member often feels he cannot comprehend. Thus there is a danger of making perpetual schoolroom lawyers of those who are interested enough to involve themselves.

Against that, collective bargaining and the resulting collective agreements bring greatly improved order and equity into university employment. There are some who object to precisely what is being put forward here as an advantage, who yearn for flexibility which, they say, brings out the best in people. It is true, of course, that willingness to accommodate in special situations is always part of a healthy employment relationship, and it is certainly a necessary part of a healthy collegial relationship, but neither will be lost by developing clear rules to guide both university administrators and faculty.

Under the first Dalhousie collective agreement for example, the provisions for granting of merit increases and, more to the point, for the denial of career development increments, explicitly called for the faculty member to display the characteristics and to make the contributions "judged relevant for appointment, re-appointment, promotion, tenure and appointment without term."<sup>119</sup>

It is in connection with termination, of course, that the *truly* sensitive issues in academia arise and that is, essentially, a matter of tenure. Before turning back to tenure it is relevant to point out here that the rights of probationary employees present a special issue in provinces where collective bargaining is possible. The Canada and British Columbia labour relations boards and a number of labour arbitrators have taken the view that the requirement in labour relations legislation that every collective agreement provide for final and binding settlement of all disputes means that probationers

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*Yeshiva University*, *supra*, note 68 in which university faculty were held to be managerial. With respect, we suggest that a view such as the one expressed in the text has little to do with the legal conclusion reached by the majority of the Court, a conclusion which we consider to be wrong. See Levgold, *Current Labour Developments*, February 1980 and, generally, Arthur P. Menard and Anne K. Morrill "Are Faculty Members Scholars or Managers? The *Yeshiva* Case" (1979), 30 Labour Law J. 754, which preceded the decision by the Supreme Court.

119. First Dalhousie Collective Agreement, article 29.06.

cannot be denied access to a grievance procedure and that any clause in a collective agreement to that effect will be overridden by the legislation.<sup>120</sup> The Ontario Courts have explicitly upheld this proposition<sup>121</sup> but the recent decision of the Supreme Court of Canada in *Re Leeming*, a case which arose under New Brunswick's public sector collective bargaining legislation, puts it in some doubt.<sup>122</sup> The New Brunswick Act does not have the compulsory "final and binding settlement" provision found in all Canadian private sector labour legislation so the *Leeming* case may be distinguishable. However the interpretation of the collective

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120. *C.A.L.F.A.A., Local No. 13 and Transair Ltd.*, [1978] 2 Canadian L.R.B.R. 354 (Can. L.R.B.); *Cassiar Asbestos Corp. Ltd.*, [1974] 1 Canadian L.R.B.R. 428, aff'd by the full Board at [1975] 1 Canadian L.R.B.R. 212 (B.C.L.R.B.); *Re Hydro Electric Commission of Borough of North York*, [1974] 6 L.A.C. (2d) 113 (Carter, Chairman); cf. *International Waxes Ltd. v. Oil, Chemical and Atomic Workers International Union* (1978), 79 C.L.L.C. para. 14,203 (Ont. H.C. D.C.), but subsequently *Re Toronto Star Newspapers Ltd.* (1979), 20 L.A.C. (2d), 392 (Prichard).

121. In *C.U.P.E. Local 1 v. The Toronto Hydro Electric System* (1980), 111 D.L.R. (3d) 693, the Ontario Divisional Court ruled that the parties to a collective agreement could not contract out of the arbitration provisions of the *Labour Relations Act*, stating at 697:

This, of course, does not mean that the parties cannot agree to a *basis* of arbitral review that would render the results of arbitration a foregone conclusion. This was not done here, but the parties might have agreed, for example, that probationary employees may be discharged on the sole discretion of the employer. This would make such a discharge almost impossible to overturn. Nevertheless, a probationary employee could *attempt*, through the arbitration procedure, to do so, albeit unsuccessfully. There is a clear distinction between rights and access to arbitration about those rights. Section 37 deals with the latter issue, not the former. The aim of section 37 is to ensure that access to arbitration is available in all cases of differences to prevent festering resentment between the parties about unresolvable disagreements. We believe that aim is best served by the interpretation adopted here.

The company obtained leave to appeal but the Ontario Court of Appeal dismissed the appeal, (1981), 113 D.L.R. (3d) 512, stating, at 512:

While we do not necessarily agree with the interpretation placed on the terms of the collective agreement by the arbitrator and the majority of the Divisional Court that is not the issue. We are all of the view that the interpretation placed on the relevant terms of the collective agreement as they presently stand is one which they can reasonably bear and certainly is not an interpretation which is patently unreasonable. In the result, accordingly the appeal is dismissed with costs.

On December 15, 1980, the Supreme Court of Canada denied leave to appeal from the Ontario Court of Appeal. The case is now concluded: [1981] 17 Labour Arbitration News—March issue, p.1.

122. (1981), 34 N.R. 480 (S.C.C.).

agreement there in question by Martland J. (for the Court) does deem to make it clear that where the parties give the employer a high degree of discretion in determining whether to retain a probationary employee, the exercise of that discretion is not incompatible with the labour legislation, and the legislation does not justify an arbitrator in imposing his standards on the employer. It is submitted, however, that the Supreme Court has not held that the employer's exercise of his power can be freed from neutral scrutiny to ensure compliance with the collective agreement.

For tenured faculty collective bargaining has not in all situations produced a clearer or more favourable situation substantively, in two respects. First, in *some* collective agreements, "cause" is specifically given a relatively high content as a basis for the removal of tenure.<sup>123</sup> While the Dalhousie agreement seems to be unique and a trifle paranoid in its spelling out of "malicious damage to University property" as a ground for the removal of tenure,<sup>124</sup> Ottawa's agreement is potentially more threatening in its definition of conduct worthy of disciplinary measures to extend to;

. . . incompetence of a professor or to his unfitness to maintain appropriate level of quality relative to his participation in the general work of the University.<sup>125</sup>

Second, in some collective agreements failure to comply with the terms of the collective agreement is included as a ground for removal of tenure.<sup>126</sup> Such a provision may be comparatively

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123. The "cause" provisions vary quite a lot from the bareness of the Acadia agreement, which in Articles 10.20 and 14.21 simply talks about "just and proper cause" without further definition or elaboration to agreements such as that at Dalhousie (Article 26.01):

. . . gross misconduct; misrepresentation of credentials; persistent neglect of duty to students or to the University; failure to maintain an acceptable standard of competence and performance in duties appropriate to the appointment; malicious damage to University property . . . Illness, including drug addiction, alcoholism and psychological disorders, are not causes for disciplinary action and shall be considered in accordance with the provisions for Clauses . . .

Illness is sometimes not dealt with separately (Acadia) but it is now common to follow the Dalhousie practice and deal with it separately (see e.g., York, Article 15.04). Note, however, Saskatchewan, Article 31.4.2, which makes a failure to make reasonable attempts to rehabilitate oneself or to follow an active treatment programme a ground for dismissal.

124. Article 26.01.

125. Article 33.28.

126. See University of Ottawa agreement, Article 33.28-29. Indeed, even when not included, failure to live up to the duties specified in the collective agreement could presumably be seen as "cause" where that is defined to include neglect of

innocuous where the failure has to be ‘‘persistent’’<sup>127</sup> or where the duties of the professor specified in the collective agreement are either not unduly onerous or spelt out with precision.<sup>128</sup> However, on occasion, it seemingly goes much further in that any breach is potentially a ground for dismissal and the duties imposed on professors represent aspirations of the highest excellence or are stated so vaguely as to mean almost anything.<sup>129</sup> To take just one example from the now expired Windsor agreement, it is the duty of professors

... to foster and maintain a learning environment which is productive of scholarly learning.<sup>130</sup>

Concerns about such clauses are alleviated to some extent by provision for independent arbitration of disputes over dismissal from tenured positions in all collective agreements. But that is not a full guarantee of protection against abuse and, of course, these standards in collective agreements may come to be regarded as the norm and by custom be implied into contracts and rules at universities without collective agreements and without provision for independent arbitration.

Another limitation on tenure that has crept into a couple of collective agreements is that of tenure review, something that the Ontario Federation of Students has called for recently,<sup>131</sup> reflecting,

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duties or where it is left undefined.

127. The York University agreement talks in Article 15.03 of

- (a) failure to discharge professional responsibility as defined by the agreement either through
  - (i) incompetence or
  - (ii) persistent neglect including persistent neglect of duty to students or scholarly/professional pursuits.

Under the Ottawa agreement (article 33.29), reprimand and suspension are obviously contemplated as the appropriate remedies except in the most serious cases.

128. See e.g., Article 5.20 of the Acadia Agreement.

129. The Rights and Responsibilities clauses in the Carleton Agreement (Article 15.1-2) are particularly broad and detailed in the duties that they impose on faculty under the collective agreement. See also Article 15 of the Dalhousie Agreement.

130. Article 5.10(a). We have not seen the new agreement to ascertain whether this particular provision has in fact been retained.

131. ‘‘Test teachers students urge’’, *Toronto Sunday Star*, 3 February, 1980.

University Professors should face review every four years, to make sure they’re fit to teach, Ontario student leaders say.

... Last year, fewer than a half a dozen tenured professors were fired in universities across Canada.

one suspects, the perspective of many members of the public about the privileged position of university teachers. Under the University of Regina agreement, for example, there is an annual review of all members of faculty and removal from a tenured position for "incompetence demonstrated by annual review reports" is specifically mentioned as a ground.<sup>132</sup> Under the University of Ottawa agreement, the same applies though in slightly different form. The denial of two successive progress through the ranks increments can form the basis for the commencement of dismissal proceedings and, though grievance procedures are available upon any such denial and the successive denials cannot be the sole basis for removal of tenure, this procedure has already been used to dismiss a tenured faculty member.<sup>133</sup>

Indeed, it is somewhat sobering to read the majority of the Arbitration Board's conclusions about the obligations of a professor with tenure, based on an interpretation of one of the provisions in the Ottawa agreement.

It is clear to the Board that a faculty member has a duty to perform his functions in a professional manner and that implicit in that duty is the obligation to improve his professional effectiveness, more or less continuously . . . It follows that "maintaining" his qualifications does not mean simply not losing them, but involves making consistent efforts to improve them.<sup>134</sup>

So much for tenure being either a license to do nothing for the rest of one's academic life or, for that matter, a recognition by the university of having attained a level of performance that will thereafter always be considered satisfactory.

While not in all instances providing as strong a guarantee of tenure as some people would advocate, the advent of collective bargaining has rendered one other great service to the institution of tenure beyond its assurances of a firm legal basis and of independent arbitration. In a number of institutions it has ensured that staff reductions for reasons of financial exigency and, in some cases, program redundancy, if they ever come to affect tenured positions, will not produce regulatory chaos and arbitrary decision-making.<sup>135</sup>

132. Article 14.1.3.1.

133. Article 33.30.

134. *Vanasse v. University of Ottawa*, unreported award of Arbitration Board, June 1980 (Professors J. Percy South and Gilles Paquet (majority), Professor A.E. Malloch dissenting). The quotation is from the fourth page of the majority award.

135. See e.g., Article 17 of the Carleton Agreement; Article 14 of the St. Thomas

While the prospect is not one that many university teachers can face with equanimity, the problem has at least been anticipated and procedures have been thrashed out. In many instances, those procedures give substantially greater protection to those with tenure than to those without and, even where tenure has not achieved paramountcy, reasonably precise formulae for determining the order of lay-off and recall are in place. All of this could be brought about without collective bargaining, but the chances of a fair financial exigency policy being in place does seem to be enhanced by a collective bargaining regime.

### V. Conclusion

Many important issues relating to tenure, such as procedures in relation to either the grant or removal of tenure, have been given very short shrift here. Some of the intransigent problems that have arisen in relation to confidentiality of assessments and sources of assessment in tenure applications<sup>136</sup> have not been discussed. Concern here has been with the legal basis of this cornerstone of academic freedom. Examination reveals that, despite almost universal, even if at time grudging, acceptance of the institution of tenure, the legal foundations upon which it rests are not as clear as one might have perhaps suspected, save in collective bargaining situations.

What we may be witnessing in this area, and what in the long run may be desirable, is the development of tenure (outside of the collectively organized universities) as a hybrid creature having some of the characteristics of both a statutory office and a contractual relationship.<sup>137</sup> The evidence for this so far tends to be

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Agreement; Articles 15-16 of the former Windsor Agreement; Article 24 of the York Agreement; Articles 28-29 of the Manitoba Agreement (which includes both programme redundancy and financial exigency); Article 24 of the Regina Agreement. Not all collective agreements have exigency provisions, however (*e.g.* Acadia Agreement).

136. That subject is in fact covered within Professor Beverley McLachlin's paper delivered at the Conference (see *supra*, note 3) entitled "References, Records and Evaluations: The Law of Privileged Communications" (now published as "Educational Records and the Right to Privacy" (1981), 15 U.B.C. L.R. 175). For subsequent litigation maintaining privilege for confidential assessments submitted as part of a salary review and promotion process, see *Re University of Guelph and Canadian Association of University Teachers* (1980), 112 D.L.R. (3d) 692 (Ont. H.C.).

137. This theme of the necessity to develop "a body of law particularly sensitive to the needs of the academic milieu" is developed in a more detailed and also



much stronger in other areas of statutorily-regulated employer-employee relationships such as those existing between a police officer and a police force or between a physician and a hospital board dispensing hospital privileges.<sup>138</sup> Yet there is no reason why some of these developments could not apply to university professors as well.

To take the remedy of reinstatement as an example; the fact that it is difficult to view tenure as either a pure statutory office or a purely contractual matter could lead the courts to the conclusion that, whether the claim was for a public law remedy or for specific performance, reinstatement should be neither automatically available nor unavailable. Rather it should be in the discretion of the court in any particular case. Granting specific performance could reflect concerns for accepted notions of academic freedom and an absence,

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somewhat different way by Matthew W. Finkin, "Toward a Law of Academic Status" (1972-73), 22 Buffalo Law Review 575. (The quote can be found at 602.)

138. Of particular interest in this regard is the discussion of this issue by Lord Wilberforce (a member of the majority) in *Malloch v. Aberdeen Corporation*, *supra*, note 19 in which he talks about "the risk of a compartmental approach which, though convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law" (*id.*, at 1595). This case involved the dismissal of a school teacher and, in the course of deciding that the dismissal was a nullity and the applicant entitled to redirection, a Scottish public law remedy, because of the lack of a hearing, he indicated fairly clearly that he did not approve of the earlier Privy Council decision of *Vidyodaya University Council v. Silva*, [1965] 1 W.L.R. 77 (P.C.(Cey.)), in which a dismissed university professor in what was then Ceylon was held to be restricted to contract as opposed to administrative law remedies because, while his employment was regulated by statute, his relationship with the university was still that of a servant to master. Lord Wilberforce (at 1596) expressed the view that in England or Scotland the existence of such a statutory content "would tend to show . . . that it was [a relationship] of a sufficiently public character, or one partaking sufficiently of the nature of an office to attract appropriate remedies of administrative law". *Nicholson*, *supra*, note 19, provides a good Canadian police example and for a hospital privileges decision, see *Abouna v. Foothills Provincial General Hospital Board* (No. 2) (1977), 77 D.L.R. (3d) 220 (Alta. S.C., T.D.), a case where damages were recovered for wrongful dismissal but in which the basis of liability was found in public law cases dealing with the dismissal of office-holders. On appeal the damages were reduced: (1978), 83 D.L.R. (3d) 333 (Alta. S.C., A.D.). Also of some interest here is *Herring v. Templeman*, *supra*, note 8, in which Russell L.J. doubted the availability of the public law remedy of *certiorari* in relation to the expulsion of a student from a university. He criticized the earlier Divisional Court judgment of *R. v. Aston University Senate, Ex Parte Roffey*, *supra*, note 8, in which *certiorari* was held to be the proper remedy to seek in challenging an expulsion from a University established by Royal Charter. According to Russell L.J. this was incorrect as it was a matter of contract — not public law (see 584-585).

generally, of a breakdown of relations between the faculty member affected and his colleagues. The frequency of reinstatement as a form of relief specifically mentioned in university collective agreements, special plans and even in non-collectively organized universities' rules is evidence of the acceptability of such relief in the university context. On the other hand, the possibility clearly exists of situations where reinstatement, the normal consequence of a public law remedy, should not automatically follow from breach of the rules by the university, because difficulties within a university can, of course, flow from a breakdown of personal relationships such that an enforced resumption of employment or office might not appear to be desirable, monetary relief being more appropriate.<sup>139</sup>

Viewing tenure as a hybrid creature would also enable the courts to be more flexible on whether the rules relating to tenure could be changed than would be the case if it were simply contractual, and could possibly lead to the imposition of due process requirements before such changes could take effect.<sup>140</sup> It also leaves the courts

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139. A good example of this kind of compromise being accepted by the courts at the point where public and private law concepts intersect is provided by the judgment of the Supreme Court of Canada in *Bellechasse Hospital Corporation v. Pilote*, *supra*, note 15, an appeal from the province of Quebec. A doctor had been dismissed from the staff of the hospital contrary to regulations promulgated under the relevant statute and sought *mandamus* (a public law remedy) to compel his reinstatement. Normally, from a public law perspective, one would expect that relief to flow automatically from the failure to abide by the rules. Nevertheless, the Court, by reference to some of the considerations that frequently intrude in the private law of contract, held that the applicant had to be content with his remedy in damages. Employment was available elsewhere and there was a strong chance that his reinstatement would cause further friction in the hospital. (At 461-463 *per de Grandpre J.* delivering the judgment of a four-person court). This notion of a hybrid status also gains some support from the struggle of the courts with the issue of whether a person wrongly dismissed from a statutory office is automatically entitled to salary from the date of dismissal to the date of judgment or whether financial confederation is subject to the same considerations as pertain to damages at common law for wrongful dismissal *viz* there is a duty to mitigate. money earned elsewhere has to be taken account of. See *eg. Emms v. The Queen* (1979), 102 D.L.R. (3d) 193, discussed by Mullan. "Developments in Administrative Law The 1979-80 Term" (1981), 2 Sup. Ct. L.R. 1 at 11-18.

140. At common law, the Canadian courts have not been willing to accept that rule-making agencies generally have an obligation to advertise proposed rules in advance and give interested persons an opportunity to comment (see *e.g., Re Braeside Farms and Treasurer of Ontario* (1978), 30 O.R. (2d), 541 (H.C., D.C.)). However, where the proposed rule in fact involves the resolution of a dispute involving the direct interests of particular individuals (*e.g., a by-law rezoning a particular piece of property*), procedural obligations may be implied

free to imply a requirement of fair procedures in that the existing procedures for the grant and removal of tenure have to be followed, whether anything is specifically incorporated in a letter of appointment or not.

This, of course, is highly speculative. It must be reiterated that tenure as a legal status has a much more clearly defined and certain basis in existing collective agreements than it has either at common law or under constituent university statutes. Collective bargaining may therefore be preferable in any situation where there are serious concerns about the legal status of tenured faculty and the rights of those in the tenure stream. However, collective bargaining, while putting tenure on a much surer legal basis than exists at non-organized universities, does not necessarily guarantee that the substance of tenure will be any greater than at non-organized universities. In good institutions, the advent of collective bargaining may well have weakened its substantive content, subject, of course, to the offsetting benefits of independent arbitration. It must also be reiterated that provisions guaranteeing independent arbitration of tenure disputes and specifying reinstatement as a remedial alternative have the clear potential even in non-organized universities to overcome many of the existing legal difficulties.

Finally, there is little cause for the kind of panic reaction that must have been behind the amendments to the British Columbia and Alberta legislation. In other provinces a number of faculty unions have opted for "structural" agreements, with annual re-opening of the monetary package, subject to some form of arbitration. That approach makes sense, because university faculty appear to have little significant withholding power. A faculty strike would engender absolutely no public sympathy, there would be no economic pressure, indeed it would be a money-saving event, and only if the strike went on long enough that students faced the prospect of losing a year would there be any significant political pressure. Even then the public pressure would be nothing compared with that which public school teachers can exert by withdrawing their free babysitting service. Why, then, have the governments of Alberta and British Columbia withdrawn the right to organize under

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(*Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512). While not quite the same kind of rule-making, rules which have the effect of changing particular individuals' contracts of employment are sufficiently analogous to the *Wiswell* type of situation to generate a good argument for implied procedural requirements of such cases.

the labour relations legislation? Universities in British Columbia are subject to the *Essential Services Disputes Act*.<sup>141</sup> If there is real fear of the impact of a strike by faculty, why not leave it at that? But perhaps that was not the basis of the amendment, because in British Columbia non-academic employees of the universities are not denied access to collective bargaining rights although, with a strike of any length they too can cause the institutions to grind to a halt. And why, in British Columbia, is there a distinction between university faculty and college faculty?

From a legal point of view, a carefully negotiated and well drafted collective agreement subject to provincial labour legislation is certainly an effective way to clear up many of the uncertainties in the university employment relationship. However, if the university is prepared seriously to negotiate a broadly inclusive special plan enforceable by arbitration to which individual faculty members have reasonable access the difference is not very great. It is, essentially, the right to strike.

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141. S.B.C. 1977, c.83.