

FEDERAL COURT

BETWEEN:

**NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN,
ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES,
AND CANADIAN MUSLIM LAWYERS ASSOCIATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN JUDICIAL COUNCIL

Intervener

and

**CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

Proposed Interveners

MOTION FOR LEAVE TO INTERVENE
pursuant to Rule 109 and 369 of the *Federal Courts Rules*

**MOTION RECORD OF THE CENTRE FOR FREE EXPRESSION AND CANADIAN
ASSOCIATION OF UNIVERSITY TEACHERS**

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Tab 1

FEDERAL COURT

BETWEEN:

**NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN,
ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES,
AND CANADIAN MUSLIM LAWYERS ASSOCIATION**

Applicants

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THE ATTORNEY GENERAL OF CANADA

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**CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

Proposed Interveners

MOTION FOR LEAVE TO INTERVENE

pursuant to Rule 109 and 369 of the *Federal Courts Rules*

**NOTICE OF MOTION OF THE CENTRE FOR FREE EXPRESSION
AND CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

TAKE NOTICE THAT the Centre for Free Expression and Canadian Association of University Teachers will make a motion to the Federal Court under Rules 109 and 369 of the *Federal Courts Rules*.

THE MOTION IS FOR an Order that:

1. The Centre for Free Expression (“CFE”) and Canadian Association of University Teachers (“CAUT”) (“the Proposed Interveners”) be granted leave to intervene, pursuant to Rule 109 of the *Federal Courts Rules*, in the application for judicial review of the National Council Of Canadian Muslims, Craig Scott, Leslie Green, Arab Canadian Lawyers Association, Independent Jewish Voices, And Canadian Muslim Lawyers Association (“the Applicants”) of the various decisions of the Canadian Judicial Council (“the CJC”) issued 20 May 2021 in Files #20-0254, 20-0260, 20-0275, 20-0261, and 20-0305 to close the Complaints and to not constitute an Inquiry Committee to further investigate the conduct of Justice David E. Spiro on the following terms:
 - (a) The Proposed Interveners may jointly file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover), on or before a date to be determined;
 - (b) The Proposed Interveners may appear and make oral submissions at the hearing of this proceeding not exceeding 30 minutes, or such other duration as this Court may direct;
 - (c) The Proposed Interveners may jointly file an Affidavit that would provide the Court with details as to the meaning and scope of academic freedom and identify and expand on the ways in which academic freedom issues arise in this Application, but were not considered by the CJC;
 - (d) Any documents served on any party in this proceeding must also be served on the Proposed Interveners; and
 - (e) The Proposed Interveners may not seek costs or have costs awarded against it.
2. The style of cause of these proceedings be amended to add the Centre for Free Expressions and Canadian Association of University Teachers as a joint intervener, and hereinafter all documents shall be filed under the amended style of cause.
3. No costs of this motion are awarded to any party.

THE GROUNDS FOR THE MOTION ARE:

1. The Proposed Interveners have a genuine interest in ensuring that the Court appreciates the gravity of the CJC's failure to recognize and consider the importance of academic freedom in its review of Justice Spiro's conduct.
2. The Proposed Interveners possess a distinct perspective and particular depth of expertise in defending academic freedom issues. The CFE is a non-partisan research, public education, and advocacy centre with a significant interest in protecting freedom of expression and specifically academic freedom, and has an extensive and established record of promoting the understanding and importance of academic freedom. The CAUT represents thousands of academic personnel across Canada and has a particular mandate to defend academic freedom. The activities of CAUT's members across the country will be directly and tangibly impacted by the decision of this Court.
3. The participation of the Proposed Interveners will assist with the determination of the judicial review by providing different and valuable insights in relation to the meaning and scope of academic freedom, and the ways in which academic freedom issues arise in this application for judicial review but were not considered by the CJC;
4. It is in the interests of justice to grant leave to intervene to the Proposed Interveners as the CJC's failure to consider academic freedom in its review of Justice Spiro's actions raises significant public interest concerns. Academic freedom is critical to the societal mission of post-secondary educational institutions of disseminating and advancing knowledge and educating students - activities which are, in turn, critical to the functioning of a democratic society. Justice Spiro's intervention in the University of Toronto's hiring process has broad implications for the importance of academic freedom for current and prospective academic staff.
5. The Proposed Interveners will apply sufficient skills and resources to make a meaningful contribution to the proceeding. No other party or potential intervener to this judicial review has the necessary expertise in the issue of academic freedom.
6. Granting leave to intervene to the Proposed Interveners will not unduly complicate, interrupt or protract the proceedings;
7. The Proposed Interveners have complied with the procedural requirements set out in Rule

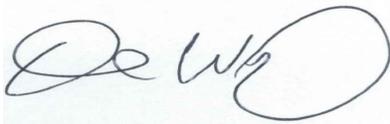
109 and 359-369 of the *Federal Court Rules*.

8. Such further and other grounds as counsel may advise and this Honourable Court permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1. The affidavit of James L. Turk affirmed January 14, 2022;
2. The affidavit of Brenda Austin-Smith affirmed January 16, 2022;
3. The written representations in support of the Proposed Interveners' motion, dated January 17, 2022; and
4. Such further and other material that Counsel may advise and this Honourable Court permit.

Dated at Toronto, Ontario this 17th day of January, 2022.



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Tab 2

FEDERAL COURT

BETWEEN:

**NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN,
ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES,
AND CANADIAN MUSLIM LAWYERS ASSOCIATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

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**CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

Proposed Interveners

MOTION FOR LEAVE TO INTERVENE
pursuant to Rules 109 and 369 of the *Federal Courts Rules*

AFFIDAVIT OF James L. Turk

I, James L. Turk, of the City of Toronto in the Province of Ontario, AFFIRM THAT:

1. I am a Distinguished Visiting Scholar at Ryerson University and Director of Ryerson's

Centre for Free Expression (“CFE”). Previously I was the Executive Director of the Canadian Association of University Teachers (“CAUT”).

2. As such I have personal knowledge of the facts and matters to which I hereinafter depose or have received the information from others, in which case I believe the information to be true.

3. I make this affidavit in support of the motion brought by the CFE and CAUT for leave to jointly intervene in the Application for Judicial Review brought by National Council of Canadian Muslims, Craig Scott, Leslie Green, Arab Canadian Lawyers Association, Independent Jewish Voices, and Canadian Muslim Lawyers Association (“Applicants”) challenging the decisions of the Canadian Judicial Council (“Council”) regarding the conduct of Justice David Spiro.

4. CAUT and the CFE seek leave of the Court to intervene in this Application for the purpose of drawing to the attention of the Court the issues of academic freedom, and the impact on academic freedom, which arise from Justice Spiro’s actions, and from the failure of the Council to consider and weigh such issues. Academic freedom is essential to the functioning of universities and to the fulfillment of their societal mandate, and it is the position of CAUT and the CFE that it is important that the Court consider the impact of Justice Spiro’s actions on academic freedom.

5. The CFE has expertise regarding academic freedom and collegial governance in the academic environment and has intervened in previous cases where a range of expressive freedom issues were at issue. I believe that the CFE can assist the Court in this application.

A. My Background

6. I have a doctoral degree in Sociology from the University of Toronto. I graduated with a Master of Arts in Sociology from the University of California, Berkeley, was a Knox Fellow in Political Science and Philosophy at Cambridge University, and completed my undergraduate studies at Harvard University.

7. I have been Director of the CFE at Ryerson since 2015. I became a Distinguished Visiting Professor at Ryerson University in 2014 and have held the title of Distinguished Visiting Scholar since 2018. I am also a member of the Steering Committee of the International Civil Liberties Monitoring Group and an Adjunct Research Professor at the Institute of Political Economy at Carleton University.
8. Prior to my work at Ryerson, I served as Executive Director of the CAUT from 1998 to June 2014.
9. From 1975 to 1989, I was an associate Professor of Sociology at the University of Toronto, specializing in Canadian Studies. From 1981 to 1998, I held various positions with unions and labour organizations. I have been Executive Assistant to the National President of the Canadian Union of Public employees, Director of Education for the Ontario Federation of Labour, and Research Director for the United Electrical, Radio and Machine Workers of Canada.
10. I have written extensively on academic freedom, freedom of expression, university governance, civil liberties, commercialization of universities, and related public policy issues. My most recent book was an edited collection titled: *Academic Freedom in Conflict: The Struggle over Speech Rights in the University*. I have received several awards acknowledging my work on freedom of expression, including the Milner Memorial Award from the CAUT in 2018, in recognition for a distinguished contribution to the cause of academic freedom.
11. My experience with academic freedom was developed in the context of my role as Executive Director of the CAUT and as Director of the CFE. During my tenure at CAUT, I also oversaw and directed the CAUT's work on academic freedom. Currently, as Director of the CFE, I oversee and direct the CFE's work on academic freedom as described in more detail below.
12. Additional details regarding my work, and credentials, are outlined in my Curriculum Vitae, attached to this Affidavit as Exhibit 1.

B. About the CFE

13. Established in 2015, the CFE is a non-partisan research, public education, and advocacy centre that is based in the Creative School at Ryerson University. The CFE serves as hub for a wide range of activities related to free expression and the public's rights to seek, receive, and share information. The CFE maintains a website that is accessible to all and provides a variety of resources on current and ongoing issues relating to free expression and the public's right to know. The CFE works collaboratively with other organizations to promote a better understanding of the importance of freedom of expression in a democratic society, and to advance expressive freedom rights in Canada and internationally.

14. The CFE is guided by an Advisory Board made up of fifteen prominent Canadians: Faisal Bhabha, Associate Professor, Osgoode Hall Law School, and Legal Advisor to the National Council of Canadian Muslims; Jamie Cameron, Professor Emeritus, Osgoode Hall Law School; Andrew Clement, Professor Emeritus & Co-Founder, Identity Privacy and Security Institute, Faculty of Information, University of Toronto; Brendan De Caires, Executive Director, PEN Canada; Ryder Gilliland, Founding Partner, DMG Advocates LLP, and Past President, Ad IDEM/Canadian Media Lawyers Association; David Hughes, Executive Director and Managing Editor, Content CTV News; Peter Jacobsen, Partner, WeirFoulds LLP; Meghan McDermott, Senior Staff Counsel, British Columbia Civil Liberties Association; Shelagh Paterson, Executive Director, Ontario Library Association; Toni Samek, Professor and past Chair, School of Library and Information Studies, University of Alberta; Robin Sokoloski, Director of Organizational Development, Mass Culture/Mobilisation culturelle; Laura Tribe, Executive Director, OpenMedia; David Walmsley, Editor-in-Chief, *The Globe and Mail*; Vershawn Young, Professor, Black Studies, Communication Arts, and English, University of Waterloo; and Cara Zwibel, Director, Fundamental Freedoms Program, Canadian Civil Liberties Association.

15. The CFE has a significant interest in protecting freedom of expression and specifically protecting academic freedom that is critical for post-secondary educational institutions to fulfill their mandates to educate students and advance and disseminate knowledge. The CFE considers a robust interpretation and protection of s. 2(b) freedom of expression rights under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”), which provides the societal

context for meaningful academic freedom, to be critical to the functioning of a democratic society. The CFE engages in public education about the nature and importance of academic freedom. It highlights current threats and works to ensure that academic freedom rights are extended to all academic staff.

C. CFE’s Expertise and Experience with respect to Academic Freedom

16. The CFE has been actively involved in issues concerning freedom of expression, including the protection and promotion of free expression rights in the academic context.

17. The CFE has been granted intervener status, as part of a coalition or individually, in recent cases on important issues of free expression, including:

- (a) *R. v. Vice Media Canada Inc.*, 2017 ONCA 231 (freedom of the press);
- (b) *R v. Vice Media Canada Inc.*, 2018 SCC 53 (freedom of the press);
- (c) *17044604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 (Ontario Anti-SLAPP legislation);
- (d) *Attorney General for Ontario v. Information and Privacy Commissioner and Canadian Broadcasting Corporation* 2020 ONSC 5085 (access to information);
- (e) *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553 (freedom of expression);
- (f) *Canadian Broadcasting Corporation v. Her Majesty the Queen, et al.* 2021 SCC 33 (open court principle);
- (g) *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 (publication ban);
- (h) *Mirna Montejo Gordillo et al. v. Attorney General of Canada*, 2020 FCA 198 (statutory interpretation);
- (i) *Attorney General of British Columbia v. Council of Canadians with Disabilities*, SCC File No. 39430 (public interest standing);
- (j) *City of Toronto v. Attorney General of Ontario*, 2021 SCC 34 (freedom of

expression in municipal elections); and

(k) *Attorney General for Ontario v. Information and Privacy Commissioner and Canadian Broadcasting Corporation* ONCA File No. M51773 (access to information).

18. The CFE promotes understanding the nature and importance of academic freedom through its blogposts, events, and publications. Its many initiatives and resources relating to academic freedom are available on the CFE website. Among other things, the CFE:

- (a) maintains a public searchable database on cases related to the freedom of expression at work;¹
- (b) maintains a public searchable database of Canadian public library policies related to intellectual freedom;²
- (c) maintains an online blog that features commentary on current issues related to academic freedom, by a wide variety of contributors. Recent posts include the following:
 - i. Carolyn Sale, “Expressive Freedom at Our Universities and Our Moral Obligations”, June 1, 2021.³
 - ii. Faisal Bhabha, “Unrest in Higher Education: An Uncertain Way Forward”, April 29, 2021.⁴
 - iii. Len Findlay, “Safe Space” Classrooms within “Communities of Care”, April 26, 2021.⁵
 - iv. Dax D’Orazio, “Free Expression on Campus: Assessing the Alberta Ministerial Directive”, March 25, 2021.⁶
 - v. Ivor Shapiro, “It’s Complicated: Six Things Worth Discussing About Free Speech”, November 18, 2020.⁷

¹ See (online): <<https://cfe.ryerson.ca/key-resources/databases/freedom-expression-work>>.

² See (online): <<https://cfe.ryerson.ca/key-resources/databases/public-library-policies-database>>.

³ Online: <<https://cfe.ryerson.ca/blog/2021/06/expressive-freedom-our-universities-and-our-moral-obligations>>.

⁴ Online: <<https://cfe.ryerson.ca/blog/2021/04/unrest-higher-education-uncertain-way-forward>>.

⁵ Online: <<https://cfe.ryerson.ca/blog/2021/04/%E2%80%9Csafe-space%E2%80%9D-classrooms-within-%E2%80%9Ccommunities-care%E2%80%9D>>.

⁶ Online: <<https://cfe.ryerson.ca/blog/2021/03/free-expression-campus-assessing-alberta-ministerial-directive>>.

⁷ Online: <<https://cfe.ryerson.ca/blog/2020/11/it%E2%80%99s-complicated-six-things-worth-discussing-about-free-speech>>.

- vi. Dax D’Orzaio, “Freedom of Information, Universities & Transparency: Lessons from Emily Eaton and the University of Regina”, November 12, 2020.
- vii. Carolyn Sale, “Contest Over “Restructuring” and Collegial Governance at University of Alberta Could Set Dangerous New Precedent Across Canada”, September 28, 2020.⁸
- viii. Jamie Cameron, “The Professor, the Petition and the President: Professor Bhabha, B’Nai Brith, and President Lenton”, August 12, 2020.⁹
- ix. Carolyn Sale, “Academic Freedom and Perceptions of Harm”, June 2, 2020.¹⁰
- x. Carolyn Sale, “Just doing their job: why we all need professors to exercise their academic freedom in Premier Kenney’s Alberta”, May 11, 2020.¹¹
- xi. James L. Turk, “Censorship Has No Place in the University”, June 27, 2019.¹²
- xii. James L. Turk, “Ontario’s Colleges Embrace Free Speech, Or Do They?”, December 19, 2018.¹³
- xiii. James L. Turk, “No thank you, Premier Ford”, September 5, 2018.¹⁴
- xiv. James L. Turk, “Kudos to University of Alberta President for Strong Defence of Academic Integrity In Face of Fierce Onslaught”, April 25, 2018.¹⁵
- xv. William Bruneau, “Campus Speech and the Inflation of Harm”, April 10, 2018.¹⁶
- xvi. Richard Moon, “(Free) Speech on Campus”, November 16, 2017.¹⁷
- xvii. David Schneiderman, “University Speech Codes and the Wounds of White Fragility”, November 9, 2017.¹⁸

⁸ Online: <<https://cfe.ryerson.ca/blog/2020/09/contest-over-%E2%80%9Cstructuring%E2%80%9D-and-collegial-governance-university-alberta-could-set>>.

⁹ Online: <<https://cfe.ryerson.ca/blog/2020/08/professor-petition-and-president-professor-bhabha-b%E2%80%99nai-brith-and-president-lenton>>.

¹⁰ Online: <<https://cfe.ryerson.ca/blog/2020/06/academic-freedom-and-perceptions-harm>>.

¹¹ Online: <<https://cfe.ryerson.ca/blog/2020/05/just-doing-their-job-why-we-all-need-professors-exercise-their-academic-freedom-premier>>.

¹² Online: <<https://cfe.ryerson.ca/blog/2019/06/censorship-has-no-place-university>>.

¹³ Online: <<https://cfe.ryerson.ca/blog/2018/12/ontario%E2%80%99s-colleges-embrace-free-speech-or-do-they>>.

¹⁴ Online: <<https://cfe.ryerson.ca/blog/2018/09/no-thank-you-premier-ford>>.

¹⁵ Online: <<https://cfe.ryerson.ca/blog/2018/04/kudos-university-alberta-president-strong-defence-academic-integrity-face-fierce>>.

¹⁶ Online: <<https://cfe.ryerson.ca/blog/2018/04/campus-speech-and-inflation-harm>>.

¹⁷ Online: <<https://cfe.ryerson.ca/blog/2017/11/free-speech-campus>>.

¹⁸ Online: <<https://cfe.ryerson.ca/blog/2017/11/university-speech-codes-and-wounds-white-fragility>>.

- xviii. William Bruneau, “A Hailstorm of Censorship at UBC”, October 19, 2017.¹⁹
- xix. William Bruneau, “Supreme Court to Decide if Doctrine is Good for You”, September 27, 2017.²⁰
- xx. James L. Turk, “Ryerson Made a Mistake in Cancelling Panel Discussion”, August 18, 2017.²¹
- xxi. Len Findlay, “J’accuse! Maclean’s, McGill, and the Andrew Potter Affair”, August 2, 2017.²²
- xxii. William Bruneau, “How to Stand on Your Head”, April 20, 2017.²³
- xxiii. William Bruneau, “Authority and Freedom at UCLA, Toronto, and UBC”, February 28, 2017.²⁴
- xxiv. Lara Karaian, “Fighting Bans with Gags? A Consideration of the Academic Boycott of US Conferences”, February 16, 2017.²⁵
- xxv. David Schneiderman, “On Yelling Fire Falsely in a Crowded Lecture Hall”, November 7, 2016.²⁶
- xxvi. William Bruneau, “Language that is narrowing the public sphere”, October 25, 2016.²⁷
- xxvii. Jon Thompson, “Turning Back the Clock”, September 30, 2016.²⁸

(d) works on its own and in partnership with a wide variety of organizations in hosting conferences, public panels and discussions to promote a more informed understanding of academic freedom and its importance. Among others, these events include the following:

- i. “Cancel Culture, Censorship, and Free Expression” (December 9, 2021) (Panelists: Piers Benn, Christina de Castell, Inaya Folarin-Iman, Eric Lybeck. Moderator: James L. Turk).²⁹

¹⁹ Online: <<https://cfe.ryerson.ca/blog/2017/10/hailstorm-censorship-ubc>>.

²⁰ Online: <<https://cfe.ryerson.ca/blog/2017/09/supreme-court-decide-if-doctrine-good-you>>.

²¹ Online: <<https://cfe.ryerson.ca/blog/2017/08/ryerson-made-mistake-cancelling-panel-discussion>>.

²² Online: <<https://cfe.ryerson.ca/blog/2017/08/j%E2%80%99accuse-maclean%E2%80%99s-mcgill-and-andrew-potter-affair>>.

²³ Online: <<https://cfe.ryerson.ca/blog/2017/04/how-stand-your-head>>.

²⁴ Online: <<https://cfe.ryerson.ca/blog/2017/02/authority-and-freedom-ucla-toronto-and-ubc>>.

²⁵ Online: <<https://cfe.ryerson.ca/blog/2017/02/fighting-bans-gags-consideration-academic-boycott-us-conferences>>.

²⁶ Online: <<https://cfe.ryerson.ca/blog/2016/11/yelling-fire-falsely-crowded-lecture-hall>>.

²⁷ Online: <<https://cfe.ryerson.ca/blog/2016/10/language-narrowing-public-sphere>>.

²⁸ Online: <<https://cfe.ryerson.ca/blog/2016/09/turning-clock-back>>.

²⁹ Online: <<https://cfe.ryerson.ca/events/cancel-culture-censorship-and-free-expression>>.

- ii. “Defunding Difference and Dissent on Campus: Why Should Canadians Care?” (February 26, 2019) (Discussants: Len Findlay, Nour Alideeb).³⁰
- iii. “White License, Free Expression & Death Threats: The Challenges of Confronting Racism” (October 12, 2017) (Speaker: Johnny Eric Williams. Moderator: James L. Turk).³¹
- iv. Colloquium on Academic Freedom. Toronto. Speakers: James L. Turk, Michael Lynk. February 28, 2020. Co-sponsored by the Canadian Association of University Teachers.

(e) promotes publications on the nature and importance of academic freedom. Among others, these publications include the following:

- i. Mark Gabbert, “Academic Freedom: Freedom of Expression's Vulnerable Child”, CFE Occasional Paper Series, November 1, 2019.³²
- ii. James L. Turk and Penni Stewart, “Safe for What? Universities and the controversy over safe spaces” July 7, 2017.³³

D. Overview of Academic Freedom

19. Whereas freedom of expression is a general right of everyone in Canada -one of the four fundamental freedoms specified by the *Canadian Charter of Rights and Freedoms* -- academic freedom is a narrower professional right of academic staff to use their best judgment in matters related to their teaching, research and scholarship, participation in the collegial governance of their institution (intramural academic freedom), and exercise of their rights as citizens without sanction by their employer (extramural academic freedom). Academic freedom is a right necessary for academic staff to fulfill their institutional and societal

³⁰ Online: <<https://cfe.ryerson.ca/events/defunding-difference-and-dissent-campus-why-should-canadians-care>>.

³¹ Online: <<https://cfe.ryerson.ca/events/white-license-free-expression-death-threats-challenges-confronting-racism>>.

³² Online: <https://cfe.ryerson.ca/sites/default/files/Gabbert_Occasional_Paper_Nov_2019_Academic_Freedom_0.pdf>.

³³ Online: <https://cfe.ryerson.ca/sites/default/files/Turk_Stewart_Safe_Spaces_2017_07_07.pdf>.

obligations to educate students and advance knowledge.

20. These four aspects of academic freedom are spelled out in the CAUT policy statement on academic freedom³⁴, in the 1915 *Declaration of Principles on Academic Freedom and Academic Tenure* by the American Association of University Professors,³⁵ and by the General Conference of UNESCO, with delegates from more than 150 countries, which adopted the *Recommendation concerning the Status of Higher-Education Teaching Personnel*,³⁶ the first international recognition of academic freedom, and which explicitly identified these same four components of academic freedom.

21. Academic staff must be free to model in their teaching the freedom of mind and critical thought that are the purpose of the university.

22. Advancement of knowledge through research and scholarship depends on academics having the freedom to decide issues to address, perspectives to be pursued, methods to be used, and freedom to share their findings with colleagues, the academic and scientific community, and the public.

23. Universities, from their outset have been institutions in which collegial governance has been essential to protect the integrity of the university's academic mission. This has meant that academic decisions are made by the collegium of academics, each of whom has the right to speak out about any aspect of the policy and practices of their institution.

24. Extramural academic freedom is the fourth component, as Matthew Finkin and Robert Post explain, because "... faculty can promote knowledge or model independent thought in the classroom only if they are *actively and imaginatively* engaged in their work. If faculty experience their institutions as repressive, they will be vulnerable to forms of self-censorship and self-restraint that are inconsistent with the confidence necessary for research and teaching. The harm would be enhanced if faculty were confused about which communications were

³⁴ CAUT Policy Statement: Academic Freedom, <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom>

³⁵ American Association of University Professors, "Appendix I: 1915 Declaration of Principles on Academic Freedom and Academic Tenure", *Policy Documents and Reports* (Eleventh Ed.), p. 297. a <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf>

³⁶ UNESCO, *Recommendation concerning the Status of Higher-Education Teaching Personnel*. Paris, 1997. Para 25-30. http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html

protected by freedom of research and which communications would be exposed to punishment if freedom of extramural speech were not a recognized dimension of academic freedom.”³⁷

25. As with any freedom, there are limits to academic freedom. The maintenance of academic freedom contemplates an accountability in respect to teaching, research and scholarship, participation in collegial governance, and extramural expression. But these are solely in respect of their professional integrity, a matter primarily determined by reference to professional ethical standards and the norms of academic disciplines.

26. The arbiter of standards for academic work (and hence for academic freedom) is not the corporate institution, but the collective academic staff in the institution and in the collectivity that constitute the academic disciplines within which academics work.

E. How Academic Freedom Issues Arise in this Application

27. I have reviewed the Affidavit of Brenda Austin-Smith, submitted on behalf of the CAUT in support of this motion.

28. Dr. Austin-Smith Affidavit reviews the specific aspects of the Record before the Court which demonstrate how academic freedom issues arise in this Application.

29. The core rationale for the principles of academic freedom is to protect the academic integrity of the university from interference in academic matters (e.g., curriculum; teaching of students; research and scholarship within the university; hiring, promotion, discipline, and termination of academic staff; and academic policies and priorities).

30. Interference most commonly arises from outside the university, whether by donors, alumni, politicians, religious institutions, lobby groups, or businesses and corporations.

31. Interference can occur from within the university, whether by board members, administrators, students, staff, or academic colleagues who attempt to interfere with the academic freedom rights of those within the institution.

³⁷ Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom*. New Haven: Yale University Press, 2009, p. 139.

32. Judge Spiro's actions were a classic case of outside interference - pressure being brought to bear on the University of Toronto in relation to its academic decision regarding who was to become the director of the International Human Rights Program (IHRP) at the University's law school.

33. The public mission of a university is to advance and disseminate knowledge, and to educate students. These ends cannot be achieved without academic freedom. The CFE is concerned that academic freedom at Canada's post-secondary institutions is being seriously undermined. Due to chronic underfunding, a significant proportion of university and college academic staff are being hired into contingent positions lacking the job security that makes protection of academic freedom feasible, and universities agree to fundraising deals and collaborative projects that compromise academic integrity and academic freedom.

34. This ruling will have broad implications for the importance of academic freedom for current and prospective academic staff. To respect academic freedom, the hiring, tenure, and promotion policies and practices at all Canadian universities must be free from outside interference – whether direct or indirect. Academic excellence requires the conspicuous promotion of research and scholarship. There is a grave risk of “academic chill”, self-censorship, and external influencing if the decisions of the Council that it would not inquire into Justice Spiro's actions are not overturned.

F. CFE's Distinct Perspective

35. If granted leave to intervene, the joint intervention of CAUT and the CFE will provide the Court with a unique perspective that will not be provided by any other party and that will be valuable to the Court as it considers this application for judicial review.

36. As noted above, the CFE is a non-partisan research, public education, and advocacy centre guided by a Board of 15 prominent Canadians, with a significant interest in protecting freedom of expression and specifically academic freedom, and has an extensive and established record of promoting the understanding and importance of academic freedom.

37. It is thus in a position to provide the court with a unique perspective on the issue of academic freedom which is not available from other parties to this Application.

38. I believe that the submissions of the CFE and CAUT will be different from those of any other party and will be valuable to this Court.

G. Proposed Submissions

39. If granted leave to intervene, the CFE and CAUT will make joint submissions.

40. The CFE and CAUT's joint submissions will focus on how principles of academic freedom arise in this Application, and how those principles were detrimentally impacted by what happened.

41. In brief, the CFE and CAUT will argue that the Council failed to appreciate the academic freedom interests raised by Justice Spiro's actions and thus failed to consider the impact of Justice Spiro's actions on academic freedom in its review. The CFE and CAUT will submit that, as such, the Council's review of Justice Spiro's actions was incomplete.

42. If granted leave to intervene, CAUT and the CFE will make the following submissions:

(a) On the standard of review:

- i. When reviewing tribunal decisions that involve the administration of justice, independence of the Canadian judiciary, and the integrity of the legal system, reviewing Courts should adopt a correctness standard.
- ii. Not only must justice be done when it comes to preserving the administration of justice, but it must be seen to be done. The Council failed to carry out that responsibility in a manner that would satisfy an outside observer.

(b) On the issue of academic freedom:

- i. Academic freedom is recognized as a foundational principle for Canadian universities and our democracy.

- ii. Academic freedom demands that university academic staff be free to assess, criticize, and select candidates without fear of retribution, censorship, or discipline. This continues to apply when academic staff participate in meetings, decisions, or on committees related to any appointment – tenured, executive, or otherwise. By revoking the decision to hire Professor Azarova after the intervention of Justice Spiro, the Dean of the Faculty of Law violated academic freedom.
- iii. A fulsome consideration of how Judge Spiro’s actions impacted on academic freedom was not done by the Council.
- iv. Had the Council properly considered academic freedom, they may have come to a different conclusion.

H. CFE will not Disrupt or Delay this Application

43. In making its submissions, CAUT and the CFE will rely on the existing record before this Court, relevant statutes, and case law.

44. In addition, in order to ensure that the Court has a fulsome understanding of the academic freedom issues in this case, CAUT and the CFE seek leave to provide the Court with an expert Affidavit outlining the principles and history of academic freedom and the recognition of the importance of academic freedom in a democratic society.

45. The CFE and CAUT undertake to deliver a memorandum of factum and law of no more than 20 pages within whatever period of time is ordered by this Court.

46. I shall instruct CFE’s counsel not to make any submissions that duplicate those made by the Applicants or Respondent in this Application.

47. The CFE will abide by any terms imposed by this Court to ensure that its intervention does not disrupt or delay the hearing of these appeals.

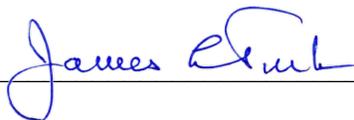
48. The CFE will not seek costs and asks that it not be liable for costs to any other party.

AFFIRMED remotely by James L. Turk at the City of)
Toronto in the Province of Ontario, before me on this 14th)
day of January, 2022 in accordance with O. Reg. 431/20,)

Administering Oath or Declaration Remotely



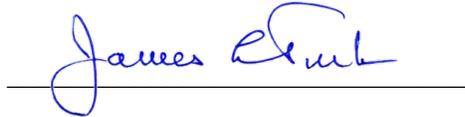
Rebecca R. Jones, Commissioner for Taking Affidavits (LSO# 79555C)



(Signature of Deponent)

Exhibit 1

AFFIRMED remotely by James L. Turk at the
City of Toronto in the Province of Ontario,
before me on this 14th day of January, 2022 in
accordance with O. Reg. 431/20, Administering
Oath or Declaration Remotely



(Signature of Deponent)



Rebecca R. Jones, Commissioner for Taking Affidavits (LSO# 79555C)

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Toronto, ON M5B 2K3
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Education

UNIVERSITY OF TORONTO, Toronto, Ontario
Ph.D., Sociology

UNIVERSITY OF CALIFORNIA, Berkeley, California
M.A., Sociology

CAMBRIDGE UNIVERSITY, Cambridge, England
Knox Fellow, Political Science and Philosophy

HARVARD UNIVERSITY, Cambridge, Massachusetts
A.B. (magna cum laude), Sociology, Social Psychology & Anthropology

Positions

RYERSON UNIVERSITY
Director, Centre for Free Expression 2015 - Present
Distinguished Visiting Professor 2014 – 2018
Distinguished Visiting Scholar 2018 - Present

CARLETON UNIVERSITY – INSTITUTE OF POLITICAL ECONOMY
Adjunct Research Professor 2010 - Present

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
Executive Director 1998 – 2014

CANADIAN UNION OF PUBLIC EMPLOYEES
Executive Assistant to the President 1996-1998

ONTARIO FEDERATION OF LABOUR
Director of Education 1986-1996

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY
Chair (Acting) 1991

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF CANADA
Director of Research 1981-1986

UNIVERSITY OF TORONTO
Associate Professor 1975-1989
Assistant Professor 1970-1975

Publications (Since 2000)

Books

- Turk, James L., ed., *Academic Freedom in Conflict: The Struggle over Free Speech Rights in the University*. Toronto: James Lorimer & Co., 2014.
- Turk, James L., and Charis Wahl, eds., *Love, Hope, Optimism: An informal portrait of Jack Layton by those who knew him*. Toronto: James Lorimer & Co., 2012.
- Turk, James L., ed, *Universities at Risk: How Politics, Special Interests and Corporatization Threaten the Integrity of the University*. Toronto: James Lorimer & Co, 2008.
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- Bruneau, William and Turk, James L. (eds). *Disciplining Dissent: The Curbing of Free Expression in Academia and the Media*. Toronto: James Lorimer & Co., 2005.
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- Turk, James L. and Norman W. Bell, "Measuring Power in Families," *Journal of Marriage and the Family* 34 (1972): 215-222.

Presentations (Selected 2014-2021)

- Turk, James L., "Libraries and Intellectual Freedom: Being a Truly Inclusive Public Space." Colchester-East Hants Regional Library, August 17, 2021.
- Turk, James L., "Public Libraries Cannot Fulfill Their Public Role without Vigorous Protection for Intellectual Freedom." Mississauga Public Library, June 30, 2021.
- Turk, James L., "Intellectual Freedom, Public Libraries, and Social Justice." Halifax Public Libraries, May 18, 2021.
- Turk, James L., "The Challenges of Intellectual Freedom." Canadian Urban Libraries Council, May 17, 2021.
- Turk, James L., "Offence Is Unavoidable, Hate Is Inexcusable: Navigating Intellectual Freedom in Public Libraries." Ontario Library Association. February 4, 2021.
- Turk, James L., "Public Libraries: Challenges of Intellectual Freedom." Milton Public Library. October 19, 2020.
- Turk, James L., "Challenges of Intellectual Freedom for Public Libraries in Democratic Society." Calgary Public Library. March 13, 2020.
- Turk, James L., "Intellectual Freedom: Human Rights, Social Justice & Public Libraries." Ontario Library Association Super Conference. January 30, 2020.
- Turk, James L., "Democracy, Public Libraries, and Intellectual Freedom." Edmonton Public Library. January 15, 2020.
- Turk, James L., "What's All the Fuss about Campus Free Speech? Politics, Academic Freedom & the Mission of the University." University of Alberta. November 6, 2019.
- Turk, James L., "Academic Freedom in Canada." International Dialogue on Education. Berlin, Germany. October 28, 2019.
- Turk, James L., "Intellectual Freedom 101." Vancouver Public Library. September 25, 2019.

- Turk, James L., "Social Responsibility and Neutrality in Libraries." Alberta Library Conference. Jasper. April 27, 2019.
- Turk, James L., "Freedom of Expression on Campus: Some Thoughts." Harry Crowe Foundation Conference. Toronto, February 22, 2019.
- Turk, James L., "Challenges to Intellectual Freedom: What to do." Ontario Library Association SuperConference. Toronto. January 31, 2019.
- Turk, James L., "Freedom of Expression: Its Importance & Its Limits." Mount Saint Vincent University, Halifax, N.S. January 22, 2019.
- Turk, James L., "University Statements on Free Expression: What is essential." Ryerson Faculty Association, Ryerson University, Toronto. November 28, 2018.
- Turk, James L., "Academic Freedom, Campus Freedom of Expression, Privacy and Other Related Adventures in Academic Collective Bargaining." Canadian Association of University Business Officers – Faculty Bargaining Services. Montreal, October 31, 2018.
- Turk, James L., "Countering SLAPPs." Parkland Institute. Edmonton, September 28, 2018
- Turk, James L. "Exploring the Tensions between Academic Freedom and Anti-Oppression." Carleton University, September 24, 2018.
- Turk, James L., "Taking Intellectual Freedom Seriously." Edmonton Public Library, September 11, 2018.
- Turk, James L., "Campus Free Speech." Council of Ontario Universities Academic Associates. Toronto, August 22, 2018
- Turk, James L., "Protecting Intellectual Freedom." Canadian Federation of Library Associations National Forum. Regina, May 2, 2018.
- Turk, James L., "Censorship Undermines Social Justice." Mount Royal University, Calgary. February 9, 2018.
- Turk, James L., "Is There Room for Academic Freedom in Today's University?" Mount Royal University, Calgary. February 8, 2018.
- Turk, James L., "Is There a Place for Censorship in Libraries and Universities?" Ontario Library Association SuperConference, Toronto. February 1, 2018.
- Turk, James L., "Who Can Say What? Censorship and Free Speech in the University." Centre for Constitutional Studies, University of Alberta Law School, Edmonton. January 23, 2018.
- Turk, James L., "The Controversy Over Campus Free Expression." OISE/UT, Toronto. November 23, 2017.
- Turk, James L., "Words Matter: Freedom of Expression, Hate Speech, and Academic Freedom in the University" Social Justice Week Forum, Ryerson University, Toronto. October 25, 2017
- Turk, James L., "Suppressing Speech In Not the Route to Social Justice." Ryerson University Conference: The Many Gods of Canada: Religion, Secularism and Public Policy. Toronto. October 19, 2017.
- Turk, James L., "Academic Freedom Worldwide: The Importance of the UNESCO Recommendation on the Status of Higher Education Teaching Personnel." UNESCO Forum – World Teachers Day, Paris. October 5, 2017.
- Turk, James L., "Researcher-Participant Privilege: Hanging by a Thread." Canadian Association of Research Ethics Boards National Conference, Halifax. April 28, 2017.
- Turk, James L., "Civility and Incivility in Academia: Academic Freedom, Expressive Speech & Misconduct." Jointly sponsored by University of Manitoba, University of Winnipeg and Brandon University. April 13, 2017.
- Turk, James L., "Under Attack from All Sides: Freedom of Expression, Academic Freedom and the Future of the University." University of Wisconsin – Stout, March 27, 2017.

Turk, James L., "Rescuing Collegial Governance." Laurentian University, March 16, 2017.

Turk, James L., "Seizing the Opportunity: Getting Better Rights and Protections." University of Alberta, February 8, 2017.

Turk, James L., "Universities Must Be Safe Spaces for Free Expression." Chang School, Ryerson University, January 18, 2017.

Turk, James L., "Requisites for Good Post-Secondary Labour Relations Law." University of Alberta, November 2, 2016.

Turk, James L., "Academic Freedom and University Boards of Governors." Ryerson University Board of Governors, November 1, 2016.

Turk, James L., "Unsafe and Unsound: Codes of Conduct Threaten Academic Freedom, Free Expression & the Academic Mission." Northern Ontario School of Medicine. April 18, 2016.

Turk, James L., "Academic Freedom." Annual Meeting of Chairs, Deans and Directors, Ryerson University. April 14, 2016.

Turk, James L., "Undermining Academic Freedom: Precarity, Duty, Surveillance & Civility." University of Alberta, November 5, 2015.

Turk, James L., "Whither University Governance." Kwantlen Polytechnic University, August 27, 2015.

Turk, James L., "Silencing the Academy: Academic freedom and the future of university governance." Dalhousie University. Halifax, Nova Scotia. March 24, 2015.

Turk, James L., "What Is an Art College without Academic Freedom?" Alberta College of Art and Design. Calgary, Alberta. March 12, 2015.

Turk, James L. "Research and Science in Canada Are in Danger." SRC Seminar, Department of Politics and Public Administration. Ryerson University. Toronto. March 5, 2015.

Turk, James L., "What's All the Fuss about Program Prioritization?" Wilfrid Laurier University. November 27, 2014.

Turk, James L., "'You can't say that': Enforced civility as a threat to academic freedom and freedom of expression." Ryerson University. Toronto, Ontario. November 13, 2014

Turk, James L., "Public Science under Siege: Past, present and a vision for the future." Professional Institute of the Public Service of Canada. National Research Council. Ottawa, Ontario. November 6, 2014.

Turk, James L., "Civility, Precarity and the Demise of Academic Freedom." Brock University. St. Catharines, Ontario. October 30, 2014.

Turk, James L. "Should universities and colleges be run like Walmart?" Ryerson University Social Justice Week Talks. Toronto, October 7, 2014.

Turk, James L., "An Inconvenient Symbol: Academic freedom in the 21st century university." Keynote address. Academic Freedom Conference. University of Saskatchewan, Saskatoon. October 1, 2014.

Turk, James L., "Limiting Academic Research." Graduate Student Association Colloquium. University of Saskatchewan, Saskatoon. September 30, 2014.

Turk, James L. "Science Under Siege." Joint session of the Canadian Association of Professional Academic Librarians, Canadian Population Society, Canadian Society for the History and Philosophy of Science, Canadian Society for the Study of Education, and Canadian Sociological Association at the Congress for the Federation for the Humanities and Social Sciences. St. Catharines, Ontario May 27, 2014.

Turk, James L., "The Future of the University and How We Can Shape It." Mount Royal University, May 12, 2014

Turk, James L. "The Remaking of the University" Ryerson University, Toronto. April 4, 2014

Turk, James L. “Academic Freedom.” University of Regina Academic Freedom Forum, March 27, 2014

Turk, James L. “Community-University Research.” Faculty of Public Affairs, Carleton University. March 17, 2014

Turk, James L. “More of the Story: *Silence of the Labs* and the undermining of science in Canada.” Science for Peace. University of Toronto, March 3, 2014

Turk, James L. “Protecting Academic Integrity When Universities Collaborate with Industry.” Centre for Policy Studies in Higher Education and Training, University of British Columbia, February 25, 2014.

Organizational (Current)

Member, Steering Committee, International Civil Liberties Monitoring Group, 2008 – Present

Awards

Les Fowlie Intellectual Freedom Award – Ontario Library Association, 2019

Milner Memorial Award – Canadian Association of University Teachers, 2018

Peter C. Dooley Legacy Award – University of Saskatchewan Faculty Association, 2014

Jay Newman Award for Academic Integrity – University of Guelph Faculty Association, 2013

Distinguished Member Award – Canadian Society for the Study of Higher Education, 2012

Tab 3

FEDERAL COURT

BETWEEN:

NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN,
ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES, AND
CANADIAN MUSLIM LAWYERS ASSOCIATION

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN JUDICIAL COUNCIL

Intervener

and

CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS

Proposed Interveners

AFFIDAVIT OF BRENDA AUSTIN-SMITH

I, Brenda Austin-Smith, of the City of Winnipeg, DO SOLEMNLY AFFIRM THAT:

A. Introduction

1. I am the President of the Canadian Association of University Teachers/l'Association Canadienne des professeurs et professeurs d'université ("CAUT/ACPPU") and have been since 2019. I have been a professor of English, Theatre, Film & Media at the University of Manitoba since 1998. My curriculum vitae is attached as exhibit "1".
2. As such I have personal knowledge of the matters to which I depose, or have received the information from others, in which case I believe the information to be true.
3. I make this affidavit in support of the motion brought by the Centre for Free Expression ("CFE") and CAUT for leave to jointly intervene in the Application for Judicial Review brought by National Council of Canadian Muslims, Craig Scott, Leslie Green, Arab Canadian Lawyers Association, Independent Jewish Voices, and Canadian Muslim Lawyers Association ("Applicants") challenging the decisions of the Canadian Judicial Council ("Council") regarding the conduct of Justice David Spiro.
4. CAUT and CFE seek leave of the Court to intervene in this Application for the purpose of drawing to the attention of the Court the issues of academic freedom, and the impact on academic freedom, which arise from Justice Spiro's actions, and from the failure of the Council to consider and weigh such issues. Academic freedom is fundamental to the operation of universities and to universities fulfilling their societal mandate. It is the position of CAUT and the CFE that it is important that the Court consider the impact of Justice Spiro's actions on academic freedom.
5. CAUT has expertise regarding academic freedom and collegial governance in the academic environment and has intervened in previous cases where academic freedom was at risk. I believe that CAUT can assist the Court in this application.

B. About CAUT

6. Founded in 1951, CAUT/ACPPU is the national voice for academic personnel in Canada at the university and college level. It represents 72,000 teachers, librarians, researchers and other academic professionals and staff across all provinces.

7. It is a federally incorporated non-profit organization located in Ottawa.
8. CAUT is a federation of academic staff associations/unions. There are currently 77 local academic staff associations and three federated associations that are full members of CAUT, representing the overwhelming majority of academic staff in Canada. There are seven provincial faculty associations which are members of CAUT, as well as a Memorandum of Cooperation between CAUT and FQPPU (Federation Quebecoise des Professeures et des Professeurs d'Université), a federation representing academic staff at several Quebec universities.
9. CAUT represents members by:
 - (a) promoting the interests of teachers, professional librarians and researchers in Canadian universities and colleges;
 - (b) advancing the standards of the academic profession; and
 - (c) seeking to improve the quality of post-secondary education in Canada.
10. CAUT has a particular mandate to defend academic freedom and works in the public interest to improve the quality and accessibility of post-secondary education in Canada.
11. CAUT has always counted notable figures among its members and presidents. For example, Bora Laskin was CAUT's President in 1964-1965.

C. CAUT's Knowledge and Expertise in Academic Freedom Cases

12. CAUT is well versed in the intersection of employment issues and academic freedom. CAUT conducts investigations into alleged breaches of academic freedom and actively lobbies governments to properly fund post-secondary education and fundamental research.
13. CAUT's first academic freedom investigation involved the case of Harry Crowe and United College in 1958. Since that time, CAUT has conducted over 50 investigations into alleged

breaches of academic freedom.¹

14. Harry Crowe was a tenured professor of history at United College (now, the University of Winnipeg). As many universities were at the time, United College had a religious affiliation. The Principal of the College received an anonymous delivery of a letter written by Professor Crowe to a colleague. In that letter, he expressed views that were critical of religion. The Board of Regents of United College felt that those views were irreconcilable with Professor Crowe's employment at a United Church institution. Consequently, the Board of Regents terminated his employment as well as the employment of his supporters, because of their personal belief and public support of academic freedom.
15. A more recent example of a breach of academic freedom during the appointment or hiring process is the case of Dr. Noble. The collegial search for a funded chair resulted in Dr. Noble as the clear choice of his peers. Similar to the Dr. Azarova affair, Dr. Noble's appointment was aborted by the Dean and the President of Simon Fraser University. They were concerned that Dr. Noble's public criticism of e-learning and corporate partnerships would stir controversy. CAUT struck an investigatory committee to inquire into Dr. Noble's academic freedom. The committee concluded that the intervention of senior administrators amounted to a breach of his academic freedom. This report is attached as exhibit "2".
16. CAUT has intervened in cases where academic freedom was at risk. Recently, CAUT participated before the Federal Court of Appeal and the Supreme Court in *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2020 FCA 77 and 2021 SCC 32, respectively where it argued for copyright laws that take into account academic freedom. The Supreme Court of Canada granted CAUT leave to intervene in *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33, and its companion case, *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32. At the Ontario Court of Appeal, CAUT intervened in support of academic freedom and university autonomy in *Canadian Federation of Students v. Ontario (Colleges and Universities)*, 2021 ONCA 553.
17. CAUT has intervened to protect academic freedom in the context of civil and criminal

¹ See <https://www.caut.ca/latest/publications/academic-freedom/reports> (accessed on December 21, 2021).

proceedings, most recently in *Rivard c. Éoliennes de l'Érable*, 2017 QCCS 2259. In *Rivard* and in *Parent c. R.*, 2014 QCCS 132 (CanLII), CAUT/ACPPU retained counsel on behalf of the faculty involved to protect research confidentiality as critical for the exercise of academic freedom.

18. As President of CAUT, I sit on CAUT's Academic Freedom and Tenure Committee - a Standing Committee of CAUT Council. The Academic Freedom and Tenure Committee deals with appeals made to it by individual faculty members who consider that their professional rights have been infringed. It also makes recommendations to Council on policy matters relating to academic freedom and tenure, grievances and discrimination, as well as policy matters arising from the Committee's consideration of academic rights issues.

D. CAUT's Direct and Genuine Interest in this Judicial Review

19. In November 2020, CAUT's governing body, CAUT Council, voted to censure the University of Toronto, after conducting its own investigation. CAUT Executive Director, David Robinson, and I spoke with University of Toronto President times during the investigation, in an attempt to have the administration redress the wrongs committed. The administration would not relent.
20. Executive Director Robinson and I concluded the investigation and provided a report and package to CAUT Council for consideration (attached as exhibit "3"). Members of Council unanimously passed a motion to censure the University of Toronto. CAUT's Council found it was implausible to conclude that Judge Spiro's call did not trigger the sudden termination of the hiring process. The assembled delegates did not take this decision lightly. Censure is the measure of last resort for serious violations of academic freedom. By censuring the University of Toronto, CAUT asked academic staff everywhere not to accept appointments or speaking

engagements until satisfactory changes were made.² The censure took effect on April 22, 2021.

21. On September 17, 2021, CAUT called upon the academic community to suspend the censure actions against the University of Toronto. Censure was removed by CAUT Council in November 2021. This was done because the Faculty of Law reversed course and re-offered the position to Professor Azarova, extended academic freedom to academic managerial positions, and committed to develop clear policies that prohibit donor interference in internal academic affairs. These changes would not have happened without CAUT's decision to impose censure.

E. Overview of Academic Freedom

22. Academic freedom applies to all university and college academic staff. Academic freedom is an essential component of the teaching and scholarship upon which every university is built. Bora Laskin and V.C. Fowke have reported that academic freedom is, "[...] indispensable to the purposes of higher education."³

23. As articulated in Articles 2 and 3 of CAUT's Policy on Academic Freedom (attached as exhibit "4"),

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

Academic freedom does not require neutrality on the part of the individual. Academic

² CAUT's Procedures Relating to Censure can be found at <https://www.caut.ca/about-us/caut-policy/lists/administrative-procedures-and-guidelines/procedures-relating-to-censure>.

³ V.C. Fowke and Bora Laskin, "Report of the Investigation by the Committee of the Canadian Association of University Teachers into the Dismissal of H.S. Crowe by United College, Winnipeg, Manitoba" (November 21, 1958), online: <<https://www.caut.ca/docs/default-source/af-ad-hoc-investigatory-committees/report-on-the-investigation-into-the-dismissal-of-professor-h-s-crowe-by-united-college-winnipeg-manitoba-%281958%29.pdf>> [Attached as exhibit "5"].

freedom makes intellectual discourse, critique, and commitment possible. All academic staff members have the right to fulfil their functions without reprisal or suppression by the employer, the state, or any other source. Institutions have a positive obligation to defend the academic freedom rights of members...

24. Academic freedom has been recognized by the Supreme Court of Canada as essential, “[...] to our continuance as a lively democracy”.⁴ Similarly, both the Court of Appeal of Alberta and the Court of Appeal for Ontario have expressed how important academic freedom is to Canadian society”.⁵ It is a concept recognized and worthy of consideration by all levels of court and tribunal across Canada.

25. Academic freedom must inform every element of university policy and education, including academic staff participation in hiring decisions and other collegial bodies within a university. Such collegial governance is necessary to protect academic freedom and high-quality education. Throughout Canada, faculty collective agreements require academic staff participation by codifying the steps, roles, and expectations for collegial processes.

26. Collegial processes are a hallmark of hiring, tenure, and promotion at Canadian universities. Academic excellence requires academic freedom during the hiring, tenure, and promotion decisions. Academic staff must be free to assess and select the best from their peers. They cannot do this if the university does not protect these processes and decisions from external interference – religious, political, financial, or otherwise.

F. The Academic Freedom Issues Which Arise in this Application

27. In their complaints to the CJC, the Complainants specifically mentioned issues of academic

⁴ *Mckinney v. University of Guelph*, [1990] 3 SCR 229 at para. 69

⁵ *Pridgen v. University of Calgary*, 2012 ABCA 139, at paras. 113-115; *Longueépée v. University of Waterloo*, 2020 ONCA 830 at para. 102.

freedom.⁶ Despite these express references and the university context, the CJC failed to address in any way how Judge Spiro’s actions impacted academic freedom. Any determination of misconduct connected to hiring at a university must consider academic freedom.

28. In the record before the CJC, there were several instances that necessitated consideration of the undermining and harm done to academic freedom. Some of these instances include:

- a) Audrey Macklin, Vincent Wong, and three other law faculty resigned from any further work on or behalf of the IHRP because of Justice Spiro’s interference, which led to the Dean revoking the decision to hire Professor Azarova;⁷
- b) Judge Spiro admits that his opinion of Professor Azarova was based on ignorance and the brief summary of her scholarship prepared for him by the CIJA.⁸ He did not consider her academic freedom to write, criticize and publish;
- c) Judge Spiro admits that he was concerned for the reputation of the Faculty of Law, due to “strong feelings on both sides” of the Israel-Palestine conflict, and that he was hoping to help the Faculty of Law avoid controversy.⁹ He did not consider that an academically free law school will likely attract controversy from time to time nor the harm done in attempting to censor meaningful debate and expression;
- d) Justice Nielsen referred to Professor Azarova’s published scholarship in his reasons for referring the complaint against Spiro to a Review Committee.¹⁰ Despite acknowledging her academic work, his reasons did not consider the impact on her academic freedom;
- e) Professor Azarova is characterized by the CIJA as an “anti-Israel academic crusader”, thereby acknowledging her role within the current discourse about Israel-Palestine and

⁶ Professor Leslie Green refers to academic freedom in his supplemental letter of September 29, 2020, found at pages 15-18 of the Certified Tribunal Record (T-1005-21). Mustafa Farooq, CEO of the National Council of Canadian Muslims mentions academic freedom in his complaint letter of September 21, 2021, page 33 of the *Certified Tribunal Record*.

⁷ *Ibid*, p. 378.

⁸ *Ibid*, pp. 60 & 85.

⁹ *Ibid*, pp. 86 & 137.

¹⁰ *Ibid*, p. 82.

implicating her academic freedom;¹¹

- f) The CIJA memo from Zelikovitz to Judge Spiro is clear that they oppose Professor Azarova's academic scholarship, publications, and service¹²;
- g) The CIJA memo begins to refute Professor Azarova's positions on the Israel-Palestine conflict, and discusses the intersection of academic freedom and anti-Semitism, thereby engaging in the back and forth that is academic debate;¹³
- h) The Cromwell Report acknowledged academic freedom, including university policies on hiring and donations, but then failed to consider how institutional systems and decisions affected the academic freedom rights;¹⁴
- i) The CJC decision grants deference to the Cromwell Report. However, Justice Cromwell deferred to the CAUT process for a more in-depth assessment of the impact on academic freedom. The CJC decision wholly ignored this fundamental democratic value;¹⁵
- j) Professor Emeritus of the University of Toronto, Joseph Carens, wrote about academic freedom and donations, using this matter as an example;¹⁶
- k) A group of law faculty expressed their concern that Justice Cromwell's recommendations conflate draconian confidentiality rules with fairness and accountability on campus;¹⁷
- l) Professor Katz of the Faculty of Law wrote a piece on the misuse of privacy and confidentiality, and how it could undermine the ability to criticize the University,

¹¹ *Ibid*, p. 88.

¹² *Ibid*, p. 147.

¹³ *Ibid*, p. 145.

¹⁴ *Ibid*, pp. 305 & 356.

¹⁵ *Ibid*, p. 357.

¹⁶ *Ibid*, p. 462.

¹⁷ *Ibid*, p. 383.

which is an important element of academic freedom;¹⁸

- m) Professor Anver Emon of the University of Toronto cited the potential conflict of interest due to the Hon. Justice Cromwell’s reviewing role and his speaking engagement for a CIJA sponsored conference;¹⁹ and
- n) Vincent Wong wrote that Israel and Palestine have become a “taboo subject” at the Faculty of Law, following the Cromwell Report and thus documenting the chilling effect on debate and discourse at the Faculty of Law.²⁰

29. Despite the centrality of academic freedom to the harm caused by Justice Spiro’s intervention, the CJC makes no reference to it. CAUT hopes to be able to assist the Court in remedying this lacuna. As the national voice of academic staff – with a particular mandate to protect academic freedom – CAUT is uniquely positioned to offer the Court a perspective and expertise that is relevant to the facts.

30. Had the CJC conducted a hearing, CAUT would have sought to introduce further evidence on the intricate linkage between Justice Spiro’s actions and prejudice to academic freedom.

31. This Court’s ruling in this judicial review will have a significant impact on the members of the post-secondary educational community, including CAUT’s members. Consequently, CAUT will be directly affected by the outcome of this case.

32. This ruling will have broad implications for the importance of academic freedom for current and prospective academic staff. To respect academic freedom, the hiring, tenure, and promotion policies and practices at all Canadian universities must be free from outside interference – whether direct or indirect. There is a grave risk of “academic chill”, self-censorship, and external influencing if the decisions of the Council not to inquire into Justice Spiro’s actions are not overturned.

¹⁸ *Ibid*, p. 414.

¹⁹ *Ibid*, p. 404.

²⁰ *Ibid*, p. 432.

G. CAUT's Distinct Perspective

33. If granted leave to intervene, the joint intervention of CAUT and CFE will provide the Court with a unique perspective that will not be provided by any other party and that will be valuable to the Court as it considers this application for judicial review.
34. CAUT represents the interests of academic staff who are on the front lines of the issues in dispute, and whose activities will be directly and tangibly impacted by the decision of this Court. CAUT's members make up the pool of candidates and search committee members for appointments such as the one at the IHRP.
35. CAUT's understanding of academic freedom - the perspective of academic staff as employees, researchers, and teachers cannot be fully represented by university administrators or any other party or potential intervener.
36. Further, as a national organization, CAUT will provide a national perspective of academic staff as educators that neither party to the appeal nor other interveners can provide.
37. I believe that the submissions of CAUT and the CFE will be different from those of any other party and will be valuable to this Court.

H. Proposed Submissions

38. If granted leave, the CFE and CAUT will make joint submissions.
39. The CFE and CAUT's joint submissions will focus on how principles of academic freedom arise in this Application, and how those principles were detrimentally impacted by what happened.
40. In brief, the CFE and CAUT will argue that the Council failed to appreciate the academic freedom interests harmed by Justice Spiro's actions and thus failed to consider the impact of Justice Spiro's actions on academic freedom in its review. The CFE and CAUT will submit that, as such, the Council's review of Justice Spiro's actions was incomplete.
41. If granted leave to intervene, CAUT and CFE will make the following submissions:

(a) On the standard of review:

- i. When reviewing tribunal decisions that involve the administration of justice, independence of the Canadian judiciary, and the integrity of the legal system, reviewing Courts should adopt a correctness standard.
- ii. Not only must justice be done when it comes to preserving the administration of justice, but it must be seen to be done. The CJC failed to carry out that responsibility in a manner that would satisfy an outside observer.

(b) On the issue of academic freedom:

- i. Academic freedom is recognized as a foundational principle for Canadian universities and our democracy.
- ii. Academic freedom demands that university academic staff be free to assess, criticize, and select candidates without fear of retribution, censorship, or discipline. This continues to apply when academic staff participate in meetings, decisions, or on committees related to any appointment – tenured, executive, or otherwise. By revoking the decision to hire Professor Azarova, at the behest of Justice Spiro, the Dean of the Faculty of Law violated academic freedom.
- iii. The CJC did not conduct a fulsome consideration of how Judge Spiro’s actions impacted on academic freedom.
- iv. Had the CJC properly considered academic freedom, it might have come to a different conclusion.

I. CAUT will not Disrupt or Delay this Application

42. In making its submissions, CAUT and the CFE will rely on the existing record before this Court, relevant statutes, and case law.

43. In addition, in order to ensure that the Court has a fulsome understanding of the academic freedom issues in this case, CAUT and CFE seek leave to provide the Court with an expert

Affidavit outlining the principles and history of academic freedom and the recognition of the importance of academic freedom in a democratic society.

- 44. CAUT and the CFE undertake to deliver a memorandum of factum and law of no more than 20 pages within the period of time ordered by this Court.
- 45. I shall instruct CAUT's counsel not to make any submissions that duplicate those made by the appellant or respondent in these appeals.
- 46. CAUT will abide by any terms imposed by this Court to ensure that its intervention does not disrupt or delay the hearing of these appeals.
- 47. CAUT will not seek costs and asks that it not be liable for costs to any other party.

SWORN remotely by Brenda Austin-Smith
at the City of Winnipeg in the
Province of Manitoba, before me at the City of
North Grenville in the Province of Ontario
this 16th day of January, 2022 in accordance with
O.Reg. 431/20, Administering Oath or
Declaration Remotely.

) *Brenda Austin-Smith*
) _____
) Brenda Austin-Smith
)
)



Sarah Godwin
Commissioner for Taking Oaths

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**Exhibit "1" in the
affidavit of Brenda
Austin-Smith
sworn January 16, 2022**

EDUCATION

- Ph.D. Department of English, Film and Theatre, University of Manitoba 1984-92
Dissertation: "The Man Without Characteristics: Rhetorical Narration in the Late Novels of Henry James"
M.A. Department of English, University of Victoria 1980-82
B.A. Department of English, Acadia University 1976-80

ACADEMIC POSITIONS

- 2019-- Professor, English, Theatre, Film & Media, University of Manitoba
2006-2018 Associate Professor, English Department/Film Studies, University of Manitoba
1998-2005 Assistant Professor, English Department/Film Studies, University of Manitoba
1995-1998 College Professor, English Department, Champlain Regional College, Lennoxville, Quebec
1994-1995 Assistant Professor (Sabbatical replacement), Department of Film and Video, University of Regina, Regina, Saskatchewan
1992-1994 Contract Faculty, Film and Women's Studies, University of Manitoba

ADMINISTRATIVE POSITIONS

- 2020-2023 **Head**, Department of English, Theatre, Film & Media
2014-2019 **Head**, Department of English, Theatre, Film & Media
2015-2016 **Acting Co-ordinator**, Film Studies Program
2004-2005 **Acting Director**, University of Manitoba Institute for the Humanities
2004-2006 **Director**, English Department Media Lab
2003 **Acting Co-ordinator**, Film Studies Program (January-July)

ACADEMIC LEADERSHIP POSITIONS

- President**, Canadian Association of University Teachers, 2019-2020; 2020-2021; 2021-2022
Vice-President, Canadian Association of Chairs of English, 2018-19
Vice-President, Canadian Association of University Teachers 2016-2017; 2017-2018; 2018-2019
President, UMFA, 2007-2008; 2008-2009
Vice-President, UMFA, 2006-2007
President, Film Studies Association of Canada, 2004-2005

REFEREED PUBLICATIONS

Edited Book

- Austin-Smith, B. and G. Melnyk, eds, and Introduction, *The Gendered Screen: Canadian Women Filmmakers*. Waterloo: Wilfrid Laurier University Press, 272 pp. 2010.

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- Austin-Smith, Brenda. "A Man's Place." *Canadian Dimension*, vol. 26, no. 1, January 1992, p. 35.
- Austin-Smith, Brenda. "Positive Images of Gays & Lesbians" *Canadian Dimension*, vol. 25, no. 4, July/August 1991, p. 32.
- Austin-Smith, Brenda. "Political Poetry not Rhetorical Enough." *Canadian Dimension*, vol. 25, no. 3, May/June 1991, p. 14.
- Austin-Smith, Brenda. "Great Expectations." *Canadian Dimension*, vol. 25, no. 2, March/April 1991, p. 49.
- Austin-Smith, Brenda. "'Piss Christ' Revisited: Not Always a Pretty Picture." *Canadian Dimension*, vol. 25, no. 1, January/February 1991, p. 50.
- Austin-Smith, Brenda. "Pondering Postmodernism: Feels so Similar." *Canadian Dimension*, vol. 24, no. 6, November/December 1990, p. 49.
- Austin-Smith, Brenda. "Insensitivity at the Royal Ontario Museum: Into the Heart of Irony." *Canadian Dimension*, vol. 24, no. 5, September/October 1990, p. 51.
- Austin-Smith, Brenda. "The Arts, The Tax and Other Things." *Canadian Dimension*, vol. 24, no. 4, July/August 1990, pp. 3-4.

CREATIVE ACTIVITY

- Lead role of Ute von Schwendler in episode 41 of TV series *I Knew My Murderer*. Produced by Frantic Films. Two-day shoot, non-union performance, May 2017.
- Austin-Smith, B. Voice-over commentary "Under the Rocking Horse" (Kelli Shinfield, dir.), *Ladies First/Ladies' First* DVD collection, Winnipeg Film Group, 2005.
- Austin-Smith, B. Voice-over commentary "Dames" (Maureen Devanik Butterfield, dir.), *Ladies First/Ladies' First* DVD collection, Winnipeg Film Group, 2005.
- Austin-Smith, B. Voiceover commentary "The Piano Lesson" (Carole O'Brien, dir.), *Ladies First/Ladies' First* DVD collection, Winnipeg Film Group, 2005.

RESEARCH GRANTS (PI unless otherwise indicated)

- 2017 University Creative Works Program Grant: The African Movie Festival in

- Manitoba-AM-FM. (\$1250). Ben Akoh, Faculty of Education, Co-Investigator
- 2012-16 SSHRC Partner Development Grant: “The Affect Project: Memory, Aesthetics, Ethics.” Co-Applicant with Arlene Young (PI) and Jason Leboe-McGowan (\$198,764)
- 2010 SSHRC Aid to Scholarly Publication Grant for *Gendering the Screen: Canadian Women Filmmakers* (\$8,000)
- 2010-11 University of Manitoba Academic Enhancement Fund, Co-applicant with Masuda, Buddle-Crowe, McLachlan et al, “Toward a Trans-Media Laboratory for Environmental, Health, and Social Equity” (\$75,000)
- 2009-14 CIHR: One of 135 Co-Investigators across Canada in Canadian Longitudinal Study on Aging, Canadian Institute of Health Research. Lead PI – Parminder Raina, CO-PI’s – Christina Wolfson, Susan Kirkland, McMaster University (\$23,500,000)
- 2006-10 SSHRC Standard Research Grant: “Women, Cinema, Memory: Weeping, Fan Pleasure, and the Hollywood Woman’s Film.” (\$45,285)
- 2005 University of Manitoba Faculty of Arts Proposal Development Fund (\$1000)
UM/SSHRC Grant in Support of International Conference Travel (\$1900)
- 2001 University of Manitoba Faculty of Arts Proposal Development Fund Grant Project: “The history of film reception and response” (\$1000)
- 2000 University of Manitoba Faculty of Arts Proposal Development Fund Grant Project: “Intergenerational responses to film melodrama” (\$1000)
- 1999 University of Manitoba Research Grant Program Project: “Reviews as Reception: The Woman’s Film in the Trade and Popular Press, 1935-1970” (\$3400)
University of Manitoba Faculty of Arts Proposal Development Fund Grant Project: “Intergenerational responses to film melodrama” (\$1000)
University of Manitoba Centre on Aging Research Fellowship Project: “Intergenerational responses to film melodrama” (\$1000 plus 6 credit hour release)
- 1998 University of Manitoba Research Grant Program Project: “Mothers, Daughters, and Melodrama: An Ethnography of Responses to Film” (\$4300)
- 1995 Social Sciences and Humanities Research Council of Canada/President's Fund General Research Grant, University of Regina Project: “Theories of Narratology and Coppola’s *The Conversation*” (\$1000)

AWARDS AND NOMINATIONS

- 2011 University of Manitoba Faculty Association Roy Vogt Award for Exceptionally Meritorious Service
Canadian Association of University Teachers Dedicated Service Award
- 2010 Award for Outstanding Achievement, Faculty of Arts
Faculty of Arts Endowment Fund Award (\$1741 for visiting speaker at “Mediated Cities,” Faculty of Architecture Conference, February 2011)
- 2005 Merit Award for Service
Nomination for University 1 Teaching Award
- 2003 Faculty of Arts Endowment Fund Award (\$900) for visiting video curator Astria

- Suparak)
- 1994 University of Manitoba UTS Certificate of Excellence in Teaching Student/Teacher Recognition Award
Innovation Fund Award, Continuing Education Division, University of Manitoba for “Spectacles and Spectators: Women and Film,” offered Summer Session (\$2500)
- 1990 Writers’ Federation of Nova Scotia Poetry Competition Award (\$100)
- 1986-88 Social Sciences and Humanities Research Council of Canada Doctoral Fellowship (\$24,000)
- 1984-86 University of Manitoba Graduate Fellowship (\$16,000)
- 1984 Dr. Vernon B. Rhodenizer Graduate Scholarship in English, University of Manitoba (\$1300)
- 1980 University of Victoria Graduate Fellowship (\$6000)

OTHER RESEARCH ACTIVITY

- 2013-2019 Member, Interdisciplinary Arts Reviewing and Writing Group
- 2013-2014 Co-coordinator, with Tina Chen, of Film Worlds Reading Group
- 2011-2015 Member, Film Worlds Research Cluster (Sponsored by the UM Institute for the Humanities).
- 2006-2012 Member, Affect Research Cluster, (Sponsored by the Department of English, Film, and Theatre),
- 2000-present Research Affiliate, University of Manitoba Centre on Aging

COMMUNITY TEACHING AND ACTIVITY

- 2014-present Guest Host, with James Borsa, of “Ultrasonic Film Radio Show” on UFMF
- 2009-2014 Discussion leader/ Facilitator for “E-60” Community Women’s Film Club.
- 2006 Presenter of “Film Studies” series of community talks on selected films. Carman Active Living Centre, Carman, MB.

EDITORIAL EXPERIENCE

- 2015-present Member, Editorial Board, *The Quint: An Interdisciplinary Quarterly from the North*
- 2009-2015 Member, Editorial Board, University of Manitoba Press
- 2006-12 Member, Editorial Board, *Canadian Journal of Film Studies*
- 1990-2015 Member, Editorial Collective, *Canadian Dimension*
- 1992-2001 Poetry Editor, *Canadian Dimension*
- 2009-2011 Literary Editor, *Canadian Dimension*

KEYNOTE/NAMED LECTURES

- “De-pathologizing Dissent,” Keynote Address, Western Regional Conference, University of Northern British Columbia Faculty Association, October 13, 2017.
- “Having a Good Cry.” Wendy Wersch Memorial Lecture. Mentoring Artists for Women’s Art, November 16, 2003.
- “Feeling Framed: Emotion and the Hollywood Woman’s Film.” Margaret Laurence Endowment Speaker’s Series, University of Winnipeg, November 4, 1999.
- "Some Problems in Film Narratology." Orlene Murad Lecture. Department of English,

University of Regina, February 10, 1995.

REFEREED CONFERENCE PRESENTATIONS

International

- Austin-Smith, B. "Damage and Fluency: Direct Address in *Fleabag*." Society for Cinema and Media Studies Conference, Online, March 17-21, 2021.
- Austin-Smith, B. "The Acousmatic City: The Sounds of *Summertime*." Society for Cinema and Media Studies Conference, Atlanta, March 30-April 3, 2016.
- Austin-Smith, B. Discussant for Panel on "American Realisms and the Pursuit of Unhappiness," American Studies Association, Toronto, October 7-11, 2015.
- Austin-Smith, B. "Adaptation, Haunting, and the Lantern of Fright in Truffaut's *The Green Room*." Society for Cinema and Media Studies, Montreal, March 25-29, 2015.
- Austin-Smith, B. "The Half-Life of Adaptation in Rivette's *Céline et Julie vont en bateau*." "A matter of lifedeath": *Mosaic* Conference, University of Manitoba, October 1-4, 2014.
- Austin-Smith, B. "Guilty Pleasures and the Pleasures of Guilt in Marleen Gorris' *A Question of Silence*," ECREA Conference, Mimar Sinan University, Istanbul, October 24-27, 2012.
- Austin-Smith, B. "Intimate Affects of Film Spectatorship," SERCIA Conference on Cinema and Intimacy, University of Bourgogne, Dijon, France, September 5-7, 2012.
- Austin-Smith, B. "Modernity, Cinema Memory, and 'Weepies': Ethnographies of Affective Spectatorship." Society for Cinema and Media Studies, Boston, March 21-25, 2012.
- Austin-Smith, B. "Davenne, Quint, and the 'turn' of Transformation in Truffaut's *The Green Room*." Transforming Henry James: International Henry James Conference, Rome, July 7-10, 2011.
- Austin-Smith, B. "'Who Knows the Occupied City? Humour as Thirdspace in *Divine Intervention*." Society for Cinema and Media Studies, New Orleans, March 10-13, 2011.
- Austin-Smith, B. "Secrets, Lies, and 'Virtuous Attachments': *The Ambassadors* and *The 39 Steps*." "James's Europe: Cultural Reappropriations, Transtextual Relations." European Society of Jamesian Studies, The American University of Paris, April 3-5, 2009.
- Austin-Smith, B. "'It Touched My Heart So Deeply': Film, Affect, and Personal Modernity." European Communication Research and Education Association, 2nd European Conference, Barcelona, November 25-28 2008.
- Austin-Smith, B. "Adaptation, Melodrama, Pharmakon: Jamesian Strands in Rivette's *Celine et Julie vent en bateau*." Jamesian Strands: The 4th International Conference of the Henry James Society, Newport, Rhode Island, July 9-13, 2008.
- Austin-Smith, B. "Melodrama as Pharmakon in Rivette's *Celine et Julie vent en bateau*." Society for Cinema and Media Studies, Philadelphia, March 6-8, 2008.
- Austin-Smith, B. "Spatial Affects in *Rose Hobart* and *Home Stories*." Society for Cinema and Media Studies, Chicago, March 8-11, 2007.
- Austin-Smith, B. "The Trial of Motherhood: The Ethics of Murder in the Maternal Melodrama." Society for Cinema and Media Studies, Vancouver, B.C., March 2-5, 2006.
- Austin-Smith, B. "Maternal Violence in Hollywood Melodrama." "America and Violence": Canadian Association of American Studies, Halifax, N.S., October 6-9, 2005.
- Austin-Smith, B. "'The sovereign charm of it': The Prince, the Princess, and Imperial Desire." "Tracing Henry James: An International Conference of the Henry James Society." University of Venice, Venice, Italy, July 12-15, 2005.

- Austin-Smith, B. "‘I Can Think of Bette and the Tears Will Come’: Weeping, Fan Pleasure, and the Hollywood Woman’s Film." Society for Cinema and Media Studies, London, UK, March 31-April 3, 2005.
- Austin-Smith, B. "Sex and the Maiden: The Erotic Adaptation of *The Wings of the Dove*." International Colloquium on The Reception of Henry James in Text and Image. University of Provence, Aix-en-Provence, France, July 1-3, 2004.

National

- Austin-Smith, B. "‘She’s So Unusual’: The Autist in *Stranger Things*." FSAC Conference. Online, June, 2021.
- Austin-Smith, B. "Room at the Top: *Now, Voyager*." FSAC Conference, Vancouver, June, 2019
- Austin-Smith, B. "Cult Film and Gender: Beyond Condescension." FSAC Conference, Regina, May, 2018.
- Austin-Smith, B. Panelist: "Lordy, Lordy, Look Who’s Forty!: 40 Years of FSAC." Film Studies Association of Canada Conference. Ryerson University, May 2017.
- Austin-Smith, B. "Odd Cult Out: Cinema by any ‘other’ name." FSAC Conference, Calgary, June, 2016.
- Austin-Smith, B. "In the Venetian Air: Ambient Sound in *Summertime*." FSAC Conference, Ottawa, June 2015
- Austin-Smith, B. "Possessing James: Adaptation, Haunting, and Truffaut’s *The Green Room*." Film Studies Association of Canada, Brock University, May 27-29, 2014.
- Austin-Smith, B. "Becoming Ordinary: Fifty Years of Arts and Culture in *Canadian Dimension*," Society for Socialist Studies, Brock University, May 27, 2014.
- Austin-Smith, B. "The Pleasures of Guilt in *A Question of Silence*," Film Studies Association of Canada, Kitchener-Waterloo, May 30-June 1, 2012.
- Austin-Smith, B. "‘It Touched My Heart So Deeply’: Memory, Affect, and Modernity." Film Studies Association of Canada, June 2-4, 2011.
- Austin-Smith, B. "Acting Matters: Noting Performance in Three Films." Film Studies Association of Canada, Montreal, June 2-4, 2012.
- Austin-Smith, B. "Women, Liminality, and ‘unhomeliness’ in the films of Mina Shum." Film Studies Association of Canada, Ottawa, May 28-31, 2009.
- Austin-Smith, B. "Acting Like a Mother: Trial as Performance in Maternal Melodrama." Film Studies Association of Canada, Vancouver, June 2-4 2008.
- Austin-Smith, B. "Adaptation and Melodrama in Jacques Rivette’s *Celine et Julie vent en bateau*." Film Studies Association of Canada, Saskatoon, May 28-30, 2007.
- Austin-Smith, B. "Who Knows the Occupied City? Spatial Practices in *Divine Intervention*." Film Studies Association of Canada, York, May 28-30, 2006.
- Austin-Smith, B. "Sex, Death, and Maidens: The Erotic Adaptation of *The Wings of the Dove*." Film Studies Association of Canada, University of Western Ontario, May 29-June 1, 2005.
- Austin-Smith, B. "Containing Desire: *Rose Hobart* and *Home Stories*." Film Studies Association of Canada, May 29-June 1, University of Manitoba, 2004.
- Austin-Smith, B. "The Trial of Motherhood: The Ethics of Murder in Maternal Melodrama." Association of Canadian College and University Teachers of English, May 31, Dalhousie University, 2003.
- Austin-Smith, B. "Feeling Framed: Emotional Responses to Hollywood Melodrama." Film

- Studies Association of Canada, May 29-31, Dalhousie University, 2003.
- Austin-Smith, B. "The Counterfeit Symbol in Henry James's *The Golden Bowl*." Canadian Society for the Study of Rhetoric, Humanities and Social Sciences Federation Conference, May 25-27, University of Toronto, 2002.
- Austin-Smith, B. "The Convictions of Melodrama: The Trial of Genre in Lars von Trier's *Dancer in the Dark*." Film Studies Association of Canada, Humanities and Social Sciences Federation Congress, May 28-31, University of Toronto, 2002.
- Austin-Smith, B. "Mothers, Daughters, and Melodrama: An Ethnography of Responses to Film." Film Studies Association of Canada, Humanities and Social Sciences Federation Conference, June 2-4, Universite de Sherbrook, 1999.
- Austin-Smith, B. "The Reification of Milly Theale: Rhetorical Narration in *The Wings of the Dove*." Canadian Society for the Study of Rhetoric, Learneds, University of Ottawa, May, 28-30, 1998.
- Austin-Smith, B. "The Second Sight of Harry Caul: Floating Free Indirect Discourse in *The Conversation*." Film Studies Association of Canada Conference, Learneds, June 2-4, Memorial University, 1997.
- Austin-Smith, B. "Cyborg Looks and the 'second consciousness'." Film Studies Association of Canada Conference, Learneds, May 27, Brock University, 1996.
- Austin-Smith, B. "The Narration of Anti-Nostalgia: Shereen Jerrett's *Taking A Walk with Dad*." Film Studies Association of Canada Conference, Learneds, June 7, University of Calgary, 1994.

FILM FESTIVAL ORGANIZING

Co-organizer, with Dr. Ben Akoh, AM/FM: African Movie Festival in Manitoba. Winnipeg Cinematheque. May 4-5, 2018

CONFERENCE/SYMPOSIUM/PANEL ORGANIZATION

- Co-organizer, with Arlene Young and Jason Leboe-McGowan, "The Affect Project Symposium: A Taste for Feeling," February 25-26, 2016.
- Co-organizer, with Arlene Young and Jason Leboe-McGowan, "The International Affect Conference: Memory, Aesthetics, and Ethics," Winnipeg, MB, September 18-20, 2015.
- Panel Organizer and Chair: "Film and/as History: David Lean's *Summertime*," FSAC Conference, Ottawa, June 2015.
- Co-organizer, with Arlene Young and Jason Leboe-McGowan, "Memory, Affect, and Nostalgia." Affect Group Panel, March 9, 2015.
- Co-organizer, with Arlene Young and Jason Leboe-McGowan, "The Werther Effect: Romantic-era Perceptions of Suicide." With Dr. Michelle Faubert (Department of English, Film, and Theatre), and Dr. Laura Loewen and Dr. Robert MacLaren (Faculty of Music). The Millenium Library, Winnipeg, March 10, 2014.

- Co-organizer, with Arlene Young and Jason Leboe-McGowan, “Narrative, Affect, and the Abolition Debate in Spielberg’s *Lincoln*,” Affect Project Panel Discussion, University of Manitoba, April 1, 2013.
- Co-organizer, with Arlene Young and Jason Leboe-McGowan, “Does Truth Matter Anymore? Colbert, Plato, ‘Truthiness,’ and the Role of Emotion in Public Discourse,” Panel Discussion, Winnipeg Millennium Library, November 13, 2012.
- Co-organizer, with Arlene Young and Jason Leboe-McGowan, “Expressing Emotion: A Symposium on Affect,” University of Manitoba, May, 2012.
- Planning Committee Member, “Atmosphere: Mediated Cities” Conference, Faculty of Architecture, University of Manitoba, February, 2011.
- Co-organizer, with Arlene Young and Struan Sinclair, “Working with Feelings: Affect and the Practices of Everyday Life,” Inter-disciplinary Symposium, March 12, 2010.
- Organizer and Chair, “Jamesian Relations,” Symposium. University of Manitoba Institute for the Humanities, September 29, 2006.
- Program Organizer, Film Studies Association of Canada Conference, Congress of the Humanities and Social Sciences, University of Western Ontario, May 29-June 1, 2005.
- Site co-ordinator, Film Studies Association of Canada Conference, Congress of the Humanities and Social Sciences, University of Manitoba, May 29-June 1, 2004.
- Organizer, visit by Astria Suparak, experimental video curator, for presentation March 24, 2003.
- Co-organizer (with Adam Muller), exchange visit of Prof. Ove Christensen, Department of Media Theory and Communications, University of Aalborg, Aalborg, Denmark, Fall, 2002.

KNOWLEDGE TRANSFER

Research Talks

- “Doing Our Work with the \$\$ We Have.” Canadian Association of Chairs of English Conference. Ryerson University, Congress of the Humanities and Social Sciences, May 2017.
- “‘I can think of Bette and the tears just come’: Hollywood, cinema memory, and emotional spectatorship.” University of Manitoba’s Centre on Aging Spring Research Symposium, May 2, 2016.
- “Food and Authenticity in *Big Night*.” Panel on Food and Visual Experience, “A Taste for Feeling” Symposium, University of Manitoba, February 25, 2016.
- “So angry I cried: Hollywood Melodrama and Mixed Feelings.” Panel on Memory, Affect, and Nostalgia, March 9, 2015.
- “The Disciplining of Emotion, and the Face of Thaddeus Stevens,” Panel discussion on “Affect, Narrative, and the Abolition Debate in Spielberg’s *Lincoln*,” University of Manitoba, April 10, 2013.
- “The *Other* Murder in *Settlers of the Marsh*.” Presentation at “Moments of Discovery: A Symposium in Honour of Robert Kroetsch,” May 9, 2012.
- “The Face of Innocence: Mothers, Murder, and the ‘Text of Muteness’ in Hollywood Melodrama.” Presentation at “Expressing Emotion: A Symposium on Affect,” May 2, 2012.
- “Film and the Feeling of Life.” Winter Solstice Graduate Teaching Symposium participant, Centre on Aging, December 8, 2011.
- “Can Feminism Reclaim a Word? Panel on ‘Slutwalks’.” Centre for Professional and Applied

- Ethics, September 30, 2011.
- “Feast for the Eyes: Culture and Cuisine in *Big Night* and *Babette’s Feast*.” Club Symposium, University of Winnipeg, January 26, 2005.
- “Weeping, Fan Pleasure, and the Hollywood Woman’s Film.” English Department, University of North Dakota, November, 2005.
- “Feeling Modern, or The Affects of Cinematic Globalization.” Roundtable on Film, History, and Global Imaginaries. University of Manitoba, April 6, 2005.
- “*Now, Voyager*, World War II, and a Case of Enduring Fandom.” Film and Global Cultural Imaginaries colloquium series. University of Manitoba. November, 2004.
- “Fan Cultures.” Discussion leader. Fuelling the Intellect series. University of Manitoba Institute for the Humanities. October 22, 2003.
- “Moving Pictures: Intergenerational Responses to Hollywood Melodrama.” Centre on Aging Spring Symposium, University of Manitoba, May 8, 2000.
- “Mothers, Daughters, and Melodrama: An Ethnography of Responses to Film.” Institute for the Humanities New Faculty Colloquium, April 5, 1999.
- “Mothers, Daughters, and Melodrama: An Ethnography of Emotional Responses to Film.” University College Public Lecture, March 18, 1999.
- “Women Watching the Weepies.” Poster Presentation. University of Manitoba Centre on Aging Spring Symposium, May 10, 1999.
- "Is the Gaze Human? Cyborg Looks in Popular Film." Visiting Artist Speaker Series. Faculty of Fine Arts, University of Regina, February 10, 1995.
- “Time and Narrative in *Daughters of the Dust*.” Centre for Gender Issues, Lakehead University, March 5, 1995.
- "Specific But Not Essential: The Subject of Feminist Theory." Women's Studies Seminar Series, University of Regina, March 2, 1995.
- "A Question of Difference: The Knowing Look in *A Question of Silence*." University of Regina, May 6, 1994.
- "What is Post-Modernism?" Panel discussion. University College, University of Manitoba, April 12, 1994.
- "'Difference' in Feminist Theory'." Panel on Gender Issues in Management. Faculty of Management, University of Manitoba, March 23, 1994.
- "Narration and Discourse in *The Conversation*." New Literatures Research Centre, University of Wollongong, Wollongong, Australia, August 16, 1993.
- "Gender and Post-Colonial Theory: Margaret Laurence's *The Stone Angel*." English Department, University of Wollongong, Wollongong, Australia, August 12, 1993.

Community Outreach Presentations

- “Why We Cry at Movies.” Seniors’ Alumni Learning for Life Program, U of M, September 21, 2017.
- Host of “A Conversation with filmmaker Mira Nair.” Winnipeg Arts Council “Art Matters” Series. West End Cultural Centre, April 14, 2016.
- Introductory remarks at screening of *Hitchcock/Truffaut* (dir. Kent Jones), Cinematheque, January 23, 2016.
- “Cinephilia: Film Love, Past and Present.” Music ‘n’ Mavens Series, Rady JCC, Winnipeg, February 13, 2014.

Invited Panelist, "Going: Remembering Winnipeg Movie Theatres." June 2, 2013, Cinematheque.

Invited Panelist, Canadian Women in Communications Winnipeg screening and discussion of *Miss Representation*, October 6, 2011.

"Why Women Love Movies that Make Them Cry." Music 'n' Mavens Series, Rady JCC, Winnipeg. January 18, 2011.

Panel Member for discussion of *Wings of Desire*. Winnipeg Cinematheque screening for "Atmosphere: Mediated Cities Conference." January 19, 2011.

"Twenty Years Since December 6: The Intimacy and Distance of 1989." CAUT Council. Ottawa, November 27, 2009.

Discussant, "Fairytales, Myths, and Poetry: The Cinema of Patricia Rozema." Winnipeg Cinematheque Screening and Discussion with Patricia Rozema, November 7, 2009.

Panel Member, "How to Talk Back to Your T.V." Digital Detox Week Film Presentation, Cinematheque, September 24, 2009.

Panel Member, "'Rude Awakenings': on feminism's influence on life and work." Carol Shields Festival of Voices Symposium. University of Winnipeg, May 8, 2009.

Discussion of *Proust Was a Neuroscientist*. *Thinking Out Loud* Series, University of Manitoba Institute for the Humanities, McNally-Robinson Books, March, 2008.

"Building Your CV." Centre on Aging Research Forum, University of Manitoba, March, 2006.

"The Pleasures of Weeping at the Movies." University of Winnipeg Club Symposium. November 26, 2003.

"History and Affect in the Woman's Film." Carmen Women's Group. November 6, 2003.

"Memory, Silence, Control, Power." Panel presentation with Dr. Margaret Groome for PinterFest, January 18, 2003.

"Taking It All In: Culture and Cuisine in *Babette's Feast* and *Big Night*." Institute for the Humanities Food for Thought series. Café au Livre. McNally Robinson Books. April 30, 2001.

"The Classic Hollywood Melodrama." Talk on film history for Hydro-X (retired Winnipeg Hydro workers), March 2, 1999.

"Cross-border Shopping: Non-Traditional Methods in English Research." Colloquium for Association of Graduate English Students. December 11, 1999.

"Women Watching the Weepies." Poster Presentation. University of Manitoba Showcase '98. November 26, 1998.

TEACHING EXPERIENCE

Undergraduate: University of Manitoba

FILM 1290: Art of the Film I
 FILM 1300: Art of the Film II
 FILM 1310: Film History
 FILM 2420: Realism and Film
 FILM 3420: Film Theory
 FILM 2460: Gross-Out Teen Comedies
 FILM 326: Television: The New Millennium
 FILM 3260: The Cult Film
 FILM 239: International Film: The French New Wave

FILM 3250: Film and the City
FILM 2410: American Film from 1950
FILM 3250: Wordless Sin: Pre-Code Hollywood Film

Undergraduate: University of Regina

FILM 100: Introduction to Film
FILM 246: The Language of Television
FILM 248: Aesthetics and Theory
FILM 382: Women and Film: Spectacles and Spectators
FILM 440: Seminar in Film Authorship: Wim Wenders
FILM 480: Contemporary Film Theory

Undergraduate: Bishops' University/Champlain College

English 111B: The Canadian Short Story
English 106A: Approaches to Literary Criticism
English 256A: The 20th Century American Novel

Honours and Graduate: University of Manitoba

ENGL 480: Insights: Representations of Consciousness in Fiction and Film
ENGL 773: The Melodramatic Imagination: Stage, Text and Screen
ENGL 4460: "Above all to make you see": Henry James on Film
ENGL 788: Film and Affect: The Moving Image
ENGL 7550 Film and the City
ENGL 7880: Cinephilia: Film Culture and Passionate Practice
ENGL 775: The Architecture of Devotion (Reading Course)
ENGL 775: The Melodramatic Imagination (Reading Course)

STUDENT SUPERVISION

Graduate Student Advising

Camilla Gina Dascal, PhD student, continuing.

Timothy Penner, PhD. Thesis: "Based On (A Work By) Ernest Hemingway: The Author as Fictionalized Celebrity." Defended 2020.

Mandy Elliott, PhD. Thesis: "We are the real countries: Space and Identity in British, French, and American Prisoner of War Cinema." Defended 2018.

Tamar Ditzian. M.A. Thesis: "Playing with Our Hearts: Realism and Reflexivity in the Films of Lars von Trier." Defended 2008.

Darren Springer. M.A. Thesis: "'It's a Strange World': Violence and the Uncanny in *Blue Velvet*." Defended 2007.

Elyssa Warkentin. M.A. Thesis: "The Disruptive Third: Textual Strategies for Androgynous Bodies." Defended 2002. Awarded English Department Warhaft Prize for Best MA Thesis.

Tanis McDonald. M.A. Thesis: "Regarding the Male Body: Lorna Crozier's Specular Erotics." Defended 2001. Awarded English Department Warhaft Prize for Best MA Thesis .

Doctoral Thesis Committees

2018-- Tim Maton, Native Studies, continuing

- 2007 Michael William Boyce. Thesis: "Re-Imagining the War in British Film 1945-55." (Dr. George Toles, Film Studies) April 2.
- 2000 Faye McIntyre. Thesis: "Celebrity and authorial integrity in the films of Woody Allen." (Dr. George Toles, Film Studies) December 15.

Masters Thesis Committees (Member)

- 2021 Songtao (Antony) Zhong. (Dr. Jonah Corne), defended September.
- 2018 Katelyn Mackenzie. "MMIW in Canadian Crime Films." (Dr. Sonia Bookman), defended August.
- 2016 Ted Malcolmson. "Evil Dead: The Problematic Story of the Jonestown Corpses." (Dr. Kenneth McKendrick, Religion), defended August.
- 2014 Greg Marchand. "How Montreal's Quality Dailies Presented the News During the First World War" (Dr. Len Kuffert, History), defended June.
- Lindsay Joy. "I'll Cry If I Want To." (Dr. Grace Nickel, School of Art), defended June.
- Kyla Doll. "The Portrayal of Violent Women in *Deadly Women*" (Dr. Dale Spencer, Sociology), defended December.
- 2013 Josee Boulanger. "Look, Listen, Learn: collaborative video storytelling by/with people who have been labelled with an intellectual disability" (Dr. Nancy Hansen, Disability Studies), defended March.
- Megha Sharma. "Adapting the Laban Effort System to Design Affect-Communicating Locomotion Path for a Flying Robot" (Dr. James Young), Computer Science, August
- 2012 Shawna Munro. "Labour of Love" (Dr. Steve Nunoda, School of Art), defended March.
- Kelly Wojnarski. "Sinister Cine-scape: an Ostranenie of the Everyday through the films of Alfred Hitchcock" (Dr. Richard Perron, Architecture), defended March.
- 2010 Brittny Trubyk. "Stay Out of Gangs: A Visual Analysis of the Campaign" (Dr. Sonia Bookman, Sociology), defended October.
- Joey Jakob. "The Stranger in Crisis: Spectacle and Social Response" (Dr. Christopher Powell, Sociology), defended August.
- 2009 Susan Rich. "Reading the Self: Positioning the Reader as a Subject of Literary Analysis Through Works by Suniti Namjoshi, Michael Ondaatje, and Dave Eggers" (Dr. Warren Cariou, English), defended July.
- Karen Christiuk. "A Content Analysis of Media Coverage of Terry Fox." (Dr. Nancy Hansen, Disability Studies), defended March.
- 2006 Tania Viegas-Monchamp. "The Death of Virtue: Charlotte Dacre's Critique of Ideals of the Feminine." (Dr. Pam Perkins, English), defended January.
- 2005 Natasha Lopusina. "Birth and ruin: the Devil versus social codes in *Rosemary's Baby*, *The Exorcist* and *The Omen*." (Dr. George Toles, Film Studies), defended February.
- 2004 Mark Barber. "Sets and Fictions." (Dr. Ben Caplan, Philosophy), defended July.
- Leah Sander. "Collecting our thoughts and re-collecting our stories: the collection of personal records in archival institutions." (Dr. Terry Cook, History), defended July.
- Mark Yuill. "The purple skunk." (Dr. George Toles, Film Studies), defended March.
- 2003 Susan Kurbis. "Ecstasy and agony : the melodramatic visions of Douglas Sirk and Alfred Hitchcock." (Dr. George Toles, Film Studies), defended August.
- Richard Duffy. "Sculpted in time : Heterotopic space in Andrei Tarkovsky's *Solaris*." (Dr. Steve Snyder, Film Studies), defended March.

- 2002 Tavia Hafso. "Breathwork." (Dr. Alison Calder, English), defended August.
- 2000 Gail Trussler. "Words as predators in Henry James's *The Wings of the Dove*." (Dr. Robin Hoople, English), defended August.
- 1999 Sharon Schwartz. "The commodification of Kate Croy in Henry James's *The Wings of the Dove*." (Dr. Robin Hoople, English), defended August.
- Kathleen Epp. "Telling stories around the 'electronic campfire': the use of archives in television productions." (Dr. T. Nesmith, History), defended September.
- 1994 Merrie Jane Kitchen. "Hearing women's voices?: an analysis of the initial newspaper coverage of the Montreal Massacre." (Dr. Elizabeth Comack, Sociology), defended January.

Undergraduate School of Art Thesis Committees

- Jasmin Pichlyk (Dr. Sharon Alward) September 2008-April 2009.
- Gerrick Schroeder (Dr. Alex Poruchnyk) September 2007-April 2008
- James Jensen (Dr. Alex Poruchnyk) September 2007-April 2008
- Patrick Dunford (Dr. Kevin Kelly) September 2004-April 2005
- Harlene Weijs (Dr. Sharon Alward) September 2003-April 2004
- Kristen Pauch (Dr. Sharon Alward) September 1993-April 1994
- Rhodora Carreon (Dr. Sharon Alward) September 1993-April 1994

PROFESSIONAL MEMBERSHIPS

- Association of Canadian College and University Teachers of English
- Canadian Association of Chairs of English
- Canadian Society for the Study of Rhetoric
- Film Studies Association of Canada
- Modern Language Association
- Society for Cinema and Media Studies
- Henry James Society

SERVICE

External Assessor

- Promotion application (to Full), Carleton University, 2021
- Promotion application (to Full), Lakehead University, 2021
- Tenure and promotion application (to Associate), Brock University, 2019
- Promotion application of (to Full), Mount Royal University, 2018
- Tenure and promotion application (to Associate), University of Oklahoma, 2018
- Member, Cyclical Review Team for the Undergraduate Program in Communication Studies, York University and lead author of report, 2017
- Member, Cyclical Review Team for the Joint Ryerson-York Graduate Programs in Communication and Culture and co-author of report, 2017
- Assessor of Teaching Dossier for Faculty of Arts Contract Teaching Award, University of Calgary, 2014
- Tenure and promotion application (to Associate), University of Lethbridge, 2012
- Tenure application, Dalhousie University, 2012
- Tenure and promotion application (to Associate), University of Winnipeg, 2010

Journal Article Peer Reviewer

Rhetor, 2019
British Journal of Canadian Studies, 2018
New Review of Film and Television, 2017
International Journal of Media and Cultural Politics, two manuscripts in 2015
Canadian Journal of Film Studies, 2002, 2006, 2015, 2020
Norteamerica, 2010
English Studies in Canada, 2003, 2008, 2009
Canadian Literature, 2009
Canadian Ethnic Studies, 2006
Mosaic, 2002, 2003, 2006
Nineteenth-Century Feminisms, 2000, 2002
Victorian Studies, 2015

Book Manuscript Peer Reviewer

SUNY Press, 2015, 2018, 2019 (two manuscripts), 2020, 2021
Athabasca UP, 2012
Fernwood Press, 2003, 2008, 2012
University of Toronto Press, 2007, 2009, 2011
Wilfred Laurier University Press, 2007, 2008
University of Manitoba Press, 1993, 2008
Routledge, 2007
Prentice-Hall, 2005
Oxford University Press, 2004
Oxford University Press (Canada), 2004
University of Alberta Press, 1999

Conference and Grant Proposal Peer Reviewer

Reviewer, MITACS “Accelerate” Research Grant Proposal, 2018
Peer Reviewer, Berlin Prize Fellowship, American Academy in Berlin, 2017
Social Sciences and Humanities Research Council of Canada Insight Grants Review Committee
1G, 2015-2016
Social Sciences and Humanities Research Council of Canada Insight Grants Review Committee
1D, 2013-2014; 2014-2015
Social Sciences and Humanities Research Council of Canada Insight Grant Proposal Reviewer,
2013
Leverhulme Trust UK Fellowship, 2011
Social Sciences and Humanities Research Council of Canada Standard Research Grant Proposal
Reviewer, 2004; 2007; 2008; 2011
Association of Canadian College and University Teachers of English Conference Proposal
Referee, 2000; 2003; 2004; 2005; 2017
Film Studies Association of Canada Conference Proposal Referee 2005

Awards, Selection, and Jury Committee Membership

Canadian Journal of Film Studies Peter Morris Memorial Essay Prize Jury, 2019.
Judge, Fort Garry 3MT (3 Minute Thesis) Competition, February, 2018.
Federation for the Humanities and Social Sciences Publications Committee of the Awards to Scholarly Publications Program, 2017-2020; 2020-2023
Manitoba Arts Council Panel: Manitoba Arts Award of Distinction, 2005, 2016
University of Manitoba Creative Grants Committee, 2007-2010; 2013, for one proposal; 2016
Judge, University of Manitoba Undergraduate Research Poster Competition, 2015
Centre on Aging Awards Adjudication Committee, 2000-2001; 2008; 2013
Film Studies Association of Canada Graduate Student Essay Award Jury, 2013
Department of English, Theatre, Film & Media Warhaft Award Committee for best M.A. Thesis, 2011; 2013
Manitoba Arts Council External Assessor for Major Arts Grant, 2010
Member, Selection and Programming Committee, Video Pool, 2006-2009
Manitoba Arts Council Jury, 2006
Selection Committee, University of Winnipeg Student Film Festival, 2004
Manitoba Arts Council Jury: Film and Video, 2003

National Service

Member, Ministry for Women and Gender Equality (formerly Status of Women Canada) Advisory Committee on the Framework to Prevent and Address Gender-Based Violence at Post-Secondary Institutions, January-July 2019
Member, Community of Practice (Work) for *Courage to Act* Project, 2019-2021

Professional service

Member-at-Large, Canadian Association of Chairs of English, 2016-17; 2017-18
Treasurer, Film Studies Association of Canada, 2003-2004
Secretary, Film Studies Association of Canada, 2002-2003

University Service

University Chancellor Search Committee, 2018
ad hoc Committee of Senate Executive to develop Bona Fide Academic Requirements for the University Written English and Math Requirements, 2016-2017
Senate Committee on Honorary Degrees, 2016-2019; 2019-2022
Senate Executive, 2014-2017; 2017-2018; 2018-2020
Senator 2004-2005; 2014-2017; 2017-2020
Staff Benefits Committee, 2000-2006; 2009-2014
Academic Vice-Presidential Search Committee, 2008-2009
Presidential Search Committee, 2007-2008
“New Media” Advisory Committee to the Provost, 2003-2004
University Bargaining Team (in negotiations with CUPE 3909), 2000-2001

Faculty of Arts Service

Member, Teaching Learning Enhancement Fund Committee, 2020-2021; 2021-2022
External Member, Head Search Committee, Department of History, 2021

External Member, Head Search Committee, Department of French, Spanish, and Italian, 2018
External Member, Head Search Committee, Department of Economics, 2018
Board Member, Centre for Applied and Professional Ethics, 2011-present
External member, Head Search Committee, Department of Philosophy, 2015-2016
University College Endowment Fund Committee, 2013-2016
Centre on Aging Research Fellowship Awards Committee, 2004; 2005; 2010; 2013
Arts Executive Committee, 2010-2012
Committee on Mission Statement and Values for the Faculty of Arts, 2010
Faculty of Arts Teaching Excellence Committee, 1999-2001; 2008-2009
Ad Hoc Committee on University College, 2006-2007
External member, Tenure Committee, School of Art, 2006
Chair, Institute for the Humanities Board, 2002-2004; 2005-2006
External member, Hiring Committee, Department of Philosophy, 2004-2005
Human Rights committee, Faculty of Arts, 2002-2004
Ad Hoc Committee to Advise the Dean on Policies Relating to Teaching, Research, and Renewal,
January-March 2003
External member, Hiring Committee Department of History, 2002
Institute for the Humanities Board, 2000-2002
Ad Hoc Committee on Academic Extra-Curricular Activities, 1999

Department Service

English Department Graduate Committee, 1999-present
Film Program Committee, 1998-present
English Department Personnel Committee, 2006-2007; 2009-2011; 2013-2015; Ex-officio 2014-2019
English Department Promotion Committee, 1999; 2010; Ex-officio 2014-2019
English Department Undergraduate Programs and Course Committee, 2000-2001; 2007-2009; Ex-officio 2014-2019
English Department Hiring Committee (Film), 2007-2008
Chair, English Department Hiring Committee (Theatre), 2017-2018
Ad Hoc Committee on Strategic Planning, 2006
English Department Executive Committee, 2004-2007; Ex-officio 2014-2019
English Department SSHRC/UMGF/Graduate Programme Selection Committee, 2003-2006
English Department Hiring Committee (Literature), 2003-2004
Search Advisory Committee for the Position of Head in the Department of English, 2002

Other Service

Member, CAUT Bargaining Team in contract talks with Canadian Office Professional Employees (Local 225), 2019
Chief Negotiator, CAUT contract talks with Canadian Office Professional Employees (Local 225), 2016-2017
CAUT Executive 2010-2012; 2012-2014; 2014-2015; 2015-2016
CAUT Executive Director Search Committee, 2014
Chair, CAUT Collective Bargaining and Economic Benefits Committee, 2010-2012; 2012-2014
Trustee, CAUT Defence Fund 2010-2012; 2012-2014

CAUT Collective Bargaining and Economic Benefits Committee, 2006-2008; 2009-2010
CAUT Ad hoc Committee on University Governance, 2009
UMFA Board of Governors Assessor, 2009-2011
UMFA Bargaining Team 2007; 2009; 2016; 2017
UMFA Senate Assessor, 2006-2007 UMFA Executive Committee, 2003-2019
UMFA Board of Representatives, 2003-2019
UMFA Collective Agreement Committee, 2003-2016
Chair, UMFA Staff Benefits Committee, 2003-2006
UMFA Staff Benefits Committee, 2000-2003; 2006-2007
UMFA Generation Gap II Committee, 2005
UMFA Generation Gap Committee, 2000-2001
UMFA Defence Fund Committee, 2009-2011
UMFA Executive Director Search Committee, 2014-2015
UMFA Equity and Diversity Committee, 2015-2017

Updated December 9, 2021

Report of the CAUT AF&T Committee into complaints raised by Professor David Noble against Simon Fraser University regarding alleged infringements of academic freedom

Exhibit "1" in the
affidavit of Brenda
Austin-Smith
sworn January 16,
2022

In the winter of 2000, the department of humanities at Simon Fraser University invited Professor David Noble of York University to apply for the J.S. Woodsworth Chair, a permanent position recently created by agreement between the department and the dean of arts. The department appointed a search committee that eventually selected Professor Noble as its first choice and ultimately recommended his appointment to the entire department.

By late January of 2001, it became apparent that there was resistance to Dr. Noble's appointment from outside the department. Professor Noble later became aware of attempts to block his appointment despite continued support from within the department. On March 26, 2001, he called the matter to the attention of the Academic Freedom and Tenure Committee of the Canadian Association of University Teachers. Professor Noble suspected that the department's choice, based on academic merit, was being opposed on questionable grounds, and that the effect of this opposition was an infringement of his academic freedom. The Academic Freedom and Tenure Committee determined that the facts of the case in the committee's possession indicated a prima facie breach of academic freedom that justified appointing a committee of inquiry.

The individuals named to this committee were the Hon. Howard Pawley PC, Q.C., former premier of Manitoba and now adjunct professor of political science at the University of Windsor and Professor Gordon Shrimpton, professor of Greek and Roman studies at the University of Victoria and Speaker of CAUT Council.

The terms of reference for the committee of inquiry were as follows:

1. To investigate the appointment process that resulted in the decision not to appoint David F. Noble as the J.S. Woodsworth Chair in the Humanities at Simon Fraser University.
2. To determine whether the appointment process adhered to established academic practice and, in particular, whether it violated CAUT policies.
3. To determine whether the appointment process violated Professor Noble's academic freedom.
4. To report its findings and recommendations to the Academic Freedom and Tenure Committee.

This report of the Academic Freedom and Tenure Committee is based on the investigation by the committee of inquiry.

Academic Freedom

The CAUT Policy Statement on Academic Freedom in effect at the time of Professor Noble's complaint reads as follows:

The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship and research. Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize the university and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the obligation to base research and teaching on an honest search for knowledge.

When deciding whether Dr. Noble's academic freedom was violated, the obligations of Simon Fraser University must be considered, in light of the CAUT policy statement. Does the clause, for example, presume an employment relationship? The second sentence of the policy statement requires protection of academic freedom by any university, regardless of whether there is an employment relationship. This protection extends to "any member of the academic community" regardless of location or employment relationship. Universities must support the principles of academic freedom when they consider hiring an academic from another university. Without this obligation, potential employers might disqualify candidates based on their ideological positions or personal style rather than strictly on their competence.

The CAUT policy statement speaks of "freedom of discussion" and "freedom from institutional censorship." Institutional censorship may take many forms, but the ones most clearly applicable to this case concern the rejection of Dr. Noble's appointment on the basis of his style of interaction, his collegiality, and whether he would adequately represent the university. Candidates earn their appointments based on academic merit. Withholding an appointment by means of egregious procedural irregularities, or because of irrelevant criteria such as personal observations or discomfort with a candidate's style, may violate a candidate's academic freedom.

Article 1.2 of the framework agreement between Simon Fraser University and the Simon Fraser University Faculty Association protects academic freedom at SFU:

Academic freedom is the freedom to examine, question, teach and learn, and it involves the right to investigate, speculate and comment without reference to prescribed doctrine, as well as the right to criticize the University, Faculty Association and society at large.

Specifically, academic freedom ensures:

1. Freedom in the conduct of teaching;
2. Freedom in undertaking research and publishing or making public the results thereof;
3. Freedom from institutional censorship.

Academic staff shall not be hindered or impeded in any way by the University or the Faculty Association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.

As part of their teaching activities, teachers are entitled to conduct frank discussion of potentially controversial matters which are related to their subjects. This freedom of expression shall be based on mutual respect for the opinions of other members of the academic community.

The Investigation

a) The J.S. Woodsworth Chair

In 1984, the Institute for the Humanities and the department of humanities at SFU established the J.S. Woodsworth Endowment Fund to support activities that reflect the commitments and accomplishments of J.S. Woodsworth.

J.S. Woodsworth was a Methodist minister who eventually renounced his calling to address the plight of the wider community of working people and the underprivileged. He was a social critic, activist, and Member of Parliament who founded the Cooperative Commonwealth Federation. Woodsworth appreciated the plight of the small business entrepreneur. He was not a friend of large or corporate business interests. He got along well with reporters but was not necessarily a friend of the press, which he regarded as “kept.” Woodsworth was a pacifist who refused to load cargoes of munitions when he worked as a long-shoreman. He was imprisoned in 1919, charged with seditious libel. The Crown never proceeded with the charge.¹ During its first 10 years, the endowment fund sponsored three Simon Fraser faculty members as resident scholars, and three visiting scholars from other universities. The J.S. Woodsworth Chair in the Humanities was inaugurated in 1990. Alan Whitehorn (1994–1996) and Ed Broadbent (1997–1999) first held the chair as term appointees.

By 1999, the dean of arts began to seriously consider making a permanent appointment to the J.S. Woodsworth Chair. The chair was eventually combined with a vacant position in the department of humanities, and by the fall of 2000, the department sought to fill the chair with a permanent appointment of a senior academic. In keeping with the aims of the Woodsworth fund, the department sought a scholar who was also an activist. They wanted someone to teach, do research on social and cultural issues, support educational and community development efforts, and build strong ties with the community through scheduled series of conferences, symposia and workshops funded by the J.S. Woodsworth Endowment Fund.

b) The Appointment Process

i) Departmental search. The J.S. Woodsworth appointment is classified in SFU policy A10.06 as a specially funded senior university chair, with the following expectations:

A candidate for a senior University Chair will normally be an established scholar who would merit the rank of full professor. This could include an individual with appropriate academic credentials whose career experience has been outside a university setting. He or she must have earned national and international recognition as being pre-eminent in her/his area of expertise. He or she will have demonstrated a continuing commitment to the support and development of emerging scholars. He or she must have been recognized by his/her peers in the discipline through the receipt of grants, awards, and/or other honors.

University chairs have a term of between five and 10 years, and may be held by tenured professors.

Simon Fraser’s appointments policy A10.01 requires advertising for all academic appointments. For the Woodsworth chair, the department of humanities search committee proposed a search without advertising. This practice was already in place for appointing Tier 1 Canada Research Chairs and endowed chairs. In early September 2000, Stephen Duguid, chair of the department of humanities, checked with John Pierce, dean of the faculty of arts, about the proposed recruitment plan. Dean Pierce suggested that Dr. Duguid check with Judith Osborne, the associate vice president academic, about whether advertising was required. Ms. Osborne outlined for him the applicable university policies and practice. She noted in the following message that it was common to fill endowed chairs without a search:

A10.06 is the applicable policy. There has been agreement amongst the Deans that

Tier 1 CRCs do not have to be advertised. For your purposes, the 'normal' rules apply: that is, it is possible to appoint without a search as long as there is a compelling rationale for doing so. Historically, it has been common for endowed chairs to be filled without a search, justified by the calibre of the person to be appointed. [SF46]

Ms. Osborne was referring to policy A10.06, "Appointment of Specially Funded University Chairs, University Professors and Research Fellows." This policy has specific procedures to follow when appointing new or existing academic staff to specially funded positions.

The search committee decided to proceed with a closed search without advertising, and dean Pierce was informed of this decision.

After consulting with the department, the search committee generated a list of individuals and eventually narrowed it down to a short list of potential nominees.

The search committee followed what appeared to be a common practice at SFU of filling endowed chairs without a search. This practice appears to violate Simon Fraser's policy A10.01 Academic Appointments (Appendix B). Policy A10.01 makes no exception to the requirement for a search and advertising.

The CAUT Model Clause on Advertising and Recruitment in effect at the time of the department's search requires advertising for all academic staff appointments. CAUT policy does not make an exception for endowed chairs.

Employment equity is a key feature of the appointment process. Policy A10.01 states "Departments shall employ appropriate strategies in order to encourage applications by and consideration of individuals from designated groups which are under represented."

The search committee attempted to cover equity considerations by polling department members, previous holders of the J.S. Woodsworth Chair, and several members of under represented groups. The search committee encouraged department members to nominate "female candidates and candidates from non-traditional backgrounds." The actual language for designated groups refers to "aboriginal people, persons with disabilities, visible minorities and women." The committee included in its initial list of 21 prospective candidates four women, one of whom was a member of a visible minority, and one male who was an aboriginal person.

Equity considerations were limited by the decision to not advertise. A more comprehensive equity strategy usually anticipates an advertised search. SFU policy A10.01 requires a strategy that will encourage applications by individuals from designated groups. Advertising is implicit in this requirement. Without advertising, potential applicants from designated groups may have no way of knowing about the position. This structural problem of SFU practice and policy is addressed in the recommendations.

The search committee generated a short list of four potential nominees. In late October 2000, Dr. Duguid discussed the short-list with dean Pierce. Around the same time, dean Pierce and Dr. Duguid agreed that letters of reference would not be solicited until the department made its choice from among the four.

A letter was sent on Oct. 27, 2000, to each of the four people on the list, inquiring if they were interested in being considered for the J.S. Woodsworth Chair. Three of the prospective nominees expressed interest, and they were all invited to visit the campus.

The candidate visits took place in November and December of 2000 and January 2001.

Professor David Noble of York University was on the committee's short list, and eventually its top choice to hold the J.S. Woodsworth Chair. He visited the campus for interviews between Jan. 11-14, 2001.

During Dr. Noble's visit he met with Dr. Duguid, Dr. Jerry Zaslove, director of the Institute for the Humanities, and dean Pierce. Before dean Pierce arrived at the meeting, Dr. Noble asked if Michael Stevenson, the newly appointed president of Simon Fraser University, would have any role in the selection process. Dr. Duguid explained that president Stevenson did not have a role until the final

recommendation reached him for forwarding to the board of governors. During the discussion, Dr. Noble noted that any involvement by president Stevenson would not bode well for his candidacy.

During the meeting, there was some discussion of the recent faculty strike at York University. At the time, Dr. Stevenson was vice president academic at York. According to Dr. Duguid, Dr. Noble was very critical of Dr. Stevenson's role in the negotiations at York. Dean Pierce arrived at the meeting during these remarks. The informal interview continued. The dean subsequently expressed concerns to both Dr. Duguid and Dr. Zaslove about his view of Dr. Noble's poor judgement in that interview vis-à-vis his comments about the president. Dean Pierce did not attend any of Dr. Noble's presentations. This was consistent with how dean Pierce dealt with the other applicants.

The search committee decided on Jan. 15, 2001, to make Dr. Noble their first choice, by a vote of five in favour, and one abstention [SF83]. Dr. Duguid said that when he informed dean Pierce about the decision, the dean had some reservations about all three of the short-listed candidates, but said that the search committee had made the right choice.

Dr. Zaslove reported to the committee of inquiry that during the week following the search committee's decision dean Pierce seemed very positive about the prospect of hiring Dr. Noble.

The department endorsed the search committee's recommendation on Jan. 25, 2001 by a vote of nine in favour with one abstention. The next day, Dr. Duguid informed dean Pierce by email of the department's decision. The search committee then wrote to all 12 of the referees provided by Dr. Noble.

Around this time, Dr. Duguid also informed Dr. Noble that he was the department's first choice.

On Feb. 22, 2001, the department approved the search committee's recommendation to forward Dr. Noble's name to the dean of arts, with a vote of seven in favour, one opposed, and two abstentions.

Under Simon Fraser's appointments procedures in effect at the time, the department chair forwards to the dean a recommendation that carries with it the demonstrated support of the department. Dr. Duguid forwarded the recommendation to dean Pierce, with the information that Dr. Noble was the department's choice.

So far the process in the department appeared to follow a reasonable and routine course for an appointment to an endowed chair. The case is, however, far more complicated. Even before the department approved the search committee's recommendation, senior officials from the dean of arts all the way up to the president became involved in trying to stop Dr. Noble's appointment. Their interventions were highly irregular, since they tried to influence a recommendation at a lower level before they received it through official channels.

ii) Interventions by the dean of arts, dean of applied sciences and the president. When Stephen Duguid, the department chair, first informed him about the department search committee's choice of Dr. Noble, dean Pierce was supportive. Yet, one week later, on Jan. 23, 2001, two days before the department first considered the search committee's recommendation, dean Pierce informed Dr. Duguid that he had serious doubts about Dr. Noble's candidacy.

Dr. Duguid stated that on Jan. 23 dean Pierce told him that:
serious issues concerning Noble have been raised at a Deans' meeting ... The issues centered on Noble's "collegiality" and on the accusation that he tended to attack individuals with whom he disagreed. The Dean suggested that I [Duguid] contact the Dean of Applied Sciences to find out more details, the specific incident referred to having occurred at a conference involving technology and distance education. It was impressed upon me by the Dean that he now felt that Noble would be a disastrous appointment for the Faculty of Arts in that it would disrupt relations with Applied Sciences [written testimony from Duguid].

In later correspondence with the Academic Freedom and Tenure Committee,

dean Pierce stated that he also told Dr. Duguid that he had concerns stemming from Dr. Noble's behaviour in the informal interview, and from coverage of Dr. Noble in articles in the Chronicle of Higher Education. Dean Pierce stated that he expressed strong misgivings about the possible impact of the appointment, but that he did not say that it would be a "disastrous" appointment.

At this stage, dean Pierce apparently based his concern on claims about Dr. Noble that he heard from Ron Marteniuk, the dean of applied sciences. Dean Pierce mentioned David Noble's candidacy to dean Marteniuk at a regular bi-weekly meeting of deans over lunch. Dean Marteniuk indicated that he had heard that Dr. Noble was not very collegial. Shortly afterwards, dean Marteniuk was told about Dr. Noble's apparently rude behaviour at a conference on technology and distance education that was held at the SFU Harbour Centre. Dean Marteniuk did not attend the conference. Dr. Noble was a speaker at the conference. He was alleged to have interrupted a speaker, shouted "Nuremberg, Nuremberg," and not allowed the speaker to finish his remarks. Dean Marteniuk passed this information on to dean Pierce. At a meeting with Dr. Duguid, dean Marteniuk mentioned this incident, and since he did not have first hand knowledge of the alleged behaviour he offered the names of two people who might have witnessed the event, and suggested contacting them to confirm the allegations [Marteniuk testimony].

After speaking with dean Marteniuk about Dr. Noble's alleged behaviour at the conference, Dr. Duguid asked Dr. Zaslove to check with Tom Calvert, the alleged victim of one of Professor Noble's alleged attacks. Professor Zaslove reported that Tom Calvert said that the exchange had been "heated" but civil and had focussed on the issues, not personalities [correspondence]. Dean Pierce received a copy of Dr. Zaslove's report.

Tom Calvert informed the committee of inquiry that he and Dr. Noble had a heated exchange, but Dr. Noble allowed him to complete his remarks and that Dr. Noble did not shout "Nuremberg Nuremberg" as he was speaking. Dr. Noble informed the committee of inquiry that the exchange concerned the use of data collected on student performance without obtaining prior consent from the students. He pointed out that the principles of obtaining informed consent from research subjects was established as a basic right during the Nuremberg trials, but did not recall saying "Nuremberg" while Calvert was speaking. The committee of inquiry's investigation concluded that there was no foundation to the allegations communicated to dean Marteniuk.

Dean Pierce also spoke on Jan. 23, 2001 with Michael Stevenson, president of SFU, about the search committee's recommendation to appoint Dr. Noble to the Woodsworth Chair. President Stevenson told dean Pierce that there was need for a thorough background check on Dr. Noble's style of interaction. The president also informed the committee of inquiry that Dr. Noble had a "controversial" reputation at MIT and York [Stevenson testimony].

President Stevenson's suggestion for a thorough background check is puzzling. Background checks are only done for academic appointees in the most severe cases. There is no provision for such a check in SFU's appointment policies. To the best of our knowledge, provisions for background checks do not exist in appointment procedures for academic positions at other Canadian universities.

President Stevenson immediately wrote the following email message about Dr. Noble's appointment to John Waterhouse, vice president academic, "I touched base with John Pierce this afternoon. I would be glad to discuss in detail, but I'd avoid this appointment like the plague" [SF82].

The opposition to Dr. Noble's nomination by the deans and the president is puzzling, especially since it was so early in the process before the department even completed the appointment file.

In the case of opposition by deans Pierce and Marteniuk, it is not clear how an appointment of a historian in humanities would affect relations between two

entire faculties, especially when they involve arts and applied sciences. It is hard to imagine relations being so disrupted, even if Dr. Noble had done what was alleged.

President Stevenson's reaction is also puzzling. He does not state in the email his reasons for wanting to avoid Dr. Noble's appointment "like the plague." This powerful imagery appears to reflect a strongly held position. Yet, president Stevenson had, as yet, no information from the department about the proposed appointment. He could not have been yet aware of the department's reasoning or of information that Dr. Noble's 12 referees would provide.

SFU's academic appointments policy A10.01 sets out a path for a recommendation to follow, from the department to the dean, to the vice president academic, then the university appointments committee and finally the president before proceeding to the board of governors for final approval. Officials at each more senior level are entrusted to ensure that there has been appropriate consideration at the lower levels, and to add their recommendation.

The process is contaminated if senior officials attempt to influence decisions at lower levels. How can a department, a dean or a vice president adequately prepare a recommendation that will ultimately land on the president's desk, when the president has already voiced his opposition to the favoured candidate? Instead of just considering the merits of the candidate, they will inevitably also consider the president's opposition. The important point here is that the president's intervention was not in accordance with the process, and is contrary to the way it is set out in the appointments policies.

On Jan. 25, 2001, when Dr. Duguid informed dean Pierce by email that the department decided to recommend Dr. Noble, he added that he would request more than the six reference letters required by policy A10.06, and that he would ask about Dr. Noble's community engagement and collegiality in addition to his scholarship and teaching.

Dr. Duguid asked five of the referees to specifically address the following issues:
... any thoughts you might have in reference to the controversies swirling about his critiques of distance learning. Simon Fraser is very active in the areas of telelearning and distance education and these initiatives deserve a critique that is coherent and civil, a critique that we hope David Noble could offer.

By late January, dean Pierce started his own investigation of Dr. Noble. He engaged a private consultant, Ms. Libby Dybikowski of Provence Consulting, to do a due diligence check on Dr. Noble. According to Ms. Dybikowski, the dean wanted to know, about "how he (Dr. Noble) would interact with people who took opposing views to his own, particularly faculty members engaged in IT work, of the business community and the press." Ms. Dybikowski said the dean also told her that he "wanted this chair to build bridges to other faculties and the external community, including business" [Dybikowski testimony]. Dean Pierce said the issue was largely collegiality, and that he was seeking insight from people who were not necessarily Dr. Noble's friends, about how Dr. Noble behaved in public situations. The dean gave Ms. Dybikowski a list of people that he wanted her to contact.

Under the Human Rights Act of British Columbia, a potential employer must have permission from an applicant before contacting referees. When Ms. Dybikowski contacted Dr. Noble for permission, he refused, on grounds that the individuals listed knew neither him nor his work, and that he could suggest others who would be more appropriate. After consulting with dean Pierce, Ms. Dybikowski again contacted Dr. Noble for permission to contact his dean, chair, and other colleagues at York University. Dr. Noble informed her that his lawyer advised him to not cooperate any further, because of the unusual nature of the request. He did indicate that she was free to check with any of his 12 named referees. The chair of his department was one of the named referees. Ms. Dybikowski contacted Dr. Noble's referees and submitted a confidential report to dean Pierce on Feb. 7. Discussion of the report can be found on page 10.

Dean Pierce's initiative is unusual. He initiated a background check on Dr.

Noble before he had even seen the file from the department of humanities. The department was collecting letters from 12 referees. SFU appointments policies A10.01 for academic appointments and A10.06 for university chairs and university professorships make no provision for deans to gather additional information on their own or through the services of an outside consultant. Policy A10.01 allows deans to request the department to add information to the departmental recommendation to appoint. The dean would have to request this from the department chair. Furthermore, for the documentation on short-listed candidates, A10.01 refers only to "letters of reference." There is no allowance made in the policy for soliciting unwritten information from third parties.

Had dean Pierce waited to see all of Dr. Noble's references, he would have discovered that several are engaged in information technology work and hold opposing views to those of Dr. Noble. Dr. Duguid even asked five of them to comment specifically on Dr. Noble's critiques of distance learning. Even if dean Pierce had first seen all the reference letters, doing a background check on an academic candidate is extraordinary and almost unheard of for appointment of academic staff. Standard appointment procedures involve an extensive process, including checks with academic referees whose names are supplied by the candidate, reviews of academic credentials and accomplishments, including published material, and a visit when the candidate usually gives a presentation and is engaged in numerous interviews.

If he was concerned about Dr. Noble's alleged lack of collegiality and disrespectful behaviour to colleagues, as reported to him by dean Marteniuk, then why did dean Pierce not first see what he could learn from the reference letters submitted by the department? SFU policy requires letters of reference from individuals named by the candidate. Dr. Noble submitted 12 names, even though just six are required for an endowed university chair. Written letters are part of the formal requirement of the appointment process. All parties in the hiring process must read them, weigh them, and accept them as legitimate evidence.

On Feb. 20, 2001, dean Pierce informed Dr. Duguid that he would not support Dr. Noble's nomination for the J.S. Woodsworth Chair. This was almost two weeks after dean Pierce received the report from Provence Consulting that provided glowing comments from 11 of Dr. Noble's referees.

It also appears that inappropriate attempts were made to inquire into how Dr. Noble would interact with certain segments of the community, and that he was expected to build bridges to business. Dr. Noble is well known as a critic of business. The department of humanities recruited him for the J.S. Woodsworth Chair in part because of his critical work on the history of technology and of university-corporate relations. Dean Pierce apparently instructed Ms. Dybikowski to ask about how Dr. Noble would build bridges to institutions that he criticized, because he was expected to do so.

Asking these types of questions amounts to a violation of Dr. Noble's academic freedom. Academic freedom guarantees the right to criticize any institutions without reprisal or penalty. The framework agreement between Simon Fraser University and the Simon Fraser University Faculty Association protects academic freedom. It is also central to the CAUT policy on academic freedom.

In a confidential email to members of the department of humanities, dated Feb. 20, 2001, Dr. Duguid summarized the clarifications dean Pierce made in the meeting they had earlier in the day. Dr. Duguid mentioned three choices available to the department. One of them was to opt for the second candidate, who the dean said he was prepared to accept. According to this message from Dr. Duguid, dean Pierce was prepared to accept a candidate without having seen the file on the candidate or the candidate's references [SF94].

In his Feb. 22, 2001, memorandum informing dean Pierce of the department's decision to recommend appointing Dr. Noble, Dr. Duguid summarized his understanding of the dean's concerns:

1. Dr. Noble's "outspoken opposition to university-corporate relations,"

2. "His outspoken opposition to educational technology use," and
3. "His reputation for being more confrontational than cooperative" [SF96].

In later correspondence with the Academic Freedom and Tenure Committee, Dr. Duguid acknowledged that it is very possible that dean Pierce did not raise the issue of Dr. Noble having an outspoken opposition to university-corporate relations. Dr. Duguid stated that it is very possible that he assumed this to be the case given the intense nature of the opposition to the Noble appointment.

There is no evidence that dean Pierce responded in writing to either confirm or deny this summary of his concerns. In response to a question to him from the committee of inquiry about whether these statements reflected his views accurately, dean Pierce said that the first two did not represent his views and the third came close.

These concerns as summarized by Dr. Duguid are most interesting. J.S. Woodsworth was well known for having similar qualities and could have been the target of similar concerns. In his suggested terms of reference for the chair, vice president Waterhouse notes that "That the chair holder will continue the tradition of social progress through engagement, education and empowerment that J.S. Woodsworth championed."² In many respects Dr. Noble's reputation as an opponent of educational technology and a critic of corporate behaviour makes him a good fit for a chair that honours the life and work of J.S. Woodsworth. Yet, here Dr. Duguid noted that they may have been raised as reasons to be concerned about Dr. Noble's appointment.

Raising concerns of this nature about a candidate would constitute a serious violation of the CAUT policy on academic freedom and of Article 1.2 of the agreement between SFU and the SFU Faculty Association. Both these documents specifically protect academics for making statements regardless of prescribed doctrine (see "Academic Freedom" on page 2).

Why were these kinds of concerns noted about a candidate for an academic appointment? These are areas of Dr. Noble's work where he is an acknowledged expert — online education and university-corporate relations. The department of humanities selected him because of this expertise and his critical perspective.

Dr. Noble is a well-known critic of initiatives such as Simon Fraser University's cooperative ventures with business to support new educational technologies.

Applied sciences and business administration were the anchor faculties for the Technology, Innovation, Management and Entrepreneurship (TIME) Centre, launched in 1999 to support the growth of the province's high technology sector. The TIME Centre opened in May 2000, in SFU's Harbour Centre. Ron Marteniuk was dean of applied sciences and John Waterhouse was dean of business administration. In the announcement for the new centre, Ron Marteniuk mentioned developing TIME's programs in consultation with industry.

The New Media Innovation Centre (NewMIC) opened in June 2000, also in the Harbour Centre, with a mandate to research, develop and commercialize advanced new media technologies, products and delivery systems. Founding NewMIC partners included Simon Fraser University, the University of British Columbia, the University of Victoria, Electronic Arts, IBM, Nortel and Xerox. Ron Marteniuk was involved in the founding of NewMIC and is currently on the board of directors.³

After he was informed of the department's decision to recommend his appointment, Dr. Noble contacted dean Pierce in early March to discuss details of the appointment. Dean Pierce informed Dr. Noble that the final decision was not determined and still some time away [Noble tapes of telephone calls].

Under SFU policy, if the dean concurs with the department chair's recommendation, he forwards it with his comments to the vice president academic. When the dean does not concur with the chair's recommendation, he refers it back to the department chair for consultation or reconsideration.

In a March 12, 2001 memorandum, dean Pierce informed Dr. Duguid and vice president Waterhouse that he would not support Dr. Noble's nomination:

Given the high profile nature of the position, in particular representing the University to the wider public and building bridges to other departments and Faculties, such as Applied Sciences, I decided to proceed with further background checks or due diligence to better situate Dr. Noble's reputation as a collegial colleague and one who can serve us well in outreach and bridge building ... Dr. Noble was contacted and he refused to give permission to talk to a number of current or former senior academic administrators at York University where he is currently employed and to one other academic from SFU who is an expert on telelearning. Dr. Noble argued that these people did not know him directly or had not worked with him directly. Yet, many of his own referees would have failed that test [SF33].

Dean Pierce also stated in the memorandum that Dr. Noble was then offered an opportunity to name an additional set of referees, and he declined to do so.

In her testimony to the committee of inquiry, Ms. Dybikowski stated that Dr. Noble's referees all indicated they had known Dr. Noble for considerable lengths of time. Furthermore, several referees were from applied sciences, and many had taken positions on information technology that Dr. Noble had criticized. For example, Andrew Feenberg, professor of philosophy at San Diego State University, is a pioneer of online education and long time associate of Linda Harasim of SFU's Telelearning Centre. Philip Agre, professor of computer science at UCLA, is an expert on artificial intelligence from MIT's Artificial Intelligence Laboratory and an ardent advocate of the Internet. Stanley Katz, from Princeton University is former president of the American Council of Learned Societies and advocate of online education. Thomas Hughes, Professor Emeritus, University of Pennsylvania and visiting professor at MIT, is an eminent historian of technology. Noam Chomsky is a linguist at MIT, advocate of online education and voracious user of email communications and the Internet.

A requirement of representing the university is contrary to generally accepted expectations of university faculty. Professors are not expected to represent their universities. On the contrary, they are usually expected to clarify that in their public statements they do not represent their university. Academic staff are expected to pursue excellence, and have the right, in Article 1.2 of the framework agreement between SFU and the SFU Faculty Association, "to criticize the University, Faculty Association and society at large." Article 1.2 also states that, "Academic staff shall not be hindered or impeded in any way by the University or the Faculty Association from exercising their legal rights as citizens."

In an interview, dean Pierce clarified that "representing the university" meant things like speaking to the media, going to conferences, outreach and fundraising. He said that he did not mean the remark to be a statement with respect to academic freedom. We respect dean Pierce's clarification about his intent. Nonetheless, the written statement appears to have an unacceptable requirement. Imposing this requirement on Dr. Noble constitutes a violation of his academic freedom.

Dean Pierce's memorandum also mentions building bridges to the faculty of applied sciences. The responsibility to build bridges to applied sciences was not an advertised expectation for this position.

We find it curious that dean Pierce singled out the faculty of applied sciences. Dean Pierce was aware of dean Marteniuk's concerns about Dr. Noble's appointment. Nonetheless, applied sciences is not a likely candidate for bridge building by an appointee in the humanities.

In response to dean Pierce, the department reconsidered its decision on March 22, 2001, and reaffirmed its choice of Dr. Noble for the J.S. Woodsworth Chair, with a vote of seven in favour of proceeding, one opposed and two abstentions.

iii) Report by Provence Consulting. On Feb. 7, 2001, Provence Consulting provided a confidential "Executive Search Reference Check Report" with the heading, "RE: Chair, J.S. Woodsworth Chair in the Humanities, David Noble." The committee of inquiry received a copy of the report under the Freedom of

Information and Protection of Privacy Act of British Columbia [SF93].

Provence Consulting contacted 11 of Dr. Noble's referees, listed below with their affiliation and brief description of their relationship with Dr. Noble:

1. Philip Agre, Department of Information Studies, UCLA, has known Dr. Noble for about five years, from when Dr. Noble was at UCLA.

2. Maud Barlow, Council of Canadians, has known Dr. Noble for about seven years, and worked with him against the attempt by York to bring a space institute to the university.

3. Noam Chomsky, professor of linguistics, Massachusetts Institute of Technology, has known Dr. Noble for about 20 years, from when Dr. Noble was at MIT.

4. Andrew Feenberg, professor of philosophy, San Diego State University, has known Dr. Noble for about six years, as a visiting professor at a neighbouring university and from serving with him on various panels at conferences. Dr. Feenberg is known for inventing online distance learning many years ago. He recently was appointed to a Canada Research Chair at Simon Fraser University.

5. Craig Heron, Chair, Division of Social Science, York University (Dr. Noble's department), has known Dr. Noble for about 10 years.

6. Stanley Katz, professor, Woodrow Wilson School of Public and International Affairs, Princeton University, has known Dr. Noble since the 1970s. He has shared some graduate students with Dr. Noble.

7. Seymour Melman, Professor Emeritus of Industrial Engineering, Columbia University, has known Dr. Noble for about 15 years.

8. Ralph Nader, consumer advocate, has known Dr. Noble for more than a decade. He became acquainted with Dr. Noble because of Dr. Noble's classic book, *American by Design*, and has worked with him on issues.

9. Dan Schiller, professor, Department of Communications, University of California at San Diego, has known Dr. Noble for about five years, from when Dr. Noble was a visitor in his department and later when Dr. Noble was a visitor at Claremont Graduate University.

10. Jack Schuster, professor of education and public policy, Claremont Graduate University, has known Dr. Noble for "a long time." Dr. Noble held a two-year visiting appointment at Claremont.

11. Sheila Slaughter, professor, Center for the Study of Higher Education, University of Arizona, has known Dr. Noble for about 15 years. They are in similar lines of work and meet at conferences.

The twelfth referee was James Turk, executive director of the Canadian Association of University Teachers. Ms. Dybikowski did not contact Dr. Turk.

Ms. Dybikowski organized the report into five sections, each one corresponding to a main question she posed to the referees: strengths; weaknesses; bridge between faculties and raise awareness of the humanities; collegial approach, especially with those who oppose his views; and other comments. In each section she listed specific comments attributable to each referee, without further analysis or commentary of her own. Comments cannot be matched with individual referees because in the copy received by the committee of inquiry the names are blacked out to protect their confidentiality.

There are 29 comments listed under "strengths," four under "weaknesses" (seven of the referees did not note any weaknesses), 23 under "bridge between faculties and raise awareness of the humanities," 52 under "collegial approach, especially with those who oppose his views," and 22 "other comments."

The summary that follows is a representative sampling of the themes raised by the referees.

The comments are overwhelmingly positive. They speak about how Dr. Noble is creative, multi-disciplinary, a gifted organizer, a good team player, a principled activist, a superb speaker and an educator who is loved by his students. They also say that he deals with issues of enormous importance with profound impli-

cation for how the academy functions and for its contributions to society.

They note that he cultivates ties with professors outside his area, would be particularly good at reaching out to commerce, engineering and computer science, is very good at building bridges outside the university, and is sensitive to opinions in the community. Dr. Noble is an activist who creates opportunities for debate on matters such as the commercialization of the university.

They also note that Dr. Noble has strong opinions that he expresses openly and takes strong positions that are credible and academically grounded. While he may upset some people with his strong opinions, he does not have difficulty working with people who do not share his opinions.

One referee, [name blacked out] said [he/she] disagrees with Dr. Noble, yet they have excellent relations and Dr. Noble has continued to include [him/her] in events when he did not have to. Another noted that people in Dr. Noble's position often get described as "difficult" because they raise issues no one wants to hear.

iv) Review by the vice president academic. Appointments policy A10.01 states that if the dean does not concur with the department, the dean attaches his/her comments to the department's recommendation and forwards it to the vice president academic.

The vice president academic is required to review the recommendations of the department and the dean, together with the supporting documentation.

If the vice president academic supports the department's recommendation, he/she forwards it to the president. In this case, vice president Waterhouse did not support the department's recommendation. SFU policy requires him to forward the department's recommendation to the University Appointments Committee (UAC). Vice president Waterhouse's April 17, 2001 submission to the UAC listed what he saw as the terms of reference for the Woodsworth Chair [SF34]:

The terms of reference for endowed chairs may specify additional criteria for appointment. It is surprising that there are no formal terms of reference for the J.S. Woodsworth Chair. A careful reading of the background materials for the endowment strongly suggest the following are applicable:

That, in creating this Chair, the University intends to have a position dedicated to teaching, research and other scholarly activities in the Humanities;

That the chair holder will continue the tradition of social progress through engagement, education and empowerment that J.S. Woodsworth championed;

That the establishment of this Chair is firmly rooted in S.F.U.'s commitment to interdisciplinary co-operation and inquiry, and involvement with and service to the broader community;

That the chair holder will be expected to include a community development dimension within the range of his/her activities;

That the chair holder will play an active role in public programming; and

That the chair holder will support activities that contribute to the quality of the educational environment at S.F.U.

The vice president's list is a fair summary of terms of reference based on the background materials for the Woodsworth Endowment. There is nothing in the summary that hints at being required to represent the university, or to forge relations with business. Vice president Waterhouse notes that the chair is expected to continue the tradition of social progress that J.S. Woodsworth championed. Woodsworth did not forge relations with business. He was a social critic who included business among his targets for criticism.

Vice president Waterhouse then listed the following concerns:

1. Equity: Chairs are often filled by invitation, an invitation that may be extended to an individual person pre-selected by the department. In that case, equity considerations do not come into play; but the department of humanities did not have an individual in mind when it began the search. Instead it, "... invited the humanities faculty to submit names of possible candidates. The process culminated in a four person short-list comprised of Caucasian male candidates." The vice president does not find evidence in the department's submission that "indi-

viduals from designated groups that were underrepresented" were encouraged to apply, as policy A10.01 directs.

2. Permission to nominate: The next matter of concern was that the "Department of Humanities did not obtain the approval of the Dean of Arts for the nomination to appoint Dr. Noble as the Woodsworth Chair before proceeding with the recommendation for appointment." This is a requirement of A10.06.

3. Documentation: A10.01 mentions the items that should be found in a complete file from a department. The vice president regarded the items found in the file as deficient in content.

4. Representing the university: The vice president notes that: "The Dean, however, has concluded that additional information is required to determine the candidate's suitability to represent the University when carrying out the community outreach and development mandate of this position and to assess whether he would be a constructive force within the University and a collegial colleague."

The vice president's comments are directed to the department's adherence to SFU procedure. The vice president is also required to review the recommendation by the dean of arts. Yet the vice president did not comment on the dean's departures from procedure.

v) First consideration by the university appointments committee. During its deliberations, the UAC noted the confusion among SFU's appointments policies, namely: A10.01 for academic appointments; A10.06 for appointments to university chairs and university professorships; and A11.01 for tenure and promotion. The chair of UAC acknowledged that the UAC had no models or written guidelines for sorting out the confusion among the policies, and in its discussions pointed out that it was advisable to have more direction from the vice president academic on how to handle the application of these policies.

Neither the UAC nor the vice president appeared to provide such guidance to the department. However, the department did seek guidance from the associate vice president academic. She confirmed that there was agreement among deans to use this type of search without advertising for Tier I CRCs, and that it was common to fill endowed chairs without a search. The UAC did not mention this confirmation.

The UAC determined that the operative policies were A10.01 for appointing Dr. Noble to an academic position, and A10.06 for the appointment to a university chair. Policy A11.01 did not apply. It applies to faculty in tenure-stream positions when they are considered for tenure. This is clear from the text of policy A10.01, which stipulates that, "In exceptional circumstances, an appointment may be made granting the appointee tenure. There shall be a recommendation to this effect from the Departmental Tenure Committee." There is no mention of using the process of A11.01 for an appointment with tenure.

The UAC returned the file to the department on May 7, 2001, with the following instructions to Stephen Duguid from Mary Lynn Stewart, chair of the UAC [SF124]:

We are sending this case back to you as Chair of the Humanities Department, according to Academic Policy A10.06 (3.4), with the following recommendations for further action.

1. Dean Pierce has sought additional information regarding specific aspects of Dr. Noble's qualifications for the Woodsworth Chair. Our understanding of Policy A10.01 (4a) vii is that such requests for information by the Dean should be made to the Chair of the Search Committee. We recommend that the Search Committee endeavour to satisfy such requests.

2. The Committee understands that consideration of an appointment with tenure requires the recommendation of the Departmental Tenure Committee, according to Policy A10.06 (3.2.3). This recommendation should be included in the documentation forwarded to the Dean.

3. We would ask the Search Committee to include the following information in the documentation provided to the Dean, as per Academic Policies A10.01 and A10.06:

- A fuller CV for the nominee

- The nominee's statement of interest in the Woodsworth Chair
- A statement of the nominee's teaching ability, and
- All documentation required to meet the Employment Equity provisions as stated in Academic Policy A10.01 (4a).

In this communication, the UAC accepted the vice president's concern regarding equity and about obtaining additional information. The UAC chair explained to the committee of inquiry that she expected the department to supply the deficiencies without major difficulty or delay. The UAC did not request a response on point 2 of the vice president's concerns that the department first obtain the dean's permission to nominate a candidate for a university chair. The UAC did not appear to be concerned about this matter, and directed the department to proceed with the process.

The department was prepared to obtain the information requested by the dean and resubmit its recommendation to the UAC. Dr. Duguid sent the following email to dean Pierce on May 7, 2001 [SF125]:

We are directed by the University Appointments Committee to "endeavor to satisfy" your need for "additional information regarding specific aspects of Dr. Noble's qualifications for the Woodsworth Chair." While I think I have a good understanding of your concerns about Noble's "collegiality", you will have to give me some suggestions as to what kind of additional references would prove useful.

In response to Dr. Duguid's request for advice, dean Pierce proposed terminating the search, and starting a new search in fall 2001. Dean Pierce communicated this to Dr. Duguid in the following memorandum on May 8, 2001 [SF130, SF32]:

Following our meeting to discuss the recommendations of the University Appointments Committee, I am proposing that the Department of Humanities begin a new search for the J.S. Woodsworth Chair in the fall of 2001.

The Appointments Committee has identified significant problems in the present search process, calling into question the adequacy of the information regarding the candidacy of Dr. Noble, and requiring a more careful consideration of the Employment Equity provision of the Academic Appointments Policy. I believe these issues to be of such importance that they cannot adequately be dealt with given the time of year where faculty research and vacation plans would preclude active participation for both potential candidates and committee members in the search process. Consequently, a delay in the search process is advisable until such time as a new search committee can be constituted and a thorough re-examination takes place of the policies and procedures as they pertain to this search process.

Please be advised that your ultimate recommendation, like all endowed chair appointments, must be approved by the University Appointments Committee.

Dean Pierce's interpretation of the UAC position differs from the interpretation provided by the UAC. According to Professor Stewart's statements to the committee of inquiry, the UAC did not determine that any of its requirements were so significant as to require excessive delays in the process, much less a full re-hearing of the Noble case or the commencement of a new search.

The fallout from dean Pierce's memorandum was a cessation of the search. The department did not respond to the request from the UAC. The department could have complied with the UAC request for further information, despite the dean's proposal for a new search. The UAC, after all, is the most senior body to review an appointment before it proceeds to the president. SFU policies do not indicate that, in cases like this, a dean or anyone else is authorized to act as an intermediary between the UAC and the department. Because the department did not respond, the case remained inactive until the fall of 2001.

President Stevenson eventually confirmed that the process was curtailed. He announced on May 24, 2001 at a meeting of department chairs that the appointment was referred back to the department of humanities so that it could renew a search for the J.S. Woodsworth Chair and that Dr. Noble could be a candidate in that search [correspondence: Ogilvy, Renault-Blake Cassels & Graydon, June 28, 2001].

vi) Suspension of the appointment process. Cessation of the appointment process by no means ended the controversy over Dr. Noble's appointment. It led

to two inquiries into the process. Dr. Noble approached CAUT to look into the matter, on grounds that his academic freedom had been violated. CAUT announced its committee of inquiry on June 1, 2001.

On May 29, 2001, president Stevenson announced that he appointed Lyman Robinson, recently retired professor of law and associate vice president, legal affairs at the University of Victoria, to inquire into the search process and procedures that were utilized in the appointment process, with particular reference to the candidacy of Dr. David Noble, and to also inquire into whether there was any possible compromise of academic freedom. Professor Robinson delivered his report to president Stevenson on July 30, 2001.

One of the Robinson report's key recommendations was to lift the suspension of the appointment process for Dr. Noble, give the department of humanities until Oct. 1, 2001 to respond to the UAC request for information, and to allow the UAC to issue its determination.

Just a few days before the Robinson report was completed, the department of humanities tenure committee met on July 26, 2001 and approved granting tenure to Dr. Noble, with a vote of five in favour and one abstention [SF15].

The departmental review did not resume until the end of August 2001. This delay deprived Dr. Noble of receiving a timely decision with reasons.

Timeliness is important in this case. When the UAC referred the file back to the department of humanities in early May 2001, there was still strong support in the department for Dr. Noble's appointment. By the fall, support for Dr. Noble's appointment fell within the department from the virtually unanimous approval vote held earlier in the year.

There are no clear-cut reasons for this decline of support. Some of it may be due to the passage of time, as people lost interest, or surrendered to what they thought was an inevitable rejection of the departmental recommendation. Pressure from administrators may have been a factor, although department members who were interviewed denied that this was so. Nonetheless, department members knew that the president, vice president and dean all opposed Dr. Noble's appointment. Some department members were also concerned about the publicity the case received in the media, and were not pleased with Dr. Noble's public statements.

vii) The Robinson report. Professor Robinson listed 10 recommendations.

The first recommendation dealt with the suspension of the appointment process, subsequent to dean Pierce's recommendation to stop the process. Professor Robinson recommended the following:

The Department should be given a reasonable opportunity to fulfil the recommendations contained in the Report of the UAC. If, at any time before October 1, 2001, the Department believes it has been able to fulfil the recommendations of the UAC, the Department may resubmit its recommendation to the Dean of Arts in accordance with Policy A10.06, Paragraph 3.2.3

This recommendation led to a resumption of the appointment process.

The next six recommendations supported and elaborated on points raised in the instructions the UAC sent to the department of humanities on May 7, 2001 (see page 13).

Recommendation 8 stipulated that "the mandatory advertising requirement of Policy A10.04 not be applied to the appointment process that commenced in the year 2000." It also stipulated that, for future appointments, consideration should be given to amending the mandatory advertising requirement.

Recommendation 9 suggested that terms of reference for the J.S. Woodsworth Chair should be prepared by the appropriate committee and submitted to senate for approval and recommendation to the board of governors.

Recommendation 10 suggested a review of policies A10.01 and A10.06 for possible amendment to deal with appointments by invitation, specifically to require the department to submit in writing its proposed recruitment plan for approval by the dean.

Professor Robinson concluded that Dr. Noble's academic freedom was not violated. One of his main reasons for reaching this conclusion is that there was

not an employment relationship between Dr. Noble and Simon Fraser University. He says the following in reference to the CAUT Policy Statement on Academic Appointments:

My analysis of the CAUT Policy Staff (sic) and its reference to the working conditions again leads me to the conclusion that academic freedom is predicated upon there being an employment relationship between the "teacher" and the university or college.

Professor Robinson was using the CAUT Policy Statement on Academic Appointments instead of the CAUT Policy Statement on Academic Freedom. The academic appointments policy is more restrictive because it addresses the employment relationship. It is not surprising that, from reading the CAUT policy on academic appointments, Professor Robinson drew his conclusion about the presumption of an employment relationship.

The CAUT policy on academic freedom, that is quoted at the beginning of this report, is listed in the "policy" section of the CAUT web site, in close proximity to the policy on academic appointments. The CAUT Policy Statement on Academic Freedom is broader than the reference to academic freedom in the policy on academic appointments. It does not presume an employment relationship. It refers more generally to "academic freedom in universities."

Professor Robinson concluded as well that Dr. Noble's academic freedom was not compromised by actions of the university administration.

viii) Resumption of the appointment process. Some time late in August 2001, the department of humanities resumed the process of gathering information for a revised submission to the UAC. The process was already suspended for almost four months. The department carried the vote to proceed with the process by a majority of six in favour, four opposed and four abstaining.

The department also invited dean Pierce to its September 2001 meeting, to discuss the Noble appointment. Department members who attended the meeting informed the committee of inquiry that dean Pierce reported he knew of facts about Dr. Noble obtained in communications he received from about two dozen sources that convinced him to oppose the nomination. However, he did not divulge the names of his informants or the nature of their allegations [SF27]. Dean Pierce confirmed to the committee of inquiry that he had mentioned these communications and that he was unable to provide any details regarding them. He was uncertain whether he had identified the number of informants or what number he might have given.

In later correspondence with the Academic Freedom and Tenure Committee, dean Pierce stated that he opposed Dr. Noble's nomination because he was unable to complete an adequate due diligence check of Dr. Noble's suitability for the position. Dean Pierce stated that the two dozen sources informed his decision that the due diligence check was necessary.

Dean Pierce identified three options for the department: to proceed with the nomination; to start a new search; or to decide that it was not possible to meet the conditions set by the UAC. He indicated he preferred the third option, which would end the process and lead to a new search. Dean Pierce's conclusion that the department could not meet the conditions set by the UAC differs from the UAC's determination that the department could meet the conditions.

Dean Pierce remarked further that, "a small department must look to its future."⁴ This was an unusual comment, given that the dean was trying to dissuade the department from pursuing its decision to comply with the UAC's request for information. Why in this context would he talk about the department looking to its future? Was this comment a threat to the department? Some department members heard it as a threat. Others did not. The dean explained that he simply meant it was better to avoid mistakes, considering the importance of this appointment.

After the dean withdrew, a motion was put forward to the effect that the department not comply with the request from the UAC to provide the requested information. The vote on this motion was conducted by mail to allow absent members time to be informed of the motion and cast a vote. Five votes were

cast for the motion and five against, with four abstentions.

Following the vote, the department gathered additional information and re-submitted its recommendation to the UAC to appoint Dr. Noble as the J.S. Woodsworth Chair.

ix) Second consideration by the university appointments committee. When president Stevenson announced that he accepted the recommendation of the Robinson report to allow the department of humanities to resubmit its nomination of Dr. Noble to the UAC, he also said he would defer to the ultimate recommendation of the UAC. President Stevenson announced that he would support the UAC's recommendation and forward it to the board of governors. President Stevenson confirmed this decision in a memo on Aug. 8, 2001 to Mary Lynn Stewart, chair of the UAC:

Further to the requirements of the University Act, I will transmit a recommendation about Dr. Noble's candidacy for the J.S. Woodsworth Chair which conforms with the final recommendation of the University Appointments Committee to me, whether that recommendation is positive or negative.

This decision by president Stevenson placed considerable importance on the final UAC decision. We were therefore concerned to learn that two members of the UAC resigned between the review of the file in May 2001, and this one in November 2001. The committee of inquiry asked about the reasons for these resignations, and was told that one was due to the expiration of the member's term and the other was due to the member having new research responsibilities. This left just three people on the UAC. We are not sure why the vacated positions were not filled with new members. The committee of inquiry was told that these positions are difficult to fill.

The UAC reviewed the submission and returned the file to the department in late November 2001, with a recommendation for a new search, in the following memo from the UAC to Stephen Duguid, chair of the department of humanities:

The University Appointments Committee has carefully considered the revised appointment recommendation for the J.S. Woodsworth Chair in the light of the advice contained in our previous memo of May 7, 2001. The Committee has concluded that the appointment recommendation still fails to meet all the documentary requirements of the University's appointment policies. The Committee further notes that the appointment recommendation does not have the support of the Dean of Arts. Recent votes related to the appointment also indicate that the recommendation does not have the demonstrated support of the department, which is required by the Academic Appointments Policy (A10.01).

The University Appointments Committee is of the view that the policies and procedures contained in the academic appointments policies (A10.01 and A10.06) should be followed consistently. This would include those provisions relating to employment equity, advertising, supporting materials and the procedures set out for the appointment of specially funded chairs.

We therefore unanimously recommend that the Department consider opening a new search that conforms with the University's academic appointments policies.

According to this memorandum, the department recommendation failed to "meet all the documentary requirements of the university's appointment policies." The second paragraph of the memorandum spells out these documentary requirements, namely provisions relating to employment equity, advertising, supporting materials and procedures for specially funded chairs.

In a later interview, (Jan. 23, 2002) the committee of inquiry asked Professor Stewart, chair of the UAC, the meaning of the second paragraph that spells out the documentary requirements. She stated that this was not one of the committee's reasons for returning the Noble recommendation:

This paragraph is not an explanation of our rejection of the Noble application. It is to be understood with reference to future cases. The Committee was of the opinion, however, that, once the decision had been made not to advertise the position, insufficient attention was paid to other hiring policies and procedures.

Professor Stewart's interpretation differs from our reading of the memorandum. It also differs from Dr. Duguid's interpretation. He understood that these deficiencies were part of the UAC's reasons for returning the file to the department. He stated this in a Nov. 26, 2001, memorandum to vice president Waterhouse:

In the discussions with the UAC, however, it became very clear that issues of advertisements, employment equity, and the search process as per AC 10.01 were key considerations in their assessment of the department's recommendation.

Dr. Duguid was convinced that, for the UAC, the lack of advertising, and inadequate coverage of employment equity were key considerations for recommending a new search.

These reasons left no options for the department, except to start a new search. The options might have been different, however, if Dr. Duguid had received the explanation Professor Stewart gave to the committee of inquiry, which was that the issues of advertising, employment equity and the search process were raised with reference to future cases and not for the consideration of Dr. Noble's candidacy. At the time he received the memo, Dr. Duguid did not receive this explanation.

Policy A10.01 establishes grounds for a review of an appointment decision as follows:

1. That a procedural irregularity occurred during the appointment process which was likely to have materially influenced the recommendation with regard to the unsuccessful candidate;
2. That bias on grounds of personal prejudice existed (sic) at any level of consideration of the review of the candidates or whether any candidate had a reasonable apprehension that such bias existed;
3. That the consideration of the candidates was adversely affected by discrimination contrary to the terms of the Human Rights Act of British Columbia.

The UAC did not appear to apply these grounds when it examined the file in May 2001, or again in November. At this stage, the UAC is not required to apply these grounds or to review the procedures. Policy A10.01 requires the UAC to "consider" the case and either recommend the candidate for appointment or refer the matter to the department chair.

x) Appointment policies. After the UAC released its decision, Dr. Duguid wrote the following message to vice president Waterhouse on Nov. 26:

I do hope that as a result of this issue the University will look again at policies A 10.01 and A 10.06 and seek to bring them more in line or separate them completely. We were from the start operating under the assumption that A 10.06 was operative in this case and that as a result we would be permitted to "nominate" a candidate without an advertised search and that since it would be an appointment of an established scholar at the full professor level we would not be subject to the search rigours of A 10.01. In the discussions with the UAC, however, it became very clear that issues of advertisements, employment equity, and the search process as per AC 10.01 were key considerations in their assessment of the department's recommendation.

We did, I admit, conduct a hybrid search which may have opened us up to the scrutiny integral to AC 10.01, but our intent was always to nominate a single candidate based on discussions within the department and visits by individuals we thought might be appropriate to consider. Hence we did not (as the UAC seemed to think we should) request letters of reference from those other than our preferred nominee. And while we did consider several individuals from designated equity groups and were in compliance with the provisions of GP 19, we did not follow as strictly as we might have the equity provisions of AC 10.01 (there is no mention of equity provisions in AC 10.06).

Dr. Duguid points to some fundamental problems with SFU's appointment policies. He was not the first person to raise them. The UAC alluded to these problems in its first review, and suggested that the vice president academic clarify how to use the policies for future appointments.

The interaction of the two policies is confusing. The department received confirmation from Judith Osborne, the associate vice president academic, that it was possible to proceed without a search. However, A10.06 does not stipulate that a search for a new appointee can be done without advertising. A10.01 requires advertising for all new academic appointments, and spells out the responsibilities at each level: department, dean, vice president academic, university appointments committee and president.

The confusion in interpreting the policies may very well have worked to Dr. Noble's disadvantage. At the outset, the department followed existing practice

at SFU. It bypassed the advertising requirement and used a less than thorough equity search. The department's process was not challenged until after the president opposed Dr. Noble's nomination. Then the dean of arts, the vice president academic and the UAC identified problems with the department's process as reasons to start a new search.

xi) Appeal to the special university appointments committee. Unsuccessful candidates for a position may appeal under policy A10.01.6.1 as follows:

Unsuccessful applicants to A.1 positions (appointments of faculty to tenure-track appointments with or without tenure on appointment) may request that the University Appointments Committee review the search process ... If the University Appointments Committee has already considered the appointment, the President shall constitute another body with similar composition to review the case.

On Nov. 26, Dr. Noble requested a review of the UAC decision.

Since the UAC had already considered the appointment, the president would normally constitute another body to review the case. In the request for the review, Dr. Noble's counsel stated:

In the wake of the Lyman Robinson Report, the President publicly announced that he would effectively recuse himself from the process surrounding Dr. Noble's candidacy in order to "further the objective of reaching an appropriate and constructive resolution" in this case. In the circumstances, we assume that the President will agree that it is most appropriate for someone else to constitute the review body.

Judith Osborne, representing the university, and David Bell, representing the Simon Fraser University Faculty Association (SFUFA) agreed that the five newly elected members of the university tenure committee would act as a Special University Appointments Committee (SUAC).

Policy A10.01 sets out the grounds for review:

1. That a procedural irregularity occurred during the appointment process which was likely to have materially influenced the recommendation with regard to the unsuccessful candidate;
2. That bias on grounds of personal prejudice existed at any level of consideration of the review of the candidates or whether any candidate had a reasonable apprehension that such bias existed;
3. That the consideration of the candidates was adversely affected by discrimination contrary to the terms of the Human Rights Act of British Columbia.

The SUAC also noted an additional provision of A10.01, namely:

If the Committee is satisfied that, although any one or more of such grounds for review has been established by a candidate, the ground for review was rectified, neutralized or obviated or otherwise satisfactorily dealt with at or by virtue of a subsequent level of consideration of the appointment process, the Committee shall rule against the applicant.

This provision permits a ruling against an applicant even where bias has entered the decision-making process. Bias, or reasonable apprehension of bias, and violations of procedure can taint a process in subtle ways that cannot easily be detected. It is very difficult for a review committee to discern whether these violations have been corrected at subsequent levels of consideration.

For example, department members who were interviewed stated they felt that their decisions were not affected by the president's "plague" email, or by the dean's referral in a department meeting to negative comments about Dr. Noble from approximately two dozen unnamed sources. There is no reason to doubt the truthfulness of their comments. However, these interventions cannot be corrected at a subsequent level of consideration, since the president is at the highest level before a recommendation is forwarded to the board of governors.

Findings by a review committee of bias, reasonable apprehension of bias, or procedural irregularities should be sufficient grounds to merit a ruling in favour of an applicant or for a new process.

The SUAC did not need to invoke this provision, because it concluded that there were no bases for a complaint on any of the three grounds.

The SUAC met once briefly with Judith Osborne. She explained the constitution and mandate of the SUAC. The SUAC received a package of documents from Judith Osborne as well as submissions and other information provided by

counsel for Dr. Noble and by the university's lawyer. The SUAC rejected a request from Dr. Noble for a meeting in the form of "a full and public hearing." Dr. Noble argued that the hearing was necessary because credibility issues were "at the heart of the matter." The SUAC was "satisfied that this was not the case," and determined that "the written submissions provide a sufficient basis upon which to make a decision and that an oral hearing is not required or justified."⁵

The SUAC found the following:

1. On whether there were procedural irregularities:

There were no procedural irregularities in the appointment process prior to May 2001.

Subsequent to May 2001, there were no procedural irregularities that materially affected the appointment process in the information that is before us.

We disagree with these findings. The conclusions in the next section demonstrate that there were serious procedural irregularities in the appointment process.

For example, dean Pierce referred in the Sept. 20, 2001 meeting to anonymous comments he received from about two dozen individuals when he attempted to convince the department to start a new search. Yet, policies A10.01 and A10.06 require third-party information in the form of confidential written letters of reference. It is not clear how this information influenced department members when they held the mail-in ballot after the meeting. The UAC used the results of this mail-in ballot to conclude that the recommendation no longer had the demonstrated support of the department.

The SUAC appeared to be unconcerned with the impact of departures from policy, such as when dean Pierce engaged Provence Consulting for a due diligence check. The dean's involvement had an impact on the final outcome. His refusal to support Dr. Noble's nomination was a factor in the UAC decision to return the nomination to the department with a recommendation to commence a new search.

2. On the dean of arts seeking information from additional persons who held views that differed from those of Dr. Noble:

[It was] not all that surprising that the university would require input from persons who may not hold the same professional views as Dr. Noble in order to make an informed and responsible appointment decision.

Discussion on pages 7–8 of this report points out that there was no necessity for the university to seek input from persons who may not hold the same professional views as Dr. Noble, since some of the 12 referees on his list already fulfilled this requirement. Evidence for this is provided in the report by Ms. Dybikowski of Provence Consulting.

3. On Dr. Noble's refusal to permit Ms. Dybikowski to contact additional referees:

We agree with Robinson that it is not unreasonable to rely on Dr. Noble's refusal to co-operate with the University by providing or agreeing to other references as a basis for declining to recommend his appointment.

Dr. Noble was exercising his legal right to refuse. Under the circumstances his refusal was reasonable. The request for a due diligence check was highly irregular and virtually unheard-of for academic appointments. Dean Pierce was seeking additional information before he saw the department's recommendation and its file of information about Dr. Noble.

4. On whether there was bias on the grounds of personal prejudice:

The Committee sees nothing in the information before us that demonstrates bias "on grounds of personal prejudice" by any of those involved in the appointments process.

With respect to the "plague email," while we acknowledge the email may be perceived as blunt, we also acknowledge the right of a person to express their personal opinion in an informal email exchange. We agree with the University that there is nothing in the information before the Committee to suggest that President Stevenson's email to Vice President Waterhouse expressing his reservations about Dr. Noble inappropriately influenced Vice President Waterhouse or anyone else involved in considering Dr. Noble's candidacy.

The SUAC characterized president Stevenson's email as the expression of a personal opinion. The president is involved in the appointment process, since he makes the final recommendation on the file before it goes to the board of

governors. Under policy A10.01, the president considers the appointment recommendation of either the vice president academic or the UAC. He is not supposed to be involved in the process before then. Any comments he makes about a candidate to another university official must be construed as emanating from his office. Describing the email message as an informal exchange leaves the impression that it counted for little in the process. We disagree. Sending this email was contrary to the procedures outlined in the appointments policies. Even if the vice president, the dean, and department members were not influenced by the president's statement, his intervention gives the appearance of an attempt to influence their recommendations.

5. On whether consideration of Dr. Noble's candidacy was adversely affected by discrimination contrary to the terms of the Human Rights Act of British Columbia:

There is nothing before us to suggest that Dr. Noble has been subjected to any discrimination in the appointment process based on his political beliefs.

We have no evidence that, under the terms of the Human Rights Act of British Columbia, Dr. Noble's political involvements or political affiliations were at issue.

Conclusions

Two questions were posed to this inquiry:

1. Did the appointment process violate Professor Noble's academic freedom?
2. Did the appointment process adhere to established academic practice and, in particular, did it violate CAUT policies?

a) Academic Freedom

The standard for academic freedom used in this report consists of the following two documents in effect at the time of the appointment process: the CAUT Policy Statement on Academic Freedom; and Article 1.2 Academic Freedom, of the framework agreement between SFU and SFUFA. The documents are quoted on page 2 of this report.

From the evidence that was gathered and examined, we conclude that there were violations of Dr. Noble's academic freedom.

David Noble's nomination to hold the J.S. Woodsworth Chair in Humanities had all the markings of an outstanding choice. Dr. Noble is a distinguished historian of industry and technology with a reputation as an outspoken critic of corporate behaviour and university-corporate relations. He is also an activist. These qualities suit him particularly well for appointment to a chair that seeks to maintain the ideals and commitments of J.S. Woodsworth.

The departmental search committee voted unanimously, with one abstention, to nominate Dr. Noble for the appointment. Dean Pierce was at that time keen on the search committee's choice. The department endorsed the search committee's nomination. After receiving letters of reference, the department approved Dr. Noble's nomination with a vote of seven in favour, one opposed, and two abstentions.

From these initial decisions and discussions at the departmental level and with the dean, the appointment seemed destined to follow a routine path to the vice president, the president, and ultimate approval by the board of governors.

If the review criteria had remained focussed on the central expectations of the J.S. Woodsworth Chair, namely Dr. Noble's scholarship, teaching, community involvement, and activism, there is a reasonable expectation that he would have been appointed to the chair.

The process changed quickly and dramatically following interventions by the dean of applied sciences and by president Stevenson. They raised questions about Dr. Noble's appointment, because of concerns that he was uncooperative and not collegial. Dean Marteniuk referred to allegations that Dr. Noble had behaved rudely at a conference on technology and distance education that

was held at the SFU Harbour Centre. President Stevenson informed vice president Waterhouse that he would avoid Dr. Noble's appointment "like the plague." He also suggested to dean Pierce that there was need for a thorough background check on Dr. Noble's style of interaction, an extraordinary requirement for an academic appointment. Dean Pierce initiated a due diligence check on Dr. Noble, and informed Dr. Duguid that he could no longer support Dr. Noble's nomination. Dr. Duguid understood that dean Pierce was concerned about Dr. Noble's outspoken opposition to university-corporate relations and to educational technology use, although the dean denied this in his interview with the committee of inquiry. Dr. Duguid subsequently clarified that it is very possible that dean Pierce did not raise the issue of Dr. Noble having an outspoken opposition to university-corporate relations. Dr. Duguid stated that it is very possible that he assumed this to be the case given the intense nature of the opposition to the Noble appointment.

These interventions violated Dr. Noble's academic freedom. They imposed unreasonable requirements that concerned his style of engaging with academics and institutions that he criticized. They may have even raised concerns about his professional positions on telelearning and university-corporate relations. As an academic, Dr. Noble has the right to develop his own analyses and critiques. Academic freedom specifically includes the freedom to criticize the university. Yet the dean and the vice president academic expressed concern about Dr. Noble with regard to how he would "represent the university."

The department was initially keen on Dr. Noble because of the critical perspectives he would bring. Dr. Noble's robust criticism could offer a useful perspective at Simon Fraser University, in light of the university's considerable commitment to educational technology through programs like the New Media Information Centre (NewMIC) and the Technology, Innovation, Management and Entrepreneurship (TIME) Centre.

For greater clarity, the specific violations of Dr. Noble's academic freedom are listed below.

i) Freedom to criticize the university. When dean Pierce, and later vice president Waterhouse, imposed a new requirement for the position to "represent the university" they introduced a criterion that interfered with Dr. Noble's academic freedom. Dr. Noble already had a reputation as a critic of commercialization at York University. His academic freedom protected him from any reprisals. Simon Fraser University should respect the same right of academic freedom. A requirement to represent the university is inconsistent with the freedom to criticize the university. The requirement may not have meant that he was expected to serve as an official representative of the university. Nonetheless, the requirement limits his freedom as a critic. He might not be free to speak on any matter he wished regarding the university, especially in light of SFU's involvements in telelearning and distance education.

The J.S. Woodsworth Chair is expected to represent the commitments of J.S. Woodsworth, a well-known and outspoken critic of many contemporary institutions of his time. Dr. Noble is in many ways a similar outspoken critic of contemporary institutions of his time. The department of humanities considered these qualities desirable. Dr. Duguid made this clear in his letter to five of Dr. Noble's referees:

Simon Fraser is very active in the areas of telelearning and distance education and these initiatives deserve a critique that is coherent and civil, a critique that we hope David Noble could offer.

The department was more concerned with having a critic in the tradition of J.S. Woodsworth than a representative of the university. It would have had such a person in David Noble.

ii) Freedom to exercise one's legal rights as a citizen. Dr. Noble exercised his right under the B.C. Human Rights Act when he refused to allow Ms. Dybikowski of Provence Consulting to contact certain individuals for a background check.

Dean Pierce and vice president Waterhouse violated Dr. Noble's academic freedom when they later used this refusal as a reason to recommend terminating the appointment process.

When he refused to allow the additional contacts, Dr. Noble was exercising his legal right as a citizen. The CAUT policy on academic freedom specifically prohibits penalizing someone for exercising his or her legal rights as a citizen.

The SUAC notes in its report that it was:

not unreasonable to rely on Dr. Noble's refusal to co-operate with the University by providing or agreeing to other references as a basis for declining to recommend his appointment.

In explaining this conclusion, the SUAC quotes from the Robinson report:

Under the Act [Section 27 of the Freedom of Information and Protection of Privacy Act], a prospective employer must obtain the permission of the candidate before soliciting a reference. The candidate is entitled to decline to grant such permission. However, where an employer seeks specific information about a candidate that the employer needs to evaluate the candidate's ability to perform the roles and functions of the position, and the information is not forthcoming, the employer may decide to prefer another candidate.

We disagree with the SUAC conclusion. We do not think that Simon Fraser University had grounds to use Dr. Noble's refusal as a reason to deny his appointment. Dean Pierce was attempting to do a background check on Dr. Noble's style of interaction. This is different from the criterion mentioned by Professor Robinson about seeking specific information to evaluate a candidate's ability. Furthermore, the specific information was available from referees on the department's list.

The request by dean Pierce was also contrary to the second condition noted by Professor Robinson, namely that the information is not forthcoming. Dean Pierce could not have known if the information was forthcoming or not, since he had not yet seen the appointment file, and many of the letters from Dr. Noble's 12 referees had not yet arrived.

iii) Freedom in carrying out research and publishing the results. According to Dr. Duguid's Feb. 22, 2001 memorandum to department members, dean Pierce was concerned about Dr. Noble's "outspoken opposition to university-corporate relations" and "his outspoken opposition to educational technology use." In later correspondence with the Academic Freedom and Tenure Committee, Dr. Duguid stated that it is very possible that he assumed dean Pierce's statement about outspoken opposition to university-corporate relations to be the case given the intense nature of the opposition to the Noble appointment. Dean Pierce did not respond in writing to the claim in this memorandum, although he stated in his interview with the committee of inquiry that this was not an accurate summary of his concerns. They were nonetheless perceived to be his concerns, and clarification was needed and apparently not forthcoming at this stage.

Dr. Noble is well known for his research in these areas. His 1977 book *America by Design: Science, Technology, and the Rise of Corporate Capitalism* is a classic in the field. A recent book of his offers a substantial critique of educational technology.⁶ The department of humanities was keen on appointing Dr. Noble because of his expertise in these areas.

In order to satisfy these concerns, Dr. Noble might have to alter his positions on university-corporate relations and educational technology use. The CAUT policy on academic freedom, and Article 1.2 of the framework agreement between Simon Fraser University and Simon Fraser University Faculty Association, state that academics must be free to make statements regardless of prescribed doctrine. Dr. Noble's opposition to, or support for, university-corporate relations or educational technology use must not be an issue in considering him for an appointment, because to do so would constitute a serious violation of his academic freedom.

There is an irony of raising these particular issues. J.S. Woodsworth himself was an outspoken critic of corporate behaviour.

iv) Freedom of discussion. Inquiries into Dr. Noble's style of interaction and his collegiality violated his freedom of discussion that is explicitly protected in

the CAUT Policy Statement on Academic Freedom. Dr. Noble holds strong opinions, and his expression of them may at times be abrasive. These characteristics should have no bearing on an appointment decision. Many academics hold strong opinions. This is a characteristic of a profession of experts. Many academics may also occasionally express their opinions in ways that are abrasive. There is a very broad consensus in the profession that they must not be penalized in any way for how they express their opinions, unless the expression infringes on the rights of others.

A current policy (A11.02.2.3) of the framework agreement between SFU and SFUFA lists effectiveness of cooperation with colleagues as a criterion to evaluate academic staff for contract renewal, tenure and promotion. This requirement is contrary to generally accepted norms for evaluating faculty performance.

Academic staff are evaluated on the quality of their performance. Evaluation is typically based on merit in teaching and research, and on reasonable involvement in service to the community, the profession and the administration of the university. Some academic staff are very effective at cooperation with colleagues, and others are not. Academic freedom gives them the right to be more or less argumentative with colleagues, as long as they do not violate anyone else's rights. Even in teaching, some professors may use more argumentative approaches. Academic freedom gives them the right to do so as long as they do not violate students' rights.

b) The Appointment Process

The appointment process that considered Dr. Noble for the J.S. Woodsworth Chair failed to adhere to established academic practice on several counts. It also violated CAUT policies.

i) Conducting an appointment process without advertising. The lack of advertising was not a reasonable cause for terminating the process to consider Dr. Noble's appointment.

While conducting an appointment process without advertisement is unusual, the department of humanities was attempting to follow a common practice at SFU. The department received confirmation from the associate vice president academic, who noted that deans had agreed to waive the advertising requirement for Tier 1 CRCs, and that it was common for endowed chairs to be filled without a search. The department did a form of closed search without advertising. While this process may not have strictly adhered to the practices described by the associate vice president, as far as we know, dean Pierce did not object to the process used by the department. The apparent selective use of A10.01 against Dr. Noble's appointment would amount to discriminating against him.

The department did an energetic and conscientious job of identifying suitable candidates, and trying to satisfy equity requirements. Nonetheless, Dr. Duguid noted that in discussions with the UAC, issues of advertisements and employment equity were key considerations in their decision to return the file and recommend a new search. We think that the UAC's response was unreasonable. The department was attempting to use a common practice, and had informed the dean.

ii) Inappropriate interventions by the president. Early in the process, before the department determined the candidate it would recommend for the Woodsworth Chair, president Stevenson told vice president Waterhouse that he would avoid the appointment of Dr. Noble "like the plague."

The president inappropriately involved himself in the appointment process by telling the vice president academic that he opposed a candidate, when the final recommendation would eventually land on the president's desk. This action contaminated the appointment process. The president is the last official to receive the recommendation before it proceeds to the board of governors. The president should not try to influence a recommendation that he will eventually receive.

The SUAC concluded that the plague email was the expression of a personal opinion in an informal email exchange. We disagree. This was not a casual or personal note. It was a written message from the president to the vice president about a candidate for a prestigious position. President Stevenson wrote to vice president Waterhouse in his capacity as president of the university. His message must be assessed in relation to how the appointment process is supposed to work. The appointment process makes no provision for the president to be involved until he receives a recommendation from the vice president or from the UAC. There is good reason for the president to not be involved until he receives the recommendation. People involved in the process at lower levels might be influenced by the president's intervention and might see it as an attempt to influence the outcome.

President Stevenson later removed himself from the process by agreeing to forward the UAC's final determination to the board of governors. However, the damage to the process was already done. The president expressed his view of a candidate before the process could exercise the candidate's right to a full determination by the department of humanities, and reviews by dean Pierce, vice president Waterhouse and the UAC. The process became tainted because each of these parties knew the president's strongly stated opposition to appointing Dr. Noble before they saw all the evidence and made their own recommendation.

iii) Commissioning a background check by an outside consultant. Dean Pierce appeared to prejudge the case by commissioning a background check on Dr. Noble before the department received letters from all of Dr. Noble's referees. SFU's appointment policies make no allowance for a dean to commission an outside consultant in this manner.

There was no authorization from SFU policies, nor was there any apparent rationale for doing a background check. Dr. Noble had already provided the names of 12 referees, double the number required for the appointment of a university chair. Until he received copies of their reference letters, dean Pierce had no way of knowing what these 12 referees would say about Dr. Noble. Dean Pierce wanted comments about Dr. Noble from people involved in information technology, and from individuals who disagreed with Dr. Noble's views. He need not have commissioned an outside consultant for this information, since several referees on the list Dr. Noble submitted were involved in information technology and some held views that differed from those of Dr. Noble.

Dean Pierce had also not yet seen the department's file or its recommendation. The department may have already addressed the questions that concerned him. To assure himself, he could have asked the department chair to ensure that the department addressed his concerns. This would be in keeping with SFU's appointments policies.

President Stevenson suggested to dean Pierce that a thorough background check be done on Dr. Noble, noting that Dr. Noble had a controversial reputation at MIT and York. This may have had something to do with dean Pierce's reason for commissioning Provence Consulting.

Vice president Waterhouse was responsible for reviewing the file, to ensure that proper procedure was followed. Yet, the committee of inquiry saw no evidence that the vice president reviewed the submissions of the department and dean for irregularities that could have been prejudicial to a positive outcome of the nomination. The vice president found a shortcoming in the department's case regarding equity, but the committee of inquiry saw no evidence that he considered the possible irregularity of the dean's collecting unwritten references by means of a third party instead of requesting written letters through the department head. There was no evidence that the vice president considered whether this departure from procedure could have compromised the administration's assessment of the department's case. There was no evidence that the vice president questioned whether dean Pierce proceeded to gather this information

too early in the proceedings, instead of waiting to request more information after dean Pierce gave full consideration to the material that the department was preparing to put before him.

iv) Denying the validity of reference letters. Dean Pierce rejected the usefulness of reports from referees named by the candidate. The department collected reference letters in conformity with SFU policies. These reference letters have standing in the appointment process, and therefore every person involved in the process must seriously consider them. The committee of inquiry saw no evidence that the letters received adequate consideration.

Letters from referees named by candidates are standard practice for academic appointments. We are not aware of any university that uses a different method for obtaining letters of reference.

v) Inappropriate use of unconfirmed information. Dean Marteniuk mentioned to dean Pierce unconfirmed information about Dr. Noble's alleged behaviour at a conference. This information would not be determinative to an appointment decision, even if the accuracy could be confirmed. It concerned a single incident at a conference about a heated exchange between two individuals. The information dean Marteniuk mentioned was an allegation that Dr. Noble acted rudely towards Tom Calvert.

According to the information received by the committee of inquiry, the alleged behaviour did not take place. Nonetheless, dean Pierce proceeded with a due diligence check on Dr. Noble, presumably in part due to the unconfirmed information about Dr. Noble's behaviour at a conference.

Dean Pierce also referred to unconfirmed comments from unnamed individuals during a department of humanities meeting where he advised the department to start a new search. Unconfirmed comments from unknown sources have no place in SFU's appointments procedures. More importantly, third party comments of this nature are not legitimate information for an appointment decision. They deny the opportunity for fact finders or for the applicant to discover confirmations or denials of the allegations. Comments from third parties must either be in writing, or clearly attributed to named persons who can verify what they are alleged to have said.

vi) Adding a requirement for the position after the department selected the candidate. Dean Pierce wrote to Dr. Duguid and vice president Waterhouse on March 12, 2001, informing them he decided to proceed with further background checks on Dr. Noble, due to the "high profile nature of the position, in particular representing the university to the wider public ..." (see page 10 of this report). This was after the department of humanities approved a recommendation to appoint Dr. Noble.

In his April 17, 2001 submission to the UAC, vice president Waterhouse also specified representing the university as a requirement of the position.

This was a new requirement for the position. As far as we know the department did not expect the J.S. Woodsworth Chair to represent the university, and did not describe such an expectation to Dr. Noble.

Adding this requirement after Dr. Noble was already interviewed and selected by the department is contrary to fair appointment procedure.

vii) Insufficient review by the special university appointments committee. The SUAC denied Dr. Noble's request for a hearing with the committee, on grounds that the written submissions it received provided a sufficient basis upon which to make a decision. Yet the committee also decided that Dr. Noble's written submissions were inadequate. It would seem reasonable for the SUAC to either allow a hearing or to allow for Dr. Noble to submit in writing the additional information it required. There was room for the committee to more thoroughly examine information concerning Dr. Noble.

The committee dismissed president Stevenson's "plague email" as the expression of a "personal opinion in an informal email exchange."

viii) Bias. To this point, the conclusions demonstrate serious violations of ac-

ademic freedom and serious lapses in the implementation of SFU procedures. We now turn to the question of whether there was bias, or reasonable apprehension of bias, by individuals involved in the process.

The *Oxford English Dictionary Online*⁷ defines bias as follows:

v. To give a bias or one-sided tendency or direction to; to incline to one side; to influence, affect (often unduly or unfairly)

n. An inclination, leaning, tendency, bent; a preponderating disposition or propensity; predisposition towards; predilection; prejudice.

Bias, or reasonable apprehension of bias, exists in a hiring process if decision-makers are predisposed in favour of or against a candidate. They may rely on factors that are inappropriate to the decision-making process, or make a decision about a candidate before examining the evidence that has been collected during the appointment process. If there is bias, the decision-making process is unfair.

SFU's appointment procedures set out an orderly progression of steps, from consideration of candidates by a department, through stages of review by senior officials, until a recommendation eventually reaches the board of governors. Every individual involved in the process is expected to act fairly and without bias. They are charged to weigh the evidence before them, and to not rely on preconceived notions about the candidate.

We find bias, or reasonable apprehension of bias, on the part of the president and the dean of arts.

President Stevenson formed an opinion about Dr. Noble while his nomination was still being considered by the department of humanities. He told dean Pierce that a thorough background check should be done on Dr. Noble's style of interaction, and he told vice president Waterhouse that he would avoid Dr. Noble's appointment "like the plague." President Stevenson had, as yet, no information from the search committee, or any information about its deliberations, the documentation submitted by Dr. Noble, or the statements by his 12 referees. President Stevenson showed bias, or reasonable apprehension of bias, in that he showed a preponderating disposition against appointing Dr. Noble.

We consider dean Pierce's actions to be biased, or to give rise to a reasonable apprehension of bias, on several grounds. He was disposed against appointing Dr. Noble very early in the process. It appears that dean Pierce was influenced by hearsay he received from dean Marteniuk concerning Dr. Noble's collegiality, and by undisclosed statements dean Pierce heard from some two dozen sources who he did not name.

Dean Pierce commissioned Provence Consulting to do a due diligence check on Dr. Noble. Such a check is not mentioned in SFU policies. Even if it were, a due diligence check should be necessary only in extraordinary circumstances, and only after reviewing all the information already collected about the candidate. However, in this case, dean Pierce had not yet seen the department's file or all of the letters of reference. He appeared to dismiss most of the reference letters as unreliable before he saw them.

Dean Pierce decided that he would not support the nomination of Dr. Noble for the J.S. Woodsworth Chair, in part on grounds that Dr. Noble did not allow Ms. Dybikowski to contact four people, whose names dean Pierce gave to her for the purpose of obtaining further information about him, and that later Dr. Noble refused to provide additional names to Ms. Dybikowski other than the 12 referees he had already listed for the department.

The dean's decision to go beyond the 12 reference letters, combined with his apparent ready acceptance of unsubstantiated hearsay he received from dean Marteniuk, and undisclosed stories he heard from informants who he would not identify (as in the case of the meeting with the department on Sept. 20, discussed on page 20) suggests a significant apprehension of bias on the part of the dean.

Use of unnamed sources also denies to those engaged in fact-finding and to Dr. Noble the opportunity to confirm or deny the allegations attributed to the sources.

Recommendations

a) Appointment of the J.S. Woodsworth Chair

We recommend that Simon Fraser University acknowledge that the department of humanities conducted a fair and thorough process, and that the department's original recommendation should be accepted, to offer to Dr. Noble an appointment with tenure, and appointment to the J.S. Woodsworth Chair in the Humanities for a term of between five and 10 years as stipulated in policy A10.06.3.1 "Term of Appointment." We think that this is the only fair resolution of this case.

A relatively straightforward appointment was inappropriately derailed after violations of SFU procedure, violations of Dr. Noble's academic freedom, and interventions by SFU officials that showed bias or reasonable apprehension of bias.

The department of humanities recommended that Dr. David Noble should be appointed to the J.S. Woodsworth Chair in the Humanities. Investigation by the committee of inquiry showed that the department conducted the appointment process in a manner that was fair, and consistent with practice at SFU for appointing people to university chairs. The department's strong endorsement might have followed a routine path for approval all the way to the board of governors.

A review such as this one could recommend a new process conducted by individuals who are neither biased nor tainted by the original process. However, we have found bias or reasonable apprehension of bias on the part of officials all the way up to the president of the university. We are not convinced that Dr. Noble would receive a fair hearing even if his consideration was repeated.

President Stevenson showed bias, or reasonable apprehension of bias, by telling the vice president academic that he would avoid Dr. Noble's appointment "like the plague," and suggesting to dean Pierce that there was need for a thorough background check on Dr. Noble's style of interaction.

Dean Marteniuk of applied sciences mentioned allegations about Dr. Noble's behaviour that were found to be unsubstantiated.

Dean Pierce commissioned a background check on Dr. Noble by an outside consultant before he saw the department's file or all of the 12 references requested by the department. He also appeared to show bias, or a reasonable apprehension of bias, by suggesting to Dr. Duguid that he would accept the department's second choice candidate, even though the department had not even requested letters of reference for its second choice candidate. The second choice candidate may have had a strong application. Nonetheless, we find it unusual that dean Pierce would offer to approve this candidate without following the appointment process.

The second consideration by the UAC concluded that the department's recommendation failed to meet all the documentary requirements of the appointments policies. The UAC recommended that the department consider opening a new search that conforms with the university's academic appointments policies. Yet, the UAC did not appear to address the seriousness of bias, and departures from SFU procedures. Had it done so, the UAC may have reached a different conclusion.

In conducting its review, the SUAC is required to consider procedural irregularities and bias. We are not convinced that the SUAC thoroughly considered these matters. Furthermore, the SUAC denied Dr. Noble the opportunity to appear at its deliberations.

b) Thorough Review of Appointments Policies

We found that there is confusion between policies A10.01 and A10.06. This undesirable situation should be remedied.

The chair of the UAC acknowledged that the UAC had no models or written guidelines for sorting out confusion among the appointments policies.

In a Nov. 26, 2001 memorandum to the vice president academic, the chair of the department of humanities stated his hope that the university would reexam-

ine policies A10.01 and A10.06 and seek to bring them more in line or separate them completely.

Appointments policies are negotiated, as part of the memorandum of agreement between the university and the faculty association.

We therefore recommend to the administration and to the Simon Fraser University Faculty Association that they each conduct thorough reviews of the appointments policies prior to the next round of collective bargaining.

Matters that require investigation include the following:

1. Provide clarity about the evidence that may be considered in the appointment process. We recommend that documentary evidence should be restricted to what is contained in the appointment file prepared by the department, including additional information that the dean may request from the department, and the recommendations added by the dean, vice president academic, UAC and president. The only other allowable evidence should be from direct contact with the candidate. Hearsay should not be allowed. Background checks should not be allowed.

2. Clarify the relationship between policy A10.01, Academic Appointments, and A10.06., Appointment of Specially Funded University Chairs, University Professors and Research Chairs. We recommend that policy A10.01 must be followed for every academic appointment. A10.06 provides additional procedures for the positions named in the title.

3. Insure that all aspects of the policies are in compliance with the B.C. Freedom of Information and Protection of Privacy Act.

4. Have clear statements of responsibilities and lines of communication between all parties involved in the appointments process. Particular attention should be given to clarifying the lines of communication with the UAC.

5. Consider removal of clause 5.3 in policy A10.01, Academic Appointments, dated April 26, 2002. An applicant who is rejected may request a review by the UAC. If the applicant has established procedural irregularities, bias, or discrimination contrary to the Human Rights Act of British Columbia, clause 5.3 allows the UAC to rule against the applicant if these grounds were "rectified, neutralized or obviated or otherwise satisfactorily dealt with at or by virtue of a subsequent level of consideration of the appointment process." Analysis of the difficulty presented by this clause can be found on page 19.

6. Insure that there is an opportunity for any parties who may be adversely affected to have an opportunity to meet the allegations made against them. Allegations should be sufficiently detailed for an investigation by fact finders.

c) Advertising

Conducting an appointment process without advertising is contrary to established academic practice of holding open advertised searches to fill academic positions. A search without advertising is contrary to the CAUT policy on academic appointments. When Dr. Noble's appointment was being considered, policy A10.01 required advertising of all academic positions.

There are good reasons for advertising all positions. Advertising a position ensures far more than with a closed search that potential applicants from equity groups will have the opportunity to apply. Open advertising also contributes to transparency of the process.

Nonetheless, deans at SFU had agreed to conduct appointments for Tier 1 CRCs without advertising, and it was common for endowed chairs to be filled without a search. The existence of these practices was confirmed by the associate vice president academic. Policy A10.01 has since been revised to include the following clause 4, "Non-Advertised Positions:"

In exceptional circumstances, a department may seek permission to proceed other than by way of an advertised search, for example, Tier 1 Canada Research Chairs or spousal appointments. A written request for an exemption must be submitted to the Dean, along with a detailed recruitment plan for the position. If a candidate has already been identified, the candidate's curriculum vita should accompany the request. If the

Dean supports the request he/she should forward it to the Vice President, Academic, whose decision is final.

This new language tightens up the practice that was previously less formal. However, it classifies Tier 1 Canada Research Chairs as exceptions that do not require advertising. It is preferable to advertise all positions, including Tier 1 CRCs. Nevertheless, we acknowledge that SFU now stipulates that searches without advertising are permitted only in exceptional circumstances.

Clause 4 is also a step forward, because a search without advertising requires approval of the vice president academic. However, the vice president represents only one party to the Memorandum of Agreement. A waiver based on exceptional circumstances should require the consent of both parties.

We therefore recommend an amendment to clause 4 to also require approval by the Simon Fraser University Faculty Association.

d) Training

Throughout this appointment process there appears to have been confusion among SFU personnel over the interpretation and application of the appointments policies.

The department and the dean of arts appeared, at times, to have different interpretations of the application of policies A10.01 and A10.06.

President Stevenson suggested a thorough background check on Dr. Noble, something that is not at all contemplated in the appointments policies.

The dean of arts commissioned an outside consultant, an action which, in our view, was a violation of policy A10.01.

The UAC raised a question about the department's decision to conduct an appointment process without advertising, even though similar processes were common for endowed chairs.

The chair of the UAC noted that the UAC considered it advisable to have more direction on how to handle the application of the appointments policies.

In light of these observations, we recommend that senior officials of Simon Fraser University and of the Simon Fraser University Faculty Association jointly organize a program to train staff who will sit on appointment committees. Ideally this should take the form of an annual workshop for people who are new to the process. Over time this should improve the application of the SFU appointments policies.

e) CAUT Policies

We recommend that CAUT, through its standing committees, review its policies and model clauses in light of the findings of this inquiry.

On appointments policies, we think there should be mention of how to deal with endowed and specially funded chairs. Allowable documentation is another important matter, specifically on issues such as the use of outside consultants, the use of hearsay, and the use of any information outside the department file.

Appendices

a) CAUT Policy

The Policy Statement on CAUT Committees of Inquiry and Investigating Committees governed the inquiry's procedures.⁸

Clause 6 of the CAUT policy statement states:

The report of the committee of inquiry shall state:

1. Definite conclusions on the issues submitted to the committee of inquiry by the Academic Freedom and Tenure Committee and/or upon a formulation by the committee of the issues involved; and where applicable;

2. Whether proper procedures were used to handle the complaint; and

3. Whether there were deviations from the CAUT policy statements.

The report will be restricted to findings of fact and conclusions drawn from them.

Where the inquiry could not state definite conclusions, the report shows how various and possible conflicting conclusions can be drawn from the facts, depending on perspective and interpretation.

Under clause 2 of the CAUT policy:

The appointment of such a committee [of inquiry] will be preceded wherever appropriate by attempts to resolve the complaint informally or to establish an arbitration or jointly named CAUT-university committee of inquiry, which will report to the CAUT, the university, and the grievor(s). The recommendations of a joint committee shall normally be binding on the parties that establish it, and its procedures will be those appropriate to an arbitration.

The committee of inquiry was not party to any such attempts to resolve the dispute before its appointment. The committee did offer to arrange for mediation on the question of whether the department's nomination of Dr. Noble should go forward to the UAC. The members of the committee of inquiry thought that if the department remained committed to its decision of Feb. 20, 2001, the UAC should consider the case forthwith. Although the suggestion of mediation was well received by the administration and CAUT, it became unnecessary when the administration implemented a recommendation of the Robinson report that the case go forward to the UAC.

b) Committee Procedures

Clause 5 of the Policy Statement on CAUT Committees of Inquiry and Investigating Committees states:

The committee of inquiry shall initially proceed by means of personal conferences with individuals having pertinent information or viewpoints, whether members of the faculty, members of the governing board, administrative officers of the institution or persons not connected with the university. Under ordinary circumstances, such persons shall be interviewed separately. The committee of inquiry shall, insofar as possible, give each party to the dispute against whom material adverse information has been received, a statement as to its content and the opportunity to rebut it. Whenever the committee of inquiry bases findings upon information given to it on condition that the source not be disclosed, it shall so state.

The committee of inquiry followed these procedures as closely as possible. After a round of interviews, the committee members compared notes and produced a written version of each interview. They sent the written version to the interviewee to confirm the facts and provide amplification as needed. The committee did not seek confirmation in cases where the committee determined that the information it received was not evidentiary (i.e., it would not be quoted or used as evidence in a report). In cases where the committee sent the interviewee a transcription of the interview and received no response, the transcription was used as evidence on the assumption that the informant had been given the opportunity to respond, and had raised no objection.

To ensure fairness to anyone who might be affected in a material adverse way by findings of this report, the Academic Freedom and Tenure Committee added the procedure in clause 6(k) of the CAUT Procedures in Academic Freedom Cases (April 2002):

With the approval of the Academic Freedom and Tenure Committee and to ensure fairness to persons potentially affected in a material adverse way by findings in the committee's report, the executive director will send a fair summary of the information upon which such findings could be based to such persons, allowing a reasonable time for them to respond.

The fair summaries were sent by the professional officer for the Academic Freedom and Tenure Committee, because the executive director was not involved in this inquiry.

The committee of inquiry received a large body of documents from the Simon Fraser University Archivist in anticipation of a request under the freedom of information legislation of British Columbia. These documents are identified in the report as SF with the number assigned to them by the university: e.g., SF33.

The committee of inquiry also obtained taped recordings of conversations held between Dr. Noble and various parties, particularly the chair of the department of humanities and the dean of the faculty of arts. These tapes were transcribed and checked. The transcriptions are cited.

The committee of inquiry also received transcriptions of conversations taken from the dean's voice mail.

The committee of inquiry received written submissions from professors Angus, Kitching and Zaslove and a written chronology of events from Professor Duguid.

CAUT staff collected newspaper articles and the transcription of a televised coverage of the case from the CBC.

The Academic Freedom and Tenure Committee was also aware that James Turk, executive director of CAUT, was one of Dr. Noble's 12 referees. Dr. Turk had no direct involvement with the committee of inquiry. All of the committee of inquiry's staff contact was with Neil Tudiver, professional officer for the Academic Freedom and Tenure Committee, and administrative support staff assigned to the Academic Freedom and Tenure Committee. Dr. Turk did not participate at all in this inquiry or in any of the deliberations regarding the content of the report by the committee of inquiry or this report by the Academic Freedom and Tenure Committee. Until this final draft was approved by the CAUT Executive Committee for publication, confidential drafts of the report were read only by Dr. Tudiver and Paul Jones, professional officers assigned to AF&T, legal counsel and members of the Academic Freedom and Tenure Committee.

c) Interviews

Cooperation from all parties was as follows:

- July 12, 2001: SFUFA, Warren, Stewart and Pierce
- July 13, 2001: Waterhouse, Stevenson, Nesbitt, Angus, Stouck and Marteniuk
- July 16, 2001: Duguid and Reickhoff
- Aug. 9, 2001: Calvert [by telephone] and Dybikowski
- Aug. 13, 2001: David Noble
- Aug. 20, 2001: Zaslove
- Jan. 22, 2002: (after meeting with SFUFA executive) Mezei, Zaslove and Kitching
- Jan. 23, 2002: Stewart, Burton, Duguid, Sheppard, Stouck and Dutton
- Jan. 24, 2002: Fellman, Pierce, Angus and Grayston

d) Abbreviations Used in this Report

- CAUT: Canadian Association of University Teachers
- IT: Information Technology
- MIT: Massachusetts Institute of Technology
- NewMIC: New Media Innovation Centre at SFU
- SFU: Simon Fraser University
- SFUFA: Simon Fraser University Faculty Association
- UAC: University Appointments Committee
- SUAC: Special University Appointments Committee
- TIME: Technology Innovation Management and Entrepreneurship Centre at SFU
- UCLA: University of California at Los Angeles

Endnotes

1. Kenneth McNaught, *A Prophet in Politics*. Toronto: University of Toronto Press, 1959, 67–68, 91–92; Grace MacInnis, J.S. Woodsworth. Toronto: MacMillan, 1953, 145, 261–280, especially 270; Harry Gutkin and Mildred Gutkin, *Profiles in Dissent: The Shaping of Radical Thought in the Canadian West*. New West Publishers, 1997, 284, 289.

2. See comments by vice president Waterhouse on pages 12–13. Also see discussion of J.S. Woodsworth's commitments and his views of corporate behaviour on page 3.

3. "It's About Time: Technology Centre Launched," *SF News*, May 5, 1999; "The Year That Was," *Simon Fraser University News*, vol. 20, no. 1, Jan. 11, 2001.

4. Correspondence, Angus/Pawley, partially confirmed in correspondence, Duguid/Pawley. Specific quotation not denied in correspondence Pawley/Pierce.

5. "Report of the Special University Appointments Committee," Aug. 22, 2002. Members of the Committee were: Dr. Stephen Easton, Faculty of Arts, Chair; Dr. Iris Geva-May, Faculty of Education; Peter Anderson, Faculty of Applied Science; Dr. Howard Trottier, Faculty of Science; and Dr. Gary Mauser, Faculty of Business.

6. *Digital Diploma Mills: The Automation of Higher Education*, New York: Monthly Review Press, 2001.

7. *Oxford English Dictionary Online*, Oxford University Press, 2003.

8. This policy, approved by CAUT Council in May 1997, was replaced by the policy on CAUT Procedures in Academic Freedom Cases, approved by CAUT Council in April 2002. The inquiry continued to use the procedures for the policy under which it was established. The Academic Freedom and Tenure Committee also utilized the procedure in clause 6(k) of the new CAUT procedures to ensure fairness to anyone who might be affected in a material adverse way by findings of the report. This is discussed on page 2.

Exhibit "3" in the
affidavit of Brenda
Austin-Smith
sworn January 16, 2022

CAUT Report on Academic Freedom at the Faculty of Law, University of Toronto

October 2020



Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

www.caut.ca

CAUT Report on Academic Freedom at the Faculty of Law, University of Toronto¹

This report concerns events surrounding the decision by the Dean of the Faculty of Law at the University of Toronto to terminate the hiring process following the selection of Dr. Valentina Azarova as Director of the International Human Rights Program (IHRP). This action was alleged to have been precipitated by pressure exerted by a sitting judge and donor to the University in apparent violation of Dr. Azarova's academic freedom.

The CAUT Academic Freedom and Tenure Committee has reviewed the evidence and testimony related to the case, much of which is publicly available. The Committee has concluded that there is sufficient evidence to support the allegations of a serious breach of Dr. Azarova's academic freedom such that CAUT censure of the University of Toronto Administration is warranted.

Background

The International Human Rights Program² was established by the Faculty of Law in 1987 with a mission to advance the field of international human rights law. The program first offered experiential learning opportunities for students through summer internships and volunteer working groups. In 2002, the program expanded to include an international human rights clinic and a human rights speaker series. Activities since then have ranged from direct client representation to policy work, with an emphasis on providing legal expertise to civil society. In 2010, the IHRP won a Lexpert Zenith award for its human rights advocacy work and in 2013 was awarded the Ludwik and Estelle Jus Memorial Human Rights Prize by the University of Toronto.

The IHRP's governance structure was modified in 2003 when the Faculty of Law established an Advisory Board comprised of prominent members of the legal profession and academia. In 2009, a Faculty Advisory Committee was created to further integrate the IHRP within the Faculty of Law's overall research mission and goals. The Faculty Advisory Committee discusses and approves all advocacy initiatives and provides strategic advice on all programming.

The Director of the IHRP is an academic administrative position responsible for providing clinical, educational, and administrative leadership and support. The Director oversees the IHRP's advocacy initiatives, clinic, speaker series, working groups, publications, internship, and mentorship programs. In addition, the Director is required to supervise students, develop and deliver clinical legal education programs, and organize and conduct workshops, conferences, and research.

Dr. Valentina Azarova is a highly recognized international legal practitioner, educator, and researcher. She obtained her L.L.B. from the University of Westminster in 2008 with first class honours and in 2014 earned her Ph.D in Public International Law from the Irish Centre for Human Rights at the National University of Ireland, Galway. She has held several research and teaching positions, including a postdoctoral fellowship with the Centre for Global Public Law and Law School at Koç University in Istanbul, a visiting research fellowship with the Central European University, and an adjunct lecturer position with Birzeit University in Palestine.

Dr. Azarova specializes in legal and human rights issues arising from immigration detention, the arms trade, and occupation and annexation. As part of this latter work, she has written several articles and book chapters on the application of international law and treaty obligations within the context of Israel's occupation of the Palestinian Territories. Dr. Azarova is also a human rights advocate and has been a legal advisor with the Global Legal Action

1. This report was prepared by CAUT staff and approved by the CAUT Academic Freedom and Tenure Committee.

2. Information about the program is taken from the IHRP website: <https://ihrp.law.utoronto.ca/>

Network³ and legal researcher with Al-Haq⁴, an independent human rights organization based in the West Bank, whose major donors include the European Union, the Swedish International Development Cooperation Agency, the Danish Representative Office in Ramallah, the Representative Office of Ireland in Palestine, and Norway's Representative Office to the Palestinian Authority.

Chronology of Events

In late July 2020, after a competitive search for the vacant position of Director of the IHRP, a three-person hiring committee consisting of Assistant Dean Alexis Archbold, Professor Audrey Macklin, and IHRP Research Associate Vincent Wong, unanimously selected Dr. Valentina Azarova as the top choice. Following the hiring committee's recommendation and subsequent reference checks, Vincent Wong contacted Assistant Dean Alexis Archbold on August 6 to ask if an offer had been made to Dr. Azarova. The Assistant Dean replied on August 9 indicating that she would be meeting with Robyn Hunter⁵ from the University's Human Resources Department to "discuss our offer to Valentina":

Hi Vince,

I hope you had a great week. I just returned to the city after being away with no access to the internet. I have meeting [sic] booked with Robyn tomorrow to discuss our offer to Valentina. I plan to get in touch with Valentina first thing Tuesday morning. She knows that we wouldn't be in touch again until this week.

I will let you know how things go.

Thanks!
Alexis

Alexis Archbold. LL.B.
Assistant Dean, J.D. Program
University of Toronto Faculty of Law

Dr. Azarova reports that Assistant Dean Archbold verbally offered her the directorship of the IHRP on August 11 by videoconference call. On the call, they discussed salary, pension, starting date, and term of the contract. Dr. Azarova indicates that she accepted the offer verbally on August 19.

On August 20, the Assistant Dean wrote to members of the hiring committee to inform them that the University was beginning the process of assisting Dr. Azarova with her work permit application. She also stated that the University wanted to find a way for Dr. Azarova to start before she received her work permit:

Hi Audrey and Vince—

Just letting you know that I am continuing to push this forward. I have spoken to Valentina 3x since we decided to go with her. She seems to get more excited each time I speak with her.

I spoke with an immigration lawyer yesterday, and will be speaking to the UT employment lawyers tomorrow. In a nutshell, we are hoping to work out a way for Valentina to start work before she has a Cdn work permit in hand. The

3. See <https://www.glanlaw.org/>

4. See <http://www.alhaq.org/>

5. Robyn Hunter also participated in the first round of interviews for the position.

immigration lawyer is suggesting she could have one in 2-3 months. We need to bridge the time between now and then.

Valentina is willing to start working remotely immediately. She plans to move to Canada by December.

I will let you know how it looks after the meeting tomorrow.

Thanks!

Alexis

Alexis Archbold. LL.B.

Assistant Dean, J.D. Program

University of Toronto Faculty of Law

As indicated by the Assistant Dean, the University proposed to initially hire Dr. Azarova as a consultant or contractor so that she could prepare for her role before her work on campus was set to begin on January 11, 2021. On August 21, Assistant Dean Archbold wrote to the hiring committee to report that the University's lawyers had confirmed that Dr. Azarova could begin work as an independent contractor while waiting for her work permit:

Continuing to have positive discussions with Valentina and others. Spoke to UT employment lawyers today and they confirmed that we can hire Valentina as an independent contractor and roll her into the permanent position when she has her permit in hand. Valentina is happy with this. Next step is to connect her with the employment lawyer directly to make sure that the 3 month timeframe that he gave me is in fact realistic in her circumstances.

Have a great weekend!

Alexis Archbold. LL.B.

Assistant Dean, J.D. Program

University of Toronto Faculty of Law

By e-mail on August 22, the Associate Dean introduced Dr. Azarova to Peter Rekai, an immigration lawyer the University hired to assist with her work permit application:

From: Alexis Archbold

Date: Sat, 22 Aug 2020 at 14:16

Subject: Meeting on Monday August 24th at 10:00 am EST

To: Peter Rekai, Valentina Azarova

Dear Peter and Valentina

It is my pleasure to introduce you. Valentina, Peter is the immigration lawyer with whom I have been speaking about our IHRP hire circumstances.

Peter, thank you very much for agreeing to meet with Valentina to discuss the routes to obtain a Canadian work permit (and ultimately permanent residency).

As you both know, we are keen to explore the best and most expedient route for Valentina to obtain a work permit no later than December 31 2020.

Peter, Valentina is available to meet on Monday August 24th at 10:00 EST. I will defer to you to send Zoom or other meeting details. I will not be joining you for this meeting.

Many thanks to you both. Have a lovely weekend!

Alexis

The Assistant Dean followed up with Dr. Azarova by e-mail on August 24 to ensure that she had spoken with the immigration lawyer. Dr. Azarova responded to confirm she had done so and provided a summary of the advice she had received:

On Mon, 24 Aug 2020 at 21:05, Alexis Archbold wrote:

Hi Valentina

I hope you are well. Just checking in—did you and Peter connect today?

Many thanks

Alexis

Alexis Archbold, LL.B.
Assistant Dean, J.D. Program
University of Toronto Faculty of Law
www.law.utoronto.ca
www.bfl.law.utoronto.ca

From: Valentina Azarova
Sent: August 24, 2020 9:00 PM
To: Alexis Archbold
Subject: Re: Checking in

Hi Alexis

Yes we did, and I was under the impression that he was going to speak with you so did not actively provide you with a debrief.

The long and short of it is that the way forward would be a double barrelled approach to a work visa, as all other paths would be too time risky at this stage and in the Covid circumstances: a) work visa application based on a market assessment and the inability to find a comparable Canadian candidate; and b) work visa application based on my contribution as a skilled professional to Canada. The second being less resource intensive. It [sic] it works out then the other route can be abandoned mid-way. He noted that to guarantee a result by sometime in Dec latest, and probably earlier, both applications need to be launched simultaneously as soon as possible. The good news is that neither require my presence at any point, and would upon their success guarantee my ability to get a work visa at the border upon my arrival to Canada.

On a call on September 1, the Assistant Dean told Dr. Azarova that she would receive a written contract during the week of September 7 confirming the details of her terms and conditions of employment that had been previously discussed. On September 3, the Assistant Dean wrote to Dr. Azarova to confirm that the hiring process was moving ahead smoothly:

On Thu, 3 Sep 2020 at 14:08, Alexis Archbold wrote:

Hi Valentina

Thank you again for meeting with me this week. As we discussed, I am taking several steps at this end to move things forward including: following up with the international law firm about the independent contractor agreement, drafting a summary of the terms of what would be included in a subsequent employment contract, and working with Peter to start the special contribution and LMIA [Labour Market Impact Assessment] processes to obtain your work permit. I have been in touch on all of these fronts and am waiting to hear back. I hope to be in touch to update you very soon.

Best
Alexis

On September 4, the Friday before the Labour Day weekend, the situation suddenly began to change. The chair of the hiring committee, Professor Audrey Macklin, was informed by Assistant Dean Archbold that a sitting Tax Court of Canada judge who is also an alumnus and major donor had contacted a fundraising official at the University. It is not clear how the judge learned about Dr. Azarova's selection as the hiring process was still confidential at that point. Professor Macklin was told the judge expressed objections to Dr. Azarova's appointment because of her work on Israel and Palestine. The Assistant Dean also said the judge would be calling the Dean of the Faculty of Law, Edward Iacobucci. Professor Macklin's notes from that day are as follows:

- a. Assistant Dean [Archbold] contacts me: the director of alumni/advancement (I think Jennifer Lancaster but I'm not sure) received a call from an alum about VA [Valentina Azarova], regarding VA's Israel/Palestine work.
- b. The alum is a tax judge and told the alum/advancement staff member that he intended to call Ed [Dean Iacobucci].
- c. I expressed my alarm and I expressed the hope that Ed would not be influenced by intervention by an alum on U of T hiring.⁶

On September 6 (Sunday of the Labour Day weekend), Dean Iacobucci called Professor Macklin to announce the hiring process was being terminated for two reasons. First, the Dean indicated it was improper to hire Dr. Azarova as an independent contractor before her work permit was secured. Second, he noted that during negotiations with the Assistant Dean, Dr. Azarova requested permission to pursue work overseas during part of the summer vacation period when no courses or programs were running at the law school. He indicated this arrangement would be highly inappropriate. When Professor Macklin raised a concern that Prof. Azarova's work on Israel and Palestine was playing a role in the Dean's decision, the Dean reportedly replied that "it is an issue, but given the other two issues, I don't need to get to the third issue."

6. Excerpts of Professor Macklin's notes were published online by the Globe and Mail on September 23, 2020, "Tax Court judge accused of pressuring U of T law school not to hire human-rights scholar identified."

On September 10, Assistant Dean Archbold wrote to Vincent Wong, the third member of the hiring committee, to inform him of the decision to rescind the offer to Dr. Azarova:

From: Alexis Archbold
 Sent: Thursday, September 10, 2020 5:27 PM
 To: Vincent Wong
 Cc: Audrey Macklin
 Subject: RE: IHRP Director Update

Hi Vince,

Thanks for checking in. Unfortunately, Valentina's immigration situation turned out to be more complicated than we thought, and the tools at our disposal to address it were fewer than we hoped. As a result, after conferring with senior HR leaders, we concluded yesterday that we cannot proceed with her candidacy. I informed Valentina today. I know this is disappointing news.

We are switching gears very quickly to look again at the Canadian candidates whom we considered. The Dean will be conducting 2nd/3rd round interviews next week.

I will let you know how things go.

Alexis

By videoconference call, the Assistant Dean informed Dr. Azarova that “we hit a wall”. While it was the University that had initially suggested that Dr. Azarova be hired as a consultant, the Assistant Dean now told her that immigration lawyers “indicated very high risks” to the University if it was to engage Dr. Azarova on a short-term consultancy contract. The Assistant Dean also indicated the Program has been without a director for too long to wait until the work permit is available, and that there were other “things going on at the law school” that she did not specify.

On September 11, Professor Macklin resigned from the hiring committee and as chair of the Faculty Advisory Committee of the IHRP. Soon afterwards, the rest of the Faculty Advisory Committee – Professors Vincent Chiao, Anna Su, and Trudo Lemmens – also resigned. On September 12, two former IHRP directors, Carmen Cheung and Samer Muscati, wrote to the Dean to express their concerns about what they viewed as political interference in the hiring process:

We are...alarmed by the sequence of events, which strongly suggests improper external interference by a member of the judiciary in the hiring of the IHRP Director as well as a serious breach of confidentiality in the hiring process. Given that the essential nature of international human rights practice is to hold the powerful to account, any IHRP Director and their work will unavoidably be the subject of criticism from some quarters.

On September 15, the remaining staff at the IHRP, Ashley Major and Vincent Wong, met with Assistant Dean Archbold to discuss IHRP programming for the upcoming year, including the abrupt cancellation of Dr. Azarova's candidacy and the Dean's decision to take over the search process. Concerns were raised about undue and improper interference into the hiring committee's process. Wong expressed his position that Dr. Azarova's offer should be reinstated and asked the Assistant Dean whether there was a possibility that Dean Iacobucci would reconsider his decision. The Assistant Dean replied that it was very unlikely. On September 16, Wong resigned from his paid position as Research Associate:

From: Vincent Wong
Sent: Wednesday, September 16, 2020 8:54 PM
To: Alexis Archbold
Subject: [IHRP] Notice of Resignation
Importance: High

Dear Alexis,

It is with a heavy heart that I send you this e-mail to convey my resignation from my Research Associate position at the International Human Rights Program with two weeks' notice.

I have put a lot of thought into this decision and it was an incredibly difficult one to make but one that I strongly believe in. When I volunteered to join you and Audrey on the hiring committee to select a new director, I did it in good faith that our process would be fair and transparent and that our choice, given our expertise and institutional knowledge, would be respected. You, Audrey, and I came to the conclusion that Valentina, given her tremendous experience, innovative work, sharp mind, was the consensus number one choice. Consequently, an offer was extended to her.

It is my view that since then, the director search process has not been handled with objectivity, fairness, and transparency. This sudden turn of events and the withdrawal of Valentina's offer raises serious concerns about abuse of process, improper external influence, and academic freedom. I was hoping upon hope that the administration would recognize these serious issues and take steps to redress them, and in particular to reinstate Valentina as the director. However, this does not seem like a realistic possibility. If I am to be completely honest, I feel like trust has been irrevocably broken. As a result, I feel that I must move on from the IHRP.

Facing mounting criticism, the Dean issued a statement to members of the Faculty of Law on September 17. He denied that an offer of employment was made, and stated that any decision about hiring was not influenced by external pressure:

From: lawprofs-I All professors at law school on behalf of Deans Office Law
Sent: Thursday, September 17, 2020, 6:34 PM
To: LAWPROFS-L@LISTSERV
Subject: Message from the Dean

Dear Colleagues,

I am writing this letter, which I will share with members of the broader community making inquiries, to offer more details about the search for a non-academic director at the International Human Rights Program. Let me say at the outset that assertions that outside influence affected the outcome of the search are untrue and objectionable. University leadership and I would never let outside pressure to be a factor in a hiring decision.

Searches at this University are and ought to be confidential, but I will say the following. Even the most basic of the conjectures that are circulating in public, that an offer was made and rescinded, is false. While conversations with a candidate had been ongoing, no offer of employment was made because of legal constraints on cross-border hiring that meant that a candidate could not meet the Faculty's timing needs. Other considerations, including political views for or against any candidate, or their scholarship, were and are irrelevant.

As the Dean's advisory committee leading the search understood – and as was stressed to me on several occasions by the non-academic administrator to whom the director would report – the timing needs existed because of the absence of a director at the moment, and the hope that a new director could mount a full clinical and volunteer program for students this academic year. Unfortunately, the opportunity to assess other candidates was derailed by this unnecessary controversy, and the search was cancelled. All candidates, including candidates in the recent search, are more than welcome to apply when the search resumes.

In the meantime, it will be necessary for the Faculty to review the IHRP's plans in the short run without a director in place. We will also consider how best to take the program forward over the long run as well. As one of my colleagues put it, I am confident we can take advantage of this pause to make the International Human Rights Program even more successful than it has been in the past.

Sincerely,
Edward Iacobucci
Dean and James M. Tory Professor of Law

In its official response to a letter written by CAUT Executive Director David Robinson, the University administration echoed the Dean's contention that no offer of employment was made and that outside pressure was not a factor in the decision:

From: President
Sent: September 17, 2020 10:19 AM
To: Monique Cooke
Subject: Re: Letter from David Robinson, Executive Director, Canadian Association of University Teachers re. Academic Freedom

Good day Mr. Robinson,

Thank you for your message to the Office of the President and for sharing your thoughts and concerns on this matter. Searches at the University of Toronto are confidential and bound by policies and applicable privacy legislation. With respect to a recent search for a non-academic staff member in the International Human Rights Program (IHRP), we can confirm that no offer of employment was made to any candidate, and therefore, no offer was revoked. The Faculty of Law has cancelled the search. No offers were made because of technical and legal constraints pertaining to cross-border hiring at this time. The Faculty of Law will be reviewing program needs, and when and if the search resumes, all candidates are encouraged to apply or re-apply.

Best wishes!
Rheema Farrell
Administrative Assistant, Correspondence Unit
Office of the President
University of Toronto
Room 206, 27 King's College Circle
Toronto, ON Canada M5S 1A1

On October 7, nine faculty in the law school wrote to the Provost of the University of Toronto to express their concerns about how, in their view, the Dean's actions subverted the collegial hiring process:

The Dean of Law wields extraordinary authority for a community that calls itself self-governing. This is the case not only as concerns the IHRP but also as concerns curriculum matters, faculty appointments, and other subjects that are of concern to the law school community. It is, nevertheless, startling that the Dean intervened in the appointment of the IHRP Director without referring the matter back to the hiring committee that identified a short list and interviewed candidates. He took these steps, moreover, by informing rather than consulting with our colleague, Professor Audrey Macklin, who chaired the hiring committee, nor with other colleagues who sit on the IHRP academic advisory committee. Claiming that 'legal constraints on cross-border hiring' barred Dr. Azarova's timely entry into Canada, the Dean would not consider Professor Macklin's advice that her immigration status was eminently solvable, and that the hiring committee had unanimously concluded that there were no qualified Canadians in the pool. No one in a position of authority, it seems, wanted to hear this. For this reason, we view immigration questions, and for that matter allegations that no offer had been made to Dr. Azarova, as pretextual.

On October 14, the University announced an "impartial review" into the affair.⁷ On October 15, CAUT issued a statement⁸ calling the University's review flawed for not addressing academic freedom concerns or questions about outside interference in the hiring process. Additionally, the report of the review will be delivered to three senior administrators – the Vice-President of Human Resources and Equity, the Dean of Law, and the Provost – who could be implicated by their conduct in the case. Both the Dean and the Vice-President of Human Resources and Equity have publicly declared that no job offer was made to Dr. Azarova, that the decision not to proceed with her candidacy was based on immigration impediments, and that external intervention did not affect the outcome. Moreover, in a message to the law school community, the Dean indicated he requested the review "in order to correct misconceptions and misunderstandings". The combined effect of the public declarations and stated purpose of the review thus appear intended to "correct misconceptions and misunderstandings" in the form of accounts that are inconsistent with the administration's position. This cannot be regarded as impartial.

Analysis and Conclusions

The central issues at dispute in this case revolve around 4 questions:

- 1) Was an offer of employment made, accepted, and then rescinded?
- 2) Were the University's stated grounds for not proceeding with the hiring of Dr. Azarova pretextual?
- 3) Do principles of academic freedom apply in this case insofar as it involves the appointment of an academic administrator?
- 4) Is there evidence that the hiring process was influenced by outside pressure based upon objections to Dr. Azarova's research and/or political views?

7. <https://hrandequity.utoronto.ca/memos/statement-on-the-search-process-for-a-director-of-the-international-human-rights-program-at-the-faculty-of-law/>

8. <https://www.caut.ca/latest/2020/10/u-t-investigation-hiring-controversy-flawed-caut>

1. Was an offer of employment made, accepted, and rescinded?

The documentary evidence strongly suggests that Dr. Azarova was offered the position on August 11 and accepted on August 19. On the August 11 call, the Assistant Dean discussed salary, pension, starting date, and term of the contract. Dr. Azarova agreed to these initial terms on August 19. Subsequent e-mail exchanges between the Assistant Dean, Dr. Azarova, and the immigration lawyer clearly demonstrate that the parties were seeking to negotiate the final details of a written contract and to obtain the appropriate work permit. In her September 3 e-mail, the Assistant Dean is explicit that she is “drafting a summary of the terms of what would be included in a subsequent employment contract.”

Based upon the evidence, it can be reasonably concluded that the University and Dr. Azarova entered a verbal employment contract on August 19. The subsequent decision to not proceed with her hiring amounted to a breach of that verbal contract.

Even if no offer had been made, however, this would not diminish concerns about external influence over the hiring process. While the Dean and members of the hiring committee disagree about whether Dr. Azarova was offered the directorship, and the determination of that would have potential legal implications under employment law, it would nevertheless remain unacceptable and a violation of academic freedom if external pressure affected the outcome of the search process.

2. Were the University’s grounds for not proceeding with the hiring of Dr. Azarova pretextual?

The University claims that the decision to end employment discussions with Dr. Azarova was due to immigration-related complications. Principally, the University indicated that the plan to hire Dr. Azarova as an independent contractor until her immigration status was secured was “improper”. This is even though it is the University that requested and initially approved the arrangement.

In her e-mail of September 3 to Dr. Azarova, the Assistant Dean states that she is “following up with the international law firm about the independent contractor agreement.” It is therefore conceivable that legal counsel may have subsequently raised previously unidentified issues about the arrangement, although specifics about its legality were not provided to Dr. Azarova. Even if the plan to engage Dr. Azarova temporarily as an independent contractor was deemed to be a problem, however, it would be difficult to see this as a justifiable reason for terminating the hiring process entirely. The immigration lawyer indicated Dr. Azarova would receive her work permit within two to three months at most. The position had been vacant for over a year and interviews were not completed until the end of July. It seems suspect that the University in early September was now insisting that it could not proceed with Dr. Azarova’s appointment because she could not start immediately. It is highly improbable that another candidate would be available to commence work within this time frame. In fact, less than a week after Dr. Azarova was informed that the offer was being revoked, the Dean announced that the search for a new Director would be suspended. If the consultancy proposal was an issue, why was the University unwilling to wait for two or at most three months for Dr. Azarova to obtain her work permit?

The second element of the Dean’s rationale relates to Dr. Azarova’s request that she be able to be absent from campus to continue her international human rights work during part of the summer vacation period when no courses or programs were running at the law school. The Dean cited this as improper. If this were indeed inappropriate, however, should not have Dr. Azarova been informed and asked to decide whether she would accept giving up this request? Instead of engaging in further negotiations on this matter, the Dean simply decided to stop the hiring process in its tracks. Neither rationale for ending talks with Dr. Azarova seems plausible.

3. Do principles of academic freedom apply in this case involving the appointment of an academic administrator?

In its e-mail response to the Executive Director of CAUT on September 17 and in subsequent public communications, the University has emphasized that the Director of the IHRP is a “non-academic staff” position. This seems to imply that principles of academic freedom do not apply. In their September 12 letter to the Dean, the former directors of the IHRP echo this when they assert that: “As a staff appointment, the position of IHRP Director does not confer academic freedom.” The Director position, as noted above, is administrative, but also includes teaching and research components.

CAUT has addressed this issue in its Policy Statement on Academic Freedom for Academic Administrators.⁹ The policy clearly rejects any distinction between the protections for academic freedom enjoyed by ordinary faculty members and that of those serving in administrative posts. The statement describes academic freedom as “indivisible and undiminished in all academic and public settings, whether or not these settings are aligned primarily with teaching, research, administration, community service, institutional policy, or public policy.” There is no valid distinction to be made between the academic freedom rights of academic administrators and those of all other members of the faculty. Academic administrators must be able to rely on the same protections in their academic activities as those in non-administrative academic positions.

4. Is there evidence that the hiring process was influenced by outside pressure based upon Dr. Azarova’s research and/or political views?

The sequence of events clearly shows that the hiring process was proceeding smoothly prior to September 4 when the University was contacted by the judge and donor. The Assistant Dean, as late as September 3, was proceeding with drafting a written contract and ensuring the work permit process was underway. The Dean’s subsequent rationale for rescinding the job offer, as discussed above, is not credible and appears to be pretextual.

The Dean has not denied that he was contacted by the judge, although the details of that conversation are not known publicly. The Dean admitted to Professor Macklin that Dr. Azarova’s research on Israel’s occupation of the Palestinian Territories was “an issue”, but not one that he needed to address because of the purported immigration and work permit issues. However, if the immigration issues were pretextual, then one is left to conclude that Dr. Azarova’s research and advocacy around Israel and Palestine were a determining factor in the Dean’s decision.

Based on a balance of probabilities, there is reasonable evidence to conclude that the rescinding of Dr. Azarova’s appointment was motivated by her research and political views regarding Israel and Palestine. On this basis, the CAUT Academic Freedom and Tenure Committee concludes that her academic freedom as defined in CAUT policy was violated, and collegial hiring practices in the Faculty of Law were breached.

9. <https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom-for-academic-administrators>

Academic Freedom

CAUT Policy Statement

1

The institution¹ serves the common good of society, through searching for, and disseminating knowledge, and understanding and through fostering independent thinking and expression in academic staff and students. These ends cannot be achieved without academic freedom. All academic staff members have the right to academic freedom.

2

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service²; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

3

Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible. All academic staff members have the right to fulfil their functions without reprisal or suppression by the employer, the state, or any other source. Institutions have a positive obligation to defend the academic freedom rights of members.

4

All academic staff members have the right to freedom of thought, conscience, religion, expression, assembly, and association and the right to liberty and security of the person and freedom of movement. Academic staff members must not be hindered or impeded in exercising their civil rights as individuals, including the right to contribute to social change through free expression of opinion on matters of public interest. Academic staff

members must not suffer any institutional penalties because of the exercise of such rights.

5

Academic staff members are entitled to have representatives on and to participate in collegial governing bodies in accordance with their role in the fulfilment of the institution's academic and educational mission. Academic staff members shall constitute at least a majority on committees or collegial governing bodies responsible for academic matters including but not limited to curriculum, assessment procedures and standards, appointment, tenure and promotion.

6

Academic freedom is a right of members of the academic staff, not of the institution. The employer shall not abridge academic freedom on any grounds, including claims of institutional autonomy.

Approved by the CAUT Council, November 2018.

Endnotes

¹ The term "institution" is meant to include universities and colleges. Replace the term with the appropriate term for your institution.

² See Policy Statement on Service.

**REPORT OF THE INVESTIGATION BY THE COMMITTEE OF THE CANADIAN
ASSOCIATION OF UNIVERSITY TEACHERS INTO THE DISMISSAL OF
PROFESSOR H.S. CROWE BY UNITED COLLEGE, WINNIPEG, MANITOBA**

[Published as a special issue of the CAUT Bulletin Volume 7, Number 3, January 1959]

The undersigned, members of the Committee appointed by the Canadian Association of University Teachers to conduct an inquiry into the dismissal of Professor H. S. Crowe by United College, Winnipeg, Manitoba, submit herewith this report of their investigation. The report is divided into sections numbered and headed as follows:

1. Establishment and Preliminary Proceedings of the Committee
2. Relation of Principal Lockhart and the Board of Regents to the Committee and Its Proceedings
3. Procedure of the Committee and Appearances Before It
4. Documents: Explanation of Appendices
5. Action of the Board of Regents Precipitating Investigation by the C.A.U.T.
6. Background of the Action of the Board of Regents
7. Principal Issues
8. Professor Crowe's Dismissal, Protection of Private Communications and Academic Freedom
9. Security of Tenure in Universities and Colleges
10. Conclusions

1. Establishment and Preliminary Proceedings of the Committee

On July 18, 1958, Professor B. N. Kropp, Acting Secretary of the Queen's Faculty Association, forwarded to Professor C.L. Barber, President of the Canadian Association of University Teachers, (hereinafter referred to as C.A.U.T.) a copy of resolutions passed by the Executive of the Queen's Faculty Association on July 16, with the request that the resolutions be presented to the executive of the C.A.U.T. "for any action that group may wish to take."

The Queen's resolutions were:

"that this executive resolves to refer to the executive of the CAUT for investigation, the case of Mr. Harry S. Crowe versus the United College, Winnipeg, because of the possibility that issues of academic tenure may be involved.

"that, if after investigation the CAUT find that principles of academic tenure have indeed been infringed, further appropriate steps be considered. Among such steps the CAUT may wish to consider the following:

- "1. Make strong representations to the College and the Board of Regents.

- "2. Failing satisfactory action, give full publicity throughout the Association to the facts of the case.
- "3. If, after representations have been made, it appears that legal action by Mr. Crowe may be required to defend principles of academic tenure, CAUT consider Association support for such legal action."

The executive officers of the C.A.U.T. met and after lengthy consideration decided that the C.A.U.T. should act. A committee was appointed on July 31 and on the same date Principal Lockhart was so notified by letter, and a statement went forward to members of the Executive Council of the C.A.U.T. advising them of the action and soliciting their comments and suggestions. The Committee comprised:

Vernon C. Fowke, Professor of Economics, University of Saskatchewan (chairman);
Martin W. Johns, Professor of Physics, McMaster University;
David Slater, Associate Professor of Economics, Queen's University.

Professor Barbers's letter of appointment, dated July 31, contained the following directive:

"Without restricting your power to make any investigation you may think wise, I would suggest the following terms of reference for the committee:

- "1. That the committee investigate carefully all relevant circumstances surrounding Professor Crowe's dismissal and attempt to determine to what extent issues of academic freedom and tenure are involved.
- "2. That in the light of its findings the committee make any recommendations for action it may think appropriate.
- "3. That the report be presented to the November Council meeting by the Chairman or some member of the Committee, if completed by that time.
- "4. That a factual report be made to the executive officers in time, if this is possible without prejudice to the thoroughness of the investigation, to permit its circulation to members of the Executive Council of C.A.U.T. in advance of the November Council meeting."

In advising Principal Lockhart of the appointment of the Committee Professor Barber expressed confidence that, in the long-run interests of the College, the committee could count on the Principal's full co-operation in its task. He stated that normally in a matter of this kind the executive officers of the C.A.U.T. would conduct initial inquiries and interview members of the College administration but that the officers of C.A.U.T. were all currently members of the faculty of the University of Manitoba and it was therefore felt to be advisable not to involve any of them in the matter in order to avoid any suggestion of possible bias.

Principal Lockhart replied from Baysville, Ontario, on August 9, acknowledging that the

question of Professor Crowe's relationship to United College had been before the Board of Regents of the College for some time and expressing confidence that the Board would be willing to meet with any properly constituted committee of the C.A.U.T. to discuss the facts of the situation. In his view it would be important that the Board should know whether the request for an investigation had come from the United College "branch" of C.A.U.T. and, if not, whether the matter had been cleared with this "branch", the United College Association. He asked Professor Barber to advise the Chairman of the Board of Regents, Mr. Allan H. Watson, with regard to these points and indicated that Mr. Watson had already seen Professor Barber's letter. "You may rest assured", concluded Principal Lockhart, "that we will do everything within our power to co-operate with your Association. We only wish to be sure that the investigation is carried out with the knowledge and support of our own section of your organization."

On August 17, Professor Barber wrote to Mr. Watson indicating that the request for an investigation had come from the executive officers of the Queen's Faculty Association of which Professor Crowe had been a member during the past year and that the United College Association had been advised of the appointment of the Committee. He pointed out, however, that while their approval had been invited, the executive of the local association had not been pressed to take a stand on the matter because of his belief that members of a local association ought not to be urged to take action which might be interpreted by some of them as an implied criticism of their administration and which "would be likely to lead to internal dissension and a disruption of the effectiveness of the staff in their regular duties of scholarship, teaching, and research."

Mr. Watson replied by letter on August 20 (Document No. 37), challenging Professor Barber's reasoning regarding the position of a local faculty association in such matters but indicating that this difference of opinion did not detract in any way from the assurance that the Board would co-operate fully with the Committee. In conclusion his letter raised the question of credentials and indicated what, in this category, the Board regarded as prerequisite to the commencement of the investigation.

In the meantime, on August 11, Professor Slater informed the chairman of the Committee that he had written to Professor Barber offering to withdraw from the investigation if there could be any doubt about the propriety of his membership on the Committee. On August 27 Mr. Watson wrote to Professor Barber protesting the document entitled "Provisional Statement of Facts Respecting the Dismissal of Harry Crowe by United College, Winnipeg, Manitoba," which Professor Barber had sent to members of the Executive Council of the C.A.U.T. and members of the investigating Committee on July 31, and a copy of which had come into Principal Lockhart's hands and had been communicated to Mr. Watson. The latter challenged the propriety of including Professor Slater in the investigating Committee on the ground that, as a member of the Association of which Professor Crowe had been a member during the past year and from which the request came for an investigation, it should not be assumed Professor Slater would be an impartial and objective observer. On August 28 Professor Barber wrote to Professor Slater, referring to Mr. Watson's letter of the 27th,

and asked him to withdraw from the Committee.

In his letter of August 27 Mr. Watson stated that the circulation of the "Provisional Statement of Facts" by Professor Barber had taken away all and every assurance that the Board of Regents was entitled to have that the investigation would proceed in an impartial and objective fashion. To offset this alleged effect he stated that Professor Barber ought to issue a retraction of the description of the document as a "statement of facts" (although clearly qualified as provisional). Professor Barber invited Mr. Watson to prepare a statement which he would forward to the persons to whom he had sent the original "Provisional Statement of Facts." A copy of a statement prepared in answer to this invitation and entitled "Statement by the Board of Regents of United College pertaining to the document entitled 'Provisional Statement of Facts Respecting the Dismissal of Harry Crowe by United College, Winnipeg, Manitoba' circulated by Professor C. L. Barber, President, C.A.U.T.." was received by the chairman of the Committee in a letter from Professor Barber dated September 26.

Neither the "Provisional Statement of Facts" nor the Board's "Statement" by way of correction has been a source of information to the Committee. The primary documents available to the Committee speak for themselves.

Dispersal of the parties and uncertainties concerning procedure retarded but did not halt action by the Committee during August. Information received from Professor Barber toward the end of August indicated an increasing likelihood that Professor Crowe would return to United College for the academic year commencing September 1. When it became known after September 1 that Professor Crowe had returned to Winnipeg, had reported for duty and had apparently been accepted, it was felt that the elements of greatest urgency had for the time being gone from the situation.

Nevertheless the C.A.U.T. Executive sought a replacement for Professor Slater without delay. At no time after the appointment of the investigating Committee did the C.A.U.T. Executive or the Committee itself consider that the need for investigation had been removed. On September 11 Professor Barber wired the chairman of the Committee, then in Toronto, that Professor Bora Laskin of the Faculty of Law, University of Toronto, had agreed to become a member of the Committee.

On September 14 the Committee met in Toronto and agreed on major lines of procedure. It was agreed that an investigation of the matter could not be properly conducted without on-the-spot hearings in Winnipeg at a time arranged to the mutual satisfaction of the Committee and the principal parties. It was agreed that the Committee should submit copies of the basic documents which were in its possession to Professor Crowe, Principal Lockhart and the Chairman of the Board of Regents for correction and with the request that they submit any additional documents which in their opinion were relevant to a determination of the facts of the case. It was agreed that Committee members, individually or collectively, should have no contact with any of the interested parties in the matter prior to the hearings other than by correspondence

conducted by the chairman to secure correction and completion of documents and to arrange a time for the hearings. It was agreed, finally, that the hearings should be held as soon as arrangements (including the referral of documents) could be completed.

On September 19 the chairman of the Committee wrote to Mr. Watson, Principal Lockhart and Professor Crowe (following notice given to Mr. Watson by Professor Barber in a letter of September 17) to say that the re-constituted Committee was proceeding with the investigation. Letters to the same persons dated September 22 stated the intention of the Committee to hold hearings at an early date and expressed the conviction that it was of the utmost importance that the Committee have before it all relevant primary documents. With particular reference to this conviction a set of the documents already in the hands of the Committee was enclosed in each letter, with instructions that they were to be regarded as confidential, and with the request that the parties notify the chairman of the Committee of any errors and make good any omissions. (These letters are set out in Appendix B.)

On September 26, Mr. Watson, Principal Lockhart and Professor Crowe were asked by letter if October 6 would be a convenient date for the commencement of the hearings in Winnipeg. On the evening of September 30 the chairman received a telegram from Mr. Watson saying that the Board of Regents would receive the Committee on October 6. (These documents are also set out in Appendix B.)

On the same evening (September 30) the chairman of the Committee received a letter from Professor Johns reporting that while attending the meetings of the General Council of the United Church in Ottawa during the preceding two weeks he had become involved in the preliminary stages of proceedings conducted by the General Council with reference to the United College and the dismissal of Professor Crowe. He had been identified in the eastern Canadian press as a member of the C.A.U.T. investigating committee. He offered to withdraw from the Committee if it was felt that these associations might give rise to any suggestion of impairment of objectivity and impartiality.

En route to Ottawa later the same night the chairman consulted with Professor Barber in Winnipeg between planes. It was agreed that Professor Johns had been placed in a compromising position by his involvement at the meetings of the General Council of the United Church. It was also agreed that further delay in opening the hearings would be intolerable and that it would be improper to ask for a postponement of the date so recently agreed upon as mutually satisfactory to the principal parties and to the Committee. It was recognized that it would be a matter of great difficulty to find another committee member without delaying the hearings unduly. It was felt too that the Board of Regents were seized of the importance of impartiality and objectivity in committee members since they had urged the necessity of these qualities in justification of their request that Professor Slater be removed from the investigation. It was agreed that it would be possible and appropriate for two persons to complete the inquiry if, after deliberation and consultation with Professor Johns, the executive officers of C.A.U.T.

should decide to ask Professor Johns to withdraw from the Committee and if in their opinion a replacement could not be secured without disruption of the arrangements agreed upon with the principal parties regarding the hearings.

Professor Barber stated that he would notify the chairman of the Committee of the decision. During the afternoon of October 3 the chairman received in Ottawa a letter from Professor Barber stating that Professor Johns had withdrawn from the Committee. The letter contained no reference to a replacement.

On consulting with Professor Barber in Winnipeg on Sunday, October 5, Professors Fowke and Laskin were directed to proceed with the hearings on the following morning as planned. In the early evening, as soon as arrangements for a place in which to meet could be arranged (Professor Laskin did not reach Winnipeg until late in the afternoon), the chairman telephoned Principal Lockhart and Professor Crowe to advise them that the investigating committee appointed by C.A.U.T. would begin its hearings at 10 o'clock on the following morning in Salon B of the Fort Garry Hotel. Efforts were made throughout the evening to reach Mr. Watson by telephone and he was finally reached before midnight. Each of the parties was advised that the Committee now comprised two members and was told briefly of the circumstances surrounding the withdrawal of Professor Johns.

2. Relation of Principal Lockhart and the Board of Regents to the Committee and Its Proceedings

While the Committee sat in Winnipeg for four days from and including Monday, October 6, 1958, its proceedings were marred, without its fault, by the conditional appearance of Principal Lockhart and the Board of Regents (through counsel) and their withdrawal on the morning of the second day. This episode deserves a full discussion; and since it is almost completely recorded in documents filed with the Committee the proper course is to let the documents carry the treatment of this matter.

It is well to begin by pointing out that at no time (did Principal Lockhart appear before the Committee. When it first convened on the morning of October 6, 1958, Mr. D. C. McGavin, a practising member of the Manitoba bar, appeared on behalf of Principal Lockhart and of the Board of Regents who were thus united in their representations to the Committee through their joint counsel. With Mr. McGavin was Mr. Allan H. Watson, chairman of the Board of Regents. Identical letters (referred to along with the correspondence in section 1 hereof) had been sent to Principal Lockhart and to Mr. Watson by the chairman of the Committee under dates of (1) September 19, 1958, advising them of the Committee's awareness that its appointment had been communicated to them by the president of the C.A.U.T. and expressing its appreciation of what it understood was an offer of full cooperation; (2) September 22, 1958, forwarding to them, under a confidential notation, copies of all documents in possession of the Committee, with an invitation to correct any errors and to supply any other documents that the Committee did not have; and (3) September 26, 1958, suggesting

Monday October 6, 1958, as the date for commencement of hearings in Winnipeg and inviting concurrence or suggestions for an alternative date. (Letters to the same effect were sent to Professor Crowe). No reply to any of these letters was received from Principal Lockhart.

By a telegram sent to Professor Fowke on the evening of September 30, 1958, Mr. Watson notified the Committee that "representatives of the Board of Regents will receive you on October 6. Writing." A letter from Mr. Watson followed under date of October 1, 1958, outlining in some detail the position of the Board of Regents with respect to the Committee's proposed inquiry. A copy of this letter is annexed hereto in Appendix B. It is, we believe, a fair comment on this letter to say that it raised a question on the "credentials" of the Committee and on the propriety of its establishment; it reserved the legal rights of the Board of Regents and of Dr. Lockhart in respect of possible actions for defamation and otherwise; it dealt with the documentation and it raised certain procedural questions (which will be considered later in this report). At the forefront of the statement of its position the Board of Regents declared that "representatives of the Board will receive the Committee and will appear before it and participate in its activities, as the Board considers that if the Committee carries out a fair and objective inquiry, it can make a useful and worthwhile contribution in the present situation".

In view of subsequent occurrences, this Committee must underline that the foregoing assurance of co-operation in the work of the Committee was not the first time that cooperation and, indeed, participation, was offered. By a letter dated August 20, 1958, addressed to the president of the C.A.U.T., Mr. Watson twice gave an assurance of full cooperation in an investigation by a C.A.U.T. Committee under Professor Fowke, pointing out only the need for credentials so as to enable the Board of Regents to know to whom to look for redress if any damage should result to United College by reason of the investigation. A copy of this letter will be found in Appendix B. By an open letter of August 26, 1958, Document No. 40, addressed to the Faculty members of United College, Mr. Watson speaking for the Board of Regents set out the Board's position on Professor Crowe's relationship with United College and in the concluding part of the letter is this paragraph: "The Board will cooperate fully in any investigation of the facts in the Crowe situation by any properly constituted and authorized committee of the Canadian Association of University Teachers and Professor Barber has been advised in writing to this effect. He has also been informed that we expect this matter to be properly processed through the United College Faculty Association". In a long public statement of its position dated September 20, 1958 (Document No. 46) and communicated to the press, the Board of Regents reiterated that it would "cooperate fully with any properly constituted investigating committee of the C.A.U.T. if, as or when there is an investigation", and added that it would seek assurances that the investigation, if it proceeds, would be fair and objective.

In resumé, it is clear that, excluding the telegram of September 30, there were five assurances of cooperation and participation by the Board of Regents in an investigation

by a committee of the C.A.U.T., assurances given in four successive documents : There were the two assurances in the letter of August 20, 1958; an assurance in the open letter of August 26, 1958; and assurance in the public statement of September 20, 1958, and an assurance in the letter to Professor Fowke dated October 1, 1958. Principal Lockhart is not specifically associated with any of these assurances although the implication from other documents is clear enough that he had associated himself with, or was associated by the Board in their position. In response to a letter to him from Professor Barber tinder date of July 31, 1958, advising him of the appointment of a C.A.U.T. investigating committee, Principal Lockhart stated in a letter dated August 9, 1958 from Baysville, Ontario, that the matter of any proposed investigation was in the hands of the Board of Regents but he included an offer of his co-operation. (This letter is set out in Appendix B.) His subsequent failure to acknowledge Committee communications is, it must be assumed, properly ascribable to his deference in this matter to the Board under whose direction he placed himself. This is borne out by a telegram from Principal Lockhart to Professor Fowke under date of October 7, 1958, which was a reply to a telegram sent by the Committee to the Board of Regents and to Principal Lockhart inviting them to appear and offer evidence in accordance with their previous undertakings. In his reply, Principal Lockhart referred to his letter of August 9 and added that "I have therefore necessarily referred your telegram to representatives of the Board. I am instructed to decline the invitation extended in your telegram to me."

The circumstances attending the withdrawal of Professor Johns from the Committee have already been outlined. The withdrawal could not reasonably be communicated to Principal Lockhart and to the Board of Regents until the evening of Sunday, October 5, 1958. At the opening of hearings the next day, counsel for Principal Lockhart and the Board of Regents filed a letter dated October 6, 1958, over Mr. Watson's signature and it is reproduced in Appendix B to this report.

Following the filing of the letter with accompanying submissions in elaboration of its contents, Mr. McGavin stated that Mr. Watson and he wished an opportunity to consider with the Board of Regents the situation produced by Professor Johns' withdrawal from the Committee. An attempt would be made to have a Board conference at noon and Mr. McGavin undertook to report back to the Committee at 3 p.m. In the meantime, and under the reservations and conditions already stipulated, he was agreeable to a discussion of certain requirements of United College on credentials as set out in a memorandum then filed with the Committee, this memorandum being in supplement and extension of the points made in the letter of October 1, 1958, already referred to earlier in this section of this report; and he was agreeable too to a discussion of procedure as raised in the letter of October 1, 1958. The memorandum stipulating the requirements on credentials is annexed hereto in Appendix B.

It will suffice to say that Professor Barber who was present as an observer representing the C.A.U.T. undertook to comply with items 1 to 5 inclusive of the memorandum. Item 6 was explained by Mr. McGavin as raising the question of N.C.C.U. concern in the investigation. So far as the Committee then knew or now knows, there were and are no

principles or procedure agreed upon with the N.C.C.U. regarding investigations as to academic freedom and tenure. Further, the Committee did not see that there was any relevance in the request for its views as to the propriety of making an investigation which would affect an N.C.C.U. member, but further consideration of this point was deferred pending the filing with the Committee by Mr. McGavin of a copy of a letter sent by Principal Lockhart to the president of the N.C.C.U. It may be said here that the point became moot when the Board of Regents withdrew from the proceedings the next morning. Point 7 in the memorandum was answered, in the view of the Committee, by a letter sent by Professor Barber under date of September 17, 1958, to all persons concerned informing them that the Committee had been authorized "to make a thorough investigation of the circumstance surrounding the dismissal of Professor Crowe by United College to determine whether principles of academic freedom and tenure have been infringed", and to report its findings to the executive council of the C.A.U.T. On this view, the reference in point 7 of the memorandum to s. 25(b) of the United College Act was quite immaterial. Mr. McGavin found it difficult to appreciate that there was any difference between security of tenure in the sense in which it is understood in an academic community and tenure as it is covered by the enactment which he quoted. More explicit consideration is given to this issue in sections 7 and 9 of this report below.

On point 8 of the memorandum, the Committee told Mr. McGavin that its only action would be to report to the C.A.U.T. in accordance with the terms of reference already quoted. Professor Barber, speaking for the C.A.U.T, on the point, stated that the nature of the action, if any, which would be taken by the C.A.U.T. would depend on the report which it received and on the decisions made thereon by the executive council. The Committee would like to record, in respect of points 7 and 8, of the Board of Regent's memorandum, that it supplied Mr. McGavin and Professor Crowe with a statement of its position thereon, and a copy of this statement is annexed hereto in Appendix B.

The last requirement on credentials was an affidavit from each member of the Committee as to his impartiality. Needless to say, the Committee was taken aback by this request but the members complied with it. Copies of the statutory declarations furnished to Mr. McGavin are annexed hereto in Appendix B.

Turning now to the matters raised in the letter of October 1, 1958. They included, first, a request to deal with credentials, but it is clear that this matter was disposed of as part of the consideration of the memorandum already noted in this report. There was also a request on publicity, and this was handily resolved by the Committee's own determination to conduct all proceedings in camera and to have an understanding by all concerned that testimony and submissions given and made would be for the Committee's ears only and for the purpose of its report. Another point raised by the letter of October 1 straddled points 7 and 8 in the memorandum with which this Committee has already dealt. Again, the letter of October 1 raised questions of confrontation of witnesses by interested persons and the right to counsel and to cross-examination. It will suffice to say at this point that the Committee agreed that directly interested parties, namely Principal Lockhart, the Board of Regents and

Professor Crowe, could be represented by counsel and would be entitled to remain in the hearing room at all times. Witnesses, other than the parties aforementioned would be admitted to the hearing room only to give evidence and would then leave. The Committee refused to permit cross-examination by counsel but ruled that all questions would be put by the Committee members subject to permission to counsel or to the immediate parties themselves to suggest questions that should be put by the Committee. Mr. McGavin conceded that this elaboration of procedure went a long way (to use his own expression) to meet the Board of Regents' requirements in that respect.

It may be noted that the letter of October 1, 1958, referred to the United Church of Canada as a "principal" party. The Committee at no time received any intimation that the United Church so considered itself, or that it wished to appear or be represented. The Committee did permit a representative of the C.A.U.T. to be present during its proceedings and also a representative of the United College Association, but with the reservation that either or both might be asked to leave if testimony might otherwise be inhibited.

Two last requests were included in the letter of October 1: first, that the proceedings be held elsewhere than at United College. The Committee had anticipated this by convening its hearings at the Fort Garry Hotel; the second was that a satisfactory record be kept of all proceedings. The Committee advised those present that the members proposed to make and keep their own record, but it had no objection if either of the parties wishes to have a shorthand reporter present. It may be pointed out that the Committee, in its subsequent proceedings, undertook to provide certain witnesses with a transcript of its record of their testimony for their perusal and certification.

This recital of the Committee's handling of the questions touching its credentials, its terms of reference and its procedure is given at some length in order to make it clear that the Committee had entered upon its task in the earnest desire to accommodate any manifested wish in the interests of a reasonable and fair procedure which would help to elicit all the facts without impeding the Committee in its essentially investigatory function. Professor Crowe made no demands but announced his readiness to place himself completely in the hands of the Committee.

On resumption of proceedings after 3 p.m. on Monday, October 6, Mr. McGavin appeared alone and informed the Committee that the Board of Regents was still in deliberation and that a statement of its position on participation in the proceedings of the Committee would be presented the following morning. On Tuesday morning Mr. McGavin attended with Mr. Watson and read a statement to the Committee in the presence of Professor Crowe, Professor Barber, president of the C.A.U.T., and Professor McNaught, president of the United College Association. The Statement dated October 7, 1958, and addressed to Professor Barber and to the undersigned Professors Fowke and Laskin is set out in Appendix B.

Discussion on this statement ensued, and one allegation therein was corrected by

Professor Fowke who pointed out that while he was aware on September 30 of Professor Johns' participation in the United Church of Canada proceedings in Ottawa and of Professor Johns' offer to withdraw from the Committee he was not then aware of any action having been taken by the C.A.U.T. on this offer. In fact Professor Fowke did not know of the actual withdrawal until October 3 and Professor Laskin was also unaware of it until October 3, 1958 when he received a letter from Professor Barber. Since arrangements had been made in the week of September for holding hearings on October 6, and since documents had been collected and copies sent out for perusal, the C.A.U.T. was of opinion that the investigation should proceed as scheduled under the direction of a Committee of two. So far as the members of the Committee were concerned, their acceptance of the C.A.U.T.'s invitation to serve was not conditional on having any particular number or any particular associate; and they saw no reason to alter plans for the investigation in view of the degree to which they had been implemented, preferring to meet with Professor Crowe, Principal Lockhart and the Board of Regents and to proceed with the discharge of the assignment.

The Committee regrets the necessity of making some comment in this report on the Board of Regents' statement of October 7 and on the Board's consequent withdrawal. The terms of the letter and the oral submissions which followed it make it imperative that the Committee should express itself thereon. Throughout the discussion on credentials and procedure on Monday, October 6 and the discussion leading to withdrawal of the Board of Regents and of Principal Lockhart (through his counsel) on October 7, it was quite clear that Mr. McGavin was determined to treat the investigation as if it arose out of a labour relations dispute between an employer and a trade union. The concept of a University as a community of scholars, as an integrated body of civilized men and women (composed of administrative heads, teaching faculty and students) dedicated to pursuit of knowledge and development of wisdom, was completely absent from his presentation. He was less than subtle in trying to cast the members of the Committee in the role of trade union nominees to a Board of Conciliation; and even if there was nothing else to illuminate his attitude, his request for affidavits of impartiality carries its own condemnation. This Committee cannot believe that Mr. McGavin's philosophy of a University is that of the Board of Regents. The degradation involved is the very antithesis of higher education.

The proposal of the Board of Regents for a bi-partisan five man board was obviously one which this Committee could not entertain, nor could the proposal be implemented unless the C.A.U.T., first disavowed its own Committee. This, Professor Barber said, he could not do.

There can be no pretence that investigation of Professor Crowe's dismissal could be properly made only by a C.A.U.T. committee. That, however, was the original proposal, and it was to this kind of investigation that the Board of Regents and Principal Lockhart pledged their cooperation. If there were any genuine reservation about the propriety or competence of a committee designated by the C.A.U.T., both Principal Lockhart and the Board of Regents had ample time through July, August and September to suggest an

alternative or different form of proceeding. The eleventh hour proposal of a five man bi-partisan board is no less insulting in its timing than it is in its conception. The repetition in the letter of October 7 of concern, expressed also on October 6, about the proper constitution of the Committee is without meaning if the fact be (as it was) that the C.A.U.T. and no one else would establish and appoint an investigating Committee. No one connected with the situation which arose upon Professor Crowe's dismissal could have any doubt about the voluntary character of the proposed investigation, whether in the recruitment of Committee members or the cooperation of the principals or the attendance of witnesses. Principal Lockhart and the Board of Regents appreciated this only too well, as the documents detailing their promises of cooperation show. Why then the subsequent attack on credentials and constitutional propriety? The Committee could well appreciate concern and questioning about its procedure and on this it went almost the whole way in satisfying expressed wishes. It refused to countenance cross-examination for the very simple reason (which was communicated to Mr. McGavin) that it did not regard itself as presiding over an adversary proceeding. It was there to investigate and not to umpire or referee a contest in forensic skill. Yet it declared itself ready to accept suggestions for questions if it were felt that relevant inquiries had been neglected by the Committee in its conduct of the questioning.

There is one final point to be made in respect of the Board of Regents' statement of October 7. If there was as much concern about numbers by the Board of Regents as was expressed by Mr. McGavin, the C.A.U.T. could have been asked to appoint a third person, and the Committee could have been asked to adjourn its hearings until this was done. No such suggestion was made. The closest that Mr. McGavin and the Board came to it was to say that there might be no decision in a Committee of two, but with three there would be a majority. The real question, "a majority of what?" could obviously not be answered. How small a role the matter of numbers played in the Board of Regents' opposition to the present Committee is seen in that sentence of its statement of October 7 asserting its refusal to participate in the proceedings of the two-man Committee *"or any enlargement of the Committee consisting solely of members or appointees of the Canadian Association of University Teachers"*. (The underlining is that of the Committee.)

In view of the record, the withdrawal of the Board of Regents (and indeed of Principal Lockhart) is a gross breach of faith.

3. Procedure of the Committee and Appearance Before it

The wide terms of reference given to the Committee invited extensive consideration of procedure and of how best to secure attendance of persons who would be able to give relevant evidence. In view of the promises of cooperation by Professor Crowe, Principal Lockhart and the Board of Regents, the Committee felt that the presence of witnesses would be assured through their efforts. The withdrawal of Principal Lockhart and the Board of Regents obliged the Committee to take steps of its own to elicit testimony from those who had it to offer.

The discussion of procedure in the previous section of this report makes it unnecessary to go into any great detail on that subject here. The C.A.U.T. had turned over to the Committee all documents in its possession bearing on Professor Crowe's dismissal, and they were used as a source of names of persons who might be invited to appear before the Committee. In addition, the Committee invited those present at its hearings to suggest who else might be invited to testify. The Committee acted on some of the suggestions. A complete list of the names of those who offered evidence is annexed hereto as Appendix C.

Since the Committee had no power to compel attendance, all those who appeared did so voluntarily. Some persons who were invited to attend refused to do so. This applies to Principal Lockhart and to the Board of Regents who, after their withdrawal, were invited again by telegram on October 7, to honour their promises of cooperation. Several members of the Board of Regents whose names were mentioned in evidence by certain witnesses were asked by the Committee if they would like to testify, but all refused on the principle of collective responsibility. A notice of the hearings with an invitation to appear was given to each faculty member of United College through Professor Packer, the secretary of the United College Association. A few faculty members were reached personally by the Committee. Some came and testified; others refused. Among those who refused, one, Professor Gordon Blake, did so with an explanatory statement which is reproduced in Appendix B to this report. This Committee respects Professor Blake's privilege to refuse to participate in the investigation. His reason for refusal, the alleged improper constitution of the Committee, was one which this Committee could not very well accept unless it was prepared to dispute the regularity of its appointment and abdicate its function. Professor Blake's objection does not touch the issues or merits of the matter under investigation, and it seems to this Committee that he would have better served the wider and more durable interest of the academic community if he had given such evidence as he had to offer. This would not have been incompatible with his freedom to urge upon the C.A.U.T. that it had gone about the investigation of Professor Crowe's dismissal in the wrong way.

As already explained in the preceding section of this report, Professor Crowe was present during all sessions of the Committee at which evidence was taken. He himself gave evidence and supplied additional documents to those previously in the Committee's possession. Professor McNaught gave evidence and stayed as an observer for the United College Association. Professor Barber alternated with Professor G. H. Boyes, secretary of the C.A.U.T., as observer for the CA.U.T. All others who attended at sessions of the Committee were persons who had evidence to give and they were allowed to remain only while they offered testimony. A witness was required to leave once he or she had concluded the testimony being offered. All questioning was done by members of the Committee. Its purpose, of course, was to make an investigation of the facts and not to preside over adversary litigation.

The Committee adopted a policy of "no publicity" from the time of its appointment, and it conformed to this policy rigidly throughout its proceedings. The only statement given to

the press was the simple sentence that the Committee was continuing with its hearings, and this comment was necessitated by the press publicity which the Board of Regents gave to its withdrawal from the Committee's proceedings and to the reasons advanced for the withdrawal. Those present at the Committee's sessions were also cautioned that there must be no publicity, and all were told that testimony and submissions given and made to the Committee were for the ears and record of the Committee alone.

The Committee understood well enough from the outset that it would have to accept full responsibility for any legal consequences of its proceedings and of such publication of its findings as it might make. Mr. McGavin, when he was before the Committee, as counsel for Principal Lockhart and the Board of Regents took pains to emphasize their reservation of any rights of action which might flow from the Committee's proceedings, whether against the Committee or against the C.A.U.T. This was underlined by Mr. McGavin's demand for a copy of the financial statement of the C.A.U.T. None was sought of the members of the Committee. The C.A.U.T., as a voluntary unincorporated association, is not a legal person for purposes of suit and any action taken against it would normally have to be taken against its officers and members in their personal capacities.

4. Documents: Explanation of Appendices

The Committee lists below the documents which it had before it during its inquiry. They are numbered consecutively in chronological order (save for the last item), and most of them numbered 2 to 42 inclusive were submitted to Principal Lockhart, the Board of Regents and Professor Crowe in advance of and for the purpose of the oral hearings conducted by the Committee. The other numbered documents were filed with the Committee at its hearings. The numbering of the documents in this section is retained, as a matter of convenience of identification, wherever there are references to any of them in other sections of this report. Appendix A to this report reproduces not all the documents which are listed herein by number, but only those which, in the Committee's judgment, are relevant to the issues raised by its terms of reference. As is evident from the size of the Appendix, these represent a large proportion of all that were received. The Committee felt it advisable to lean in favour of comprehensiveness.

Appendix B to this report contains the texts of the documents affecting the status of this Committee, particularly those containing the representations made in that connection by the Board of Regents. Appendix C lists the names of the witnesses who appeared before the Committee. Appendix D contains a Statement of Principles on Academic Freedom and Tenure followed in American universities and colleges.

BASIC DOCUMENTS SUBMITTED TO THE COMMITTEE

1. Letter, May 9, 1950, from Principal W. C. Graham, United College, Winnipeg, to Harry S. Crowe, Winnipeg, confirming Mr. Crowe's appointment as Assistant Professor in the Department of History, United College Winnipeg, and outlining

- specifically the terms of the appointment.
2. Letter, March 14, 1958, from Harry S. Crowe, Queen's University, Kingston, to "Viljo" (Dr. W. A. Packer), Associate Professor of German, and Secretary of the United College Association, United College, Winnipeg.
 3. Letter, April 23, 1958, from Principal Wilfred Lockhart, United College, to Professor Harry Crowe, Department of History, Queen's University.
 4. Letter, May 1, 1958, from W. E. C. Harrison, Professor and Head of the Department of History, Queen's University, to Principal W. C. Lockhart, United College.
 5. Letter, May 2, 1958, from James E. Wilson, Winnipeg, to Harry S. Crowe, Esq., 31 Mack Street, Kingston, Ontario.
 6. Telegram, May 5, 1958, from James Wilson, Winnipeg, to Harry Crowe, 31 Mack Street, Kingston.
 7. Telegram, May 8, 1958, from Harry Crowe, Kingston, to Mr. Allan H. Watson, 144 Girton Boulevard, Winnipeg.
 8. Letter, May 9, 1958, from A. H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor H. S. Crowe, Department of History, Queen's University, Kingston.
 9. Letter, May 17, 1958, from H. S. Crowe, Queen's University, to Mr. A. H. Watson, Chairman, Board of Regents, United College.
 10. Letter, May 17, 1958, from H. S. Crowe, Queen's University, to Investigations Division, Post Office, Winnipeg.
 11. Letter, May 23, 1958, from H. S. Crowe, Kingston, to Dr. Wilfred C. Lockhart, Principal, United College, Winnipeg.
 12. Letter, May 27, 1958, from James E. Wilson, Winnipeg, to Professor Harry S. Crowe, Queen's University.
 13. Letter, May 28, 1958, from Principal W. C. Lockhart, United College, Winnipeg, to Professor H. Crowe, Queen's University.
 14. Letter, May 28, 1958, from R. J. McCourt for H. R. York, District Director of Postal Service, Winnipeg, to H. S. Crowe, Department of History, Queen's University.
 15. Statement made by Professor Crowe to Rev. Dr. E. E. Long, General Secretary of the United Church of Canada, at a luncheon conference convened by Dr. Long at Peterborough, Ontario, June 2, 1958, and at which Rev. Dr. W. Harold Young, Secretary of the Board of Colleges and Secondary Schools of the United Church of Canada and Rev. Dr. W. F. Banister, Professor of Practical Theology, Queen's Theological College and Minister of Chalmers United Church, Kingston, and President of the Bay of Quinte Conference, were also present. A copy of this statement was given to Dr. Long at his request.
 16. Letter, June 2, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, to Professor H. S. Crowe, Department of History, Queen's University.
 17. Letter, June 10, 1958, from Professor H. S. Crowe, Queen's University, to Mr. Allan H. Watson, Winnipeg.
 18. Letter, June 11, 1958, from James E. Wilson, Winnipeg, to Professor H. S. Crowe, Queen's University.
 19. Letter, June 17, 1958, from H. R. York, District Director of Postal Service, Winnipeg,

- per R. J. McCourt, to Mr. H. S. Crowe, Associate Professor of History, Queen's University.
20. Letter, June 17, 1958, from Rev. W. Harold Young, Secretary, Board of Colleges and Secondary Schools, United Church of Canada, Toronto, to Professor H. S. Crowe, Queen's University, Kingston.
 21. Letter, June 20, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, to Professor H. S. Crowe, Queen's University, Kingston.
 22. Letter, June 26, 1958, from Professor H. S. Crowe, Queen's University, to Mr. A. H. Watson, Chairman, Board of Regents, United College, Winnipeg.
 23. Letter, June 26, 1958, from Professor H. S. Crowe, Queen's University, Kingston, to Rev. W. Harold Young, Secretary, Board of College and Secondary Schools, United Church of Canada, Toronto,
 24. Letter, July 4, 1958, from Allan H. Watson, Chairman, Board of Regents, United College, Winnipeg, to Professor H. S. Crowe, Queen's University, Kingston.
 25. Letter, July 6, 1958, from Professor J. H. Stewart Reid, Chairman, Department of History, United College, Winnipeg, to Harry Crowe, Queen's University, Kingston.
 26. Letter, July 10, 1958, from ditto to ditto.
 27. Letter, morning July 11, 1958, front ditto to ditto.
 28. Letter, evening, July 11, 1958, from ditto to ditto.
 29. Telegram, July 15, 1958, from H. S. Crowe, Kingston, to Mr. A. H. Watson, Winnipeg.
 30. Letter, July 21, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor H. S. Crowe, Queen's University, Kingston.
 31. Telegram, July 25, 1958, from H. S. Crowe, Kingston, to Mr. A. H. Watson, Winnipeg.
 32. Letter, August 1, 1958, from Wilfred Lockhart, Principal of United College, date-lined Baysville, Ontario, to Professor Stewart Reid, United College, Winnipeg.
 33. Letter, August 7, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor H. S. Crowe, Queen's University, Kingston.
 34. Telegram, August 14, 1958, from H. S. Crowe, Kingston, to Mr. A. H. Watson, Winnipeg.
 35. Letter, August 16, 1958, from Alderman David Orlikow, M.L.A., Winnipeg, to Harry Crowe, Kingston.
 36. Letter, August 18, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor H. S. Crowe, Queen's University, Kingston.
 37. Letter, August 20, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor C. L. Barber, President C.A.U.T., Winnipeg. (This letter is reproduced in Appendix B.)
 38. Telegram, August 22, 1958, from H. S. Crowe, Kingston, to Mr. A. H. Watson, Winnipeg.
 39. Letter, August 25, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, to Professor H. S. Crowe, Kingston.
 40. Statement, August 26, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, carrying the salutation "Dear Faculty Member" and distributed to members of the faculty of United College. Appended to this

- statement are copies of Mr. Watson's letter to Professor Crowe dated July 4 (item 24 above), Professor Crowe's telegram to Mr. Watson dated July 25 (item 31 above), and Professor Crowe's telegram to Mr. Watson dated August 14 (item 34 above), and, dated August 25, 1958, a letter (item 39) from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor H. S. Crowe, which was a reply to Professor Crowe's telegram of August 22, 1958.
41. Letter, August 29, 1958, from W. C. Lockhart, Principal, United College, Winnipeg, to Professor H. S. Crowe, United College, Winnipeg.
 42. Memorandum, September 2, 1958, from J. H. S. Reid, Chairman of the Department of History, United College, Winnipeg, to Dean Anderson, Dean of Arts, United College.
 43. Letter, September 2, 1958, from H.S. Crowe, St. James, Manitoba, to Mr. A. H. Watson, Winnipeg.
 44. Letter, September 15, 1958, from Allan H. Watson, Chairman of the Board of Regents, United College, Winnipeg, to Professor Harry S. Crowe, St. James, Winnipeg, Manitoba.
 45. Letter, September 15, 1958, from W. P. Fillmore. Winnipeg, to Mr. Allan H. Watson, Chairman, Board of Regents, United College, Winnipeg.
 46. Statement of the Board of Regents of United College released to the press and published in the *Winnipeg Free Press*, September 20, 1958. The statement as printed in the *Winnipeg Free Press* was forwarded to the Committee by the Chairman of the Board of Regents in reply to a request for an authentic copy of the statement as released by the Board.
 47. Letter, September 22, 1958, from W. P. Fillmore, Winnipeg, to Messrs. Aikins, MacAulay & Co., Att'n. Mr. McGavin, Q.C.
 48. Form of Release submitted to Professor H. S. Crowe for signature accompanying tender of compensation in lieu of notice, September 17, 1958.
 49. Statement released to the press by Professor H. S. Crowe, Winnipeg, on or about September 22, 1958.
 50. Letter, September 22, 1958, from J. H. Stewart Reid, Chairman, Department of History, United College, to Mr. Allan H. Watson, Chairman of the Board of Regents, United College.
 51. Letter, October 6, 1958, from Peggy J. Morrison, graduate of and now registrar of United College, to Mr. Allan H. Watson, Chairman of the Board of Regents, United College; copy to Principal W. C. Lockhart.
 52. Mimeographed statement entitled "Organization of the College".

5. Action of the Board of Regents Precipitating Investigation by the C.A.U.T.

Professor Crowe was twice dismissed by the Board of Regents. His first dismissal, which may be described as a deferred dismissal, was effected through a letter of July 4, 1958, in which the Board of Regents stated that Professor Crowe could return to United College for one year, if certain conditions (discussed in the following section of this report) were met, and that his employment would terminate as of August 31, 1959. (The letter of July 4, Document No. 24, is annexed hereto in Appendix A.) It was this action

that prompted the C.A.U.T. to initiate an investigation, and, as already noted, the announced scheme of investigation was accepted by Principal Lockhart and the Board of Regents. The second dismissal was effected by a peremptory letter of September 15, 1958, terminating Professor Crowe's services "forthwith". This letter, Document No. 44, is annexed hereto in Appendix A. At the time of the first deferred dismissal, Professor Crowe was still in Kingston, Ontario, having gone there in the late summer of 1957 to serve as visiting professor of history at Queen's University on the invitation of that University and with the consent of the proper authorities of United College. Professor Crowe returned to Winnipeg on August 31, 1958, and the second peremptory notice of dismissal was addressed to him in Winnipeg.

The background of these dismissals, as it was developed in the documents and evidence submitted to the Committee, is treated fully in the succeeding section of this report. The purpose of the present brief references to the dismissals is to highlight the immediate reasons for the C.A.U.T. investigation and to point out, what are certainly the facts, that neither letter of dismissal informed Professor Crowe why he was being dismissed. The letter of July 4 only went so far as to say that "The Board is of the opinion that your conduct has been such that would enable it to dismiss you for cause and without notice". What that conduct was the Board did not tell Professor Crowe, nor did it elaborate the reasons for the first dismissal until August 26, 1958 when it included them in an open letter to each faculty member of United College. This letter, Document No. 40, is in Appendix A to this report. The reasons for the second peremptory dismissal were first disclosed in a public statement given to the press under date of September 20, 1958. This statement, Document No. 46, is also in Appendix A to this report.

Not only was Professor Crowe not told by the Board of Regents, at the time of his dismissals, why he was being dismissed, but he was not told beforehand of the nature of the charges, if any, that were preferred against him. He was informed only in a letter by Principal Lockhart dated May 28, 1958 (Document No. 13), and replying to a letter of May 23, 1958 (Document No. 11) received from Professor Crowe that "since the matter of your relationship to the College is presently under consideration of the Board and will be at the direction of the Board, it will be in order for you to address any correspondence in this regard to its Chairman, Mr. A. H. Watson." By a letter of June 20, 1958 (Document No. 21.), Mr. Watson in reply to a letter of June 10 from Professor Crowe, told the latter that "you have been advised that the question of your future relationship with the College is being considered by the Board. It is to be expected that a decision finalizing the matter will be made at the next meeting of the Board to be held on July 2nd. If you wish to make any further representations prior to the meeting please feel free to do so." At no time was Professor Crowe told either by Principal Lockhart or by the Board of Regents what was the fault or dereliction which precipitated the issue of possible termination of his association with United College. Professor Crowe's letters and actions showed clearly enough that he was under the impression that his security of tenure was threatened by the contents of a private letter which under date of March 14, 1958 he sent from Kingston to Professor Packer at United College in Winnipeg. This letter did not reach Professor Packer through the mails but was handed to him, opened

and without its original envelope, by Principal Lockhart in the latter's office on April 16, 1958. The questions before this Committee necessitate a review of all that happened in the relationship of Professor Crowe, Principal Lockhart and the Board of Regents from the time that the letter of March 14, 1958 came into Principal Lockhart's possession. The following section of this report contains this review. It is worth noting at this point that when the Board of Regents gave reasons for Professor Crowe's deferred dismissal in the circular faculty letter of August 26, 1958 (Document No. 40), it stated categorically that "Professor Crowe's letter to Professor Packer . . . was not a factor in the Board's decision to take this action. The letter was never before the Board nor was its contents considered by it".

6. Background of the Action of the Board of Regents

At the time of his dismissals by United College, Harry S. Crowe, age 36, was Associate Professor in the Department of History of that institution. He was a graduate of the College, having completed the first four years of Arts there in 1942. He then taught public school for the summer in northern Manitoba and entered the Army later in 1942 as an Officer Cadet attached to the Winnipeg Light Infantry. Posted overseas on the Canadian Loan Scheme to the British Army he served from the spring of 1944 until the end of the war with the Fourth Battalion of the Welsh Regiment in the 53rd Welsh Division. At the time of his discharge in 1946 he held the rank of Captain and the Military Cross.

In the year 1946-47 he completed the fifth year at the University of Manitoba and graduated with the Bachelor of Arts degree with Honours in the spring of 1947. Proceeding to graduate work he obtained the Master of Arts degree from the University of Toronto in 1948. In 1950 he completed the residence requirements for the Ph.D. at Columbia University and in 1951 took orals in Canadian History.

Professor Crowe taught at the University of Manitoba at each of the Summer School sessions from 1947 to 1950 inclusive, and as Lecturer for the regular university year, 1949-50. He was first appointed to the United College teaching staff by the Board of Regents in 1950 on the recommendation of Professor J. H. Stewart Reid, Chairman of the Department of History. This recommendation (as was the usual procedure at that time) was presented by the Chairman of the Department to the Executive of the Faculty (an advisory body consisting of the Deans and a number of appointed members and chaired by the Principal), and after approval by the executive was taken by the Principal to the Board of Regents for action. The late Rev. W. C. Graham, then Principal of United College, advised Mr. Crowe of his appointment as Assistant Professor in the Department of History effective September 1, 1950, in a letter dated May 9, 1950 (Document No. 1). It was a permanent appointment with a probationary period of one year. The probationary qualification was dissolved by renewal which took place in 1951.

Dr. Graham's letter specified the terms of the appointment and was unequivocal in stating that it was made, and, if the letter was signed and returned by the appointee, the

appointment was thereby accepted by the appointee, "on the terms indicated". Professor Crowe signed and returned the original as directed.

The Rev. Dr. Graham was Principal of United College from 1938 to 1955 and was accordingly the Head of the College throughout the years when Harry Crowe attended as a student.

Professor Crowe was promoted to the rank of Associate Professor in the Department of History in 1956 after Dr. Lockhart became Principal.

For the academic year 1957-58 Professor Crowe was at Queen's University as visiting Associate Professor in the Department of History pursuant to an invitation from that University, and he was given a year's leave of absence from United College as arranged with the responsible people at the College. He remained in Kingston throughout the spring and summer of 1958 and, leaving there on or about August 26, was in Winnipeg on August 31.

It would be desirable at this point to describe the academic qualifications and experience of Principal Lockhart if it were possible for the Committee to do so. His refusal to appear, however, left the Committee with only the most fragmentary information on these points. Dr. Lockhart apparently came to United College as Principal in 1955. He is described in the Calendar for 1958-59 as Rev. Wilfred Cornett Lockhart, M.A. (Toronto), Ph.D. (Edinburgh), D.D. (Victoria). He is said to have come from a pastoral charge in the City of Toronto (Kingsway-Lambton) and to have been Chairman of the Board of Colleges and Secondary Schools of the United Church of Canada before coming to United College. The Committee has no information on whether he held an academic position or one of administrative responsibility in an institution of higher learning at any time before coming to United College.

The Board of Regents charged by statute with the management of United College comprises the following persons:

1. Four *ex officio* members representing the United Church of Canada: The Moderator, the Chairman of the Board of Colleges and Secondary Schools, the President of Manitoba Conference, and the President of Saskatchewan Conference.
2. The Principal.
3. Twenty members appointed by the General Council of the United Church of Canada for four-year terms.
4. Eight members elected by the graduates: five from Arts and three from Theology, for four-year terms.
5. Ten members (the maximum allowed) co-opted, for four-year terms.

On April 16, 1958, Principal Lockhart's secretary told Dr. W. A. Packer, Associate Professor of German at United College and Secretary of the United College Association, that the Principal had been trying to get in touch with him for a day or so.

As it was the end of term, faculty members were no longer in regular attendance at the College buildings. Dr. Packer called at the Principal's office. The Principal drew a sheet of paper from a folder on his desk, handed it to Dr. Packer and asked him if he had seen it before. Dr. Packer noted the Queen's University crest at the top and the salutation, "Dear Viljo", the latter a Finnish equivalent for his name commonly used by his colleagues at the College in addressing him. He turned the paper over and saw that it was signed "Harry". He told Principal Lockhart that he had not seen the paper before. He read the letter through and repeated that he had not seen it before.

Throughout the interview Principal Lockhart appeared to be under considerable strain. He said that this letter provided confirmation of the existence of a group of faculty members collaborating in opposition to his policies. This was a repetition of a statement made by the Principal in discussion with Dr. Packer almost exactly one year earlier when the latter had succeeded Professor Crowe in office as Secretary of the United College Association. At that time the Principal had stated that such a group existed and Dr. Packer had told him he did not believe it. Dr. Packer reiterated this view again in the interview of April 16.

In answer to an explicit or implicit inquiry as to how he came into possession of the letter, Principal Lockhart stated that it had been found in the halls of the College by a student, and further contents left Dr. Packer with the impression that it had been turned over to the Principal by a student. The Principal did not on that occasion state that the letter had come to him in the mail.

Dr. Packer assumed his own position to be that of guilt by association. He informed the Principal that he was not responsible for interpreting Professor Crowe's opinions, that if the Principal wished to know what those opinions were, he should consult with Professor Crowe directly and that, as far as he himself was concerned, if his attitude to the College changed in any way he would tell Principal Lockhart directly.

The conversation was broken off after about half an hour by the Principal who indicated that he had a luncheon engagement. Dr. Packer immediately asked for a further conference; this was arranged for the following day. Dr. Packer took the original of the letter with him from the interview on the 16th.

Next day, April 17, Dr. Packer saw Principal Lockhart for some 15 minutes. He said that he had been trying in his own mind to account for the Principal's possession of the letter, that someone must have removed it from the basket containing mail, and after opening it sent it on to the Principal. Thereupon Principal Lockhart drew a blue envelope and a sheet of paper from a file and, handing them to Dr. Packer, remarked that the letter had reached him in the envelope with the sheet of paper also enclosed. The paper had typed on it: "Found in College Hall. We think you should read it. Some staff loyalty???" There was no signature. Dr. Packer told the Principal that on the previous day he had understood him to say that a student had found the letter and given it to him. Principal Lockhart replied that that was the only reasonable explanation. Dr. Packer

stated that he would need the full details in order to report the matter to the postal authorities. Principal Lockhart said that if he reported to the postal authorities it would be on his own responsibility.

On being shown the blue envelope and the anonymous note which, the Principal stated, carried Professor Crowe's letter to Turn, Dr. Packer said that that confirmed his theory, that the Principal had been sent a poison pen letter for the purpose of damaging Harry Crowe. The blue envelope was stamped and postmarked Winnipeg. It was addressed with a typewriter with keys seemingly badly out of line. The address was placed so far up in the right hand corner that the cancellation stamp ran through part of it. Dr. Packer did not see any original envelope and no mention was made of any such envelope.

In the interview of April 17 Principal Lockhart said that he had received the letter 6 or 7 days before the interview of the day before, and that he had photostated the letter. In neither interview did he mention having shown the letter to anyone, or state any intention of doing so.

After the interview of April 16 with Principal Lockhart, Professor Packer went successively to the office of Dr, K.W.K. McNaught, Professor of History and Chairman of the United College Association, and to that of R. M. Stingle, Assistant Professor of English, gave each of them the letter to read, told of having received it from the Principal and outlined the nature of the interview with the Principal. Although Principal Lockhart made no reference in the interview of the 16th to having made photostatic copies of the letter, Dr. Packer expressed to Dr. McNaught on that day his suspicion that such had been done because the Principal had drawn the original letter from a file which appeared to contain photostatic materials.

On the evening of April 16, Professor Packer telephoned from Professor McNaught's house to Professor Crowe, in Kingston, to tell him of receiving his letter of March 14 from Principal Lockhart's hands in the latter's office. Professor Stingle was also present at Professor McNaught's at this time.

In this and in other communications with Professor Crowe Dr. Packer left Professor Crowe with the clear impression that it might be impossible for him (Professor Crowe) to continue at United College. When Professor Crowe received Principal Lockhart's letter of April 23 (Document No. 3), written two weeks after the time when the Principal said Professor Crowe's letter of March 14 to Professor Packer came into the Principal's hands¹ and one week after the first interview with Professor Packer, Professor Crowe interpreted it to be a request for his resignation.

Professor Crowe was convinced as early as April 16 that Principal Lockhart intended to use the contents of the March 14 letter to secure his removal front the College faculty. He established contact with friends in Winnipeg with a view to securing the good offices of some one on the spot yet not associated with the College who might effectively act as intermediary in personal interview, Colonel J. E. Wilson, Q.C., a friend of Professor

Crowe, agreed to assist after telephone conversations with a Mr. Israels and with Professor Crowe. He wrote to Professor Crowe on May 2 saying he proposed to call on Principal Lockhart personally and would ask him to relinquish the copies of Professor Crowe's letter and would attempt to secure an agreement that nothing further would be done or said on the subject by either of the parties. "The main thing", he concluded in his letter, "is to put to rest any further ill will on the subject and I am hopeful that this can be done to the contentment of everyone concerned."

On calling Principal Lockhart's office, Colonel Wilson was told that the Principal was out of town and would not be available until May 7th. Meanwhile Professor Crowe wrote to Colonel Wilson indicating that he proposed to answer Principal Lockhart's letter of April 23. Colonel Wilson wired to Professor Crowe on the afternoon of May 5: "YOUR LETTER RECEIVED DO NOT WRITE LOCKHART." This directive was sent, Colonel Wilson told the Committee, because of his conviction that in the circumstances then existing, only harm could come from long-distance, impersonal communications and that he hoped to be able, acting as an intermediary in personal interview, to avert further misunderstanding and friction. He made it clear to the Committee that anything he did in attempting a resolution of the difficulties in this matter was done as an individual and not in any legal capacity, as a friend of Professor Crowe and not as a solicitor.

Colonel Wilson was at Principal Lockhart's office very early on the morning of May 7 and the two had a long, informal talk. Colonel Wilson told Principal Lockhart that he was not appearing as a solicitor or as a busybody but in the hope that the situation might be contained and the difficulties resolved informally. Principal Lockhart said that it was too late, that the matter was already on the agenda for a meeting of the Board of Regents called for the next night. He showed Colonel Wilson the anonymous letter or note which had come in the mail along with Professor Crowe's letter and a copy of the letter itself: both of these Colonel Wilson read. It was his impression from the conversation that Principal Lockhart had not shown the letter but had disclosed its tenor and significance to an extent that a meeting of the Board of Regents seemed warranted. Colonel Wilson was not aware of any newspaper publicity prior to that time or for weeks thereafter.

Principal Lockhart assured Colonel Wilson that there was no quarrel with Professor Crowe's ability or competence as a teacher. Colonel Wilson gathered the impression that a part of the contents of the letter of March 14 was the issue.

This was the only time that Colonel Wilson saw Principal Lockhart or any official representative of the College or Board of Regents. Three members of the Board, all lawyers, called to see him unofficially a short time later and their visit will be discussed below. One of these three told another witness before this Committee, Alderman David Orlikow, M.L.A., much later and indeed after the peremptory dismissal of September 15, that Principal Lockhart had read the letter of March 14 to him and that he had advised the Principal to communicate its contents to Mr. Watson and then to "seal" the letter. There is little reason to doubt the correctness of Colonel Wilson's impression on May 7 that the nature of Professor Crowe's letter of March 14 had already been revealed to

members of the Board.

On May 7 there was a special meeting of the General Faculty Council of United College, comprising all teaching members of the staff and certain *ex officio* members, summoned by formal written notice from the Principal's office and with the Principal in the Chair. The meeting was fully attended. Principal Lockhart stated that the purpose of the meeting was to discover ways of dealing with rumours that, he alleged, were circulating beyond the campus and which would ruin the Building Fund campaign, the rumours being to the effect that he was intercepting faculty members' mail. He said that the rumours could only have come from the faculty. In the course of explaining how completely false the rumours were he mentioned Professor Crowe's letter of March 14 to Professor Packer, explained that it had come to his desk without any original envelope, in an envelope addressed to him, and accompanied by an anonymous note saying that the letter had been found in College hall. He stated that he had read the letter and photostated it but had intended to take no action; he had shown it to nobody and had not intended to submit it to the Board but the rumours now forced him to do so. This would be done at a meeting to be held the next evening.

At the meeting of General Faculty Council Professors K.W.K. McNaught and J.H. Stewart Reid protested the Principal's statement that the alleged rumours could have come only from the faculty and protested too the Principal's actions regarding the letter to that date as indicated by him to the meeting, and the Principal's proposal to take the letter to the Board of Regents. Professor Reid pointed out that if the letter of March 14 were placed before the Board, Professor Crowe would be on trial and would not be present to defend himself. Principal Lockhart said he doubted if Professor Crowe would dare to return to defend the letter before the Board. Professor Reid said that, failing other representation, he as chairman of the department of which Professor Crowe was a member would represent him. Principal Lockhart indicated that he had written to Professor Crowe concerning the letter. When asked whether he had received an answer he said, no, there could be no answer. Rev. Dr. E.G.D. Freeman, then Dean of Theology, challenged Professor Packer to show good faith to the College by reading the letter: Professor Packer declined to do so and was supported by a number of those present. Dean Freeman said that when he first read the letter he was of the opinion that any one on the faculty was duty bound to take it to the Principal.

Before the close of the meeting Principal Lockhart indicated that he would not read the letter to the Board.

Principal Lockhart telephoned Professor Reid in the evening after the meeting of the General Faculty Council and they discussed at length the propriety and wisdom of Professor Reid appearing before the Board of Regents. Principal Lockhart said he would consult and call back. He called again about one hour later to say that no useful purpose would be served by Professor Reid's presence because he had made up his mind that the letter would not be read to the Board. Professor Reid told the Committee that he inferred from the Principal's remarks at the time that the letter would not be

"discussed" before the Board. He later recognized that this was an incorrect inference and that what the Principal said or meant to convey was that the letter "would not be read" before the Board.

Information communicated to Professor Crowe in Kingston by friends in Winnipeg on the evening of May 7 or during the morning of May 8 left no doubt in his mind but that the Principal was going to discuss the question of his letter of March 14 with the Board of Regents on the evening of May 8. He consulted with colleagues at Queen's on May 8 and it was agreed that it was important to try to avert a decision by the Board at its meeting that evening and, with that in view, Professor Crowe, with the advice and assistance of these colleagues, drafted a telegram and dispatched it to Mr. A. H. Watson (Document No. 7). A copy of this telegram was handed to Principal Lockhart by Professor McNaught in person before the meeting of the Board on May 8.

Professor McNaught went of his own volition to see Principal Lockhart in his office on May 8 to remonstrate with him over his actions regarding Professor Crowe's letter of March 14 and to impress upon the Principal his opinion that the proposal to place the matter before the Board of Regents could not be supported. They carried on a heated discussion lasting at least one and one half hours. Principal Lockhart told Professor McNaught that he (Professor McNaught) had never been in a position of responsibility, that he (Principal Lockhart) might not have done what he did as a private citizen but that he represented the Church and the Board and had to do what he was doing in order to defend them. He went on to say that the letter was not the only thing; that Professor Crowe's file contained evidence to show that the College had taken severe disciplinary action against him because of his conduct while a student. Professor McNaught said that he did not believe that, and asked Principal Lockhart how he could explain the fact that the Rev. Dr. W. C. Graham who was Principal of the College when Harry Crowe was a student was also the Principal upon whose recommendation he was added to the faculty. Principal Lockhart agreed that to explain this was a problem but did not pursue the matter further.

Principal Lockhart told both Professor McNaught and Professor Reid on May 8 that he had never had any intention of taking action against Professor Crowe and did not know how Professor Crowe got the idea that he had such intent. On May 8, when Professor Crowe and his advisers in Kingston came to the conclusion that the situation was one of urgency and forwarded a telegram to Mr. Watson in an attempt to forestall action at the Board meeting scheduled for that evening in Winnipeg, they also agreed that it would be advisable to solicit the good offices of the United Church with a view to mediation and reconciliation. Professor Crowe went to the Rev. Dr. W. F. Banister, a member of the Faculty at Queen's Theological College, minister of Chalmers United Church, Kingston, and President of the Bay of Quinte Conference of the United Church, and asked him if he would telephone the Moderator, Dr. J. S. Thomson. A telephone call brought the information that the Moderator had left for Europe. Dr. Banister then telephoned Dr. W. Harold Young, Secretary of the Board of Colleges and Secondary Schools of the United Church, to let him know why he was trying to get in touch with the Moderator. He asked

Dr. Young if he knew about the matter relating to Professor Crowe. Dr. Young replied that he knew all about it. Either during this or a later telephone conversation on the same day (May 8) Dr. Banister asked Dr. Young to telephone Mr. Watson and Principal Lockhart to ask them not to come to any precipitate decision at the Board meeting scheduled for that night. The Committee does not know whether Dr. Young complied with this request.

Some time during May Principal Lockhart assured Professor Reid that he had no animus against Professor Crowe and wanted him back at the College. Professor Reid met Principal Lockhart on various occasions after May 8 and was sure that they talked about Professor Crowe but no specific incident remained in his memory. He received no report of the Board meeting of May 8, either in his official capacity as Chairman of the History Department or in any other capacity.

Professor Crowe's information about what occurred at the Board meeting of May 8 is limited to what is contained in the letter of May 9 from M. Watson (Document No. 8). This letter indicated that Professor Crowe's telegram of May 8 was read to the Board and that a postal investigation was ordered; but gave no indication whether any other correspondence was read or referred to or acted upon.

The postal authorities in Winnipeg were requested to conduct an inquiry of allegations of misdelivery or non-delivery of mail at United College and they complied. Eight letters before the Committee, dated from May 9 to June 20, 1958, dealt in whole or in part with the request and the subsequent post office report. Allowing for confusion of names in certain items of correspondence it appears that Professors Packer and Crowe and Mr. Watson were all individually in communication with the Winnipeg postal authorities with reference to an investigation concerning delivery of mail to and at United College. The report of the District Director of Postal Service forms the text of a letter from R. J. McCourt to Professor Crowe dated May 28. In summary, the investigators concluded that good delivery of the mail to the College had been effected and beyond that point their responsibility did not go.

A few days after the Board meeting of May 8 three lawyer members of the Board of Regents, Campbell Haig, Duncan Jessiman and B. Stuart Parker, called on Colonel Wilson. They made it plain that they were not representing the Board or Principal Lockhart: they had not been asked to come. There was no doubt that they were calling as a result of a Board meeting at which Professor Crowe had been discussed but the position of the Board was not revealed. Their hope was that things might be smoothed over and the chief contribution to this end, in their view, would be for Professor Crowe to go elsewhere. They felt that if he returned to United College he might undermine confidence and would be an object of curiosity. His opinions were not very acceptable, and if he came back it would be uncomfortable. There was a clear implication in their remarks that they knew the nature of Professor Crowe's letter of March 14. Suppose that Professor Crowe did not see fit to resign, suggested Colonel Wilson; what then? As far as these men knew he would not be fired; he could return for a year if he wanted to.

But it would be much better if he went elsewhere. They were sure that references would be readily available – and this was said with no suggestion of bribery but as a simple statement of fact.

Colonel Wilson had another talk subsequently with some or all of the three Board members. They were all convinced, although not in equal degree, that it would be better for all concerned including Professor Crowe if he found employment elsewhere. However, they did not doubt that he could return for a year if he wished. On June 11 Colonel Wilson wrote to Professor Crowe saying he had been in touch with Mr. Jessiman and Mr. Haig earlier in the week and hoped soon to have something definite to report but that he thought things were going to work out.

At the end of May or the first of June, Dr. E. E. Long, General Secretary of the United Church of Canada, telephoned to Professor Crowe's house in Kingston and left a message asking if Professor Crowe would lunch with him in Peterborough on June 2. Professor Crowe went to Peterborough and four persons lunched together, Doctors E. E. Long, W. Harold Young and W. F. Banister and Professor Crowe. At the luncheon Professor Crowe made a statement to Dr. Long; he spoke from a prepared manuscript while they ate and at the conclusion of the luncheon gave Dr. Long, at his request, a copy of the statement from which he had spoken (Document No. 15). He also gave Dr. Long, at his request, and for the exclusive use of Dr. Long and the Moderator, a copy of the letter of March 14 to Professor Packer.

On June 17 Dr. W. Harold Young telephoned to Professor Crowe with certain suggestions and on Professor Crowe's request wrote on the same day in confirmation of the points which he wished to convey. In the letter (Document No. 20) Dr. Young stated that he had long conversations with Principal Lockhart the preceding night, that he was informed that there was a strong sentiment in the Board of Regents of United College favouring severance of Professor Crowe's connection with the College, and that the matter had been held in abeyance on Principal Lockhart's representations. Dr. Young suggested to Professor Crowe that he (Professor Crowe) inform Principal Lockhart by an early letter what, in Dr. Young's recollection, Professor Crowe had stated verbally to him a fortnight before in Peterborough, that is, that it was Professor Crowe's desire and intention to return to United College for the year 1958-59 and to secure employment elsewhere at the end of that academic year. Dr. Young stated his conviction that Principal Lockhart was prepared to support an arrangement permitting Professor Crowe to return to United College for one year if it could be understood that he intended to try to secure an appointment elsewhere thereafter. Dr. Young emphasized that he was not asking Professor Crowe to submit a resignation but only a written statement of intention to leave.

Professor Crowe replied to Dr. Young by letter of June 26 (Document No. 23) indicating, in effect, that his own recollection of what he had said in Peterborough differed from that outlined by Dr. Young in his letter of June 17.

Three letters comprise the total correspondence between Principal Lockhart and Professor Crowe prior to the Board meeting of July 2. Principal Lockhart's letter of April 23 (Document No. 3) which Professor Crowe interpreted as a request for his resignation has already been referred to, as has also the fact that Colonel Wilson advised against reply by wire of May 5. Eventually Professor Crowe replied, by letter of May 23 (Document No. 11), expressing regret at the interpretation which Principal Lockhart had placed upon the letter of March 14 and stating his opinion that Principal Lockhart's conclusions were incorrect, and asking for the photostatic copies of the letter. Principal Lockhart replied on May 28 (Document No. 13) that Professor Crowe's letter of May 23 had been placed before the Board of Regents, and advising that further correspondence should be addressed to Mr. Watson, Chairman of the Board of Regents, since that body was considering Professor Crowe's relationship to the College.

This was the first official intimation that Professor Crowe received that his status as a member of United College was under review.

Three other letters complete the correspondence which passed between Professor Crowe and any official representative of United College prior to July 2. Professor Crowe wrote to Mr. Watson on June 10 (Document No. 17) pursuant to Principal Lockhart's directive; Mr. Watson replied on June 20 (Document No. 21) to say that the Board of Regents expected to decide Professor Crowe's future relationship with the College on July 2 and inviting further representations; and, finally, Professor Crowe wrote to Mr. Watson on June 26 (Document No. 22).

The Board of Regents dismissed Professor Crowe for the first time on July 2, 1958. The decision taken at the Board meeting on the evening of that day was communicated to Professor Crowe by the Chairman of the Board in a letter dated July 4, postmarked July 7 and received in Kingston on July 9. Professor Crowe was not present at the meeting nor was he asked to appear before the Board at any time. Professor J. H. S. Reid, Chairman of the Department of History, asked permission from Principal Lockhart to attend the Board meeting of July 2 after receiving a telegram from Professor Crowe requesting him to do so. Principal Lockhart consulted with Mr. Watson and said Professor Reid might appear and make a brief statement. Professor Reid said that he wanted to do more than that since Professor Crowe had already submitted a letter, and he wished to be present when Professor Crowe's future was under discussion. At dinner time, July 2, Principal Lockhart telephoned and agreed to a lengthier appearance.

Professor Reid was summoned very soon after the commencement of the Board meeting and was introduced by Mr. Watson who said Professor Reid was there to make a statement on behalf of Professor Crowe, Professor Reid said that he was not there on behalf of Professor Crowe as his position was already on the record. He pointed out that he had not read Professor Crowe's letter of March 14 to Professor Packer and had refused to do so. Mr. Watson said no one in the room except Principal Lockhart had read the letter. Professor Reid said he had sought permission to come to the meeting because as Chairman of the History Department he did not wish to see his department

wrecked; because he believed that the dismissal of Professor Crowe would lead to overwhelming condemnation on the part of academic people all over Canada; because, if Professor Crowe were dismissed, it would not be on account of inefficiency but only as a result of alleged opinions the evidence of which should not be in their hands; and, finally, because, having given ten years of service to the College, he felt it to be of the utmost importance that every effort be made to retain and recruit high quality teachers, rather than to drive them away.

There followed at least forty minutes of rapid-fire discussion directed primarily toward the ascertainment of Professor Reid's views about the reasonableness or otherwise of dismissal for criticism, for possible lack of sympathy with the aims of an institution, or for alleged incomparability; and his opinion as to the nature of tenure in an institution of higher learning. One member of the Board put to Professor Reid what he (the Board member) described as the key question: If Professor Reid had a vacancy in his department tomorrow, would he recommend the appointment of Professor Crowe? Professor Reid said he could think of no one he would rather have than Professor Crowe.

Another member of the Board is reported by Professor Reid to have said twice that the thing he could not countenance or forgive was the reflection on two dead men. Professor Reid said he did not know what this person was talking about. Mr. Watson said again that no one but Principal Lockhart had seen Professor Crowe's letter of March 14.

Further reference to Professor Reid's appearance at the Board meeting of July 2 is made in section 8 of this report.

Professor Reid left the meeting after asking if he might be advised of the decision of the Board. He was told that this would be considered but that in any case Professor Crowe would be notified the following morning.

On July 3 Professor Reid met the Rev. Dr. Fred J. Douglas, a member of the Board of Regents who had been at the Board meeting on the evening of July 2. Dr. Douglas told Professor Reid that he would be happy to know that the Board had decided to take his advice. The sentiment of the Board, he said, was that they had a perfect right to dismiss Professor Crowe but that they were not going to do it. The Board had been impressed, he said, by Professor Reid's presentation.

Professor Reid wrote to Professor Crowe on July 6 saying that he assumed Professor Crowe would have heard from the Board by this time, that the unofficial word was that while the Board insisted they had the right to fire him, they were not going to do it. On July 10 he wrote again saying he was sure that Professor Crowe would have heard from the Board by this time, and that Mr. Watson had telephoned the night before (July 9) to apologize for the fact that Professor Reid had not been advised of the Board's decision. Mr. Watson had concluded the telephone conversation, however, without imparting any

specific information about the Board's decision.

Later in the day (July 10) Professor Reid received a letter from Professor Crowe enclosing a copy of Mr. Watson's dismissal letter of July 4 to Professor Crowe which Professor Crowe had finally received on July 9. Professor Reid telephoned to Dr. Douglas but did not reach him until evening. When he finally got in touch with him he read to him the operative paragraphs of Mr. Watson's letter to Professor Crowe and asked him how he could reconcile them with the information he had given to the effect that Professor Crowe was not to be dismissed. Dr. Douglas appeared to be amazed. He offered to telephone Mr. Watson. The next morning, July 11, he called back and suggested that Professor Reid telephone Mr. Watson himself.

Professor Reid obtained an interview with Mr. Watson the same day (July 11) and talked with him in his office for at least an hour. He told Mr. Watson that he had been told unofficially that the Board had decided not to dismiss Professor Crowe. Mr. Watson said that that was right. How then, asked Professor Reid, could he account for the operative clauses in the letter of July 4 to Professor Crowe? No business man, replied Mr. Watson, would regard the terms of the letter as dismissal; no business man would dismiss with a year's notice. Since a year's notice had been given, Professor Crowe would return and many things could happen. Mr. Watson believed it likely that by the end of the year Professor Crowe and Principal Lockhart would be in agreement again. Mr. Watson asked Professor Reid what, in his opinion, the Board should have done on July 2. "Absolutely nothing." Professor Reid replied. "What should be done now?" asked Mr. Watson. Professor Reid suggested that Mr. Watson write to Professor Crowe, ask for the return of the letter of July 4, and start over again; or advise Professor Crowe that the letter did not constitute dismissal. Mr. Watson said he was not instructed by the Board to do either of these things and that the Board could not be reconvened. Mr. Watson suggested that Professor Reid advise Professor Crowe to write expressing his intention to return to the College, his surprise at any reference to termination of service on August 31, 1959, and his hope to have the opportunity to discuss the whole matter with Mr. Watson on his return. Professor Reid said he would communicate this suggestion to Professor Crowe but could not undertake to advise him to accept it.

Professor Reid wrote to Professor Crowe later in the day (July 11) and reported his conversation with Mr. Watson.

Communications between Professor Crowe and Mr. Watson during July and August were (as before) entirely by letters and telegrams the texts of which are reproduced in Appendix A, Principal Lockhart had no communication with Professor Crowe during July and August. His letter of August 29 (Document No. 4.1) was handed to Professor Crowe in the College on September 2 after Professor Crowe's return to Winnipeg.

Mr. Watson's letter of July 4 notified Professor Crowe of the termination of his services in the College as of August 31, 1959. This much was clear. The letter also, however, extended permission to Professor Crowe to return for one year starting September 1,

1958, on condition that he notify the Board in writing by July 25 that he was returning at the same salary and on the same conditions as in 1956-57, the year before he went on leave of absence. Professor Crowe's salary as Associate Professor before he went on leave was \$5,300, an amount well above the minimum for the rank at that time. Meanwhile, general salary increases had been granted in the College and the salary schedule had advanced to the extent that the range for Associate Professors was \$6,000 to \$6,500. Professor Crowe, assuming that Mr. Watson's letter of July 4 meant what it obviously appeared to mean on this point, i.e., that he was being offered the privilege of returning for one year at the same salary he had in 1956-57, well below the new minimum for his rank, concluded that he was dismissed and was being offered a new one-year contract at the reduced level. He sought clarification of the Board's salary proposal in a telegram to Mr. Watson, dated July 15 (Document No. 29). Mr. Watson replied by letter of July 21 (Document No. 30) saying that his letter of July 4 meant simply that Professor Crowe's salary when he reported for duty would be the same as when he left. He went on to list a set of factors which, he stated, normally governed salary increments, and concluded with the statement that there was nothing in the correspondence to prevent Professor Crowe from discussing his salary for 1958-59 when he returned.

On July 25 Professor Crowe sent a telegram to Mr. Watson (Document No. 31) saying that Mr. Watson's letters of July 4 and 21 constituted termination of employment without notice and the offer of a new contract for one year at a salary below the minimum for his rank, and this he declined to accept. There followed an inter-change of letters and telegrams, all of which are reproduced in Appendix A; a letter from Mr. Watson to Professor Crowe dated August 7 (Document No. 33); a telegram from Professor Crowe to Mr. Watson, dated August 14 (Document No. 34); a letter from Mr. Watson to Professor Crowe, dated August 18 (Document No. 36); a telegram from Professor Crowe to Mr. Watson, dated August 22 (Document No. 38); and finally, a letter from Mr. Watson to Professor Crowe, dated August 25 (Document No. 39), the original sent to Professor Crowe and a copy released by Mr. Watson and attached to Document No. 40.

Under date of August 26, Mr. Watson, acting on instructions from the Board of Regents, released a mimeographed, personally-signed statement to members of the Faculty of United College which purported to outline recent developments in the relationship between Professor Crowe and the College (Document No. 40). This semi-public document contained the first and only explanation made by or for the Board of Regents or any representative of the College in justification of the dismissal action taken by the Board on July 2. According to this statement the letter of March 14 to Professor Packer was not a factor in the Board's decision; instead it was Professor Crowe's attitude to the College, the Board and the Principal as reflected in his communications and actions in the situation.

A copy of this mimeographed release was sent to Professor Crowe along with the other members of the Faculty. Being addressed to Kingston late in August, it necessarily followed him back to Winnipeg and reached him on September 3. This was the only

statement ever seen by Professor Crowe (except for items in the newspapers) which purported to explain the actions taken by the Board of Regents with reference to his status as a member of the United College Faculty.

Professor Crowe returned to Winnipeg on August 31 and reported to Professor Reid, Chairman of the History Department at the College. He stated that he was reporting for duty according to the terms of his continuing employment and had entered into no arrangement in modification of such employment. Professor Reid put his statement into writing and submitted it as notification to the late Dr. O. T. Anderson, Dean of Arts (Document No. 42). Later in the day, while still in the College, Professor Crowe was handed a letter from Dr. Lockhart written August 29 (Document No. 41) asking him to telephone Mr. Watson and indicate that he was back at the College. Principal Lockhart expressed regret at being absent from the city and said he would look forward to seeing Professor Crowe on his return. Professor Crowe telephoned to Mr. Watson's office as directed and on learning that Mr. Watson was out for the remainder of the day, wrote him a letter (September 2) saying that he had reported for duty with reservation of all rights of his employment as Associate Professor (Document No. 43).

On September 3 Professor Crowe received a telephone call from Mr. W. D. G. Runions, Bursar of United College, who stated that Mr. Watson would like him to be at his office downtown at 4 o'clock that afternoon. Professor Crowe said he would be there and that Professor Reid, Chairman of the History Department, would accompany him. When they arrived at Mr. Watson's office, Mr. Watson said that Mr. Campbell Haig of the Board of Regents would soon be along. The latter came in and the four were present for the interview: Messrs. Watson and Haig, and Professors Reid and Crowe. The substance of the exchanges which had taken place between Mr. Watson and Professor Crowe from July 2 onward was restated. Most of the subsequent discussion related to salary. Professor Reid's impression of the discussion was that the proposal was to pay Professor Crowe the same dollar salary as he had been paid in 1956-57, before he went on leave of absence. Professor Crowe gathered that Mr. Haig and Mr. Watson were prepared to accept him for duty for the year starting September 1 at the salary of an associate professor. There was discussion whether Professor Crowe's request was for \$6,000, the minimum for an associate professor as at September 1, 1958, or for an amount as far above \$6,000 as was accorded to other associate professors whose salaries, like Professor Crowe's had been \$5,300 in 1956-57. Professor Crowe admitted that if their suggestion was to pay him \$6,000 and no more, there was nothing he could do about it. A second question raised by Mr. Haig was whether, if they paid Professor Crowe a salary of \$6,000, he would accept the Board's right to dismiss him at the end of the year. Professor Crowe replied that if they paid him a salary of \$6,000 they would have converted his dismissal and the offer of a new contract, as put forward in Mr. Watson's letter of July 4, into a year's notice of dismissal. He said, and Professor Reid agreed, that if this was the Board's decision nothing could be done to prevent it. The conversation regarding salaries ended on this note.

When Professor Crowe left this meeting on September 3 his firm expectation was that

he would be back at United College for the year starting September 1, 1958, at a salary of at least \$6,000, but not for longer than the one year. He went home and began to prepare his lectures.

Professor Crowe had no further meetings or conversations or telephone communications with Mr. Watson or any official of the Board or College until September 15. On that date a representative of the legal firm of which Mr. McGavin is a member served Professor Crowe with notice of summary dismissal by letter (Document No. 44) handed to him at his house. The information was known almost simultaneously at United College as was made clear by a telephone call received from the College by Professor Crowe within two hours of the formal serving of notice. A copy of the notice of dismissal was on Professor Reid's desk by the evening of September 15 in a sealed envelope and with the notation, "For your information", signed "W. C. Lockhart".

In conjunction with its notice of summary dismissal the Board of Regents offered Professor Crowe the compensation to which he would be legally entitled in lieu of notice. Legal advice placed this at \$6,000, the minimum amount which Professor Crowe would have received for a year's service as associate professor (Document No. 45). The Board issued cheques to Professor Crowe and the Receiver General of Canada totalling \$6,000 on September 17 and forwarded the cheque for Professor Crowe to his legal advisers along with a form of release for signature. On being advised that the form of release covered a field much wider than compensation in lieu of notice, Professor Crowe rejected the tender and the cheque was returned, along with the form of release, to counsel for the Board on September 22 (Documents Nos. 47 and 48).

Professor Reid wrote to Mr. Watson on September 22 (Document No. 50), as Chairman of the History Department, in formal protest of the action taken against Professor Crowe. He received an acknowledgement of the letter saying that it had been read at a meeting of the Board of Regents and that its contents had been noted. Professor Crowe had no further contact with any representative of the Board of Regents or the Principal until the morning of October 6 when he and Mr. Watson met at the hearings of this Committee.

7. Principal Issues

The interest of the C.A.U.T. in a thorough investigation of the facts attending Professor Crowe's dismissal or dismissals by United College raises for the first time in relation to a concrete case (so far as this Committee is aware) the question of applicable standards for judging the propriety of the treatment of a faculty member by a university or college administration. The C.A.U.T. has not yet adopted a defined policy on academic freedom and tenure, nor does it have any code of procedural standards which might be put forward for acceptance by universities and colleges in Canada. This Committee has no intention of formulating either a complete statement of principles on academic freedom and tenure, or a complete code of procedure which ought to govern faculty discipline proceedings. Such action might be within the broad terms of reference, but the

Committee prefers to regard those terms as involving a particular consideration of academic freedom and tenure in the context of a particular set of facts. This particularity does not exclude the establishment of a frame of reference for those facts; indeed, it is obviously demanded.

In assessing the conduct and treatment of Professor Crowe against a postulate of academic freedom and tenure and against a conception of procedural fairness, this Committee is not, of course, limited to the purely legal relations of Professor Crowe and United College. The common law and statute law governing university or college employment cannot be the sole measure of academic freedom and tenure or of procedural fairness in discipline of faculty members.

The Committee has already referred to the United College Act, 1938 (titan.), c. 80, which provides in section 25 for the appointment of all professors and lecturers by the Board of Regents. The statute stipulates that tenure, unless otherwise provided, shall be during the pleasure of the Board. While rejecting any suggestion that this provision governs academic tenure as it is understood in the university community, the Committee would also draw attention to the terms of the contract which Professor Crowe accepted on being appointed to the staff of United College by the late Principal Graham in a letter of May 9, 1950 (Document No. 1). The first term of the contract was expressed by the Principal (who is by statute chief executive officer of the Board of Regents) in the following words:

"Your appointment will date from September 1, 1950, and will be for one year, subject to renewal at the end of that time if there is mutual satisfaction. The position to which you are being appointed is a permanent position, but all new appointments are made on the basis of a year's probation".

The appointment was renewed and it accordingly became "permanent". The Committee will not presume to determine the legal significance of such a status. For present purposes, it reinforces the Committee's own appreciation that even the most elementary understanding of security of academic tenure excludes arbitrary dismissal without just cause and without prior opportunity to know and to meet charges on which the dismissal purports to be founded. In assessing just cause, some understanding of academic freedom is necessarily involved. Cause for dismissal which is a denial of academic freedom cannot be just cause.

What has been written above fixes for this Committee the issues which must be dealt with in the light of the facts surrounding Professor Crowe's dismissal, He was entitled to continuous employment as a faculty member of United College subject only to termination for just or proper cause and there cannot be just cause in a ground of dismissal which violates academic freedom. His security of tenure, while vulnerable if just cause for dismissal be shown, entitled him to prior notice of charges with a fair opportunity to be heard either personally or through a chosen adviser before condemnation by the governing body of United College. Annexed to this report as

Appendix D is a statement of principles on academic freedom and tenure agreed upon in 1940 by representatives of the American Association of University Professors and the Association of American Colleges, and officially endorsed by these associations in 1941.

8. Professor Crowe's Dismissal, Protection of Private Communications and Academic Freedom

Professor Crowe's dismissal was in no way related to his ability and competence as a teacher and professor of history. By direct evidence from the head of his department, he is an outstanding teacher and historian, and a similar testimonial to his ability and capacity was given by Professor Harrison, head of the department of history at Queen's University where Professor Crowe was a visiting professor in the academic year 1957-58. Professor Reid, head of the history department at United College for the past eleven years, testified that at no time had he made or received a complaint about Professor Crowe. It was on his recommendation that Professor Crowe had been appointed to the staff of United College in 1950 as an assistant professor by the late Principal Graham. It was on Principal's Lockhart's recommendation that Professor Crowe was promoted to the rank of associate professor in 1956. Professor Crowe's evidence was that he had not received any complaints about his conduct from Principal Lockhart before the incidents involved in this investigation.

Professor Reid was not consulted about Professor Crowe's impending dismissal and learned of the threat to his security of tenure only on May 7 at the open General Faculty Council meeting called and addressed by Principal Lockhart. Reference to this meeting has been made in section 6 of this report. This Committee cannot say whether or not Principal Lockhart recommended Professor Crowe's dismissal on either of the two occasions on which he was dismissed. It did not have the advantage of testimony from the Principal nor do the documents in the case disclose whether he played an active part in the dismissal proceedings. Clearly, however, he precipitated them by the manner in which he dealt with Professor Crowe's private letter to Professor Packer after it fell into his hands. The Committee is satisfied on the evidence before it, which has been recited at some length, that Principal Lockhart disclosed the contents of the letter to others before the first deferred dismissal effected under the Board's letter of July 4 (Document No. 24). The evidence shows that Dr. Freeman, then Dean of Theology, claimed to have read the letter, and that Mr. Watson and Mr. Campbell Haig of the Board of Regents had seen either the actual letter, or a photostat made by Principal Lockhart, or were made aware by the latter of the contents of the private communication. It could reasonably have been expected that the chief executive officer of United College would, at least in the first instance, deal with Professor Crowe personally and demand an explanation of the letter, if he felt that an explanation was owing, while respecting in the meantime the privacy of a communication to which he was not entitled. This Principal Lockhart saw fit not to do; and the course he took cannot be explained by any annoyance he may have felt at Professor Crowe's delay in answering the letter of April 23 (Document No. 3). Before he wrote that letter to

Professor Crowe, he had already photostated the private letter. This Committee cannot fix the exact date when he first communicated its contents or showed it to others (that is, to persons other than Professor Packer), but the evidence points to a date before May 7; and it may be recalled that Principal Lockhart admitted to Professor Packer that he had the letter about a week before calling Professor Packer in on April 16 to talk about it. He did not up to that time even contemplate informing the Post Office about the unusual circumstance of receiving in the mail a letter to which, clearly, he was not entitled, and made the response that "it will be on your own responsibility" when Professor Packer, quite properly, told the Principal that the Post Office must be informed.

Principal Lockhart was not to be deterred, even by the friendly intervention of Colonel J. F. Wilson, from throwing the matter into formal reference to the Board of Regents and from making it, again without a first attempt at private composition, the centre of attraction at a General Faculty Council meeting. Indeed, Colonel Wilson's evidence showed that the Principal had, before May 7, put the matter in issue before the Board of Regents of which he is, ex officio, a member.

The course taken by Professor Lockhart as of May establishes without any doubt that the only thing then in issue was the contents of Professor Crowe's private letter to Professor Packer. Professor Crowe had been advised by Colonel Wilson on May 5 (Document No. 6) not to send a proposed letter to Principal Lockhart whom Colonel Wilson was going to see. It was only after the General Faculty Council meeting and when Professor Crowe learned of the publicity given by the Principal to his receipt of the letter and to the photostating thereof and learned also of the Principal's submission of the matter to the Board of Regents, that Professor Crowe remonstrated and propounded his legal rights to the chairman of the Board of Regents (Document No. 7). Professor Crowe followed this by answering Principal Lockhart's letter of April 23 and protesting the latter's conclusions about the private letter (Document No. 11). The Principal's reply that the matter of Professor Crowe's relationship to United College was already under consideration by the Board and referring him to Mr. Watson so far as further representations and correspondence were concerned (Document No. 13) underlines again that it was the private letter and Dr. Lockhart's handling thereof that was made by him and by the Board of Regents the principal issue in Professor Crowe's relationship to United College.

There is thus a decided unreality in the published reasons for Professor Crowe's first dismissal as disclosed for the first time in the Board's open letter of August 26 to the Faculty (Document No. 40). The Committee accepts the statement in this letter of August 26 that Professor Crowe's private letter was not before the Board at its dismissal meeting of July 2. (The letter had been given to Professor Packer but the Committee assumes that none of Principal Lockhart's photostats were before the Board.) The Committee cannot agree, on the evidence before it, with the further statement by the Board of Regents (Documents No. 40) that the private letter was not a factor in the dismissal nor were its contents considered by the Board. Some members knew of the

contents, and Professor Reid's evidence of what occurred when he appeared before the Board at its July 2 meeting leaves no doubt that the contents of the letter were very much to the fore. According to Professor Reid, one of the members of the Board of Regents said that what he could not forgive about the letter was the reference to dead men. Mr. Watson asked Professor Reid some questions which were to the following effect: If the Board could not dismiss Professor Crowe as a person who was critical of the administration and not sympathetic to the aims of the College, what grounds were there then for dismissal? Was not incompatibility with the Principal a proper ground of dismissal? Did Professor Reid think that Professor Crowe had any future at United College? How could there be any future for Professor Crowe if there was an unbridgeable gulf between him and Principal Lockhart? Professor Reid replied that harmony does not come by having every person sing the same note and that if incompatibility were a proper ground of dismissal, there would be many dismissals. He agreed that on the view taken by Mr. Watson there was no future for Professor Crowe at United College. Mr. Watson's questions are in themselves a more eloquent commentary on his attitude to academic freedom than anything this Committee could say about it.

The Committee finds it difficult to understand why the reasons for dismissal (as set out in Document No. 40) could not be given to Professor Crowe in the dismissal letter of July 4 (Document No. 24). Of even more significance is the failure of the Board to give Professor Crowe previous notice of the nature of the charges against him if it be the fact that the first dismissal was for the reasons later given. (The lawyer members of the Board at least would understand the compelling propriety of such a course.) It is desirable to set out the reasons for dismissal which were as follows:

What the Board has had under consideration has been Professor Crowe's expressed attitudes to the College, the Board and the Principal as reflected in his communications to the Principal and the Board and his actions pertaining thereto. He has attempted to intimidate the Principal and the Board by threats of legal and other action and by public denouncement. He has imputed improper and false motives to the Principal and has made accusations against him of distortion and grotesqueness, deliberately misrepresenting the facts to accomplish this end. The intemperate tone of his communications to the Board, the Principal and the Church as represented by the Board of Colleges and Schools, reflects an aggressive belligerency that appears to make any long term relationship between himself and the College impossible.

It is obvious that they refer to Professor Crowe's audacity in protesting an invasion of privacy and violation of what he conceived to be his legal rights, as well as protesting possible adverse use of the contents of the letter based on conclusions which he declared were unfounded. These protests are underlined in Documents Nos. 7, 11, 17 and 22 of Appendix A, documents which ought reasonably to have suggested to both Principal Lockhart and the Board that a hearing to give an opportunity for explanations was in order. Far from giving Professor Crowe either a hearing or previous notice of the charges which were to be aired against him in his absence, the Board dismissed him

without giving him any reasons (see Document No. 24), and some seven weeks later announced to his teaching colleagues in language already quoted, that he was dismissed for protesting what he considered to be a misuse and misconstruction by Principal Lockhart of a private letter.

That Principal Lockhart violated privacy without justification is clear on the record, Whether he misconstrued the private letter cannot be answered with definiteness any more than the Committee can say that he was correct in the construction that he did put on it. This was an issue which could only be resolved, and above all in an academic community, by confrontation, by seeking or requiring an explanation. Persons in academic life are well aware that words do not always illuminate thoughts; that the reader may easily miss the point made by the writer, in a public communication. How much more likely then is misconstruction where there is intrusion, even though initially unintentional as here, upon a private communication.

The Board of Regents' expressed reasons for the first deferred dismissal make it clear that it saw no impropriety in Dr. Lockhart's retention, disclosure and photostating of a private letter, without prior permission of or notice to the writer or addressee, and on the other hand it saw grave impropriety warranting dismissal in the writer's expression of indignation against this invasion of his privacy. The matter goes even deeper because Professor Crowe's second, peremptory dismissal on September 15, again without previous notice and without reasons given him at the time, was subsequently justified in a statement to the press as based on the contents of his private letter. Thus, the Board of Regents, at a time when it well knew that issue had been taken with Dr. Lockhart's construction of the letter, found either in that construction or in their own estimate warrant for dismissal. A professor of some length of service was thus unceremoniously discharged for a private expression of opinion which he was given no opportunity to explain and which should not have been before the Board of Regents at all, or certainly not without a previous conference between Dr. Lockhart and Professor Crowe.

The central question at this point is whether the dismissals of Professor Crowe have any relation to academic freedom. In the Committee's view, both the first deferred dismissal and the second peremptory one, having regard to the reasons given in each case, involve a trespass on academic freedom and involve as well an unjustified invasion of the privacy of personal communication in the manner in which the affair was handled by Principal Lockhart and by the Board of Regents. The relation of the dismissals to security of tenure is considered in the succeeding section of this report.

The privilege of a teacher in a university or college to utter and publish opinions in the course of teaching and research and to exchange opinions with faculty colleagues without liability to official censure or discipline is the commonly understood substance of academic freedom. This Committee intends no exhaustive definition. It recognizes too that particular institutions may require some kinds of conformity which, if agreed to by a teacher, would amount to acceptance of a limitation on academic freedom as otherwise generally understood. Normally it would be expected that any limitations should be

clearly expressed and understood at the outset by both teachers and institution. Failure to stipulate or define limitations would warrant a teacher, at least in an arts faculty, in believing that he enjoys the academic freedom which has been traditionally associated with Canadian universities and colleges.

United College is by its constituent Act (1938 (Man.), c. 80) "a body corporate and politic for the education of youth and the promotion of knowledge according to the principles of the Christian religion" (section 3); and by section 44 the Act is to be deemed a "public Act", and hence presumably deemed to be known in all its terms by the public at large. The Committee is not disposed to say that the Act itself establishes an a priori limitation on academic freedom as it is commonly understood; but, assuming that it does, the actions of Principal Lockhart and of the Board of Regents in this case cannot be brought within the cover of the Act.

Academic freedom would be vulnerable indeed if its limits depended on the interpretation placed by a college administration on the remarks of a member of the academic staff. Academic people may say things which are not understood by the administration. Indeed, it is no part of the function of a professor to speak only in accents familiar to the administration. For a man to be discharged on the basis of an interpretation of his remarks made by the administration would create a situation fraught with peril for academic freedom. To find a discharge made in the face of a remonstrance by the teacher that he has been misunderstood, and without being afforded an opportunity of explanation, makes the offence against academic freedom grave indeed. This is what happened in the instant case.

The Committee does not propose to dwell on the invasion of privacy of personal communication involved in Professor Crowe's dismissal. The facts speak for themselves. From an academic standpoint, the situation here might be regarded as one where Principal Lockhart accidentally overheard Professor Crowe speaking to Professor Packer in the terms expressed in the letter of March 14; and as one where the Principal put his own construction on Professor Crowe's remarks and reported both the remarks and his construction to the Board of Regents. Viewed on this basis, the situation is shorn of the more distasteful aspects of the actual invasion of privacy which occurred. But it exhibits in no less grave a fashion the violation of academic freedom which it represents.

The Committee may say, quite candidly, that it gave long consideration to the question whether it should include or append Professor Crowe's private letter to this report. The letter was disclosed to the Committee, and, of course, a number of other persons have already seen it. Its contents are well known to Principal Lockhart and to the Board of Regents. It may be urged, accordingly, that there can no longer be any pretence of privacy and that, moreover, disclosure of its contents is necessary to give an objective basis to any conclusions on the justness or otherwise of Professor Crowe's final dismissal.

If the Committee felt that the contents of the letter were directly material to the issues of academic freedom and security of tenure which are the reference points of its inquiry, it would agree unreservedly that the letter should be reproduced as part of its report. The contents of the letter are riot, however, central to the matters under inquiry. What the evidence before this Committee shows is, first, that improper use was made of a private letter and, secondly, that action had been taken in the wake of this use without any opportunity given to offer an explanation and with foreknowledge that the construction put on the letter was challenged. The Committee does not appreciate that these issues touch the nature of the contents of the letter. On the contrary, if in these circumstances it gave publicity to the letter it would be, without justification, making further inroads upon privacy of personal communication. This much can be said by way of reference to the tenor of what Professor Crowe wrote. It is stale enough and safe enough, even for churchmen, to deplore religious hypocrisy or to doubt whether devotion to religious principle in words is satisfactory if there is no manifestation of the devotion in action in the world in which we live. Association of persons, both living and dead, with propositions of this kind rises to no greater enormity than would be present in writing a book or reviewing one. This Committee asserts again that it does not purport to make any finding on what Professor Crowe meant. That could have been determined easily enough, by asking him. Even in an academic institution that requires conformity there should be some respect, as a prelude to punitive action, for elementary courtesies (calling at least for personal confrontation) and for principles of natural justice which demand that no person be condemned without specification of charges and without an opportunity to meet them. The denial of these precepts is grave enough in any circumstances. But it is graver when the occasion of denial is an objection to a private professorial opinion and the objection is enforced by the ultimate economic sanction of dismissal.

9. Security of Tenure in Universities and Colleges

Academic freedom and tenure are not mutually exclusive either as ideas or as realities and they cannot be analysed in separation. Much of what has already been said in defining the essential attributes of academic freedom and in describing its impairment in the present case is equally relevant with reference to academic tenure. The Committee is convinced that the following basic postulates are not open to serious question: that academic freedom and security of tenure are neither ends in themselves nor the exactions of special privilege but merely conditions indispensable for the performance of the purposes of higher education; that the search for truth which is the central purpose of institutions of higher learning cannot prosper without freedom of inquiry and expression; and finally, that security of tenure is prerequisite to academic freedom. The immediate relevant consequences of these propositions are, first, that control over tenure is in equal measure control over academic freedom and, second, that adverse adjustments of tenure arbitrarily applied to a member or members of an academic community, or action which creates the semblance of likelihood that such adjustments might seriously be entertained, cannot but jeopardize if not completely destroy any assurance that the authorities of the institution in question hold academic freedom in

high esteem. These elementary principles serve to illuminate for the Committee the most significant of the tenure aspects of the case under review.

As already pointed out Professor Crowe held a permanent appointment at the time of his dismissal. This is specific in the documents, but as mentioned in section 7 above the Committee does not presume to assess the legal aspects of this status. The simple explanation of this position is the conviction that teaching and research groups of stature, capable of creative scholarship and instruction on a broad front, are not recruited and maintained by careful legal definition of individual status or by meticulous observance of legal rights and limitations. The charters of Canadian universities and colleges strongly suggest an intention to create institutions in the pattern of the modern business corporation, with supreme governing bodies — governors or regents rather than directors — exercising rights as employers, at pleasure, over teachers and research workers to be regarded as employees. It is only infrequently that scholars find it necessary to repudiate this conception for it is seldom that it finds expression in Canadian practice. Teachers and research workers as the operative part of a university or college are not regarded as hired men and women either by faculties or administrations throughout the Canadian academic world. The employer-employee, boss and hired hand, relationship is not accepted as an appropriate analogy for the treatment of faculty by the governing boards of Canadian universities and colleges. To search the law as one might in a labour-relations case would do little to clarify the points of significance in the circumstances under review.

Recognizing the impropriety of a legalistic approach to tenure in cases of this kind the Committee nevertheless found it necessary and not difficult to determine minimum standards of treatment which Professor Crowe might reasonably have expected from United College. As a permanent appointee he had passed through and beyond the probationary period, not marginally either in time or in quality of service. When dismissed on a deferred basis in July, 1958, he was completing his eighth year with the College, his seventh after probation. He had been promoted from assistant to associate professor after six years of employment, a space of time which in itself is convincing testimony that his services had proven satisfactory. All relevant evidence confirms this as well. Recapitulating for the particular instance the general principles outlined in section 7 above, Professor Crowe, as a permanent member of United College, might properly have regarded himself immune from arbitrary dismissal although remaining subject to dismissal for just cause; he might properly have assumed that no ground for dismissal which violated academic freedom could constitute just cause; and, finally, he had the right to expect that no adverse modification of his status would be effected without prior notice of the alleged cause and the opportunity to appear to answer to charges specified against him.

As pointed out in section 7, the cause for Professor Crowe's dismissal as alleged by the Board of Regents in the press release of September 20 can not be regarded as just cause because it involved an impairment of academic freedom. Inadequacies of procedure touched on briefly in the same section require fuller elaboration and

emphasis at this point because they relate more specifically to security of tenure. Professor Crowe was not notified at any time of reasons why or how the Board of Regents came to regard him as unsuitable to continue as a teacher in United College. This statement summarizes the glaring and wholly unjustifiable disregard of elementary canons of tenure displayed by the administration of United College in dealing with a member of the permanent faculty.

The Board of Regents issued two post facto statements of cause for the dismissals of Professor Crowe: one in the open mimeographed letter sent by Mr. Watson to the faculty of United College on August 26 (Document No. 40), and the second in the press release of September 20 (Document No. 46). The first of these purported to explain the deferred dismissal of July 2 and a copy of the letter was addressed to Professor Crowe as a member of the College faculty. The press release informed the public at large about the peremptory dismissal of September 15. One direct personal communication to Professor Crowe, and one only, seemed to carry some intimation of the reason for official displeasure. This was Principal Lockhart's letter of April 23 (Document No. 3). It left Professor Crowe with the definite impression that his status in United College was in jeopardy because of some of the things he had said in his private letter to Professor Packer, "Your letter [to Professor Packer]," said the Principal, "is a profoundly disturbing document. After reading it I have had to regretfully come to the conclusion that personally you have no sympathy with the avowed purposes of the College, and that you have no respect for or loyalty to the administration." This, of course, did not constitute an official statement of cause for subsequent action and it was not intended as such. More than two weeks later, immediately prior to the Board meeting of May 8, Principal Lockhart assured Professors Reid and McNaught that no action against Professor Crowe had ever been contemplated. Yet, at the end of May, Professor Crowe learned through a parenthetical reference in a second letter from the Principal (Document No. 13) that his status in the College was under official review; this was confirmed by the Chairman of the Board on June 20 in a letter (Document No. 21) indicating that final decision was to be taken on July 2 and inviting "further representations", but with no reference whatsoever to cause. Mr. Watson's letter of July 4 (Document No. 24) informed Professor Crowe of deferred dismissal, saying "The Board is of the opinion that your conduct has been such that would enable it to dismiss you for cause and without notice" : but neither this nor any subsequent letter gave the slightest hint of what this conduct was.

The Committee was uncertain whether to pay any serious attention to the reasons for the deferred dismissal of July 2 as alleged in open letter to the United College faculty on August 26. The letter cannot be regarded as a statement of cause for it was not directed to Professor Crowe except that he was on the mailing list as a member of the College faculty, and, in any case, the letter was dated nearly two months after the dismissal which it purported to explain. It has been made abundantly clear to the Committee, however, that many people including some of Professor Crowe's colleagues at United College have accepted the letter of August 26 as a true and fair representation and are judging the Board's actions accordingly - this regardless of the fact that Professor

Crowe had no opportunity at any time to reply to the allegations contained therein.

Anticipating the possibility that the accusations contained in Mr. Watson's letter of August 26 might require assessment (the crucial paragraph is reproduced in section 8 above), and aware that a random and fortuitous selection of the communications referred to would be worse than useless, the Committee prepared the confidential file of documents in its possession as referred to in section 1 above and forwarded copies to each of the principal parties - Principal Lockhart, Mr. Watson and Professor Crowe - in advance of the hearings and with the request that errors and omissions be called to the Committee's attention. Principal Lockhart made no reply to this request but Mr. Watson (under general formal reservation of the right to submit other documents at any time) forwarded two additional items: one, a letter to Professor Barber concerning procedural matters (this is referred to in Appendix B) and a second, a photostatic copy of a letter from the postal authorities in Winnipeg to Professor Crowe. Neither of these is relevant here. Professor Crowe submitted additional documents to the Committee at the hearings.

The Committee is satisfied that it has before it the communications referred to in Mr. Watson's letter of August 26 (Document No. 40) and they are incorporated in Appendix A in order that members of the executive of the C.A.U.T. may judge for themselves the truth or falsity of the various accusations including those of "aggressive belligerency" and "intemperate tone" and of attempts at intimidation, etc. The communications, already referred to in section 6 in the context of developments and actions, are as follows: telegram to Mr. Watson, May 8 (Documents No. 7); letter to Mr. Watson, May 17 (Document No. 9); letter to Principal Lockhart, May 23 (Document No. 11); letter to Mr. Watson, June 10 (Document No. 17); and letter to Mr. Watson, June 26 (Document No. 22). Communications to officials of the United Church of Canada, also placed in context in section 6, are the statement made to Dr. E. E. Long, General Secretary of the United Church, on June 2 (Document No. 15); and the letter to Dr. W. Harold Young, Secretary of the Board of Colleges and Secondary Schools, United Church of Canada, dated June 26 (Document No. 23).

The evidence is that Professor Crowe was unwilling to accept supinely and without protest a deliberately sustained invasion of privacy and the violation of what he felt to be his legal rights. The Committee is convinced that standards of treatment commonly accepted as reasonable in the Canadian university and college world do not require that scholars, research workers and university teachers refrain from protest under such circumstances for fear of being dismissed. Viewed in the full context of circumstance, the Committee can not find in the written or oral evidence any justification for the accusation that the protest expressed by Professor Crowe was intemperate or aggressively belligerent or vigorous beyond the point of reasonable firmness.

The part played by the Principal beyond the initial stages of this case calls for special comment. The Committee took it for granted that the Principal, as chief executive officer of the College and head of the faculty, would be found occupying a position of

unquestioned leadership throughout this period of crisis in the affairs of the institution. Constitutional control of a university or college by an exclusively lay governing body presents obvious anomalies but the academic community readily admits that few of these are significant provided the president or principal is able to present the academic viewpoint persuasively to the governing board and provided he accepts it as his continuous duty to do so. The Committee is compelled to report that one of the most disturbing circumstances to come to its attention in the present case has been the apparent abdication by Principal Lockhart of a position of leadership in the conduct of the dealings with Professor Crowe. Whether this took place of the Principal's own volition or on the insistence of the Board, the Committee has no way of knowing, but in the situation under review the Principal has in fact been permitted or forced to occupy the subordinate, servant-to-master role vis-a-vis the Board of Regents which is suggested but not prescribed by the United College Act (1938 (Man.), c. 80, s.25(b)) and which can not be regarded as tolerable for the chief executive officer of any institution of higher learning.

The tenure aspects of the present case reveal a shocking failure in human relationship. Within a period of barely three months an admittedly competent and hitherto satisfactory member of the united College faculty was reduced from a position of permanence to the offer of one additional year's employment extended as charity, and within two and one-half months more his employment was summarily ended. The Committee is prepared to believe that this break-down of relationships was neither anticipated nor deliberate on the part of any of the persons primarily concerned. Yet it was allowed to happen: and, in this as in similar circumstances in any institution of higher learning, the Principal as the responsible head of the College and faculty, must answer for it in the first instance, The Committee regarded it as one of its primary obligations in this inquiry to determine whether or not the Principal had exercised all reasonable care to prevent the original misunderstanding - regardless of how initiated or precipitated - from degenerating into the near impasse which rapidly developed.

Distance and the separation of the various parties provided a fertile basis for the initial misunderstanding in this case. The attempt to deal with the situation continuously at long range doomed any possibility of reconciliation to certain failure. This, in the opinion of the Committee, might well have been anticipated. Professor Crowe was absent from Winnipeg until August 31, engaged in appropriate academic activity and with the full consent and approval of the authorities at united College. On the emergence of a misunderstanding, regardless of its nature or cause, the responsibility of the Principal was or ought to have been clear. He should have sought an explanation immediately and directly from Professor Crowe and, failing complete satisfaction by an early mail, the next and obvious action was for him to insist on a personal interview with Professor Crowe. Principal Lockhart did neither of these things. At least two and perhaps three weeks after the letter of March 14 came into his hands, after he had photostated it and discussed it with Professor Packer and other people, he wrote to Professor Crowe expressing his regretful conclusion that Professor Crowe was out of sympathy with the purposes of the College and without respect for or loyalty to the administration, but not

asking for an explanation or if there could be any explanation. Indeed, when asked at the meeting of the General Faculty Council two weeks later whether Professor Crowe had replied to his letter he said he did not think there could be any reply.

As the weeks passed and the situation steadily deteriorated, Principal Lockhart permitted the Board of Regents to take complete charge of the dealings with Professor Crowe and faded into the background from which he had not emerged at the time of the Committee's hearings in Winnipeg.

The Committee is satisfied that there was no insuperable obstacle to a personal meeting of Principal Lockhart and Professor Crowe or to a meeting of the Principal, the Chairman or some other responsible member of the Board of Regents, and Professor Crowe. The Committee is of the opinion that, without having insisted on, and making the arrangements for, at least one such meeting, the administration of United College cannot claim to have made reasonable efforts to compose the misunderstanding in this case.

Principal Lockhart left Winnipeg the day after the Board meeting of July 2 and spent several weeks thereafter in Montreal and Toronto on the Building Fund Campaign. The evidence suggests that he was in Toronto in mid-June and possibly in the East over the end of April and the first week in May. He had ample opportunity to arrange for a meeting with Professor Crowe at a minimum inconvenience to himself. Whether convenient, however, it was the Principal's duty to United College and to his position in United College to arrange for at least one personal interview with Professor Crowe. This assumes the existence of a genuine desire on the part of the Principal and the administration of United College to compose the differences with Professor Crowe,

As far as the Committee knows, Professor Crowe did not request an interview with the Principal or with the Chairman of the Board of Regents, but he demonstrated his willingness to assist toward a resolution of the difficulties in a variety of ways. He sought and secured the informal intervention of Mr. Wilson in Winnipeg with a view to averting further misunderstanding at the end of April or beginning of May. He informed Principal Lockhart by letter of May 23 (Document No. 11) that he regretted the Principal's interpretation of his letter to Dr. Packer and considered the interpretation incorrect and without foundation. Despite evidence pointing to the disappearance of more than one letter which he had written to colleagues at United College, Professor Crowe yielded to legal advice that, in the interests of the College, a police investigation ought to be avoided if possible (Document No. 15). He sought the intervention of the Moderator of the United Church and readily agreed to a suggestion that he travel to Peterborough for an interview with the Rev. Drs. Long and Young of the Head Office of the United Church in the absence of the Moderator in Europe.

The Committee can find no counterpart in the actions of Principal Lockhart or of the Board of Regents for the efforts put forward by Professor Crowe to try to arrest the deterioration of relationships involved in this affair.

10. Conclusions

The oral and documentary evidence offered to the Committee compels the conclusion that Principal Lockhart and the Board of Regents were respectively tactless and arbitrary in their handling of a situation which they themselves had created. Once Principal Lockhart had taken the course that he did, retaining Professor Crowe's private letter for a week, making copies, communicating its contents and its tenor to a number of persons, speaking about it in an open General Faculty Council meeting which he himself convened, drawing in the Board of Regents, and disregarding suggestions offered for a quieter consideration of the matter, he could hardly have expected that the situation would be contained within college walls. Nor could the Board of Regents have had any reasonable expectation that their master-servant attitude to a professor of some considerable length of service, who was being disciplined in his absence, in entire disregard of elementary courtesies and of principles of natural justice, would go unchallenged or unnoticed. These conclusions stand quite apart from any substantive cause for discipline, and they necessarily mark Professor Crowe's dismissal as an unjust and unwarranted invasion of the security of academic tenure to which he was entitled.

Substantively, neither the Principal nor the Board or Regents had any tenable ground for the severe treatment of Professor Crowe. This phase of the matter has already been explored in section 8. The evidence and documents before the Committee also support the conclusion that in the view of the Board Professor Crowe was not sufficiently complaisant, not servile enough in thought and attitude to his administrative superiors. Mr. Watson's letters in reply to Professor Crowe's persistent inquiries about his salary and status following the first deferred dismissal are revealing in this respect in their tone of exasperation. The letters show (and this is emphasized by the Board of Regents' press statement of September 20, 1958, Document No. 46) that the Board considered that Professor Crowe's claim to even the minimum salary for his rank should depend on its grace which could be extended if loyalty and co-operation were exhibited as well as teaching proficiency. In so far as these letters also suggest that published minimum salary scales are not really basic minima and that salary levels, despite rank, depend on individual appraisal, they raise an issue which must be of general concern to the Faculty at United College. It is not, however, one for this Committee to pursue.

It is with regret that this Committee has had to conclude that there is discord among the Faculty members of United College. The "Crowe affair" did not create it, but undoubtedly it deepened it. Faculty members have taken sides on the matter, and the particular facts of the case have been overlaid with a call for protection of academic freedom and tenure on the one hand and for support of Principal Lockhart and United College on the other. One symptom of this discord appeared in the General Faculty Council meeting of May 7 at which a senior faculty member declared that everyone should affirm loyalty to the Principal and confidence in him. Another symptom appeared in a well-meant but abortive move in September, 1958, to secure the endorsement by Faculty members of a statement declaiming their confidence in the integrity of Principal

Lockhart and announcing that, under his administration and that of his predecessors, staff members have always enjoyed full academic freedom. The Committee in no way implies that either Principal Lockhart or the Board of Regents inspired this move: it is satisfied that they did not. But the fact that a group of the Faculty felt this to be necessary at a time when one of their number had been dismissed without a hearing and without any specification of charges, and also at a time when the C.A.U.T. had announced the appointment of an investigating committee and had been assured of the co-operation of the Board of Regents, is a mark of the condition of intra-faculty relations. The Faculty overall is a small one, being composed of about 45 active teachers in all branches of United College. The current calendar lists 54 names but not all those listed are actively engaged in teaching. Indeed, it is not much larger than the Board of Regents which consists presently of 43 persons, and smaller if one excludes the 7 persons associated with the collegiate department.

The publicity which followed Professor Crowe's dismissal could be expected to drive proponents of opposing views deeper into their trenches. Principal Lockhart exhibited the depths to which he allowed himself to go by his censure of Miss Peggy J. Morrison, Registrar of United College, who has been associated with it in an administrative capacity since 1944 and previously had been a student there. Miss Morrison testified that she wrote a letter, as a graduate of the College, to Mr. Watson (with a copy to the Principal) expressing her concern about the discharge of Professor Crowe. On October 8, at a time when the Committee was holding its hearings, Principal Lockhart came to Miss Morrison's office and remonstrated with her for writing the letter, and particularly for using "Registrar" stationery. A copy of the letter was filed with the Committee and it was signed by Miss Morrison in her personal capacity and clearly indicated that she was writing as a graduate. Principal Lockhart scolded her for not coming to him first, as a matter of courtesy and decency, to learn the facts. Her reply was that she understood that all communications on the matter were to go to the Board of Regents. Principal Lockhart said that as she did not know the facts her action was irresponsible and her conduct most peculiar. He charged that she had been asked by Professor Reid and Professor McNaught to write her letter, a charge she denied. He reminded her that he had her promoted from assistant registrar to registrar, and stated that her letter called to his mind a story told of Winston Churchill who, when criticised by a junior official, allegedly remarked "I don't remember having done you a favour recently"; and he added to Miss Morrison, "I hope you get the full implication". Miss Morrison was told by Principal Lockhart that as Registrar she could not divorce herself from the administration without its being evidence of her lack of confidence in him and of a condemnation of the Board of Regents. This incident suggests that Principal Lockhart, no less than the Board, expected unquestioning loyalty and servility on his own terms.

The Committee takes particular note of that portion of the Board's press statement of September 20 (Document No. 46) quoting a section of the Statement of Principles on Academic Freedom and Tenure which is Appendix D to this report. No part of the quoted section has any relevance to the facts connected with Professor Crowe's

dismissal. The quotation is clearly concerned with a professor's public utterances and with an understandable obligation to be accurate and restrained and not to pose as an institutional spokesman. It would have been more to the point if the Board had adverted to other sections of this Statement of Principles or if it had been attentive, in the very section that it quoted, to the admonition that when a professor speaks or writes as a citizen "he should be free from institutional censorship or discipline". This has a particular pertinence where private communications are concerned.

In summary, and conscious that some repetition is involved, the Committee's conclusions are as follows:

1. The treatment of Professor Crowe's private letter of March 14 to Professor Packer by the Principal involved an invasion of privacy which, while inadvertent in the first instance, was deliberately sustained by the Principal in that he retained the letter, neglected to report it to the postal authorities, discussed it with and revealed its contents to other persons, photostated it, made it the occasion of a special meeting of the General Faculty Council and reported it formally to the Board of Regents. The deliberate persistence in the invasion of personal privacy is an encroachment on one of the most elementary rights of a citizen, academic or otherwise, in any society in which freedom is anything but an empty word.
2. The Board of Regents gave their unqualified endorsement to this encroachment on the rights of a citizen, a member of United College and in that connection subject to their jurisdiction, by agreeing that the Principal had acted in a responsible manner as Chief Executive Officer of the College in dealing with Professor Crowe's letter. The interpretation of propriety implicit in this endorsement must be categorically rejected as unacceptable with reference to the conduct of any officer of an institution of higher learning in Canada.
3. A serious misunderstanding involving a permanent member of United College was precipitated by action of the Principal. Regardless of the source or nature of the misunderstanding, the Principal had an obvious responsibility as head of the College and of the faculty to attempt to resolve it. Having assumed the role of interested party in Professor Crowe's private correspondence, the Principal did not ask Professor Crowe for an explanation of critical remarks contained in a single letter in that correspondence or for a statement whether these remarks indicated fundamental disaffection or mere momentary irritation. He did not insist on a personal interview with Professor Crowe although he spent several weeks in central Canada within easy reach of Kingston where Professor Crowe was situated. The Principal did not make even the minimum efforts which might reasonably have been regarded as his responsibility or the responsibility of anyone in his office to compose the misunderstanding in this case.
4. The role which the Principal occupied in this incident after it had passed its early stages, whether by permission of the Board of Regents on the Principal's request or on

the initiative and direction of the Board, was wholly inappropriate to his office as chief executive officer and head of the College. In the absence of information to the contrary, the Principal and the Board must bear equal responsibility for this distribution of operative authority. The academic community cannot have confidence that an administration which considers this allocation of responsibility appropriate for a time of crisis in faculty relationships has any clear appreciation of a principal's inescapable responsibility as the head of the faculty and its sole representative on an otherwise non-academic governing body. To force or to permit the principal of a university or college to occupy a position of docile subservience to the governing board is to reduce an institution of higher learning to the level of a business corporation with teachers, scholars, and research workers and the principal as well regarded merely as hired employees.

5. The procedures by which Professor Crowe was dismissed on July 2 and September 15 were arbitrary and therefore improper: (a) Professor Crowe was not informed prior to either dismissal of any action or attitude or dereliction of duty which had led the Principal or Board of Regents to conclude that he had, after eight years of satisfactory service, come to be unsuitable for membership in the United College teaching faculty; (b) Professor Crowe was not asked or directed to appear before the Principal or the Board of Regents to answer charges which might be preferred against him and which were considered sufficient, without confrontation, to warrant his dismissal; (c) Professor Crowe was not advised after either dismissal of the reason or reasons therefor except by open letter to the faculty of United College on August 26 with reference to the dismissal of July 2 and by press release of September 20, which purported to explain to the public the dismissal of September 15.

6. Although Professor Crowe was not confronted with the charges revealed to the faculty of United College by the Board of Regents on August 26, the Committee nevertheless made every effort to secure the evidence necessary for a determination of their validity. It is clear that Professor Crowe refused to countenance abjectly a sustained invasion of his privacy and the possibility of adverse use of a private letter the content of which he declared was taken out of context and misinterpreted. The Committee holds that Canadian scholars are not commonly or properly held in such low esteem that they must abstain from protest in such circumstances, The Committee finds, on the evidence before it, that Professor Crowe's protests were neither intemperate nor aggressively belligerent nor vigorous beyond the point of reasonable firmness. In themselves, they warranted neither dismissal nor discipline short of dismissal.

7. The Committee is struck by the unreality of the reasons for the summary dismissal of Professor Crowe given to the public by the Board of Regents in its press statement of September 20. The public were informed that Professor Crowe's attitude to religion and to his colleagues, as expressed in his letter of March 14 to Professor Packer, was incompatible with the traditions and objectives of United College, and that his reference

in the letter to six faculty members, two of them deceased, overstepped the limits of decency. In consequence, the Board's statement continued, it was decided on September 9 that Professor Crowe's services with United College should be terminated forthwith. Principal Lockhart had Professor Crowe's letter early in April and its contents were known to other Board members at least as early as the first week in May; yet the letter was not regarded as sufficiently devastating or incriminating to warrant summary dismissal. The photostatic copies of the letter made by Principal Lockhart "for the Board" were continuously available at the Board's direction and could have been read to the Board at any time. There was no need in September to pursue the artificiality of receiving "from the board of colleges of the United Church" a copy of the letter which had been provided for the use of the Moderator,

The facts which are of greatest concern to the Committee, however, are, first, that the Board of Regents took a decision of crucial importance for the future of Professor Crowe, a member of the United College faculty, on what can without exaggeration be characterized as less than a shred of evidence; and, second, that they to confront Professor Crowe with any charge and gave him no opportunity to speak to any charge. The Board did not suggest that there was any evidence other than the contents of the private letter of March 14 to indicate Professor Crowe's attitudes to religion or to his colleagues. The Committee would observe that the administration of United College, judged by its conduct, seems to hold the view that religious belief is so fragile that it may be shattered by a breath of criticism.

The Committee's investigation leaves it in no doubt that Professor Crowe has been a victim of injustice, violative of academic freedom and tenure. The story is the sorer because of the attempt to associate the dismissal with protection of religious principle. Rectification of the wrong done to Professor Crowe demands that the Board of Regents invite him to resume teaching duties at the rank he had at the time of his dismissal and at a salary appropriate to that rank and sufficiently above the announced minimum for that rank to reflect Professor Crowe's merit as a teacher in the same way as did his previous salary. The offer must, of course, be associated with an assurance of academic freedom and tenure as elaborated in this report. The Committee feels that this is the simplest as well as the most direct way to bring to a conclusion an episode in the Canadian academic community which, it is to be hoped, will never be duplicated. If the offer is made as suggested, it will be for Professor Crowe to consider its acceptance. The Committee does not consider that it should make any suggestion to him on this score.

The Committee's last word must be one of thanks to all who volunteered evidence and who met the Committee's convenience in appearing before it.

Dated this 21st day of November, 1958
V. C. Fowke, *Chairman*
Bora Laskin, *Member*

**APPENDIX A DOCUMENTS
COPY**

DOCUMENT NO. 1

May 9th, 1950

Mr. Harry S. Crowe
87 Arlington Street,
WINNIPEG, Man.

Dear Mr. Crowe:

Pursuant to our conversations during the past few days I am writing to advise you of your appointment as a member of the Faculty of United College on the following terms:

1. Your appointment will date from September 1st, 1950, and will be for one year, subject to renewal at the end of that time if there is mutual satisfaction. The position to which you are being appointed is a permanent position, but all new appointments are made on the basis of a year's probation.
2. Your rank will be Assistant-Professor in the Department of History. It will be understood, however, that should necessity arise to ask you to teach in any other field for which you are fitted, you will be ready to do so.
3. Your salary will be \$3,000.00 per annum, payable in twelve monthly instalments, commencing September 30th, 1950.
4. You will be eligible to join our Faculty retiring allowance plan at once should you wish to do so, but in case your appointment is confirmed a year hence, it will be necessary for you to begin to participate at that time in this plan. For the first year it is optional with you.

Although we have no established rules on the subject, we expect members of Faculty to be available by the 1st of September until the Annual Spring Convocation of the University. Should you wish to absent yourself later than September 1st or prior to the Convocation I would suggest that you might discuss the matter with me. I may say that all possible liberty will be given to members of Faculty who are pursuing research.

If you are prepared to accept this appointment on the terms indicated, will you please

sign the original of this letter in the space provided and return to me. A signed copy of the letter is enclosed for your own personal record.

Sincerely yours,

W. C. Graham, Principal.

WCG/hjs

I accept the above appointment on the terms indicated.

Date

Signature

COPY

DOCUMENT NO. 3

UNITED COLLEGE
WINNIPEG, Manitoba

April 23, 1958

Office of the Principal

Professor Harry Crowe
The Department of History
Queen's University
Kingston, Ontario.

Dear Harry:

You will recognize the enclosed as excerpts from your letter to Professor Packer of March 14th. The original was sent to me through the mail, devoid of its envelope, with a sheet of paper all which was typed the following: "Found in College Hall. We think you should read it, Some staff loyalty???" There was no signature to this communication. I have now given your letter to Professor Packer. He affirms that he had not received it and had never seen it before.

Your letter is a profoundly disturbing document. After reading it I have had to regretfully

come to the conclusion that personally you have no sympathy with the avowed purposes of the College, and that you have no respect for or loyalty to the administration.

Yours Sincerely,

Wilfred Lockhart

Enclosure
(Enclosure not reproduced here)

c.c. J. H. Stewart Reid

DOCUMENT NO. 4

May 1, 1958

Principal H. C. Lockhart
United College,
Winnipeg, Manitoba

Dear Principal Lockhart:

Six years ago I had the pleasure of writing to your predecessor, Principal Graham, to tell him how much we had enjoyed having Professor McNaught here at Queen's as Visiting Professor, and what an effective contribution he had made to the work of the Department. Having heard the paper which he read to a large and distinguished gathering of The Canadian Historical Association in Ottawa last June, I realized again how fortunate we had been.

McNaught came to us as one of a number of men whom we have been in a position year by year to invite to come here as Visitors. In proposing our appointments, we have considered the best people available over a wide field of selection, which has included the United States, Scotland, Australia and South Africa. The fact that we have now twice called upon members of United College is an indication of our high professional regard for your own Department of History.

It is now my pleasant duty to offer my thanks to the President of the College, this time in the case of Professor H. S. Crowe.

As our Visiting Associate Professor during the session now coming to an end, Mr.

Crowe has demonstrated first-rate abilities as a teacher, fully alert to the scholarly demands of his subject and its implications in immediate and contemporary terms, and as a colleague whose wide interests and independence of viewpoint are in the best academic tradition.

We are very grateful to you and to Professor Stewart Reid for the administrative arrangements which have made it possible for us to have the benefit of Professor Crowe's services in the Department here.

I need hardly add that I write entirely without any solicitation on his part.

I am sending a copy of this expression of appreciation to Principal Mackintosh.

Sincerely yours.

W. E. C. HARRISON
Professor and Head of Department of History

WECH/dh

DOCUMENT NO. 6

May 5, 3:55 p.m., 1958

Telegram

Harry Crowe
31 Mack Street
Kingston.

Your letter received do not write Lockhart

James Wilson

COPY

DOCUMENT NO. 7

Telegram

May 8, 1958

Mr. A. H. Watson
144 Girton Boulevard
Tuxedo, Winnipeg, Man.

I am informed that three letters which I addressed to colleagues at United College did not reach them through the mails, and that one of these, a letter addressed to Dr. Packer, has fallen by mysterious means into the hands of Principal Lockhart. It is now clear that Principal Lockhart read this letter, retained it for some time, reproduced it for his own use, and proceeded to draw from it a number of grotesque conclusions and to employ these conclusions to my discredit, first in a letter to me and more recently in a meeting of faculty.

I am informed further that reports of these actions on the part of the Principal have spread throughout Winnipeg. I have done nothing whatever to initiate or circulate any such reports, but I do now protest most strongly against the uses which have been made of the contents of a private and confidential letter. I have been advised that an actionable breach of copyright has thereby already been committed and I am given to understand that a further breach is now impending.

I find it exceedingly hard to believe that information obtained in this manner will be presented to the Board of Regents and I would find it even harder to believe that the Board of Regents should consider it proper to act upon such information. If, however, I am incorrect in this judgment, and if action adverse to me follows, full publicity will inevitably be given to all the facts in this incident.

Harry Crowe

COPY

DOCUMENT NO. 8

UNITED COLLEGE
WINNIPEG

*Board of Regents
Office of the Chairman*

May 9, 1958

Professor H. S. Crowe
Department of History
Queen's University

Kingston, Ontario

Dear Professor Crowe:

This is to acknowledge receipt of your telegram to me under the date of May 8th. It was read to a meeting of the Board of Regents last evening and in view of your assertion that letters sent by yourself to colleagues on the staff at United College did not reach them through the mails, I have been directed by the Board to request the Investigations Division of the Post Office to proceed with an investigation into this matter.

The other matters to which you refer in your telegram will be considered by the Board in the light of information obtained by further study and enquiry.

Yours truly,

A. H. WATSON,
Chairman of the Board

AHW/dp

TRANSCRIPT

DOCUMENT NO. 9

Department of History
Queen's University
17 May 1958

Mr. A. H. Watson
Chairman, Board of Regents
Portage and Balmoral
Winnipeg, Manitoba

Dear Mr. Watson:

Thank you for your prompt reply to my telegram of May 8. As you state that you have been directed by the Board to request the Investigations Division of the Post Office to proceed with an investigation into the failure to arrive of letters sent by myself through the mails to Colleagues at United College, I have been advised to provide the Investigations Division with a statement of those relevant facts which are known to me.

I am pleased that the Board shares my determination to discover the cause of loss or interception of my letters and to locate the two letters which have not yet reappeared. I am enclosing for the information of yourself and of the Board a transcript of my letter to the Investigation Division.

Yours truly,

H.S. Crowe
Assoc. Prof. of History.

TRANSCRIPT

DOCUMENT NO. 10

Department of History
Queen's University
17 May 1958

Investigations Division
Post Office
Wnnipeg, Man.

Dear Sir:

I am in receipt of a letter dated May 9, 1958, from Mr. A. H. Watson, Chairman of the Board of Regents of United College, Winnipeg, stating that he has been directed by the board to request the Investigations Division of the Post Office to proceed with an investigation into the failure to arrive of letters sent by myself through the mails to members of the faculty at the College. To facilitate the investigation I am providing you with the information which follows.

A letter addressed by me on March 14, 1958, to Professor W. A. Packer, United College, Portage and Balmoral, Winnipeg, Manitoba, was not delivered to Professor Packer through the mails. On April 16, this letter, without its envelope, was handed to Professor Packer by Principal Wilfred Lockhart. Principal Lockhart asserts that the letter had come into his possession without its envelope, with an unsigned message stating that it had been found in the College.

A. second letter, addressed by me as above, to Professor Packer at United College, on March 20 or 21, 1958, has not yet been delivered to him through the mails, and has not been returned to me,

A third letter, addressed by me on March 23, 1958, to Professor (or Dr.) Gordon Blake, United College, Portage and Balmoral, Winnipeg, Manitoba, has not yet been delivered to Professor Blake through the mails and has not been returned to me.

These letters were mailed in Queen's University envelopes, bearing my name in the upper left hand corner and were posted in Kingston, Ontario.

If the Investigations Division should decide that it is satisfied that the letters all reached United College, although not the intended correspondent, and that the matter of their loss or interception does not fall within the province of the Investigations Division, please advise me if the matter is to be brought to the attention of other authorities.

Yours truly,

H. S. Crowe
Assoc. Prof. of History.

COPY

DOCUMENT NO. 11

May 23, 1958

Dr. Wilfred C. Lockhart
Principal
United College
Portage and Balmoral
Winnipeg, Manitoba

Dear Dr. Lockhart:

I am in receipt of your letter of April 23 to which I have not replied before this date as I was under the impression that it was your intention to ask the Board of Regents for my dismissal. Now I am informed that this is not your intention. It is my intention to return to United College this autumn.

I regret the conclusions which you state in your letter to me that you have reached. Insofar as I am able to examine and understand my feelings in these matters your conclusions are incorrect and without foundation.

The letter which I mailed to Professor Packer under the date of March 14 became the property of the addressee when it was posted, but the copyright remained with me. I

have given no authority to anyone to make copies and I am advised that without that authority copies cannot be made. Therefore I now ask that the photostatic copies be delivered to me.

Yours truly,

H. S. Crowe

HSC:ES

COPY

DOCUMENT NO. 13

UNITED COLLEGE
WINNIPEG
Manitoba

May 28, 1958

Office of the Principal

Professor H. Crowe
Queen's University
Kingston, Ontario

Dear Professor Crowe:

Your letter of May 23rd has been received and was placed before the Board of Regents at a meeting last evening. Since the matter of your relationship to the College is presently under consideration by the Board and will be at the direction of the Board, it will be in order for you to address any correspondence in this regard to its Chairman, Mr. A. H. Watson.

Yours truly,
W. C. Lockhart
Principal

WCL/nl

DOCUMENT NO. 15

Statement presented by Professor Crowe orally to Drs. E. E. Long and W. Harold Young, with Dr. W. F. Banister present, at Peterborough, June 2, 1958: copy given to Dr. Long at his request for himself and the Moderator.

Three letters written by me between March 14 and 23 to colleagues at United College, in envelopes of Queen's University where I am visiting Professor, and hearing my name, were not delivered to the addressees through the mails. Two of these letters were addressed to the Secretary of the Faculty Association (I was Secretary from 1955-57 and we have kept in continuous communication) and the third was to a faculty member who has worked closely with me on salary briefs.

One of these letters (dated March 14) was handed by Principal Lockhart to the addressee, Dr. Packer, on April 16, devoid of envelope, with the following remarks:

1. A student had given him the letter, devoid of envelope.
2. He had read my private and confidential letter to Dr. Packer.
3. He did not see how I could stay at United if I held the views expressed in the letter.

Dr. Packer informed Dr. Lockhart that he had not seen the letter before that moment.

On April 17, Dr. Packer had a second interview with Dr. Lockhart. On this occasion, Dr. Lockhart said:

1. The letter had come to him through the mails with a typed message from an anonymous person saying that it had been found in the College. He "assumed" it was a student as no faculty member would do such a thing.
2. Dr. Lockhart said he had made photostatic copies of my letter.
3. He said he now had evidence that a group of the faculty (presumably the Faculty Association executive) was working against him and against the College.

Legal advice, to which Dr. Packer and I agreed was that in the interest of the College, a police investigation should be avoided if possible. A letter arrived from Dr. Lockhart which, in effect, asked me to resign. Advice of colleagues and of lawyers in both Winnipeg and Kingston was that the only course of action was for my Winnipeg lawyer, Col. Wilson, to visit Dr. Lockhart, pointing out the moral and legal position he was in, requesting Dr. Lockhart to deliver up the photostats, and proposing a general understanding that Dr. Lockhart would forget about the information he had wrongfully acquired and misunderstood, and in return I would not press action against him. Col. Wilson saw Dr. Lockhart on May 7, but made no impression whatever on him, and came away with the clear impression that Dr. Lockhart was going to use the letter to "force" me out of the College.

At a special meeting of the General Faculty Council on May 7, Dr. Lockhart defended his actions in reading and making photostatic copies of my private letter to Dr. Packer.

Aided by the Dean of Theology, he made outrageous remarks about the meaning of my letter, said that there was no place on the faculty for me, and, that he was going to read my letter to a meeting of the Board of Regents the following evening. He said that faculty members, including myself, had been spreading word of his actions about Winnipeg, and that this would ruin the Building Fund campaign. The Principal's conduct was strongly attacked at the faculty meeting by several faculty members, led by Dr. Stewart Reid, Chairman of the History Department.

Upon urging of faculty members at the College, I sent the Chairman of the Board of Regents (Allan H. Watson) on May 8, a telegram which colleagues and lawyers at Queen's helped to compose. This telegram stated (1) the facts which were known to me (2) that I had been advised that an actionable breach of copyright had been committed and (3) that if action adverse to me were taken, full publicity would inevitably be given to all the facts in the incident. A copy of this telegram was given to Dr. Lockhart before the Board meeting by the Chairman of the Faculty Association, Dr. Kenneth McNaught. On May 8, prior to the Board meeting, Dr. Lockhart told Dr. McNaught and Dr. Stewart Reid, that no action was ever contemplated against me and he could not see how I got such an idea. At the same time an invitation which Dr. Lockhart had issued to Dr. Reid (at Dr. Reid's request) to appear at the Board meeting to seek entrance, was withdrawn.

Mr. Watson wrote to me under the date May 9, stating that he had been "directed" by the Board of Regents to ask the Investigations Division of the Post Office to conduct an investigation. Subsequently I wrote to the Investigations Division stating those facts which were known to me. I sent a copy to Mr. Watson. I am in receipt of a reply from the District Director of Postal Service, Winnipeg, wider the date May 28, stating that no request for an investigation, or indeed enquiry of any kind had been made by the College. An investigation however was carried out as a consequence of my letter, and the Post Office is satisfied that the three letters reached the College, and the matter is one for the police.

On May 15, three members of the Board of Regents (all lawyers) visited my lawyer, Col. Wilson, with the following message: (1) they were "unofficially" present, representing neither Dr. Lockhart nor the Board, (2) I should resign and if I did "they" would give me "excellent" reference, (3) if I do not resign I might be fired, (4) if I wasn't fired and returned to the College, things would be made "most unpleasant" for me, and an "investigation" of me would continue.

Col. Wilson pointed out the sharp conflict between the representations of the three Board lawyers on May 15, and the statements of Dr. Lockhart to my Department Chairman and the Chairman of the Faculty Association on May 8. Col. Wilson said I would have to know what representations had been made to the Board of Regents, and what attempt had been made to determine their truth or falsity, before I could consider their suggestions.

These three gentleman said they would have to return for a second interview, (which probably took place late last week). At this second interview, Col. Wilson will inform them: (1) I intend to return to United College this autumn. I shall get a job elsewhere as soon as I can, but it is not possible to get an academic job this late in the year. (2) If I am dismissed I shall defend my interests with every available means. This I am fully prepared to do. (3) I am determined to discover what has happened to my mail. Also, I shall have to ask Dr. Lockhart to deliver to me the photostats of my letter.

On May 23, I wrote to Dr, Lockhart stating that it is my intention to return to United College this autumn. In my letter I asked him to send me the photostats, and I said I regretted the conclusions which he had reached on the basis of my letter to Dr. Packer, and assured him they were incorrect and without foundation. His reply was a curt directive to send my communications to the Chairman of the Board of Regents. A series of injustices has been done — my mail has been stolen, a private letter of mine has been read by the Principal and photostated: he has presumed to understand what it means (torn from my correspondence). It has been paraded before the faculty and the Board; and now an even greater injustice is threatened.

COPY

DOCUMENT NO. 16

P. O. Box 815,
WINNIPEG 1, Manitoba
June 2, 1958

Professor H. S. Crowe
Department of History
Queen's University
KINGSTON, Ontario.

Dear Professor Crowe:

Your letter of May 17th was awaiting me upon my return to the City. I have spoken to the Investigation Division of the Winnipeg Post Office and have been informed that they have completed their investigation, and, in accordance with their general policy, have forwarded a report to you as the sender of the letters and as at the place of mailing. I shall be glad if you will send me a copy of this report at your earliest convenience.

Yours very truly,

Allan H. Watson,

*Chairman of the Board of Regents,
United College
AHW :vp*

COPY

DOCUMENT NO. 17

June 10, 1958

Mr. Allan H. Watson
P.O. Box 815
Winnipeg 1, Manitoba

Dear Mr. Watson:

I wish to acknowledge receipt of your letter of June 2nd. I am enclosing a copy of the report of the District Director of Postal Service which you requested.

I am in receipt also of a letter under the date May 28th from Principal Lockhart stating that it is in order for me to address correspondence to you. Dr. Lockhart's letter was in reply to my letter to him of May 23rd, in which I regretted certain conclusions with respect to myself which he had informed me he had reached, and I assured him that they were incorrect and without foundation.

My letter to Dr. Lockhart contained the following paragraph: "The letter which I mailed to Professor Packer under the date of March 14 became the property of the addressee when it was posted, but the copyright remained with me. I have given no authority to anyone to make copies and I am advised that without that authority copies cannot be made. Therefore I now ask that the photostatic copies be delivered to me". As Dr. Lockhart's reply was that it is in order for me to address correspondence to you, I now ask you to undertake the delivery to me of the photostatic copies of my private and confidential letter to Dr. Packer.

Also, I must inform you that I am distressed by information which has been sent to me that the Principal has made a very serious charge about me relating to an alleged occurrence when I was a student at the College many years ago. He has stated that material to this effect is in my file at the College. Although I know there is not a shred of truth to this charge, I have secured statements from persons who were on the college faculty when I was a student. You will appreciate, that I am most disturbed that material of this nature should be in existence, and that it should be used by the Principal. When I return to United College this autumn, I shall appreciate an opportunity to discuss this matter further with you.

Yours very truly,

H. S. Crowe
Associate Professor of History

COPY

DOCUMENT NO. 21

P. O. Box 815,
Winnipeg 1, Manitoba
June 20, 1958

Professor H. S. Crowe
Dept. of History
Queen's University
KINGSTON, Ontario

Dear Professor Crowe:

This will acknowledge receipt of your letter dated June 10th which arrived during my absence from my office.

I thank you for sending me a copy of the report of the District Director of Postal Services. The statement in the report "a check was made of records of enquiries at this office but outside of the telephone conversation with Professor Packer, no complaint has been received of misdelivery or non receipt of any mail for anyone in the College" being incorrect, I contacted the Post Office and was informed that this statement was corrected in a subsequent letter to you, a copy of which is being forwarded to me. My concern in this is simply to keep the record straight.

You have been advised that the question of your future relationship with the College is being considered by the Board. It is to be expected that a decision finalizing the matter will be made at the next meeting of the Board to be held on July 2nd. If you wish to make any further representation prior to the meeting please feel free to do so.

Yours truly,

Allan H. Watson
Chairman of the Board of Regents
United College

AHW:vp

COPY

DOCUMENT NO. 22

Mr. A. H. Watson
Chairman, Board of Regents
United College, P. O. Box 815
Winnipeg 1, Manitoba

CONFIDENTIAL

Dear Mr. Watson:

I have your letter of June 20 stating that the question of my relationship with the College is being considered by the Board and inviting representations from me prior to the Board meeting of July 2. I have already made representations to you on the subject in a telegram dated May 8 and in a letter dated June 10, and to Dr. Lockhart in a letter dated May 23.

The question of my relationship to the College has arisen as a result of the unauthorized reading, retention, photostating and employment by the Principal of a private letter which I had addressed to Dr. Packer. The fact that this letter, along with others, was apparently stolen by someone from the mails within the College, the fact that conflicting versions of how it came into the Principal's hands have been transmitted to me, the fact that its contents have been grossly misinterpreted and misrepresented, are in themselves important but they are far less important than the basic fact that my position as a faculty member is in question because a private letter of mine to another faculty member has been read, retained, photostated and otherwise used in an unauthorized manner by the Principal.

I will tell you frankly that I have been urged by colleagues at United College and by a number of outstanding members of the academic community across the country, including executive officers of the Canadian Association of University Teachers, all of whom feel strongly that the basic interests of the academic profession have been gravely affected, to bring forward immediately before the Canadian Association of University Teachers this invasion of the fundamental rights of university teachers. I have also been advised that my legal rights have been seriously infringed in more than one respect and that I should act to secure appropriate legal redress. Despite my respect for the persons who have offered this counsel, and despite my personal sense of outrage, I have thus far declined to act upon their advice because of my continuing primary loyalty to the College, and because of my confidence that the Board of Regents can be relied

upon to protect the interests and rights of faculty members.

If, however, I am proven to be wrong in this judgment, and if action should be taken which would prejudice my resumption of duties at United College in accordance with the normal condition of academic tenure, then I shall be left with no alternative but to defend by every available means my interests as a member of the academic profession and of the faculty of United College. I will do so in the clear conviction, a conviction shared by everyone who has communicated with me on this subject, that the well-being of the College would depend upon the success of my action.

Although this letter is marked "Confidential" I wish you to present it to the other members of the Board.

Yours truly,

H. S. Crowe
Associate Professor of History

HSC:ES

TRANSCRIPT

DOCUMENT NO. 23

QUEEN'S UNIVERSITY
KINGSTON, ONTARIO

26 June, 1958

Rev. W. Harold Young
Secretary, Board of Colleges and Secondary Schools
United Church of Canada
526 Wesley Buildings
299 Queen St. West
Toronto 2B, Ontario

Dear Dr. Young:

I wish to acknowledge your letter of June 17 which, I must confess, I find a rather puzzling communication. I can recollect no statement made by myself to you, or in your presence, which might have conveyed to you the impression that I was prepared to enter any arrangement in which I would resume my teaching duties at United College in

any qualification of the normal conditions of academic tenure. I regret that I seem to have left you with this misimpression.

The question of my relationship to the College has arisen solely because of the unauthorized reading, retention, photostating and employment by the Principal of a private letter which I addressed to Dr. Packer. Nothing which I have done justifies the raising of this question, or would cause me to consider the kind of arrangement which you propose.

Thank you for your efforts and your good wishes.

Yours sincerely,

H. S. Crowe
Associate Professor of History

Copy to Dr. E. E. Long

COPY

DOCUMENT NO. 24

P.O. Box 815
Winnipeg 1, Manitoba
July 4, 1958

Professor H. S. Crowe
Department of History
Queen's University
KINGSTON, Ontario

Dear Professor Crowe:

The Board of Regents of United College met Wednesday evening, July 2nd and had before it your telegram to me of May 8th, your letters to me of June 10th and 26th and your letter to Principal Lockhart of May 23rd. Professor Stewart Reid was also at the meeting in compliance with your request to him.

The Board has considered carefully the facts related to the manner in which your letter to Dr. Packer under date of March 10th came into the hands of Principal Lockhart and the subsequent development. The members of the Board unanimously agree that the Principal acted in a responsible manner as Chief Executive Officer of the College in

dealing with this correspondence.

The Board is of the opinion that your conduct has been such that would enable it to dismiss you for cause and without notice.

Notwithstanding this, however, and without prejudice to the Board's legal position in the matter, the Board has instructed me to inform you that:

1. You may resume your duties with the College for one year commencing on the first day of September, 1958 at the same salary and on the same conditions as when you last taught at the College in the year 1956-57, if you notify the Board in writing on or before the 25th July, 1958 of your intentions so to do. If such written notice is not received on or before the 25th July, 1958, the Board will assume that you are not returning to teach at the College and will make arrangements to engage another person in your place.

2. If written notice is received from you that you will return to the College on the first day of September, 1958, your services to the College will not be required after the 31st August 1959, and this is formal notice to you that your employment with the College will end on the 31st August, 1959.

It is hoped that during the 1958-59 academic year you will be able to find employment in some other institution of higher learning which will be more congenial to you.

Yours truly,

Allan H. Watson,
Chairman of the Board of Regents,
United College

AHW :vp

COPY

DOCUMENT NO. 29

15 July 1958

Telegram to

Mr. A. H. Watson,
144 Girton Blvd., Tuxedo,
Winnipeg, Man.

Does salary referred to in fourth paragraph of your letter of July 4 include increment granted to my rank in the year 1957-58 and any which may be granted in the year 1958-59 or does it mean the exact salary I received in the year 1956-57.

H. S. Crow

COPY

DOCUMENT NO. 30

Box 815,
Winnipeg 1, Manitoba,
July 21st, 1958

Professor H. S. Crowe
Department of History,
Queen's University
KINGSTON, Ontario.

Dear Professor Crowe:

Referring to your telegram of the 16th instant, Section 1 of the fourth paragraph of my letter of the 4th instant simply means that your salary on the date you report for duty will be the same as it was when you commenced your leave of absence.

In the normal course, the following factors govern salary increments:

- a) Teaching proficiency
- b) Loyalty to the institution
- c) Measure of co-operation extended in attaining the objectives of the College.

There is nothing in my previous letter or in this designed to impede discussion of your 1958 salary as soon as you report to the College for duty.

Yours truly,

Allan H. Watson,
Chairman of the Board of Regents
United College

COPY

DOCUMENT NO. 31

25 July 1958

Telegram to

Mr. A. H. Watson
144 Girton Blvd., Tuxedo,
Winnipeg, Man.

You propose in your letters of July 4 and July 21 to terminate my employment without notice and to offer a new one-year contract at reduced salary below the minimum for my rank and without the increment due me and other continuing members of staff. September salary discussions are no protection to me now. New conditions now introduced by you restricting increments and your previous letter suggest unfavourable result of such discussions predetermined.

Accepting your proposal would admit your right to dismiss or punish me for non-existent misconduct. I do not recognize any right to terminate or modify my present and continuing employment. I intend to exercise all rights and fulfill all duties flowing from that employment. This telegram is sent under reserve of all my legal rights.

H. S. Crowe

COPY

DOCUMENT NO. 33

P. O. Box 815,
Winnipeg 1, Manitoba
August 7th, 1958

Professor H. S. Crowe
Department of History
Queen's University
Kingston, Ontario

Dear Professor Crowe:

Referring to your telegram of the 25th ultimo, your interpretation of my letters of July 4th and 21st is wrong in all important respects.

I feel sure that upon re-reading my letters of July 4th and 21st and upon further serious reflection, you will realize that you may resume your duties on the basis outlined in my letter of July 4th or decline to do so. The choice is entirely yours.

The wording of your telegram is so ambiguous that we cannot be sure whether you intend to resume your duties or not.

You will appreciate that the interests of the College demand a definite answer. We must either keep a post open for you or engage a replacement without delay. We cannot afford to permit the matter to drag indefinitely.

Please inform us definitely if you intend to resume your duties in September. A simple yes or no is all that is necessary. Surely this is not asking too much of you. Unless we have definite advice from you by Thursday, August 14th, that you intend to resume your duties for the forthcoming academic year, we will assume that you do not intend to do so and will proceed without delay to fill the vacant post.

Yours very truly,

Allan H. Watson
Chairman of the Board, United College

AHW:ny

COPY

DOCUMENT NO. 34

Thursday, Aug. 14, 1958

Telegram to

Mr. A. H. Watson
144 Girton Boulevard
Tuxedo, Winnipeg, Man.

You have no power to compel me to accept one of the alternatives in your letter of July 4 without my consent and I do not consent to either of them. I propose to return to duty September first pursuant to my continued employment under previous conditions on the understanding that I am to receive the appropriate salary under present schedule for my rank and service with all increments accrued or accruing according to regular practice, without deduction, abatement or reduction, and without refusal, reduction or

postponement of increase or increment and without penalty for alleged disloyalty or alleged misconduct.

H. S. Crowe

TRANSCRIPT

DOCUMENT NO. 36

P.O. Box 815
Winnipeg, Manitoba,
August 18th, 1958

Professor H.S. Crowe
Department of History
Queen's University
Kingston, Ontario.

Dear Professor Crowe:

I acknowledge receipt of your telegram of August 14th which reads as follows: (There follows a transcript of *Document 34*)

In order that any possibility, on your part, of misunderstanding of the decision of the Board, I again repeat for your information and consideration pertinent excerpts from my letter of July 4th as follows:

1. "You may resume your duties with the College for one year commencing on the first day of September, 1958 at the same salary and on the same conditions as when you last taught at the College in the year 1956-1957.
2. If written notice is received from you that you will return to the College on the first day of September, 1958, your services to the College will not be required after the 31st of August, 1959 and this is formal notice to you that your employment with the College will end on the 31st of August, 1959".

From my letter of July 21st as follows :

"There is nothing in my previous letter or in this designed to impede discussion of your 1958 salary as soon as you report to the College for duty."

The above pertinent excerpts represent the Board's decision in the matter under

discussion and no other understanding exists between us. You will resume your duties at United College, if you do report for duty, on the conditions laid down in my letters of July 4th and 21st.

Yours very truly,

Allan H. Watson,
Chairman of the Board of Regents, United College

AHW :ny

TRANSCRIPT

DOCUMENT NO. 38

Telegram to

Mr. A. H. Watson,
144 Girton Blvd. Tuxedo
Winnipeg, Man.

Under my contract of employment I am entitled to return to duty September First at the salary appropriate to my rank and service under the present schedule without any deduction, holdback or penalty. I am ready and willing to do so. The minimum salary for Associate Professor under the present schedule is 6,000 dollars and the maximum is 6,500 dollars. I am an Associate Professor with eight years service to the College and as such my salary must be above 6,000 dollars and not 5,300 dollars as offered me in your letters of July 4 and August 18. If I am not to receive a salary above 6,000 dollars I shall have to regard your letter of August 18 as a final confirmation of your earlier letters terminating my contract and offering me a new contract at the lower figure. If I am not permitted to return according to my contract it must be because I am dismissed. Advise at once whether I am to return according to my contract as outlined above or not.

H. S. Crowe

DOCUMENT NO. 39

Winnipeg 1, Manitoba
August 25th, 1958

Professor H. S. Crowe

Department of History
Queen's University
Kingston, Ontario

Dear Professor Crowe:

This will acknowledge receipt of your telegram of the 22nd instant which reads as follows :

"Under my contract of employment I am entitled to return to duty on September first at the salary appropriate to my rank and service under the present schedule without any deduction hold back or penalty stop I am ready and willing to do so. The minimum salary for associate professors under the present schedule is Six Thousand Dollars and maximum is Six Thousand Five Hundred Dollars. I am an associate professor with eight years service to the College and as such my salary must be above Six Thousand Dollars and not Five Thousand Three Hundred Dollars as offered me in your letters of July four and August eighteen. If I am not to receive a salary above Six Thousand Dollars I shall have to regard your letter of August eighteen as a final confirmation of your earlier letters terminating my contract and offering me a new contract at the lower figure. If I am not permitted to return according to my contract it must be because I am dismissed stop Advise at once whether I am to return according to my contract as outlined above or not".

You have not been offered a new contract and we are not offering you a new contract. You have been advised in writing, repeatedly, that you may resume your teaching duties with the College on September 1st, 1958 *at the same salary and on the same conditions as when you last taught at the College and that your employment with the College will end on the 31st August, 1959.*

You have also been advised in writing that there is nothing in my previous letters *designed to impede discussion of your 1958-59 salary as soon as you report to the College for duty.*

You are free to resume your duties with the College. The decision to do so or to decline to do so is yours and the responsibility for the decision is also yours.

If you fail to report at the College for duty not later than September 2nd, 1958, you will have by your own action terminated your employment with the College and the College will thereafter accept no further responsibility to you.

Yours very truly,

Allan H. Watson
Chairman of the Board of Regents

United College

AHW:ny

DOCUMENT NO. 40

UNITED COLLEGE
Winnipeg 2,
Manitoba

(Affiliated with The University of Manitoba)

August 26, 1958.

Dear Faculty Member:

Acting under the direction of the Board of Regents I am writing to provide you with a brief statement of fact concerning the most recent developments pertaining to Professor H. S. Crowe and his relationship with the College.

At a meeting of the Board on July 2nd it was decided that Professor Crowe could resume his duties at the College this autumn and be given a year in which to reestablish himself in some other reaching position. A copy of the letter sent to Professor Crowe is attached. Copies of Professor Crowe's replies by telegram to me dated July 25th and August 14th are also attached.

(Documents referred to in the preceding paragraph were attached to the original release but are not duplicated here. They are reproduced in this Appendix as Documents 24, 31 and 34.)

It would appear from these telegrams that Professor Crowe has declined to return to the College at the same salary at which he left and has demanded a salary in excess of \$6,000.00 per annum evidently on the assumption that salary increases made last January 1st automatically apply to all staff members. He previously was informed that the Board of Regents was prepared to discuss the matter of his claim for an increase in salary upon his return.

While the Board has an established salary scale for each rank it has not been the policy of the Board to necessarily equalize the salary of all persons in any given rank or to maintain every person of that rank at the published scale. Salary increases have been made at the discretion of the Board with due recognition of the merits of the individual

involved. There was nothing in the letter written to Professor Crowe regarding the resumption of his duties that precluded a possible increase of salary in this academic year and Professor Crowe has been so informed.

The Board's position is that if Professor Crowe does not report for duty by September 2nd, 1958, he will have by his own action terminated his employment with the College. It is our belief that you should be informed of the reasons behind the Board's decision to inform Professor Crowe that his services would not be required by the College after August 31st, 1959.

Professor Crowe's letter to Professor Packer, of which so much has been said and which came to the Principal through the mail, was not a factor in the Board's decision to take this action. The letter was never before the Board nor was its contents considered by it.

What the Board has had under consideration has been Professor Crowe's expressed attitudes to the College, the Board and the Principal as reflected in his communications to the Principal and the Board and his actions pertaining thereto. He has attempted to intimidate the Principal and the Board by threats of legal and other action and by public denouncement. He has imputed improper and false motives to the Principal and has made accusations against him of distortion, and grotesqueness, deliberately misrepresenting the facts to accomplish this end. The intemperate tone of his communications to the Board, the Principal and the Church as represented by the Board of Colleges and Schools, reflects an aggressive belligerency that appears to make any long term relationship between himself and the College impossible.

Under the date of July 31st Professor Barber has written to inform us that the Canadian Association of University Teachers has set up a commission to investigate "the circumstances under which one of your faculty members, Professor H. S. Crowe was dismissed from his position." It was stated that this was being done on the grounds "that the facts at the disposal of our executive appeared to indicate that issues of academic freedom and tenure were involved."

We wish to make it clear to all members of the faculty that neither academic freedom or tenure are in jeopardy by the decision of the Board in this case and that there has been no deviation in the Board's policy to ensure the full privileges of academic freedom and tenure for all members of the staff. The Board would welcome a full discussion with representatives of the faculty for the purposes of more clearly defining these academic rights and of securing the best ways and means of effectively safeguarding them.

The Board will co-operate fully in any investigation of the facts in the Crowe situation by any properly constituted and authorized committee of the Canadian Association of University Teachers and Professor Barber has been advised in writing to this effect. He has also been informed that we expect this matter to be properly processed through the

United College Faculty Association.

We are sending you this statement so that you may be in possession of the facts pertaining to the Board action and the reasons that prompted it. It is important that we all do whatever we can to dispel the many and malicious rumours that may do so much harm not only to the institution but to all who are involved.

Yours very sincerely,

Allan H. Watson
Chairman of the Board of Regents

TRANSCRIPT

DOCUMENT NO. 41

UNITED COLLEGE
Winnipeg
Manitoba

August 29, 1958

Office of the Principal

Professor H S. Crowe
United College
Winnipeg 2, Man.

Dear Professor Crowe:

I am in Montreal this week attending meetings of the Association of Universities of the British Commonwealth and therefore am unable to be in my office to receive you as you report for duty. Will you please call Mr. Allan Watson at Globe 3-1545, Local 217, and indicate to him that you have been back at the College. I will look forward to seeing you on my return from Montreal.

Yours very sincerely,

W. C. Lockhart
Principal

WCL/nl

DOCUMENT NO. 42

Memo to Dean Anderson: September 2, 1958.

Will you accept this memo as notification that today Professor Harry Crowe reported to me for duty as a member of the College teaching staff in History. He wishes me to say that he has returned to duty pursuant to his continuing employment with the College, and with all the rights of that employment including salary at the rank of Associate Professor. He wishes me to say also that he has not entered into any arrangement with the College nor will he enter any arrangement with the College by which he would accept any penalty on account of alleged disloyalty, or alleged misconduct.

J. H. S. Reid

JHSR/ml

TRANSCRIPT

DOCUMENT NO. 43

11 Lodge Avenue
St. James, Manitoba
2 Sept., 1958.

Mr. A. H. Watson
P. O. Box 815,
Winnipeg 1, Manitoba

Dear Mr. Watson:

I have been handed a letter from Dr. Lockhart by Mrs. Lowe asking me to phone you at your office to "indicate" that I have been "back at the College", and when I phoned your office I was informed by Miss Yaskiew that you were out and would not be returning.

I have reported to Dr. Reid for duty pursuant to my continuing employment with all rights of that employment, including a salary at the rank of Associate Professor, and I have informed Dr. Reid that I have entered no understanding with the College by which I will accept any penalty on account of alleged disloyalty or alleged misconduct.

Yours very truly,

H. S. Crowe

COPY

DOCUMENT NO. 44

September 15, 1958

*Board of Regents
Office of the Chairman*

Professor Harry S. Crowe
11 Lodge Avenue,
St. James, Winnipeg 12, Man.

Dear Professor Crowe:

The Board of Regents of United College hereby gives you notice that your service as a member of the teaching staff of United College is terminated forthwith.

The Board of Regents is prepared to pay you the compensation in lieu of notice to which you may be legally entitled by reason of the above termination of service.

Yours truly,

Allan H. Watson,
Chairman, Board of Regents

AHW/nl

COPY

DOCUMENT NO. 45

September 15, 1958

Mr. Allan H. Watson
Chairman, Board of Regents,
United College,
Winnipeg, Man.

Dear Mr. Watson:

Professor Crowe has shown us your letter of September 15th, whereby his services as member of the teaching staff at the United College are terminated. You state that the Board is prepared to pay Professor Crowe the compensation in lieu of Notice to which he may be legally entitled.

We suggest that the amount to which he is entitled is \$6,000.00, which is the minimum amount the Professor would have received had he been continued in his position as Associate Professor of History. We would be glad to hear from you.

Yours truly,

FILIMORE, RILEY, McLACHLAN, NORTON & YARNELL per

WPF:L

DOCUMENT NO. 46

Statement released by the Board of Regents and printed in the *Winnipeg Free Press*, September 20, 1958

The board of regents of United College has refrained until now from any statement relative to Prof. Crowe and his relationship to the college. It has been unwilling to be a party to any newspaper debate on this issue. However, since the public has been given such an inaccurate view of the matter the board now believes that the time has come to provide a full statement of the facts.

United College is a college of the United Church of Canada. It has maintained throughout its long history a concern for excellence in learning and the freedom to pursue the truth. It was founded on the conviction that higher education should be set in an atmosphere that is congenial to religion so that the insights and understandings that come through the Christian faith can be related to all knowledge.

Principal Lockhart received in Her Majesty's Mail in an envelope post-marked Winnipeg, April 1, 1958, an unsigned communication addressed to himself. The communication to Dr. Lockhart was as follows:

"FOUND IN COLLEGE HALL. WE THINK YOU SHOULD READ IT. SOME STAFF LOYALTY???"

There was enclosed a letter, from "Harry" to one "Viljo", dated March 14.

The contents of this letter are now known in certain circles because Prof. Crowe himself released a copy in his own handwriting to the board of colleges and secondary schools of the United Church. A copy in turn was furnished to the board of regents by the church and read to the Board of Regents on Sept. 9. Until that date the board did not have the letter, or any copy or transcript of it before its members. Dr. Lockhart did not release the letter to the board.

The board's opinion of the letter is that the attitude toward religion revealed by it is incompatible with the traditions and objectives of United College, and that, in the manner in which he has named in the letter six faculty members, two of whom are deceased and are of hallowed memory, Prof. Crowe overstepped the limits of decency.

If Prof. Crowe sees fit to publish his letter, such publication will once and for all remove any uncertainty about the nature of contents.

KEPT A COPY

When Dr. Lockhart received this document, without any knowledge of who had sent it to him, and in view of its contents, he felt himself morally responsible as official representative of the United Church on the board, and as the chief executive officer of the college, to retain a copy of it for the board.

He also felt it necessary to retain a copy in that it was received anonymously and therefore with possible sinister intent.

He handed the original letter to the person to whom presumably it had been sent, who stated that he had not seen it prior to that date.

Dr. Lockhart then wrote to Prof. Crowe, informing him of what he had done and stating: "Your letter is a profoundly disturbing document. After reading it I have had to regretfully come to the conclusion that personally you have no sympathy with the avowed purposes of the college, and that you have no respect for or loyalty to the administration."

This was the whole substance of Dr. Lockhart's personal rebuke to Prof. Crowe at that time or since.

Malicious rumours began to circulate at this time, and the chairman of the board of regents convened a meeting of the board to consider the entire matter.

WIRED STATEMENT

When Prof. Crowe learned that this matter was to come before the board, he wired to

the board stating in conclusion:

".. if action adverse to me follows, full publicity will inevitably be given to all the facts in this incident."

This was followed by efforts on Prof. Crowe's part, contained in a memorandum dated June 2, 1958, forwarded to the secretary of the board of colleges and secondary schools of the United Church, to discredit the principal by imputing improper and false motives to him. The memorandum also contained various mis-statements of fact.

When the board met on July 2 to deal finally with this matter, it felt that there was sufficient evidence from the expressed attitudes of Prof. Crowe to the board and the principal to make it clear that it would be better for all concerned if he were not retained on the staff.

The board of regents was willing to allow Prof. Crowe to return to the college in order to have one year at least to establish himself in some other teaching position more congenial to him. It so informed him on July 2 and at the same time gave him legal notice of termination of service as of August 31, 1959.

NEW CONTRACT

Prof. Crowe insisted on interpreting this as the offer of a new contract, despite the fact that he was informed that he would resume his duties on the same basis as when he left for his year's leave of absence. He was also informed in writing that the board stood ready to consider granting him the increase in salary that had been afforded to those of his rank during his absence.

On Sept. 2 Prof. Crowe returned to the college. On his return, however, he refused to accept his year's notice of discontinuance of service; insisting that he had "continuing employment" with the college.

On Sept. 9 the board, having just received from the board of colleges of the United Church a copy of the original letter, reconsidered the matter of Professor Crowe's Position. The letter was then read to the board and its contents raised a question as to Prof. Crowe's fitness to teach at a church college. The board decided that his attitude to religion and to his colleagues on the staff as expressed in his letter was such that his services should be terminated forthwith.

DECISION

In light of its then full knowledge of the facts, the board was governed by these considerations in its decision of Sept. 9.

It is a fact clearly recognized in the university community of the United States, which over the past 50 years has gone a long distance in the direction of codifying principles and procedures concerning academic liberty and tenure in that country, that institutions of higher education which have religious affiliations of any kind must be permitted to expect from members of their faculties certain restraints in the expression of opinion which may not appear to be necessary in purely secular institutions.

The board concurs in the view expressed by scholarly writers that any faculty member who questions the basic tenets of religion within such an institution should, in honesty, seek an academic environment more congenial to him. It is upon this principle that the board of regents has acted in this affair but, in addition, in an honest endeavour to be scrupulously fair with Prof. Crowe, the board first, and before the contents of Prof. Crowe's letter were placed before it, offered him a further year of service within the college, and later, after the contents thereof were disclosed to it, *offered to hint a year's salary in lieu of notice.*

The board has informed the president of the Canadian Association of University Teachers that it will co-operate fully with any properly constituted investigating committee of the C.A.U.T. if, as, or when there is an investigation. The board wishes also to have the proper assurances that such an investigation, if it proceeds, will be fair and objective.

In this regard it must be pointed out that Prof. Barber, the president of the CAUT has informed the board that steps are being taken by him to rectify the wrong done to the principal and the college by his issuance of a document which, in the judgment of the board, is extremely prejudicial to the position of the board.

The board of regents wishes to make it abundantly clear that there has been no deviation from its traditional support of academic freedom, and that it will continue to stand firm in safeguarding such privileges. The charge of infringement of academic freedom, in this instance, is absurd unless the immunity claimed by a scholar in the pursuit of knowledge is to be extended to cover any kind of irresponsible action.

United College has long held an enviable reputation in this country as an integral part of a fine university and its high scholastic standards have been matched only by its devotion to true academic liberty, The board realizes that it holds a heavy responsibility in maintaining and furthering both these desirable things, and it does not intend to waiver from them now. But it feels bound to state that it fails entirely to see in this affair any conceivable connection between its actions with respect to Prof. Crowe and any concept of academic liberty known to it. The governing body of this college is in either explicit or implicit agreement with the following statements on academic freedom which were agreed upon in 1940 by the American Association of University Professors and by the Association of American Colleges. The first part of a highly relevant clause of this statement was apparently provided to the press some days ago, and printed.

We take the liberty of reproducing the entire statement of this clause, with the additional part underlined:

"The College or University teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline; *but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise proper restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman.*"

The members of the board of the college have the utmost confidence in the integrity of Principal Lockhart and are in unanimous agreement that he acted in a right and responsible manner as chief executive officer of the college in dealing with the letter in question. The Board also gives its full support and approval to the chairman of the board and the principal for the dignified and restrained manner in which they have handled this entire situation.

COPY

DOCUMENT NO. 47

September 22, 1958

Messrs. Aikins, MacAulay & Co.,
Barristers, etc.,
Somerset Building
Winnipeg 1.

Dear Sirs:

Att'n: Mr. McGavin, Q.C.
Re: United College & Professor H. S. Crowe

We return herewith the cheque for \$5,521.20 which was enclosed with your letter of September 17th, also the form of release. As presently advised, Professor Crowe is not prepared to sign this form in that it covers a field much wider than compensation in lieu of notice.

Yours truly,

FILIMORE, RILEY, McLACHLAN, NORTON & YARNELL

per:

WPF:L

Encls.

DOCUMENT NO. 48

RELEASE

KNOW ALL MEN BY THESE PRESENTS that I, HARRY S. CROWE, of the City of Winnipeg in the Province of Manitoba, for and in consideration of the payment by United College to me of the sum of \$5,521.20, the receipt whereof I hereby acknowledge, and the payment by United College on my behalf to the Receiver General of Canada of the sum of \$478.80, have absolutely and forever released, remised, acquitted and discharged and by these presents DO ABSOLUTELY AND FOREVER RELEASE, REMISE, ACQUIT AND DISCHARGE the said United College, the Board of Regents of United College, and all members thereof, the Chairman of the said Board, Allan H. Watson, and the Principal of United College, Dr. Wilfred C. Lockhart, their heirs, executors, administrators, successors and assigns, of and from all manner of action or actions, cause or causes of action, suits, debts, dues, sums of money, accounts, bonds, covenants, contracts, claims, demand or damages whatsoever, at law or in equity, which I ever had, now have, or in which my heirs, executors, administrators or assigns, or any of them, hereafter can, shall or may have, for or by reason of any cause, matter or thing whatsoever existing up to the present time; exempting only out of the said release and discharge whatever rights I may be entitled to pursuant to the Pension Plan of United College.

IN WITNESS WHEREOF I have hereunto set my hand and seal this day of September, 1958.

SIGNED, SEALED AND DELIVERED
in the presence of

HARRY S. CROWE

DOCUMENT NO. 49

Release to the Press by Professor H. S. Crowe,
September 22, 1958

Allan H. Watson, Chairman of the Board of Regents of United College, has issued to the press a statement on my relationship with the Principal and the Board of Regents which contains so many mis-statements of fact and so many omissions of essential pieces of information, that I am compelled to make this public reply, much as I would have preferred to maintain silence until the investigating committee of the Canadian Association of University Teachers had completed its investigation.

The following is a selection, and by no means an exhaustive account, of Mr. Watson's mis-statements and omissions:

1. Mr. Watson says that my private and undelivered letter to a Colleague at United College reached the Principal through the mail, in an envelope addressed to the Principal.

Mr. Watson did NOT say that an entirely different account of how my private and undelivered letter came into unauthorized hands was given to postal authorities by a College official. This version is recorded in a letter from postal authorities to me.

2. Mr. Watson says that the envelope the Principal received was postmarked April 1, and the letter presumably arrived on April 1 or April 2. This now becomes the third (late which has been stated to be the date on which the Principal received my private and undelivered letter to a Colleague.

3. Mr. Watson says that until September 9 "the Board did not have the letter, or any copy or transcript of it before its members. Dr. Lockhart did not release the letter to the Board." Evidence will be presented to the investigating committee of the Canadian Association of University Teachers that some members of the Board were aware of the contents of my private and undelivered letter to a Colleague at the time the Board took action against me on July 2. Moreover, Mr. Watson admits in his statement that the Principal photostated my private and undelivered letter "for the Board".

4. Mr. Watson says that the Principal eventually handed the letter to the person to whom it "presumably" had been addressed. As the salutation read "Dear Viljo" there is no possibility whatever of doubt as to whom this private letter was addressed.

5. Mr. Watson says that a letter which the Principal sent to me (dated April 23) "was the whole substance of Dr. Lockhart's personal rebuke." Mr. Watson did NOT say that the Principal's letter could be interpreted only as a request for my resignation, that the Principal concealed from me the fact that he had photostated my private and undelivered letter, and that the Principal knew at the time he was writing that my original letter had not been delivered to the addressee through the mails. Moreover, Mr. Watson did not include in his statement of "facts" the remarks which the Principal had made against me, and which were based upon my private and undelivered letter, to a full assembly of the faculty. And, Mr. Watson did not reveal that at that meeting of the

faculty, a faculty member admitted that he had been shown and had read my private and undelivered letter.

6. Mr. Watson says I "forwarded" a memorandum, dated June 2, to the secretary of the Board of Colleges and Secondary Schools. This is not so, On June 2, I had an interview with Dr. E. E. Long, General Secretary of the United Church, at his request, as the Moderator was in Europe, to discuss the matter which had arisen at the College, and I handed Dr. Long a memorandum of my verbal statement, along with a copy of my original undelivered letter, for his private information, and for that of the Moderator. The Secretary of the Board of Colleges and Secondary Schools was present at the interview, but no document was handed to him.

7. Mr. Watson says that in this memorandum I imputed "improper and false motives" to the Principal. In this memorandum which I am prepared to show to any interested party, I imputed NO motives to the Principal, proper or improper, true or false.

8. Mr. Watson says that this memorandum contains "various mis-statements of fact." Neither I, nor any Colleague who has seen it, can detect in this memorandum a single mis-statement of fact.

9. Mr. Watson says that I was informed on July 2 that action had been taken against me. I received no communication from the Board on July 2. I did receive on July 9, a letter from Mr. Watson dated July 4 and postmarked July 7, which terminated my contract and offered me a one-year contract at the same salary as I had received in 1956-57.

10. Mr. Watson says that action was taken against me because of my "expressed attitudes". This reason for the termination of my employment which was decided at a Board of Regents meeting on July 2, was not divulged to me, and I did not learn it until I was informed that a mimeographed circular letter, dated August 26, had been sent to faculty members and to other people, stating that action had been taken against me because of the "intemperate tone" and "aggressive belligerency" of the manner in which I had protested the unauthorized reading, retention, photostating and use of a private and undelivered letter to a Colleague.

11. Mr. Watson did not produce the evidence to support his charge of "intemperate tone" and "aggressive belligerency" for the understandable reason that it does not exist. The strongest letter which I dispatched to the Board or the Principal, and upon which Mr. Watson's explanation of the action against me in July must stand or fall, was written on June 26, and reads as follows:

(A copy of Document No. 22 was inserted in the original release at this point)

12. Mr. Watson objects to my interpreting the Board's action of July 2 as the offer of a

new contract. My interpretation of the Board's letter was that it terminated my contract and offered me a new contract. My legal advice is that no other interpretation can be placed upon it.

13. Mr. Watson said I was informed that "the Board stood ready to consider granting" me the increase in salary that had been afforded to those of my rank during my absence. The facts are that Mr. Watson's letters to me of July 4 and July 21 suggested that it was most unlikely that I would receive the salary of my rank, and in any case, I had to report for duty at a salary considerably below the salary scale. In his letter of July 21 Mr. Watson said:

"In the normal course the following factors govern salary increments:

- a) teaching proficiency
- b) loyalty to the Institution
- c) measure of co-operation extended in attaining the objectives of the College."

14. Mr. Watson says that on my return to the College on September 2 I refused to accept a year's notice of discontinuance of service. The fact is that I refused to accept a new one-year, low-salary contract.

15. Mr. Watson says that on September 9 the Board of Regents decided on the basis of my private and undelivered letter, the contents of which had been known for many months to some Members of the Board, that I would not be allowed to resume my duties.

This action of the Board was not revealed to me until September 15, a few hours before a meeting of the College Faculty Association, and the reasons for this action were unknown to me until Mr. Watson released them on Saturday to the press.

16. Mr. Watson says the Board offered me "a year's salary in lieu of notice". The fact is the Board offered "compensation", and I requested a year's salary, to which the Board agreed subject to a release from responsibility for their actions, not only for the Board and its chairman, but also for the Principal.

17. Mr. Watson says the Board "feels bound to state that it fails entirely to see in this affair any conceivable connection between its actions with respect to Prof. Crowe and any concept of academic liberty known to it", because he suggests, "the public may judge his profession and his institution by his utterances".

My utterance was a private one, and not a public one, in a letter 'to a friend and colleague, a letter which neither the Principal nor the Board had any right to read, let alone to judge, a letter which was not delivered to the addressee through the mails, a letter which was read, retained, photostated and used against me by the Principal, all without the prior knowledge or consent of either myself or my colleague to whom it was addressed. This, and this alone, is the issue, and to this assault upon my personal

liberty I cannot and will not submit.

DOCUMENT NO. 50

September 22, 1958

Mr. Allan H. Watson
Chairman, Board of Regents
650 Harrow Street,
Winnipeg 9, Manitoba

Dear Mr. Watson:

Principal Lockhart has supplied me with a copy of your letter of September 15 to Professor H. S. Crowe, containing notice of his dismissal from the College teaching staff. As a faculty member and as Chairman of the department of which Professor Crowe was a very valuable member, I must express my deep personal concern about this action.

In private conversation with Principal Lockhart and with you, as well as at the Board meeting of July 2, I have already expressed my doubts about the rightness and the wisdom of action against Professor Crowe. I have refrained, nevertheless, from voicing any formal judgment, since I was several times assured that there was pertinent and essential information about Professor Crowe, not yet revealed, that would affect any such judgment. Now, however, the Board has made a public statement of the reasons for its decision. I must assume that all its reasons were given and that the case against Professor Crowe has been fully stated.

I must tell you that it is my considered opinion

- (1) That Principal Lockhart was wrong in reading a private letter which came into his hands as part of an anonymous communication.
- (2) That Principal Lockhart was wrong in having this letter photostated in order "to retain a copy for the Board."
- (3) That the Board was wrong when, on the basis of whatever information about the letter it had been given by Principal Lockhart, it decided on July 2 to give Professor Crowe a year's notice and a reduced salary for the year.
- (4) That the Board was wrong when on September 9, after reading the letter in question, it decided to dismiss Professor Crowe "forthwith".

My reasons for holding this opinion are simple ones. Professor Crowe was not dismissed for inefficiency in the performance of his duties. As his department chairman I have already testified to you that he is an extremely capable and conscientious member of my staff. He was dismissed, it is alleged, for holding a particular opinion. That in itself is a decision very difficult for the Board of a liberal arts college to defend. Worse still, the only evidence of that opinion ever offered, is evidence which the Board should not have had in its possession.

I have come to the conclusion that, since I hold these opinions, the only honourable course of action for me is to inform you of them fully, formally and publicly. Please do not regard this letter as either private or confidential. I have provided Principal Lockhart with a copy and I shall certainly let my colleagues read it if they care to know my opinion. I respectfully request that it be read at the Board meeting which I understand is to be held tonight.

Yours very sincerely,

J. H. Stewart Reid,
Chairman, Department of History

JHSR/dp

APPENDIX B

DOCUMENTS RELATING TO THE CONSTITUTION AND FUNCTION OF THE COMMITTEE

UNITED COLLEGE
Winnipeg
Manitoba

Office of the Principal
Baysville, Ontario

Professor Clarence Barber
The University of Manitoba
Winnipeg, Man.

Dear Professor Barber:

Your letter to me of July 31st concerning a request by one of the member associations of the Canadian Association of University Teachers for an inquiry "into the circumstances under which one of your faculty members, Professor H. S. Crowe was recently dismissed from his position" has just reached me here where I am on vacation.

The question of Professor Crowe's relationship to the College has been before the Board of Regents for some time and on July 4th Professor Crowe was informed by letter that he might resume his teaching duties at the College in September. He was also informed that his services would no longer be required by the College after August 31st, 1959. As far as I can gather from what information I have, it appears that Professor Crowe failed to accept the terms offered for the resumption of his duties before the date specified in the letter to him of July 4th and is apparently terminating his relationship with the College as of August 31, 1958.

As I have indicated, this matter is under the direction of the Board of Regents. However, I feel confident that the Board would be willing to meet with any properly constituted committee of the Canadian Association of University Teachers to discuss the facts involved in this situation. As you no doubt are aware, we have within United College a branch of your Association and I think it would be important for the Board to know whether this matter has been before our own Association and whether the request for this investigation came from that quarter or from some other. I am not acquainted with the methods of procedure in your Association when investigations of this type are conducted but I would be concerned if an investigation is requested from some other quarter without clearance with the United College Faculty Association. I would be glad if

you could let me know whether this step has been taken and also from what quarter the request for an investigation has come to you.

The Chairman of our Board of Regents is Mr. Alan H. Watson and I would suggest that you might communicate the above information which I have requested to him. If you could send me a copy of your letter it would be appreciated. He has already seen your letter to me. I assure you that you will find him most co-operative in this matter. You may rest assured that we will do everything within our power to co-operate fully with your Association. We only wish to be sure that the investigation is carried out with the knowledge and support of our own section of your organization.

Yours very sincerely,

Wilfred C. Lockhart
Principal

P. O. Box 815,
Winnipeg 1,
Manitoba
August 20th, 1958.

Professor C. L. Barber,
President, C.A.U.T.
320 Kingsway Avenue
Winnipeg 9, Manitoba.

Dear Professor Barber:

I acknowledge receipt of your letter of August 18th. I should like to assure you that the Board of Regents of United College will extend a full measure of cooperation to Professor Fowke and his committee. It is desirable that the investigation should be exhaustive and complete in every detail,

I am at a complete loss to follow your reasoning outlined in the fourth paragraph of your letter. It appears obvious to me that a basic principle is involved. If a member of the faculty of United College and a member of the United College Association claims to have been treated unjustly, the United College Association should be the first to take effective action, if in fact there has been any cause for action.

Surely your reasoning can not be sound when it leads you to the conclusion, in effect, that a request for an enquiry should not properly come from and/or be consented to and supported by the local association. I should think that the local association would be the

most interested and active party in seeking an investigation of unjust treatment of a colleague, if in fact, any evidence of unjust treatment exists. Why, indeed, should you have to urge them to action and if there is any cause for action, why should there be internal dissension and a disruption of effectiveness? A reasonable assumption is that, if cause for action exists, such a cause would have the effect of welding the members of the association more closely together, and result in a united front. However, although I feel I must challenge your reasoning this does not detract in any way from the assurance that the Board will co-operate fully with your committee.

You will, of course, appreciate the necessity for your committee being furnished with the proper credentials before commencing the investigation. Specifically we must be informed through the medium of the credentials, the constitutional right of the persons, group and/or Association to order the investigation and assume the moral and legal responsibility for this action, in order that we may know to whom we should look to for redress should this unprecedented, and, in our opinion, totally unwarranted action result in damage to the College of either a temporary or permanent nature.

Yours very truly,

Allan H. Watson
*Chairman, Board of Regents,
United College*

AHW:ny

11 Lodge Avenue
St. James, Manitoba
10 September, 1958

Professor Clarence Barber
President
Canadian Association of University Teachers
University of Manitoba

Dear Professor Barber:

I wish this letter to record my request to the Canadian Association of University Teachers to determine the facts of my recent relationship with United College as they bear upon academic freedom and academic tenure, and to take such steps as seem advisable in the light of those facts.

On July 16 when a similar request to the Canadian Association of University Teachers was made by the Executive of the Queen's Faculty Association, I was a member of that association. Although I have returned to Winnipeg, and remain a member of the Canadian Association of University Teachers, I am not at present, and have not been since August 31, 1957, a member of the United College Association.

Yours sincerely,

"H.S. Crowe"

MOTION PASSED AT THE UNITED COLLEGE ASSOCIATION GENERAL MEETING
SEPT. 15, 1958

Released to the Press Sept. 16, 1958

Whereas H.S. Crowe has been a fully accredited member of the teaching faculty of United College for the past eight years,
and whereas the said H.S. Crowe has been a member of the U.C.A. since its inception,
and whereas the U.C.A. is a member in good standing of the C.A.U.T.,
and whereas the U.C.A. unconditionally supports the principles of academic freedom and tenure,

Be it resolved

1) that the Executive and the Executive Council of the C.A.U.T. be informed that the U.C.A. is willing to co-operate in an enquiry by any properly constituted investigating committee into the charge that principles of academic freedom and tenure have been violated in the termination of H.S. Crowe's employment at United College.

2) that the Executive Council of the C.A.U.T. be requested to consider at its November meeting the adoption of the 1940 A.A.U.P. statement of Principles on Academic Freedom and Tenure as a working basis until such time as the C.A.U.T. can create its own statement, and similarly, that the Executive Council consider following the procedural rules for such investigations as worked out by the A.A.U.P. until such time as it can devise its own.

The above is a true copy of the U.C.A. resolution of 15 Sept. '58.

W. A. Packer,
Secretary

(This same letter was also sent to Lockhart, Crowe and McNaught)

320 Kingsway Ave.,
Sept. 17, 1958

Mr. Allan H. Watson
Chairman, Board of Regents,
United College,
Winnipeg, Manitoba

Dear Mr. Watson:

This letter will provide you with a formal notification of the fact that the executive officers of the Canadian Association of University Teachers have set up a committee under the chairmanship of Professor V.C. Fowke and have authorised them to make a thorough investigation of the circumstances surrounding the dismissal of Professor Crowe by United College to determine whether principles of academic freedom and tenure have been infringed. When they have completed their investigations the committee will report their findings to the executive council of C.A.U.T.

The committee is made up of the following three people:

Professor Vernon C. Fowke, University of Saskatchewan;
Professor Martin Johns, McMaster University;
Professor Bora Laskin, University of Toronto.

Action by C.A.U.T. on behalf of Professor Crowe was originally requested by the local Faculty Association at Queen's University, the association of which Professor Crowe was a member during the past academic year. As a member of C.A.U.T., Professor Crowe has also formally asked the Canadian Association of University Teachers to investigate this matter on his behalf and has agreed to accept the findings of Professor Fowke's committee.

We have informed the members of our executive council of the action we have taken and invited an expression of their approval or disapproval. All executive council members who have replied to date have expressed complete approval of the action we have taken.

The matter is now entirely in the hands of the committee and you can expect to hear from them directly in the very near future.

Yours very truly,

Clarence L. Barber

President, C.A.U.T.

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
University of Saskatchewan
Saskatoon, Sask.

September 19, 1958

Mr. Allan H. Watson
Chairman, Board of Regents,
United College,
Winnipeg, Manitoba.

Dear Mr. Watson;

By yesterday's mail I received a copy of Professor Barber's letter, dated September 17, advising you of the appointment of a committee by the executive officers of the Canadian Association of University Teachers, to investigate the circumstances surrounding the dismissal of Professor Crowe by United College.

I understand that you have assured Professor Barber that the Board of Regents will cooperate fully in this investigation. This assurance is very much appreciated by the committee because we realize that only with the fullest cooperation of all concerned will a complete and impartial discovery and examination of the facts be possible.

I shall be writing to you again shortly to indicate how we propose to proceed with our assignment.

Yours very truly,

V. C. Fowke
Professor of Economics

VCF/rg

(Similar letter sent to Principal Lockhart and Professor Crowe)

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
University of Saskatchewan
Saskatoon, Sask.

September 22, 1958

Mr. Allan H. Watson
Chairman, Board of Regents
United College
P. O. Box 815
Winnipeg, Manitoba

Dear Mr. Watson:

Further to my letter of September 19, I can say that the committee proposes to rely largely on personal interviews in attempting to arrive at the truth concerning the dismissal of Professor Crowe.

There are, however, a number of primary documents which bear on the case and some at least of these have been made available to the committee. It is of the utmost importance that no essential item be overlooked. I am therefore forwarding herewith copies of the primary documents now in the possession of the committee and would ask that you be so good as to notify me of any errors and to make good any omissions which appear to you.

I am forwarding copies of these documents to Principal Lockhart and Professor Crowe with the same request.

I shall be in touch with you in the near future with a view to establishing a mutually satisfactory date for our personal meeting and interview.

Yours sincerely,

V. C. Fowke
Professor of Economics

VCF/rg

Encl.

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
University of Saskatchewan
Saskatoon, Sask.

September 26, 1958

Special Delivery

Mr. Allan H. Watson
Chairman, Board of Regents
United College
P. O. Box 815
Winnipeg, Manitoba

Dear Mr. Watson:

I regret to say that I have received no acknowledgement of my letters of September 19 and 22.

However, the committee feels that undue delay is to be avoided in proceeding with its investigations and is increasingly convinced that discovery of the truth will require the full cooperation of all parties in personal, on-the-spot interviews.

I have the assurance of the other committee members that they could meet with me in Winnipeg on Monday, October 6, to begin our inquiries. It is our hope that representatives of the Board of Regents would find it convenient to receive us on that date or within a day or two thereafter. If this proposal does not meet with your convenience I should appreciate it greatly if you would suggest an alternative date as close thereafter as possible.

We shall, of course, have to interview Principal Lockhart and Professor Crowe while in Winnipeg and I am writing them by today's mail with the same suggestion regarding dates. We anticipate that we shall require about half a day with each of the major parties, that is, the Board of Regents, Principal Lockhart and Professor Crowe.

There will, in all probability, be other persons whom it would be desirable to interview, and for a start in the extension of our list of contacts we will rely on suggestions from yourself, Principal Lockhart and Professor Crowe.

I hope that in the near future you will find it possible to indicate errors or emissions which appear to you in the examination of the basic documents, as forwarded to you by Registered Air Mail on September 22.

I should greatly appreciate an early acknowledgement and reply.

Yours sincerely,

V.C. Fowke
Professor of Economics

VCF/rg

cc Professor Johns
Professor Laskin

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
University of Saskatchewan
Saskatoon, Sask.

Special Delivery

Dr. W. C. Lockhart
Principal, United College
Winnipeg, Manitoba

Dear Dr. Lockhart:

The committee appointed by the Canadian Association of University Teachers to investigate the dismissal of Professor Crowe, wishes to avoid undue delay in proceeding with its task.

I have the assurance of the other committee members that they can meet with me in Winnipeg on Monday, October 6, to begin our inquiries, and I am writing to Mr. Watson in the hope that representatives of the Board of Regents can receive us on that date or within a day or two thereafter. We will, of course, wish to interview Professor Crowe as well and I shall keep him informed about any arrangement of dates.

The committee will welcome suggestions from yourself, Mr. Watson and Professor Crowe, of additional persons whom it would be helpful to interview.

I should appreciate hearing either directly, or by way of Mr. Watson, whether you could be available to receive the committee at the time suggested, or at another time suitable also to the representatives of the Board of Regents.

Yours sincerely,

V. C. Fowke,
Professor of Economics

VCF/rg

cc: Professor Johns

Professor Laskin

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS
University of Saskatchewan
Saskatoon, Sask.

Special Delivery

September 26, 1958

Professor H. S. Crowe
11 Lodge Avenue
St. James, Manitoba

Dear Professor Crowe:

I am writing to Mr. Watson and Principal Lockhart today to ask if it would be possible for the committee of investigation to interview them on Monday, October 6, or within a day or two thereafter. I shall, of course, let you know their replies regarding dates and would hope that we might interview you on the same trip to Winnipeg.

I am also indicating to Mr. Watson and Principal Lockhart that the committee will entertain suggestions from them and from you of additional persons whom it would be useful for the committee to interview.

Yours sincerely,

V. C. Fowke
Professor of Economics

VCF/rg

cc Professor Johns
Professor Laskin

October 1, 1958

Professor V.C. Fowke
c/o Chateau Laurier,
Ottawa, Ontario,

Dear Professor Fowke:

I have received your letters to me of September 19th, 22nd and 26th.

I wired you last evening as follows:

"Regret unavoidable delay in answering your letter STOP Representatives of Board of Regents will receive you on October 6th Writing."

The position of the Board of Regents of United College, in respect of the inquiry by The Canadian Association of University Teachers is set forth in my letter of August 20th to Professor Barber, a copy of which is enclosed. You will note the following statement I made in that letter:

"You will, of course, appreciate the necessity for your committee being furnished with the proper credentials before commencing the investigation. Specifically we must be informed through the medium of the credentials, the constitutional right of the persons, group and/or Association to order the investigation and assume the moral and legal responsibility for this action, in order that we may know to whom we should look to for redress should this unprecedented, and, in our opinion, totally unwarranted action result in damage to the College of either a temporary or permanent nature."

In the letter dated August 22nd which Professor Barber wrote to me he stated:

"I shall undertake to see that the committee is furnished with proper credentials."

Reference to the furnishing of credentials was made in subsequent correspondence between Professor Barber and myself, but no credentials have yet been received.

The position of the Board of Regents in respect of the committee, of which you are Chairman, is as follows:

1. Representatives of the Board will receive the committee, and will appear before it and participate in its activities, as the Board considers that if the committee carries out a fair and objective inquiry, it can make a useful and worthwhile contribution in the present situation.
2. The Board in this letter raises questions as to procedure for the consideration of the committee, and reserves the right to raise additional such questions.
3. The Board will not at this stage agree to accept or be bound by the findings of the committee.

4. Since the legal rights of individuals are involved, for example, without limitation, the rights of the persons named in Professor Crowe's letter of March 14th to take legal proceedings for defamation of character, the Board of Regents and Dr. Lockhart hereby specifically reserve their legal right to take such actions as they may deem advisable in respect of the proceedings before and findings of the committee. The Board and Dr. Lockhart also wish to make it clear that any previous communications they have had with yourself, or with officers or representatives of The Canadian Association of University Teachers, are not to be construed in any way as constituting any waiver of their legal rights.

5. The Board and Dr. Lockhart will not be responsible for any costs incurred in respect of the inquiry by your committee, except such costs as they specifically authorize.

Subject to the foregoing, the Board of Regents respectfully make the following submissions to you and your committee.

1. The Board asks that the committee deal with the request for credentials set forth in my letter of August 20th to Professor Barber.
2. Enclosed herewith are copies of documents as listed on the attached memorandum A, which we consider to be relevant and pertinent to your inquiry and which are in addition to the documents forwarded with your letter to me of September 22nd. The Board reserves the right to submit additional documents for consideration by the committee.
3. Enclosed herewith is memorandum B setting forth a list of documents which we consider should be placed before the committee. Copies of these documents are not enclosed as they are not available to the Board.
4. In view of the wide spread publicity already given to this matter, the Board suggests that a policy be adopted in respect of publicity on the principle that the work of the committee should be carried on with a minimum of publicity and unaffected by it. Such a policy will necessitate decision as to whether hearings by the committee are to be opened to other than the interested parties.
5. That the terms of reference of the committee and its purpose be clearly defined, and also that the principal parties be informed at the outset of the inquiry as to the limits within which action will be taken by the committee, and the possible nature of such action.
6. That the principal parties concerned, namely, The United Church of Canada, United College and its Board of Regents, Principal Lockhart and Professor Crowe, shall be entitled to be present at all times when persons appear before the committee, and that such parties shall be entitled to be represented by counsel, who shall be permitted to

question such persons.

7. That a satisfactory record be maintained of all proceedings before the committee.

8. That insofar as possible the committee conduct its proceedings elsewhere than at United College.

I understand from the telephone conversation I had with you on September 30th, that you will communicate with me on your arrival in Winnipeg.

Yours sincerely,

Allan H. Watson
Chairman of the Board of Regents

MEMORANDUM "A"

The following documents are furnished for the information of the committee, and the Board of Regents and Dr. Lockhart reserve the right not to be bound by them, except insofar as they may consent to be so bound.

1. Photostatic copy of letter dated August 20, 1958, from Allan H. Watson to Professor C. L. Barber.
2. Photostatic copy of letter dated June 17, 1958, to Professor H. S. Crowe by H. R. Yorke, District Director of the Winnipeg Post Office.

MEMORANDUM "B"

1. Copies of relevant communications Professor Crowe has had with The Canadian Association of University Teachers, including his formal request for an investigation and his agreement to accept the findings of Professor Fowke's committee.
2. All relevant correspondence which The Canadian Association of University Teachers has had in connection with the matter, including correspondence of its branches and their officers at Queen's University and United College.

MEMORANDUM RE UNITED COLLEGE AND PROFESSOR CROWE

Certain requirements of United College in respect of the credentials of the Committee of The Canadian Association of University Teachers

1. Copies certified in writing by the respective Secretaries of the following:
 - (a) Constitution, Bylaws and relevant resolutions of The Canadian Association of University Teachers.
 - (b) Constitution, Bylaws and relevant resolutions of the Queen's Faculty Association.
 - (c) Constitution, Bylaws and relevant resolutions of The United College Association.

2. A list certified in writing by the Secretary of The Canadian Association of University Teachers of:
 - (a) The names and addresses of the Officers of the Association.
 - (b) The names and addresses off the members of the Executive Council of the Association.

3. Copy of the latest financial statement of The Canadian Association of University Teachers.

4. Copies of the complete correspondence between the President of The Canadian Association of University Teachers and the Queen's Faculty Association and the United College Association in respect of the setting up of the Committee under the Chairmanship of Professor Fowke.

5. Copy certified in writing by the Secretary of The Canadian Association of University Teachers of the resolution in respect of Academic Freedom and Tenure passed at the Executive Council Meeting held in Edmonton June 9 - 10, 1958.

6. A written statement by Professor Fowke and his Committee as to any principles or procedure agreed upon with the National Conference of Canadian Universities regarding investigations as to Academic Freedom and Tenure and in the absence thereof a statement by all the members of the Committee setting forth their views as to the propriety of the Committee undertaking the proposed investigation which would affect directly a member of NCCU.

7. A written statement by the Committee of its terms of reference and purpose. In this respect Section 25(b) of the United College Act (S.M. 1938, c. 80) is to be noted as follows:

"25. Without thereby limiting the general powers by this Act conferred upon or vested in the Board, it is hereby declared that the Board shall have the following powers:

 - (a)

(b) To appoint the Principal (who shall be the chief executive officer), the registrar, the bursar, the librarian, all heads of faculties and heads of the different departments under the faculties and all professors and lecturers of and in the college, and all such officers, clerks, employees and servants as the Board may deem necessary, and to fix their salaries or remuneration, and to define their duties and their tenure of office or employment which, unless otherwise provided, shall be during the pleasure of the Board. S.M. 1919, c.131, s.18(b)am.."

8. A written statement by the Committee as to the limits within which action will be taken by it and by The Canadian Association of University Teachers, and the possible nature of such action.

9. An affidavit by each member of the Committee that he has not personally acted on behalf of or advised any of the interested parties, and is completely impartial and unbiased in the matter.

October 6, 1958

Professor V. C. Fowke
Fort Garry Hotel
Winnipeg, Manitoba

Dear Professor Fowke:

Re: United College and Professor Crowe

Last evening Dr. Lockhart and representatives of United College learned for the first time that Professor Johns has resigned as a member of the Committee which has been appointed by the Canadian Association of University Teachers to inquire into this matter.

This information, coming as it did on the day prior to the day appointed by you for the commencement of the inquiry, raises very serious questions as to whether the Committee, consisting as it now does of two members, is properly constituted to conduct the proposed inquiry. Also, another effect of Professor Johns' resignation is to alter the basis upon which, on behalf of the Board of Regents of United College, I previously corresponded with Professor Barber and with you regarding the activities of the Committee.

In these circumstances, and on behalf of the Board of Regents, I am writing to inform you that the Board of Regents and Dr. Lockhart reserve fully the right not to proceed with, appear before, or participate in the proposed inquiry until they are satisfied that the

Committee is properly constituted, and until the Committee, as so constituted, gives the assurances which we have repeatedly requested in order to ensure a fair and objective inquiry.

Until you are notified in writing to the contrary, please treat this letter as notice that the Board of Regents and Dr. Lockhart fully reserve all their rights to take such action as they deem advisable in respect of the proceedings before and findings of the Committee. Any discussions with you and the Committee on behalf of United College and Dr. Lockhart are to be regarded as exploratory and conditional only, and entirely without prejudice to the above mentioned reservation of rights.

Yours very truly,

Allan H. Watson
Chairman of the Board of Regents

October 7, 1958.

To: Professor Barber
President
The Canadian Association of University Teachers
and

To: Professor Fowke and Professor Laskin, being two of the members of a Committee appointed by The Canadian Association of University Teachers.

On the evening of Sunday, October 5, you informed representatives of the Board of Regents of United College for the first time that Professor Johns had been discontinued as a member of the Committee appointed by The Canadian Association of University Teachers.

We understand Professor Fowke was aware of Professor Johns position on Tuesday, September 30.

When representatives of United College and Dr. Lockhart met with you on October 6, the day appointed for the first meeting of the Conunittee, you stated that The Canadian Association of University Teachers had, upon the decision only of its three executive officers resident in Winnipeg, authorized the two remaining members to act as the Committee.

As we informed you at the commencement of the meeting on October 6, the discontinuation of Professor Johns as a member of the Committee raises a very serious

question as to whether the Committee, consisting as it now does of two members only, is properly constituted. We also stated that a two-man Committee alters the basis upon which we have corresponded with you since July.

A two-man Committee would be impractical as in the event of disagreement there would be no decision.

In the discussion with you on October 6, it became evident that there were divergencies between your views and the views we had presented to you.

1. The two-man Committee stated that no questioning of one party by representatives of another would be permitted, except through and with the consent of the two-man Committee itself.
2. The Canadian Association of University Teachers had ruled and the Committee proposed that the two-man Committee proceed with the inquiry.

Since the Canadian Association of University Teachers have taken positive action to have the enquiry conducted by a two-man Committee, without notice to us, notwithstanding that Professor Fowke had notice of Professor Johns position when Mr. Watson spoke to Professor Fowke by long distance telephone on September 30, the authorized representatives of the Board of Regents, having reviewed the situation in the light of this and other developments since this Committee was first proposed has decided that the Board can not participate in the activities of the presently constituted Committee of The Canadian Association of University Teachers or any enlargement of the Committee consisting solely of members or appointees of The Canadian Association of University Teachers.

Notwithstanding the above, the Board of Regents reaffirms its willingness to cooperate with any properly constituted Committee and also its desire to have a full disclosure made of all the relevant facts in this unfortunate situation.

Accordingly, on behalf of the Board of Regents, we are authorized to propose the following:

1. That a Committee be constituted consisting of:
 - (a) Two appointees of The Canadian Association of University Teachers;
 - (b) Two appointees of the Board of Regents, who, having regard to the public interest expressed locally may be residents of Manitoba;
 - (c) One additional member to be appointed by the four first mentioned appointees and who will act as Chairman.
2. That the Board of Regents hereby names as one of its appointees, Mr. D. A. Thompson, Q.C., who has consented to act. Mr. Thompson is:
 - (a) Senior partner of the law firm of Thompson, Dilts, Jones, Hall and

Dewar;

- (b) Member of the Manitoba Hydro Electric Board;
- (c) Past President of Boy Scouts Association;
- (d) Member of Board of St. Johns College;
- (e) Chairman of Board Misericordia Hospital.

The Board will be prepared shortly to name as its second appointee an outstanding citizen of Winnipeg.

3. That the terms of reference of the proposed five-man Committee shall be:

"To enquire into the circumstances surrounding the termination by United College of the services of Professor Crowe and the extent to which, if at all, such circumstances affect academic freedom and security of tenure. The Committee will at its discretion be free to consider and report upon any other matters relevant to the situation."

4. That the Committee be empowered to determine its own rules of procedure.

5. That the Committee shall make public its findings.

As the proposed enquiry in this matter is apparently unprecedented in Canada, we consider that our position, as outlined above, provides to all interested parties a fair and reasonable basis upon which an objective and impartial consideration of all the circumstances in the matter can be made.

Yours very truly,

Allan H. Watson,
Chairman, Board of Regents

CANADIAN NATIONAL TELEGRAPHS

Fort Garry Hotel, October 7, 1958

Mr. Allan H. Watson
Chairman, Board of Regents
United College
Winnipeg, Man.

Following this morning's proceedings and upon full consideration of the matters raised at that time I consider it proper to advise you that the committee appointed by the Canadian Association of University Teachers and consisting of Professor Fowke, Chairman, and Professor Laskin is proceeding with its investigation and would be pleased to have you appear and offer evidence in accordance with your original undertaking to cooperate in the investigation. Proceedings are continuing this afternoon

and tomorrow and longer if necessary.

V. C. Fowke

(Similar telegram sent to Principal Lockhart.)

CANADIAN PACIFIC TELEGRAM

Winnipeg, Manitoba, October 7, 1958

Professor V. C. Fowke
Fort Garry Hotel
Winnipeg, Man.

I have received your telegram of October seven. You and Professor Laskin were informed fully at the meeting on October seven of the position of the Board of Regents which in summary is as follows. The Board considers you and Professor Laskin are not a properly constituted committee and are not acting in accordance with our original understanding. The Board considers your refusal to permit questioning of witnesses by interested parties is unacceptable. The Board considers its proposal of a balanced and representative tribunal of five men provides the fair and proper method of conducting the inquiry. We are at a loss to understand why the Canadian Association of University Teachers cannot agree to increase the committee to five members when it had no difficulty in reducing the number of members to two.

Allan H. Watson

12:00 a.m.

CANADIAN PACIFIC TELEGRAM

Winnipeg, Manitoba, October 7, 1958

Professor V. C. Fowke
Fort Garry Hotel
Winnipeg, Man.

I have received your telegram. I stated in my letter of August nine that the matter of the proposed investigations is under the direction of the Board of Regents. I have therefore necessarily referred your telegram to representatives of the Board. I am instructed to

decline the invitation extended in your telegram to me. I personally believe the Board's proposal of a balanced and representative tribunal of five men provides the fair and proper method of conducting the inquiry.

Wilfred C. Lockhart

CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS

Re: United College and Professor Crowe

Item 7. The Committee understands its terms of reference as encompassing an investigation of the circumstances and grounds on which Professor Crowe was dismissed and the extent to which, if at all, the dismissal affects academic freedom and security of tenure.

Item 8. The only action envisaged by the Committee is to make the investigation under the terms of reference as defined above and to report to the Canadian Association of University Teachers

V. C. Fowke

Bora Laskin

Winnipeg, Manitoba, October 6, 1958

(The item numbers refer to the items similarly numbered in the United College memorandum of requirements.)

IN THE MATTER OF A PENDING INVESTIGATION INTO THE DISMISSAL OF PROFESSOR H. S. CROWE BY UNITED COLLEGE, WINNIPEG, MANITOBA:

I, VERNON C. FOWKE, Professor, of the City of Saskatoon, in the Province of Saskatchewan, do solemnly declare that:

1. I am a member and Chairman of the Committee appointed by the Canadian Association of University Teachers to enquire into the dismissal of Professor H. S. Crowe by United College.

2. I have not, prior to nor since my appointment as a member of the Committee, acted on behalf of or advised any of the interested parties in any way which would affect my impartiality in the conduct of the investigation.

3. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.

DECLARED before me at Winnipeg, Manitoba, this 6th day of October, 1958.

“Vernon C. Fowke”

“Gordon C. Hall”

A Barrister-at-Law entitled to practise in the Province of Manitoba

IN THE MATTER OF A PENDING INVESTIGATION INTO THE DISMISSAL OF PROFESSOR H. S. CROWE BY UNITED COLLEGE, WINNIPEG, MANITOBA:

I, BORA LASKIN, Professor, of the City of Toronto, in the Province of Ontario, do solemnly declare that:

1. I am a member of the Committee appointed by the Canadian Association of University Teachers to enquire into the dismissal of Professor H. S. Crowe by United College.

2. I have not, prior to nor since my appointment as a member of the Committee, acted on behalf of or advised any of the interested parties in any way which would affect my impartiality in the conduct of the investigation.

3. I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.

DECLARED before me at Winnipeg, Manitoba, this 6th day of October, 1958.

“Bora Laskin”

“Gordon C. Hall”

A Barrister-at-Law entitled to practise in the Province of Manitoba.

I have in the past expressed my views of the unconstitutionality and lack of propriety of the C.A.U.T. intervening in this particular matter which I have held is not concerned with issues of academic liberty. I have observed the developments incidental to the setting up of the committee from the time of its inception, and I have been made aware of the persons who have been present at the hearings of this committee to date. As a member of the C.A.U.T. I have felt an obligation to it and I wish it well in the future as an association concerned with my interests and the interests of scholars in Canada. I had to conclude regretfully that this committee does not meet my personal requirements as properly constituted and I must therefore decline to appear before it.

G. Blake

(Statement dictated by Professor Blake to Professor Fowke in the evening of October 7, 1958, when he declined to appear before the Committee.)

APPENDIX C

WITNESSES

1. Professor Harry S. Crowe
2. Professor J. H. Stewart Reid
3. Professor W. A. Packer
4. Professor R.M. Stingle
5. Professor K. W. McNaught
6. Mr. Joseph Martin
7. Colonel J. E. Wilson, Q.C.
8. Alderman D. Orlikow, M.L.A.
9. Miss E. F. Morrison
10. Miss Peggy J, Morrison
11. Mr. David Young

Persons who verified documents before the Committee without also giving evidence were Professor Clarence L. Barber and Professor W. E. C. Harrison.

APPENDIX D

STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE

1940 STATEMENT OF PRINCIPLES ENDORSED BY THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE ASSOCIATION OF AMERICAN COLLEGES

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extramural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline, but his special position in the

community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman.

Academic Tenure

(a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice;

(1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

(2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.

(3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.

(4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers

on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

(5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.

Tab 4

FEDERAL COURT

BETWEEN:

**NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN,
ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES,
AND CANADIAN MUSLIM LAWYERS ASSOCIATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN JUDICIAL COUNCIL

Intervener

and

**CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

Proposed Interveners

MOTION FOR LEAVE TO INTERVENE
pursuant to Rule 109 and 369 of the *Federal Courts Rules*

**WRITTEN REPRESENTATIONS OF THE CENTRE FOR FREE EXPRESSION
AND CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

PART I. FACTS

A. Overview

[1] The Centre for Free Expression (“CFE”) and the Canadian Association of University Teachers (“CAUT”) (“Proposed Interveners”) seek leave to jointly intervene in this application for judicial review pursuant to Rule 109 of the *Federal Courts Rules*.¹

[2] The Proposed Interveners seek to make arguments solely in relation to the issues of academic freedom, and the impact on academic freedom from Justice David Spiro’s intervention in the University of Toronto’s hiring of Dr. Valentina Azarova, and from the failure of the Canadian Judicial Council (“CJC”) to consider and weigh such issues. In its decisions, the CJC failed to refer to, consider, or in any way address, the harmful effect of Justice Spiro’s conduct on academic freedom within public universities.

[3] Academic freedom is fundamental to the operation of universities and the role of post-secondary education in Canadian democracy.

“Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service; freedom to express one’s opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible. All academic staff members have the right to fulfil their functions without reprisal or suppression by the employer, the state, or any other source. Institutions have a positive obligation to defend the academic freedom rights of

¹ *Federal Courts Rules* (SOR/98-106).

members...²

- [4] It is the position of the Proposed Interveners that Justice Spiro's actions significantly harmed academic freedom.
- [5] Despite concerns respecting the impact of Justice Spiro's actions on academic freedom having been raised with the CJC, the CJC made no reference what-so-ever to academic freedom in its review of Justice Spiro's conduct.
- [6] If granted leave to intervene, the Proposed Interveners will argue that the CJC's failure to give any consideration to the impact on academic freedom in its review of Justice Spiro's conduct was a fundamental error which rendered its decisions incorrect and unreasonable.
- [7] If granted leave to intervene, the Proposed Interveners seek to be permitted to file an Affidavit from an expert witness that would provide the Court with details as to the meaning and scope of academic freedom, and identify and expand on the ways in which academic freedom issues arise in this Application, but were not considered by the CJC. The Proposed Interveners are uniquely positioned to offer the Court this relevant perspective and expertise.

B. Background

- [8] In September and October 2020, several public interest organizations and two professors submitted complaints to the CJC regarding Tax Court of Canada Justice David Spiro's intervention in the University of Toronto Faculty of Law's hiring of Dr. Valentina Azarova, for the position of Director of the International Human Rights Program ("IHRP"). Although Dr. Azarova had been unanimously recommended by the hiring

² Affidavit of Brenda Austin-Smith at para 23 and Exhibit 4.

committee composed of University of Toronto academics, the Dean revoked the decision to hire her after receiving input from Justice Spiro.³

[9] On January 11, 2021, members of the Judicial Conduct Committee convened a Review Panel to investigate the matter. On May 20, 2021, the CJC provided its decisions and reasons in response to the complaints.⁴

[10] The Applicants have applied to the Federal Court seeking judicial review of the CJC decisions to close the complaints against Justice Spiro without constituting an Inquiry Committee to further investigate his conduct. The applicants also seek various declarations, including that the CJC's reasons "were not justified, transparent and intelligible."⁵

[11] In their Notice of Application, the Applicants submit that the CJC's decisions are internally inconsistent, are not based on a rational chain of analysis, and are therefore unreasonable for several reasons, including that the CJC failed to refer to, consider, or explain the effect of Justice Spiro's conduct on academic freedom within public universities or on Dr. Azarova.⁶

C. Proposed Intervenors

[12] The CFE is a non-partisan research, public education, and advocacy centre guided by an Advisory Panel made up of fifteen prominent Canadians. The CFE serves as hub for a wide range of activities related to free expression and the public's rights to seek, receive, and share information. The CFE provides a variety of resources to the public on

³ *Ibid* at para 28(a).

⁴ T-1005-21 Notice of Application to Federal Court for Judicial Review, filed June 23, 2021 [Notice of Application].

⁵ *Ibid*.

⁶ *Ibid*.

current and ongoing issues relating to free expression and the public's right to know. It also works collaboratively with other organizations to promote a better understanding of the importance of freedom of expression in a democratic society, and to advance expressive freedom rights in Canada and internationally⁷.

[13] The CFE has a significant interest in protecting freedom of expression and specifically protecting academic freedom that is critical to the mandate of educational institutions to disseminate and advance knowledge. It considers a robust interpretation and protection of s. 2(b) freedom of expression rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), in particular the robust debate and expression that academic freedom protects, as critical to the functioning of a democratic society. The CFE engages in public education about the nature and importance of academic freedom, highlights current threats, and works to ensure that academic freedom rights are extended to all academic staff.⁸

[14] CAUT is a federation of academic staff associations/unions and the national voice for academic personnel in Canada at the university and college level. There are currently 77 local academic staff associations and three federated associations that are full members of CAUT, representing the overwhelming majority of academic staff in Canada. CAUT represents 72,000 teachers, librarians, researchers and other academic professional and staff.⁹

[15] CAUT represents members in every province by: (i) promoting the interests of teachers, professional librarians and researchers in Canadian universities and colleges;

⁷ Affidavit of James L. Turk at paras 13-14.

⁸ *Ibid* at para 15.

⁹ Affidavit of Brenda Austin-Smith at paras 6-8.

ii) advancing the standards of the academic profession; and; (iii) seeking to improve the quality of post-secondary education in Canada. CAUT has a particular mandate to defend academic freedom and works in the public interest to improve the quality and accessibility of post-secondary education in Canada.¹⁰

[16] One of CAUT's primary mandates is to defend academic freedom, which it does through education, intervention in legal cases, monitoring and investigations of alleged breaches of academic freedom.¹¹

PART II. ISSUES

[17] This motion raises the following issue: Should the CFE and CAUT be granted leave to jointly intervene in this application for judicial review?

PART III. SUBMISSIONS

A. Legal Test for Intervention

[18] In *Sport Maska*,¹² the Federal Court of Appeal re-affirmed that the criteria for consideration of a motion to intervene remain those set out in *Rothmans*.¹³ *Rothmans* requires the Court to consider the following factors in deciding whether to grant leave to intervene:

¹⁰ *Ibid* at paras 9-10.

¹¹ *Ibid* at paras 10 and 12, 17-18.

¹² See *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 at paras 37-43 and 70-76.

¹³ *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* [1990] 1 F.C. 90, 103 N.R. 391 (C.A.); *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, 1989 CarswellNat 594, [1990] 1 F.C. 74 (Trial Decision) (Rouleau J.) at para 12.

1. Is the proposed intervener directly affected by the outcome?
2. Does there exist a justiciable issue and a veritable public interest?
3. Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
4. Is the position of the proposed intervener adequately defended by one of the parties to the case?
5. Are the interests of justice better served by the intervention of the proposed third party?
6. Can the Court hear and decide the cause on its merits without the proposed intervener?

[19] On an intervention motion, the critical question is whether the intervener will bring further, different and valuable perspectives to the Court that will assist the Court in determining the matter.¹⁴ Not all factors need be present and some factors may weigh more heavily than others depending on the unique circumstances of a particular case.¹⁵ As stated by Justice Nadon in *Sport Maska*, “flexibility is the operative word in dealing with motions to intervene” and, in the end, courts must decide if the interests of justice require that the intervention be granted or refused.¹⁶ Justice Stratas has recently stated that, “the central part of the test for intervention is whether a moving party’s submissions will be useful to the panel determining the appeal.”¹⁷

[20] Not all of the *Rothman*’s factors will be apposite in every case. For example, in *Prophet River First Nation*, several of the *Rothmans* factors were not considered relevant. The Court found that being directly affected was required for full party status, which was

¹⁴ See *Gordillo v Canada (Attorney General)*, 2020 FCA 198 at para 14, citing *Sport Maska* at para 40 and *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21 at para 9; see also *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 at para 6.

¹⁵ *Gordillo v Canada (Attorney General)*, 2020 FCA 198 at para 9; See also, *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120

¹⁶ *Sport Maska* at para 42.

¹⁷ *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 at para 8.

not the intent of that proposed intervention. In considering if the interests of justice were better served by the intervention of the proposed intervener in that case, Justice Stratas considered whether the proposed intervener had a “genuine interest” in the matter and whether the matter had assumed such a public, important and complex dimension that the Court needed to be exposed to perspectives beyond those offered by the particular parties before the Court.¹⁸

[21] Similarly, a number of the *Rothmans* factors are inapplicable to this intervention. The Proposed Interveners focus their request on (i) their genuine interest in the appeal; (ii) the different and valuable insights that will be provided; (iii) how the interests of justice will be better served by this intervention.

B. Applying the Relevant Factors to this Motion

[22] The Proposed Interveners bring a distinct perspective and expertise that will assist the Court. Furthermore, the Proposed Interveners and their members, have a “genuine interest” in the outcome of this proceeding.

[23] As stated by Justice Rennie in *Gordillo*, “in asserting a genuine interest, there must be a link between the issue to be decided and the mandate and objectives of the party seeking to intervene.” A genuine interest can be established “through the expertise or experience the intervener brings to the issue” or “unique perspective it has on the issues.”¹⁹

¹⁸ *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 at paras 5-6; see also *Gordillo v Canada (Attorney General)*, 2020 FCA 198 at para 11.

¹⁹ *Gordillo v Canada (Attorney General)*, 2020 FCA 198 at para 12.

[24] Collectively, and organizationally, the Proposed Interveners possess significant and longstanding experience and expertise in defending academic freedom issues, such as those that arise in this case. If granted leave to intervene, the Proposed Interveners will provide different and valuable insights on the concept of academic freedom which will not otherwise be before the Court. No other party or potential intervener has a similar history and depth of knowledge on the issue of academic freedom.

[25] The CFE is a non-partisan research, public education, and advocacy centre with a significant interest in protecting freedom of expression and specifically academic freedom, and has an extensive and established record of promoting the understanding and importance of academic freedom. The CFE's work highlights current threats to academic freedom and works to ensure that academic freedom rights are extended to all academic staff.²⁰

[26] The CAUT represents thousands of academic personnel across Canada and has a particular mandate to defend academic freedom.²¹ The activities of CAUT's members across the country will be directly and tangibly impacted by the decision of this Court. CAUT's members make up the pool of candidates and search committee members for appointments such as the one at the IHRP. Furthermore, in November 2020, the CAUT's governing body voted to censure the University after conducting its own investigation into the actions of Justice Spiro. Censuring a university is a serious matter and measure of last resort.²²

²⁰ Affidavit of James L. Turk at paras 13, 15.

²¹ Affidavit of Brenda Austin-Smith at paras 6-8 and 10.

²² *Ibid* at para 19.

[27] As such, the Proposed Interveners have a real and substantial interest in ensuring that the Court appreciates the gravity of the CJC’s failure to recognize and consider the importance of academic freedom in its review of Justice Spiro’s conduct. The perspective of the CFE, and of the CAUT as a representative of academic staff as employees, researchers, and teachers, cannot be fully presented by any other party or potential intervener.

[28] The joint intervention of CAUT and the CFE will provide the Court with a unique perspective on the issue of academic freedom that will be valuable to the Court as it considers this application for judicial review.²³ No party to this judicial review has the necessary expertise in academic freedom to elucidate this issue.

[29] It is in the interests of justice to grant leave to intervene to the CFE and CAUT as the CJC’s failure to consider academic freedom in its review of Justice Spiro’s actions raises significant public interest concerns. As stated by Justice Stratas in *Pictou Canada (Attorney General) v. Pictou Landing Band Council*, “[s]ometimes the issues before the Court assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court.”²⁴

[30] Academic freedom is critical to the societal mission of post-secondary educational institutions of disseminating and advancing knowledge and educating students - activities which are, in turn, critical to the functioning of a democratic society.²⁵ Academic freedom has been recognized by the Supreme Court of Canada as essential, “[...] to our

²³ Affidavit of James L. Turk at paras 19 – 24; Affidavit of Brenda Austin-Smith at paras 33-37.

²⁴ *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21 at paras 9, 11; see also *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13 at para 9 for a discussion of the considerations that shed light on the meaning of the “interests of justice”.

²⁵ Affidavit of James L. Turk at para 15.

continuance as a lively democracy”.²⁶ Similarly, both the Court of Appeal of Alberta and the Court of Appeal for Ontario have expressed how important academic freedom is to Canadian society.”²⁷

[31] If granted leave to intervene, the Proposed Intervenors would seek to demonstrate to the Court that the CJC should have considered the impact of Justice Spiro’s conduct on academic freedom, as the right to academic freedom applies to all university and college academic staff and must inform every element of university policy and education, including hiring, tenure and promotion decisions. The Proposed Intervenors will argue that Justice Spiro’s intervention in the University’s hiring process has broad implications for the importance of academic freedom for current and prospective academic staff. Hiring, tenure, and promotion policies and practices at all Canadian universities must be free from outside interference – whether direct or indirect. There is a serious risk of “academic chill” and self-censorship if the CJC’s decision is permitted to stand.²⁸

[32] As recently stated by the Federal Court of Appeal, intervenors’ assistance can take many forms and may address the broader social or economic context within which a particular case is situated, the policy implications of a decision, or the ramifications of a decision which are not apparent on the face of the record.²⁹ The purpose of the joint intervention of the CFE and CAUT will be to draw to the attention of the Court the academic freedom interests which are at issue in this case, and the impact of Justice Spiro’s actions on those academic freedom interests so that, in considering this

²⁶ *Mckinney v. University of Guelph*, [1990] 3 SCR 229 at para 69.

²⁷ *Pridgen v. University of Calgary*, 2012 ABCA 139, at paras 113-115; *Longuepée v. University of Waterloo*, 2020 ONCA 830 at para. 102.

²⁸ Affidavit of Brenda Austin-Smith at paras 25-26, 32.

²⁹ *Gordillo v Canada (Attorney General)*, 2020 FCA 198 at para 15.

Application for Judicial Review, the Court is in a position to appreciate the significance of the CJC's failure to consider academic freedom.³⁰

C. Affidavit Evidence on Academic Freedom

[33] If granted leave to intervene, the Proposed Interveners seek permission to provide the Court with an expert Affidavit outlining the principles and history of academic freedom and the recognition of the importance of academic freedom in a democratic society.

[34] The Proposed Interveners acknowledge that, as a general rule, the evidentiary record before the Federal Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker.³¹ However, in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)* (“AUCC”), the Federal Court of Appeal stated that there are a few recognized exceptions to this general rule and the list of exceptions may not be closed. These exceptions tend to facilitate or advance the role of the reviewing court without offending the role of the decision-maker.³² The exceptions enumerated by the Court in *AUCC* include:

- a. Affidavit evidence that provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review.

³⁰ Affidavit of James L. Turk at paras 39-42.

³¹ *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; *Delios v. Canada (Attorney General)*, 2015 FCA 117 at paragraphs 41-46

³² *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19-20, 428 N.R. 297.

- b. Affidavit evidence that brings to the Court’s attention procedural defects that cannot be found in the evidentiary record of the administrative decision-maker to enable the reviewing court to fulfil its role of reviewing for procedural unfairness.
- c. Affidavit evidence that highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding.³³

[35] The Proposed Interveners are not seeking to add new facts to the record but are seeking to provide general background to assist the Court in understanding how Justice Spiro’s actions triggered academic freedom interests and how the CJC failed to consider this fundamental concept in its review of Justice Spiro’s conduct. Consideration of academic freedom is absent from the CJC’s reasons. Nowhere in its review did the CJC address the impact of Justice Spiro’s interference on the academic freedom of Professor Azarova, the hiring committee, or the educational community at the Faculty of Law.

[36] The Proposed Interveners will seek to demonstrate to the Court that this failure to consider the principle of academic freedom was a significant oversight that renders the CJC’s decision incorrect and unreasonable as the record demonstrates that academic freedom interests were raised by the complainants.³⁴ The Proposed Interveners assert that any determination of judicial misconduct connected to hiring at a university must consider the concept of academic freedom.³⁵

[37] In submitting an Affidavit on the concept of academic freedom and the ways in which academic freedom issues arise in this Application, the Proposed Interveners seek to

³³ *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20, 428 N.R. 297

³⁴ Professor Leslie Green refers to academic freedom in his supplemental letter of September 29, 2020, found at pages 15-18 of the Certified Tribunal Record (T-1005-21). Mustafa Farooq, CEO of the National Council of Canadian Muslims mentions academic freedom in his complaint letter of September 21, 2021, page 33 of the *Certified Tribunal Record*.

³⁵ Affidavit of Brenda Austin-Smith at para 27.

assist the Court in its review of the CJC's reasons and decision. The Proposed Interveners proposed Affidavit evidence would illustrate how Justice Spiro's actions triggered academic freedom concerns and how the CJC should have been alive to academic freedom concerns during its deliberations concerning Justice Spiro.

[38] The Proposed Interveners do not seek to have the Court make any findings on the academic freedom concerns raised by Justice Spiro's actions, but merely seek to show the Court that the CJC ignored academic freedom implications during their decision-making process, therefore rendering their decision incorrect and unreasonable.

PART IV. ORDER SOUGHT

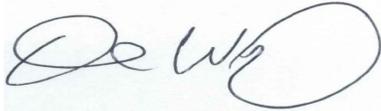
[39] The Proposed Interveners be granted leave to intervene, pursuant to Rule 109 of the *Federal Court Rules*, in this application for judicial review on the following terms:

- (a) The Proposed Interveners may jointly file a memorandum of fact and law of no more than 15 pages, or such other length as this Court may direct (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover), on or before a date to be determined;
- (b) The Proposed Interveners may appear and make oral submissions at the hearing of this proceeding not exceeding 30 minutes, or such other duration as this Court may direct;
- (c) The Proposed Interveners may jointly file an Affidavit that would provide the Court with details as to the history and nature of academic freedom and identify

and expand on the ways in which academic freedom issues arise in this Application, but were not considered by the CJC;

- (d) Any documents served on any party in this proceeding must also be served on the Proposed Interveners; and
- (e) The Proposed Interveners may not seek costs or have costs awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of January, 2022.



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PART V. Authorities

1. *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44
2. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* [1990] 1 F.C. 90, 103 N.R. 391 (C.A.)
3. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, 1989 CarswellNat 594, [1990] 1 F.C. 74 (Trial Decision) (Rouleau J.)
4. *Gordillo v Canada (Attorney General)*, 2020 FCA 198
5. *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21
6. *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120
7. *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164
8. *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13
9. *Mckinney v. University of Guelph*, [1990] 3 SCR 229
10. *Pridgen v. University of Calgary*, 2012 ABCA 139
11. *Longueépée v. University of Waterloo*, 2020 ONCA 830
12. *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297
13. *Delios v. Canada (Attorney General)*, 2015 FCA 117

Tab 5

Appendix B

FEDERAL COURT

BETWEEN:

**NATIONAL COUNCIL OF CANADIAN MUSLIMS, CRAIG SCOTT, LESLIE GREEN,
ARAB CANADIAN LAWYERS ASSOCIATION, INDEPENDENT JEWISH VOICES,
AND CANADIAN MUSLIM LAWYERS ASSOCIATION**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

and

CANADIAN JUDICIAL COUNCIL

Intervener

and

**CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

Proposed Interveners

MOTION FOR LEAVE TO INTERVENE

pursuant to Rule 109 and 369 of the *Federal Courts Rules*

**BOOK OF AUTHORITIES OF THE CENTRE FOR FREE EXPRESSION AND
CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS**

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3. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, 1989 CarswellNat 594, [1990] 1 F.C. 74 (Trial Decision) (Rouleau J.)
4. *Gordillo v Canada (Attorney General)*, 2020 FCA 198
5. *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21
6. *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120
7. *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164
8. *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 13
9. *Mckinney v. University of Guelph*, [1990] 3 SCR 229
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12. *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297
13. *Delios v. Canada (Attorney General)*, 2015 FCA 117

Tab 1

2016 CAF 44, 2016 FCA 44
Federal Court of Appeal

Sport Maska Inc. v. Bauer Hockey Corp.

2016 CarswellNat 265, 2016 CarswellNat 7138, 2016 CAF 44, 2016
FCA 44, 140 C.P.R. (4th) 11, 263 A.C.W.S. (3d) 565, 480 N.R. 387

**Sport Maska Inc. dba Reebok-CCM Hockey, Appellant and Bauer
Hockey Corp., Respondent and Easton Sports Canada Inc., Respondent**

M. Nadon, J.D. Denis Pelletier, Johanne Gauthier J.J.A.

Heard: September 15, 2015
Judgment: February 9, 2016
Docket: A-402-14

Proceedings: affirming *Bauer Hockey Corp. v. Easton Sports Canada Inc.* (2014), 2014 CarswellNat 3359, 463 F.T.R. 91, 2014
CF 853, 2014 CarswellNat 3775, 2014 FC 853, Sean Harrington J. (F.C.)

Counsel: Christopher Van Barr, for Appellant
François Guay, Jean-Sébastien Dupont, for Respondent

M. Nadon J.A.:

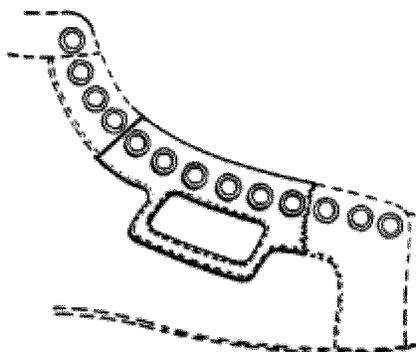
I. Introduction

1 In this appeal, Sports Maska Inc. dba Reebok-CCM Hockey ("CCM") challenges the judgment (2014 FC 853 (F.C.)) of Harrington J. (the "Judge") of the Federal Court dated September 8, 2014 pursuant to which he dismissed CCM's motion which sought to overturn the June 20, 2014 order (2014 FC 594) of Prothonotary Morneau (the "Prothonotary") denying CCM's motion for leave to intervene in proceedings commenced by the respondent Bauer Hockey Corp. ("Bauer") in Federal Court File T-1036-13.

2 For the reasons that follow, I would dismiss the appeal.

II. Facts

3 CCM, Bauer and Easton Sports Canada Inc. ("Easton") are competitors in the hockey equipment industry. Bauer is the current owner of the trade-mark referred to as the "SKATES EYESTAY Design" registered under number TMA361,722 (the "'722 registration", the "trade-mark" or the "mark").



Graphic 1

4 On January 11, 2010, pursuant to a request made by Easton, the Registrar of Trade-marks (the "Registrar") issued a notice under [section 45 of the Trade-marks Act, R.S.C. 1985 c. T-13 \(the "Act"\)](#) requiring Bauer to furnish evidence of use of the SKATES EYESTAY Design during the three year period preceding the date of the notice.

5 On January 12, 2011, Bauer brought an action against Easton, *inter alia*, for infringement of the '722 registration (in Federal Court File: T-51-11). On December 21, 2012, Bauer launched a similar action against CCM (in Federal Court File: T-311-12).

6 On April 5, 2013, the Registrar ordered that the '722 registration be expunged from the Register because of her finding that the mark had not been used, as registered, in the relevant time frame. On June 11, 2013, Bauer filed, pursuant to [section 56 of the Act](#), a notice of application appealing the Registrar's decision in which Easton was named as a respondent (in Federal Court File: T-1036-13) ("Bauer's application").

7 On February 13, 2014, Bauer and Easton reached an agreement pursuant to which Bauer agreed to discontinue its infringement action against Easton and the latter agreed to abandon its contestation of Bauer's application of the Registrar's decision.

8 On April 7, 2014, CCM filed a motion in the Federal Court seeking leave to intervene in Bauer's application.

9 On April 9, 2014, CCM filed its statement of defence and counterclaim in Federal Court File: T-311-12.

10 On April 30, 2014, Bauer filed its reply and defence to CCM's counterclaim arguing, *inter alia*, that CCM was barred from attacking its trade-mark by reason of an agreement concluded on February 21, 1989 between CCM and Bauer's predecessors in title. More particularly, CCM and Canstar Sports Group and Canstar Sports Inc. ("Canstar"), predecessors in title to Bauer, reached an agreement pursuant to which CCM undertook to withdraw its opposition to trade-mark application 548,351, filed on September 9, 1985 by Warrington Inc. (to whom Canstar succeeded in title), which led to the '722 registration on November 3, 1989. In a letter dated February 24, 1989, counsel for CCM wrote to the Registrar to advise that its client, the opponent, would not object to the use and registration of the trade-mark in association with the wares identified in the trade-mark application.

III. Decisions Below

A. The Prothonotary's Decision

11 In his decision of June 20, 2014, the Prothonotary, who was the case management judge assigned to Bauer's application and the related actions brought by Bauer against Easton and CCM for infringement of the trade-mark, dismissed CCM's motion, brought under [Rule 109 of the Federal Courts Rules, SOR/98-106 \(the "Rules"\)](#), for leave to intervene in Bauer's application.

12 The Prothonotary began his analysis by pointing out that the effect of granting leave to CCM would be to substitute CCM as a respondent for the absent Easton. This was not, according to the Prothonotary, how [Rule 109](#) should be used. In so saying, the Prothonotary referred to this Court's decision in *Canada (Attorney General) v. Siemens Enterprise Communications Inc.*, [2011 FCA 250, 423 N.R. 248 \(F.C.A.\) \("Siemens"\)](#) where, in his view, this Court held that Rule 109 was not meant to be used so as to allow an intervener to substitute itself as a respondent.

13 The Prothonotary then addressed CCM's argument that the interests of justice militated in favour of granting it leave to intervene so as to provide the Court with a different view of the case. The Prothonotary dealt with CCM's argument by referring, with approval, to Madam Prothonotary Tabib's decision in *Genencor International Inc. v. Canada (Commissioner of Patents)*, [2007 FC 376, 55 C.P.R. \(4th\) 395 \(F.C.\) \("Genencor"\)](#) where she made the point that even if it was useful for the Court to have an opponent in a patent proceeding, the Court could nevertheless carry out its duties without an opposing side.

14 The Prothonotary then turned to Bauer's argument that its agreement with Easton should be respected, and that it not be jeopardized by allowing CCM to substitute itself as a respondent in lieu of Easton. The Prothonotary indicated that he fully agreed with that argument.

15 The Prothonotary then addressed CCM's argument that there was a public interest component in [section 45](#) proceedings. He rejected this argument and again referred to Prothonotary Tabib's decision in *Genencor* where the learned Prothonotary, albeit on a question of registration of intellectual property and not [section 45](#) proceedings, held that there was no public interest involved in allowing an intervention so as to ensure that untenable or invalid intellectual property registrations not be maintained.

16 Finally, the Prothonotary turned to Bauer's submission that because CCM in its counterclaim to the infringement action in Federal Court File T-311-12 had raised the invalidity of the '722 registration on the same grounds as those relied on by the Registrar in expunging the mark at issue, it had raised in its defence to CCM's counterclaim the fact that CCM was barred, by reason of its 1989 agreement with Bauer, from attacking the '722 registration. This led the Prothonotary to make the comment that "[i]t would appear that said argument by Bauer would not be possible to make against CCM in the Appeal should the latter be granted intervener status" (paragraph 13 of the Prothonotary's decision).

17 The Prothonotary then referred to my colleague Stratas J.A.'s reasons in *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, [2015] 2 F.C.R. 253 (F.C.A.) ("*Pictou Landing*") where, at paragraph 11, he sets forth those factors which he considers relevant in determining whether intervention should be granted to a proposed intervener. In light of the factors set out in *Pictou Landing*, the Prothonotary concluded that by reason of what he referred to as the "full debate already ongoing in File T-311-12", the first two factors were met but that factors III, IV and V were not met.

18 This led the Prothonotary to opine that, on balance, CCM should not be allowed to intervene in the [section 45](#) proceedings which were "well under way" (paragraph 16 of the Prothonotary's reasons). Consequently, he dismissed CCM's motion to intervene with costs.

B. The Federal Court's Decision

19 The Judge began by addressing the standard of review which should be applied in reviewing the Prothonotary's decision. In his view, because the questions on a motion to intervene were not vital to the final issue of the case, the Prothonotary's decision should be reviewed in accordance with the principles set out by this Court in *Merck & Co. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 (F.C.A.), at paragraph 19. Thus, it was his task to determine whether the Prothonotary had exercised his discretion based upon a wrong principle or upon a misapprehension of the facts.

20 The Judge then briefly reviewed the facts and turned to the factors which were to guide him in determining whether leave should be granted. In that regard, he referred to this Court's decision in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, [1989] F.C.J. No. 707 (Fed. C.A.) ("*Rothmans, Benson & Hedges*") where the Court, in allowing the appeals before it, affirmed the correctness of the factors, i.e. six factors relevant to the determination of a leave to intervene application, enunciated by the trial judge, Rouleau J. of the Federal Court ((1989), [1990] 1 F.C. 74, 29 F.T.R. 267 (Fed. T.D.)), at paragraph 12).

21 After setting out Rouleau J.'s six factors, the Judge turned to Stratas J.A.'s reasons in *Pictou Landing* and cited paragraph 11 thereof where my colleague sets forth the factors which, in his view, are relevant to present day litigation. The Judge then remarked that the relevant factors, as set out in *Rothmans, Benson & Hedges* and in *Pictou Landing*, were not to be taken, in his words, *au pied de la lettre*. He also indicated that this Court's decision in *Siemens* was not to be taken as an absolute bar to a motion to intervene, adding that he did not feel that it was necessary to carry out a detailed analysis based on the factors of *Rothmans, Benson & Hedges* and *Pictou Landing*. He then pointed out that Stratas J.A.'s reasons in *Pictou Landing* were those of a single motions judge and thus not binding on this Court, adding that this Court was reluctant to reverse itself, citing for that proposition our decision in *Miller v. Canada (Attorney General)*, 2002 FCA 370, [2002] F.C.J. No. 1375 (Fed. C.A.) ("*Miller*"), at paragraph 8.

22 The Judge then turned to the merits of the motion before him. In his view, there could be no doubt that CCM had an interest in Bauer's application for judicial review of the Registrar's decision and that CCM's intervention would be useful to the Court in that no one was opposing Bauer in the proceedings. He then stated that the Prothonotary was clearly wrong in considering the settlement agreement between Bauer and Easton.

23 He then turned his attention to the question of whether the Prothonotary had downplayed the public interest aspect of the Register. He pointed to a number of decisions, both of this Court and of the Federal Court, to make the point that there was a public interest aspect in proceedings arising under [section 45 of the Act](#). However, in his view, the public interest aspect of these proceedings did not rank as high as the public interest aspect of cases, for example, where constitutional issues were raised. On this point, the Judge concluded that the Court "might well benefit from CCM's intervention as it would give a different perspective, in the sense that Easton is giving no perspective at all" (paragraph 29 of the Judge's reasons).

24 All of this led the Judge to conclude that although the Prothonotary had been wrong to consider the agreement between Bauer and Easton, that error was not fatal as he was satisfied that the Prothonotary would, in any event, have come to the same conclusion. The Judge then made the point that the better forum in which CCM could advance its arguments was in the action for infringement between it and Bauer. Thus, in the Judge's view, the Prothonotary had not wrongly exercised his discretion upon a wrong principle or upon a misapprehension of facts. Hence, he dismissed CCM's appeal.

IV. Issues and Standard of Review

25 In my opinion, there are two issues raised in this appeal:

(1) What are the applicable criteria to decide whether to grant intervener status to CCM?

(2) Was the Judge wrong in not interfering with the Prothonotary's decision?

26 There is no dispute between the parties that a prothonotary's decision ought to be disturbed by a judge only where it is clearly wrong, in the sense that the exercise of discretion was based upon a wrong principle or a misapprehension of the facts. Consequently, in the present matter, we should not interfere with the Judge's decision unless there were grounds justifying his intervention, or if he arrived at his decision on a wrong basis or was plainly wrong (*Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 (S.C.C.), at paragraph 18).

V. Parties Submissions

A. CCM's Submissions

27 CCM argues that the Prothonotary's decision was based upon wrong principles and a misapprehension of the facts thus constituting grounds for the Judge to set his order aside. CCM finds numerous errors in the Prothonotary's decision that can be divided into the following three categories:

(1) Misapplying this Court's decision in Siemens

28 In applying the *Pictou Landing* criteria, the Prothonotary concluded that criteria III, IV and V had not been met. Criteria III relates to the different and valuable perspective that an intervener should advance. The Prothonotary held that CCM would only be replacing Easton as a respondent and for that finding, relied on this Court's decision in *Siemens*. CCM argues, however, that the rule put forward in *Siemens* was only "directed to the particular mischief of duplication" (CCM's memorandum of fact and law, paragraph 32). In CCM's view, there would be no duplication in this case given that Easton undertook not to participate in the judicial review.

(2) Finding no public interest in section 45 proceedings / Failing to appreciate that it is in the interests of justice that the Court hear both sides of the issue / Finding intervention inconsistent with Rule 3

29 The *Pictou Landing* criteria IV and V purport to ensure that the intervention is in the interests of justice and that it would advance the imperatives set forth in [Rule 3](#) which provides that [the Rules](#) are to be interpreted and applied so as to secure "the just, most expeditious and least expensive determination of every proceeding on its merits". CCM argues that there is a public interest in ensuring the accuracy of the Register as a public record of trade-marks: "[t]he fact that an applicant under [s. 45](#) is not even required to have an interest in the matter (...) speaks eloquently to the public nature of the concerns the section is designed

to protect" (CCM's memorandum of fact and law, paragraph 39, quoting *Meredith & Finlayson v. Canada (Registrar of Trade Marks)*, [1991] F.C.J. No. 1318, 40 C.P.R. (3d) 409 (Fed. C.A.) ("*Meredith*").

30 CCM asserts that it was an error on the part of the Prothonotary to refuse to grant it leave to intervene on the basis that there was a "full debate already ongoing" between itself and Bauer because of the different questions at issue in the [section 45](#) proceedings and in the infringement action. Moreover, the existence of another efficient means to submit a question to the Court was held to be irrelevant in *Pictou Landing*.

(3) Giving credence to Bauer's settlement with Easton

31 This private agreement plays no role in considering whether CCM should be given the right to intervene. The Judge agreed with CCM on this point and found that the Prothonotary was clearly wrong in taking the settlement into account.

32 CCM submits that the Judge identified a number of "errors" in the Prothonotary's decision: the settlement should not have been taken into account, there is a public aspect to the Trade-marks Register, *Siemens* is not an absolute bar to intervention and the Court would be better served if someone were present to defend the expungement decision (CCM's memorandum of fact and law, paragraph 21). In addition, CCM says that the Judge "erred in implying that the decision in *Pictou Landing* reverses the Federal Court of Appeal decision in *Rothmans*" (CCM's memorandum of fact and law, paragraph 71). CCM says that *Pictou Landing* simply updates and evolves the *Rothmans, Benson & Hedges* factors. Accordingly, the Judge's decision was plainly wrong.

B. Respondent's Submissions

33 Bauer argues that the Judge's decision not to intervene is not fundamentally wrong given that the Prothonotary turned his mind to the applicable factors and did not misapprehend the facts. The sole error found by the Judge was the effect to be given to the settlement between it and Easton, and he was not satisfied that "without referring to that settlement, [the Prothonotary] would have come to a different conclusion" (Bauer's memorandum of fact and law, paragraph 48, quoting the Judge's decision at paragraph 30).

34 Contrary to what is suggested by CCM, the Judge's decision was not based upon a finding that the infringement action would be a forum more appropriate for CCM's case, but rather on a rightful application of the standard of review. Bauer further argues that even greater deference should be given to the Prothonotary's decision for he was the Case Management Judge and was "intimately familiar" with the history and details of the matter. In Bauer's view, "CCM must demonstrate that the Judge 'erred in a fundamental way' in refusing to disturb the Prothonotary's decision, in that the latter was the 'clearest case of misuse of judicial discretion'" (Bauer's memorandum of fact and law, paragraph 42).

35 Bauer further says that the list of factors to consider in a motion for intervention were "originally developed in *Rothmans* some 25 years ago and has since then been reiterated on several occasions" (Bauer's memorandum of fact and law, paragraph 53). Bauer argues that the new test set out in *Pictou Landing* must not be applied to this case because it was created by a judge alone and is therefore not binding. Bauer points out that the "traditional" *Rothmans, Benson & Hedges* factors were applied by the Federal Court in a trade-mark expungement case posterior to *Pictou Landing* (*Coors Brewing Co. v. Anheuser-Busch LLC*, 2014 FC 318, 123 C.P.R. (4th) 340 (F.C.)).

36 Bauer also stresses that the motion to intervene is late (CCM only launched it after it learned that Bauer and Easton had reached an agreement), that there is no public interest in a [section 45](#) proceeding, that unopposed cases of this kind are commonplace in the Federal Court, and that CCM is already attacking the validity of the '722 registration in the infringement action. Finally, Bauer argues that CCM undertook, in an agreement signed in 1989, not to object to the use or registration of the '722 registration. It is thus arguably breaching this agreement.

VI. Analysis

A. What are the applicable criteria to decide whether to grant CCM leave to intervene?

37 I begin by noting that there appears to be a certain amount of confusion as to the governing jurisprudence on the question of motions for leave to intervene since the decision of my colleague Stratas J.A. in *Pictou Landing*. It is my view, which I do not believe is contentious, that the decision of a panel of this Court has precedence over that of a single judge of the Court sitting as a motions judge. My colleague recognized as much in his reasons: see *Pictou Landing* at paragraph 8. This means that the governing case is *Rothmans, Benson & Hedges*.

38 That said, I wish to make it clear that this panel, or for that matter any other panel of the Court, cannot prevent a single motions judge from expressing his view of the law if he is so inclined. In my view, parties may use a single motions judge's reasoning, if they wish, and make it part of their argument in order to convince the Court that it should change or modify its case law. But all should be aware that a single judge's opinion does not change the law until it is adopted by a panel of the Court.

39 A comparison of *Rothmans, Benson & Hedges* factors and *Pictou Landing* shows that the main differences between the two are the removal of the "lack of any other reasonable means" factor (*Rothmans, Benson & Hedges* third factor) and of the "ability of the Court to hear the case without the intervener" factor (*Rothmans, Benson & Hedges* sixth factor), as well as the addition of the "compliance with procedural requirements" factor (*Pictou Landing* first factor), and the "consistency with Rule 3" factor (*Pictou Landing* fifth factor). These differences are not, in my respectful view, of any substance. In effect, "compliance with procedural requirements" will generally always be a relevant consideration and the "consistency with Rule 3" factor can always be considered under the "interests of justice" factor (*Rothmans, Benson & Hedges* fifth factor).

40 I do not disagree with Stratas J.A.'s comments in *Pictou Landing* that the existence of another appropriate forum is not necessarily a reason to refuse a proposed intervention that can be helpful to the Court. It obviously depends on the relevant circumstances. It is also undeniable that the Court, in most cases, is able to hear and decide a case without an intervener and that the "more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter" (*Pictou Landing*, paragraph 9, last bullet). This requirement is, in essence, what *Rule 109(2)(b)* requires. In any event, as Stratas J.A. recognized at paragraph 7 of his reasons, he could have reached the same result by applying the *Rothmans, Benson & Hedges* factors and ascribing little weight to the factors which he did not find relevant.

41 In my opinion, the minor differences between the *Rothmans, Benson & Hedges* factors and those of *Pictou Landing* do not warrant that we change or modify the factors held to be relevant in *Rothmans, Benson & Hedges*. As the *Rothmans, Benson & Hedges* factors are not meant to be exhaustive, they allow the Court, in any given case, to ascribe the weight that the Court wishes to give to any individual factor.

42 The criteria for allowing or not allowing an intervention must remain flexible because every intervention application is different, i.e. different facts, different legal issues and different contexts. In other words, flexibility is the operative word in dealing with motions to intervene. In the end, we must decide if, in a given case, the interests of justice require that we grant or refuse intervention. Nothing is gained by adding factors to respond to every novel situation which motions to intervene bring forward. In my view, the *Rothmans, Benson & Hedges* factors are well tailored for the task at hand. More particularly, the fifth factor, i.e. "[a]re the interests of justice better served by the intervention of the proposed third party?" is such that it allows the Court to address the particular facts and circumstances of the case in respect of which intervention is sought. In my view, the *Pictou Landing* factors are simply an example of the flexibility which the *Rothmans, Benson & Hedges* factors give to a judge in determining whether or not, in a given case, a proposed intervention should be allowed.

43 To conclude on this point, I would say that the concept of the "interests of justice" is a broad concept which not only allows the Court to consider the interests of the Court but also those of the parties involved in the litigation.

B. Was the Judge wrong in not interfering with the Prothonotary's decision?

44 In determining the second question before us, it must be kept in mind that our task is not to decide whether we believe that CCM meets the relevant factors for intervention and thus that leave should have been granted, but whether the Judge was wrong in refusing to interfere with the Prothonotary's decision. To that task I now turn.

45 So the question is: should the Judge have interfered with the Prothonotary's order? CCM says that the Prothonotary made a number of errors which should have justified his intervention. First, it says that the Prothonotary misapplied *Siemens*.

46 I begin by saying that CCM's motion is not, in reality, a motion for leave to intervene. It is, in effect, a motion which seeks to allow CCM to become the respondent, in lieu of Easton, in Bauer's application. In that respect, CCM's motion is similar to that made by West Atlantic Systems ("WAS") in *Siemens* where WAS sought to intervene in an application for judicial review filed by the Attorney General following a decision of the Canadian International Trade Tribunal (the "CITT") which was unfavourable to the Department of Public Works and Government Services. More particularly, the CITT determined that the procurements at issue were deficient and failed to comply with Article 1007(1) of the *North American Free Trade Agreement*.

47 Siemens Enterprises Communications Inc. ("Siemens"), which had filed a number of complaints with the CITT and which had fully participated in the proceedings before that tribunal, chose not to participate in the Attorney General's judicial review application. WAS, which had unsuccessfully attempted to participate in the proceedings before the CITT, sought to obtain leave from this Court to intervene in the judicial review proceedings. In denying WAS' motion, Mainville J.A., writing for the Court, made the following comments at paragraph 4 of his reasons.

By its motion, WAS is attempting to substitute itself for Siemens as the respondent in this judicial review application. WAS seeks to challenge the application under a proposed order of the Court which would, for all intents and purposes, grant it a status equivalent to that of a respondent in these proceedings. The rules permitting interventions are intended to provide a means by which persons who are not parties to the proceedings may nevertheless assist the Court in the determination of a factual or legal issue related to the proceedings (*Rule 109(2)b* of the *Federal Courts Rules*). These rules are not to be used in order to replace a respondent by an intervener, nor are they a mechanism which allows a person to correct its failure to protect its own position in a timely basis.

[emphasis added]

48 CCM argues that the Prothonotary erred in relying on *Siemens* because our decision in that case "should be understood to be directed to the particular mischief of duplication" (paragraph 32 of CCM's memorandum of fact and law). In my respectful view, this argument is without merit as there was no question of duplication in *Siemens* since there was no respondent in the judicial review proceedings as Siemens had decided not to participate.

49 Considering that our Court in *Siemens* held that Rule 109 should not be used to substitute a new respondent in the proceedings, it cannot be said, in my view, that the Prothonotary was wrong to consider, as a relevant factor, that the purpose of CCM's motion was to substitute itself as a respondent in lieu of Easton. However, I agree with the Judge that *Siemens* does not, *per se*, constitute an absolute bar to a motion to intervene.

50 Second, CCM says that the Prothonotary was in error in holding that there was no public interest in [section 45](#) proceedings sufficient to support its intervention in Bauer's application. More particularly, it says that the Prothonotary was wrong to rely on Prothonotary Tabib's decision in *Genencor* which dealt with an entirely different matter, adding that "[t]here is a public interest in ensuring the accuracy of the Register as a public record of trade-marks" (CCM's memorandum of fact and law, paragraph 41).

51 CCM also says that the Prothonotary erred in holding that Bauer's judicial review proceedings could be disposed of without its participation, adding that the Prothonotary again erred in relying on *Genencor*. CCM says that both [the Rules](#) and [section 45 of the Act](#) envisage the participation of the requesting party in [section 45](#) proceedings and any appeal taken therefrom. In CCM's view, it can be said that there is an expectation that in any appeal from a [section 45](#) decision, the Court will have the benefit of an appellant and a respondent. Thus, CCM says that the Judge ought to have intervened in that the Prothonotary was wrong to find that there was no public interest in [section 45](#) proceedings and that the matter could be heard without its participation.

52 Before determining whether the Prothonotary erred, as argued by CCM, it is important to have a brief look at [section 45](#) and the proceedings which arise from it. Pursuant to [section 45](#), the Registrar may at any time and at the written request of any

person, give notice to the registered owner of a trade-mark requiring it to show, by way of an affidavit or a statutory declaration, that the mark was used in Canada during the three years preceding the notice.

53 In making a determination as to whether or not the mark was used in the time frame provided by [section 45](#), the only evidence admissible before the Registrar is the aforementioned affidavit or statutory declaration. It is on the basis of that evidence and the parties' representations that the Registrar must decide whether or not there has been use of the mark as required by [section 45](#).

54 Following the Registrar's decision, an appeal may be taken before the Federal Court pursuant to [section 56 of the Act](#) and new evidence may be submitted to the Court in addition to the evidence already adduced before the Registrar. If the new evidence could have materially affected the Registrar's decision, then the Court must consider the matter *de novo* and reach its own conclusion on the issues to which the new evidence pertains.

55 The purpose of [section 45](#) proceedings is to remove registrations which have fallen into disuse. The burden of proof on the registered owner is not a heavy one. In *Locke v. Osler, Hoskin & Harcourt LLP*, 2011 FC 1390, 98 C.P.R. (4th) 357 (F.C.), O'Keefe J. stated at paragraph 23 that "[t]he threshold to establish use is relatively low and it is sufficient if the applicant establishes a prima facie case of use". It has also been said that the purpose of [section 45 of the Act](#) is to remove deadwood from the Register (see *Eclipse International Fashions Canada Inc. c. Shapiro Cohen*, 2005 FCA 64, 348 N.R. 86 (F.C.A.), at paragraph 6). In *Dart Industries Inc. v. Baker & McKenzie LLP*, 2013 FC 97, 426 F.T.R. 98 (Eng.) (F.C.), at paragraph 13, O'Keefe J. commented that "[p]roceedings under [section 45 of the Act](#) are summary and administrative in nature". Finally, in *Meredith*, Huguessen J.A., writing for this Court, made these comments, at page 412, regarding [section 45](#) proceedings:

[Section 45](#) provides a simple and expeditious method of removing from the register marks which have fallen into disuse. It is not intended to provide an alternative to the usual *inter partes* attack on a trade mark envisaged by [s. 57](#). The fact that an applicant under [s. 45](#) is not even required to have an interest in the matter (the respondent herein is a law firm) speaks eloquently to the public nature of the concerns the section is designed to protect.

[Subsection 45\(2\)](#) is clear: the Registrar may only receive evidence tendered by or on behalf of the registered owner. Clearly it is not intended that there should be any trial of a contested issue of fact, but simply an opportunity for the registered owner to show, if he can, that his mark is in use or if not, why not.

An appeal to the Court, under [s. 56](#) does not have the effect of enlarging the scope of the inquiry or, consequentially, of the evidence relevant thereto. We cannot improve on the words of Thurlow C.J., speaking for this Court, in *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 at p. 69, [1981], 1 F.C. 679, 34 N.R. 39, quoting with approval the words of Jackett P. in *Broderick & Bascom Rope Co. v. Registrar of Trade Marks* (1970), 62 C.P.R. 268.:

In my view, evidence submitted by the party at whose instance the [s-s. 44\(1\)](#) [now [45\(1\)](#)] notice was sent is not receivable on the appeal from the Registrar any more than it would have been receivable before the Registrar. On this point, I would adopt the view expressed by Jackett P. in *Broderick Bascom Rope Co. v. Registrar of Trade Marks*, *supra*, when he said at p. 279:...

[emphasis added]

56 In my view, the Prothonotary ought to have considered that there was a public interest component in [section 45](#) proceedings. In concluding as he did, the Prothonotary relied on *Genencor* for support. However, I note from paragraphs 3 and 7 of *Genencor* that Prothonotary Tabib made a clear distinction between the nature of the proceedings before her and those which arise under [section 45 of the Act](#). More particularly, in refusing to grant intervener status to the proposed intervener, she pointed out that the provisions at issue before her, namely sections 48.1 to 48.5 of the *Patent Act*, R.S.C., 1985, c. P-4 were not similar to those arising under [section 45](#) in that they did not give third parties the right to challenge patents by way of a summary process in the way that [section 45](#) allowed third parties to challenge trade-marks.

57 Section 45 proceedings contemplate the participation of persons with no interest whatsoever in the existence of a given trade-mark. The provision allows anyone to initiate a section 45 notice, to submit representations to the Registrar and in the case of an appeal, to either launch the appeal or to participate as a respondent in that appeal. As this Court said at page 412 in *Meredith*, this "speaks eloquently to the public nature of the concerns the section is designed to protect", i.e. removing from the Registrar marks which have fallen into disuse. Thus, it necessarily follows, in my view, that the nature of the proceedings under section 45 is a relevant consideration in determining whether or not intervener status should be given to a third party, such as CCM in the present matter.

58 In coming to that view, I am mindful of the arguments put forward by Bauer in response to CCM's arguments on this issue. In particular, I am mindful of Bauer's arguments that *Genencor* is relevant, that *Meredith* had to be understood in its proper context, i.e. that the public nature of section 45 had to do with the fact that any member of the public could initiate a section 45 notice, that, as in *Genencor*, there is no overriding public interest in ensuring that invalid trade-marks are not maintained on the public register, that proceedings arising under section 45 do not usually involve complicated legal questions but, to the contrary, usually pertain to simple well known legal principles resulting from an extensive body of jurisprudence and that proceedings under section 45 are commonplace in the Federal Court.

59 However, the fact that there is a public aspect to section 45 proceedings does not elevate these proceedings to a level comparable to cases that, in the words of the Judge at paragraph 26 of his reasons, "affect large segments of the population or raise constitutional issues". Thus, the public nature of section 45 proceedings must be balanced against other relevant considerations which, in my respectful view, must be considered in the present matter. As I will explain shortly, the existence of a public interest component in section 45 does not, in the present matter, outweigh other considerations which militate against granting intervention. In my view, when all of the relevant factors are considered, the public nature of section 45 proceedings does not tip the scale in CCM's favour. In other words, a proper balancing of all the relevant factors leads me to conclude that the Prothonotary did not err in refusing to allow CCM to intervene.

60 I now turn to these other considerations.

61 The first consideration is the agreement entered into between Bauer and CCM wherein CCM undertook and agreed not to object to Bauer's use or registration of the trade-mark at issue. On the basis of this agreement, Bauer asserts that CCM is contractually barred from attacking the validity of its trade-mark. It says that this argument can be put forward in its defence against CCM's counterclaim in Federal Court File T-311-12 and will constitute one of the issues to be determined by the Federal Court in that file. However, Bauer says that if intervener status is given to CCM, it will be unable to raise the issue in the context of section 45 proceedings in that the Federal Court "will merely be reviewing the decision of the Registrar to expunge Bauer's Trademark registration applying the appropriate standard of review" (Bauer's memorandum of fact and law, paragraph 113).

62 I should point out that the aforesaid agreement between CCM and Bauer was considered by our Court in *Bauer Hockey Corp. v. Sport Maska Inc.*, 2014 FCA 158 (F.C.A.) where it held that the judge below had erred in striking certain portions of Bauer's amended statement of claim. More particularly, our Court was of the view that Bauer's amended allegations, which relied in part on the aforesaid agreement, were such that it could not be said that its claim for punitive damages had no reasonable prospect of success. In other words, it was not plain and obvious, in the Court's view, that the amended statement of claim disclosed no reasonable cause of action with respect to punitive damages.

63 The Prothonotary, at paragraph 13 of his reasons, considered this point concluding that "it would appear that said argument by Bauer would not be possible to make against CCM in the appeal should the latter be granted intervener status". It is clear, in my view, that this is one of the considerations which led the learned Prothonotary to conclude that intervention should not be granted to CCM. In considering Bauer's contractual arrangements with CCM as relevant in the determination of whether intervener status should be granted, the Prothonotary did not err. I would go further and say that it would have been an error on his part not to give consideration to this matter.

64 The other consideration which, in my view, militates against granting intervener status to CCM is the existence of litigation between Bauer and CCM in Federal Court File T-311-12. In that file, Bauer has instituted proceedings against CCM claiming that CCM has infringed its trade-mark and CCM has counter-claimed seeking a declaration that the trade-mark is invalid. In seeking the invalidity of the trade-mark, CCM says at paragraph 25 of its Statement of Defence and Counterclaim:

25 [...] Bauer does not use the [Trademark] as a trade-mark; rather, the [Trademark] is merely a decorative border or surround on the skate to highlight the BAUER word mark. To the extent that the [Trademark] or the Floating Skate's Eyestay Design have ever appeared on Bauer's skates, they have always been in combination with the BAUER word mark. [...]

65 The above assertion by CCM is similar to paragraph 13 of the Registrar's decision where she said:

[13] I find that the addition of the word element "BAUER" IS A DOMINANT ELEMENT OF THE [Trademark] as used. As such, the [Trademark] as used is no longer simply a design mark but is clearly composed of two elements — an eyestay design and the word BAUER. As for the use of BAUER within the design mark, I am not convinced that the public would likely perceive it as a separate trade-mark from the [Trademark] at issue. Such additional matter would detract from the public's perception of the use of the trade-mark "SKATES'S EYESTAY DESIGN" *per se*

66 Bauer says that its use of the trade-mark at the time that Easton requested that the Registrar send a [section 45](#) notice is the same as that when it reached its agreement with CCM approximately 30 years ago. In its reply and defence to CCM's counterclaim, Bauer also says, as I have just indicated, that CCM is contractually barred from challenging its trade-mark.

67 The Prothonotary was of the view that the litigation in Court File T-311-12 was a factor which had to be considered in determining whether intervener status should be given to CCM. At paragraph 15 of his reasons, the Prothonotary referred to those proceedings by saying that there was a "full debate already ongoing in File T-311-12 — a dynamic not present in *Pictou Landing*". The Judge shared the Prothonotary's view and said at paragraph 31 of his reasons that "[t]he validity of the trade-mark is in issue in the litigation between Bauer and CCM in docket T-311-12. That is the forum in which CCM should make its case".

68 In my view, there was no error in so concluding on the part of the Prothonotary and the Judge. I agree with Bauer's assertion that allowing CCM to intervene would not, in any event, necessarily simplify and expedite the ongoing dispute over Bauer's trade-mark. However, I need not go into this in greater detail since both the Prothonotary and the Judge, exercising their respective discretions, were of the view that litigation in File T-311-12 was a relevant consideration in determining whether CCM should be allowed to intervene. I can see no basis on which I could conclude that it was wrong on their part to take the ongoing litigation between the parties as a relevant factor. Again, I am of the view that it would have been an error not to take such litigation into consideration.

69 CCM further submits, as it did before the Judge, that the Prothonotary erred in considering Bauer's settlement with Easton. As I indicated earlier, the Judge agreed with CCM but was satisfied that the Prothonotary's error was inconsequential. I am also of that view. In any event, it is my opinion that Bauer's agreement with CCM and the existence of litigation in Federal Court File T-311-12 clearly outweigh all other considerations in this file.

70 Although I believe that this is sufficient to dispose of the appeal, I will nonetheless briefly examine the specific factors enunciated in *Rothmans, Benson & Hedges* in the light of the evidence before us.

71 First, is CCM directly affected by the outcome of the [section 45](#) proceedings? The answer is that it is affected, in a certain way. More particularly, if the Registrar's decision is upheld, Bauer's trade-mark will be expunged and that conclusion will be helpful to CCM in Bauer's infringement action. However, it is clear to me, in the circumstances of this case, that the purpose of CCM's attempt to intervene is to gain a tactical advantage. In so saying I do not intend to criticize CCM. I am simply making what I believe to be a realistic observation of what is going on in the file.

72 As to the second factor, i.e. whether there exists a justiciable issue and a veritable public interest, I have already dealt with this in addressing CCM's arguments concerning the public nature of [section 45](#) proceedings.

73 As to the third factor, i.e. whether there is a lack of any other reasonable or efficient means to submit the question at issue before the Court, the answer is no. The question raised in the section 45 proceedings is, albeit in a different setting, also raised in the litigation conducted by the parties in Federal Court File: T-311-12. Preventing CCM from intervening in the section 45 proceedings will not cause it any prejudice other than the loss of a tactical advantage. In any event, CCM can and could have requested the Registrar to give Bauer a section 45 notice at any time. It chose not to do so for reasons which are of no concern to us. Whether it did not request the Registrar to give such a notice because of its agreement with Bauer not to object to Bauer's use or registration of the trade-mark is a question which I need not address.

74 With regard to the fourth factor, i.e. whether the position of the proposed intervener can be adequately defended by one of the parties, the answer is no in that there is no party to the case other than Bauer. The position which CCM wishes to advance is that which Easton put forward, with success, before the Registrar and which it would have defended in the appeal before the Federal Court.

75 As to the sixth factor, i.e. can the Court hear and decide the case on its merits without the proposed intervener, the answer is yes. The fact that there would be no respondent does not prevent the Federal Court from performing its task in the circumstances. There can be no doubt that a respondent would be helpful to the Court but, in the circumstances, this factor does not tip the scale in favour of CCM. In any event, that was the conclusion arrived at by the Prothonotary and I can see no basis to disturb it.

76 To repeat myself, I am satisfied that when all of the relevant considerations are taken in, the interests of justice are better served by not allowing CCM to intervene.

VII. Conclusion

77 For these reasons, I conclude that the Judge made no error in refusing to interfere with the Prothonotary's decision. Consequently, I would dismiss the appeal but, in the circumstances, without costs.

J.D. Denis Pelletier J.A.:

I agree.

Johanne Gauthier J.A.:

I agree.

Appeal dismissed.

Tab 2

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Davy Global Fund Management Limited v. Michele Bottiglieri Armatore S.p.A.](#) | 2021 FC 789, 2021 CF 789, 2021 CarswellNat 5058, 2021 CarswellNat 5059 | (F.C., Jul 26, 2021)



Original

1989 CarswellNat 600

Federal Court of Canada — Appeal Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 600F, 1989 CarswellNat 600, [1989] F.C.J. No. 707, [1990] 1

F.C. 90, 103 N.R. 391, 17 A.C.W.S. (3d) 28, 31 F.T.R. 239 (note), 45 C.R.R. 382

Rothmans, Benson & Hedges Inc. (Plaintiff) (Appellant) v. Attorney General of Canada (Defendant) (Respondent) and Canadian Cancer Society (Intervenor)

Rothmans, Benson & Hedges Inc. (Plaintiff) v. Attorney General of Canada (Defendant)

Hugessen, MacGuigan and Desjardins JJ.A.

Judgment: August 17, 1989

Docket: A-277-89; A-301-89

Counsel: *Edward P. Belobaba* and *Barbara L. Rutherford* for appellant.

Gerry N. Sparrow for respondent.

Karl Delwaide and *Andre T. Mecs* for intervenor.

Claude R. Thomson, Q.C. for Institute of Canadian Advertising.

Headnote

Constitutional Law --- Procedure in constitutional challenges — Standing

Practice --- Parties — Intervenors

Practice — Parties — Intervention — Appeals from orders granting Canadian Cancer Society (CCS), and denying Institute of Canadian Advertising (ICA), leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not to be unduly restricted where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene in public interest litigation recognized by courts in organization genuinely interested in, and possessing special knowledge and expertise related to, issues — No error in finding CCS meeting test, but intervention should be restricted to s. 1 issues — ICA's application granted — Position extending beyond question of advertising of tobacco products to more general questions relating to commercial free speech — May contribute to balancing process in s. 1 assessment of justification of limits imposed upon Charter-guaranteed freedom.

Constitutional law — Charter of Rights — Limitation clause — Appeals from orders granting one organization and denying another leave to intervene in action attacking constitutionality of Tobacco Products Control Act — Interventions at trial not subject to traditional restrictions where Charter s. 1 defence to attack on public statute only serious issue — Interest required to intervene recognized in organization genuinely interested in, and possessing special knowledge and expertise related to, issues.

Table of Authorities

CASES JUDICIALLY CONSIDERED

REFERRED TO:

Re Canadian Labour Congress and Bhindi et al. (1985), 17 D.L.R. (4th) 193 (B.C.C.A.).

STATUTES AND REGULATIONS JUDICIALLY CONSIDERED

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.), ss. 1, 2(b).

Tobacco Products Control Act, S.C. 1988, c. 20.

The following are the reasons for judgment of the Court delivered orally in English by *Hugessen J.A.*:

1 These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS) [[1990] 1 F.C. 74], and denying, in the case of the Institute of Canadian Advertising (ICA) [[1990] 1 F.C. 84], leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the *Tobacco Products Control Act* (TPCA) (S.C. 1988, c. 20).

2 It is common ground that the plaintiff's attack is primarily Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.)] based, invoking the guarantee of freedom of expression in paragraph 2(b). There can also be no doubt, given the prohibitions contained in the TPCA, that such attack is best met by a section 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

3 We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a section 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A section 1 question normally requires evidence for the Court to make a proper determination and such evidence should be adduced at trial (see *Re Canadian Labour Congress and Bhindi et al.* (1985), 17 D.L.R. (4th) 193 (B.C.C.A.)). Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said [at page 79] "the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised".

4 As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to section 1 issues, that it be required to deliver a pleading or statement of intervention within ten days and permitted to call evidence and to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the order as aforesaid.

5 As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a section 1 assessment of the justification and reasonableness of limits imposed upon a Charter-guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

6 In our view this is not a case for costs in either Division.

Solicitors of record:

Gowling, Strathy & Henderson, Toronto, for appellant.

Deputy Attorney General of Canada for respondent.

Martineau, Walker, Montréal, for intervenor.

Campbell, Godfrey & Lewtas, Toronto, for Institute of Canadian Advertising.

Tab 3

1989 CarswellNat 594
Federal Court of Canada — Trial Division

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)

1989 CarswellNat 594, 1989 CarswellNat 663, [1989] F.C.J. No. 446,
[1990] 1 F.C. 74, 15 A.C.W.S. (3d) 323, 29 F.T.R. 267, 41 Admin. L.R. 102

ROTHMANS, BENSON & HEDGES INC. v. ATTORNEY GENERAL OF CANADA

Rouleau J.

Heard: April 7, 1989
Judgment: May 19, 1989
Docket: No. T-1416-88

Counsel: *E. Belobaba*, for plaintiff.
P. Evraire, for defendant.
C.R. Thomson, for proposed intervenor.
R. Staley, for Institute of Canadian Advertising.
D. McDuff, agent for the Canadian Cancer Society.

Rouleau J.:

1 This is an application brought by the Canadian Cancer Society ("Society") seeking an order allowing it to intervene and participate in the action. The issue relates to an attack by the plaintiff on the constitutional validity of the *Tobacco Products Control Act, S.C. 1988, c. 20*, which prohibits the advertising of tobacco products in Canada.

2 The plaintiff, Rothmans, Benson & Hedges Inc., initiated this action by way of statement of claim filed on July 20, 1988 and amended on October 24, 1988.

3 The Canadian Cancer Society is described as the largest charitable organization dedicated to public health in Canada. As recently as 1987, it was made up of approximately 350,000 active volunteer members who were responsible for the raising of some \$50,000,000 annually, which money was primarily directed to health and related fields. The Society's primary object is cancer research; it is also involved in the distribution of scientific papers as well as pamphlets for the purpose of enlightening the general public of the dangers of the disease. For more than 50 years this organization has been the driving force investigating causes as well as cures. In the pursuit of its objectives, and, with the endorsement of the medical scientific community, it has been instrumental in establishing a correlation between the use of tobacco products and the incidence of cancer; its persistence has been the vehicle that generated public awareness to the danger of tobacco products. As a result of the Society's leadership and inspiration, the research results and the assembling of scientific data gathered from throughout the world, it has provided the authorities and its public health officials with the necessary or required evidence to press the government into adopting the legislation which is complained of in this action.

4 The applicant maintains that the constitutional facts underlying the plaintiff's amended statement of claim that will be adduced in evidence, analyzed and discussed before the Court are essentially related to health issues. It has special knowledge and expertise relating cancer to the consumption of tobacco products. It further contends that it has sources of information in this matter to which the other parties in the litigation may not have access.

5 The Canadian Cancer Society urges upon this Court that it has a "special interest" with respect to the issues raised in the litigation. That knowledge and expertise and the overall capacity of the applicant to collect, comment and analyze all the data

related to cancer, tobacco products and the advertising of those products, would be helpful to this Court in the resolution of the litigation now before it. It is their opinion that it meets all the criteria set out in the jurisprudence which apply in cases where parties seek to be allowed to intervene.

6 The plaintiff, Rothmans, Benson & Hedges Inc., opposes the application for standing. It argues that prior to the promulgation of the *Tobacco Products Control Act* the Legislative Committee of the House of Commons and the Standing Senate Committee on Social Affairs and Technology held extensive hearings into all aspects of the proposed legislation. In the course of those hearings, the committees received written representations and heard evidence from numerous groups both in favour of and opposed to the legislation, including the applicant; that studies commissioned by the Cancer Society relevant to the advertising of tobacco products are all in the public domain; that no new studies relating directly to tobacco consumption and advertising have been initiated nor is it in possession of any document, report or study relating to the alleged relationship between the consumption of tobacco products and advertising that is not either in the public domain or accessible to anyone who might require it.

7 Finally, the plaintiff argues that the applicant's motion should be denied on the grounds that it is seeking to uphold the constitutionality of the *Tobacco Products Control Act* by means of the same evidence and arguments as those which will be put forward by the defendant, the Attorney General of Canada. Their intervention would unnecessarily lengthen the proceeding and it is open to the applicant to cooperate fully with the defendant by providing viva voce as well as documentary evidence in order to assist in providing the courts with full disclosure of all facts which may be necessary to decide the ultimate issue.

8 There is no *Federal Court Rule* explicitly permitting intervention in proceedings in the Trial Division. In the absence of a rule or provision providing for a particular matter, r. 5 allows the Court to determine its practice and procedure by analogy to other provisions of the *Federal Court Rules* or to the practice and procedure for similar proceedings on the Courts of "that province to which the subject matter of the proceedings most particularly relates."

9 *Rule 13.01 of the Ontario Rules of Civil Procedure* permits a person not a party to the proceedings who claims "an interest in the subject matter of the proceeding" to move for leave to intervene as an added party. The rule requires of the Court to consider "whether intervention will unduly delay or prejudice the determination of the rights of the parties to the proceedings." *Rule 13.02* permits the Court to grant leave to a person to intervene as a friend of the Court without becoming a party to the proceeding. Such intervention is only permitted "for the purpose of rendering assistance to the Court by way of argument."

10 In addition to the gap rule, one must be cognizant of the principles of law which have been established by the jurisprudence in applications of this nature. In constitutional matters, and more particularly, in *Charter* issues, the "interest" required of a third party in order to be granted intervenor status has been widely interpreted in order to permit interventions on public interest issues. Generally speaking, the interest required to intervene in public interest litigation has been recognized by the Courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issues raised.

11 There can be no doubt as to the evolution of the jurisprudence in "public interest litigation" in this country since the advent of the *Charter*. The Supreme Court appears to be requiring somewhat less by way of connection to consider "public interest" intervention once they have been persuaded as to the seriousness of the question.

12 In order for the Court to grant standing and to justify the full participation of an intervenor in a "public interest" debate, certain criteria must be met and gathering from the more recent decisions the following is contemplated:

(1) Is the proposed intervenor directly affected by the outcome?

(2) Does there exist a justiciable issue and a veritable public interest?

(3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?

(4) Is the position of the proposed intervenor adequately defended by one of the parties to the case?

(5) Are the interests of justice better served by the intervention of the proposed third party?

(6) Can the Court hear and decide the cause on its merits without the proposed intervenor?

13 The plaintiff has argued that adding a party would lengthen the proceedings and burden the courts unnecessarily, perhaps in some instances leading to chaos. In *Service de limousine Murray Hill Ltée c. Québec (P.G.)*, 33 Admin. L.R. 99, [1988] R.J.Q. 1615, 15 Q.A.C. 146, the Court noted that it was quite familiar with lengthy and complex litigation including a multiplicity of parties. This did not lead to injustice and would certainly provide the presiding Judge with additional points of view which may assist in enlightening it to determine the ultimate issue. Such an objection is really of very little merit.

14 I do not choose at this time to discuss in detail each of the criteria that I have outlined since they have all been thoroughly analyzed either individually or collectively in recent jurisprudence.

15 The courts have been satisfied that though a certain "public interest" may be adequately defended by one of the parties because of special knowledge and expertise, they nevertheless allowed the intervention.

16 As an example, in *R. v. Seaboyer* (1986), 50 C.R. (3d) 395 (Ont. C.A.), the Legal Education and Action Fund ("LEAF") applied to intervene in the appeal from a decision quashing the committal for trial on a charge of sexual assault on the grounds that subs. 246.6 and 246.7 of the *Criminal Code*, R.S.C. 1970, c. C-34 were inoperative because they infringed s. 7 and para. 11(d) of the *Charter*. LEAF is a federally incorporated body with an objective to secure women's rights to equal protection and equal benefit of the law as guaranteed in the *Charter* through litigation, education and research. The respondents opposed the application on the grounds that the interests represented by LEAF were the same as those represented by the Attorney General for Ontario, namely, the rights of victims of sexual assault, and that the intervention of LEAF would place a further and unnecessary burden on the respondents. The Court concluded that it should exercise its discretion and grant LEAF the right of intervention. In giving the Court's reasons for that decision, Howland C.J.O. stated as follows at 397-398:

Counsel for LEAF contended that women were most frequently the victims of sexual assault and that LEAF had a special knowledge and perspective of their rights and of the adverse effect women would suffer if the sections were held to be unconstitutional.

The right to intervene in criminal proceedings where the liberty of the subject is involved is one which should be granted sparingly. Here no new issue will be raised if intervention is permitted. It is a question of granting the applicant a right to intervene to illuminate a pending issue before the court. While counsel for LEAF may be supporting the same position as counsel for the Attorney General for Ontario, counsel for LEAF, by reason of its special knowledge and expertise, may be able to place the issue in a slightly different perspective which will be of assistance to the court.

17 Other courts have been even more emphatic in pointing out that when it comes to first-time *Charter* arguments, the Court should be willing to allow intervenors in order to avail itself of their assistance. This is especially true where those proposed intervenors are in a position to put certain aspects of an action into a new perspective which might not otherwise be considered by the Court or which might not receive the attention they deserve. In *Re Schofield and Minister of Consumer & Commercial Relations* (1980), 28 O.R. (2d) 764, 19 C.P.C. 245, 112 D.L.R. (3d) 132 (C.A.), Thorson J.A. made the following comments in this regard at 141 [D.L.R.]:

It seems to me that there are circumstances in which an applicant can properly be granted leave to intervene in an appeal between other parties, without his necessarily having any interest in that appeal which may be prejudicially affected in any 'direct sense', within the meaning of that expression as used by Le Dain, J., in *Rothmans of Pall Mall et al. v. Minister of National Revenue et al.* (1976) 67 D.L.R. (3d) 505, [1976] C.T.C. 339, and repeated with approval by Heald, J., in the passage in the *Solosky* case [infra] quoted by my colleague. As an example of one such situation, one can envisage an applicant with no interest in the outcome of an appeal in any such direct sense but with an interest, because of the particular concerns which the applicant has or represents, such that the applicant is in an especially advantageous and perhaps even unique position to illuminate some aspect or facet of the appeal which ought to be considered by the Court in reaching

its decision but which, but for the applicant's intervention, might not receive any attention or prominence, given the quite different interests of the immediate parties to the appeal.

The fact that such situations may not arise with any great frequency or that, when they do, the Court's discretion may have to be exercised on terms and conditions such as to confine the intervenor to certain defined issues so as to avoid getting into the merits of the *lis inter partes*, does not persuade me that the door should be closed on them by a test which insists on the demonstration of an interest which is affected in the 'direct sense' earlier discussed, to the exclusion of any interest which is not affected in that sense.

18 Certainly, not every application for intervenor status by a private or public interest group which can bring different perspective to the issue before the Court should be allowed. However, other courts, and notably the Supreme Court of Canada, have permitted interventions by persons or groups having no direct interest in the outcome, but who possess an interest in the public law issues. In some cases, the ability of a proposed intervenor to assist the Court in a unique way in making its decision will overcome the absence of a direct interest in the outcome. What the Court must consider in applications such as the one now before it is the nature of the issue involved and the likelihood of the applicant being able to make a useful contribution to the resolution of the action, with no injustice being imposed on the immediate parties.

19 Applying these principles to the case now before me, I am of the opinion that the applicant should be granted intervenor status. Certainly, the Canadian Cancer Society has a genuine interest in the issues before the Court. Furthermore, the applicant has the capacity to assist the Court in its decision making in that it possesses special knowledge and expertise relating to the public interest questions raised, and in my view it is in an excellent position to put some of these issues in a different perspective from that taken by the Attorney General. The applicant has, after all, invested significant time and money researching the issue of advertising and its effects on tobacco consumption and I am of the opinion that it will be a most useful intervenor from the Court's point of view.

20 The jurisprudence has clearly established that in public interest litigation, the Attorney General does not have a monopoly to represent all aspects of public interest. In this particular case, I think it is important that the applicant be allowed to intervene in order to offset any perception held by the public that the interests of justice are not being served because of possible political influence being asserted on the government by those involved in the tobacco industry.

21 Finally, allowing the application by the Canadian Cancer Society will not unduly lengthen or delay the action nor will it impose an injustice or excessive burden on the parties involved. The participation by the applicant may well expand the evidence before the Court which could be of invaluable assistance.

22 Referring back to my criteria, I am convinced that the Canadian Cancer Society possesses special knowledge and expertise and has general interest in the issues before the Court. It represents a certain aspect of various interests in society which will be of assistance. It is a question of extreme importance to certain segments of the population which can be best represented in this debate.

23 For the foregoing reasons, the application by the Canadian Cancer Society for leave to be joined in the action by way of intervention as a defendant is granted. Costs to the applicant.

Application granted.

Tab 4

2020 CAF 198, 2020 FCA 198
Federal Court of Appeal

Gordillo v. Canada (Attorney General)

2020 CarswellNat 6048, 2020 CarswellNat 7387, 2020 CAF 198, 2020 FCA 198, 329 A.C.W.S. (3d) 233

MIRNA MONTEJO GORDILLO, JOSÉ LUIS ABARCA MONTEJO, JOSÉ MARIANO ABARCA MONTEJO, DORA MABELY ABARCA MONTEJO, BERTHA JOHANA ABARCA MONTEJO, FUNDACIÓN AMBIENTAL MARIANO ABARCA (MARIANO ABARCA ENVIRONMENTAL FOUNDATION OR FAMA), OTROS MUNDOS, A.C., CHIAPAS, EL CENTRO DE DERECHO HUMANOS DE LA FACULTAD DE DERECHO DE LA UNIVERSIDAD AUTÓNOMA DE CHIAPAS (THE HUMAN RIGHTS CENTRE OF THE FACULTY OF LAW AT THE AUTONOMOUS UNIVERSITY OF CHIAPAS), LA RED MEXICANA DE AFECTADOS POR LA MINERÍA (MEXICAN NETWORK OF MINING AFFECTED PEOPLE OR REMA) and MININGWATCH CANADA (Appellants) and ATTORNEY GENERAL OF CANADA (Respondent) and AMNESTY INTERNATIONAL CANADA and CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND THE INTERNATIONAL JUSTICE AND HUMAN RIGHTS CLINIC and the CENTRE FOR FREE EXPRESSION AT RYERSON UNIVERSITY (Interveners)

Donald J. Rennie J.A.

Judgment: November 16, 2020

Docket: A-290-19

Counsel: Yavar Hameed, Nicholas Pope, for Appellants

Korinda McLaine, Sarah Jiwan, for Respondent

Daniel Sheppard, Louis Century, for Intervener, Amnesty International Canada

Jennifer Klinck, Joshua Sealy-Harrington, Penelope Simons, for Interveners, Canadian Lawyers, for International Human Rights and the International Justice and Human Rights Clinic

David Yazbeck, Michael Fisher, for Intervener, Centre, for Free Expression at Ryerson University

Donald J. Rennie J.A.:

1 The Canadian Lawyers for International Human Rights and The International Justice and Human Rights Clinic (CLIHR/IJHRC), Amnesty International Canada, and the Centre for Free Expression at Ryerson University (CFE) seek leave to intervene in an appeal to this Court from a decision of the Federal Court (2019 FC 950, *per* Boswell J.). In that decision, the Federal Court dismissed a judicial review application of the refusal of the Public Sector Integrity Commissioner to investigate allegations that officials in the Canadian Embassy in Mexico City failed to follow Government of Canada policies applicable to the protection of human rights advocates and failed to report an act of corruption in a timely manner. The Commissioner found that these were not "wrongdoings" under subsection 33(1) and paragraphs 8(d) and (e) of the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (Disclosure Act.)

2 By way of context, in 2007, a Canadian mining company, Blackfire Exploration Ltd. (Blackfire), opened a barite mine in Chiapas, Mexico. The mine met with local opposition, manifesting in demonstrations in front of the Canadian Embassy in Mexico City and a blockade of one of the transportation routes to the mine. In 2009, the leader of the opposition movement, Mr. Abarca, was arrested and held without charges for eight days. The appellants assert that in 2009, shortly following a complaint to the police by Mr. Abarca that two employees of Blackfire had made death threats to him, Mr. Abarca was murdered.

3 At issue before the Commissioner was whether the Embassy's actions or inactions in assisting Blackfire navigate the political and social opposition to the mine and in liaising between Blackfire and the local, state and national governments in respect of regulatory requirements, conformed to Government of Canada policies in relation to adherence to customary international law and Canada's stated policy to advance and protect human rights. It was the position of the appellants these actions or inactions contributed to the danger faced by Mr. Abarca. The second allegation concerned whether the Embassy reported an act of corruption in a timely manner.

4 The respondent Attorney General "consents" to the leave to intervene motions of the CLIHR/IJHRC and Amnesty International and opposes the motion by the CFE, arguing that it has not satisfied the test for intervention under [Rule 109 of the Federal Courts Rules, SOR/98-106](#). The position of the Attorney General requires comment.

5 A party cannot "consent" to a motion for leave to intervene: it can support, oppose or it can take no position. Parties can only "consent" to procedural matters such as a delay in completing a procedural step that would work to its advantage. A delay in filing a defence to which it would otherwise be entitled under the Rules is an example.

6 The question whether an intervention should be allowed is substantive and the consent of a party is irrelevant. At best, it is an acknowledgement on the part of the party that there is no issue of prejudice from its perspective. But that is only one consideration among many. The Court must be satisfied that the intervention is in the overall best interests of justice. If the Attorney General is of the view that the motions ought to be granted, he should say so, and explain, albeit in a summary way, why that is so.

7 In a motion under [Rule 109\(2\)\(b\)](#), a party is to explain how it wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding. The court then assesses and weighs these submissions against the factors as articulated in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1990), [1990] 1 F.C. 74, 1989 CarswellNat 594 (Fed. C.A.), affirmed [1990] 1 F.C. 90, 103 N.R. 391 (C.A.), at para. 3 (*Rothmans, Benson & Hedges Inc.*). As noted by this Court in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 (F.C.A.) at para. 37 (*Sport Maska Inc.*), these factors are flexible and "well tailored for the task at hand" (*Sport Maska Inc.* at para. 42).

8 The relevant factors can include whether:

- 1) the proposed intervener is directly affected by the outcome;
- 2) there is a justiciable issue and a veritable public interest;
- 3) there are other reasonable or efficient means to submit the question to the Court;
- 4) the position of the proposed intervener is adequately defended by one of the parties to the case;
- 5) the interests of justice are better served by the intervention of the proposed third party; and
- 6) the Court can hear and decide the cause on its merits without the proposed intervener (*Rothmans, Benson & Hedges Inc.* (T.D.) at para. 12).

9 Not all factors need be present and some may weigh more heavily than others. There may also be new considerations, unique to a particular case, which are pertinent (see, e.g., *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 (F.C.A.) at paras. 5-6 (*Prophet River First Nation*)). For this reason, the criteria are not prescriptive. Criteria identified as pertinent in one case should not be viewed as pre-requisites in another. As noted by Nadon J. in *Sport Maska Inc.*, "flexibility is the operative word" (at para. 42). The over-arching test is whether the Court will be better served in its consideration of the issues with which it has to grapple by the presence of the intervener.

10 A comment is required on the sixth criteria in *Rothmans*. It asks whether the court can determine the matter without the presence of the interveners. This factor is of doubtful utility and is, if scrutinized, unsound. If the answer is negative, that the

matter cannot be heard without the presence of the interveners, there may well be an underlying problem in the proceeding itself. It may be moot, for example. An affirmative answer, on the other hand, that the matter can be heard without the interveners, does nothing to advance the analysis. It simply tells you that there is a properly constituted *lis* between the parties. The question is not whether the presence of the intervener is necessary to the proceeding, rather, the question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter (*Sport Maska Inc.* at para. 40).

11 Turning to the *Rothmans* factors, none of the parties here are "directly affected" in that they have the same level of "direct interest" an entity or person with full party status would typically have (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2013 FCA 236 (F.C.A.) at paras. 19-20; *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, [2015] 2 F.C.R. 253 (F.C.A.) at para. 9). That is not a barrier, however; indeed if they did have that degree of interest they would likely be a party. Courts have long granted parties in public interest litigation intervener status in the absence of a direct interest. Instead, the court looks for a genuine interest on the part of the intervener in the proceeding.

12 In asserting a genuine interest, there must be a link between the issue to be decided and the mandate and objectives of the party seeking to intervene. The source of the genuine interest must be identified and it should be clear from the submissions what animates the intervention. Sometimes, a genuine interest is established through the expertise or experience the intervener brings to the issue. Sometimes it is established through the unique perspective it has on the issues. However, in asserting a genuine interest, an intervener must demonstrate more than a "jurisprudential" motivation (*Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 257 (F.C.A.) at paras. 6-7; *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233, [2010] 1 F.C.R. 226 (Fed. C.A.) at paras. 11-12). An interest in the legal question alone is insufficient.

13 Here, the proposed interveners have, through their supporting affidavits, established a historical record of engagement in different facets of the legal issues before the Court. The CLIHR/IJHRC and Amnesty outline their mandates as non-governmental institutions working on international human rights issues, and explain how the issues in this case bear on their work. The CFE also describes, in its materials, its extensive engagement with the issue of public disclosure by government institutions, and its participation in other court cases in the interpretation of the Disclosure Act.

14 As noted in *Sport Maska Inc.*, the critical question is whether the intervener will bring further, different and valuable perspectives to the Court that will assist it in determining the matter.

15 This assistance can take many forms (*Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 (F.C.A.) at para. 49 (*Tsleil-Waututh Nation*)). It may address the broader social or economic context within which a particular case is situated. It may address the policy implications of a decision — the ramifications of a decision which are not apparent on the face of the record, or which have not been identified by the parties. These factors may bear on the purpose of the legislation, and inform the exercise of statutory interpretation.

16 In this case, the interveners' submissions draw on their understanding of international law, both customary and treaty, and its role in the interpretation of domestic legislation. The focus of the CFE is different — its interest is in the substance of the Disclosure Act and its scope. In its supporting affidavit, the CFE describes initiatives it has undertaken in Canada with respect to the protection of public servants who make disclosures, including the publication of a ten year review of how the Disclosure Act has been implemented and interpreted. More specifically, it proposes to make submissions on the interpretation of sections 8 and 33 of the Disclosure Act.

17 A proposed intervener's motion will be dismissed if their submissions substantially duplicate those already made by the parties or is not sufficiently distinct (*Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at paras. 16-17). This is not the case here. The interveners have all filed, as part of their motion records, draft outlines of the arguments that they propose to make. Both Amnesty International and the CLIHR/IJHRC propose to present arguments on the impact of international law on both the statutory interpretations and administrative law principles at the heart of this proceeding. These arguments are not addressed in the memorandum of the parties or in the decision of the Federal Court but

may assist this Court in deciding the matter. I am also satisfied, on reviewing the submissions of the CFE and the reasons of the Federal Court, that the legal analysis it proposes is unique and is not replicated in the submissions filed by the principal parties.

18 As noted, the controlling consideration is whether the interests of justice are better served by allowing the intervention. It is under this factor that the Court can address "the particular facts and circumstances of the case in respect of which intervention is sought" (*Sport Maska Inc.* at paras. 39 and 42). The relevant considerations can be both substantive and procedural. They are not exhaustive and will vary from case to case. They can include whether the moving party intends to work within the current proceedings, whether they intend to add anything to the evidentiary record (*Tsleil-Waututh Nation* at para. 49), whether they were involved in earlier proceedings, whether the issues before the Court have a public dimension which can be illuminated by the perspectives offered by the interveners, whether any terms should be attached to the intervention (*Prophet River First Nation* at para. 6), whether the intervention was timely or whether it will delay the hearing and prejudice the parties.

19 In this instance, there are no specific facts that would weigh against either Amnesty International, the CLIHR/IJHRC or the CFE. They have not delayed in bringing their motions, they have outlined the nature of their representations and have restricted themselves to the evidentiary record already before the court.

20 The Attorney General advances three main objections to the intervention of the CFE. I do not find these compelling.

21 The first is that the appeal does not raise any new legal issues and can be disposed of based on settled precedent. This assumes, of course, there is nothing unique in the facts of this case that would distinguish its consideration from prior cases. Without prejudging what this Court may decide with respect to the merits after hearing the appeal, it is sufficient to note that assumption is not made out in the argument on this motion.

22 The second objection is that the CFE's argument is simply a challenge to the reasonableness of the Commissioner's decision. On reading the CFE's proposed submissions, I do not agree that this is a proper characterization, particularly in light of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (S.C.C.). The thrust of the CFE submissions is on the correct legal test, and the scope of legal or policy obligations that inform the interpretation of sections 8 and 33 of the Disclosure Act.

23 The third objection is that the CFE's interest is purely jurisprudential. While I agree with counsel that the focus of the CFE's submission is on the nature of the legal tests, it is nonetheless a genuine interest because of the link between the CFE's mandate and expertise and the issue. The requirement that a party demonstrate more than a purely jurisprudential interest serves as a gatekeeper — it excludes busybodies. It is not meant to exclude those with a genuine interest in the legal framework within which it may operate, whether a non-governmental organization or corporation.

24 On balance I am satisfied that the proposed interveners have demonstrated through their submissions that they have a genuine interest in the matter before this Court, that their proposed submissions are not duplicated by either party and that it would be in the interests of justice to grant them intervener status. That said, I am also satisfied, having regard to the slight overlap in some of the arguments, and complexity and novelty of others, that some adjustment in the amount of time for oral argument allotted to the interveners is warranted. This is reflected in the allocation of time in the order.

25 I make one final observation. There is a distinction to be made between public interest issues determined on the basis of the application of settled jurisprudence, established doctrine and cases where, as described by Stratas JA in *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 (F.C.A.), "interveners advance too much policy talk, untethered to the facts and legal doctrine," and cautions that this may seep into the Court's consideration of legal issues.

26 This is not the case before me. Here, while the interventions arise in the context of a broader policy question of Canada's role in relation to the advancement of human rights abroad, the interventions do not seek to engage the court in the merits of that discussion. All focus on the proper interpretation of a statute. All draw on authoritative legal sources of international law. All the arguments pivot on questions of legal doctrine. Unlike *Kattenburg*, they do not directly bring geo-political considerations to the table.

27 The motions for leave to intervene by the Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic (a single intervention), Amnesty International Canada and the Centre for Free Expression are granted without costs. The title of the proceeding shall be modified to include these parties as interveners. The leave to intervene is granted on the following terms:

- 1) The interveners are required to accept the record as adduced by the parties and shall not be entitled to file any additional evidence.
- 2) The interveners Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic are entitled to file a memorandum of fact and law not exceeding 20 pages.
- 3) The interveners Amnesty International and the Centre for Free Expression are each entitled to file a memorandum of fact and law not exceeding 15 pages.
- 4) The interveners' memoranda of fact and law are to be filed on or before December 4, 2020.
- 5) The reply of the Attorney General is limited to 10 pages per intervention, to be filed on or before December 15, 2020.
- 6) The interveners Canadian Lawyers for International Human Rights and the International Justice and Human Rights Clinic are allowed to make oral submissions to the Court, not exceeding 20 minutes.
- 7) The interveners Amnesty International and the Centre for Free Expression are allowed to make oral submissions to the Court, not exceeding 10 minutes each.

Motions granted.

Tab 5



Original

2014 CAF 21, 2014 FCA 21
Federal Court of Appeal

Canada (Attorney General) v. Pictou Landing Band Council

2014 CarswellNat 149, 2014 CarswellNat 8483, 2014 CAF 21, 2014 FCA
21, 237 A.C.W.S. (3d) 570, 456 N.R. 365, 68 Admin. L.R. (5th) 228

Attorney General of Canada, Appellant and Pictou Landing Band Council and Maurina Beadle, Respondents

David Stratas J.A.

Judgment: January 29, 2014
Docket: A-158-13

Counsel: Jonathan D.N. Tarlton (written), Melissa Chan (written), for Appellant
Justin Safayeni (written), Kathrin Furniss (written), for Proposed Intervener, Amnesty International
Katherine Hensel (written), Sarah Clarke (written), for Proposed Intervener, First Nations Child and Family Caring Society

Headnote

Aboriginal law --- Practice and procedure — Parties — Intervenors

Applicant mother had severely disabled First Nations son — Applicant First Nations band provided funding for son's care — Band requested funding from respondent Attorney General of Canada (Canada) to cover son's expenses — Funding request was refused — Band successfully quashed this rejection — Canada appealed — First Nations Child and Family Caring Society (Society) and Amnesty International (AI) brought motions to intervene in appeal — Motions granted — Society and AI had complied with specific procedural requirements in [R. 109\(2\) of Federal Court Rules](#) — Evidence offered was particular and detailed, not vague and general — Society and AI had genuine interest in matter, and had relevant knowledge, skills and resources — Society and AI's submissions on contextual matters they proposed to raise would further determination of appeal — Proposed interventions would, at best, delay hearing of appeal by only three weeks — Existing parties would not suffer any significant prejudice.

Civil practice and procedure --- Practice on appeal — Parties — Adding parties — Intervenors on appeal

Applicant mother had severely disabled First Nations son — Applicant First Nations band provided funding for son's care — Band requested funding from respondent Attorney General of Canada (Canada) to cover son's expenses — Funding request was refused — Band successfully quashed this rejection — Canada appealed — First Nations Child and Family Caring Society (Society) and Amnesty International (AI) brought motions to intervene in appeal — Motions granted — Society and AI had complied with specific procedural requirements in [R. 109\(2\) of Federal Court Rules](#) — Evidence offered was particular and detailed, not vague and general — Society and AI had genuine interest in matter, and had relevant knowledge, skills and resources — Society and AI's submissions on contextual matters they proposed to raise would further determination of appeal — Proposed interventions would, at best, delay hearing of appeal by only three weeks — Existing parties would not suffer any significant prejudice.

Table of Authorities

Cases considered by *David Stratas J.A.*:

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 339 D.L.R. (4th) 428, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, (sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.)*) 424 N.R. 70, 52 Alta. L.R. (5th) 1, 28 Admin. L.R. (5th) 177, [2012] 2 W.W.R. 434, (sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*) [2011] 3 S.C.R. 654, (sub nom. *Alberta Teachers' Association v.*

Information and Privacy Commissioner) 519 A.R. 1, (sub nom. *Alberta Teachers' Association v. Information and Privacy Commissioner*) 539 W.A.C. 1 (S.C.C.) — referred to

Abraham v. Canada (Attorney General) (2012), (sub nom. *Canada (Attorney General) v. Abraham*) 2012 D.T.C. 5160 (Eng.), 440 N.R. 201, 2012 FCA 266, 2012 CarswellNat 4018, [2013] 1 C.T.C. 69, 2012 CarswellNat 5638, 2012 CAF 266 (F.C.A.) — referred to

British Columbia (Securities Commission) v. McLean (2013), 2013 CarswellBC 3618, 2013 CarswellBC 3619, 2013 SCC 67, 366 D.L.R. (4th) 30 (S.C.C.) — referred to

Canada (Human Rights Commission) v. Canada (Attorney General) (2013), 2013 CAF 75, 444 N.R. 120, (sub nom. *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*) 277 C.R.R. (2d) 233, 2013 CarswellNat 518, 2013 FCA 75, 2013 CarswellNat 2243 (F.C.A.) — referred to

CCH Canadian Ltd. v. Law Society of Upper Canada (2000), 189 D.L.R. (4th) 125, 6 C.P.R. (4th) 500, 258 N.R. 241, 2000 CarswellNat 1468, 2000 CarswellNat 5839 (Fed. C.A.) — referred to

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 37 R.P.R. (5th) 1 (S.C.C.) — referred to

Forest Ethics Advocacy Assn. v. National Energy Board (2013), 2013 CarswellNat 3547, 2013 FCA 236, 450 N.R. 166 (F.C.A.) — referred to

JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue (2013), 2013 CarswellNat 3822, 2013 FCA 250, (sub nom. *MNR v. JP Morgan Asset Management (Canada) Inc.*) 2014 D.T.C. 5001 (Eng.), 450 N.R. 91 (F.C.A.) — referred to

Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal) (2008), 2008 CarswellOnt 3184, 2008 ONCA 436, 237 O.A.C. 71 (Ont. C.A.) — referred to

Pictou Landing Band Council v. Canada (Attorney General) (2013), 2013 FC 342, 2013 CarswellNat 990, 2013 CF 342, [2013] 3 C.N.L.R. 371, 2013 CarswellNat 2484 (F.C.) — referred to

R. v. Salituro (1991), 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 50 O.A.C. 125, [1991] 3 S.C.R. 654, 131 N.R. 161, 68 C.C.C. (3d) 289, 1991 CarswellOnt 1031, 1991 CarswellOnt 124 (S.C.C.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), [1990] 1 F.C. 74, 1989 CarswellNat 663, 29 F.T.R. 267, 41 Admin. L.R. 102, 1989 CarswellNat 594 (Fed. T.D.) — followed

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), [1990] 1 F.C. 90, 45 C.R.R. 382, 1989 CarswellNat 600F, 103 N.R. 391, 1989 CarswellNat 600 (Fed. C.A.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 15 — considered

Rules considered:

Federal Courts Rules, SOR/98-106

Generally — referred to

R. 3 — considered

R. 65-68 — referred to

R. 70 — considered

R. 109 — considered

R. 109(2) — considered

R. 359-369 — referred to

David Stratas J.A.:

1 Two motions to intervene in this appeal have been brought: one by the First Nations Child and Family Caring Society and another by Amnesty International.

2 The appellant Attorney General opposes the motions, arguing that the moving parties have not satisfied the test for intervention under [Rule 109 of the *Federal Courts Rules*, SOR/98-106](#). The respondents consent to the motions.

3 [Rule 109](#) provides as follows:

109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.

(2) Notice of a motion under subsection (1) shall

(a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(b) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

(3) In granting a motion under subsection (1), the Court shall give directions regarding

(a) the service of documents; and

(b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.

109. (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.

(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir:

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

(3) La Cour assortit l'autorisation d'intervenir de directives concernant:

a) la signification de documents;

b) le rôle de l'intervenant, notamment en ce qui concerne les dépens, les droits d'appel et toute autre question relative à la procédure à suivre.

4 Below, I describe the nature of this appeal and the moving parties' proposed interventions in this appeal. At the outset, however, I wish to address the test for intervention to be applied in these motions.

5 The Attorney General submits, as do the moving parties, that in deciding the motions for intervention I should have regard to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 74 (Fed. T.D.) at paragraph 12, aff'd (1989), [1990] 1 F.C. 90 (Fed. C.A.), an oft-applied authority: see, e.g., *CCH Canadian Ltd. v. Law Society of Upper Canada* (2000), 189 D.L.R. (4th) 125 (Fed. C.A.). *Rothmans, Benson & Hedges* instructs me that on these motions a list of six factors should guide my discretion. All of the factors need not be present in order to grant the motions.

6 In my view, this common law list of factors, developed over two decades ago in *Rothmans, Benson & Hedges*, requires modification in light of today's litigation environment: *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.). For the reasons developed below, a number of the *Rothmans, Benson & Hedges* factors seem divorced from the real issues at stake in intervention motions that are brought today. *Rothmans, Benson & Hedges* also leaves out other considerations that, over time, have assumed greater

prominence in the Federal Courts' decisions on practice and procedure. Indeed, a case can be made that the *Rothmans, Benson & Hedges* factors, when devised, failed to recognize the then-existing understandings of the value of certain interventions: Philip L. Bryden, "Public Intervention in the Courts" (1987) 66 Can. Bar Rev. 490; John Koch, "Making Room: New Directions in Third Party Intervention" (1990) 48 U. T. Fac. L. Rev. 151. Now is the time to tweak the *Rothmans, Benson & Hedges* list of factors.

7 In these reasons, I could purport to apply the *Rothmans, Benson & Hedges* factors, ascribing little or no weight to individual factors that make no sense to me, and ascribing more weight to others. That would be intellectually dishonest. I prefer to deal directly and openly with the *Rothmans, Benson & Hedges* factors themselves.

8 In doing this, I observe that I am a single motions judge and my reasons do not bind my colleagues on this Court. It will be for them to assess the merit of these reasons.

9 The *Rothmans, Benson & Hedges* factors, and my observations concerning each, are as follows:

- *Is the proposed intervener directly affected by the outcome?* "Directly affected" is a requirement for full party status in an application for judicial review — *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Assn. v. National Energy Board*, 2013 FCA 236 (F.C.A.). All other jurisdictions in Canada set the requirements for intervener status at a lower but still meaningful level. In my view, a proposed intervener need only have a genuine interest in the precise issue(s) upon which the case is likely to turn. This is sufficient to give the Court an assurance that the proposed intervener will apply sufficient skills and resources to make a meaningful contribution to the proceeding.

- *Does there exist a justiciable issue and a veritable public interest?* Whether there is a justiciable issue is irrelevant to whether intervention should be granted. Rather, it is relevant to whether the application for judicial review should survive in the first place. If there is no justiciable issue in the application for judicial review, the issue is not whether a party should be permitted to intervene but whether the application should be struck because there is no viable administrative law cause of action: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.).

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. If an intervener can help and improve the Court's consideration of the issues in a judicial review or an appeal therefrom, why would the Court turn the intervener aside just because the intervener can go elsewhere? If the concern underlying this factor is that the intervener is raising a new question that could be raised elsewhere, generally interveners — and others — are not allowed to raise new questions on judicial review: *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paragraphs 22-29.

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* Again, this is relevant and important. Sometimes the issues before the Court assume such a public and important dimension that the Court needs to be exposed to perspectives beyond the particular parties who happen to be before the Court. Sometimes that broader exposure is necessary to appear to be doing — and to do — justice in the case.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Almost always, the Court can hear and decide a case without the proposed intervener. The more salient question is whether the intervener will bring further, different and valuable insights and perspectives that will assist the Court in determining the matter.

10 To this, I would add two other considerations, not mentioned in the list of factors in *Rothmans, Benson & Hedges*:

- *Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"?* For example, some motions to intervene will be too late

and will disrupt the orderly progress of a matter. Others, even if not too late, by their nature may unduly complicate or protract the proceedings. Considerations such as these should now pervade the interpretation and application of procedural rules: *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.).

• *Have the specific procedural requirements of Rules 109(2) and 359-369 been met?* Rule 109(2) requires the moving party to list its name, address and solicitor, describe how it intends to participate in the proceeding, and explain how its participation "will assist the determination of a factual or legal issue related to the proceeding." Further, in a motion such as this, brought under Rules 359-369, moving parties should file detailed and well-particularized supporting affidavits to satisfy the Court that intervention is warranted. Compliance with the Rules is mandatory and must form part of the test on intervention motions.

11 To summarize, in my view, the following considerations should guide whether intervener status should be granted:

I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.

II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?

III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?

IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?

V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

12 In my view, these considerations faithfully implement some of the more central concerns that the *Rothmans, Benson & Hedges* factors were meant to address, while dealing with the challenges that regularly present themselves today in litigation, particularly public law litigation, in the Federal Courts.

13 I shall now apply these considerations to the motions before me.

— I —

14 The moving parties have complied with the specific procedural requirements in Rule 109(2). This is not a case where the party seeking to intervene has failed to describe with sufficient particularity the nature of its participation and how its participation will assist the Court: for an example where a party failed this requirement, see *Forest Ethics Advocacy Association*, *supra* at paragraphs 34-39. The evidence offered is particular and detailed, not vague and general. The evidence satisfactorily addresses the considerations relevant to the Court's exercise of discretion.

— II —

15 The moving parties have persuaded me that they have a genuine interest in the matter before the Court. In this regard, the moving parties' activities and previous interventions in legal and policy matters have persuaded me that they have considerable knowledge, skills and resources relevant to the questions before the Court and will deploy them to assist the Court.

— III —

16 Both moving parties assert that they bring different and valuable insights and perspectives to the Court that will further the Court's determination of the appeal.

17 To evaluate this assertion, it is first necessary to examine the nature of this appeal. Since this Court's hearing on the merits of the appeal will soon take place, I shall offer only a very brief, top-level summary.

18 This appeal arises from the Federal Court's decision to quash Aboriginal Affairs and Northern Development Canada's refusal to grant a funding request made by the respondent Band Council: *Pictou Landing Band Council v. Canada (Attorney General)*, 2013 FC 342 (F.C.). The Band Council requested funding to cover the expenses for services rendered to Jeremy Meawasige and his mother, the respondent Maurina Beadle.

19 Jeremy is a 17-year-old disabled teenager. His condition requires assistance and care 24 hours a day. His mother served as his sole caregiver. But in May 2010 she suffered a stroke. After that, she could not care for Jeremy without assistance. To this end, the Band provided funding for Jeremy's care.

20 Later, the Band requested that Canada cover Jeremy's expenses. Its request was based upon *Jordan's Principle*, a resolution passed by the House of Commons. In this resolution, Canada announced that it would provide funding for First Nations children in certain circumstances. Exactly what circumstances is very much an issue in this case.

21 Aboriginal Affairs and Northern Development Canada considered this funding principle, applied it to the facts of this case, and rejected the Band Council's request for funding. The respondents successfully quashed this rejection in the Federal Court. The appellant has appealed to this Court.

22 The memoranda of fact and law of the appellant and the respondents have been filed. The parties raise a number of issues. But the two key issues are whether the Federal Court selected the correct standard of review and, if so, whether the Federal Court applied that standard of review correctly.

23 The moving parties both intend to situate the funding principle against the backdrop of section 15 Charter jurisprudence, international instruments, wider human rights understandings and jurisprudence, and other contextual matters. Although the appellant and the respondents do touch on some of this context, in my view the Court will be assisted by further exploration of it.

24 This further exploration of contextual matters may inform the Court's determination whether the standard of review is correctness or reasonableness. It will be for the Court to decide whether, in law, that is so and, if so, how it bears upon the selection of the standard of review.

25 The further exploration of contextual matters may also assist the Court in its task of assessing the funding principle and whether Aboriginal Affairs was correct in finding it inapplicable or was reasonable in finding it inapplicable.

26 If reasonableness is the standard of review, the contextual matters may have a bearing upon the range of acceptable and defensible options available to Aboriginal Affairs. The range of acceptable and defensible options takes its colour from the context, widening or narrowing depending on the nature of the question and other circumstances: see *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at paragraphs 37-41 and see also *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 ONCA 436 (Ont. C.A.) at paragraph 22, *Abraham v. Canada (Attorney General)*, 2012 FCA 266 (F.C.A.) at paragraphs 37-50, and *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2013 FCA 75 (F.C.A.) at paragraphs 13-14. In what precise circumstances the range broadens or narrows is unclear — at this time it cannot be ruled out that the contextual matters the interveners propose to raise have a bearing on this.

27 In making these observations, I am not offering conclusions on the relevance of the contextual matters to the issues in the appeal. In the end, the panel determining this appeal may find the contextual matters irrelevant to the appeal. At present, it is enough to say that the proposed interveners' submissions on the contextual matters they propose to raise — informed by

their different and valuable insights and perspectives — will actually further the Court's determination of the appeal one way or the other.

— IV —

28 Having reviewed some of the jurisprudence offered by the moving parties, in my view the issues in this appeal — the responsibility for the welfare of aboriginal children and the proper interpretation and scope of the relevant funding principle — have assumed a sufficient dimension of public interest, importance and complexity such that intervention should be permitted. In the circumstances of this case, it is in the interests of justice that the Court should expose itself to perspectives beyond those advanced by the existing parties before the Court.

29 These observations should not be taken in any way to be prejudging the merits of the matter before the Court.

— V —

30 The proposed interventions are not inconsistent with the imperatives in Rule 3. Indeed, as explained above, by assisting the Court in determining the issues before it, the interventions may well further the "just...determination of [this] proceeding on its merits."

31 The matters the moving parties intend to raise do not duplicate the matters already raised in the parties' memoranda of fact and law.

32 Although the motions to intervene were brought well after the filing of the notice of appeal in this Court, the interventions will, at best, delay the hearing of the appeal by only the three weeks required to file memoranda of fact and law. Further, in these circumstances, and bearing in mind the fact that the issues the interveners will address are closely related to those already in issue, the existing parties will not suffer any significant prejudice. Consistent with the imperatives of Rule 3, I shall impose strict terms on the moving parties' intervention.

33 In summary, I conclude that the relevant considerations, taken together, suggest that the moving parties' motions to intervene should be granted.

34 Therefore, for the foregoing reasons, I shall grant the motions to intervene. By February 20, 2014, the interveners shall file their memoranda of fact and law on the contextual matters described in these reasons (at paragraph 23, above) as they relate to the two main issues before the Court (see paragraph 22, above). The interveners' memoranda shall not duplicate the submissions of the appellant and the respondents in their memoranda. The interveners' memoranda shall comply with [Rules 65-68](#) and [70](#), and shall be no more than ten pages in length (exclusive of the front cover, any table of contents, the list of authorities in Part V of the memorandum, appendices A and B, and the back cover). The interveners shall not add to the evidentiary record before the Court. Each intervener may address the Court for no more than fifteen minutes at the hearing of the appeal. The interveners are not permitted to seek costs, nor shall they be liable for costs absent any abuse of process on their part. There shall be no costs of this motion.

Motions granted.

Tab 6



Original

2016 CAF 120, 2016 FCA 120
Federal Court of Appeal

Prophet River First Nation v. Canada (Attorney General)

2016 CarswellNat 1351, 2016 CarswellNat 9924, 2016 CAF 120, 2016 FCA
120, 15 Admin. L.R. (6th) 14, 265 A.C.W.S. (3d) 833, 99 C.E.L.R. (3d) 78

**Prophet River First Nation and West Moberly First Nations, Appellants
and Attorney General of Canada, Minister of the Environment,
Minister of Fisheries and Oceans, Minister of Transport, and
British Columbia Hydro and Power Authority, Respondents**

David Stratas J.A.

Judgment: April 20, 2016

Docket: A-435-15

Counsel: Allisun Rana, Emily Grier, for Appellants

Mark Andrews, Q.C., Charles Willms, Bridget Gilbride, for Respondent, British Columbia Hydro and Power Authority

Jessica Orkin, Cassandra Porter, for Proposed Intervener, Amnesty International

Robert J.M. Janes, Q.C., Elin R.S. Sigurdson, for Proposed Intervener, Te'mexw Treaty Association

Headnote

Environmental law --- Statutory protection of environment — Miscellaneous

Parties were involved in environmental law proceedings regarding jurisdiction or statutory mandate of Governor-in-Council under s. 52(4) of [Canadian Environmental Assessment Act, 2012](#) — Charitable organization and treaty association brought application to added as intervenors — Application dismissed — Intervenors were not affected by outcome — Public interest existed in proceedings — Case could be heard on merits without aid of intervenors — Charitable organization unlikely to be of assistance on central issue, and had not sufficiently explained argument regarding applicability of international law — Court would likely not receive anything more from charitable organization than general presentation on international law provisions and concepts as they pertain to law of indigenous peoples, suggesting overall that law was of prime importance, something already very front-of-mind for Court — Treaty association's submissions would closely mirror those of existing parties — Significant delay in making application by both potential intervenors.

Table of Authorities

Cases considered by *David Stratas J.A.*:

Anderson v. Canada (Customs & Revenue Agency) (2003), 2003 FCA 352, 2003 CarswellNat 2931, 2003 CAF 352, 2003 CarswellNat 3638, 311 N.R. 184 (Fed. C.A.) — referred to

C.U.P.E. v. Canadian Airlines International Ltd. (2000), 2000 CarswellNat 282, (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*) 37 C.H.R.R. D/325, 2000 FCA 233, (sub nom. *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*) [2010] 1 F.C.R. 226, 2000 CarswellNat 4395 (Fed. C.A.) — referred to

Canada (Attorney General) v. Canadian Doctors for Refugee Care (2015), 2015 FCA 34, 2015 CarswellNat 246, (sub nom. *Canadian Doctors for Refugee Care v. Canada (Attorney General)*) 470 N.R. 167, 2015 CAF 34, 2015 CarswellNat 4818 (F.C.A.) — referred to

Canada (Attorney General) v. Pictou Landing Band Council (2014), 2014 FCA 21, 2014 CarswellNat 149, (sub nom. *Pictou Landing Band Council v. Canada (Attorney General)*) 456 N.R. 365, 68 Admin. L.R. (5th) 228, 2014 CAF 21, 2014

CarswellNat 8483, (sub nom. *Pictou Landing First Nation v. Canada (Attorney General)*) [2015] 2 F.C.R. 253 (F.C.A.) — considered

Canada (Minister of Citizenship and Immigration) v. Ishaq (2015), 2015 FCA 151, 2015 CarswellNat 2385, (sub nom. *Ishaq v. Canada (Minister of Citizenship and Immigration)*) 474 N.R. 268, 37 Imm. L.R. (4th) 14, 2015 CAF 151, 2015 CarswellNat 9225, (sub nom. *Ishaq v. Canada (Citizenship and Immigration)*) [2016] 1 F.C.R. 686 (F.C.A.) — referred to *Forest Ethics Advocacy Assn. v. National Energy Board* (2013), 2013 FCA 236, 2013 CarswellNat 3547, 450 N.R. 166, 64 Admin. L.R. (5th) 80, 2013 CAF 236, 2013 CarswellNat 6969 (F.C.A.) — referred to

Gitxaala Nation v. R. (2015), 2015 FCA 73, 2015 CarswellNat 522, 2015 CAF 73, 2015 CarswellNat 4831 (F.C.A.) — considered

JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue (2013), 2013 FCA 250, 2013 CarswellNat 3822, 450 N.R. 91, (sub nom. *MNR v. JP Morgan Asset Management (Canada) Inc.*) 2014 D.T.C. 5001 (Eng.), [2014] 2 C.T.C. 99, 62 Admin. L.R. (5th) 76, 367 D.L.R. (4th) 525, 2013 CAF 250, 2013 CarswellNat 6109, (sub nom. *JP Morgan Asset Management (Canada) v. Canada (National Revenue)*) [2014] 2 F.C.R. 557 (F.C.A.) — referred to

R. v. Boulton (1975), [1976] 1 F.C. 252, 1975 CarswellNat 86, 1975 CarswellNat 86F (Fed. C.A.) — referred to *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), 103 N.R. 391, [1990] 1 F.C. 90, 45 C.R.R. 382, 1989 CarswellNat 600, 1989 CarswellNat 600F, 31 F.T.R. 239 (note) (Fed. C.A.) — followed

Sport Maska Inc. v. Bauer Hockey Corp. (2016), 2016 FCA 44, 2016 CarswellNat 265, (sub nom. *Bauer Hockey Corp. v. Easton Sports Canada Inc.*) 480 N.R. 387 (F.C.A.) — followed

Tioxide Canada Inc. v. R. (1994), 94 D.T.C. 6366, 174 N.R. 212, [1995] 1 C.T.C. 285, 1994 CarswellNat 1136 (Fed. C.A.) — referred to

ViiV Healthcare ULC v. Teva Canada Ltd. (2015), 2015 FCA 33, 2015 CAF 33, 2015 CarswellNat 1965, 2015 CarswellNat 1966, 474 N.R. 199 (F.C.A.) — referred to

Statutes considered:

Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52
s. 52(4) — considered

Rules considered:

Federal Courts Rules, SOR/98-106

R. 3 — considered

R. 109 — considered

R. 109(2) — considered

David Stratas J.A.:

1 Amnesty International and Te'mexw Treaty Association move for leave to intervene in this appeal. For the reasons set out below, I dismiss the motions.

A. The test for intervention

2 The factors to be considered on an intervention motion are set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, 103 N.R. 391 (Fed. C.A.), recently reaffirmed in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44 (F.C.A.).

3 Prior to *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, [2015] 2 F.C.R. 253 (F.C.A.) [hereinafter *Pictou Landing First Nation*] tweaked and reformulated the *Rothmans, Benson & Hedges* factors. One of the reasons for that was to provide greater guidance concerning the "interests of justice" factor in *Rothmans, Benson & Hedges*. The danger of a broad "interests of justice" factor is that it can be taken to mean "whatever the judge assigned to the motion thinks."

4 In the end, the Court in *Sport Maska* found there was not enough of a difference between *Rothmans, Benson & Hedges* and *Pictou Landing* to warrant a departure from the former: para. 41. Instead, the panel held that a number of the *Pictou Landing*

factors are the sorts of factors that the Court may consider within the flexible "interests of justice" factor: *Sport Maska*, para. 42. That is how I shall proceed with these motions.

B. Applying the test for intervention

(1) Considerations common to both intervention motions

5 Four of six of the factors in *Rothmans, Benson & Hedges* can be dismissed as irrelevant right at the outset:

- *Is the proposed intervener directly affected by the outcome?* No. It may be that both are very interested in the outcome. But they are not directly affected. "Directly affected" is a requirement for full party status in an application for judicial review — *i.e.*, standing as an applicant or a respondent in an application for judicial review: *Forest Ethics Advocacy Assn. v. National Energy Board*, 2013 FCA 236 (F.C.A.). Neither moving party says that it should have been an applicant or respondent in this case.

- *Does there exist a justiciable issue and a veritable public interest?* There is a justiciable issue. If there were not, the application for judicial review would have been struck out: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250 (F.C.A.). Yes, there seems to be public interest in the case, but that does not necessarily mean that the moving parties should succeed.

- *Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?* This is irrelevant. The question is before the Court and it will be decided whether or not the moving parties are before the Court.

- *Can the Court hear and decide the case on its merits without the proposed intervener?* Yes. The absence of the interveners will not stop the Court from deciding this appeal.

6 This leaves only two *Rothmans, Benson & Hedges* factors to be considered on these motions:

- *Is the position of the proposed intervener adequately defended by one of the parties to the case?* This is relevant and important. It raises the key question under Rule 109(2), namely whether the intervener will bring further, different and valuable insights and perspectives to the Court that will assist it in determining the matter. Among other things, this can acquaint the Court with the implications of approaches it might take in its reasons.

- *Are the interests of justice better served by the intervention of the proposed third party?* In my view, this factor includes all of the factors discussed in *Pictou Landing First Nation* plus any others that might arise on the facts of particular cases:

- whether the intervention is compliant with the objectives set out in Rule 3 and the mandatory requirements in Rule 109 (provisions binding on us);

- whether the moving party has a genuine interest in the matter such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

- whether the matter has assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court;

- whether the moving party has been involved in earlier proceedings in the matter;

- whether terms should be attached to the intervention that would advance the objectives set out in Rule 3 and afford procedural justice to existing parties to the proceeding.

7 I have carefully considered these factors. In the interests of brevity I need only offer brief reasons on the factors most salient to my decision.

(2) *Amnesty International's motion*

8 Amnesty International offers us submissions on a variety of international law issues. However, I am not persuaded that these issues are sufficiently relevant and material to the issues in this appeal.

9 In particular, I am not persuaded that Amnesty International will assist the Court on the central issue in this appeal, namely the jurisdiction or statutory mandate of the Governor-in-Council under ss. 52(4) of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19.

10 The matter before us is an appeal from the dismissal of an application for judicial review. Amnesty International has not explained with particularity exactly how international law will bear upon the precise administrative law issues in this case. We are told that "[i]nternational law requires high standards of substantive and procedural protection for Indigenous peoples' rights" and that "domestic legal standards...must be informed by and accord with Canada's international obligations," but precisely why and how that is so in the precise facts, circumstances and legislative provisions in this case is left unmentioned.

11 The Supreme Court of Canada has done much to define the law that we must follow. We do not have licence to modify that law. The scope for more general submissions based on international law concepts is narrower for our Court than the Supreme Court.

12 In *Gitxaala Nation v. R.*, 2015 FCA 73 (F.C.A.) — a case in which Amnesty International was one of the moving parties — this Court outlined the rather limited (but sometimes important) ways in which international law can come to bear in proceedings such as this. In this case, it was open to Amnesty International to take issue with the Court's observations in that case, but it did not. Amnesty International has not demonstrated, with particularity and with reference to *Gitxaala*, how the international law matters it wishes to raise will be relevant to our determination of the precise issues in this appeal. For example, it has not pointed to any particular ambiguity in any relevant legislative provision, nor has it outlined in any precise way how international law standards might affect the Court's interpretation of any relevant provision.

13 I have not been convinced by Amnesty International's submissions that the Court would receive anything more from Amnesty International than a general presentation on international law provisions and concepts as they pertain to the law of indigenous peoples, suggesting overall that this law is of prime importance — something that is already very front-of-mind for this Court.

14 The Court would welcome precise submissions on specific international law matters that might affect our decision on the precise issues in this case. But I have not been persuaded that that is on offer.

15 Finally, I note several months delay in the bringing of this application. In the circumstances of this case, this is a significant consideration: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 (F.C.A.) at paras. 28 and 39; *ViiV Healthcare ULC v. Teva Canada Ltd.*, 2015 FCA 33, 474 N.R. 199 (F.C.A.) at para. 11. Amnesty International was granted leave on a limited basis in the Federal Court to intervene, so it was well-aware of this appeal. But inexplicably, it delayed.

16 Before this Court is a motion by the appellants to set an early hearing date for this appeal. If Amnesty International were permitted to intervene, responding submissions would be required, resulting in further delay and potentially exposing the appellants to more of the sort of harm they allege in their motion.

17 Thus, I shall dismiss Amnesty International's motion to intervene. In doing so, I cast no aspersions upon it and the exemplary work it has done in some legal matters and other broader matters.

(3) Te'mexw Treaty Association's motion

18 I have not been persuaded that the Association will offer a different perspective on the issues in this appeal. Instead, it seems to propose submissions that will substantially duplicate those of the appellants.

19 The Association submits that its unique perspective arises from its involvement in the modern treaty process but the legal arguments it wishes to advance are unconnected to its participation in that process.

20 I accept that this Court's determination of this appeal may affect the interests of the Association. However, that sort of interest — a jurisprudential interest — has been repeatedly held not to be sufficient: *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233, [2010] 1 F.C.R. 226 (Fed. C.A.); *Anderson v. Canada (Customs & Revenue Agency)*, 2003 FCA 352, 311 N.R. 184 (Fed. C.A.); *R. v. Boulton* (1975), [1976] 1 F.C. 252 (Fed. C.A.); *Tioxide Canada Inc. v. R.* (1994), 174 N.R. 212, 94 D.T.C. 6366 (Fed. C.A.).

21 Among other things, the Association intends in this appeal to submit that the decision below will dissuade First Nations from entering into modern treaties. A respondent would likely respond that a modern treaty would be expected to contain detailed and specific provisions that would render the kind of dispute in this case unnecessary. Whether the Association or the respondent is correct turns on a factual matter on which no evidence has been adduced. Evidence cannot normally be adduced on appeal: *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 (F.C.A.) at paras. 14-27.

22 At the centre of this appeal is the statutory scheme, the authority of the administrative decision-maker, and the decision at issue. The Association offers general submissions but has failed to persuade me that those submissions will affect this Court's consideration of those central matters.

23 Like Amnesty International, the Association has delayed in moving to intervene. In the circumstances of this case, this is another significant factor in the Court's exercise of discretion against granting the Association's motion.

C. Disposition

24 Therefore, I shall dismiss the motions to intervene. Concurrently with the release of these reasons and order, the parties will receive a direction from the Court concerning the appellants' motion for an early hearing date.

Application dismissed.

Tab 7

2020 CAF 164, 2020 FCA 164
Federal Court of Appeal

Canada (Attorney General) v. Kattenburg

2020 CarswellNat 4288, 2020 CarswellNat 7028, 2020 CAF 164, 2020 FCA 164, 323 A.C.W.S. (3d) 302

**ATTORNEY GENERAL OF CANADA (Appellant) and DR. DAVID
KATTENBURG and PSAGOT WINERY LTD. (Respondents)**

David Stratas J.A.

Judgment: October 6, 2020

Docket: A-312-19

Counsel: Gail Sinclair, Negar Hashemi (written), for Appellant
A. Dimitri Lascaris (written), for Respondent, Dr. David Kattenburg
David Matas (written), for Proposed Intervener, League, for Human Rights of B'Nai Brith Canada
Barbara Jackman (written), for Proposed Intervener, Independent Jewish Voices
Mark J. Freiman (written), for Proposed Intervener, Centre, for Israel and Jewish Affairs
David Elmaleh, Aaron Rosenberg (written), for Proposed Intervener / Respondent, Psagot Winery Ltd.
Faisal Bhabha, Madison Pearlman (written), for Proposed Intervener, Centre, for Free Expression
Paul Champ, Bijon Roy (written), for Proposed Intervener, Amnesty International Canada
Asher G. Honickman (written), for Proposed Intervener, Professor Eugene Kontorovich
Matthew R. Gourlay (written), for Proposed Intervener, Professor Michael Lynk, U.N. Special Rapporteur, for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967
Sujith Xavier (written), for Proposed Intervener, The Arab Canadian Lawyers Association and the Transnational Law and Justice Network
Ceyda Turan, James Yap (written), for Proposed Intervener, Canadian Lawyers, for International Human Rights and Al-Haq

David Stratas J.A.:

1 An appeal has been brought from a judicial review in the Federal Court: [2019 FC 1003](#) (F.C.) (*per* Mactavish J. as she then was). The appeal is pending in this Court.

2 Before the Court are multiple motions for leave to intervene under Rule 109 and one motion by Psagot Winery Ltd. to be added as a party respondent.

A. The intervention motions

3 The underlying judicial review is a review of whether an administrative decision-maker, here the Canadian Food Inspection Agency, interpreted and applied certain legislative requirements concerning the labelling of a food product, here wine, in a defensible and acceptable way, *i.e.*, within the constraints discussed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), [441 D.L.R. \(4th\) 1](#) (S.C.C.). There is nothing more to it. It appears to be a standard judicial review of a regulatory decision.

4 But twelve separate parties now line up to intervene: League for Human Rights of B'Nai Brith Canada, Independent Jewish Voices, Centre for Israel and Jewish Affairs, Centre for Free Expression, Amnesty International Canada, Professor Eugene Kontorovich, Professor Michael Lynk (U.N. Special Rapporteur for the Situation of Human Rights in the Palestinian Territory Occupied Since 1967), The Arab Canadian Lawyers Association, the Transnational Law and Justice Network, Canadian

Lawyers for International Human Rights, Al-Haq, and Psagot Winery Ltd. Many of them say this judicial review is something more than standard: the label described the wine as a "product of Israel" and it was made in the West Bank.

5 As a result, a number of these moving parties seek to intervene to speak to the issue of Israel's occupation of the West Bank, including the status of the West Bank, the territorial sovereignty of Israel, human rights and humanitarian concerns, issues of international law, and other related issues. Many of them appear to want this Court to rule on the merits of these issues.

6 But there is one basic problem. This appeal does not raise the merits of these issues. As I shall explain, it is narrower.

7 That is not all. Some of the moving parties seek to intervene on other issues, such as the international trade law dimensions lying behind the labelling requirements and issues arising under [section 2\(b\) of the Charter](#).

8 Under Rule 109, the Federal Courts' rule governing intervention, the central part of the test for intervention is whether a moving party's submissions will be useful to the panel determining the appeal.

9 This requires four questions to be asked. In some intervention motions, such as the ones presently before the Court, it is useful to consider them separately. The four questions are as follows:

(1) *What issues are live before the panel determining the proceeding?* The issues are set by the originating document, here the notice of appeal, as explained by any memoranda of fact and law that have been filed: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 (F.C.A.) at paras. 54-56. Here, the Court must determine the "real essence" and "essential character" of the proceeding and disregard those matters that are doomed to fail: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at paras. 49-50. In doing so it must understand its role in the proceeding. For example, in the context of judicial review, often the Court is only in a reviewing role of the administrative decision-maker's decision on the merits and the administrative decision-maker is the only one entitled to decide on the merits: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.); *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.); *Robbins v. Canada (Attorney General)*, 2017 FCA 24 (F.C.A.); *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1 (F.C.A.) at paras. 26-28; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (F.C.A.) at paras. 87 and 97. And to avoid disguised correctness review, the Court must not consider the merits itself: *Vavilov* at para. 83; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at para. 28.

(2) *What does the moving party intend to submit in the proceeding?* The Court must not be taken in by tricky drafting by skillful pleaders. Instead, it must determine the "real essence" and "essential character" of what the prospective intervener intends to say. It does this by reading the motion materials "holistically and practically without fastening onto matters of form". See *JP Morgan Asset Management*, above at paras. 49-50.

(3) *Are the moving party's submissions doomed to fail?* When considering an intervention motion, the Court should not venture too deeply into the merits of issues that are for the panel. That being said, the panel should not have to deal with submissions of an intervener that are doomed to fail or that are inadmissible. This includes submissions that are indisputably wrong in law or irrelevant to the live issues before the Court. Issues that require new evidence and new evidence itself are also not admissible: *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 (F.C.A.) at paras. 17 and 36; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 (F.C.A.) at para. 19; *Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at para. 14; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 (F.C.A.) at para. 11. Similarly submissions and academic articles that, in reality, contain new evidence intertwined with the legal discussion are prohibited: *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, 2000 SCC 2, [2000] 1 S.C.R. 44 (S.C.C.); *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 (F.C.A.) at para. 14; *Zaric* at para. 14.

(4) *Will the moving party's arguable submissions advance the determination of the panel determining the appeal?* The Court should exclude submissions that duplicate those of others. It should also exclude those that make political points

without law, pronounce freestanding policy positions untethered to law, or offer submissions irrelevant to the legal task the Court must perform.

10 I will now consider these questions.

(1) What issues are live before the panel determining the proceeding?

11 Before us is an appeal from an application for judicial review. The appeal panel's job will be to consider whether the decision of the Agency about two particular wine labels is acceptable and defensible, *i.e.*, within the constraints discussed in *Vavilov*. Nothing more.

12 In particular, the panel will focus on the administrative decision-maker's interpretation and application of the legislation that governs it. The administrative decision-maker in this case, the Agency, had to interpret and apply a country of origin labelling requirement under the *Food and Drug Regulations*, C.R.C., c. 870, s. B.02.108 to two particular wines produced in the West Bank and decide whether their labels were false or misleading under subsection 5(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 and subsection 7(1) of the *Consumer Packaging and Labelling Act*, R.S.C., 1985, c. C-38.

13 What do country of origin and misleading mean in the legislation? To answer that question, the Agency had to examine, explicitly or implicitly, the text, context and purpose of the provisions in which those terms appear: *Vavilov* at paras. 115-124; and see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.); *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.); *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.).

14 In reviewing the legislative interpretation reached by the Agency, the panel hearing this appeal will be engaging in reasonableness review. I acknowledge that the respondent intends to argue that the standard of review for the administrative decision-maker's interpretation of the relevant legislation is correctness on the ground that the issue is of public significance. But on the authority of *Vavilov* at paras. 53-72, this is doomed to fail and so I do not consider it a live issue. The panel hearing this appeal will be conducting reasonableness review on the issue of legislative interpretation, not correctness review.

15 When conducting reasonableness review, the panel will not be allowed to reach its own interpretation of the legislation and impose it on the Agency: see *Vavilov* at para. 83; *Delios* at para. 28.

16 The panel will also determine whether the Agency's decision was reasonable in the sense that it engaged in an adequate investigation or inquiry in light of its governing legislation and whether it offered sufficient justification in support of its decision: see, generally, *Vavilov*.

17 Another issue for the panel will be whether the Federal Court was correct in law in holding that the Agency should have considered issues under section 2(b) of the Charter. This is a live issue. Note, however, that it is not for this Court to decide how section 2(b) might affect the interpretation and application of the legislative provisions. That will be for the Agency if this matter is sent back to it for redetermination.

(2) What do the moving parties intend to submit in the proceeding?

18 The true essence or essential character of the submissions of the interveners are three-fold:

- Many of the interveners intend to submit that Israel's occupation of the West Bank is illegal. They rely on plenty of international instruments. Further, some interveners wish to make submissions about human rights and humanitarian concerns of those in the West Bank.
- Some of the interveners, in particular Independent Jewish Voices, the Centre for Free Expression, B'nai Brith, the Centre for Israel and Jewish Affairs and Amnesty International, intend to argue that section 2(b) is engaged in this case. Some intend to address the substantive content of section 2(b), including how international law might inform its interpretation and application.

- Professor Kontorovich intends to submit mainly that there are international law understandings under the GATT and the WTO, including the importance of non-tariff barriers such as labelling rules. He submits that these bear upon the interpretation of the legislation in this case.

(3) *Are the moving parties' submissions doomed to fail?*

19 The submissions on Israel's occupation of the West Bank are doomed to fail on the legislative interpretation issue.

20 Quite properly, none of the moving parties contend that the provisions of the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act* are aimed at furthering or implementing Canada's international obligations or dealing with the Israel/West Bank issue. There is nothing to suggest that these provisions were enacted to address state occupation of territories and, in particular, Israel's occupation of the West Bank.

21 Rather, these provisions are of general application, appearing amongst similar provisions, aimed at regulating, often in exacting detail, food products and the public's interaction with those products through, among other things, labels on containers. The purpose seems to be, at a broad level of generality, consumer protection, quality assurance and safety. The exact purpose will be for the appeal panel to consider.

22 In support of their submissions, the moving parties offer many international instruments, opinions and understandings. Their submissions assume they enter the process of legislative interpretation automatically, almost as if they are some sort of super-Charter that can be used to supplement, amend or displace the provisions of domestic law. They do not.

23 Certain authorities of this Court concerning the use of international law, heavily based on authorities from the Supreme Court, will bind the panel hearing the appeal. The moving parties' proposed use of international law is contrary to these authorities. It is doomed to fail.

24 International law enters into the interpretation of domestic law such as, in this case, the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act*, only in certain limited ways: see *Entertainment Software Assoc. v. Society Composers*, 2020 FCA 100 (F.C.A.) at paras. 69-92 and the many Supreme Court authorities cited therein (including the most recent Supreme Court authority, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, 443 D.L.R. (4th) 183 (S.C.C.)); see also *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 (F.C.A.) at paras. 54-59. None of these limited ways are available here. The requirement that domestic law be interpreted in accordance with international obligations cannot be used to amend domestic legislation: *Entertainment Software Association* at paras. 89-91; *B010 v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (S.C.C.).

25 International law is irrelevant to the discernment of legislative purpose in a case like this: *Gitxaala Nation v. R.*, 2015 FCA 73 (F.C.A.) at paras. 11-18; *Ishaq* at para. 27. Legislative purpose is discovered from the words of the provision, related provisions, and, with some caution, legislative history and regulatory impact or official explanatory statements: *Hillier v. Canada (Attorney General)*, 2019 FCA 44, 431 D.L.R. (4th) 556 (F.C.A.) at paras. 25-27 and 35; *Williams v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 252, [2018] 4 F.C.R. 174 (F.C.A.) at paras. 50-51. Sometimes it is clear from these things that the purpose of a legislative provision is to implement some or all of an international instrument: *Entertainment Software Association* at paras. 73-74 and 82. Sometimes international law can be used to resolve ambiguities: *Entertainment Software Association* at paras. 83-84.

26 But aside from those instances, as far as the discernment of legislative purpose is concerned, international law is not like a series of tasty plates on a buffet table from which we can take whatever we like and eat whatever we please. Legislative purpose is the authentic aim of the legislation passed by the legislators, not what international authorities, judges, parties and interveners think is "best for Canadians" or what they consider to be "just", "right" or "fair": see *Hillier*, *Williams* and *Ishaq*; and see also *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144 (S.C.C.), *R. v. Rafilovich*, 2019 SCC 51, 442 D.L.R. (4th) 539 (S.C.C.) and *Michel v. Graydon*, 2020 SCC 24 (S.C.C.) and, in particular, the rejection of the dissents in these cases; and see also M. Mancini, "The 'Return' of 'Textualism' at the SCC[?]" (9 April 2019), online (blog):

Double Aspect <doubleaspect.blog/2019/04/09/the-return-of-textualism-at-the-scc/>. Thus, interveners' policy preferences and the policies they want the legislation to pursue are irrelevant to the Court's discernment of legislative purpose: *Atlas Tube Canada ULC v. Canada (Minister of National Revenue)*, 2019 FCA 120 (F.C.A.) at paras. 5-9.

27 The detailed consumer-oriented and product-oriented provisions at issue in this case were enacted without regard to issues concerning Israel's occupation of the West Bank. Specifically, they were enacted without regard to the specific international instruments the moving parties wish to insert into this appeal. These include the United Nations advisory opinions entitled *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-west Africa) Notwithstanding Security Council Resolution 276* and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*; United Nations General Assembly resolutions entitled *The Right of the Palestinian People to Self-Determination, Permanent Sovereignty of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the Occupied Syrian Golan over their Natural Resources, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan, Peaceful Settlement of the Question of Palestine* and resolutions numbered 2435, 2649, 3236, 43/177, 48/94 and 73/158; United Nations Security Council Resolutions entitled *The Situation in the Middle East, including the Palestinian Question, Territories Occupied by Israel* and resolutions numbered 446, 465, 476 and 2334 and other U.N. documents such as *Territories Occupied By Israel, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab Population in the Occupied Syrian Golan Over Their Natural Resources, Peaceful Settlement of the Question of Palestine, Settlements and Creeping Annexation, the Agreement on the Gaza Strip and the Jericho Area*, and various U.N. resolutions affirming the Palestinian peoples' right to self-determination. The same can be said for more general documents such as the *Charter of the United Nations*, the *Articles on Responsibility for States for Internationally Wrongful Acts*, the *Vienna Convention on the Law of Treaties*, the *Declaration of Principles on Interim Self Government Arrangements*, the *Regulations Annexed to the Hague Convention No. IV respecting the Laws and Customs of War on Land*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Rome Statute of the International Criminal Court*, the *2019 Concluding Observations of the United Nations Committee on Economic, Social, and Cultural Rights*, the *2019 Concluding Observations of the United Nations Committee on the Elimination of Racial Discrimination*, the *League of Nations, Covenant of the League of Nations*, the *Israeli-Palestinian Agreement on the West Bank and the Gaza Strip (Oslo III)* and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*.

28 Quite apart from interpreting the *Food and Drugs Act*, the *Food and Drug Regulations* and the *Consumer Packaging and Labelling Act*, many of the moving parties suggest that international law is part of the process of applying this legislation to the facts of this case. They say that this legislation must be applied in a way that implements the obligations and requirements found in international instruments.

29 This too is doomed to fail.

30 First, this misconceives this Court's task in the appeal. This Court will not be applying the legislative provisions to the facts of this case. Rather, it is only conducting reasonableness review of the Agency's decision to examine whether it is acceptable and defensible and supplies adequate justification under *Vavilov*. Under reasonableness review, it is for the administrative decision-maker, here the Agency, to apply the authentic meaning of the legislation to the facts of the case, not this Court: see *Association of Universities* and related authorities in paragraph 9(1) above.

31 As well, the moving parties are again using international law improperly in a manner that is doomed to fail. Once a court or administrative decision-maker arrives at a definitive legal interpretation of a provision — including, where proper, the content of international law — its job is to apply the provision's authentic meaning dispassionately and objectively to the facts of the case. To decide a case, a court or administrative decision-maker cannot reach out to other standards, such as those in international law, to supplement, modify or oust the authentic meaning of domestic law; international law is not a directly binding source of substantive law that supplements, modifies or ousts the authentic meaning of domestic law: see *Entertainment Software Association* at paras. 78-79 and the numerous authorities cited therein, including many from the Supreme Court. The meaning of domestic law is not to be amended by international law: see *Entertainment Software Association*, above at para. 85; see also *Németh c. Canada (Ministre de la Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 (S.C.C.) at para. 35; *R. v. Hape*,

2007 SCC 26, [2007] 2 S.C.R. 292 (S.C.C.) at para. 54; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 (S.C.C.) at para. 50; *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, 69 Imm. L.R. (4th) 297 (F.C.A.); *Gitxaala Nation* at para. 16.

32 Many of the moving parties' proposed submissions are doomed to fail for another reason. Many rely on evidence that is not before the Court. Some of the moving parties supply us with hyperlinks to find reports, opinions, news articles and informal articles to buttress their claims about the content of international law and the illegality of Israel's occupation of the West Bank. But as far as facts are concerned, judges can act only on evidence, matters of judicial notice or statutory deeming provisions: *Kabul Farms Inc. v. R.*, 2016 FCA 143, 13 Admin. L.R. (6th) 11 (F.C.A.) at para. 38; *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 483 N.R. 275 (F.C.A.) at paras. 79-80. They cannot act on the basis of personal assumptions: *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 (S.C.C.). As well, the normal rule in judicial reviews is that evidence is to be adduced before the administrative decision-maker, not in reviewing courts: *Association of Universities*, above. Finally, at no time do we supplement the proper evidentiary record with whatever we can scrounge from the Internet.

33 I do not doubt for a moment that international law, when properly used, can play an important role in the interpretation of legislation and the discernment of the authentic meaning of legislation: see, e.g., *Entertainment Software Association* at para. 92. But this is not one of those cases.

34 Some moving parties ask this Court to award a remedy that the applicant for judicial review does not seek. This is doomed to fail. The case remains that of the applicant for judicial review; others cannot commandeer it and ask for remedies the applicant does not seek: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 (F.C.A.) at paras. 55-56; *Teksavvy Solutions* at para. 11; *Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7*, 2019 FC 261 (F.C.) at para. 50. In any event, on these facts, the relief sought by some interveners — non-remittal to the Agency and a positive pronouncement on the merits by this Court — is not available: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (F.C.A.) and *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175 (F.C.A.) at paras. 51-56 and 84, as discussed in *Vavilov* at para. 142.

35 Some of the prospective interveners appear to want to argue that the labels on the wines violate the [section 2\(b\)](#) rights of some of those who read them. The panel hearing this appeal will not be considering that issue. Rather, it will be considering whether the Federal Court was correct in law in holding that the Agency should have considered issues under [section 2\(b\) of the Charter](#). That issue, a purely legal one, is already before the Court and the interveners have nothing to add that will help the Court determine it.

36 If this Court agrees with the Federal Court that the Agency should have considered [section 2\(b\) of the Charter](#), it will be for the Agency to consider and determine it, not this Court. Thus, this Court does not need to receive submissions on the content of [section 2\(b\) of the Charter](#).

(4) Will the moving parties' arguable submissions advance the determination of the panel determining the appeal?

37 I note that a number of the submissions the moving parties propose to make in this appeal are already made by the respondent, Dr. Kattenburg. Thus, their involvement is not necessary. The panel hearing the appeal will determine for itself the relevance and effect of the submissions of Dr. Kattenburg.

38 The panel hearing this appeal may have to consider whether the Agency's decision was reasonable in the sense that it engaged in an adequate investigation or inquiry in light of its governing legislation. The panel will identify what the Agency considered in making its decision. It will know that the Agency received and relied upon advice from Global Affairs Canada. Whether the Agency was mindful of and considered other advice is for the panel to decide. But the panel will know, as the Federal Court did (at para. 125), that the Israel/West Bank issue is a controversial one, with many differing views and deeply-felt opinions on all sides. To consider these points, it is not useful for the panel to receive the submissions of the moving parties.

39 In many respects, the submissions of the moving party, Professor Kontorovich, are different from those of most of the other interveners. They are closer to the mark. He proposes to make submissions on international trade understandings of country

of origin as well as Canada's international trade obligations. But the Court is not persuaded that these submissions are useful or necessary. To a large extent, the submissions of the respondent, Dr. Kattenburg, address these issues: see Dr. Kattenburg's memorandum of fact and law on the merits of the appeal at paras. 77-83. As well, this Court will have the reasons of the Agency before it. It will be able to assess whether the Agency should have considered these issues and, if not, whether its decision is unreasonable for not doing so. If it is unreasonable for that reason, it will be for the Agency to reinterpret the legislation and consider these issues on their merits.

40 This appeal turns on how the Agency applied domestic labelling requirements in legislation to specific imported food products, namely wine. Yet many of the moving parties seek to advocate for a specific foreign policy to be adopted by the Government of Canada. Rather than helping us in our task of conducting reasonableness review of the Agency's decision, they want us to make findings that further their causes.

41 We are only a court of law, not a policy forum, and still less a department of foreign affairs pronouncing on controversial international issues. We are suited to law, not free-standing policy or ideology. We are just lawyers who happen to hold a judicial commission: *Canada v. Cheema*, 2018 FCA 45, [2018] 4 F.C.R. 328 (F.C.A.) at para. 79 and *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 (F.C.A.) at para. 30. We are not a roving commission of inquiry able to investigate whatever we wish. We are not policymakers empowered by huge budgets to decide what is best for millions. Nor are we high priests who can arbitrate values, judge what is "just", "right" and "fair" and give benediction to our personal beliefs.

(5) Concluding observations concerning the intervention motions

42 I do not want to be too hard on the moving parties. I suspect that some of them have been lured to this appeal by torqued-up press reports distorting what the Federal Court decided. And once one group applies to intervene on a controversial issue like this, others feel they also have to apply.

43 But many of these intervention motions illustrate a growing, regrettable tendency in public law cases in Canada: the tendency of those seeking political and social reform to see courts as unfettered decision-making bodies of a political or ideological sort that can give them what they want. What accounts for this? Alas, I fear that in part some courts and some judges may be to blame.

44 Some courts admit into an appeal just about anyone who wants to offer any views, even political or ideological ones oblivious to the legal doctrine that binds the Court: see observations in *Teksavvy Solutions* at para. 11; *Ishaq* at paras. 25-27; *Atlas Tube* at paras. 4-12. And sometimes upwards of twenty or more special interest or political advocacy groups are allowed to pile in, giving appeals the appearance of a sprawling Parliamentary committee hearing or an open-line radio show, and often a one-sided one at that: *Gitxaala Nation* at paras. 21-24; *Zaric* at para. 12; *Teksavvy Solutions* at para. 11; *Atlas Tube* at para. 12. So much of their loose policy talk, untethered to proven facts and settled doctrine, can seep into reasons for judgment, leading to inaccuracies with real-life consequences: see examples provided in *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 (F.C.A.) at paras. 156-159, citing *Teksavvy Solutions* at para. 22, both referring to *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409 (S.C.C.) and *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, 433 D.L.R. (4th) 381 (S.C.C.).

45 As for judges, some give the impression that they decide cases based on their own personal preferences, politics and ideologies, whether they be liberal, conservative or whatever. Increasingly, they wander into the public square and give virtue signalling and populism a go. They write op-eds, deliver speeches and give interviews, extolling constitutional rights as absolutes that can never be outweighed by pressing public interest concerns and embracing people, groups and causes that line up with their personal view of what is "just", "right" and "fair". They do these things even though cases are under reserve and other cases are coming to them.

46 They should not act in this way. They should stay in their proper place. Their place is not in the public square amongst the partisans and the politicians, participating in the fray. Instead, their place is inside their courthouses, hearing each side, weighing and assessing the admissible evidence and discerning and applying the relevant legal doctrine, all in a rational, open-minded and neutral way, both in appearance and actual fact.

B. The motion by Psagot Winery Ltd. to be added as a party respondent

47 Psagot Winery has moved to intervene or to be added as a party respondent. It should be a party respondent. But, for the following reasons, its participation must be limited.

48 Psagot Winery produced one of the two wines at issue before the Agency but was never invited to participate in its proceedings. It says that the Agency should have brought the issue to its attention and invited it to participate. It says it first learned of the Agency's proceedings after the media attention surrounding the Federal Court's decision.

49 The proper way for Psagot Winery to attack the Agency's alleged omission was to bring its own application for judicial review. It did not and the time to do so has expired. Through this motion, it cannot bring a disguised judicial review.

50 However, there is another dimension to Psagot Winery's motion. It can be taken to be arguing that the Federal Court should have notified it and invited it to participate in Dr. Kattenburg's judicial review. This is an arguable position and supports Psagot Winery's addition to these proceedings as a party respondent. It is entitled to file evidence to support this procedural fairness position in the Federal Court and to file a short memorandum on that issue alone: *Mediatube Corp. v. Bell Canada*, 2018 FCA 127, 156 C.P.R. (4th) 289 (F.C.A.) at para. 58 and authorities cited therein. The other parties should be given an opportunity to respond and, if necessary, cross-examine on that evidence and file responding submissions.

C. Another procedural issue

51 The appellant filed its memorandum of fact and law on the merits of the appeal, including submissions concerning the standard of review, before the Supreme Court's decision in *Vavilov*. The respondent, Dr. Kattenburg, filed his memorandum after *Vavilov*. By direction, the Court asked the parties whether the appellant should be given the opportunity to make submissions on *Vavilov*. The parties agreed that the appellant should be given that opportunity and Dr. Kattenburg should be permitted to respond. These parties should also have the opportunity to respond to Psagot Winery's evidence and memorandum.

D. Disposition

52 Therefore, for the foregoing reasons, the motions for intervention will be dismissed. Psagot Winery's motion to be added as a party respondent will be granted. The style of cause will be amended to reflect this and will appear as it does on these reasons. An order will issue giving effect to all of these things and related procedural matters.

53 The Attorney General of Canada was largely successful on the motions. But it did not seek costs and so none will be awarded.

Motions for intervention dismissed, and motion to be added as party respondent granted.

Tab 8

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Attorney General of Quebec v. Center for Gender Advocacy](#) | 2021 QCCA 1300, 2021 CarswellQue 13651, EYB 2021-404840 | (C.A. Que, Aug 24, 2021)



Original

2021 CAF 13, 2021 FCA 13
Federal Court of Appeal

Canada (Citizenship and Immigration) v. Canadian Council for Refugees

2021 CarswellNat 113, 2021 CarswellNat 511, 2021 CAF 13,
2021 FCA 13, 329 A.C.W.S. (3d) 518, 481 C.R.R. (2d) 234

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
(Appellants) and THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY
INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES,
ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY
HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER
HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, REDA
YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA (Respondents)**

David Stratas J.A.

Judgment: January 27, 2021

Docket: A-204-20

Counsel: Martin Anderson (written), David Knapp (written), Lucan Gregory (written), Laura Upans (written), for Appellants
Andrew Brouwer (written), for Respondents

Adriel Weaver (written), Jessica Orkin (written), for Proposed Intervener, British Columbia Civil Liberties Association
Lorne Waldman (written), Tara McElroy (written), for Proposed Interveners, Canadian Lawyers, for International Human Rights
and Canadian Centre, for Victims of Torture

Lobat Sadrehashemi (written), Cheryl Milne (written), for Proposed Interveners, David Asper Centre, for Constitutional Rights,
Women's Legal Education and Action Fund Inc., West Coast Legal Education and Action Fund Inc.

Ewa Krajewska (written), Daniel Girlando (written), Teagan Markin (written), Deborah Rachlis (written), for Proposed
Intervener, Health Coalition

Sameha Omer (written), Naseem Mithoowani (written), for Proposed Intervener, National Council of Canadian Muslims

Frances Mahon (written), Kay Scorer (written), Michael Battista (written), Adrienne Smith (written), for Proposed Interveners,
Rainbow Refugee Society and Rainbow Railroad

Headnote

Civil practice and procedure --- Parties — Interveners — General principles

On eve of hearing appeal, thirteen parties brought six sets of motions to intervene — Motions dismissed — Six proposed
interveners' submissions, if allowed, would support respondents, three of which were powerful and experienced interest litigants
— Admitting all six into appeal would create imbalance: seven separately represented groups on one side, and only one on
other, which could not be countenanced as court must ensure that appeal is fair and is seen to be fair — Motions were not
timely and lateness was not explained — Proposed interveners' submissions on issues would be duplicative, did not add insights
or added dimensions to existing issues, and in some cases attempted to improperly introduce new issues — While proposed
interveners were high quality organizations and their causes were important and worthy of attention and consideration, court

was not persuaded that they could enter this appeal at this late stage and that their participation would be useful to court's determination of real issues genuinely in play.

Table of Authorities

Cases considered by *David Stratas J.A.*:

Amnesty International Canada v. Canada (Minister of National Defence) (2008), 2008 FCA 257, 2008 CarswellNat 4367, 2008 CAF 257, 2008 CarswellNat 5269, (sub nom. *Amnesty International Canada v. Canadian Armed Forces (Chief, Defence Staff)*) 383 N.R. 275 (F.C.A.) — referred to

Atlas Tube Canada ULC v. Canada (Minister of National Revenue) (2019), 2019 FCA 120, 2019 CarswellNat 1691, 2019 D.T.C. 5062, 2019 CAF 120, 2019 CarswellNat 12967 (F.C.A.) — considered

C.U.P.E. v. Canadian Airlines International Ltd. (2000), 2000 CarswellNat 282, (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*) 37 C.H.R.R. D/325, 2000 FCA 233, (sub nom. *Canadian Airlines International Ltd. v. Canada (Human Rights Commission)*) [2010] 1 F.C.R. 226, 2000 CarswellNat 4395 (Fed. C.A.) — referred to

Canada (Attorney General) v. Canadian Doctors for Refugee Care (2015), 2015 FCA 34, 2015 CarswellNat 246, (sub nom. *Canadian Doctors for Refugee Care v. Canada (Attorney General)*) 470 N.R. 167, 2015 CAF 34, 2015 CarswellNat 4818 (F.C.A.) — considered

Canada (Attorney General) v. Kattenburg (2020), 2020 FCA 164, 2020 CarswellNat 4288 (F.C.A.) — referred to
Canada (Attorney General) v. Pictou Landing Band Council (2014), 2014 FCA 21, 2014 CarswellNat 149, (sub nom. *Pictou Landing Band Council v. Canada (Attorney General)*) 456 N.R. 365, 68 Admin. L.R. (5th) 228, 2014 CAF 21, 2014 CarswellNat 8483, (sub nom. *Pictou Landing First Nation v. Canada (Attorney General)*) [2015] 2 F.C.R. 253 (F.C.A.) — considered

Canada (Attorney General) v. Utah (2020), 2020 FCA 224, 2020 CarswellNat 5639 (F.C.A.) — considered

Canada (Citizenship and Immigration) v. Canadian Council for Refugees (2020), 2020 FCA 181, 2020 CarswellNat 4507, 2020 CAF 181, 2020 CarswellNat 5176 (F.C.A.) — referred to

Canada (Minister of Citizenship and Immigration) v. Ishaq (2015), 2015 FCA 151, 2015 CarswellNat 2385, (sub nom. *Ishaq v. Canada (Minister of Citizenship and Immigration)*) 474 N.R. 268, 37 Imm. L.R. (4th) 14, 2015 CAF 151, 2015 CarswellNat 9225, (sub nom. *Ishaq v. Canada (Citizenship and Immigration)*) [2016] 1 F.C.R. 686 (F.C.A.) — referred to
Canadian Council for Refugees v. Canada (Immigration, Refugees and Citizenship) (2020), 2020 FC 770, 2020 CarswellNat 2684, 2020 CF 770, 2020 CarswellNat 3252, 448 D.L.R. (4th) 132, 75 Imm. L.R. (4th) 246 (F.C.) — referred to
Canadian Council for Refugees v. R. (2008), 2008 FCA 229, 2008 CarswellNat 1995, 2008 CAF 229, 2008 CarswellNat 2197, 74 Admin. L.R. (4th) 79, 73 Imm. L.R. (3d) 159, (sub nom. *Canadian Council for Refugees v. Canada*) 385 N.R. 1, (sub nom. *Canadian Council for Refugees v. Canada*) [2009] 3 F.C.R. 136 (F.C.A.) — referred to

Cusson v. Quan (2009), 2009 SCC 62, 2009 CarswellOnt 7958, 2009 CarswellOnt 7959, 70 C.C.L.T. (3d) 1, 397 N.R. 94, 314 D.L.R. (4th) 55, 258 O.A.C. 378, (sub nom. *Quan v. Cusson*) [2009] 3 S.C.R. 712, 102 O.R. (3d) 480 (note) (S.C.C.) — referred to

Defence Construction Canada v. Canada (Office of the Information Commissioner) (2017), 2017 FCA 133, 2017 CarswellNat 2792, 384 C.R.R. (2d) 330, 2017 CAF 133, 2017 CarswellNat 8737, [2018] 2 F.C.R. 269 (F.C.A.) — considered

Gitxaala Nation v. R. (2015), 2015 FCA 73, 2015 CarswellNat 522, 2015 CAF 73, 2015 CarswellNat 4831 (F.C.A.) — referred to

Gosselin c. Québec (Procureur général) (2005), 2005 SCC 15, 2005 CarswellQue 763, 2005 CarswellQue 764, (sub nom. *Gosselin v. Quebec (Attorney General)*) 250 D.L.R. (4th) 483, 331 N.R. 337, (sub nom. *Gosselin (Tuteur de) c. Québec (Procureur général)*) [2005] 1 S.C.R. 238, 2005 CSC 15, 130 C.R.R. (2d) 26 (S.C.C.) — considered

Ignace v. Canada (Attorney General) (2019), 2019 FCA 266, 2019 CarswellNat 5657 (F.C.A.) — referred to

JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue (2013), 2013 FCA 250, 2013 CarswellNat 3822, 450 N.R. 91, (sub nom. *MNR v. JP Morgan Asset Management (Canada) Inc.*) 2014 D.T.C. 5001 (Eng.), [2014] 2 C.T.C. 99, 62 Admin. L.R. (5th) 76, 367 D.L.R. (4th) 525, 2013 CAF 250, 2013 CarswellNat 6109, (sub nom. *JP Morgan Asset Management (Canada) v. Canada (National Revenue)*) [2014] 2 F.C.R. 557 (F.C.A.) — referred to

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd. (2002), 2002 SCC 19, 2002 CarswellAlta 186, 2002 CarswellAlta 187, 20 B.L.R. (3d) 1, 209 D.L.R. (4th) 318, [2002] 5 W.W.R. 193, 98 Alta. L.R. (3d) 1, 283 N.R. 233, 299 A.R. 201, 266 W.A.C. 201, 50 R.P.R. (3d) 212, (sub nom. *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*) [2002] 1 S.C.R. 678, 2002 CSC 19 (S.C.C.) — referred to

Québec (Procureure générale) c. 9147-0732 Québec inc. (2020), 2020 SCC 32, 2020 CSC 32, 2020 CarswellQue 10837, 2020 CarswellQue 10838, 451 D.L.R. (4th) 367, 67 C.R. (7th) 225 (S.C.C.) — referred to

Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7 (2019), 2019 FC 261, 2019 CarswellNat 594, 2019 CF 261, 2019 CarswellNat 954, 437 C.R.R. (2d) 85 (F.C.) — referred to

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (1989), 103 N.R. 391, [1990] 1 F.C. 90, 45 C.R.R. 382, 1989 CarswellNat 600, 1989 CarswellNat 600F, 31 F.T.R. 239 (note) (Fed. C.A.) — considered

Sport Maska Inc. v. Bauer Hockey Corp. (2016), 2016 FCA 44, 2016 CarswellNat 265, (sub nom. *Bauer Hockey Corp. v. Easton Sports Canada Inc.*) 480 N.R. 387, 140 C.P.R. (4th) 11, [2016] 4 F.C.R. 3, 2016 CAF 44, 2016 CarswellNat 7138 (F.C.A.) — followed

Steel v. Canada (Attorney General) (2011), 2011 FCA 153, 2011 CarswellNat 1472, 2011 CAF 153, 2011 CarswellNat 2622, 2011 C.L.L.C. 240-005, 418 N.R. 327, 94 C.C.E.L. (3d) 86, [2013] 1 F.C.R. 143 (F.C.A.) — considered

Teksavvy Solutions Inc. v. Bell Media Inc. (2020), 2020 FCA 108, 2020 CarswellNat 2184, 174 C.P.R. (4th) 85, 2020 CAF 108, 2020 CarswellNat 4080 (F.C.A.) — referred to

Tsleil-Waututh Nation v. Canada (Attorney General) (2017), 2017 FCA 174, 2017 CarswellNat 4093, 11 C.E.L.R. (4th) 188, 414 D.L.R. (4th) 373 (F.C.A.) — considered

UHA Research Society v. Canada (Attorney General) (2014), 2014 FCA 134, 2014 CarswellNat 1888, 2014 CAF 134, 2014 CarswellNat 3170 (F.C.A.) — referred to

ViiV Healthcare ULC v. Teva Canada Ltd. (2015), 2015 FCA 33, 2015 CAF 33, 2015 CarswellNat 1965, 2015 CarswellNat 1966, 474 N.R. 199 (F.C.A.) — considered

Zaric v. Canada (Minister of Public Safety and Emergency Preparedness) (2016), 2016 FCA 36, 2016 CarswellNat 283, 2016 CAF 36, 2016 CarswellNat 677 (F.C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 15 — considered

Rules considered:

Federal Courts Rules, SOR/98-106

R. 3 — considered

R. 109 — considered

R. 109(2)(b) — considered

David Stratas J.A.:

1 On the eve of the hearing of this appeal, thirteen parties have brought six sets of motions to intervene:

- British Columbia Civil Liberties Association;
- Canadian Lawyers for International Human Rights and the Canadian Centre for Victims of Torture;
- David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund;

- HIV & AIDS Legal Clinic Ontario, HIV Legal Network, the Committee for Accessible AIDS Treatment and Health Justice Program (together, the Health Coalition);
- National Council of Canadian Muslims; and
- Rainbow Refugee Society and Rainbow Railroad.

For the reasons that follow, I dismiss the motions.

A. The test for intervention

2 Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 governs interventions in the Federal Court system. Two cases offered a test to determine intervention motions under Rule 109: *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 90, 103 N.R. 391 (Fed. C.A.) and *Canada (Attorney General) v. Pictou Landing Band Council*, 2014 FCA 21, [2015] 2 F.C.R. 253 (F.C.A.).

3 This Court discussed the interaction of these two cases and the test in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, [2016] 4 F.C.R. 3 (F.C.A.). It observed that *Pictou Landing* and *Rothmans, Benson & Hedges* express the test for intervention differently. But, in its view, they are not different in substance.

4 That finding binds the Court. However, it has been difficult for some parties to implement because the phrasing of the test is different in each. So how should parties express the test?

5 In responding to the intervention motions in this case, the appellants have attempted to come up with the right wording. They distill the combination of the wording of Rule 109, *Pictou Landing* and *Rothmans, Benson & Hedges* to three requirements. They have done quite well. All that is missing is the concept in Rule 109(2)(b) of the usefulness of the proposed intervention. It must be remembered that the legislative provision here, Rule 109, governs and any judge-made test in this area is just an explanation of the meaning of that rule: *Canada (Attorney General) v. Utah*, 2020 FCA 224 (F.C.A.) at paras. 26-28. Further, the test needs to incorporate this Court's holding that usefulness under Rule 109 resolves itself into four questions: *Canada (Attorney General) v. Kattenburg*, 2020 FCA 164 (F.C.A.).

6 Thus, the current test for intervention under Rule 109 is as follows:

I. The proposed intervener will make different and useful submissions, insights and perspectives that will further the Court's determination of the legal issues raised by the parties to the proceeding, not new issues. To determine usefulness, four questions need to be asked:

- (a) What issues have the parties raised?
- (b) What does the proposed intervener intend to submit concerning those issues?
- (c) Are the proposed intervener's submissions doomed to fail?
- (d) Will the proposed intervener's arguable submissions assist the determination of the actual, real issues in the proceeding?

II. The proposed intervener must have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court;

III. It is in the interests of justice that intervention be permitted.

7 According to *Sport Maska*, this test must be applied in a "flexible" way. I take this to mean that the relative weight to be accorded to these requirements and the rigor with which they are to be applied can vary from case to case. *Sport Maska*'s mention of "flexibility" is not a licence for an anything-goes approach. A judge acting judicially is constrained by the legislative text of Rule 109 and the elements of the tests in *Pictou Landing* and *Rothmans, Benson & Hedges*, as combined in *Sport Maska*.

8 *Sport Maska* does not say or even imply that a judge can rely on solely a subjective view of what is "in the interests of justice" — something that varies from judge to judge. Consistent with the rule of law, intervention motions must be determined by applying a reasonably stable, uniform legal standard, logically and rationally. Further, it must be remembered that many interveners are dedicated to advance causes — many political and some controversial. A judge that applies subjective views rather than law can create an apprehension of sympathy for the intervener's cause or a preference for a result in the case, undermining the appearance of impartiality essential to the maintenance of public confidence in the judiciary.

9 Far from being a subjective, impressionistic concept, "the interests of justice" have been tied down in the case law by interpreting Rule 109 and its text, context and purpose. In doing this, the Court has developed a number of considerations that shed light on the meaning of "the interests of justice":

- Is the intervention consistent with the imperatives in Rule 3? For example, will the orderly progression or the schedule for the proceedings be unduly disrupted?

- Has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court?

- Has the proposed intervener been involved in earlier proceedings in the matter? For example, if the Federal Court acceptably rules that a particular party should be admitted as an intervener, that ruling will be persuasive in this Court.

- Will the addition of multiple interveners create the reality or an appearance of an "inequality of arms" or imbalance on one side?

The list of considerations is not closed.

10 In substance, this test or close variants of it have been applied for some time now. Experience has shown that it, like the Rule it interprets, is balanced: although the test inquires into many things, some meet it, indeed sometimes quite easily.

11 For example, recently by way of speaking order, I admitted a number of environmental advocacy groups into a case on statutory interpretation. Their proposed intervention was focused, respectful of the Court's schedule, relevant to the statutory interpretation issues already before the Court, pursued the proper way to interpret statutory provisions, and added a different, useful dimension to the Court's statutory interpretation task.

B. Applying the test for intervention

12 None of the six intervention motions before the Court meet the test. A number of considerations drawn from the test, alone or in combination, lead the Court to dismiss them.

(1) Equality of arms and fairness

13 This is one recognized consideration under the rubric of "the interests of justice".

14 The six proposed interveners' submissions, if allowed, will support the respondents, three of which are powerful and experienced public interest litigants. Admitting all six into this appeal would create an imbalance: seven separately represented groups on one side and only one on the other. This cannot be countenanced: in deciding these intervention motions, the Court has to ensure that the appeal is fair and is seen to be fair.

15 Intensifying the concern about fairness is the fact that the Court decides who intervenes. If the Court allows piles of interveners on one side of the debate, it creates the appearance that it wants a gang-up against one side: *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 (F.C.A.) at para. 11. And the concern is beyond just appearance. If "one side...[is] so numerous or dominant that its voices drown out the other side and prevent it from expressing itself adequately", fairness is called into question: *Gitxaala Nation v. R.*, 2015 FCA 73 (F.C.A.) at para. 23.

16 Thus, "equality of arms" before the Court matters when considering the interests of justice requirement: *Gitxaala Nation* at paras. 21-24; *Atlas Tube Canada ULC v. Canada (Minister of National Revenue)*, 2019 FCA 120, 2019 D.T.C. 5062 (F.C.A.) at para. 12; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 (F.C.A.).

17 This Court put it this way in *Zaric v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 36 (F.C.A.) at para. 12:

For example, in *Gitxaala Nation v. Canada*, 2015 FCA 73 at paragraphs 21-24, under the rubric of fairness (or what is "just" within the meaning of Rule 3), this Court paid attention to the principle of "equality of arms". It noted that the appearance of fairness can be harmed by allowing too many interveners on one side of the case. A court that allows several interveners supporting one side of the case — especially those that have partisan leanings and advocate political positions — with none or very few on the other side, gives the appearance of a court-sanctioned gang-up against one side, an appearance that can be enhanced by the ultimate result and reasoning in the case. This is especially harmful in public law cases that should be decided on the basis of doctrine, not subjective impressions, aspirations, personal preconceptions, ideological visions, or freestanding policy opinions: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at paragraphs 25-26.

18 In this case, even if all six proposed interveners meet the test for intervention, the Court would have to pick and choose among the six and only allow a couple at most. Were it necessary to do so, it would base this on who best meets the test for intervention and, overall, who is most likely to assist the Court in its determination of the appeal. Another option might have been to require the proposed interveners to combine into a small number of groups and collaborate: *Teksavvy* at para. 18.

(2) Timeliness

19 This is another recognized consideration under the rubric of "the interests of justice". The appellants raised it.

20 All of the intervention motions were filed between December 3, 2020 and December 18, 2020. No one sought to expedite them. The last one was perfected January 12, 2020. The Registry has worked at a breakneck pace to prepare them for the Court's consideration. Just now, they have come before the Court. The hearing of the appeal has been set for February 23-24, 2021 and it will not be adjourned, especially since this appeal has been expedited and the Federal Court's judgment has been stayed: *UHA Research Society v. Canada (Attorney General)*, 2014 FCA 134 (F.C.A.). Between now and then, any interveners admitted into this appeal would have to file their memoranda of fact and law, the appellants would need to file a response, and the Court would be severely challenged to complete its already daunting preparations.

21 Late interventions can disrupt the orderly progress of a matter: *ViiV Healthcare ULC v. Teva Canada Ltd.*, 2015 FCA 33, 474 N.R. 199 (F.C.A.) at para. 11. They can also cause prejudice: *Pictou Landing* at paras. 10, 32. As a result, intervention motions should be brought early: *Zaric* at para. 23; *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 (F.C.A.) at paras. 27-29; *Ignace v. Canada (Attorney General)*, 2019 FCA 266 (F.C.A.) at para. 8. Bringing a motion early also shows that the proposed intervener monitors the area closely, has a keen interest in the area and is dedicated to it. In *Canadian Doctors*, the Court put it this way (at para. 28):

[T]hose who have a valuable perspective to offer to an appeal court jump off the starting blocks when they hear the starter's pistol. Keen for their important viewpoint to be heard, soon after the notice of appeal is filed, they move quickly.

To the same effect, this Court has observed that "[t]hose really concerned about a proceeding, who have much to say about it, and who are concerned that no one else will say it, proceed quickly": *ViiV Healthcare ULC* at para. 11.

22 Intervention is a privilege bestowed to the skilled and committed who will truly assist the determination of a real-life, concrete proceeding that is up and running. Interveners have no right to disrupt the interests of those with a direct stake in the proceeding who have lived it from the beginning, often at great cost. No intervener is so grand and important that the Court will admit it late into the proceedings, whatever may be the prejudice to others or to itself.

23 There is no reason why these intervention motions could not have been brought earlier. The issues in this case have swirled about for many years: *Canadian Council for Refugees v. R.*, 2008 FCA 229, [2009] 3 F.C.R. 136 (F.C.A.). Ordinary members of the public — let alone dedicated observers of this area of law — became aware of the proceedings in the Federal Court long ago. The Federal Court's judgment (2020 FC 770, 448 D.L.R. (4th) 132 (F.C.)) received enormous publicity, as did the appellants' intention to appeal. Anyone could have obtained the appellants' grounds of appeal in August 2020 and the respondents' grounds of cross-appeal in September 2020, would have noticed the order expediting the appeal in September 2020, and would have known the arguments on the merits of the appeal and the cross-appeal from the earlier submissions before the Federal Court and from the submissions on the stay motion in this Court. In October 2020, this Court stayed the judgment of the Federal Court partly on the basis that prejudice would be minimized by expediting the appeal: 2020 FCA 181 (F.C.A.). All issues were known and on the table. Strangers seeking admission to these fast-moving proceedings could have acted quickly — and, given the impending hearing date, had to act quickly.

24 In these circumstances, it is baffling why the proposed interveners did not move until December 2020, indeed in some cases well into that month. Yet, all of them fail to explain their lateness. In fact, some deny any lateness at all. Others just ignore the issue altogether.

25 Where an intervention motion is late — and valid reasons sometimes exist — proposed interveners should candidly fess up, explain themselves, emphasize the importance of and critical need for their participation, and propose measures to minimize any prejudice: *Tsleil-Waututh Nation* at paras. 15 and 32. Here, however, owing to the degree of lateness, the Court doubts it would have accepted any explanation.

(3) Usefulness

26 A proposed intervention must be useful. One critical element of usefulness is the addressing of the real, actual issues in the case, not new issues. Many of these proposed interveners intend to address new issues.

27 At first instance, the issues in a proceeding are set by the originating document such as a statement of claim or notice of application, as explained by the arguments in the parties' memoranda of fact and law: *Kattenburg* at para. 9. A proposed intervener, has no standing to amend that originating document, add new issues or reinvent the theory of the case. It is the parties' case, the case has been defined by them, and their case cannot be commandeered by others: *Kattenburg* at para. 34. Still less should it become a reference case on general issues of law not pleaded by the parties.

28 The issues before an appellate court are found primarily in the notice of appeal, as explained by the arguments in the parties' memoranda of fact and law. A proposed intervener has no standing to amend the notice of appeal and add new issues.

29 Some guidance as to the issues in play in the appellate court can also be found in the originating document that defined the issues in the first-instance court. After all, the appellate court might have to grant judgment in the action or application that was brought in the first-instance court. And whether a party actually pursued an issue that was pleaded in the first-instance court is also relevant to the assessment whether the issue is in play in the appellate court.

30 Normally, parties cannot raise new issues in the appellate court: *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.); *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 (S.C.C.). The same is true for interveners: *Canadian Doctors* at para. 19; *Canada (Minister of Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686 (F.C.A.) at para. 17; *Teksavvy Solutions* at para. 11; *Kattenburg* at para. 9. As strangers to a proceeding they have not brought, they have no right to change it. If they wish, they can seek to bring their own proceeding as a public interest litigant to prosecute the issues they want.

31 This Court has spoken about proposed interveners who seek to add new issues in this way:

In this Court, interveners are guests at a table already set with the food already out on the table. Intervenors can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.

To allow them to do more is to alter the proceedings that those directly affected — the applicants and the respondents — have cast and litigated under for months, with every potential for procedural and substantive unfairness.

(*Tsleil-Waututh Nation* at paras. 55-56; see also *Reference re subsection 18.3(1) of the Federal Courts Act, R.S.C. 1985, c. F-7*, 2019 FC 261, 437 C.R.R. (2d) 85 (F.C.) at para. 50.)

32 In this area, the Court must be alert. Earnest and driven by their passion for their cause, some moving to intervene try to add new issues to a proceeding, sometimes deliberately, sometimes not. Thus, in considering a motion to intervene, the Court must gain a "realistic appreciation" of the "essential character" and "real essence" of both the issues in the proceeding and the issues the proposed intervener intends to raise: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at paras. 49-50.

33 In this case, the claim based on section 7 of the Charter in the notice of application in the Federal Court and the notice of appeal in this Court is precise and clear. Before the Court is a strong team of experienced and skilled counsel representing the respondents on the section 7 issues. The Court is satisfied that the respondents have truly covered the field, raising in a high-quality way all the relevant matters, with thorough and admirable reference to this evidentiary record. Were it otherwise or had the interveners moved to intervene before the Court was sure the issues were well-handled by both sides, this would be a factor in favour of allowing the interventions: *Zaric* at para. 18; *Ishaq* at para. 37. Therefore, further section 7 submissions, to the extent they are proper, are neither useful nor necessary to the Court.

34 Four intervener groups raise section 15 of the Charter: David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund; the Health Coalition; National Council of Canadian Muslims; Rainbow Refugee Society and Rainbow Railroad.

35 Here, once again, the Court is satisfied that the respondents have truly covered the field with thorough and admirable reference to the evidentiary record. The proposed interveners' submissions on these issues would be duplicative. They do not add insights or added dimensions to the existing issues.

36 To some extent, the proposed interveners raise new section 7 arguments. For example, the British Columbia Civil Liberties Association submits that the principles of fundamental justice in section 7 must be interpreted in a way that incorporates various non-binding international instruments or incorporates the language of other sections of the Charter. These are new issues that were not raised at the Federal Court or in the originating documents before this Court. The submission fails to cite the lead authority on the interpretation of Charter provisions and on the relevance of non-binding international instruments to that issue and, thus, it is not sufficiently useful: *Québec (Procureure générale) c. 9147-0732 Québec inc.*, 2020 SCC 32 (S.C.C.).

37 The section 15 claim made in the Federal Court was based only on discrimination against women and children, not other groups. Some of the proposed interveners raise other grounds of discrimination not previously argued, such as religion, disability and sexual orientation. These are new issues. While one can find some evidence relevant to the treatment of these groups in the record, the issue of discrimination against these groups was not briefed or argued at the Federal Court, has not been argued by any of the parties, and, for practical purposes, would be a new issue in this Court. It is open to these moving parties to seek standing as public interest litigants to bring their own proceeding on these bases.

38 Some of the proposed interveners, aware of the jurisprudence prohibiting the introduction of new issues, have tried to clothe their section 15 arguments as section 7 arguments, using the concept of intersectionality and phrases such as "viewing the section 7 issues through a section 15 lens", approaches to Charter interpretation and application not raised by the parties

to the case. Here, the essential character and real essence of what they are doing is to introduce [section 15](#) grounds into the case that are new.

39 David Asper Centre for Constitutional Rights, Women's Legal Education and Action Fund Inc. and West Coast Legal Education and Action Fund do not address the actual [section 15](#) claim raised in this case, as they admit at paragraph 11 of their reply. They propose to submit that courts of first instance must always decide [section 15](#) matters when they are raised before them. This goes beyond the respondents' submission that the Federal Court had a discretion to decide the [section 15](#) issue but should have exercised it. Thus, it is new. Also their interest in this issue is solely jurisprudential and thus, on some authorities, is insufficient to justify intervention: *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FCA 257, 383 N.R. 275 (F.C.A.) at paras. 6-7; *C.U.P.E. v. Canadian Airlines International Ltd.*, 2000 FCA 233, [2010] 1 F.C.R. 226 (Fed. C.A.) at paras. 11-12.

40 As well, this submission is doomed to fail and cannot be entertained: *Kattenburg* at para. 9. Implicit in it is that issues under [section 15 of the Charter](#) stand above all other issues and so, unlike other issues, when raised, the Court must deal with them. The Supreme Court has unanimously rejected this: *Gosselin c. Québec (Procureur général)*, 2005 SCC 15, [2005] 1 S.C.R. 238 (S.C.C.). [Section 15](#) does not enjoy "superior status in a 'hierarchy' of rights": *Gosselin* at para. 26. As well, this submission runs counter to the well-established proposition that courts have a discretion whether or not to deal with issues unnecessary to the outcome of the case: see, e.g., *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2013] 1 F.C.R. 143 (F.C.A.) at paras. 65-66 and 68; *Defence Construction Canada v. Canada (Office of the Information Commissioner)*, 2017 FCA 133, [2018] 2 F.C.R. 269 (F.C.A.) at paras. 47-52.

C. Conclusion and disposition

41 The proposed interveners are high quality organizations. Their causes are important and worthy of attention and consideration. In the right case with the right kind of intervention, they can contribute much.

42 However, the Court is not persuaded that they can enter this appeal at this late stage and that their participation would be useful to the Court's determination of the real issues genuinely in play.

43 Intervention is not the only way groups such as these can participate. They are dedicated to their causes and remain free to offer their views and insights and other assistance to counsel for the respondents.

44 Therefore, I will dismiss the motions.

Motions dismissed.

Tab 9

1990 CarswellOnt 1019
Supreme Court of Canada

McKinney v. University of Guelph

1990 CarswellOnt 1019F, 1990 CarswellOnt 1019, [1990] 3 S.C.R. 229, [1990] S.C.J. No. 122, 118 N.R. 1, 13 C.H.R.R. D/171, 24 A.C.W.S. (3d) 479, 2 O.R. (3d) 319 (note), 2 C.R.R. (2d) 1, 45 O.A.C. 1, 76 D.L.R. (4th) 545, 91 C.L.L.C. 17,004, J.E. 91-12, EYB 1990-67618

David Walter McKinney, Jr., Appellant v. Board of Governors of the University of Guelph and the Attorney General for Ontario, Respondents

Horacio Roque-Nunez, Appellant v. Board of Governors of Laurentian University and the Attorney General for Ontario, Respondents

Syed Ziauddin, Appellant v. Board of Governors of Laurentian University and the Attorney General for Ontario, Respondents

John A. Buttrick, Appellant v. Board of Governors of York University and the Attorney General for Ontario, Respondents

Bernard Blishen, Appellant v. Board of Governors of York University and the Attorney General for Ontario, Respondents

Tillo E. Kuhn, Appellant v. Board of Governors of York University and the Attorney General for Ontario, Respondents

Hollis Rinehart, on his own behalf and on behalf of all other members of the York University Faculty Association, Appellants v. Board of Governors of York University and the Attorney General for Ontario, Respondents

Ritvars Bregzis, Appellant v. Governing Council of the University of Toronto and the Attorney General for Ontario, Respondents

Norman Zacour, Appellant v. Governing Council of the University of Toronto and the Attorney General for Ontario, Respondents and The Attorney General of Canada, the Attorney General of Nova Scotia and the Attorney General for Saskatchewan, Interveners

Dickson C.J. * and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

Judgment: May 16, 1989

Judgment: May 17, 1989

Judgment: December 6, 1990

Docket: 20747

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *Jeffrey Sack, Q.C., James K. McDonald, Steven M. Barrett and Ethan Poskanzer*, for the appellants.
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Mary Eberts and Michael A. Penny, for the respondent Board of Governors of Laurentian University.
George W. Adams and Richard J. Charney, for the respondent Board of Governors of York University.
John C. Murray and S. John Page, for the respondent Governing Council of the University of Toronto.
Janet E. Minor and Robert E. Charney, for the respondent the Attorney General for Ontario.

Duff Friesen, Q.C., and *Virginia McRae Lajeunesse*, for the intervener the Attorney General of Canada.
Alison W. Scott, for the intervener the Attorney General of Nova Scotia.
Robert G. Richards, for the intervener the Attorney General for Saskatchewan.

The judgment of Dickson C.J. and La Forest and Gonthier JJ. was delivered by La Forest J.:

1 This appeal is concerned with the application of [s. 15\(1\) of the Canadian Charter of Rights and Freedoms](#) to mandatory retirement in universities. It raises a number of broad issues, namely,

- (a) whether [s. 15 of the Charter](#) applies to universities;
- (b) assuming it does, whether the universities' policies of mandatory retirement at age 65 violate [s. 15\(1\) of the Charter](#);
- (c) whether the limitation of the prohibition against discrimination in employment on grounds of age in [s. 9\(a\) of the Human Rights Code, 1981, S.O. 1981, c. 53](#), to persons between the ages of 18 and 65 violates [s. 15\(1\) of the Charter](#); and
- (d) whether, if such violation exists, it is justifiable under [s. 1 of the Charter](#).

2 The appeal was argued at the same time as *Harrison v. University of British Columbia*[1990] 3 S.C.R. 450; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, and *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, all of which are issued concurrently. The first of these also deals with retirement from universities, while the second is concerned with retirement from association with a research hospital and the third from employment in a community college. The cases raise many of the same issues, most of which will be discussed in the present appeal.

Background

Facts

3 The appellants, eight professors and a librarian at the respondent universities, applied for declarations that the policies of the universities, which require the appellants to retire at age 65, violate [s. 15 of the Charter](#), and that [s. 9\(a\) of the Human Rights Code, 1981](#), by not treating persons who attain the age of 65 equally with others, also violates [s. 15](#). The appellants also ask for certain consequential relief. The appellants' competence has never been seriously questioned; they are highly qualified academics. The sole ground for their retirement is that they have reached the mandatory age of 65.

4 The respondent universities have established mandatory retirement policies in somewhat different ways. At the University of Toronto, it has been effected by a formal resolution of the Board, and the university's pension plan provides for retirement at age 65 and is funded on that basis; as well, the collective agreement between the university and the faculty association refers to retirement at age 65 as basic policy and stipulates that there will be no change in this policy during the term of the agreement. At York University, both the university plan and the collective agreement with the faculty association provide for retirement at age 65. At the University of Guelph, mandatory retirement is based on policy and practice and a pension plan that provides for retirement at age 65. At Laurentian University, retirement policy is established by the general by-laws, the collective agreement between the university and the faculty, and the retirement plan for the staff.

5 There can be little question that, while the impact will vary from individual to individual, mandatory retirement results in serious detriment to the appellants' working lives, including loss of protection for job security and conditions, economic loss, loss of a working environment and facilities necessary to support their work, diminished opportunities for grants, and generally seriously diminished participation in activities both within and outside the university.

6 Several of the appellants filed complaints with the Ontario Human Rights Commission, but the Commission refused to deal with the complaints because its jurisdiction was confined with respect to employment to persons between 18 and 65. The applicable provisions of the *Human Rights Code, 1981* read:

4. —(1) Every person has a right to equal treatment with respect to employment without discrimination because of ... age....

9. ...

(a) "age" means an age that is eighteen years or more, except in subsection 4(1) where "age" means an age that is eighteen years or more and less than sixty-five years;

23. The right under section 4 to equal treatment with respect to employment is not infringed where,

.....

(b) the discrimination in employment is for reasons of age ... if the age ... of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

On further communication with the Commission, the appellants were advised that when their application concerning the constitutional validity of s. 9(a) was decided, the Commission would review its position, noting that it had recommended the abolition of mandatory retirement.

Judicial History

7 Gray J. of the Ontario High Court (1986), 57 O.R. (2d) 1, dismissed the appellants' application. *The Charter*, he held, did not apply to the mandatory retirement policies of the universities. There was no statutory provision directing or authorizing mandatory retirement. Though universities served public purposes, they were essentially private institutions. The fact that they were incorporated and heavily funded by government was insufficient to make them fall within the rubric of "government" to which the application of *the Charter* is limited by s. 32(1)(b). They were essentially autonomous bodies which ran their own affairs. As he put it, at pp. 21-22, "the "governmental function", "governmental control", "State action" or "nexus" which links the essentially private universities with the province is insufficient to invoke s. 32(1)(b) of the *Charter*". In the present context, he saw mandatory retirement as a "creature of contract, negotiated in good faith for the parties' own economic and other benefits" (p. 17).

8 Gray J., however, did conclude that, in denying persons 65 years of age or older the right to complain that their rights to equal treatment with respect to employment had been infringed, s. 9(a) of the *Human Rights Code, 1981* offended s. 15(1) of the *Charter*. In the context of the contractual relationships, however, he saw s. 9(a) as constituting a reasonable limit that is demonstrably justified in a free and democratic society in accordance with s. 1 of the *Charter*. He noted, at p. 32, that "Ramifications relating to the integrity of pension systems and the prospects for younger members of the labour force were the predominant concerns" of the legislature in limiting protection against age-based employment discrimination. These objectives and concerns were, in his opinion, "of sufficient importance to warrant overriding a constitutionally protected right".

9 On an appeal to the Ontario Court of Appeal (1987), 63 O.R. (2d) 1, the majority (Howland C.J.O. and Houlden, Thorson and Finlayson JJ.A.) found nothing in the enabling legislation creating the respondent universities that conflicts with *the Charter*. There is, they observed at p. 16, "no statutory restriction on the term of employment of faculty or staff". In their opinion, *the Charter* has no direct application to the universities or to their contracts of employment with the appellants.

10 So far as s. 9(a) of the *Human Rights Code, 1981* was concerned, the majority agreed with the conclusion of Gray J. that the section discriminates against staff over the age of 65 and denies them the equal treatment to which they are entitled under s. 15(1) of the *Charter*. The majority also agreed, at p. 41, that Gray J. was correct in finding that s. 9(a) of the Code was inconsistent with *the Charter* "without requiring the appellants to prove that the discrimination it created was "unreasonable"".

11 Gray J., however, had applied a lesser standard of scrutiny to legislation involving age-based discrimination than to other types of discrimination. The majority disagreed with this approach. The fact that the justification of discriminatory legislation will be more difficult in some cases than in others did not, in their view, mean that different standards of proof apply to different categories of cases. The onus of establishing s. 1 limitations on s. 15 rights "requires careful factual analysis in every case" (p. 47).

12 In the opinion of the majority, the Court of Appeal was in a position only to deal with the effect of the Charter on the provisions of s. 9(a) as they apply to mandatory retirement of the teaching staff and librarians of the universities. They, therefore, considered only evidence pertinent to the universities and found that, in the university context, the objectives of making it possible for parties to negotiate a mandatory retirement date in keeping with the tenure system, of preserving existing pension plans, and of facilitating faculty renewal, were pressing and substantial and, therefore, warrant overriding a constitutionally protected right.

13 The majority was further of the view that there exists a clear rational connection between the measures adopted by s. 9(a) and the objectives of that section in the university context. They concluded, as well, that the provisions of the impugned section impair "as little as possible" the right to freedom from discrimination on the basis of age in so far as they apply to the mandatory retirement policies of the universities. Nor were they persuaded that the measures imposed by the policies are out of proportion with the objectives of s. 9(a).

14 Blair J.A., dissenting, disagreed with the view that the compulsory retirement of tenured university professors and staff is justifiable under s. 1 of the Charter. In his opinion, the function of the court was to review the Code in order to determine whether it complies with the Charter. It was not open to it (at p. 67) "to read qualifications or exceptions into the statute which might under s. 1 justify a Charter infringement". It was not free to restrict its examination of the provision to the university context alone. To do so would have the effect of amending the Code, something only the legislature is entitled to do. Furthermore (at p. 74), s. 9(a), "being facially invalid, is not a provision that can be saved by allowing a "constitutional exemption" to its operation where appropriate facts exist". In his view, at p. 76, s. 9(a) "falls clearly within the category of legislative provisions which are inconsistent with the Charter" and is incapable of being applied to the appellants.

15 Although Blair J.A. agreed that s. 9(a) met the first two requirements of the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, he found, at p. 77, that it did not satisfy the third requirement that the measure adopted "should impair 'as little as possible' the right or freedom in question". That section, rather than merely restricting the right under s. 15(1), eliminates it, since the Code provides no protection against age discrimination in employment after the age of 65.

16 Blair J.A. further remarked that, while his conclusion would be limited to a declaration that the appellants are not subject to compulsory retirement, it would have "wider ramifications" for the reason that it is based upon two findings applicable to all employees in Ontario. Those findings are that the impugned section is inconsistent with the Charter and that there are no standards within the Code upon which a justification of the denial under s. 1 of the Charter could be based.

17 Leave to appeal to this Court was granted and the following constitutional questions were stated:

1. Does s. 9(a) of the *Ontario Human Rights Code, 1981*, S.O. 1981, c. 53, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?
2. Is s. 9(a) of the *Ontario Human Rights Code, 1981*, S.O. 1981, c. 53, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?
3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?
4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?
5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

18 The Attorneys General of Canada, Nova Scotia and Saskatchewan intervened.

19 As the constitutional questions indicate, the issues may be divided into two broad groups. The first concerns the possible effect of the Charter on the universities' mandatory retirement policies, the second concerns its possible effect on s. 9(a) of the Human Rights Code, 1981. For convenience, I shall deal with the universities' policies first, beginning with the question whether the Charter applies to these policies at all.

The Application of the Charter

20 The application of the Charter is set forth in s. 32(1), which reads:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

21 These words give a strong message that the Charter is confined to government action. This Court has repeatedly drawn attention to the fact that the Charter is essentially an instrument for checking the powers of government over the individual. In *Hunter v. Southam Inc.*[1984] 2 S.C.R. 145, at p. 156, Dickson J. (as he then was) observed: "It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action." In *Operation Dismantle Inc. v. The Queen*[1985] 1 S.C.R. 441, at p. 490, Wilson J. noted that "the central concern of [s. 7 of the Charter] is *direct impingement by government* upon the life, liberty and personal security of individual citizens" (emphasis added). See also *R. v. Big M Drug Mart Ltd.*[1985] 1 S.C.R. 295, at p. 347, *per* Dickson J.; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, especially at pp. 593-98; and *Tremblay v. Daigle*, [1989] 2 S.C.R. 530.

22 The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual. Others, it is true, may offend against the rights of individuals. This is especially true in a world in which economic life is largely left to the private sector where powerful private institutions are not directly affected by democratic forces. But government can either regulate these or create distinct bodies for the protection of human rights and the advancement of human dignity.

23 To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, "diminish the area of freedom within which individuals can act". In *Re Bhindi and British Columbia Projectionists* (1986), 29 D.L.R. (4th) 47, Nemetz C.J., speaking for the majority of the British Columbia Court of Appeal, made it clear that such an approach could seriously interfere with freedom of contract. It would mean reopening whole areas of settled law in several domains. For example, as has been stated: "In cases involving arrests, detentions, searches and the like, to apply the Charter to purely private action would be tantamount to setting up an alternative tort system" (see McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 Alta. L. Rev. 361, at p. 367, cited in *RWDSU v. Dolphin Delivery Ltd.*, *supra*, at p. 597). And that is by no means all.

24 Opening up private activities to judicial review could impose an impossible burden on the courts. Both government and the courts have recognized the need to limit judicial review by means, for example, of privative clauses and deference to specialized tribunals, techniques that would be unavailable in a Charter context. As well, as I noted earlier, government may, in many cases, establish more flexible means to deal with individual rights. Thus Human Rights Commissions have more flexible techniques for dealing with discriminatory practices without unduly constraining the exercise of other democratic rights that are extremely hard to balance; see McLellan and Elman, *ibid.*, and Tarnopolsky (now Mr. Justice Tarnopolsky), "The Equality Rights in the Canadian Charter of Rights and Freedoms" (1983), 61 Can. Bar Rev. 242, at p. 256.

25 The leading authority in this area is, of course, this Court's decision in the *Dolphin Delivery* case, *supra*, which sets forth many other considerations of this kind. In that case, McIntyre J. made it clear that [the Charter](#) was by [s. 32](#) limited in its application to Parliament and the legislatures, and to the executive and administrative branches of government. As he put it, at p. 598: "... [s. 32](#) it refers not to government in its generic sense — meaning the whole of the governmental apparatus of the state — but to a branch of government" (Emphasis added). So far as a legislature was concerned, he stated, it was only by way of legislation that it could infringe [the Charter](#). Action by the executive and administrative branches of government would generally depend upon the legislation but there were also situations (which do not concern us here) where it could depend on common law rules or the prerogative.

26 McIntyre J. thus carefully limited [the Charter's](#) application to Parliament and the legislatures and the executive and administrative branches of government. It is significant, too, that in buttressing his view as to the meaning of government, he relied not only on its general meaning, but also on the manner in which the words were used in the *Constitution Act, 1867*. He thus put it, at p. 598:

The word 'government', following as it does the words 'Parliament' and 'Legislature', must then, it would seem, refer to the executive or administrative branch of government. This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word 'government' is used in [s. 32 of the Charter](#) in the sense of the executive government of Canada and the Provinces. This is the sense in which the words 'Government of Canada' are ordinarily employed in other sections of the *Constitution Act, 1867*. Sections 12, 16, and 132 all refer to the Parliament and the Government of Canada as separate entities. The words 'Government of Canada', particularly where they follow a reference to the word 'Parliament', almost always refer to the executive government.

27 The Court in *Dolphin Delivery* did not have to decide on the extent to which [the Charter](#) applies to the actions of subordinate bodies that are created and supported by Parliament or the legislatures, but it did leave open the possibility that such bodies could be governed by [the Charter](#). Thus, McIntyre J. stated, at p. 602:

It would also seem that [the Charter](#) would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures.

It was not incumbent upon him to define more closely the scope of government or to enter into the question of what could constitute action by the government.

28 The appellants first argued that "universities constitute part of the legislature or government of the province within the meaning of [s. 32 of the Charter](#), insofar as they are creatures of statute which exercise powers pursuant to statute and carry out a public function pursuant to statutory authority". Undoubtedly, as the Court of Appeal recognized, a statute providing for mandatory retirement in the universities would violate [s. 15 of the Charter](#), and it is also true that the government could not do so in the exercise of a statutory power. That is because, as McIntyre J. pointed out, they — the legislative, executive and administrative branches of government — are the actors to whom [the Charter](#) applies under [s. 32\(1\)](#).

29 *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, affords a recent example of a situation where action pursuant to statutory power was held to fall within the ambit of [the Charter](#). That case dealt with an order of an adjudicator appointed by the Minister of Labour which was alleged to infringe the employer's *Charter* right of freedom of expression. The *Canada Labour Code*, R.S.C. 1970, c. L-1, is, of course, a statute regulating labour relations within federal competence. As part of the machinery for the settlement of labour disputes, the Minister was authorized to appoint an arbitrator who, under [s. 61.5\(9\)\(c\)](#), was given a number of discretionary powers to effect that purpose. The arbitrator was, therefore, part of the governmental administrative machinery for effecting the specific purpose of the statute. It would be strange if the legislature and the government could evade their *Charter* responsibility by appointing a person to carry out the purposes of the statute. [Section 61.5\(9\)\(c\)](#) was, therefore, "interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal" that

is consistent with [the Charter](#). The close nexus between the statute and the legislative scheme and governmental administration is immediately obvious.

30 But the mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to [the Charter](#). Such an entity may be established to facilitate the performance of tasks that those seeking incorporation wish to undertake and to control, not to facilitate the performance of tasks assigned to government. It would significantly undermine the obvious purpose of [s. 32](#) to confine the application of [the Charter](#) to legislative and government action to apply it to private corporations, and it would fly in the face of the justifications for so confining [the Charter](#) to which I have already referred. In *Re Bhindi and British Columbia Projectionists*, *supra*, the British Columbia Court of Appeal refused to apply [the Charter](#) to a collective agreement though such agreements are provided for by statute (they were unenforceable at common law) and the legal status of the union itself derived from statute. The employer, too, was a creature of statute. The majority of the court had this to say, at p. 54:

In my opinion, Mr. Justice Gibbs was right in rejecting the extension of [the Charter](#) to a private contract such as this. It is a rare commercial contract which does not *ex facie* infringe on some freedom set out in [s. 2](#) or some legal right under [s. 7](#). To include such private commercial contracts under the scrutiny of [the Charter](#) could create havoc in the commercial life of the country.

31 The appellants strongly relied on a statement by Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at p. 671, cited by this Court in *Slaight Communications Inc. v. Davidson*, *supra*, at p. 1078, to the effect that Parliament and the legislatures cannot authorize action by others that would be in breach of [the Charter](#). That statement would, no doubt, be true of a situation such as occurred in *Slaight Communications Inc. v. Davidson*, *supra*, where a statute authorizes a person to exercise a discretion in the course of performing a governmental objective. But [the Charter](#) was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility. Professor Hogg himself makes this clear, at n. 140 on p. 677:

There is perhaps a faint argument that [the Charter](#) applies to the actions of all Canadian corporations, whether publicly or privately owned, and even if they are engaged only in commercial activity. The argument would start from the premise that the existence and powers of a modern corporation depend upon the statute which authorized its incorporation. In that sense, it could be argued, all modern corporations act under statutory authority and should be held to be bound by [the Charter](#). But the better view is that a corporation, once it has been brought into existence and empowered (admittedly under statutory authority), is thereafter exercising the same proprietary and contractual powers as are available to any private person.

32 The situation just described is entirely different from requiring a person to do something, and it is different also from empowering someone within the government apparatus to do something. It is true that Hogg, in the first of the passages referred to — a passage cited with approval by this Court in *Slaight Communications Inc. v. Davidson* — includes universities among a number of governmental institutions exercising statutory power bound by [the Charter](#). It should be underlined, however, that the passage was cited in *Slaight Communications Inc. v. Davidson* in support of the proposition that [the Charter](#) covers a discretionary exercise of authority under a statute in effecting the statutory scheme. The case did not more widely address the issue of what entities may form part of the governmental apparatus, and cannot be taken as accepting Professor Hogg's inclusion of universities among entities like the Governor in Council and administrative tribunals (which was all that was in question in that case) that are obviously part of government, a question which, of course, is a central issue in the present case.

33 The appellants sought to draw a distinction between commercial corporations and corporations serving a public interest (or at least to confine their argument to the latter). In this context, the appellants cited a number of cases holding that statutory bodies exercising powers of decision may be subjected to judicial review by the courts to ensure that they perform their duties and do so fairly; see *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, and especially the reasons of Dickson J. (as he then was).

34 It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of [s.](#)

32 of the Charter. Essentially, the prerogative writs were designed to ensure that administrative decision-making was legally and procedurally correct. They did not deal with substantive rights like those enshrined in the Charter and their scope extends beyond what one would normally characterize as government. In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. As Beetz J. observed in *Harelkin v. University of Regina*[1979] 2 S.C.R. 561, at p. 594, it is only "in a sense" that a university may be regarded as a public body. It is clear from that case that judicial review may be available in certain circumstances even though a university may be an autonomous body. The following passage from Beetz J.'s reasons, at pp. 594-95, is instructive:

The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens, as was held in *Polten* [(1975), 59 D.L.R. (3d) 197], its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy of the university by making provision for the solution of conflicts within the university.

35 The Charter apart, there is no question of the power of the universities to negotiate contracts and collective agreements with their employees and to include within them provisions for mandatory retirement. These actions are not taken under statutory compulsion, so a Charter attack cannot be sustained on that ground. There is nothing to indicate that in entering into these arrangements, the universities were in any way following the dictates of the government. They were acting purely on their own initiative. Unless, then, it can be established that they form part of government, the universities' action here cannot fall within the ambit of the Charter. That cannot be answered by the mere fact that they are incorporated and perform an important public service. Many institutions in our society perform functions that are undeniably of an important public nature, but are undoubtedly not part of the government. These can include railroads and airlines, as well as symphonies and institutions of learning. And this may be so even though they are subjected to extensive governmental regulations and even assistance from the public purse, as Beetz J.'s statement from *Harelkin v. University of Regina* indicates; see also *Jackson v. Metropolitan Edison Co.* 419 U.S. 345 (1974), per Rehnquist J., for the court, at pp. 350-51. I would refer, in this respect, to McIntyre J.'s statement in *Dolphin Delivery*, supra, at p. 598, that s. 32(1) does not refer "to government in its generic sense — meaning the whole of the governmental apparatus of the state". A public purpose test is simply inadequate. It is fraught with difficulty and uncertainty. It is simply not the test mandated by s. 32. As Wellington, "The Constitution, the Labor Union and "Governmental Action"" (1961), 70 Yale L.J. 345, has stated, at p. 374, in relation to the United States Constitution:

The easy conclusion, shared by too many "bold thinkers", that "whenever any organization or group performs a function of a sufficiently important public nature, it can be said to be performing a governmental function and thus should have its actions considered against the broad provisions of the Constitution" is wrong. Like most easy conclusions about most hard governmental problems it lacks the institutional feel. Perhaps there are private groups in society to which the Constitution should be applied. But one thing is clear: that conclusion should depend on more than an awareness that the group commands great power or performs a function of an important public nature.

36 In attempting to support the view that government went beyond the administrative and executive branches of the government of Canada and the provinces but included statutory bodies serving the public interest, the appellants referred to *Re McCutcheon and City of Toronto* 1983 147 D.L.R. (3d) 193 (Ont. H.C.), where Linden J. expressed the view that municipalities are part of the government within the meaning of s. 32 of the Charter. Assuming the correctness of Linden J.'s view, about which I express no opinion, I agree with the Court of Appeal that, if the Charter covers municipalities, it is because municipalities perform a quintessentially governmental function. They enact coercive laws binding on the public generally, for which offenders may be punished; see also *Re Klein and Law Society of Upper Canada* 1985 16 D.L.R. (4th) 489 (Ont. Div. Ct.), per Callaghan J., at p. 528. The same can obviously not be said of universities. I hasten to add that I agree with my colleague Wilson J. that the Charter is not limited to entities which discharge functions that are inherently governmental in nature. As to what other entities may be subject to the Charter by virtue of the functions they perform, I would think that more would have to be shown than that they engaged in activities or the provision of services that are subject to the legislative jurisdiction of either the federal

or provincial governments. It seems to me that my colleague Wilson J. takes the contrary view. To the extent that she does, I respectfully disagree.

37 The appellants also submit that the universities constitute part of the government under s. 32 of the Charter having regard to the nature of their relationship to the provincial government. The entire context must, they say, be looked at including the facts that they are established by statute which determines their powers, objects and governmental structures, that their historical development was as part of a public system of post-secondary education, that their survival depends on public funding, and that government structures largely coordinate and regulate their activities, through operating and capital grants, special funds, control over tuition fees and approval of new programs.

38 There is no question that the relationship of government to Canadian universities has always been significantly different from that existing in Europe when communities of scholars first banded together to pursue learning. From the early days of this country, several of the provinces acted to establish provincial universities, one of which, of course, was the University of Toronto which was established by the Ontario legislature in 1859. Its governing statute is now *The University of Toronto Act, 1971, S.O. 1971, c. 56*. Other universities were created out of specialized educational bodies under the direct control of the province, such as the University of Guelph, which was created in its present form in 1964 by *The University of Guelph Act, 1964, S.O. 1964, c. 120*. Others were founded by private groups for religious and linguistic purposes such as Sacred Heart College in Sudbury, which became Laurentian University with the passage of *The Laurentian University of Sudbury Act, 1960, S.O. 1960, c. 151, rep. & sub. 1961-62, c. 154, ss. 1-7*. Others, like York University, were originally affiliates of older universities but later became separate universities: *The York University Act, 1965, S.O. 1965, c. 143*. These statutes set out the universities' powers, functions, privileges and governing structure. While these vary from university to university, they are in general much the same. As well, the *University Expropriation Powers Act, R.S.O. 1980, c. 516*, gives them expropriation powers, a matter not in issue here. The *Degree Granting Act, 1983, S.O. 1983, c. 36*, restricts the entities that can operate a university and grant university degrees.

39 There can be no doubt that the reshaping in the 1950s and 1960s of the universities of Ontario (a process that also occurred in other provinces) resulted from provincial policies aimed at promoting higher education. Nor did the Legislature confine itself to rationalizing the existing system. It heavily funds universities on an ongoing basis. The operating grants alone range, according to the evidence, between a low for York of 68.8% of its operating funds to a high for Guelph of 78.9%. The Ontario Council on University Affairs makes annual global funding recommendations to the government, but the latter assumes responsibility for determining the amounts. It also effectively defines tuition fees within a formula that limits the universities' discretion within a narrow scope. The province also provides most of the funds for capital expenditures, and provides special funds earmarked to meet specific policies. It exercises considerable control over new programs by requiring that they be specifically approved to be eligible for public funds.

40 It is evident from what has been recounted that the universities' fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government. There are many other entities that receive government funding to accomplish policy objectives governments seek to promote. The fact is that each of the universities has its own governing body. Only a minority of its members (or in the case of York, none) are appointed by the Lieutenant-Governor in Council, and their duty is not to act at the direction of the government but in the interests of the university (see, for example, s. 2(3) of *The University of Toronto Act, 1971*). The remaining members are officers of the Faculty, the students, the administrative staff and the alumni.

41 The government thus has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources. What Beetz J. said of the University of Regina in *Harelkin v. University of Regina, supra*, in the passage at pp. 594-95, quoted above, applies equally here. I simply reiterate his general conclusion: "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy." In short, I fully share the following conclusion of the Court of Appeal 198763 O.R. (2d) 1, at pp. 24-25:

The fact is that the universities are autonomous, they have boards of governors, or a governing council, the majority of whose members are elected or appointed independent of government. They pursue their own goals within the legislated limitations of their incorporation. With respect to the employment of professors, they are masters in their own houses.

42 The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom. In a word, these are not government decisions. Though the legislature may determine much of the environment in which universities operate, the reality is that they function as autonomous bodies within that environment. There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.

43 I should perhaps note that a similar approach has been followed in the United States. For example, in [Greenya v. George Washington University](#), 512 F.2d 556 (D.C. Cir. 1975), the court refused to find the university to be a governmental entity, though it was incorporated by the state, was given tax exemption and received federal capital funding and funding for some of its programs. A similar approach has been followed in respect of other entities rendering public services that are heavily regulated by government (see *Jackson v. Metropolitan Edison Co.*, *supra* — there a public utility) or that are heavily funded (see *Blum v. Yaretsky* 457 U.S. 991 (1982) — there a nursing school where virtually all the school's funds were derived from government funding).

44 It is true that there are some cases where United States courts did hold that significant government funding constitutes sufficient state involvement to trigger constitutional guarantees, but these were largely confined to cases of racial discrimination which was the prime target of the 14th Amendment (see *Greenya v. George Washington University*, *supra*, at p. 560). As Professor (now Mr. Justice) Tarnopolsky has noted in a passage quoted by the Court of Appeal (at pp. 21-22), these judicial intrusions, devised to meet a problem particular to the United States, should not be imported here; see "The [Equality Rights in the Canadian Charter of Rights and Freedoms](#)" *supra*, at p. 256. Nor is there reason to consider the American authorities on state universities; Canadian universities, as I have explained, are private entities.

45 I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of [the Charter](#). Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy.

46 With deference to my colleague Wilson J., I do not rest this conclusion on a belief that "the role of government should be strictly confined" and that "[s]ocial and economic ordering should be left to the private sector" (at p. 342). My conclusion is not that universities cannot in any circumstances be found to be part of government for the purposes of [the Charter](#), but rather that the appellant universities are not part of government given the manner in which they are presently organized and governed. By way of parenthesis, I would note that it seems to me that if one were indeed committed to the doctrine of "constitutionalism" as my colleague describes it (at p. 342), one would interpret government for the purposes of s. 32(1) as broadly as possible, and not in "its narrowest sense".

47 The foregoing is sufficient to dispose of the issues concerning the mandatory retirement policies of the universities. However, I also propose to discuss the issue of whether, on the assumption that the universities form part of the apparatus of government, these policies violate [s. 15 of the Charter](#). Not only was it fully argued. It is of considerable assistance in considering other issues in this appeal by throwing light on the repercussions of mandatory retirement on the organization of the workplace generally which figures largely on other issues in this appeal. It also is of relevance in considering a number of the issues in the companion cases. The university setting is not, of course, a perfect microcosm of the larger whole. I recognize that each sector of the workplace will have different dynamics depending on the individual configuration of that sector, whether it is managerial, professional, technical, skilled or unskilled, whether or not it has a seniority or tenure system attached to it, and whatever the physical and intellectual demands of the work may be. But there are many common or related features.

Do the University Policies Violate s. 15?

48 I now propose to deal with the question whether the universities' policies on mandatory retirement violate [s. 15 of the Charter](#) on the basis of the assumption that the universities form part of "government" apparatus within the meaning of [s. 32\(1\) of the Charter](#).

"Law"

49 For [section 15 of the Charter](#) to come into operation, the alleged inequality must be one made by "law". The most obvious form of law for this purpose is, of course, a statute or regulation. It is clear, however, that it would be easy for government to circumvent [the Charter](#) if the term law were to be restricted to these formal types of law-making. It seems obvious from what McIntyre J. had to say in the *Dolphin Delivery* case that he intended that exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision. At all events, this Court has now acted on this basis in *Slaight Communications Inc. v. Davidson*, *supra*; see also the remarks of Linden J. in *Re McCutcheon and City of Toronto*, *supra*, at p. 202. On the assumption that the universities form part of the fabric of government, I would have thought their policies on mandatory retirement would amount to a law for the purposes of [s. 15 of the Charter](#). Indeed, in most of the universities, these policies were adopted by the universities in a formal manner. That being so, the fact that they were accepted by the employees should not alter their characterization as law, although this would be a factor to be considered in deciding whether under the circumstances the infringement constituted a reasonable limit under [s. 1 of the Charter](#).

50 In the case of some of the universities, however, it may not be as clear that one is dealing with university policy as simply an agreement entered into with a view to respond to what is really desired by the employees. Here again, however, I am unwilling to accept that a power by government to contract should include the power to contract in violation of a *Charter* right. It would be easy for the legislatures and governments to evade the restrictions of [the Charter](#) by simply voting money for the promotion of certain schemes. In *Operation Dismantle Inc. v. The Queen*, *supra*, at p. 459, Dickson J. drew attention to the possibility "that if the supremacy of [the Constitution](#) expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52". I have no doubt that this is true of [s. 15 of the Charter](#). One need simply examine s. 15(2) which provides that s. 15(1) "does not preclude *any law, program or activity* that has as its object the amelioration of conditions of disadvantaged individuals or groups..." (emphasis added). There would be no need to refer to programs and activities if s. 15(1) were confined to legislative activity. This is supported by the experience in the United States. In that country, no court ever appears to have suggested that the equal protection of the law or due process is restricted to legislative activity. Rather, the cases appear to afford protection against discriminatory state action whether by way of legislation or conduct; see [Bakke v. Regents of the University of California](#)^{438 U.S. 265 (1978)}; [Roth v. United States](#)^{354 U.S. 476 (1957)}.

51 It may be that the acceptance of a contractual obligation could, in some circumstances, constitute a waiver of a *Charter* right especially in a case like mandatory retirement, which not only imposes burdens, but benefits on employees. On the whole, though, I think such an arrangement would usually require justification as a reasonable limit under s. 1. That is especially true in the case of a collective agreement, which may or may not really find favour with individual employees subject to discrimination. In the present case, I am, therefore, of the view that the mandatory retirement provisions are law even if they are as much desired by the unions as by the universities.

Discrimination

52 Assuming the policies of the universities are law, it seems difficult to argue in light of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, that they are not discriminatory within the meaning of [s. 15\(1\) of the Charter](#) since the distinction is based on the enumerated personal characteristic of age. In *Andrews v. Law Society of British Columbia*, this Court applied the following test for discrimination under s. 15(1), at pp. 174-75:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or

disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

There is no doubt that the policies, agreements and regulations impose burdens on the employees. In [Reference Re Public Service Employee Relations Act \(Alta.\)](#), [1987] 1 S.C.R. 313, at p. 368, employment was described as follows:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

Mandatory retirement takes this away, on the basis of a personal characteristic attributed to an individual solely because of his association with a group.

53 Two arguments were put forward for the proposition that even in light of *Andrews v. Law Society of British Columbia*, the mandatory retirement provisions in issue here do not violate s. 15. First, it was argued that the words "without discrimination" in s. 15 require more than a mere finding of adverse distinction, but also require proof of irrationality, stereotypical assumptions and prejudice, for if this were not the case, universally accepted and manifestly desirable legal distinctions would be viewed as violations of s. 15 and require justification under s. 1 of the Charter. It was somewhat weakly argued that a mandatory retirement policy is not based on irrelevant personal differences or stereotypical assumptions, but rather is motivated by "administrative, institutional and socio-economic" considerations. This is all irrelevant, since as *Andrews v. Law Society of British Columbia* made clear in the above-cited passage, not only does the Charter protect from direct or intentional discrimination, it also protects from adverse impact discrimination, which is what is in issue here.

54 The second argument was that the similarly situated test is still the governing test, provided it is not applied mechanically. Simply put, I do not believe that the similarly situated test can be applied other than mechanically, and I do not believe that it survived *Andrews v. Law Society of British Columbia*.

55 I therefore have no hesitation in concluding that the policies of the universities violate s. 15 of the Charter, on the assumption, of course, that they are "law" and that the Charter applies to the universities. They make a distinction based upon an enumerated ground to the disadvantage of individuals aged 65 and over. What requires examination then is whether this distinction constitutes a reasonable limit under s. 1 of the Charter to the right accorded under s. 15.

Section 1 of the Charter

General

56 The approach to be followed in weighing whether a law constitutes a reasonable limit to a Charter right has been stated on many occasions beginning with *R. v. Oakes*, *supra*, and I need merely summarize it here. The onus of justifying a limitation to a Charter right rests on the parties seeking to uphold the limitation. The starting point of the inquiry is an assessment of the objectives of the law to determine whether they are sufficiently important to warrant the limitation of the constitutional right. The challenged law is then subjected to a proportionality test in which the objective of the impugned law is balanced against the nature of the right, the extent of its infringement and the degree to which the limitation furthers other rights or policies of importance in a free and democratic society.

57 This balancing task, as the Court recently stated in *United States of America v. Cotroni*[1989] 1 S.C.R. 1469, at pp. 1489-90, should not be approached in a mechanistic fashion. For, as was there said, "While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature." Indeed, early in the development of the balancing test, Dickson C.J. underlined that "Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards"; see *R. v. Edwards Books*

and *Art Ltd.* [1986] 2 S.C.R. 713, at pp. 768-69. Speaking specifically on s. 15 in *Andrews v. Law Society of British Columbia*, at p. 198, I thus ventured to articulate the considerations to be borne in mind:

The degree to which a free and democratic society such as Canada should tolerate differentiation based on personal characteristics cannot be ascertained by an easy calculus. There will rarely, if ever, be a perfect congruence between means and ends, save where legislation has discriminatory purposes. The matter must, as earlier cases have held, involve a test of proportionality. In cases of this kind, the test must be approached in a flexible manner. The analysis should be functional, focussing on the character of the classification in question, the constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

I should add that by state interest, here I include not only those where the state itself is, in the words of the majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 994, "the singular antagonist", typically prosecuting crime, but also where the state interest involves "the reconciliation of claims of competing individuals or groups or the distribution of scarce ... resources". I shall have more to say about this later.

58 I turn, then, to the objectives of the "law".

Objectives

59 The universities advance a combination of intertwined purposes to justify their policies of mandatory retirement which have been put into place by collective and other agreements and pension plans. The central objectives of these policies, they say, are intended: (1) to enhance and maintain their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal; and, (2) to preserve academic freedom and the collegial form of association by minimizing distinctive modes of performance evaluation. These combined objectives, I have no doubt, meet the "objectives test". Certainly, excellence in higher education is an admirable aim and should be fostered. The preservation of academic freedom is also an objective of pressing and substantial importance.

Proportionality

60 It then becomes necessary to assess whether the measures adopted are appropriate and proportional to the objectives sought. In carrying out this assessment, Dickson C.J., in *R. v. Edwards Books and Art Ltd.*, supra, at p. 768, has set out a three-step approach that must ordinarily be taken in the following passage:

Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

Rationality

61 The next question then is whether the policies of mandatory retirement are rationally connected to the objectives sought by the universities by these policies.

62 To answer this question, it becomes imperative to look briefly at the relationship between the needs of the universities and the tenure of faculty members. By and large, members of a faculty begin their careers in university in their late 20s to mid-30s and with retirement age at 65 this means that they continue on staff for some thirty to thirty-five years. During this period, they must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. Rigorous initial assessment is necessary as are further assessments in relation to merit increases, promotion and the like. But apart from this, and excepting cases of flagrant misconduct, incompetence or lack of performance, strict performance appraisals are non-existent and, indeed, in many areas

assessment is extremely difficult. In a tenured system, then, there is always the possibility of dismissal for cause but the level of interference with or evaluation of faculty members' performance is quite low. The desire to avoid such evaluation does not, as I see it, relate solely or even principally to administrative convenience. Rather, the desire is to maximize academic freedom by minimizing interference and evaluation. Elimination of mandatory retirement would adversely affect this for there could well be an increase in evaluation and attempts to dismiss for cause, though it must be said that evidence on this point is unavoidably lacking. The general situation is well stated by the Court of Appeal, at p. 54:

The policy of tenure in university faculties is fundamental to the preservation of academic freedom. It involves a vigorous assessment by one's peers of academic performance after a probationary period of up to five years. Once tenure is granted, it provides a truly free and innovative learning and research environment. Faculty members can take unpopular positions without fear of loss of employment. It provides stability of employment, because once an academic is found worthy of tenure by his or her peers, he or she can be assured of keeping that position until death, or the normal age of retirement, unless there is termination for cause following a properly conducted hearing before one's peers. This is based usually on gross misconduct, incompetence, or persistent failure to discharge academic responsibilities. Collegial governance is also a safeguard of academic freedom. In addition to tenure, peer review is involved in promotions, merit increases, appointment to senior administrative posts in a department or faculty, and eligibility for research grants. Without mandatory retirement, the imposition of a stricter performance appraisal system might be required. It would be fraught with many difficulties, and would probably require an assessment by one's peers or by outside experts. It could not be unilaterally imposed by university administration because of the role of the faculty or faculty associations in the governance of the university.

63 Mandatory retirement is thus intimately tied to the tenure system. It is true that many universities and colleges in the United States do not have a mandatory retirement but have maintained a tenure system. That does not affect the rationality of the policies, however, because mandatory retirement clearly supports the tenure system. Besides, such an approach, as the Court of Appeal observed, would demand an alternative means of dismissal, likely requiring competency hearings and dismissal for cause. Such an approach would be difficult and costly and constitute a demeaning affront to individual dignity.

64 Mandatory retirement not only supports the tenure system which undergirds the specific and necessary ambience of university life. It ensures continuing faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be on the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new people. In a *closed system with limited resources*, this can only be achieved by departures of other people. Mandatory retirement achieves this in an orderly way that permits long-term planning both by the universities and the individual.

65 There are, it is true, conflicting arguments and evidence about the effect of mandatory retirement on faculty renewal. There is evidence that losing faculty to retirement does generate new jobs for younger faculty. There is also evidence that this is not always the case and that often the correlation is not on an even one-to-one basis, i.e., it does not necessarily follow that for every faculty member who retires, a new one is hired. That there is some correlation, however, cannot, on my view of the evidence, be denied in a closed system like a university. It is a question of resource allocation and some resources are obviously freed when a teaching member retires. A similar approach has been judicially approved in the United States. In [Lamb v. Scripps College, 627 F.2d 1015 \(1980\)](#), the United States Court of Appeals, Ninth Circuit, accepted the legitimacy of the following justifications for mandatory retirement in the academic context, at p. 1022:

...the opening of positions for younger professors and minorities; relieving the financial burden caused by the retention of highly paid senior employees; and avoiding the difficulty of assessing individual performances for purposes of good cause discharges.

See also [Palmer v. Ticcione, 576 F.2d 459 \(1978\)](#), which adopts the same rationale for other sectors.

66 From the above considerations, I have no difficulty in concluding that there is a rational connection between the university policies on mandatory retirement and the objectives sought to be achieved by those policies. I turn, then, to the question whether measures to attain these objectives infringed the right as little as possible.

Minimal Impairment

67 In assessing proportionality and particularly the issue whether there has been a minimal impairment to a constitutionally guaranteed right, it must be remembered that we are concerned here with measures that attempt to strike a balance between the claims of legitimate but competing social values. In the case of broadly based social measures like these, where government seeks to mediate between competing groups, it is by no means easy to determine with precision where the balance is to be struck. As the majority of this Court observed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 993:

Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.

68 The approach taken to these cases has been marked by considerable flexibility having regard to the difficulty of the choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters. Implicit in earlier cases, this was expressly adopted in *Irwin Toy Ltd. v.* There, the majority put it this way, at pp. 993-94:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (*Edwards Books and Art Ltd.*, *supra*, at p. 772).

In short, as the Court went on to say, the question is whether the government had a *reasonable basis* for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives. Speaking specifically of the right in question there, the Court had this to say, at p. 994:

In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a *reasonable basis*, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. [Emphasis added.]

69 It is worth repeating the government's (or rather the universities') pressing and substantial objectives in the present case. They are: (1) to enhance and maintain their capacity to seek and maintain excellence by permitting flexibility in resource allocation and faculty renewal; and (2) to preserve academic freedom and the collegial form of association by minimizing distinctive modes of performance evaluation. Excellence in our educational institutions, and specifically in our universities, is vital to our society and has important implications for all of us. Academic freedom and excellence is essential to our continuance as a lively democracy. Faculty renewal is required if universities are to stay on the cutting edge of research and knowledge. Far from being wholly detrimental to the group affected, mandatory retirement contributes significantly to an enriched working life for its members. It ensures that faculty members have a large measure of academic freedom with a minimum of supervision and performance review throughout their period at university. They need not be unduly concerned with a "bad year" or a few bad years, or that their productive capacity may decline with the passing years. Security of employment is well protected for a substantial number of years and they are spared demeaning tests that would otherwise have to be employed. That is not to say, and there can be no doubt, that mandatory retirement can be a source of considerable anguish for those who do not wish to retire. But the "bargain" involved in taking a tenured position has clear compensatory features even for the individual affected, and it is noteworthy that it is the bargain sought by faculty associations and indeed by labour unions in many other sectors of our society.

70 Against the detriment to those affected must be weighed the benefit of the universities' policies to society generally and the individuals who compose it. It must be remembered as well that, in a closed system with limited resources like universities,

there is a significant correlation between those who retire and those who may be hired. Thus the young must be deprived of the opportunities to contribute to society through work in the universities as part of the cost of retaining those currently employed on an indefinite basis. The right to work, as this Court has stated, is important. But it is important for the young as well as the old. By this I am not suggesting that discrimination against the old is as such justifiable to alleviate the difficulties faced by the young. But from the standpoint of the university, and in turn of society, staff renewal is vital. Again, the fact that the young would suffer some measure of deprivation were mandatory retirement abolished would mean that students in turn would, to that extent, be deprived of younger faculty members and of the better mix of young and old that is a desirable feature of a teaching staff. The evidence indicates that there is at present a significant problem of an older teaching staff in universities.

71 Another matter merits consideration. Universities comprise some of the outstanding research facilities that are essential to push forward the frontiers of knowledge. These have been acquired over the years by the expenditure of significant private and public funds and there is need not only to encourage the best use that can be made of them but also to adopt policies to give access to as many as can benefit from, and contribute to, society by their use. The majority in *Irwin Toy Ltd. v. Quebec (Attorney General)*, supra, made it clear that the reconciliation of claims not only of competing individuals or groups but also the proper distribution of scarce resources must be weighed in a s. 1 analysis. Having observed that the courts can ascertain with "some certainty" whether the "least drastic means" has been chosen to achieve a desired objective where the government is the "singular antagonist", typically in the case of criminal sanctions and prosecutions, the majority then noted that this was not the case with polycentric situations. It added, at p. 994:

The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

72 Weighing all the above matters, I conclude that, to paraphrase the remarks from *Irwin Toy Ltd. v. Quebec (Attorney General)*, previously cited, on the evidence the universities had a reasonable basis for concluding that their mandatory retirement policies impaired the appellants' rights as little as possible given the pressing and substantial objectives they sought to achieve.

73 One final point may be mentioned. It may be argued that in these days, 65 is too young an age for mandatory retirement. At best, however, this is an exercise in "line drawing", and in *R. v. Edwards Books and Art Ltd.*, supra, at pp. 781-82, 800-801, this Court made it clear that this was an exercise in which courts should not lightly attempt to second-guess the legislature. While the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards; see the reasons of Gray J. 198657 O.R. (2d) 1, at pp. 40-41, and of the Court of Appeal 198763 O.R. (2d) 1, at pp. 61-62. To raise the retirement age, then, might give rise to greater demands for demeaning tests for those between the ages of 60 and 65 as well as other shifts and adjustments to the organization of the workplace to which I have previously referred.

Effects

74 It is evident from what I have said in relation to the "minimal impairment" that the effects of the universities' policies on mandatory retirement are not so severe as to outweigh the government's pressing and substantial objectives. In the present circumstances, the same factors have to be balanced in dealing with deleterious effects and I need not repeat them.

Section 9(a) of the Human Rights Code, 1981

Does s. 9(a) contravene s. 15(1) of the Charter?

75 I come now to the question whether s. 9(a) of the Human Rights Code, 1981 contravenes s. 15(1) of the Charter by reason of the fact that it confines the Code's prohibition against discrimination in employment on grounds of age to persons between the ages of 18 and 65. The effect of the restriction in s. 9(a), the appellants say, is that they are denied protection against age-based employment discrimination under the *Human Rights Code, 1981*. There is no question that, the Code being a law, the Charter applies to it. In *Re Blainey and Ontario Hockey Association (1986)*, 54 O.R. (2d) 513 (leave to appeal denied, [1986] 1 S.C.R. xii), the Ontario Court of Appeal held invalid s. 19(2) of the Code which provided that the right to equality without

discrimination because of listed personal characteristics accorded under s. 1 of the Code is not infringed where membership in athletic activity is restricted to persons of the same sex.

76 Nor can there be any doubt since the *Andrews* case, which I have already discussed, that the differential treatment to which the appellants have been subjected constitutes discrimination for the purposes of s. 15(1) of the Charter. It deprives them of a benefit under the Code on the basis of their age, a ground specifically enumerated in the Charter. It must be underlined that s. 15(1) expressly guarantees the right to equality before and under the law; it also guarantees the right to equal protection of the law. The following remarks of McIntyre J. in *Andrews v. Law Society of British Columbia, supra*, at p. 171, are apposite:

It is clear that the purpose of s. 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component. Howland C.J. and Robins J.A. (dissenting in the result but not with respect to this comment) in *Reference re an Act to Amend the Education Act (1986)*, 53 O.R. (2d) 513, attempt to articulate the broad range of values embraced by s. 15. They state at p. 554:

In our view, s. 15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law. It is an all-encompassing right governing all legislative action. Like the ideals of "equal justice" and "equal access to the law", the right to equal protection and equal benefit of the law now enshrined in the Charter rests on the moral and ethical principle fundamental to a truly free and democratic society that all persons should be treated by the law on a footing of equality with equal concern and respect.

77 It is right, however, to indicate with some precision what the discrimination is, and what it is not. The Code does not impose mandatory retirement at any age. Its general effect, in this context, is to prevent the making of a contract providing for mandatory retirement at a fixed age of less than 65 unless the employer is able, under s. 23(b) of the Code, to establish on a balance of probabilities that age is a reasonable and *bona fide* qualification because of the nature of the employment. Such protection can, in the government sector, also be obtained under the Charter, without reference to age at all, subject to reasonable limitation under s. 1. The Code, however, extends protection within the age limits prescribed against age discrimination in employment in the private sector which, we saw, is not directly affected by the Charter.

78 Though not directly relevant perhaps, I should mention that s. 9(a) is also discriminatory in that it provides for a minimum age of 18 years for those seeking protection under the Code in respect of employment. That distinction is, I would think, readily explicable on human, social and economic grounds. More relevant, however, is the fact that until 1982 the Code or its predecessor statutes limited protection on the basis of age to persons "of forty years or more and less than sixty-five years". The Age Discrimination Act, S.O. 1966, c. 3, the first statute that provided protection against discrimination in respect of employment, was limited to those ages as was the Ontario Human Rights Code Amendment Act, S.O. 1972, c. 119, which extended the protection to other types of discrimination. Those statutes, in fact, provided for a number of qualifications to the age protection: an exemption for *bona fide* superannuation funds or plans, or insurance plans which discriminated on grounds of age, for "special employment programs", and for an exemption based on "*bona fide* occupational qualification and requirement". The present restriction between the ages of 18 and 65 was only proclaimed on June 15, 1982, a change that, as one can see from the companion case of *Harrison v. University of British Columbia, supra*, has not yet been made in all the provinces.

79 What this reveals, of course, is that there has been a growing recognition of the need for protection against distinctions on the basis of age as society has more clearly perceived its discriminatory effects. It also reveals that, for a variety of reasons, there has long been a differentiation made between it and other rights, and that like other rights, it is not absolute. Under the Charter, however, questions as to whether these qualifications have been made must be measured against the requirements of s. 1 of that instrument. As a preliminary to that task, however, it appears useful to deal first with the history of mandatory retirement and the place it occupies in our society and its interrelationship with legislation, notably the *Human Rights Code, 1981*, aimed at preventing discrimination on the ground of age. This is in keeping with Dickson J.'s admonition in *R. v. Big M Drug Mart Ltd., supra*, at p. 344, that it is important to recall that the Charter was not enacted in a vacuum and must, therefore, be placed in its proper linguistic, philosophic and historical contexts; see also *United States of America v. Cotroni, supra*, at pp. 1490-91.

History and place of Mandatory Retirement

80 Retirement as a social phenomenon is relatively new. It is a by-product of industrialization which effected a separation between family life and work. Bismark is generally credited with establishing 65 as the age for retirement when, through his initiative, Germany adopted a public pension plan for the aged. At that time, 65 would certainly have been considered "old", the life expectancy in Germany then being 45. When Great Britain adopted similar legislation in 1908, it initially applied from age 70 but was later reduced to 65. Other countries followed Bismark's lead.

81 Of greater significance for this country is that this was the age adopted as the age when social security would be paid pursuant to the *Social Security Act*, 49 Stat. 620, enacted by the United States Congress in 1935. This measure was undoubtedly aimed at providing some security for the aged, but it was also designed to remove older people from the labour force in the interests of maintaining employment for younger workers with families during the Depression years. There appears to have been no special reason for the adoption of 65 beyond the fact that it appears to have been widely accepted at the time. The Act did not mandate retirement at age 65 as such, but since people who were regularly employed were not entitled to social security payments, this became the "normal" age of retirement; see *Retirement Without Tears*, the Report of the [Canadian] Special Senate Committee on Retirement Age Policies (1979); *Mandatory Retirement: The Social and Human Cost of Enforced Idleness*, U.S. Congress Report by the Select Committee on Aging (1977); Kertzer, "Perspectives on Older Workers: Maine's Prohibition of Mandatory Retirement" (1981), 33 Me. L. Rev. 157; Graebner, *A History of Retirement: The Meaning and Function of an American Institution, 1885-1978* (1980).

82 In Canada, mandatory retirement developed with the introduction of private and public pension plans. It is not based on law. In 1927, public security plans began with The Old Age Pensions Act, 1927, S.C. 1926-27, c. 35, which adopted 70 as the age of entitlement, but this was lowered to 65 in the 1960s. Other programs, such as the Old Age Security (O.A.S.), Guaranteed Income Supplement and the Canada and Quebec Pension Plans also provided that retirement benefits were to be paid beginning at age 65. By the 1970s, the orientation in respect of the treatment of age had been set. Public social security and pension schemes as well as private pension plans were put in place in order to provide income security to older persons; see Atcheson and Sullivan, "Passage to Retirement: Age Discrimination and the Charter" in Bayefsky and Eberts, *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), at p. 231.

83 Private business developed or adapted their plans to complement and integrate with government pensions. About one half of the Canadian work force occupy jobs subject to mandatory retirement, and about two-thirds of collective agreements in Canada contain mandatory retirement provisions at the age of 65, which reflects that it is not a condition imposed on the workers but one which they themselves bargain for through their own organizations. Generally, it seems fair to say that 65 has now become generally accepted as the "normal" age of retirement. This has had profound implications for the organization of the workplace — for the structuring of pension plans, for fairness and security of tenure in the workplace, and for work opportunities for others. The Court of Appeal succinctly put the matter this way in describing what it saw as the objectives of s. 9(a), at p. 53:

One of the primary objectives of s. 9(a) was to arrive at a legislative compromise between protecting individuals from age-based employment discrimination and giving employers and employees the freedom to agree on a date for the termination of the employment relationship. Freedom to agree on a termination date is of considerable benefit to both employers and employees. It permits employers to plan their financial obligations, particularly in the area of pension plans and other benefits. It also permits a deferred compensation system whereby employees are paid less in earlier years than their productivity and more in later years, rather than have a wage system founded on current productivity. In addition it facilitates the recruitment and training of new staff. It avoids the stress of continuous reviews resulting from ability declining with age, and the need for dismissal for cause. It permits a seniority system and the willingness to tolerate its continuance having the knowledge that the work relationship will be coming to an end at a finite date. Employees can plan for their retirement well in advance and retire with dignity.

Another important objective of s. 9(a) was the opening up of the labour market for younger unemployed workers. The problem of unemployment would be aggravated if employers were unable to retire their long-term workers.

84 To put it in its simplest terms, mandatory retirement has become part of the very fabric of the organization of the labour market in this country. This was the situation when s. 9(a) of the Human Rights Code, 1981 was enacted. It was the situation when the Charter was proclaimed as well.

85 It must be said, however, that there has been a profound alteration in society's view of age discrimination in recent years and, in consequence, of mandatory retirement. Originally, social services schemes and private arrangements, which encouraged and sometimes required mandatory retirement coupled with pension benefits were viewed as a reward for a lifetime of service, and there is no doubt that the beneficial aspects of these plans do serve the important goal of ensuring financial security for the aged, and many still so regard it. But as Jacques Maritain has taught us, human rights continue to emerge from human experience: *Man and the State* (1951). For some, it became all too obvious that retirement was a curse rather than a blessing and resulted in deprivations of former advantages that a number of commentators have denounced in biting terms: see, for example, McDougal, Lasswell and Chen, "The Protection of the Aged from Discrimination" in *Human Rights and World Public Order* (1980), chapter 15, especially at pp. 779-82.

86 Age had not fully emerged as an unacceptable ground of discrimination when the early international human rights documents were adopted. These did not specifically refer to age among impermissible grounds of discrimination although their specific enumerations were never regarded as exhaustive. At all events, in the light of growing concerns about the issue, the United Nations undertook a study on the aged (*Question of the Elderly and the Aged* (report of the Secretary General) U.N. Doc. A9126 (1973)), which culminated in a resolution of the General Assembly in which that body, emphasizing the "respect for the dignity and worth of the human person", urged member states to "discourage, whenever and wherever the overall situation allows, discriminatory attitudes, policies and measures in employment practices based exclusively on age" (G.A. Res. 3137, U.N. Doc. A19030 (1973)).

87 The evolving right against discrimination on the ground of age is gaining ground in this and other countries. I have mentioned earlier its partial recognition in the Human Rights Codes. In some provinces, as in the British Columbia statute dealt with in *Harrison, supra*, it is still only recognized in the form in which it existed in Ontario before 1982. Other provinces, Quebec, New Brunswick and Manitoba, have now gone further and prohibited age discrimination in employment altogether. Similarly in 1967, the United States enacted the *Age Discrimination in Employment Act*, 29 U.S.C. §§ 621-634 (1976), although it was limited to persons between 40 to 65. In 1977, however, Maine abolished as of 1980 all mandatory retirement in both the public and private sectors (the Act is discussed by Kertzer, "Perspectives on Older Workers: Maine's Prohibition of Mandatory Retirement", *supra*).

The Nature of the Right

88 Section 15(1) of the Charter specifically mentions age as one of the grounds of discrimination sought to be protected by that provision, and there is no doubt as I have already indicated that such discrimination, like the other categories mentioned, can constitute a significant abridgement to the dignity and self-worth of the human person. It must not be overlooked, however, that there are important differences between age discrimination and some of the other grounds mentioned in s. 15(1). To begin with there is nothing inherent in most of the specified grounds of discrimination, e.g., race, colour, religion, national or ethnic origin, or sex that supports any general correlation between those characteristics and ability. But that is not the case with age. There is a general relationship between advancing age and declining ability; see "The Age Discrimination in *Employment Act of 1967*" (1976), 90 *Harv. L. Rev.* 380, at p. 384; Tarnopolsky and Pentney, *Discrimination and the Law* (1985), at p. 7-5. This hardly means that general impediments based on age should not be approached with suspicion, for we age at differential rates, and what may be old for one person is not necessarily so for another. In assessing the weight to be given to that consideration, however, we should bear in mind that the other grounds mentioned are generally motivated by different factors. Racial and religious discrimination and the like are generally based on feelings of hostility or intolerance. On the other hand, as Professor Ely has observed, "the facts that all of us once were young, and most expect one day to be fairly old, should neutralize whatever suspicion we might otherwise entertain respecting the multitude of laws ... that comparatively advantage those between, say, 21 and 65 vis-à-vis those who are younger or older", *Democracy and Distrust* (1980), at p. 160. The truth is that, while we must guard against laws having an unnecessary deleterious impact on the aged based on inaccurate assumptions about the effects of

age on ability, there are often solid grounds for importing benefits on one age group over another in the development of broad social schemes and in allocating benefits. The careful manner in which the General Assembly Resolution on the rights of the aged is framed is worth noting. Its recommendation discouraging discriminatory practices in employment based exclusively on age is prefaced by the words that this be done "wherever and whenever the *overall situation allows*".

89 I turn then to the balancing of the competing values mandated by [s. 1 of the Charter](#).

Section 1

Preliminary Issue

90 I have already referred in a general way to the approach taken by this Court in weighing competing values in assessing whether a legislative scheme or other law constitutes a reasonable exception to a right guaranteed under [the Charter](#), and I shall not repeat it here. Before making this assessment, however, it is necessary to dispose of a preliminary issue that has arisen in this case. In the Court of Appeal, the majority largely confined its examination of [s. 1](#) to the specific situation before it, i.e., it considered the specific import of [s. 9\(a\) of the Human Rights Code, 1981](#) to mandatory retirement in the university setting. On an examination of the evidence in that specific area, it concluded that [s. 9\(a\)](#) constituted a reasonable exception to the right under [s. 15 of the Charter](#) not to be subjected to discrimination on the ground of age. Blair J.A. (dissenting), however, was of the view that [s. 9\(a\)](#) had to be considered against the background of all the situations to which it could apply and in considering the issue in this way he concluded that [s. 9\(a\)](#) did not meet the requirements of [s. 1 of the Charter](#). The trial judge, Gray J., I should say, also considered the whole context against which the provision operated but concluded that it was justified under [s. 1 of the Charter](#).

91 I agree, and this was conceded by the Attorney General for Ontario, that the analysis under [s. 1](#) should not be restricted to the university context. The appellants in this case were denied the protection of the Code, not because they were university professors but because they were 65 years of age or over. To restrict examination of its application to the university context would be inconsistent with the first component of the proportionality test enunciated by this Court in [R. v. Oakes](#), at p. 139, namely, that "the measures adopted must be carefully designed to achieve the objective in question". [Section 9\(a\)](#) is not restricted to the university context, and while evidence respecting the specific context in which the issue arises may, as I indicated earlier, serve as an example to demonstrate the reasonableness of the objectives, it must not be confused with those objectives. To the objectives I now turn.

Objectives

92 The objective of [ss. 9\(a\) and 4 of the Human Rights Code, 1981](#) is to extend protection against discrimination to persons in a specified age range. The protection as originally prescribed was limited, we saw, to persons between the ages of 45 and 65, an age group considered with considerable justification to be most in need of protection. Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills. Their difficulty is also influenced by the fact that many in that age range are paid more and will generally serve a shorter period of employment than the young, a factor that is affected not only by the desire of many older people to retire but by retirement policies both in the private and public sectors. By 1982, youth employment had also become a more serious factor and the protection was extended, we saw, to the ages of 18 to 65.

93 Those over 65 are by and large not as seriously exposed to the adverse results of unemployment as those under that age. As mentioned earlier, many social security schemes and private pensions are geared to have effect on the attainment of 65. The respondents, however, did not rely on this factor as constituting a sufficient justification for the differentiation made in the Code between those under, and those over 65. And there is no question that while social security and private pension schemes may afford some financial redress, many older people have need of additional income, a situation that is becoming more apparent as people live longer. Besides, as I indicated earlier, work cannot be considered solely from a purely economic standpoint. In a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth. I need not pursue this further,

however, for as the respondents argued, there are several intertwined objectives of these provisions and it is in terms of these combined objectives that the legislation must be assessed.

94 The general objectives of the legislature in enacting ss. 9(a) and 4, Gray J. noted, are readily apparent from a reading of the debates leading to their enactment. Throughout the debate, great concern was expressed about the perplexing problem of not affording protection in the employment sector for those over 65, but in the end other considerations predominated. After voicing his concerns about mandatory retirement, the Minister, the Honourable Mr. Elgie, in moving second reading of the Bill, continued (Ontario Hansard, May 15, 1981, at p. 743):

On the other hand, I can appreciate the views of those employees who fear that such a change might result in their delayed retirement and delayed benefits, especially for those older workers who wish to take advantage of what they have considered for years to be the normal age of retirement.

We also have to look at the labour market ramifications of extending the definition of age under the code and the effect it might have on younger persons entering the labour force. The rates of unemployment there are chronically the highest.

Later, on May 25, 1981 (*ibid.*, at p. 959), he again noted that

...emotionally, we all want to do that [raise the age of mandatory retirement], but in doing so we must make sure we do not deprive people of certain rights they expect, and rightfully expect, when they retire.

We should not rush headlong into that; we should recognize that we must not deprive people of certain benefits they have come to expect following retirement, and we must be sure that we do not interfere with hiring and personnel practices, and with the problem of youth unemployment, by acting very hastily over an issue that we have strong emotional feelings about.

At the Committee stage, the Minister again spoke of the reasons why the government was not ready to abandon the age of 65 as the upward limit for protection of the Code in the field of employment. On December 1, 1981 (*ibid.*, at p. 4097), he stated:

One cannot address this issue without thoughtful consideration of the real issues — the demographic issues, youth unemployment issues, pension benefits and the changes that may be suddenly thrown on people who had not planned it in that way. Those are things that have to be considered.

...Let us not pretend that there is any disagreement about the principle. We are talking about the problems that may arise, and that is what we are going to address in the study.

What comes out clearly from the debates is the anguish of the members in the face of a measure, which for reasons they viewed as overriding, they felt could not be extended to the protection of the elderly, and the government undertook to make further studies of the ramifications of raising the age limit.

95 Assuming the test of proportionality can be met, most of the reasons identified by the Legislature for not extending the protection of the Code to those over 65 warrant overriding the constitutional right of the equal protection of the law. That was the view, as well, of Gray J. who, in a passage (at p. 32) with which I am in complete agreement, thus put the matter:

The foregoing excerpts from Hansard indicate the true objectives of the Legislature in limiting protection against age-based employment discrimination. Ramifications relating to the integrity of pension systems and the prospects for younger members of the labour force were the predominant concerns. The object of the age ceiling is intimately related to the desire for cautious legislative reform. On their face, these objectives and concerns are of sufficient importance to warrant overriding a constitutionally protected right. The motivating concerns can be readily characterized as "pressing and substantial in a free and democratic society".

96 What we are confronted with is a complex socio-economic problem that involves the basic and interconnected rules of the workplace throughout the whole of our society. As already mentioned, the Legislature was not operating in a vacuum. Mandatory retirement has long been with us; it is widespread throughout the labour market; it involves 50 per cent of the

workforce. The Legislature's concerns were with the ramifications of changing what had for long been the rule on such important social issues as its effect on pension plans, youth employment, the desirability of those in the workplace to bargain for and organize their own terms of employment, the advantages flowing from expectations and ongoing arrangements about terms of employment, including not only retirement, but seniority and tenure and, indeed, almost every aspect of the employer-employee relationship. These issues are surely of "pressing and substantial [concern] in a free and democratic society". And as Gray J. observed at p. 32, this conclusion is generally reinforced by reference to other industrialized democracies. The United States, the United Kingdom, Ireland, Australia, the Federal Republic of Germany, Norway and Japan all recognize some form of pension-associated mandatory retirement.

97 As for the objective of reducing youth unemployment, it seems to me that such objective should not be accorded much weight. If the values and principles essential to a free and democratic society include, according to *Oakes*, "respect for the inherent dignity of the human person" and "commitment to social justice and equality", then the objective of forcibly retiring older workers in order to make way for younger workers is in itself discriminatory since it assumes that the continued employment of some individuals is less important to those individuals, and of less value to society at large, than is the employment of other individuals, solely on the basis of age.

Proportionality

98 The objectives of the legislation being sufficient to warrant overriding a constitutional right, it remains to consider whether the means employed to achieve them are proportional in terms of the guidelines previously enunciated by this Court and set forth earlier in these reasons. First of the matters to be considered is whether these means are rationally connected to the objectives.

Rationality

99 I find little difficulty in holding that the legislation is rationally connected to its objectives and I shall only briefly deal with this issue since most of the same considerations arise in discussing whether the legislation impinges on the guaranteed right as little as possible.

100 In examining this question, the history of mandatory retirement and its position as an integral part of the organization of the workplace, which I have already discussed, must not be overlooked. And, as Gray J. observed, *supra*, at pp. 35-36, the courts' "consideration of the propriety of the Legislature's methods cannot be divorced from the knowledge that the Legislature's cautious conduct is motivated by the concern for an orderly transition of values". I noted earlier that the resolution of the General Assembly of the United Nations itself manifests a recognition of the need to have regard for the "overall situation" in advancing the rights of the aged.

101 The legislation obviously achieves its purpose of maintaining stability in pension arrangements, and is thus rationally connected to that end. That is true, as well, of the impact of having a set age of retirement on conditions of work. Mandatory retirement is part of a complex web of rules which results in significant benefits as well as burdens to the individuals affected. In consequence, there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity.

102 Finally, there is the concern for youth unemployment. As I noted earlier, mandatory retirement appears to have some influence on youth employment in closed systems such as universities. As a general proposition, however, the evidence, as Gray J. noted, is somewhat conjectural and I attach little weight to it. As Professor Pesando has pointed out in a passage cited by the British Columbia Court of Appeal in *Harrison v. University of British Columbia* 1988 21 B.C.L.R. (2d) 145 (at p. 159), the job opportunities made available through mandatory retirement should not be accorded a central role in the debate on mandatory retirement.

103 On the whole, however, as stated earlier, I have no difficulty concluding that the legislation is rationally connected to the various objectives sought to be accomplished.

Minimal Impairment

104 I turn then to the question whether mandatory retirement impairs the right to equality without discrimination on the basis of age "as little as possible". In undertaking this task, it is important again to remember that the ramifications of mandatory retirement on the organization of the workplace and its impact on society generally are not matters capable of precise measurement, and the effect of its removal by judicial fiat is even less certain. Decisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components. They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch, as *Irwin Toy*, has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.

105 In performing their functions of ensuring compliance with the constitutional norms in these amorphous areas, courts must of necessity turn to such available knowledge as exists and, in particular, to social science research, both of a particular and general nature. The Court of Appeal in its judgment (at pp. 49-51) has helpfully described the difficult problems of evaluating these works and the extent to which the judiciary should defer to legislative judgment in determining issues of minimal impairment of a constitutional right when evidence rationally supports the legislative judgment. This Court has, however, recently dealt with these issues in *Irwin Toy, supra*, which I have discussed earlier in these reasons and I rely on what I have already said there. I simply reiterate here that the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government's pressing and substantial objectives.

106 In examining this question, it is relevant as it was in the examination of the issue of the rationality of the legislative means employed in attaining the legislature's objectives, to recall the historical origins of mandatory retirement at age 65 and its evolution as one of the important structural elements in the organization of the workplace. As a result of this development, I repeat, 65 has come to be generally considered the normal age of retirement and some 50 per cent of the work force is organized on the basis of mandatory retirement at that age. There is thus no stigma attached to being retired at 65. It conforms as well to what most people would do voluntarily. Indeed, the evidence indicates that there is an increasing trend towards earlier retirement. Many regard it as a reward for long years of service and, for one reason or another, look forward to retirement. The estimates of workers who would voluntarily elect to work beyond the age of 65 vary from 0.1 to 0.4 per cent of the labour force, or 4,787 to 19,148 persons annually in 1985, rising to 5,347 to 21,388 in the year 2000 (Dr. Foot's affidavit). And the likelihood is that a disproportionate number rank among the more advantaged in society.

107 As noted earlier, mandatory retirement forms part of a web of interconnected rules mutually impacting on each other. In dealing with university policies on mandatory retirement, I noted its impact in the university context. In that context, we saw, mandatory retirement forms part of a system of long-term employment up to age 65. The system involves increased remuneration over the years without, on the whole, reference to ongoing performance, and reduces demeaning competency hearings for dismissal and the like. I refer again to that portion of the Court of Appeal's judgment at p. 54 cited above. As I mentioned earlier, while s. 9(a) cannot be looked at in the discrete setting of the university, it serves as a microcosm that throws important light on what is a widespread labour market phenomenon involving 50 per cent of the work force and undoubtedly affecting other areas by a kind of osmosis.

108 While there are significant differences from sector to sector, the university system is in many respects a reflection of many other parts of the work force where mandatory retirement is part of a complex, interrelated, lifetime contractual arrangement involving something like deferred compensation. Certainly it is true of union-organized labour where seniority serves as something of a functional equivalent to tenure. Seniority not only allocates the high paying jobs to senior people; it protects them against layoffs which are first allocated to younger people. And it takes no great stretch of the imagination to understand that reduction in performance in the years before retirement will be met with more understanding and tolerance than if the person were not close to retirement. As I indicated, this type of arrangement is reflected by osmotic forces in many other areas of the work force. Many organizations are so arranged that the individual is paid increasingly higher remuneration with the years with the expectation or understanding that he or she will depart at a certain stage.

109 As the study by Professors Gunderson and Pesando submitted by the respondents indicates, mandatory retirement cannot be looked at in isolation. In the view of these scholars, the repercussions of abolishing mandatory retirement would be felt "in all dimensions of the personnel function: hiring, training, dismissals, monitoring and evaluation, and compensation". All these issues would require to be addressed. In a passage cited with approval by Gray J., at p. 38 these authors observed:

In short, a number of issues regarding the design of occupational pension plans would have to be addressed if mandatory retirement were not permitted. So, too, would the wage policy followed by many employers, especially when the pension benefit is linked to the employee's earnings. The use of the occupational pension plan as a *vehicle* for deferring a portion of the employee's total compensation to the employee's later work years may be reduced. As before, not permitting mandatory retirement is likely to require compensating adjustments elsewhere in the compensation package and in the set of work rules that govern the workplace.

In tinkering with mandatory retirement, we are affecting an institution closely intertwined with other organizing rules of the workplace.

110 The parties presented competing social science evidence on each of these issues. The appellants began by underlining that mandatory retirement simply constituted arbitrary treatment of individuals on the sole ground that they are members of an identifiable group, citing the 1985 Federal Parliamentary Committee on Equality Rights, *Equality For All*, at p. 21. While there may be some jobs where mandatory retirement can be justified on the basis of a reasonable and *bona fide* occupational qualification, they said, s. 9(a) does not differentiate between these jobs and those where it cannot be so justified. It would, they added, be easy to design a scheme permitting mandatory retirement only in workplaces where it was required, for example, to preserve the integrity of existing pension plans or to implement a scheme to hire younger persons. At all events, they argued, the evidence they submitted disclosed: that the abolition of mandatory retirement would not increase youth employment; that pension plans do not require mandatory retirement to provide financial security for employees; and that it would not have a significant effect on personnel policies, including deferred compensation, dismissals, evaluation and monitoring, or planning considerations which were in any event matters only of administrative convenience or costs. They drew attention to the fact that in several Canadian jurisdictions, New Brunswick, Quebec and Manitoba, mandatory retirement had been abolished without adverse effects, and the same was true of Maine.

111 The respondents naturally submitted evidence supporting the opposite conclusions. Their argument and evidence in support was that a number of consequences would likely arise at all stages of the employment relationship. At the hiring stage, it could reduce youth employment opportunities. As well, employers might be reluctant to hire middle-aged workers in the absence of a known age when the contract must end, and this might restrict promotion opportunities for older workers. Deferred compensation would not be as feasible. As to working conditions, the evidence they presented was to the following effect: dismissals of older workers would likely increase; monitoring and evaluation of all workers would also increase; so too would continuous monitoring and evaluation; ultimately, compensation of older workers would fall and that of younger workers would rise; the importance of seniority would be affected. In addition, the design of occupational pension plans would have to be reviewed. As now constituted, these plans form part of deferred compensation schemes which generally benefit workers.

112 In the face of these competing views, it should not be altogether surprising that the Legislature opted for a cautious approach to the matter. The Legislature, like this Court, was faced with competing socio-economic theories, about which respected academics not unnaturally differ. In my view, the Legislature is entitled to choose between them and surely to proceed cautiously in effecting change on such important issues of social and economic concern. On issues of this kind, where there is competing social science evidence, I have already discussed what *Irwin Toy*, has told us about the stance the Court should take. In a word, the question for this Court is whether the government had a *reasonable basis* for concluding that the legislation impaired the relevant right as little as possible given the government's pressing and substantial objectives.

113 We are told that a number of jurisdictions have removed mandatory retirement and the apprehended effects have not resulted. I should say, first of all, that this step did not result from judicial fiat, but out of a legislative choice. A study on the Maine legislation to which I have already referred (see *Kertzer*, *supra*, at p. 168) reveals the incremental way in which a

legislative process for the abolition of mandatory retirement proceeded. More important, however, is that we do not really know what the ramifications of these new schemes will be and the evidence is that it will be some 15 to 20 years before a reliable analysis can be made. The American data available is open to question because the "tax back" features of the American social security legislation discourage workers from continuing to work beyond the normal retirement age. We thus do not really know how many workers will opt for a longer working life in a climate where 65 is no longer the normal age and thus the nature and extent of the impact the removal of mandatory retirement would have on the organization of the workplace.

114 Take the issue of pensions. The importance of this issue and its interrelationship with mandatory retirement is set forth by Professors Gunderson and Pesando [in their joint affidavit sworn February 6, 1986] in the following passage (at p. 8):

Mandatory retirement, as part of a collective agreement or a company personnel policy, is highly correlated with the existence of occupational pension plans. For example, the Conference Board report (page 7) indicates that ninety-six per cent of their respondents with a pension plan have a mandatory retirement policy. A recent Labour Canada report indicates that 95 per cent of the pension plans in Canadian collective agreements of 500 or more employees contain mandatory retirement clauses, and that approximately 70 per cent of these agreements contain pension provisions. Therefore, about two-thirds of these major collective agreements have mandatory retirement provisions.

115 The appellants nonetheless argue that the removal of mandatory retirement has no demonstrated effect on pensions, and that any dislocations resulting from such removal could easily be adjusted. But there is strong evidence to support Dickson C.J.'s remark in *Beauregard v. Canada*, [1986] 2 S.C.R. 169, "ship between salaries and pensions". Professors Gunderson and Pesando put it this way:

Especially if the employee's pension is linked to the employee's earnings just prior to retirement, the pension plan is likely to be an important vehicle through which the deferral of total compensation takes place (James E. Pesando, "The Usefulness of the Wind-Up Measure of Pension Liabilities," *Journal of Finance*, July 1985, entered as Exhibit "L"). The pension benefits earned each year tend to rise with the employee's age and years of service. Pension benefits become more valuable as the employee nears the age at which they become payable, and wage increases granted the employee have a magnified impact through the benefit formula. Without mandatory retirement, there would likely be a reduction in the willingness of employers to defer compensation. This would require adjustments in pay policy and/or the pension plan on this account.

There is concern that if the age of retirement is lifted, social security benefits will be moved upwards.

116 It can be seen, therefore, that the concern about mandatory retirement is not about mere administrative convenience in dealing with a small percentage of the population. The concern is with the impact the removal of a rule that is generally beneficial for workers would have on the compelling objectives the Legislature has sought to achieve.

117 It is argued that the Legislature should tailor the legislation so as to permit mandatory retirement only in those industries where age constitutes a reasonable and *bona fide* employment requirement. As we saw in discussing university policies, however, one is not necessarily concerned with whether a particular individual is or is not competent to do the job. We are concerned with whether a private organization should or should not be organized in those terms; see also *Stoffman v. Vancouver General Hospital*, *supra*. It seems difficult to see how the Legislature could in the absence of an examination in context of factors such as were analyzed in the university context and in the context of these companion cases be able to divine this ahead of time. Nor is it by any means obvious that a Human Rights Commission is necessarily the most appropriate body to make that assessment.

118 Indeed, there are not only valid economic reasons, but sound reasons of social policy, for the Legislature's not imposing its will in the area. Mandatory retirement is not government policy in respect of which the Charter may be directly invoked. It is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the Charter tangentially because the Legislature has attempted to protect, not attack, a Charter value. This is not a case like *Blainey*, *supra*, where the provision in question could only have a discriminatory purpose.

119 It must be remembered that what we are dealing with is not regulation of the government's employees; nor is it government policy favouring mandatory retirement. It simply reflects a permissive policy. It allows those in different parts of the private sector to determine their work conditions for themselves, either personally or through their representative organizations. It was not a condition imposed on employees. Rather it derives in substantial measure from arrangements which the union movement or individual employees have struggled to obtain. It results from employment contracts that ensure stable, long-term employment, and some security for retirement. Far from being an unmitigated evil, it forms, as Professor Gunderson puts it, "an intricate part of the interrelated employment relationship" that is generally beneficial to both employers and employees. Expectations have built up on both sides.

120 As I stated, the labour movement, which comprises the most protected group of employees, fought for it for many years. University faculties and personnel, with which we are directly concerned here, actively sought it. The labour movement is now worried about its elimination. The Canadian Labour Congress adopted a resolution on the subject (No. 377), passed in 1980 and confirmed in 1982, which reads as follows:

WHEREAS the organized labour movement has fought hard and long legislative battles to establish the mandatory retirement age of sixty-five (65) years; and

WHEREAS the labour movement has continued to press for a lowering of the retirement age with adequate pensions in order that workers may enjoy a few years of leisure in good health; and

WHEREAS a mandatory retirement age provides employment for Canada's youth entering the labour market for the first time; and

WHEREAS there has been recent discussion and especially Senator David Croll's report expressing some desire to end the mandatory retirement age and encourage a system of voluntary retirement;

BE IT RESOLVED that the Canadian Labour Congress oppose the erosion of the mandatory retirement system, and that the current permissive legal framework with regard to mandatory retirement be maintained, so that the unions that wish to accept mandatory retirement are free to do so and those that wish to eliminate it can do so through collective bargaining.

121 Involved here, as I indicated, are important *social* as well as *economic* values. The present situation allows the parties concerned, the employers and the employees, the freedom to agree about an issue of central importance to their lives and activities. The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society. Certainly, the parties involved desire it. The employers are contesting this action. The labour movement, which represents a significant portion of the labour force and whose efforts have benefited other workers, both through legislation adopting standard conditions in collective agreements and through private agreements that emulate them, contests it as well.

122 Both employers and employees may prefer a contractual relationship which includes a definite termination date rather than an indefinite work term, because such an agreement provides a number of benefits to both parties. I have already referred to these — a type of deferred compensation scheme, periodic as opposed to continuous monitoring that may prevail if an employee's compensation is tied to productivity at all times, a "due process" scheme achieved through seniority rules, consensual evaluation and promotion procedures, a known time ending the work relationship which permits both employer and employee to engage in long-term planning, and a desire for a termination date that allows the individual to retire with dignity. These are looked upon by both sides as characteristics of a lifetime contractual arrangement in which mandatory retirement is an integral part. Though an individual may, quite understandably, object to being mandatorily retired when he or she becomes 65, it does not alter the fact that this was the arrangement that underlay the expectations of both parties at the beginning and throughout the employee's working life and for which they contracted.

123 I do not intend here to take sides on the economic arguments, and it may well be that acceptable arrangements can be worked out over time to take more sensitive account of the disadvantages resulting to the aged from present arrangements. But

I am not prepared to say that the course adopted by the Legislature, in the social and historical context through which we are now passing, is not one that reasonably balances the competing social demands which our society must address. The fact that other jurisdictions have taken a different view proves only that the Legislatures there adopted a different balance to a complex set of competing values. The latter choice may impinge on important rights of others, especially those near retirement. The observations I made in *R. v. Edwards Books and Art Ltd.*, supra, at p. 795, have application here:

By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the *Charter* established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.

In such circumstances, as I there stated, "a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures". What a court needs to consider is whether, on the available evidence, the Legislature may reasonably conclude that the protection it accords one group does not unreasonably interfere with a guaranteed right. To repeat the formulation adopted in *Irwin Toy*, the Legislature had a reasonable basis for concluding that the rights of the aged were impaired as little as possible given the government's pressing and substantial objectives.

Overbreadth

124 I have dealt with s. 9(a) of the Human Rights Code, 1981 solely in terms of mandatory retirement. That, as I see it, is the real cause of concern about the provision. It is right to say, however, that the appellants' attack on the provision was more comprehensive. In their counsel's view, s. 9(a) denies them any protection against any form of age-based employment discrimination under the Code. Even if it could be justified if confined to mandatory retirement, he argued, it would simply be overbroad.

125 Counsel did not press this argument too strongly, and in my view rightly so. With respect, it seems to me, the argument addresses concerns that are more fanciful than real. In *R. v. Edwards Books and Art Ltd.*, supra, at p. 795, I cautioned against a too abstract, too theoretical approach to constitutional interpretation. *The Constitution*, I there observed, must be applied on a realistic basis taking account of the practical, living facts to which legislation is addressed. Here counsel for the appellants was hard-pressed to give an example of age-based discrimination that would not otherwise be covered by the Code. The one example he did give, a highly unlikely situation in the workplace, could be dealt with by the Code as harassment. It would be wrong to let the constitutionality of the legislation hang on the Legislature's failure to address situations that are, for all practical purposes, hypothetical in the workplace. This fussy concern for legislative perfection cannot realistically be expected. In fact, it may be, as counsel for the universities suggested, that the Legislature may have wished to allow some flexibility to make adjustments with respect to hours of work or responsibilities on the basis of age. Nobody doubts that the effective impact of the provision is in relation to mandatory retirement.

Effects

126 There remains the question whether there is a proportionality between the effects of s. 9(a) of the Code on the guaranteed right and the objectives of the provision. From the perspective from which the arguments were, for the most part, advanced, I could say, as I did in respect of the universities' policies, that this enquiry really involved the same considerations as were discussed in dealing with the issue of whether the legislation met the test of minimal impairment.

127 That is certainly true, but it seems to me that the legislation may usefully be approached from a rather different, and probably truer, perspective. It is important to keep in mind that the Legislature did not purport to legislate about mandatory retirement at all. What it genuinely sought to do was to protect individuals within a particular age range. Given the macro-economic and social concerns of extending this protection beyond 65, it did not accord the same protection beyond that age.

The effect, of course, was to deny equal protection of the law for those over 65, just as, I suppose, government does not accord equal benefit of the law by granting old age pensions at 65, rather than at 63 or 64 for those who need it.

128 It seems to me, however, that the courts must exercise considerable caution in approaching this type of *Charter* problem. This is not a case like *Blainey, supra*, where there is no legitimate ground to support a provision. It is quite obvious from looking at the situation there that the different treatment accorded women was simply based on an irrelevant personal trait. In short, it was sex discrimination. The situation is quite different here. The Legislature sought to provide protection for a group which it perceived to be most in need and did not include others for rational and serious considerations that, it had reasonable grounds to believe, would seriously affect the rights of others.

129 In looking at this type of issue, it is important to remember that a Legislature should not be obliged to deal with all aspects of a problem at once. It must surely be permitted to take incremental measures. It must be given reasonable leeway to deal with problems one step at a time, to balance possible inequalities under the law against other inequalities resulting from the adoption of a course of action, and to take account of the difficulties, whether social, economic or budgetary, that would arise if it attempted to deal with social and economic problems in their entirety, assuming such problems can even be perceived in their entirety. This Court has had occasion to advert to possibilities of this kind. In *R. v. Edwards Books and Art Ltd.*, Dickson C.J., there dealing with the regulation of business and industry, had this to say, at p. 772:

I might add that in regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. In this context, I agree with the opinion expressed by the United States Supreme Court in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), art p. 489:

Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think.... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.... The legislature may select one phase of one field and apply a remedy there, neglecting the others.

130 The question becomes whether the cut-off point can be reasonably supported. In *Blainey*, it could not. Here I think it can and I do not think (though this is a matter that always bears scrutiny) that the cut-off point, which is not only reasonable but is appropriately defined in terms of age, is necessarily invalid because this is a prohibited ground of discrimination. *The Charter* itself by its authorization of affirmative action under s. 15(2) recognized that legitimate measures for dealing with inequality might themselves create inequalities. It should not, therefore, be cause for surprise that s. 1 of the *Charter* should allow for partial solutions to discrimination where there are reasonable grounds for limiting a measure.

131 This leads to a final consideration. *The Charter*, we saw earlier, was expressly framed so as not to apply to private conduct. It left the task of regulating and advancing the cause of human rights in the private sector to the legislative branch. This invites a measure of deference for legislative choice. As counsel for the Attorney General for Saskatchewan colorfully put it, this "should lead us to ensure that *the Charter* doesn't do through the back door what it clearly can't do through the front door". Not, I repeat, that the courts should stand idly by in the face of a breach of human rights in the Code itself, as occurred in *Blainey*. But generally, the courts should not lightly use *the Charter* to second-guess legislative judgment as to just how quickly it should proceed in moving forward towards the ideal of equality. The courts should adopt a stance that encourages legislative advances in the protection of human rights. Some of the steps adopted may well fall short of perfection, but as earlier mentioned, the recognition of human rights emerges slowly out of the human condition, and short or incremental steps may at times be a harbinger of a developing right, a further step in the long journey towards full and ungrudging recognition of the dignity of the human person.

Disposition

132 I would dismiss the appeal. I would answer the constitutional questions as follows:

1. Does s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

133 Yes.

2. Is s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

134 Yes.

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

135 No.

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

If these provisions had been enacted by government, they would infringe s. 15(1) of the *Charter*.

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

If question 4 had been answered in the affirmative, these provisions would nevertheless be justified under s. 1 of the *Charter*.

The following are the reasons delivered by *Wilson J.* (dissenting):

136 This appeal and those heard along with it were grouped together in order that this Court review the applicability of the *Canadian Charter of Rights and Freedoms* to a number of different entities performing different kinds of public functions which the government has an interest in having performed. It was hoped that through an examination of these entities, their constitutions, their objects, how they were regulated or controlled, how they were funded, and how they conducted their affairs, some criteria could be developed for application in a principled way in determining whether other entities performing such functions or comparable functions were or were not covered by s. 32 of the *Charter*. If such criteria could be developed, as opposed to having each entity brought before the Court and the question addressed on a case by case basis, it would obviously be desirable in that both government and such entities could at least make an informed assessment as to whether or not their conduct would be subject to *Charter* scrutiny. It is with this objective in mind, therefore, that I approach the first question addressed by my colleague Justice La Forest in this appeal, namely does the *Charter* apply to universities?

I. To Whom Does the *Charter* Apply?

137 Section 32(1) of the *Charter* states:

32. (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

138 The appropriate approach to the interpretation of this section received detailed treatment by this Court in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573. At issue was the question whether a court injunction to restrain a union from

engaging in secondary picketing infringed a union's freedom of expression under [s. 2\(b\) of the Charter](#). This, in turn, raised the question whether a court order obtained in the course of a dispute between a company and a union was subject to review under [the Charter](#).

139 Justice McIntyre, speaking for the Court on this issue, began his analysis of [the Charter's](#) applicability by observing that [s. 32\(1\) of the Charter](#) made clear that [the Charter](#) applied to the Parliament and Government of Canada and to the legislatures and governments of the provinces. But because [s. 32\(1\)](#) made no reference to private parties it was his view that [the Charter](#) did not apply to private litigation divorced from any connection to government. He then went on to discuss what "government" as used in the section meant. He said at p. 598:

[Section 32\(1\)](#) refers to the Parliament and Government of Canada and to the legislatures and governments of the Provinces in respect of all matters within their respective authorities. In this, it may be seen that Parliament and the Legislatures are treated as separate or specific branches of government, distinct from the executive branch of government, and therefore where the word "government" is used in [s. 32](#) it refers not to government in its generic sense — meaning the whole of the governmental apparatus of the state — but to a branch of government. *The word "government", following as it does the words "Parliament" and "Legislature", must then, it would seem, refer to the executive or administrative branch of government.* This is the sense in which one generally speaks of the Government of Canada or of a province. I am of the opinion that the word "government" is used in [s. 32 of the Charter](#) in the sense of the executive government of Canada and the Provinces. [Emphasis added.]

140 Having concluded that "government" meant the executive or administrative branch of government, McIntyre J. then moved on to consider the ways in which the executive or administrative branch could violate [the Charter](#). He concluded that it could happen in two different ways. The executive could act pursuant to legislation which was itself in violation of [the Charter](#). Or it could act on a common law principle which resulted in a violation of [the Charter](#). He said at p. 599:

It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority. Such action may also depend, however, on the common law, as in the case of the prerogative. To the extent that it relies on statutory authority which constitutes or results in an infringement of a guaranteed right or freedom, [the Charter](#) will apply and it will be unconstitutional. The action will also be unconstitutional to the extent that it relies for authority or justification on a rule of the common law which constitutes or creates an infringement of a *Charter* right or freedom. *In this way the Charter will apply to the common law, whether in public or private litigation. It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom.* [Emphasis added.]

141 McIntyre J. then turned to the question that lay at the heart of *Dolphin Delivery*, namely whether for the purposes of [Charter](#) application a court order should be viewed as government action. He concluded at pp. 600-601 that it should not:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of Government, that is, legislative, executive, and judicial, I cannot equate for the purposes of [Charter](#) application the order of a court with an element of governmental action. This is not to say that the courts are not bound by [the Charter](#). *The courts are, of course, bound by the Charter as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the Charter would, it seems to me, widen the scope of Charter application to virtually all private litigation.* All cases must end, if carried to completion, with an enforcement order and if [the Charter](#) precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to [the Charter](#). In my view, this approach will not provide the answer to the question. A more direct and a more precisely-defined connection between the element of government action and the claim advanced must be present before [the Charter](#) applies. [Emphasis added.]

142 McIntyre J. acknowledged the difficulty in defining exactly what element of government involvement was necessary in order to bring the Charter into play. He did, however, indicate at p. 602 that the Charter applied to subordinate legislation such as "regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures". Where government action of this kind was relied on by a private litigant as giving rise to an infringement of the Charter rights of another, the Charter would apply. But a court order alone could not be relied on as constituting government action for Charter purposes. He said at p. 603:

Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply.

143 McIntyre J. concluded his analysis by observing that in the case before him there was no offending statute. There was simply a common law rule that rendered secondary picketing tortious and subject to injunctive restraint on the basis that such picketing induced a breach of contract. While the Charter applied to the common law when government action was based upon it, McIntyre J. was of the view that in the case before him there was no government action that would bring the Charter into play.

144 What principles then are to be drawn from *Dolphin Delivery*? It seems to me that there are three:

- (i) s. 32(1) of the Charter applies to legislation broadly defined and to acts of the executive or administrative branch of government;
- (ii) s. 32(1) of the Charter does not apply to private litigation divorced from any connection to government; and,
- (iii) a court order does not constitute government action for purposes of Charter review.

145 These conclusions, particularly the second and third, have been the subject of considerable criticism. Some critics have found the Court's interpretation of the section ambiguous. Others simply disagree with it. But it is clear that there are at least two divergent lines of thought underlying the criticism and it might be helpful to address them.

1. Academic Opinion

(a) The Common Law/Statute Distinction

146 A number of critics have interpreted the Court's reasons in *Dolphin Delivery* as drawing a distinction between the common law and legislation and then suggesting that the common law and private litigation are linked and that legislation and litigation in which government is involved are linked. Having interpreted the decision in this manner, the critics then point out that, if this were correct, the *Civil Code of Lower Canada* would be subject to Charter review but the bulk of the common law would not. Professor Otis puts the point this way: Amazingly, the Justices of the Supreme Court of Canada do not appear to have realized that such a sharp distinction between the common law and statute law in applying the Charter could be of significant consequence for the civil law system of Quebec. Virtually the whole field of private legal relationships in Quebec is governed by the Civil Code or statutes. If the Court's reasoning in *Dolphin Delivery* is applied to characterize the Code under subsection 32(1), the Charter seems likely to have a broader scope in Quebec than in the common law provinces where judge-made law relating to private dealings is immune from direct constitutional challenge. Quebecers potentially enjoy more extensive constitutional protection than other Canadians and, conversely, Quebec's private law is subjected to potentially greater constitutional constraint than its common law counterparts. This arguably amounts to little less than instituting a dual constitutional order in Canada on the slim ground that "government" in subsection 32(1) must be given an institutional connotation. (Otis, "The Charter, Private Action and the Supreme Court" (1987), 19 Ottawa L. Rev. 71, at p. 87.)

147 Others have made the same point: see Slattery, "The Charter's Relevance to Private Litigation: Does *Dolphin Delivery*?" (1987), 32 McGill L.J. 905, at p. 910; and Howse, "*Dolphin Delivery*: The Supreme Court and the Public/Private Distinction in Canadian Constitutional Law" (1988), 46 U.T. Fac. L. Rev. 248, at p. 251. Moreover, Professor Slattery submits that given that in much of Canada the application of the common law ultimately depends on explicit provisions in various

Reception Acts, it is difficult to see how one can justify excluding that common law from *Charter* review: see Slattery, *supra*, at p. 910.

148 Having pointed to one of the ways in which they feel the common law/statute distinction gives rise to difficulties, a number of critics then proceed to attack the distinction at a more general level. Professor Manwaring, for example, observes that it "seems inconsistent to say that the rules governing secondary picketing in British Columbia can be challenged to the extent that they infringe on freedoms of expression solely because they are found in a statute whereas the more restrictive rules in the other jurisdictions cannot be because the legislatures chose consciously not to legislate": see Manwaring, "Bringing the Common Law to the Bar of Justice: A Comment on the Decision in the Case of Dolphin Delivery Ltd." (1987), 19 *Ottawa L. Rev.* 413, at p. 444.

149 Professor Slattery accepts that important distinctions exist between the common law and legislation but emphasizes that "these differences are irrelevant to the question of the *Charter's* application to private relations": see Slattery, *supra*, at p. 917. He goes on to ask:

Does it make *sense* to hold that the *Charter* applies to relations between private parties where those relations are regulated by legislation, but not when they are governed by the common law? Are there good reasons in principle or policy, or in the clear wording of the *Charter*, for reaching this result? Or is the distinction an arbitrary one, producing artificial and unprincipled results? [Emphasis in original.]

And in a passage that captures the essence of much of the criticism directed at the common law/statute distinction, Howse suggests that "McIntyre J.'s identification of common law rules with private ordering and his definition of government action in terms of statute and government activity pursuant to statute represent a formalistic approach to the constitutionally relevant meaning of government action": see Howse, *supra*, at p. 251.

150 In my view, this criticism is based on a misinterpretation of the judgment in *Dolphin Delivery*. I cannot find that McIntyre J. identified the common law with private litigation and legislation with litigation in which government is involved. He in fact made it clear that the crucial element was action by the executive or administrative branch of government based on either legislation which violates the *Charter* or a common law principle which results in a violation of the *Charter*. He states very clearly, in my opinion, in the passage I have underlined from p. 599 of his reasons that the *Charter* applies to the common law, *whether in public or private litigation*, provided the government has acted upon it. Obviously, it follows from his analysis that while legislation (the act of the legislature) can be subject to *Charter* review regardless of any executive or administrative action being based upon it, the common law will not be subject to *Charter* review absent any government action based upon it. This is a necessary conclusion from his view that s. 32(1) requires either a legislative act (legislation broadly construed) or an act of the executive or administrative branch of government based on a common law principle which results in a violation of the *Charter*. This is the consequence, he states, of the *Charter's* being made applicable in s. 32(1) to legislatures and governments.

151 I agree with the commentators that one of the consequences of *Dolphin Delivery's* refusal to apply the *Charter* to the common law absent government action is that the *Charter* will have a broader application in Quebec than in the other provinces. However, it seems inescapable that all legislation including the Civil Code of Quebec is subject to *Charter* review under s. 32(1). I see no basis on which the *Civil Code* can be distinguished for this purpose from other legislation. One might speculate as to whether Parliament overlooked this problem when it enacted s. 32(1), particularly if Professor Hogg is correct that the legislative history supports the view that Parliament did not intend the *Charter* to apply to private action: see Hogg, *Constitutional Law of Canada* (2nd ed. 1985), at pp. 23-24. The necessary result of this, it seems to me, is that government action of some sort is a pre-requisite for *Charter* review of common law principles.

152 The real issue, it seems to me, is whether the Court was correct in concluding that on the wording of s. 32(1) of the *Charter* government involvement of some kind was required in order to trigger *Charter* scrutiny. I propose to return to this later.

(b) *The Status of Court Orders*

153 The second major criticism of McIntyre J.'s judgment, i.e., that it is a mistake not to treat court orders as government action, is particularly challenging because it raises complex questions concerning the very nature of government action. In discussing this aspect of the decision many of *Dolphin Delivery's* critics have been quick to point to a seeming contradiction in McIntyre J.'s reasoning. For example, Professor Manwaring, *supra*, states at p. 438:

His reasoning on this point is confusing in spite of its importance to the result. He said that the courts are bound by *the Charter* in the same way that they are bound by all law but, at the same time, he argued that court orders are not governmental action for the purposes of section 32 because the courts are not part of the executive branch of government. They act as neutral arbiters. This implies that courts have an independent constitutional status that exempts them from *the Charter*. This reasoning is contradictory because it suggests that the courts are at the same time bound and not bound without providing any clear criteria which would permit us to decide when *the Charter* will apply.

If the courts are bound by *the Charter* it makes no sense to suggest that they do not have to respect it when making orders.

154 Other critics have gone on to make at least three points concerning McIntyre J.'s observations about court orders and the apparent tension in his reasoning. First, several writers have stressed that various sections of *the Charter* make clear that there *are* instances in which *the Charter* applies to courts. Professor Hogg, for example, states that ss. 11, 12, 13, 14 and 19 of *the Charter* obviously apply to the courts: see Hogg, "*The Dolphin Delivery Case: The Application of the Charter to Private Action*" (1986-87), 51 *Sask. L. Rev.* 273, at p. 275; see also Howse, *supra*, at p. 251. Professor Hogg notes that courts in this country have been established or continued by statute and that "their powers to grant injunctions and make other orders are granted (or continued) by statute". Given that other statutory tribunals will have to comply with *the Charter*, he asks, "Why not the courts?": see Hogg, *supra*, at p. 275.

155 A second and more sweeping line of attack suggests that McIntyre J.'s analysis of s. 32(1) is simply incompatible with a robust understanding of s. 52 of the *Constitution Act, 1982*. Professor Beatty puts the argument this way:

For those who read section 52 comprehensively, as elevating *the Constitution* and the rule of law above all branches of our government, the result can be no different when the same or a similar law is declared to be the deciding rule by the judicial branch of our government. Regardless of which of the three branches of government exercises the authority of the state to reconcile these competing freedoms, the force and coercion of the law will be the same.

(Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987), 37 *U.T.L.J.* 183, at p. 187.)

156 Professor Slattery argues that courts *must* be seen as a branch of government: courts "act in the name of the community as a whole, as symbolized by the Crown, and derive their authority from that fact. In this respect they represent the State, even if they function differently than other branches of government" (Slattery, *supra*, at p. 918). Similarly, Professor Gibson states:

If one were to inquire why, in the opinion of most constitutionalists, and now of the Supreme Court of Canada, governmental actors should be subjected to a more stringent obligation to respect rights and freedoms than private actors, the most frequent answer would surely be: because government activities, backed by the overwhelming power of the State, have much greater potential for oppression than do private activities. Do judicial powers carry less potential for oppression than executive powers? Clearly not. Judges wield at least as much power over individual citizens as do most bureaucrats. Sometimes it includes the power of life and death. At the highest level, the judiciary could be said to hold even greater power than the executive, since decisions of the Supreme Court of Canada, unlike those of the Cabinet, are immune from judicial review.

(Gibson, "What did *Dolphin* Deliver?", in Gérald-A. Beaudoin, ed., *Your Clients and the Charter — Liberty and Equality* (1987), at p. 83.)

157 Finally, some critics have gone on to articulate a third line of attack on the proposition that court orders are not government action. They have emphasized that it is well accepted in the United States both that court action may constitute government

action and that attempts to distinguish courts from government are likely to prove unsuccessful: see, for example, Manwaring, supra, at p. 440. Furthermore, Professor Etherington has observed that many of the academics whose work McIntyre J. found persuasive in *Dolphin Delivery* conclude that [the Charter](#) should not apply to private action and at no time suggest that [the Charter](#) does not apply to private litigation: see Etherington, “Retail, Wholesale and Dept. Store Union, Local 580 v. Dolphin Delivery Ltd.” (1987), 66 Can. Bar Rev. 818. At page 833, he notes:

But all treat the question, whether [the Charter](#) should apply to private litigation where a court is asked to enforce a common law rule which infringes a Charter right, as a separate issue under the question of what constitutes governmental action. Swinton remains noncommittal on the question of whether [the Charter](#) should apply to private litigation in such circumstances. McLellan and Elman suggest that it is likely that [the Charter](#) will have an indirect impact on private activity by this route, while Hogg advocates the adoption of the *Shelley v. Kraemer* [334 U.S. 1 (1948)] and *N.Y. Times Co. v. Sullivan* [376 U.S. 254 (1964)] doctrine in such cases to preclude the judicial enforcement of common law doctrines that would infringe [Charter](#) rights. Although Hogg's position on the central question at issue in *Dolphin Delivery* is revealed with some clarity later in the judgment, McIntyre J.'s assertion that his conclusion, that [the Charter](#) does not apply to private litigation, has been adopted by most commentators who have dealt with this question is not convincing.

158 To summarize, critics of the proposition that court orders are not government action stress: (i) that various sections of [the Charter](#) are obviously applicable to the courts, (ii) that [s. 52 of the Constitution Act, 1982](#) requires that [s. 32\(1\) of the Charter](#) be interpreted in such a way as to bind courts by its provisions, and (iii) that courts represent the state as much as any other branch of government.

159 Let us return to McIntyre J.'s analysis on this point. The nub of it appears in the passage which I have underlined from p. 600 of his reasons. It states:

The courts are, of course, bound by [the Charter](#) as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke [the Charter](#) would, it seems to me, widen the scope of [Charter](#) application to virtually all private litigation.

160 Two thoughts underlie this passage, it seems to me. The first is the distinction made by McIntyre J. between the role of the court in litigation as compared with the role of the parties. One of the parties is alleging a *Charter* violation by the other. The court is bound by [the Charter](#) in the sense that it must interpret and apply it to the dispute. But it is, he says, a neutral arbiter in the decision-making process. The question it has to answer is: has there been a violation of [the Charter](#) by either the legislature or the executive or administrative branch of government? The critics say: but it is itself "government" within the meaning of s. 32(1) when it does this. McIntyre J. says no: it is acting in its traditional adjudicative capacity in which it is totally independent of the other branches of government. This must be so, he says, because it could not otherwise perform the function it has been given under [the Charter](#). It cannot be both judge and judged at the same time. How could it, for example, take an unbiased approach to whether the government had violated human rights or whether, if it had, its conduct was justified under s. 1?

161 This is not to say, as McIntyre J. points out, that the courts are above the law and above [the Charter](#), but simply that in exercising their adjudicative function under [the Charter](#) in a dispute between others, they cannot be viewed as "government" and the end product of their decision-making, the order of the court, as government action for purposes of s. 32(1).

162 If, of course, a court as an institution were in its own administration to violate a citizen's human rights, e.g., its employees' freedom of religion or equality rights, it would be just as guilty of a *Charter* violation as any other institution.

163 The second thought expressed by McIntyre J. is that, if court orders constitute government action for purposes of s. 32(1) then, since virtually all disputes before the court end in a court order of some kind, all litigation would be subject to [Charter](#) scrutiny. McIntyre J. obviously thought that this would be a very convoluted way of making [the Charter](#) applicable to private action. Why would s. 32(1) restrict the application of [the Charter](#) to legislatures and governments if it was meant to apply to

private action as well? Why not simply say so? It is, I believe, also clear from the judgment in *Dolphin Delivery* that McIntyre J. was concerned that the role of the Human Rights Codes not be pre-empted by the Charter.

164 Assuming that my interpretation of the Court's decision in *Dolphin Delivery* is correct and that the Court did draw a sharp distinction between government and private action for purposes of Charter application, was it justified in so doing?

2. Is the Private/Government Distinction Sustainable?

165 Professor Slattery has argued that many of the difficulties encountered in *Dolphin Delivery* flow from the Court's distinction between government and private action. He shares Professor Beatty's view that s. 52 of the Constitution Act, 1982 which states that any law inconsistent with the Constitution "is, to the extent of the inconsistency, of no force or effect" is a clear indication that s. 32(1) was not meant to place limits on the Charter's application. Slattery states at p. 920:

Given that the law in most of Canada today is a tightly woven mesh of mixed common law and statutory origins, the search for the golden thread of State action is likely to prove both frustrating and in the end pointless.

As a result, Professor Slattery suggests that questions of applicability can really only be determined by looking at the individual provisions of the Charter: see Slattery, *supra*, at p. 922, and Slattery, "Charter of Rights and Freedoms — Does it Bind Private Persons" (1985), 63 Can. Bar Rev. 157, at p. 158.

166 For his part, Professor Gibson has consistently argued that the only sensible interpretation of s. 32(1) of the Charter is one that places no restrictions on the range of bodies to which it applies: see "The Charter of Rights and the Private Sector" (1982), 12 Man. L.J. 213; "Distinguishing the Governors from the Governed: The Meaning of "Government" Under Section 32(1) of the Charter" (1983), 13 Man L.J. 505; *The Law of the Charter: General Principles* (1986), at pp. 85-118; and "What did Dolphin Deliver?", in *Your Clients and the Charter — Liberty and Equality op. cit.*, at pp. 75-90. He stresses that American jurisprudence and academic commentary has struggled in vain to produce a workable distinction. He observes that in *Reitman v. Mulkey* 387 U.S. 369 (1967), at p. 378, the United States Supreme Court described efforts to distinguish between private action and government action as an "impossible task". He too is of the view that the wording of s. 32(1) does not require the Court to read limits into the scope of the Charter's application. Moreover, he submits that "If the Charter is to serve the purpose of striking a satisfactory compromise between the claims of the individual and the claims of the community, its norms must be applied to everyone — public or private — whose actions affect the rights and freedoms of others": see *The Law of the Charter: General Principles*, *op. cit.*, at p. 118.

167 Professor Manwaring has also explored some of the problems raised in American jurisprudence that addresses the state action doctrine and notes that there are American writers who have argued that the public/private distinction is conceptually incoherent: see, for example, the Papers from the University of Pennsylvania Law Review Symposium on *The Public/Private Distinction* (1982), 130 U. Pa. L. Rev. 1289 to 1608. While he observes that in his view s. 32(1) of the Charter was meant to be a codification of the very state action doctrine that has proven the source of so many intractable problems in the United States, he concludes that "The extent of the doctrinal confusion and the strength of the critique suggest that, in spite of the fact that the reasons for including section 32 in the Charter seem obvious, it is going to prove very difficult to apply the section in practice": see Manwaring, *op. cit.*, at p. 436.

168 Some commentators who take the position that the Charter applies to private action as well as government action have suggested that s. 32(1) may simply have been included to make it clear that the Charter binds the Crown. For example, Professor de Montigny notes that one might be tempted to explain the presence of this clause by resorting "to the well-known and long-established principle that the Crown, in absence of an express indication to the contrary, is not subject to statutory law, and to thereby contend that without express mention of government in section 32, decisions taken by the executive in the exercise of its prerogative powers could not be reviewed": see "Section 32 and Equality Rights", in Bayefsky and Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (1985), at p. 568.

169 In similar vein Professor Gibson notes in *The Law of the Charter: General Principles*, *op. cit.*, at pp. 112-13:

First, there is a long-established principle of interpretation that although legislation normally applies to everyone else without explicit reference, it does not apply to the Crown unless the Crown is referred to explicitly or by necessary implication. Statutes which state that they apply to the Crown, but make no explicit reference to others to whom they apply are common-place. Given the possibility that a similar approach might be taken with respect to the interpretation of [the Charter](#), there was good reason to refer expressly to "government" in section 32(1). While the term "government" rather than the more formal "Her Majesty" is somewhat unusual, its use can be attributed to both a desire to make the document intelligible to lay readers and the fact that certain non-Crown governmental entities, such as local governments, were intended to be covered.

In other words, this line of argument suggests that had s. 32 not been included, this Court might well have concluded that at least some of the Crown's activities were not subject to [the Charter](#).

170 I do not find this line of reasoning persuasive since it seems to me obvious that one of the basic purposes of a constitutional document like [the Charter](#) is to bind the Crown. I do not believe therefore that in the absence of s. 32(1) it would have been open to the Court to apply ordinary principles of statutory interpretation when construing [the Charter](#) and thereby conclude that the Crown was not bound by its provisions.

171 Moreover, it seems to me that if the purpose of s. 32(1) was simply to make clear that [the Charter](#) applies to activities undertaken by virtue of the Crown's common law powers, the provision would have been drafted in much more precise language and that the term "Crown" or "Her Majesty" would have been used. I do not find convincing the suggestion that the term "government" was employed as a more colloquial way of referring to the Crown.

172 There are, of course, also commentators who agree that providing a clear outline of the limits on [Charter](#) application is a very difficult task, but who nonetheless argue that [s. 32\(1\) of the Charter](#) does impose such limits. The problem with *Dolphin Delivery*, they suggest, is not that the distinction cannot be drawn, but that the Court did not draw it in a satisfactory way. Howse, for example, puts the point this way (*supra*, at p. 253):

The Court was thus justified in its view that *some* limits must be placed on the applicability of [the Charter](#) to private activity. Yet, instead of developing a constitutional doctrine of the public/private distinction to determine these limits, it employed a formal conception of government action to restrict [Charter](#) application.

173 Professor Otis, for his part, observes that it is "remarkable" that the Court did not elaborate on the "jurisprudential and contextual assumptions" underlying its stance. He suggests that when one puts s. 32(1) in its broader context, it becomes clear that the document as a whole *was* meant to apply only to government: "Many substantive provisions are textually restricted to government, while others have been arguably construed as such by the Supreme Court of Canada". See Otis, *supra*, at p. 78. In particular, he points to the following provisions of [the Charter](#): s. 19, which sets out linguistic rights that are clearly aimed at delineating governments' obligations; s. 15, which refers to equality rights only with respect to "law" and which he feels thereby provides strong textual evidence in support of the proposition that [the Charter](#) is only applicable to government; [ss. 3 and 4](#), which set out a citizen's democratic rights and which impose corresponding obligations on government; [ss. 11 and 13](#), which, he submits, this Court has made clear are restricted to criminal and penal proceedings (see *Dubois v. The Queen*, [1985] 2 S.C.R. 350); and [s. 7](#) which he points out has been interpreted in *Operation Dismantle Inc. v. The Queen*[1985] 1 S.C.R. 441, at p. 490, as concerned with the protection of the individual from direct impingement by government upon his or her life, liberty and security of the person. Professor Otis concludes at p. 84:

When the whole picture of [the Charter](#) is thus revealed, its application to the private sector appears ruled out and the conclusion reached by the Supreme Court of Canada is vindicated.

174 Professor Hogg also accepts that one must draw a distinction between the acts of private actors and government action. He observes, however, (*op. cit.*, at p. 274) that:

McIntyre J. did not give his reasons for reaching this important conclusion, but, in my view, there are good reasons for reading *the Charter* in this way. I think that it is the best reading of the (admittedly ambiguous) language of *the Charter*, it is supported by the legislative history of *the Charter*; and it is consistent with the "state action" limitation on the *American Bill of Rights*. Underlying these reasons, of course, is the assumption that there is a private realm in which people are not obliged to subscribe to "state" virtues and into which constitutional norms ought not to intrude.

175 Professor Hogg develops this argument at greater length in his *Constitutional Law of Canada* (2nd ed. 1985), at pp. 670-78. In particular, he suggests, at pp. 675-76, that *s. 32(2) of the Charter*, which stipulates that, "notwithstanding" *s. 32(1), s. 15 of the Charter* was only to come into force three years after *s. 32* came into force, "plainly assumes that *s. 15* is effective through *s. 32(1)*". This, in his view, is evidence that *s. 32(1)* was meant to limit the application of *the Charter*. Moreover, he points out that the legislative history of *s. 32* supports the view that *the Charter* has no applicability to private action. He places particular weight on testimony given by Mr. Jordan in 1981 before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, who was at the time senior counsel, Public Law, in the Department of Justice. Mr. Jordan [at p. 48:27] asserted that *the Charter* "addresses itself only to laws and relationships between the state and individuals", not private relationships. Finally, Professor Hogg expresses his conviction that the American state action doctrine captures "the normal, expected role of a constitution: it establishes and regulates the institutions of government, and it leaves to those institutions the task of ordering the private affairs of the people" (op. cit., at p. 677).

176 As McIntyre J. pointed out in *Dolphin Delivery*, supra, at pp. 593-97, Professor Hogg is not the only one to argue that there are limits on *the Charter's* application. Professor Swinton has argued that *the Charter* is neither designed nor suited to deal with private action: see "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, eds., *The Canadian Charter of Rights and Freedoms — Commentary* (1982), at p. 41. She observes that *the Charter* contemplates no positive obligation on governmental bodies to eliminate private discrimination and suggests that *the Charter's* purpose is to restrain government action, not to generate legislative action (at pp. 46-47). And at p. 48, she puts forward yet another textually related argument in favour of the proposition that *the Charter* is limited in its application:

One should also keep in mind the concerns of the federal and provincial governments in drafting and agreeing to *the Charter*. Their focus was its effect on their own governmental operations. That is the reason for *s. 1*, requiring the courts to interpret the guarantees so as to allow reasonable limitations imposed by law. The override section (*s. 33*), allowing the legislatures to enact laws infringing *the Charter*, also indicates that governments were concerned about bounds on legislative action. The governments did not address the application of *the Charter* to private action, and indeed it would have been strange for them to do so, for their existing human rights codes address that matter.

177 Professor Swinton also suggests that it is important to bear in mind that *the Charter* is a less effective way to regulate private action than human rights legislation and was not intended to pre-empt such legislation. She says at p. 48:

In conclusion, while the language of *the Charter* could be interpreted to extend to private relationships, it should not be so interpreted. To apply *the Charter* to private activity will lead to a great deal of litigation in a judicial forum unsuited to the problem. It was not intended by the drafters nor accepting governments that it would so extend, for *the Charter*, as part of *the Constitution*, is meant to restrict governmental action.

And as McIntyre J. noted in *Dolphin Delivery*, supra, at p. 597, further support for this view may be found in McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on Section 32" (1986), 24 Alta. L. Rev. 361. These authors are also sympathetic to the argument that human rights legislation provides a more efficient and less costly method by which an individual may seek redress for acts of private discrimination (at p. 367).

178 Where does this leave us? It seems to me that it leaves us where the Court began pre-*Dolphin Delivery*, asking itself what the purpose of *the Charter* was. Was it aimed at government action? Was *the Charter* perceived by the draftsmen as the intermediary between the citizen and government only or was it also perceived as the intermediary between citizen and citizen? I remain of the view that it was aimed at government action, both legislative and administrative, and that the provincial and

federal human rights legislation was left to function within its proper sphere. I do not doubt that the government/private action distinction will be difficult to make in some circumstances but I also believe that the text of [the Charter](#) must be respected.

179 One particularly convincing textual argument, it seems to me, is the proposition that s. 32(1) must be read in light of s. 33, the so-called override provision. While I do not propose to analyze the nature of the override provision in any detail, particularly since this Court recently had occasion to consider the provision in [Ford v. Quebec \(Attorney General\)](#), [1988] 2 S.C.R. 712, at pp. 733-45, I believe that the presence of a provision designed to enable the legislature to override certain sections of [the Charter](#) lends considerable weight to an interpretation of s. 32(1) that concludes that the focus of [the Charter](#) is government. The presence of s. 33 suggests that those governments that subscribed to [the Charter](#) were aware that the document was designed to place constraints on their action and that they were concerned to provide themselves with a way to avoid some of those constraints (i.e., [ss. 2 and 7 to 15](#)) should this prove necessary.

180 It seems to me also that this Court's approach to [s. 1 of the Charter](#) has emphasized [that Charter](#) interpretation is fundamentally about balancing the rights of the citizen against the legitimate objectives of government. At no point has this Court suggested that a [s. 1](#) analysis, notably the proportionality test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, is intended to assist in the resolution of disputes between individuals. Indeed, given this Court's approach to [s. 1](#), I have difficulty in seeing how one could engage in a [s. 1](#) analysis absent government action.

181 No less revealing, in my view, is the fact that provisions like [ss. 3-4 and 16-20 of the Charter](#) are clearly aimed at legislatures and governments. While no single section can be said to provide conclusive proof that [the Charter](#) must be interpreted as concerned solely with government action, I believe that a reading of the document that is sensitive to the need to provide a coherent and consistent interpretation of all of its provisions leads to the conclusion that the purpose of [the Charter](#) was to constrain government action.

182 It is, of course, true that in limiting what government may do, particularly the legislative branch of government, [the Charter](#) may place limits on what citizens are entitled to do. But I do not think that this derivative form of constraint supports the proposition that [the Charter's](#) focus is as much on constraining the individual as it is on constraining government. On the contrary, it seems to me that a careful analysis of the text as a whole makes clear that, as far as the individual is concerned, the focus of the document is protection and not constraint. It was designed to provide the citizen with constitutionally protected rights and freedoms which he or she could assert against government if the need arose.

183 While I am sensitive to the observation of Lamer J. [as he then was] in [Re B.C. Motor Vehicle Act](#)[1985] 2 S.C.R. 486, at p. 508, that "the Minutes of the Proceedings of the Special Joint Committee [on [the Constitution](#)], though admissible, and granted somewhat more weight than speeches should not be given too much weight", it seems to me that the testimony before that Committee lends support, however limited, to the proposition that the document's focus is on government action. I note that Mr. Jordan, Senior Counsel, Public Law, in the Department of Justice at the time [the Charter](#) was before the Special Joint Committee on [the Constitution](#), told the Committee [at p. 48:28] that he thought "the whole of [the Charter](#) is addressing itself to the protection for individuals against acts by the state" and that he would be "very worried if we ended up with a Charter that mixed into that the domain of private infringement of liberties and freedoms". He expressed the view [at p. 48:28] that "private" infringements of this kind were best "left to be dealt with by human rights codes": see *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, First Session of the Thirty-second Parliament, 1980-81, pp. 48:27, 48:28 (January 29, 1981); see also p. 49:47 (January 30, 1981).

184 The then Minister of Justice (Mr. Chrétien) observed that [the Charter](#) was not intended to provide a solution to all social problems and that room had to be left for both levels of government in this country to enact and amend legislation designed to deal with social problems without constantly having to resort to constitutional amendments: see p. 48:27. Although I do not think that any more weight should be placed on testimony regarding the meaning of the term "government" in s. 32(1) than testimony regarding the meaning of the term "liberty" or "equal", we cannot totally ignore the fact that much of the testimony before the Committee is highly compatible with a textual analysis that concludes that [the Charter's](#) purpose is to constrain "government", however that term is best understood.

185 Finally, while it is my view that the textual argument is in and of itself convincing and that ultimately this is the proper basis on which to rest conclusions about the application of [the Charter](#), it seems to me that Professors Swinton, McLellan and Elman have a point when they suggest that the legislatures which enacted [the Charter](#) were of the view that the ordering of relations between private individuals was best left to human rights legislation. The thrust of such legislation was to get many disputes out of the courts and into a setting more conducive to providing constructive solutions to various forms of discrimination. I do not believe that [the Charter](#) was intended as an alternate route to human rights legislation for the resolution of allegations of private discrimination.

186 In summary, I remain committed to the view previously expressed by the Court that [the Charter](#) applies to government action. And rather than attempt to define the boundary between government action and private action, it seems to me that the focus of our analysis in the group of appeals currently before us must be on the nature of government action. Whether this process will shed light on the debate about the validity of the government/private action distinction need not concern us. What must concern us is: when is action properly attributed to government and what are the criteria by which that determination is to be made? As Roger Tassé points out, "If [the Charter](#) applies to everyone, there is no need to define the scope of the government" but if it applies only to government action, then it is vital to ask the question: "What is meant by the word 'government' in this context?" See Tassé, "[Application of the Canadian Charter of Rights and Freedoms](#)", in Beaudoin and Ratushny (eds.) *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), at pp. 97 and 77 respectively.

3. What is "Government Action"?

187 My colleague La Forest J. has concluded that [the Charter](#) applies only to government in its narrowest sense. He finds support for this view in a particular doctrine of the role of constitutions known as "constitutionalism". According to this doctrine states are a necessary evil. Because of the potential for tyranny and abuse which large states embody, the role of government should be strictly confined. Social and economic ordering should be left to the private sector. The more the state interferes with this private ordering, the more likely it is that the freedom of the people will be curtailed. Thus, the minimal state is an unqualified good. However, even with the minimal state there has to be some mechanism to protect the citizen against the risk of government tyranny and that mechanism is the constitution itself. Hence the concept of constitutional government as protector of the citizens' liberty.

188 Drawing on this vision of the classical role of states and constitutions my colleague has formulated what I would view as a very narrow test of "government action" under [s. 32\(1\) of the Charter](#). In his view, only those entities which actually are "government" will fall within the ambit of [the Charter](#). They must be "part of the government apparatus", "part of government", "part of the machinery of government".

189 I believe that the concept of government as oppressor of the people and the function of government as the enactment of "coercive laws" is no longer valid in Canada, if indeed it ever was. To make my point it is necessary to consider the historical evolution of the state in Canada as well as the evolution of its constitution culminating in the document before us, the [Canadian Charter of Rights and Freedoms](#).

(a) Canada and the United States Compared

190 The doctrine of constitutionalism was a driving force behind the creation of the American constitution. The [American Bill of Rights](#) was in large measure the product of a revolution. Unhappy with the injustices the Americans perceived were perpetrated against them by the British, the American people were left with a deep distrust of powerful states. The United States Constitution enshrines the belief of the American people that unless the state is strictly controlled it poses a great danger to individual liberty. Its primary focus, articulated in the bulk of its provisions, is against "state action". Canada does not share this history.

191 This Court has already recognized that while the American jurisprudential record may provide assistance in the adjudication of [Charter](#) claims, its utility is limited. In [Re B.C. Motor Vehicle Act](#), *supra*, we were called upon to determine the scope of [s. 7 of the Charter](#). Naturally, at that early stage of [Canadian Charter](#) jurisprudence, the American constitutional

tradition was heavily relied upon. Nevertheless, Lamer J., writing for the Court, made it eminently clear that our courts were not to be unduly influenced by the decisions in United States cases. He said at p. 498:

The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the [U.S. Constitution](#). [That Constitution](#), it must be remembered, has no s. 52 nor has it the internal checks and balances of [ss. 1](#) and [33](#). We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions.

192 Although in that case Lamer J. was relying primarily on the structural differences that exist between the Canadian and American constitutions, structural differences are not the sole measure of differentiation. Social, political and historical differences between our two nations also exist. [The Charter](#) has to be understood and respected as a uniquely Canadian constitutional document. However, the fact that Canada did not spring into being as a nation through the same process as the United States does not necessarily mean that Canadians do not share the same perception as our neighbours of the proper role of government. We can only discern how Canadians perceive that role by examining how it has developed through our history.

(b) The Historical Development of the Canadian State

193 Professor Corry in his report *The Growth of Government Activities Since Confederation* (Ottawa 1939) has emphasized the fact that regulation has always played a role in the governance of Canadian society and that, apart from a brief interlude during the first half of the nineteenth century, the philosophy of laissez-faire never enjoyed permanent or widespread acceptance here. He commences his discussion of the growth of government activity with the following observation at p. 1:

The period since Confederation has seen a steadily accelerating increase in the activities of governments. We tend to think of this as an increase in absolute terms, eclipsing in range and intensity all previous state interference. This, of course, is quite unhistorical. In all ages prior to the nineteenth century, strong governments had interfered quite freely and generally, quite arbitrarily in every aspect of human affairs. Regarded in proper perspective, the retreat of the state from the overhead direction of human affairs was a brief interlude roughly coincident with the first half of the nineteenth century.

194 Professor Risk in his article "Lawyers, Courts, and the Rise of the Regulatory State" (1984), 9 *Dalhousie L.J.* 31, makes the same point at pp. 32-33:

Canada never had the liberal state in the middle of the nineteenth century that England had and which some thinkers thought it should have. The state encouraged the creation of the nation and its economic expansion primarily by creating and financing railways, creating a tariff barrier, and encouraging immigration.

While Canada was struggling to become a self-sufficient nation the popularity of laissez-faire in England and in the United States was on the wane. As Professor Corry points out, the needs of a new country required the energies of government to be directed towards development. The primary obligation resting on the state in the years immediately following Confederation was the need to open up the country through the establishment of transportation facilities and the provision of basic services.

195 Indeed, one of the first priorities of the new federation was to knit the country together by the establishment of transportational connections between the various regions. Dorman points out in *A Statutory History of the Steam and Electric Railways of Canada, 1836-1937*, (Ottawa 1938), at p. 7:

Confederation brought a new impetus to railway construction. One of the articles of agreement between the four provinces called for construction of an Intercolonial Railway, and the Federal Government began the implementing of that agreement...

196 While it is beyond the scope of this review to detail the myriad ways in which the state has intervened in the railway sector, suffice it to say that the Canadian government has always played a large part in the creation and control of the railways. As Abbott said in his *A Treatise on the Railway Law of Canada* (Montreal 1896), at p. 1:

Railways in this country exist exclusively in virtue of legislative authority, and are invariably constructed and operated by incorporated companies subject to statutory conditions and limitations.

197 It was during those decades that the Canadian economy greatly expanded. This period has been described by a number of authors as the "wheat boom" since during that time, as Mackintosh wrote in his report *The Economic Background of Dominion-Provincial Relations* (Toronto 1964), at p. 39:

...the driving force behind the new period was wheat and the wheat-growing region. It gave an economic unity to the country not hitherto experienced and built up a degree of interdependence between its different regions which was in sharp contrast to the isolation of the separate economic regions which had united in 1867.

Whether or not the wheat economy was primarily responsible for the economic growth of the period, there is no dispute about the soundness of the general observation that the time was one of significant growth for Canada. The government of the day, headed by Prime Minister Sir Wilfrid Laurier, believed that it was its duty to involve itself in this process. In a speech delivered in 1903 he said, at p. 7660:

We say to-day it is the duty of all those who have a mandate from the people to attend ... to the needs and requirements of this fast growing country.

As Baggaley noted in his review of the role of the Canadian state (*The Emergence of the Regulatory State in Canada, 1867-1939* (Ottawa 1981)), Laurier's conception of the appropriate role of the Canadian government was not novel. He said at pp. 42-43:

...it was not surprising that Laurier thought it was the duty of the Canadian government to assist in the construction of a second transcontinental railway. (It was soon assisting the construction of a third) He was merely continuing a long Canadian tradition. *Public policy in Canada has always been explicitly developmental...* In 1903, at the same time Laurier was justifying public assistance to build a transcontinental railway, his government was preparing to create the Board of Railway Commissioners to regulate freight rates. *In Canada public regulation went hand in hand with public assistance.* [Emphasis added.]

198 The increase in accessibility to all regions of the country was accompanied by increased crop production, increased immigration and the growth of Canadian cities. Business also began to grow, in part due to the creation of new enterprises and in part due to the consolidation or merger of smaller businesses. In short, rapid socio-economic changes were taking place in the early part of this century and those changes sparked a re-evaluation of the appropriate role of the state. While historians have not always agreed on the characterization of this era of government interventionism most agree that the so-called "progressive era" marked an increased role for and acceptance of government regulation. A remarkable amount of government regulation both economic and social was introduced in this period.

199 For instance, pure food laws designed to afford basic protections to consumers were enacted during this period. Sellers were compelled to ensure minimum standards of food purity on pain on penalty. The Inland Revenue Act of 1875, S.C. 1874, c. 8, which made it an offence to knowingly sell any adulterated food or drink, exemplifies this kind of legislation. With the increase in industrialization came more sophisticated laws dealing with the market. Under *The Food and Drugs Act, 1920, S.C. 1920, c. 27*, for example, officers appointed under the Act were given the power to take samples and have them tested for quality by government analysts. Grading and inspection of products was made compulsory and false or misleading labelling was prohibited. Thus, the thrust of these laws shifted from being pure health measures to a regime aimed at protecting the producer's status in the marketplace by providing government guarantees of the quality of his products.

200 The provinces enacted measures of a similar nature, particularly in the dairy industry. Initial attempts were aimed at correcting the problem of the selling of tainted or diseased products although, as in the case of the federal sphere, these attempts eventually led to a more regulated regime with the added purpose of protecting markets. See for example: *The Milk, Cheese and Butter Act*, S.O. 1908, c. 55; *The Dairy Association Act*, S.Q. 1921, c. 37; and *Creameries and Dairies Regulation Act*, S.B.C. 1920, c. 23.

201 Legislative forays were also conducted into the employer/employee relationship. Factories Acts were passed in most provinces dealing with the terms of employment of women and children and with sanitation and safety in the work place. By the 1920s all provinces except Prince Edward Island had workers' compensation legislation. Minimum wages and maximum hours of work were established as well. Initially these protections applied only to women and children. It was not until the depression years that mandatory minimum employment standards were recognized as necessary for most workers.

202 It was during the First World War, however, that the real boom in government regulation during the first half of this century occurred. A number of agencies were created to deal with the problems that a war economy produces, including: a Food Controller, a Fuel Controller, a Paper Controller, the War Trade Board, the Wheat Board, a Board of Commerce, and a Cost of Living Commissioner. Many of the initiatives were short lived, however, and at the end of the war only the Wheat Board remained.

203 The movement back to a more moderate level of government intervention, one committed to fostering private sector growth, gained sway in the years immediately following the war. It was not to last long, however. The Canadian stock market crash in 1929 ushered in the era of the Great Depression and a dramatic shift in favour of government involvement in market processes and the maintenance of minimum living standards for the population. Ominously, Prime Minister Bennett announced to the country in 1935:

I am for reform

.....

And in my mind reform means Government intervention.... It means the end of *laissez faire*.... I nail the flag of progress to the masthead. I summon the power of the State to its support.

Perhaps because of the great toll the Depression took, a number of welfare oriented pieces of legislation were enacted in the areas of agriculture, labour relations and unemployment. The new measures were unlike the legislation passed in previous decades in that they endorsed the objectives of redistribution and planning. Government began to regulate both prices and output in the agricultural sector. Licensing was introduced in gasoline sales. Restrictions were placed upon the common law remedies of mortgagees and creditors. Some of the important legislative initiatives of that era included: *The Farmers' Creditors Arrangement Act*, 1934, S.C. 1934, c. 53; *The Natural Products Marketing Act*, 1934, S.C. 1934, c. 57; *The Dominion Trade and Industry Commission Act*, 1935, S.C. 1935, c. 59; *The Minimum Wages Act*, S.C. 1935, c. 44; *The Weekly Rest in Industrial Undertakings Act*, S.C. 1935, c. 14; *The Limitation of Hours of Work Act*, S.C. 1935, c. 63; and *The Employment and Social Insurance Act*, S.C. 1935, c. 38. These statutes, their provisions and effects are thoroughly explored by McConnell in his article, "The Judicial Review of Prime Minister Bennett's 'New Deal'" (1968), 6 Osgoode Hall L.J. 39.

204 A number of commentators date the birth of the Canadian welfare state to the period immediately following the New Deal. Prior to this period there were few provisions aimed at protecting working people and ensuring a minimum standard of living. Before the First World War public education and public health services were virtually the only measures of this kind in place. It was not until later, however, that other forms of income security were introduced. The old age pension scheme was introduced in 1951 and the Guaranteed Income Supplement in 1966. Two employment related measures were also introduced during this period: unemployment insurance in 1940 and the Canada Pension Plan in 1951. Families also began to receive state support in the form of the family allowance and the child tax credit. The provinces continued to provide social assistance to the particularly needy, continuing a tradition that started with the ancient poor laws. The financing of these programs, however, became a joint effort when the federal government introduced the Canada Assistance Program under which a fifty per cent cost

sharing agreement was reached with all the provinces except Quebec. In addition, tax deductions for individual pension plans were introduced under the [Income Tax Act, R.S.C. 1952, c. 148](#), as am.

205 The new wave of social welfare provisions was not limited to income security measures. During the 1950s and 60s a new form of social protection was added: human rights legislation. The first province to enact a statute dedicated solely to the protection of human rights was Saskatchewan which in 1947 passed *The Saskatchewan Bill of Rights Act*, 1947, S.S. 1947, c. 35. Other provinces, some of which had enacted legislation dealing with specific forms of discrimination in particular sets of circumstances (e.g., Ontario, *The Fair Accommodation Practices Act*, 1954, S.O. 1954, c. 28), followed suit. Comprehensive codes providing protection on a more global scale began next starting with Ontario in 1962 (*The Ontario Human Rights Code*, 1961-62, S.O. 1961-62, c. 93) and ending with Quebec in 1975 (*Charter of Human Rights and Freedoms*, S.Q. 1975, c. 6). Three provinces have now enacted specific legislation dealing with the problem of pay inequities based on gender: *The Pay Equity Act*, 1987, S.O. 1987, c. 34; *Pay Equity Act*, R.S.P.E.I. 1988, c. P-2; and *The Pay Equity Act*, S.M. 1985-86, c. 21.

206 Nor was the growth of human rights law the last phase in the increasing involvement of the state in the protection of citizens' welfare. The 1970s in particular saw a period of rapid growth in the number of regulatory statutes on such issues as environmental protection, health and safety, and consumer protection. For instance, at the federal level the *Arctic Waters Pollution Prevention Act*, R.S.C., 1985, c. A-12, the *Clean Air Act*, R.S.C., 1985, c. C-32, the *Environmental Contaminants Act*, R.S.C., 1985, c. E-12, and the *Ocean Dumping Control Act*, R.S.C., 1985, c. O-2, were virtually all passed during the first half of that decade. Similarly, government in the 1970s enacted a number of statutes directed at protecting consumers from dangerous or hazardous products such as: the *Hazardous Products Act*, R.S.C., 1985, c. H-3; the *Motor Vehicle Safety Act*, R.S.C., 1985, c. M-10; and the *Radiation Emitting Devices Act*, R.S.C., 1985, c. R-1.

207 The increase in state activity has naturally led to a large increase in the size of government. In 1962 *The Royal Commission on Government Organization* (Ottawa) reported that the federal public service had increased nine fold since the First World War and employed some 214,000 civil servants. No fewer than 89 government departments, crown agencies and corporations are listed in the schedules to the *Financial Administration Act*, R.S.C., 1985, c. F-11.

208 As well, the diversification of state function has led to the creation of a complex conglomeration of entities which together constitute "government". An examination of the range of entities listed in the *Financial Administration Act* is instructive. For instance, the long tradition of Crown ownership which began with the canals, the Canadian National Railway and provincial public utilities has been continued and many are listed in the schedules. So too are the subsidiaries which these Crown corporations themselves own. Also included are what the *Royal Commission on Financial Management & Accountability* ("The Lambert Commission") (Ottawa 1979) called shared enterprises and independent deciding and advisory bodies. The latter, which operate with a marked degree of autonomy from government, are nonetheless still considered to be part of the state, illustrating very well the diversity of bodies now considered by the state itself to be part of its enterprise.

(c) *The Modern Canadian State*

209 In approaching the question of the scope of application of the Charter, I believe we must address the issue of how this very important document became part of Canadian life. While Canada has existed as a nation for over 100 years, it never seems to have been considered necessary or especially desirable prior to 1982 that the Canadian people be protected by an entrenched bill of rights. It is legitimate to ask: why in 1982?

210 Many commentators have suggested that the increased power of private groups and institutions has resulted in the violation of human freedoms on a massive scale (Tribe, "Refocusing the "State Action" Inquiry: Separating State Acts From State Actors", in *Constitutional Choices* (Cambridge 1985); Chemerinsky, "Rethinking State Action" (1985), 80 *Nw. U.L. Rev.* 503; Bazelon, "Civil Liberties — Protecting Old Values in the New Century" (1976), 51 *N.Y.U. L. Rev.* 505; Nerken, "A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Bases of the *Civil Rights Cases* and State Action Theory" (1977), 12 *Harv. C.R.-C.L. L. Rev.* 297; and Berle, "Constitutional Limitations on Corporate Activity — Protection of Personal Rights from Invasion Through Economic Power" (1952), 100 *U. Pa. L. Rev.* 933). They argue that private

discrimination is hardly trivial and is just as pernicious as discrimination caused by government. As Professor Chemerinsky, *supra*, put it at pp. 510-11:

...the concentration of wealth and power in private hands, for example, in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of governmental conduct. Just as people may need protection from government because its power can inflict great injuries, so must there be some shield against infringements of basic rights by private power. In fact, the need for court protection from private actions arguably is greater because democratic processes, no matter how imprecise a check, impose some accountability and limits on the government. Ultimately, of course, the point is that private parties can inflict great injuries upon constitutional values; how this compares to other sources of injury is of secondary concern.

211 It is not simply that the accumulation of social, political and legal power in private entities makes possible the commission of human rights violations, it is also that recent evidence tends to suggest that it is within the realm of the "private" that the vast bulk of these injustices occur. As Tribe, *supra*, has remarked (at p. 246):

...particularly where ostensibly "private" power is the primary source of the coercion and violence that oppressed individuals and groups experience, it is hard to accept with equanimity a rigid legal distinction between state and society. The pervasive *system* of racial apartheid which existed in the South for a century after the Civil War, for example, thrived only because of the "resonance of society and politics ... the close fit between private terror, public discrimination, and political exclusion."

212 Clearly, one of the realities of modern life is that "private" power when left unchecked can and does lead to problems which are incompatible with the Canadian conception of a just society. The increasing pressure for and ultimate enactment of human rights legislation speaks eloquently to this fact. Canadian society has been prepared to embrace and solicit the assistance of the state in respect of a number of social, political and economic problems that have plagued our communities from time to time. The Canadian government has thus not been regarded as a monolith of oppression but rather as having a beneficent and protective role to play. Indeed, as Professor Robson points out in his book *The Governors and the Governed* (London 1964), at pp. 12-13:

The vast majority of citizens nowadays want their government to be continuously active. Few people still subscribe to the doctrine that the less government does the better will be the result. The main controversies are centred not on whether the government should act, but on how and when it should act.

213 This is not to say, as Professor Slattery has remarked in his article, "A Theory of the Charter" (1987), 25 Osgoode Hall L.J. 701, at p. 729, that the Canadian state has not at times been guilty of discriminatory, oppressive, and otherwise inappropriate behaviour towards its citizens. It would be a gross distortion of this nation's history to advance a purist vision of the Canadian way of life. Accordingly, the federal government, recognizing that we are living in a world which is becoming increasingly preoccupied with the problem of effective safeguards for human freedom — witness the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), the *European Convention on Human Rights and Fundamental Freedoms*, 213 UNTS 221, and the *International Covenant on Civil and Political Rights*, 999 UNTS 171, to which Canada became a signatory in 1976 — enacted first the Canadian Bill of Rights, R.S.C., 1985, App. III, in 1960 and then the *Canadian Charter of Rights and Freedoms* in 1982, the latter having constitutional status. The values reflected in the Charter were to be the foundation of all laws, part of the "supreme law of Canada" against which the constitutionality of all other laws was to be measured.

214 Several observations may be made with respect to the role of the Canadian state based on this brief historical review.

215 First, government regulation and intervention has long been part of the political, social and economic culture of Canada though its extent has varied during different periods in our history. The focus of intervention has also changed from time to time in response to different needs. In spite, however, of these fluctuations, it seems to be generally accepted by our historians that the political philosophy of laissez-faire has not been embraced to any substantial degree in Canada.

216 Second, as some historians have noted, the phenomenon of the interventionist state has traditionally been and continues to be a feature of Canadian political life. Government participation and control has persisted irrespective of the particular government in power. Thus, as Professor McConnell concludes at p. 222 of his article "Some Comparisons of the Roosevelt and Bennett 'New Deals'" (1971), 9 Osgoode Hall L.J. 221:

There can hardly be any question, however, that governments of all political hues will henceforward use all the instruments of fiscal and economic policy to prevent a recurrence of the depression and, in smaller or greater measure, to achieve the overall economic planning that is associated with the further development of the "welfare state".

217 Third, the interventionist activities of the Canadian state have taken many forms. As noted by Priest, Stanbury and Thompson, ("On the Definition of Economic Regulation", in Stanbury (ed.), *Government Regulation: Scope, Growth, Process* (Montreal 1980)), policy instruments may take the form of "Moral suasion, exhortation or negotiation", direct expenditures, taxation, tax expenditures and public ownership. All of these measures and probably others are available in order to further the objectives of the state and the Canadian government has utilized many if not all of them at some time or other. It has, for example, engaged in a government-owned industry in some sectors while merely imposing tariffs in others.

218 I believe that this historical review demonstrates that Canadians have a somewhat different attitude towards government and its role from our U.S. neighbours. Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. The state has been looked to and has responded to demands that Canadians be guaranteed adequate health care, access to education and a minimum level of financial security to name but a few examples. It is, in my view, untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.

219 Finally, it is, I think, true to say that while government intervention has traditionally been acceptable to Canadians, the state has never assumed sole responsibility for economic and social welfare matters. There has always been and continues to be a broad sphere of purely private activity in Canada.

220 All of these observations lead, in my opinion, to the conclusion that a concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action". Governments act today through many different instrumentalities depending upon their suitability for attaining the objectives governments seek to attain. The realities of the modern state place government in many different roles *vis-à-vis* its citizens, some of which cannot be effected, or cannot be best and most efficiently effected, directly by the apparatus of government itself. We should not place form ahead of substance and permit the provisions of the Charter to be circumvented by the simple expedient of creating a separate entity and having it perform the role. We must, in my opinion, examine the nature of the relationship between that entity and government in order to decide whether when it acts it truly is "government" which is acting. We must, as I suggested at the outset, identify those criteria which are relevant to that determination so that they may be applied in a principled way.

4. The Relevant Criteria

221 In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, Dickson J., as he then was, emphasized at p. 156, that it was important to engage in a broad purposive analysis of the Charter's provisions. And in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, at p. 344, he stressed that interpretations of the Charter's provisions should be generous rather than legalistic. In deciding what kind of criteria are relevant in interpreting the term "government" in s. 32 of the Charter, we should therefore adopt a purposive approach. We should ask ourselves the question: why does the Charter constrain the activities of government?

222 It seems to me that a historical review of the growth of the Canadian state makes clear that those who enacted the Charter were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role. I do not think they intended to do this by carving out or preserving "private" spheres of activity. I believe, however, that they considered it crucial to establish norms by which government would be constrained in performing the many roles it has assumed and will no doubt continue to assume. They sought to do this by setting out basic constitutional norms

rooted in a concern for individual dignity and autonomy which government should be compelled to respect when structuring important aspects of citizens' lives. The purpose of the Charter then, it seems to me, is to ensure that government action that affects the citizen satisfies these basic constitutional norms. I think that Dickson J. put the point well in *Hunter*, supra, at p. 155, when he made the following observation about the role of a constitution:

Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties.

223 In my view, it follows from these propositions that we must take a broad view of the meaning of the term "government", one that is sensitive both to the variety of roles that government has come to play in our society and to the need to ensure that in all of these roles it abides by the constitutional norms set out in the Charter. This means that one must not be quick to assume that a body is *not* part of government. Consideration of a wide range of factors may well be necessary before one can conclude definitively that a particular entity is not part of government. If this Court is to discharge its responsibility of ensuring that our constitution does provide "unremitting protection of individual rights and liberties" against government action, then it must not take a narrow view of what government action is. To do so is to limit the impact of the Charter and minimize the protection it was intended to provide.

224 What then are the criteria which will help us to identify the kinds of bodies that the Charter seeks to constrain through the imposition of constitutional norms? At least three tests have been suggested. While none is probably in and of itself determinative, each has something important to say about the nature of government.

(a) *The "Control" Test*

225 The control test poses the question: is the body in question part of the legislative, executive or administrative branches of government and, if not, is it subject to the control of one of these branches of government? When faced with a body that is not itself part of the legislative, executive or administrative branches of government, the control test in turn asks: (a) general questions about the nature and extent of government control over an entity, such as, "does government exercise such signification control over the operation of the institution that the activities of the latter may properly be seen as activities of the former?"; and (b) more specific questions about the entity's activities, such as, "is there a clear nexus between government and the particular impugned activity?"

226 In my view, we see a very clear application of this approach in the British Columbia Court of Appeal's decision in the related appeal in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1988] 2 W.W.R. 718. In that case, the Court of Appeal stated at p. 721 that "The control exercised by the government over the affairs of the college generally, coupled with actual governmental involvement in the finalization of the collective agreement, permits no other conclusion [than that the college in question is subject to the Charter]". In reaching this conclusion the Court of Appeal first examined the question of general control. It noted that the College was an agent of the Crown, was subject to ministerial control over many aspects of its activities, and had to have its by-laws approved by a College Board whose members were appointed by the government.

227 The Court of Appeal then turned to specific questions concerning the nexus between government and the College's contractual relations with its employees. It noted that the executive branch of government had the power to appoint a Commissioner whose task it was to monitor compensation plans and to investigate arrangements by public sector employers. The [Compensation Stabilization Act, S.B.C. 1982, c. 32](#), gave this Commissioner extensive power to approve or disapprove the terms of collective agreements between the parties. The Court of Appeal was of the view that "In these circumstances the collective agreement must be regarded as the result of an action of the executive or administrative arm of government" (at p. 723).

228 The general questions the control test questions to be asked in the case of an entity not clearly part of the legislative, executive or administrative branches of government are, in my view, quite apposite. The approach seeks to ascertain whether there is a link between that which one knows is government (i.e., the executive, legislative and administrative branches) and that which one is not sure is government by focussing on whether the former exercises general control over the latter. The challenge under this part of the approach, of course, is to ascertain what are relevant forms of control. While I do not think that one can

come up with an exhaustive list of relevant forms of control or that any one form of control will necessarily prove determinative, it does seem to me that the Court of Appeal in *Douglas College* focussed on the kind of considerations one should bear in mind, viz. whether an actor that is clearly part of a branch of government controls aspects of the entity's activity through input into its policy formulation process, through the approval of the by-laws or rules that determine how that entity is to carry out its mandate, through the allocation of funding used to implement its objectives, or through the appointment of the personnel that run the entity. These forms of relatively direct control will provide strong indicia that an entity is part of government.

229 More problematic, in my view, is the second limb of the control test: namely, the search for a specific nexus between government and the impugned act. In many instances, it may be that the relevant branch of government does not exercise control over the entity's activities in as direct a way as in the *Douglas College* case, but that the entity is nonetheless a governmental actor. One need only think of those bodies that are created by statute, that depend heavily on government funding and that receive broad policy directives concerning their overall mandate from one of the branches of government, but that are deliberately placed at arm's length and given the freedom to make a wide range of choices about how to implement particular policies. This kind of arrangement is hardly novel, particularly in areas where ministers and government departments do not wish to be involved in complex and politically sensitive decisions concerning the allocation of government funds or the specific application of particular policies. Decisions of these kinds often require choosing between irreconcilable demands, and governments have therefore frequently found it prudent to create agencies or tribunals that can make these decisions free from political pressure. Thus, even although such arm's length organizations have often been created with a view to performing tasks that a government department had previously performed or might otherwise have performed, one cannot necessarily point to a nexus between the government and the arm's length organization's day-to-day activities.

230 In my view, it is therefore far from obvious that a body should automatically be deemed to be non-governmental simply because one cannot point to a specific nexus of the kind seen in *Douglas College*. To conclude that bodies that are in an arm's length relationship with the executive or administrative branches of government are automatically non-governmental would mean that a wide range of entities that are created but not controlled by the legislative branch of government would escape *Charter* review. This would hardly provide the kind of "unremitting protection" of rights and liberties that the Charter was meant to secure.

231 In other words, the problem with a restrictive application of the control test is that it risks leaving open to government the option to delegate wide powers to arm's length agencies and then to insulate those bodies from *Charter* review by limiting government involvement in those bodies' day-to-day decision-making processes. An unduly restrictive version of the control test would thereby leave it open to government to exclude significant areas of activity from *Charter* review.

232 I note that Mr. Roger Tassé has observed, "There has been a tremendous increase in subordinate legislation over the course of the past 25 years. Government by way of regulation is much more commonplace today than is government by conventional legislation": see "Application of the Canadian Charter of Rights and Freedoms", *supra*, at p. 73. Mr. Tassé goes on to identify the very concern that I have just raised when he states at p. 72:

The subordinate authority to which legislative powers are delegated must be subject to the same obligations and constraints as the enabling authority. *If it were otherwise, Parliament and the legislatures could avoid their constitutional obligations simply by confiding to others the authority to exercise their powers.* This means that all regulation-making authority conferred on Cabinet, individual ministers, civil servants, commissions or administrative tribunals must be exercised so as to comply with the Charter. It means still more, however. *Not only must the regulations themselves comply with the Charter, but actions taken under the authority of those regulations must also comply.* [Emphasis added.]

In my view, these comments are equally applicable to arm's length bodies that are subject to general governmental control.

233 It seems to me therefore that the control test has something valuable to say at a general level. The presence of general government control *will* amount to an important indicium that one is faced with government action although it will not necessarily be conclusive. One can, of course, conceive of entities that are subject to government regulation and that are therefore subject to control but that are in no sense part of government, e.g., private corporations that are subject to government regulation.

The evidence that one *is* dealing with government action will, of course, be even stronger if one can point to a direct nexus between government and the activity in question. But I do not think that the specific questions the control test poses about the presence of such a nexus are in any sense necessary conditions for a finding that there is government action. I am quite prepared to accept that, even in the absence of such a nexus, there may be sufficient government control to enable one to conclude that government action is in issue.

(b) *The "Government Function" Test*

234 A second test that has been proposed asks whether the performance of a given activity is a "government function". It seems to me that this is the kind of test that the Ontario Court of Appeal applied in this appeal when it asked itself whether a university performs a government function. In the Ontario Court of Appeal's view universities do not perform a government function even although they provide a public service for which they receive significant government funding. But the Court of Appeal felt that a body like a municipality would be subject to the Charter because it performs what the Court of Appeal viewed as quintessentially governmental functions, including the enactment of laws of general application. The Court of Appeal observed (see: [McKinney v. University of Guelph](#) 1987 3 O.R. (2d) 1, at p. 24):

The fact that municipal corporations are "creatures of the legislature" is not determinative. *It is the function that they were created to perform that is.* "Creatures of the legislature" do not automatically become accountable to the Charter: they remain accountable to their "creator". Ordinarily, it is their "creator" which would attract the reach of the Charter, but municipal corporations differ from other statutory corporations in that they are incorporated by government to perform a governmental function; a function that the provincial government could and often does perform itself. As such, they can be considered "a distinct level of government" to use Linden J.'s phrase, or "a branch of government" to use that of McIntyre J. in *Dolphin Delivery*, *supra*. But it is the function for which they are incorporated that gives them this status and not the mere fact that they are incorporated and have their authority to act bestowed upon them by their incorporating statute. [Emphasis added.]

235 In my view, there are at least three problems with the Ontario Court of Appeal's "functional" approach. First, it seems to me that the particular version of this approach advocated by the Ontario Court of Appeal is based on a rather narrow view of government as the maker and enforcer of laws. At best, this can be but part of any complete picture of the modern Canadian state. I think it clear that over time government has become involved in many areas through the creation of bodies that do not simply enact laws (and may not enact laws at all) but that provide a wide range of services and support (financial or otherwise) to the citizen. There is therefore a real danger that the Ontario Court of Appeal has narrowly circumscribed government's "function" in a way which does not accord with twentieth century reality.

236 Second, even if one were to operate with a somewhat more expansive concept of a government's "function", this approach would risk excluding from *Charter* review many actions of the legislative, executive or administrative branches of government that might not necessarily be seen as part of a government's "function": for example, entering into employment agreements with civil servants or entering into contracts for supplies with outside bodies. This result would hardly be compatible with a purposive interpretation of s. 32(1) of the Charter, a provision which states that the Charter applies to "all matters within the authority" of Parliament.

237 Third, and most importantly, it seems to me that a functional approach risks assuming that government is static, something which the historical review that I have presented reveals is far from the case. If we have learned anything from the widespread criticism of the private/government distinction and the remarkable evolution of government in the last century, it must surely be that government's functions are not finite. Government has become involved in an ever-widening range of activities. Moreover, it is likely both to move into new areas and to move out of areas in which it no longer feels it should be involved. Governments' functions are constantly evolving even although there may be some core group of activities that most governments have engaged in most of the time. Any test that focusses solely on these core activities, or that limits itself to the activities that a given government is engaged in at a particular point in time, will be of little use in dealing with hard cases in which government has assumed a new area of involvement.

238 In other words, it is a mistake to think that one can identify *the* key function(s) that is (are) determinative of what is government. In my view, it is hardly surprising that in the course of conducting a thorough analysis of a variety of bodies that one might consider part of government, Mr. Tassé concludes that "There are no clear and generally accepted criteria for determining when a function is properly judged to be governmental" (Tassé, *op. cit.*, at p. 81). A function becomes governmental because a government has decided that it should perform that function, not because the function is inherently a government function. It seems to me that in ignoring this point the functional approach risks putting the cart before the horse. Moreover, it seems to me that one must recognize that there may be circumstances in which both governmental and non-governmental bodies fulfil a given function at the same time. In such cases the functional approach may tell us little about the status of any given entity that performs that function.

239 That much having been said, it does seem to me that the functional approach has something to offer, provided that one does not assume that just because a body is not performing a traditional government function it is not a government actor. The fact that an entity is performing an activity that we have come to accept as being one of the exclusive functions that a given level of government performs may well be a strong indicium that one is faced with a government actor. Indeed, one may conclude that even although there is no direct nexus between government and a given body's activities and that even although there is minimal government control over that body, the entity must nonetheless be viewed as part of government because it performs a function that has traditionally been performed by government.

240 Ultimately, much will turn on the function with which one is concerned. While there are functions that government has long fulfilled, e.g., the criminal law enforcement process, there are others that may on some occasions be fulfilled by government and on other occasions by other kinds of bodies, e.g., private corporations. There may also be functions that government decides it should no longer perform. And, as I have already suggested, there may be sectors of the economy where government is competing directly with the private sector with respect to the provision of particular services and where it is very difficult to apply a functional approach in order to sort out which players are government actors and which are not. At best, then, the functional approach can only provide tentative answers to the question whether one is dealing with government. But the approach may nonetheless point to important considerations that should be taken into account in any analysis of the status of a given body.

(c) The "Government Entity" Test

241 A third approach might centre on the question of whether a given body is a "government entity". This approach focusses on the question whether an entity performs a task pursuant to statutory authority and whether it performs that task on behalf of government in furtherance of a government purpose. In my view, this approach captures considerations which neither the control test nor the government function test address, considerations that may well enable us to ascertain whether government is in fact taking on new roles or fulfilling old roles through the creation of new institutional arrangements.

242 While I am not aware of a decision based on this approach to the interpretation of s. 32(1) of the Charter, it seems to me that this Court has applied a variation of this test in cases in which it has dealt with the doctrine of Crown immunity. I note, for example, that in *R. v. Eldorado Nuclear Ltd.*[1983] 2 S.C.R. 551, at pp. 565-66, this Court stated:

Statutory bodies such as Uranium Canada and Eldorado are created for limited purposes. When a Crown agent acts within the scope of the public purposes it is statutorily empowered to pursue, it is entitled to Crown immunity from the operation of statutes, because it is acting on behalf of the Crown. When the agent steps outside the ambit of Crown purposes, however, it acts personally, and not on behalf of the state, and cannot claim to be immune as an agent of the Crown.

While this approach has traditionally been used to determine when an entity's actions are not bound by statutes, it seems to me that it may well be of assistance in identifying bodies whose acts are subject to *Charter* review.

243 More precisely, this approach looks at the nature of a body's statutory authority and addresses the possibility that government has delegated power to a subordinate body. It seems to me that this approach may therefore assist one to identify those bodies that are neither subject to extensive government control and that cannot be said to be carrying out a traditional government function, but that may nonetheless be the product of government's decision to take on a new role. By examining

whether a body exists to serve a government's objectives in a particular area or acts primarily in its own self-interest, this approach may also assist one in distinguishing between entities that are in some sense creatures of statute but that cannot be said to form part of government (e.g., privately held corporations incorporated under a [Business Corporations Act](#)) and entities that are creatures of statute that do form part of government (e.g., Crown agents).

244 Thus, this approach would assist in identifying bodies like Eldorado Nuclear Limited as part of government even although the body's "corporate objects clauses and the relevant statutes leave it free to operate without government direction" (*per* Dickson J. in [Eldorado](#), *supra*, at p. 573) and even although the body operated within a relatively new area of government activity, i.e., the nuclear industry. As a Crown agent created to address what the government of the day clearly perceived to be a matter of public concern, this body would therefore be required to abide by basic constitutional norms.

245 In my view, this result accords with common sense. I note that in the course of its extensive study of government management and accountability, the Lambert Commission, *op. cit.*, at p. 269, observed:

The extensive resort to Crown agencies is a legitimate response by government to the problem of developing alternative instrumentalities to cope with the demands imposed by the assumption of new roles that require independent sources of policy advice, regulation of important sectors of the economy, objective determination of rights, and outright government ownership and operation of numerous business-like undertakings. Crown agencies serve a necessary and useful purpose in lightening the burdens on ministers caused by the growth of programs and added responsibilities within conventional departments.

As I have already mentioned, it seems to me self-evident that the Charter was meant to bind the Crown. I can see no reason why Crown agents should be labelled non-governmental and thereby exempted from the ambit of the Charter. If we are to ensure that the Charter continues to provide unremitting protection of individual rights and liberties, then it seems to me that the "alternative instrumentalities" that the Lambert Commission identified must be subject to the Charter. I note that Professor Hogg has reached a similar conclusion in *Constitutional Law of Canada* (2nd ed.), *op. cit.*, at p. 672, where he observes:

Also clearly included are those Crown corporations and public agencies that are outside the formal departmental structure, but which, by virtue of ministerial control or express statutory stipulation, are deemed to be "agents" of the Crown.

246 Once again, I do not think that this approach will necessarily produce definitive answers. There might well be entities like charitable organizations that are creatures of statute and that serve the public interest, but which would not be properly viewed as part of government. Nevertheless, it does seem to me that this approach captures an important perspective that must be borne in mind in any inquiry concerning government action, a perspective that is absent from both the control test and the government function test. This is a perspective that can help us to identify some of the more unusual bodies that government creates or becomes intricately involved with in the process of pursuing particular government objectives.

247 As this review of possible approaches to the identification of government makes clear, I do not think that any one test or approach is a panacea. All have something of value to offer since each provides a somewhat different perspective from which to deal with the question what is government. But each alone risks missing a range of bodies that it seems to me must be viewed as part of government, particularly if one is to ensure that the Charter does in fact provide unremitting protection for individual rights and liberties. It would seem therefore that the only satisfactory approach under s. 32(1) of the Charter is one that is sensitive to the strong points of each of the approaches outlined above.

248 As a result, I would favour an approach that asks the following questions about entities that are not self-evidently part of the legislative, executive or administrative branches of government:

1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?

3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

249 Each of these questions is meant to identify aspects of government in its contemporary context. An affirmative answer to one or more of these questions would, to my mind, be a strong indicator that one is dealing with an entity that forms part of government. I hasten to add, however, that an affirmative answer can never be more than an indicator. It will always be open to the parties to explain why the body in question is not part of government. Likewise a negative answer is not conclusive that the entity is not part of government. It will always be open to the parties to explain that there is some other feature of the entity that the questions listed above do not touch upon but which makes it part of government.

250 We must at all costs be sensitive to the fact that government is a constantly evolving organism. It follows that the kinds of questions we must ask when trying to identify government must also be capable of evolving. It seems to me that the reason why fixed tests designed to identify government inevitably fail is that they assume that government is static, an assumption that is not borne out by an historical and comparative review of governments in this and other countries. As a result, the questions that I have listed above are not carved in stone. Other questions may have to be added to the list as governments enter or withdraw from different fields. The questions I have listed are intended only as practical guidelines to those trying to decide whether a body that is not self-evidently part of the legislative, executive or administrative branches of government may nonetheless be part of government for purposes of s. 32(1) of the Charter.

5. Application of the Criteria to the Universities

(a) The "Control" Test

251 A review of the various connections between the province and the universities leads me to conclude that the state exercises a substantial measure of control over universities in Canada.

252 As I noted earlier in these reasons, control may be exercised in a variety of different ways. In this case the government has exercised control over the universities in four broad areas: (1) funding; (2) governing structure; (3) decision-making processes; and (4) policy. Dealing first with funding, it is clear that the province has involved itself heavily in the financing of these institutions of higher learning. As my colleague La Forest J. has noted, the province contributes substantially to the existence of the universities. It finances the bulk of the universities' capital expenditures and provides special funds for special projects. The evidence reveals that approximately 80 per cent of the operating and capital costs of the universities is met by government. In addition to those matters to which La Forest J. has referred, I point out that the government also funds the universities' "clientele", i.e., the student population. It is the availability from government of student grant and loan programs which makes it possible for a great many students to obtain a university education. Finally, the government provides funding for specific research projects.

253 It should also be noted that government funding of universities is not unconditional. The universities disburse operating grants in accordance with a ministerial Operating Formula Manual which, while not designed to limit or control the expenditure of funds granted to the universities, has as a practical matter that effect. Operating grants are calculated on the basis of the costs of the university program and the number of students involved in that program. The universities set their own tuition fees which are then subtracted from the operating grants. The universities may set tuition fees at 110 per cent of the formula fee without a reduction in operating grants. Control is also exercised over capital and special grants. These grants must be spent on the purposes for which they were received.

254 The broadly based nature of the financial assistance offered by government to all members of the university community including the administration, students, and academics indicates that government exercises a substantial measure of control over the operation of universities.

255 Second, the government exercises what may be termed "structural" control over these institutions. All of the universities in issue in this appeal have been incorporated through Acts of the provincial legislature. The history of this feature of these institutions was summarized by the Ontario Court of Appeal at pp. 14-15:

The University of Toronto (U. of T.) was created by the legislature as the "provincial university" in 1849. Its enabling statute was changed from time to time and is presently the *University of Toronto Act, 1971, S.O. 1971, c. 56*.

The University of Guelph (Guelph) is an amalgam of the Ontario Agricultural College, the Ontario Veterinary College and the McDonald Institute which formerly operated under the direct control of the provincial Department of Agriculture. The university in its present form was created in 1964 by the *University of Guelph Act, 1964, S.O. 1964, c. 120*.

Laurentian University (Laurentian) finds its origin in Sacred Heart College established as a Roman Catholic and bilingual college in 1913. In 1957 it was changed by an Act of the legislature into the University of Sudbury and subsequently became Laurentian University by the passage of the *Laurentian University of Sudbury Act, 1960, S.O. 1960, c. 151*, as amended by 1961-62, c. 154, ss. 1 to 7.

York University (York) was established in 1959 as an affiliate of the U. of T. This affiliation ended by mutual agreement in 1965 when the legislature enacted the *York University Act, 1965, S.O. 1965, c. 143*.

These "enabling" statutes set out in detail the powers, functions, privileges, and governing structure of the universities. Each establishes a governing body known as the board of governors in the case of Laurentian, York and Guelph and the governing council in the case of the U. of T. These governing bodies are given the power to "run" the institutions. They are the entities responsible for exercising all the powers and authority granted to the universities under their enabling legislation as well as under other Acts which touch upon their powers (eg., the *University Expropriation Powers Act, R.S.O. 1980, c. 516*).

256 Third, the legislative branch of government through the *Judicial Review Procedure Act, R.S.O. 1980, c. 224*, confers power on the courts to supervise the universities' exercise of their authority in order to ensure adherence to the principle of fairness. There is accordingly governmental control over some university processes.

257 Finally, I believe that the province indirectly controls a significant amount of university policy. For example, in the area of undergraduate programs, prior approval must be obtained from the Ontario Council on University Affairs ("OCUA"), an advisory committee appointed by the Lieutenant Governor in Council pursuant to the *Ministry of Colleges and Universities Act, R.S.O. 1980, c. 272*, for any new programs outside core arts and science subjects. Further, an annual report must be submitted by OCUA respecting regular programming. With respect to graduate programs, they must first be accredited by the Ontario Council on Graduate Studies ("OCGS"), a sub-committee of the Council of Ontario Universities ("COU"). If the program is approved by COU, COU recommends to OCUA that the program be funded. OCUA reviews the program in terms of academic considerations, societal need, student demand, economic constraints, and duplication of existing programs and makes its recommendations to the province which makes the final determination.

258 I believe also that government exercises a measure of control over the universities' degree granting power pursuant to the *Degree Granting Act, 1983, S.O. 1983, c. 36*. Under that Act, only approved universities are given the power to grant degrees.

259 It is true that government has no direct involvement in the policy of mandatory retirement instituted by the universities. As I have indicated, however, a specific connection between the impugned act and government need not necessarily be established. If the relationship between the universities and government is sufficiently close to warrant their being considered governmental for purposes of s. 32, I see no reason why their internal policies and practices should not have to conform to the dictates of the *Constitution*.

260 I accept the submission of the respondents that the principle of academic freedom accounts for the absence of governmental intervention in some types of decisions universities must make. In my opinion, however, this argument does not really advance the universities' case for exemption from *Charter* review. Rather, it supports the view expressed earlier that government must preserve an arm's length relationship with some types of bodies in order that they can perform their function in the best possible way. The essential function which the principle of academic freedom is intended to serve is the protection and encouragement of the free flow of ideas. Accordingly, government interference in this realm is impermissible.

261 Quoting from the Bissell Report of The Commission on the Government of the University of Toronto (Toronto 1970), at p. 27:

By and large, devotion to his discipline in an atmosphere of freedom characterizes the academic. As long as his discipline is respected and allowed to develop according to its own requirements, and he is provided with books, libraries, laboratories and technical services in keeping with the university's resources, the academic is content to leave the overall administration of the university to others and to encumber himself with as little administrative responsibility in the faculty or department as is consistent with common decency.

Academic work and academic decisions - his teaching and research, curricular development in his department, appointments to staff, and so forth - are his primary concern, and he is convinced that academics *alone* are possessed of the expertise required to make such decisions. His dedication is to his discipline, and even when he engages in writing, research and consultancy outside the university, he usually sees such activities as contributing to his work in the discipline. [Emphasis added.]

262 Quoting also from an essay by Underhill "The Scholar: Man Thinking", in Whalley (ed.), *A Place of Liberty* (Toronto 1964), at p. 68:

The claim of the university teacher is that he and his fellows, whatever their legal position as employees, are in fact members of a professional community and should be considered to enjoy the rights of a learned profession. That is, they collectively should determine what shall be taught, how it shall be taught, who shall be taught, who shall be qualified to do the teaching, and who shall be qualified to receive the teaching. In a word, they should be self-governing as are the members of other learned professions. Academic freedom is the collective freedom of a profession and the individual freedom of the members of that profession.

263 It should be noted that it is the universities themselves which confer academic freedom through their tenure arrangements for each faculty member. And this system is not without its critics. Indeed, the Bissell Commission calls for a re-thinking of tenure as a means of protecting academic freedom, suggesting that it has more to do with job security than academic freedom (at pp. 53-54).

264 While I believe that the principle of academic freedom serves an absolutely vital role in the life of the university, I think its focus is quite narrow. It protects only against the censorship of ideas. It is not incompatible with administrative control being exercised by government in other areas. In this respect, it may be somewhat analogous to the principle of judicial independence in relation to the adjudicative function. I do not believe that the fact that the province has not exercised control over the retirement policies of the universities is decisive of their status although it is clearly relevant to it.

265 With regard to the general level of control exercised by government over the universities, I believe that the indicia of control which I have identified support the conclusion that the province exercises quite substantial, although in some areas indirect, control over these institutions. This is not, however, by itself enough to bring them within s. 32 of the Charter. We have to apply the other tests outlined above.

(b) The "Government Function" Test

266 In applying the "government function" test the general principle is that a function becomes governmental because a government has decided to perform it, not because the function is inherently governmental.

267 Education has occupied an important sphere of governmental activity in both pre- and post-Confederation Canada. For example, as early as 1766 the legislature of Nova Scotia enacted *An Act concerning Schools and Schoolmasters*, S.N.S. 1766, c. 7, which provided for the appointment of schoolmasters and the funding of local schools in the colony. Other colonies of British North America had similar legislation. For example, the Revised Acts and Ordinances of Lower-Canada 1845 contain four Acts relating to education and educational establishment: *An Act to facilitate the establishment and the endowment of*

Elementary Schools in the Parishes of this Province, R.S.L.C. 1845, Class I, c. 1; *An Act for the establishment of Free Schools and the advancement of Learning in this Province*, R.S.L.C. 1845, Class I, c. 2; *An Act to provide for the establishment of Normal Schools*, R.S.L.C. 1845, Class I, c. 3; and *An Act to incorporate the College of Chambly*, R.S.L.C. 1845, Class I, c. 4. See also Province of Canada Statutes, *An Act for the better establishment and maintenance of Public Schools in Upper Canada and for repealing the present School Act*, S. Prov. C. 1849, c. 83; *An Act to repeal certain Acts therein mentioned, and to make further provision for the establishment and maintenance of Common Schools throughout the Province [Common Schools Act]*, S. Prov. C. 1841, c. 18; *An Act to enable the Corporation of the Royal Institution for the Advancement of Learning, to dispose of certain portions of Land, for the better support of the University of McGill College*, S.L.C. 1844-45, c. 78; *An Act for the appropriation of the Revenues arising from the Jesuits' Estates, for the year one thousand eight hundred and forty-six*, S.L.C. 1846, c. 59; and *An Act to make better provision for promotion of superior Education and the establishment and support of Normal Schools in Lower Canada and for other purposes*, S.L.C. 1856, c. 54. And in Prince Edward Island an educational regime had been established under various Acts such as *An Act for the encouragement of education*, S.P.E.I. 1852, c. 13, and *An Act to consolidate and amend the several laws relating to education*, S.P.E.I. 1861, c. 36. All these educational activities have been continued and expanded by the various levels of government down to the present day.

268 In 1867 the Fathers of Confederation recognized the role that provincial governments had come to ply in the area of education. [Section 93 of the Constitution Act, 1867](#) gives exclusive jurisdiction over education to the provinces, limiting that jurisdiction only to the extent necessary to protect denominational schools and religious minorities.

269 Provincial government activity in the education field subsequent to 1867 may be characterized as all-inclusive. For example, in 1871 the Ontario legislature passed *An Act to Improve the Common and Grammar Schools of the Province of Ontario*, S.O. 1871, c. 33, which reorganized the lower school system in the province creating a public system of free schools. In 1874 the legislature again acted to reform the public education department, together with the lower schools, collegiate institutes and high schools of the province, and to amend and consolidate the Consolidated Public School Act of 1874, S.O. 1874, cc. 27 and 28 respectively. Finally the Revised Statutes of Ontario for 1877 contains a consolidation of the various educational statutes in force at the time. They provide for, *inter alia*, a Department of Education (c. 203), a complete regime of public (grade) schools and high schools (cc. 204 and 205), as well as the University of Toronto (cc. 209 and 210), a school of Practical Science (c. 212), and Industrial Schools (c. 213). This governmental activity is also mirrored in other provinces and territories: see Prince Edward Island, *The Public Schools' Act*, 1877, S.P.E.I. 1877, c. 1; Nova Scotia, *Of Public Instruction*, R.S.N.S. 1873, c. 32; Quebec, *Public Instruction*, R.S.Q. 1888, Title V, arts. 1860-2288; [New Brunswick, Schools Act, C.S.N.B. 1877, c. 65](#); Manitoba, *The Manitoba School Act*, C.S.M. 1880, c. 62; British Columbia, *Consolidated Public School Act*, 1876, S.B.C. 1876, c. 142, and the North-West Territories, *The School Ordinance*, C.O.N.W.T. 1898, c. 75.

270 A brief review of the legislation in place both before and after Confederation leads to the inescapable conclusion that education at every level has been a traditional function of governments in Canada.

(c) Statutory Authority and the Public Interest Test

271 It has already been established that the universities are broadly empowered to conduct their affairs through their enabling statutes. Moreover, the grant of statutory authority clearly encompasses the power to enter into employment contracts and collective agreements with faculty and staff.

272 It is beyond dispute that the universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed. Counsel for the respondents conceded as much at trial. Moreover, justification for state activity in this area is not hard to find. The state's interest in education in today's society does not and cannot stop at the point of ensuring basic literacy. The promotion of higher learning and the provision of access to opportunities for study at this level is clearly in the public interest. The state readily acknowledges the important role universities play not only in the education of our young people but also more generally in the advancement and free exchange of ideas in our society. On a more practical level, the province recognizes that prospects for economic growth are linked to the development and maintenance of a critical mass of scholars and researchers and, more basically, an educated community. For this reason also the province has a vital interest in a first class, comprehensive system of education.

273 As in the case of the control test, I might not be prepared to conclude that satisfaction of the third test was enough by itself to bring the respondents within s. 32 of the Charter. However, the fact that the universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of "government" for purposes of s. 32. Their policies of mandatory retirement are therefore subject to scrutiny under s. 15 of the Charter.

II. Does the Universities' Mandatory Retirement Policy Infringe Section 15 of the Charter?

1. The Meaning of "Law" in Section 15

274 Having found that the Charter applies to universities in Ontario, it must next be determined whether the policy of mandating retirement at the age of 65 infringes s. 15(1) of the Charter. Section 15(1) provides:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

275 In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. discussed the meaning of the word "law" in s. 15 as follows at pp. 163-164:

This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law. No problem regarding the scope of the word "law", as employed in s. 15(1), can arise in this case because it is an Act of the Legislature which is under attack. Whether other governmental or quasi-governmental regulations, rules, or requirements may be termed laws under s. 15(1) should be left for cases in which the issue arises.

Because of its obvious application to statute law McIntyre J. did not have to consider how much further the word "law" in s. 15 might extend. This, however, has a direct bearing on the reach of s. 15.

276 A number of lower courts have attempted to grapple with this issue. In *Douglas/Kwantlen Faculty Assn. v. Douglas College*, *supra*, the British Columbia Court of Appeal noted that the word "law" appears not only in s. 15 but also in s. 1 of the Charter and s. 52 of the Constitution Act, 1982. Relying upon a rule of statutory construction which provides that when a term appears more than once in the same piece of legislation it should be given the same meaning, the court turned to the jurisprudence of this Court dealing with "law" in s. 1 of the Charter and s. 52 of the Constitution Act, 1982. The Court of Appeal offered the following definition at pp. 726-27: "a rule or a system of rules formulated by government and imposed upon the whole or a segment of society. In this context, law may be made by government itself or by bodies or agencies exercising governmental power."

277 At issue in *Douglas College* was a provision in a collective agreement mandating retirement at age 65. The court noted that in general the provisions in a collective agreement would not be considered "law" since they reflect the will of the parties and not the government. The same could not be said of the agreement before the court, however, since all its terms were subject to the approval of a commissioner appointed by the government with the power to review and reject all compensation practices. Similarly in *Stoffman v. Vancouver Gen. Hosp.* 1988 21 B.C.L.R. (2d) 165, the same panel of the court (Hinkson, Macfarlane and McLachlin (now of this Court) J.J.A.) found on the strength of *Douglas College* that a regulation passed by the hospital's management board terminating the hospital privileges of doctors over the age of 65 was also "law". As in *Douglas College* the regulation did not become effective until approved by the Minister.

278 By way of contrast, in *Re Ontario English Catholic Teachers Association and Essex County Roman Catholic School Board* (1987), 58 O.R. (2d) 545, the Divisional Court of Ontario divided on the issue of whether a policy formulated by the

school board mandating retirement at age 65 could be considered "law" for the purposes of s. 15. Craig J. in dissent expressed the opinion, at p. 550, that "the policy is intended to be binding upon the teachers and is "law" within the meaning of s. 15(1) of the Charter and s. 52(1) of the Constitution Act, 1982." The majority (Anderson and McKinlay JJ.) felt otherwise, noting at p. 565, that "law" meant "law in the sense of a rule of conduct made binding upon a subject by the State." In their view, the policy of the board and its resolution to apply it did not constitute law in this sense.

279 Despite the differences between *Douglas College* and *Vancouver General Hospital* on the one hand, and *Essex County* on the other, these decisions all accept as a fundamental premise that the word "law" in s. 15 embraces the notion of some discrete, explicit and identifiable rule. My colleague La Forest J. also seems to accept this approach to the role the word "law" is intended to play in the operation of the equality guarantee although he would give it a liberal interpretation.

280 I do not regard it as self-evident that the term "law" in s. 15 was intended to play a limiting role. I would agree with La Forest J. that if you have to find a "law" under s. 15 before the section is triggered, then "law" should be given a very liberal interpretation and should not be confined to legislative activity. It should also cover policies and practices even if adopted consensually. Indeed, it would be my view that the guarantee of equality applies irrespective of the particular form the discrimination takes.

281 As La Forest J. noted in *Andrews, supra*, at p. 193:

I am not prepared to accept at this point that the only significance to be attached to the opening words that refer more generally to equality is that the protection afforded by the section is restricted to discrimination through the application of law. It is possible to read s. 15 in this way and I have no doubt that on any view redress against that kind of discrimination will constitute the bulk of the courts' work under the provision. Moreover, from the manner in which it was drafted, I also have no doubt that it was so intended. However, it can reasonably be argued that the opening words, which take up half the section, seem somewhat excessive to accomplish the modest role attributed to them, particularly having regard to the fact that s. 32 already limits the application of the *Charter* to legislation and governmental activity. It may also be thought to be out of keeping with the broad and generous approach given to other *Charter* rights, not the least of which is s. 7, which like s. 15 is of a generalized character.

See also Eberts, "Sex-based Discrimination and the Charter," in Bayefsky and Eberts (eds.), *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto 1985), at pp. 206-07.

282 I believe, however, that on a purposive interpretation of s. 15 the guarantee of equality before and under the law and equal protection and benefit of the law also constitutes a directive to the courts to see that discrimination engaged in by anyone to whom the Charter applies is redressed whether it takes the form of legislative activity, common law principles or simply conduct. In other words, s. 15 is, in effect, declaratory of the rights of all to equality under the justice system so that, if an individual's guarantee of equality is not respected by those to whom the Charter applies, the courts must redress that inequality. I say "by those to whom the Charter applies" because of this Court's conclusion in *Dolphin Delivery* that it does not apply to private action absent a government connection.

283 However, accepting that limitation, this approach to s. 15 seems to me to be completely consistent with the finding that s. 32 of the Charter makes acts of the executive or administrative branch of government subject to *Charter* scrutiny. I see no sound reason why government conduct which violates an individual's equality rights under s. 15 is not subject to redress by the courts in order to restore that individual's declared right to equality under the law. Section 15, on this interpretation, does not require a search for a "law" which discriminates but merely a search for discrimination which must be redressed by the law.

284 Section 24 of the Charter confers a broad discretion on the courts to redress *Charter* violations. It reads:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This section may be contrasted with s. 1 of the Charter and s. 52 of the Constitution Act, 1982. Section 1 requires limits on *Charter* rights to be "prescribed by law", and if so prescribed, to be reasonable and demonstrably justified in a free and democratic society. Section 52 provides that [the Constitution](#) is the supreme law of Canada and that any law which is inconsistent with it is of no force or effect. These provisions operate to allow the courts to strike down existing laws which derogate from the values enshrined in [the Constitution](#). Section 24 of the Charter, on the other hand, seems to have been included so as to give the courts jurisdiction to design appropriate remedies for violations which do not necessarily have their origin in law as such. It thus provides a means whereby the courts can remedy infringements arising from conduct.

285 I believe also that the wording of s. 15(2) supports the view that s. 15(1) was not meant to be restricted to "law" even broadly construed. Section 15(2) provides:

15. ...

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

"Activity" cannot, in my view, be read narrowly in order to be equated with "law". Subsection (2) must be read together with subs. (1). It would not have been necessary to exempt programs and activities from the ambit of subs. (1) if they were not included in subs. (1) in the first place. I believe that the inclusion of these words in subs. (2) provides strong support for the proposition that s. 15(1) was not intended to apply only in the narrow context of discriminatory legislation or "rules" analogous thereto.

286 Finally, and perhaps most importantly, this broad interpretation of s. 15 best achieves the purpose of the section, namely to protect against the evil of discrimination by the state whatever form it takes. This Court has said on many occasions that the proper approach to *Charter* interpretation is a purposive one: see *Hunter v. Southam Inc.*, *supra*. Moreover, in interpreting "law" in s. 1 of the Charter and s. 52 of the Constitution Act, 1982, the decisions of this Court demonstrate that "law" may not have the same meaning throughout the constitution. For instance, in *Operation Dismantle Inc. v. The Queen*, *supra*, Dickson J. said of s. 52 at p. 459:

I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the *Charter* [*sic*] is confined to statutes, regulations and the common law. It may well be that if the supremacy of [the Constitution](#) expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52.

287 Contrariwise, in interpreting s. 1, Lamer J. said in *R. v. Therens*[1985] 1 S.C.R. 613, at p. 623:

As set out in the reasons of Estey J., the violation of the respondent's rights is not the result of the operation of law but of the police action and there is no need, in my view, to consider in this case whether under s. 1 of the *Charter* the "breathalyzer scheme" set up through [s. 235\(1\)](#) and [s. 237 of the Criminal Code](#) is a reasonable limit to one's rights under the *Charter*.

Le Dain J., dissenting on other grounds, agreed saying at p. 645:

The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law *within the meaning of s. 1* if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule. [Emphasis added.]

288 These two definitions of "law" are obviously quite different. Their difference springs from the fact that s. 1 of the Charter and s. 52 of the Constitution Act, 1982 serve two very different purposes. [Section 52](#) is animated by the doctrine of constitutional supremacy. As such, a wide view of "law" under that provision is mandated so that all exercises of state power, whether legislative or administrative, are caught by the Charter. [Section 1](#), on the other hand, serves the purpose of permitting limits to be imposed on constitutional rights when the demands of a free and democratic society require them. These limits

must, however, be expressed through the rule of law. The definition of law for such purposes must necessarily be narrow. Only those limits on guaranteed rights which have survived the rigours of the law-making process are effective. Just as the meaning of "law" in s. 1 of the Charter and s. 52 of the Constitution Act, 1982, depends on the purpose those sections were meant to achieve, so also does the meaning of "law" in s. 15(1).

289 In *Andrews* it was acknowledged that the key to s. 15 is the word "discrimination". At page 172 of his reasons McIntyre J. said:

The right to equality before and under the law, and the rights to the equal protection and benefit of the law contained in s. 15, are granted with the direction contained in s. 15 itself that they be without discrimination. Discrimination is unacceptable in a democratic society because it epitomizes the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that s. 15 provides a guarantee.

In *Reference Re Workers' Compensation Act, 1983 (Nfld.)*, [1989] 1 S.C.R. 922; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Rudolf Wolff & Co. v. Canada*[1990] 1 S.C.R. 695, and *R. v. S. (S.)*, [1990] 2 S.C.R. 254, this Court repeatedly affirmed that in order to establish a violation of s. 15(1) there must be evidence of discrimination in stereotype and prejudice. For example, quoting from *Turpin*, at p. 1333:

Differentiating for mode of trial purposes between those accused of s. 427 offences in Alberta and those accused of the same offences elsewhere in Canada would not, in my view, advance the purposes of s. 15 in remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society. A search for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice would be fruitless in this case....

290 It is, I think, now clearly established that what lies at the heart of s. 15(1) is the promise of equality in the sense of freedom from the burdens of stereotype and prejudice in all their subtle and ugly manifestations. However, the nature of discrimination is such that attitudes rather than laws or rules may be the source of the discrimination. In *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, this Court quoted from Judge Abella's report *Equality in Employment* regarding the phenomenon of "systemic discrimination". At page 9 of that report, Judge Abella explains:

The impact of behaviour is the essence of "systemic discrimination". It suggests that the inexorable, cumulative effect on individuals or groups of behaviour that has an arbitrarily negative impact on them is more significant than whether the behaviour flows from insensitivity or intentional discrimination....

Systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, *the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society*. The effect of the system on the individual or group, rather than its attitudinal sources, governs whether or not a remedy is justified. [Emphasis added.]

Given that discrimination is frequently perpetuated, unwittingly or not, through rather informal practices, it would be altogether inconceivable that they should be treated as insufficient to trigger the application of s. 15.

291 For the reasons given above I believe that the arguments in support of a liberal interpretation of s. 15 are compelling. It is not strictly necessary, however, for the Court to come to a definitive conclusion on this aspect of s. 15 in this case for two reasons. First, even if the most restrictive interpretation of "law" is adopted, the universities' enabling statutes all contain provisions conferring power on the respondents to terminate their contracts of employment with the appellants as they see fit. For example, *The York University Act, 1965, S.O. 1965, c. 143*, provides:

10. Except as to such matters by this Act specifically assigned to the Senate, the government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs are vested in the Board, and the

Board has all powers necessary or convenient to perform its duties and achieve the objects and purposes of the University, including, without limiting the generality of the foregoing, power,

.....

(c) to appoint, promote and remove all members of the teaching and administrative staffs of the University and all such other officers and employees as the Board may deem necessary or advisable for the purposes of the University, but no member of the teaching or administrative staffs, except the President, shall be appointed, promoted or removed except on the recommendation of the President, who shall be governed by the terms of the University's commitments and practices:

(d) to fix the number, duties, salaries and other emoluments of officers, agents and employees of the University:

See similarly: *The University of Toronto Act, 1971, S.O. 1971, c. 56, s. 2(14)(b) and (c)*; *The University of Guelph Act, 1964, S.O. 1964, c. 120, s. 11(b) and (c)*; and *The Laurentian University of Sudbury Act, 1960, S.O. 1960, c. 151, s. 13(1)(b) and (c)*. It was pursuant to these legislative provisions that the discrimination complained of took place.

292 Secondly, even if a more liberal approach to the interpretation of the word "law" is adopted, it would lead to a finding that the policies instituting mandatory retirement constitute "law" within the meaning of s. 15. At the University of Guelph the mandatory retirement age is in the form of a university policy. At both York University and Laurentian University mandatory retirement is imposed in collective agreements entered into between faculty and administration. And at the University of Toronto the age of retirement is incorporated into the definition of academic tenure, which definition forms part of the faculty members' contract of employment with the university. All of these methods of instituting mandatory retirement, it seems to me, constitute "binding rules" in the broad sense. I agree with La Forest J. that it makes no difference that some of the rules came about as a result of a process of negotiation culminating in their incorporation into collective agreements. Nor does it make any difference, in my view, that those subject to these rules, negotiated or not, have not previously pushed for their repeal. What we are dealing with in these appeals is, broadly speaking, "the law of the workplace" — law which may be determined exclusively by the employer in the case of unorganized establishments or by the joint efforts of the union and the employer in the case of unionized establishments — but binding law nonetheless.

293 For the above reasons, therefore, I find that the mandatory retirement policies of the universities are subject to s. 15 scrutiny.

2. Is the Imposition of Mandatory Retirement Discriminatory?

294 Both La Forest J. and L'Heureux-Dubé J. have found that the imposition of mandatory retirement infringes s. 15(1) of the Charter. I take no issue with that finding. Indeed, one would be hard pressed to construe any rule prohibiting employment past a certain age as anything other than a clear example of direct discrimination. I wish, however, to add a few comments about the developing jurisprudence of this Court on the application of s. 15.

295 In *Andrews, supra*, McIntyre J. described the steps to be taken in determining s. 15 claims. The first question to be asked is whether the rule, in purpose or effect, distinguishes between different individuals or different classes of individuals. A finding that "different treatment" exists, however, does not end the inquiry. McIntyre J. explicitly stated that not every difference in treatment would give rise to a s. 15 violation. The sorts of differences in treatment caught by the section are those that are discriminatory. Thus the second issue to be determined in equality cases is whether the distinction once found gives rise to discrimination.

296 What is discrimination? Before this Court had an opportunity to review the purpose of s. 15, many of the lower courts had equated "discrimination" with different treatment *simpliciter*, thereby rendering the presence of the word "discrimination" in the section more or less superfluous. McIntyre J. quite rightly rejected this interpretation. At pages 174-75 he said that discrimination:

...may be described as a distinction, whether intentional or not but *based on grounds relating to personal characteristics of the individual or group*, which has the effect of imposing burdens, obligations, or disadvantages on such individual or

group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed. [Emphasis added.]

Later in his reasons McIntyre J. set out the various approaches to s. 15 that had been advanced by academics and courts. In particular, he described what has become known as the "enumerated or analogous grounds approach" which was ultimately adopted by the Court as the proper approach to s. 15. At pages 180-81 he said:

The analysis of discrimination in this approach must take place within the context of the enumerated grounds and those analogous to them. The words "without discrimination" require more than a mere finding of distinction between the treatment of groups or individuals. Those words are a form of qualifier built into s. 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.

297 These comments ought not to be considered in isolation from one another. As Professor Gold remarked in his article, "Comment: *Andrews v. Law Society of British Columbia*" (1988-89), 34 McGill L.J. 1063, at p. 1079:

The equality provisions in the *Charter* are like the three-dimensional image in a holographic plate. Although one may break the plate into a thousand pieces, shining a laser beam through any one of the shards will reproduce the image in its entirety. So too is it with the concepts of "equality", "discrimination", "reasonableness" and "justification". Out of any one of these concepts can be generated all of the principles that we distribute amongst the various clauses of sections 15 and 1.

The view expressed by Professor Gold has been implicitly endorsed by this Court in its decisions following *Andrews*. As I noted earlier in these reasons, the evil which s. 15 was meant to protect against is stereotype and prejudice. The purpose of the equality guarantee is the promotion of human dignity. This interest is particularly threatened when stereotype and prejudice inform our interactions with one another, whether on an individual or collective basis. It is for this reason that the central focus of the equality guarantee rests upon those vehicles of discrimination, stereotype and prejudice.

298 The centrality of the concept of "prejudice" explains why the similarly situated test has no place in equality jurisprudence. Unhappily, the parties involved in these appeals as well as some of the academics who have commented upon the *Andrews* decisions have continued to resort to that test. For instance, Professor Gold, *supra*, remarked at p. 1065 of his comments:

A number of questions arise from the Court's analysis of the principle of formal equality. First, the Court does not say that the principle of formal equality has no role to play in any case whatsoever, only that it would be wrong to attempt to resolve all issues "within such a fixed and limited formula". Second, notwithstanding the harshness of its criticisms, the Court does not reject the underlying premise of this principle. For example, Justice McIntyre cites the following in support of the proposition that equality does not necessarily demand identical treatment: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals". If the "wise man" was not Aristotle, it certainly could have been: this passage is a pure expression of the principle of formal equality. [Citations omitted.]

See also Black and Smith, "Note" (1989), 68 Can. Bar Rev. 591, at pp. 600-601.

299 In my view, and with great respect to those who think otherwise, this Court has clearly rejected similarity of situation as the benchmark for the application of s. 15. I need not repeat the criticisms of the test articulated by McIntyre J. in *Andrews* or, indeed, any of the other criticisms of the test which have been identified by other commentators. The focus of s. 15, in my view, is clearly prejudice and stereotype.

300 In the context of these appeals the question then is whether the policy of mandatory retirement at age 65 gives rise to discrimination within the meaning of s. 15. The respondent universities contend that it does not. They argue that simply because mandatory retirement draws an adverse distinction on the basis of the enumerated ground of age does not mean that the policy discriminates. They say that those who are subject to mandatory retirement suffer no prejudice and s. 15 is therefore

not infringed. The appellants, on the other hand, submit that it is unnecessary for them to establish anything other than the fact that an adverse distinction has been drawn on the basis of a prohibited ground.

301 In my view, neither the respondents nor the appellants have properly approached the question this Court must address. The grounds enumerated in s. 15 represent some blatant examples of discrimination which society has at last come to recognize as such. Their common characteristic is political, social and legal disadvantage and vulnerability. The listing of sex, age and race, for example, is not meant to suggest that any distinction drawn on these grounds is *per se* discriminatory. Their enumeration is intended rather to assist in the recognition of prejudice when it exists. At the same time, however, once a distinction on one of the enumerated grounds has been drawn, one would be hard pressed to show that the distinction was not in fact discriminatory.

302 It follows, in my opinion, that the mere fact that the distinction drawn in this case has been drawn on the basis of age does not automatically lead to some kind of irrebuttable presumption of prejudice. Rather it compels one to ask the question: is there prejudice? Is the mandatory retirement policy a reflection of the stereotype of old age? Is there an element of human dignity at issue? Are academics being required to retire at age 65 on the unarticulated premise that with age comes increasing incompetence and decreasing intellectual capacity? I think the answer to these questions is clearly yes and that s. 15 is accordingly infringed.

III. Is the Universities' Mandatory Retirement Policy Justifiable Under Section 1 of the Charter?

303 I have found that the Charter applies to the universities and that their policy of mandatory retirement at age 65 violates s. 15. The next question is whether the policy can be saved under s. 1 of the Charter which provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. The Meaning of "Law" in Section 1

304 This section requires limits on *Charter* rights and freedoms to be "prescribed by law". As I have noted elsewhere, the term "law" within s. 1 should be construed in accordance with the purpose which the section was intended to serve. Part of that purpose, I believe, is to make sure that only limits imposed pursuant to the rule of law be examined to see whether they are reasonable and demonstrably justifiable under s. 1. Put more succinctly, as Le Dain J. noted in *Therens, supra*, the purpose behind the "prescribed by law" requirement is to distinguish between those limits which arise by law and those which result from arbitrary action. Is, then, the imposition of mandatory retirement prescribed by law within the meaning of s. 1?

305 This Court has had occasion to consider the "prescribed by law" requirement on a number of occasions. In *R. v. Therens, supra*, the respondent had lost control of his motor vehicle and collided with a tree. When the police arrived at the scene of the accident they suspected that the respondent had been drinking and consequently demanded from him a breath sample pursuant to s. 235(1) of the *Criminal Code, R.S.C. 1970, c. C-34*. The section provided that a person from whom a breath sample has been demanded is to comply with the demand "as soon as practicable" and, in any event, not later than two hours after the demand is made. *Therens* accompanied the officer to the police station and willingly provided the sample. He was subsequently charged and convicted under s. 236(1) of the Code of driving with a blood alcohol level in excess of the legal limit. *Therens* appealed his conviction on the basis that, since he was not informed of his right to counsel upon detention, the breath sample had been obtained in violation of his *Charter* rights and the evidence respecting his blood alcohol level was therefore improperly admitted.

306 One of the questions posed to the Court was whether the limit on the accused's right to counsel was prescribed by law. As the section of the Code provided that breath samples were to be provided as soon as practicable, the section did not expressly or by necessary implication compel infringement of the Charter. The majority found therefore that the limitation on the rights of the accused under the Charter arose from the action of the police officer involved and not from Parliament and as such could not be saved under s. 1.

307 The same analysis was applied in *R. v. Thomsen, [1988] 1 S.C.R. 640*, where s. 234.1(1) of the Code was challenged. Unlike s. 235(1), s. 234.1(1) provided that a breath sample was to be provided "forthwith" rather than as soon as practicable.

Le Dain J., writing for a unanimous court, held that the section by necessary implication infringed s. 10(b) of the Charter but could be justified under s. 1.

308 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the Court was faced with the question of whether a legislative prohibition on advertising directed against children was justified under s. 1. The legislation in question provided a mechanism by which it could be determined whether advertisements were in fact aimed at that segment of the community. Under s. 249 of the *Consumer Protection Act, R.S.Q., c. P-40* 1, a judge was to determine whether advertisements were directed towards children on the basis of three factors: (1) the nature and intended purpose of the goods advertised; (2) the manner of presentation; and (3) the time and place the advertisement was to be shown. The respondent complained that these factors were too vague and did not provide the court with sufficient guidance to make the determination whether or not advertising was directed toward children. This lack of solid guidance, it was argued, meant that the limit on the advertisers' freedom of expression was not "prescribed by law" within the meaning of s. 1. Dickson C.J., Lamer J. and I disagreed. At page 983 we said:

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

309 Finally, in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, it was decided that a provision which conferred a discretion upon a labour arbitrator to grant relief for infringements of the *Canada Labour Code, R.S.C. 1970, c. L-1*, impliedly gave the arbitrator jurisdiction to make orders placing limits on Charter rights. Lamer J. summarized the application of this aspect of s. 1 in such circumstances at p. 1081:

To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament had not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

310 In my view, a similar approach ought to be taken in these appeals. While the universities are not creatures of statute in the same sense as the arbitrator in *Slaight Communications*, they do derive their authority over employment relations with their faculty and staff through their enabling statutes. These provisions do not in and of themselves infringe the Charter. Instead, it is the action that has been taken pursuant to them which has led to the violation. It is not necessary, therefore, to determine specifically whether the actual policies compelling retirement at age 65 are "law" within the meaning of s. 1. For reasons analogous to those expressed in *Slaight Communications*, if the measures instituting mandatory retirement are not reasonable and demonstrably justified, they fall outside the authority of the universities and must be struck down.

2. Is the Universities' Mandatory Retirement Policy Reasonable and Demonstrably Justified?

311 The role of s. 1 within the Charter was first articulated in this Court in *R. v. Oakes*, *supra*. The *Oakes* "test" was succinctly summarized in the later case of *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, by Dickson C.J. at p. 768:

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must

impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

It is this test that must be applied in ascertaining whether the universities' mandatory retirement policy meets the requirements of s. 1 of the Charter.

312 Despite the fact that my colleagues La Forest and L'Heureux-Dubé JJ. have not found, as I have, that the Charter applies to the universities, they have both considered the constitutionality of mandatory retirement in the university context. I find myself in substantial agreement with L'Heureux-Dubé J. that the universities' mandatory retirement policy cannot be justified under s. 1. In my view, it does not meet the proportionality test.

313 The respondents argue that the "minimal impairment" branch of the *Oakes* test has been less stringently applied in some situations and give as examples the decisions of this Court in *Edwards Books* and *Irwin Toy*. They argue that the factors which motivated the Court in those two cases are present here and that therefore the requirement of minimal impairment should be relaxed in this case also.

314 In *Edwards Books*, this Court considered the constitutionality of the [Ontario Retail Business Holidays Act, R.S.O. 1980, c. 453](#). The Act deemed Sunday to be a common pause day in the retail sector but provided an exemption for small retailers who did not conduct business on Saturday. The majority upheld both the pause day provision and the exemption. After examining the exemption in relation to the interests of consumers, retailers and employees, Dickson C.J. remarked at pp. 781-82:

A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

Later, at p. 782, he added:

In my view, the principles articulated in *Oakes* make it incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers. The exemption in s. 3(4) of the Act under review in these appeals represents a satisfactory effort on the part of the Legislature of Ontario to that end and is, accordingly, permissible.

315 In *Irwin Toy, supra*, a seemingly similar approach was adopted by this Court in its determination of whether a legislative ban on television advertising directed towards children was constitutionally sound as not trenching too onerously on freedom of speech. In that case, the evidence revealed that televised advertising was particularly detrimental to children under the age of six because this group was the least able to differentiate fact from fiction. They were thus the most credulous when presented with advertising messages. The evidence was, however, less than conclusive with respect to older children. The most that could be said was that the ability to view critically advertised messages in an adult way occurred somewhere between the ages of seven and thirteen. Cognizant of the body of opinion on these matters, the Quebec legislature opted for a scheme which prohibited all advertising directed at children under the age of 13.

316 Dickson C.J., Lamer J. and I held the provision to be reasonable and demonstrably justified within the meaning of s. 1. At page 993 it was said:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

Applying this reasoning to the problem before us, we cast the issue we were called upon to determine in *Irwin Toy* as follows at p. 994:

In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. *The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.* [Emphasis added.]

At page 999 we concluded:

While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. *This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions.* [Emphasis added.]

317 Do the above quoted passages evidence a willingness on the part of the Court to adopt a more flexible approach to this aspect of the s. 1 test? I think it clear that they do. In my opinion, a close examination of the facts in both cases reveals that there were indeed good reasons for the Court's adopting such an approach.

318 In *Edwards Books* Dickson C.J. reviewed, as I have said, the relationship between the exemption in s. 3(4) and the interests of consumers, retailers and employees. In respect of the first two groups, he found that the scheme adopted by the legislature was no better or worse than any other proposed scheme. All of the suggested ways of dealing with exceptions to the Sunday closing laws had their faults. With respect to the interests of those who worked in the retail sector, other mechanisms for dealing with a satisfactory day of rest would severely impinge upon their interests. The Court took due notice of the fact that of all those affected in some way by Sunday shopping laws, retail employees were the most vulnerable. Largely unskilled and unrepresented, these workers would be in no position to resist pressure from their employers to not press for their rights. Thus, even although other acceptable schemes could have been adopted by the provincial government, none were clearly better at both minimizing the effects of Sunday closings on both consumers and retailers and especially at protecting the interests of those who would otherwise not reap the benefit of a uniform day off work.

319 In *Irwin Toy* the respondent advertisers submitted that there were indeed alternative means of dealing with the problem of children's advertising and that these means did not infringe so severely on the free speech rights of the advertisers. It was nonetheless held that these different means of dealing with the issue did not invalidate the legislature's right to proceed as it did. None of the proposed alternatives adequately accomplished the legislature's admittedly reasonable objective of protecting children from manipulation through commercial media. In that context, the Court refused to second guess the legislative wisdom of choosing to protect the interests of vulnerable children at the limited expense of the commercial speech rights of advertisers.

320 It seems to me that the central message to be drawn from the foregoing cases is that, if there is to be deference toward the legislative initiative in cases where different means might impinge less severely upon a guaranteed right or freedom, the exercise of such deference is particularly apposite in those cases where something less than a straightforward denial of a right is involved. Where the legislature is forced to strike a balance between the claims of competing groups for instance, and particularly where the legislature has sought to promote or protect the interests of the less advantaged, the Court should approach the application of the minimal impairment test with a healthy measure of restraint. As was said by Dickson C.J. in *Edwards Books* at p. 779:

In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

321 In such a context, the requirement of minimal impairment will be met where alternative ways of dealing with the stated objective meant to be served by the provision in question are not *clearly* better than the one which has been adopted by government. It is not a question of the Court refusing to entertain other viable options. For example, in *Ford v. Quebec, supra*,

other mechanisms for promoting the French language in the Province of Quebec were quite obviously considered by this Court and ultimately found preferable to the exclusivity route opted for by the legislature of Quebec. Similarly, this branch of the *Oakes* proportionality test will be met where the means chosen by government are the most reasonable ones available in light of the objective sought to be achieved.

322 The respondent universities seek to reap the benefit of the "vulnerable group" standard of review under *Edwards Books* and *Irwin Toy* on the basis that their mandatory retirement policy was intended to make available positions for younger academics. They argue that younger academics are "vulnerable" in the sense that, if senior faculty members are not required to retire, they are deprived of an opportunity to enter careers in academe having regard to the financial exigencies which presently plague the universities. In my view, young academics are not the kind of "vulnerable" group contemplated in *Edwards Books* and *Irwin Toy*. There is no reason outside the reality of fiscal restraints why this group cannot gain access to their chosen profession. Their exclusion does not flow, in other words, from their condition of being young as in *Irwin Toy*, or from the nature of their relationship with the universities as in *Edwards Books*. It flows solely from the government's policy of fiscal restraint. Absent the pressures to which this policy gives rise, there is nothing to suggest that younger academics would be denied meaningful career opportunities.

323 I think it fair, however, that note be taken of the efforts of some universities to actively recruit for faculty positions those who previously have been denied fair access to teaching opportunities. To my mind, if one of the purposes of the mandatory retirement policy had been to provide employment opportunities to visible minorities there would arguably be a legitimate foundation for applying the deferential standard of review advocated in *Edwards Books* and *Irwin Toy*. I give this as an illustration only and express no conclusive opinion on it because it is not before us. But it serves to underline that what is at issue in these appeals cannot be characterized as an attempt to protect or promote the interests of the disadvantaged.

324 Thus far in my reasons I have approached the issue of the standard of review under s. 1 solely on the basis that younger academics do not constitute a "vulnerable" group within the meaning of the case law. I have concluded that since younger academics are not "vulnerable" in this sense, this basis for relaxing the standard of minimal impairment does not apply. This finding, however, does not end the matter. It is evident from the extracts I have quoted from the cases that a further factor influenced this Court's decision not to apply the full rigours of *Oakes*. As my colleague La Forest J. has noted, this Court has also expressed its approval of the idea that the *Oakes* requirement of minimal impairment may be less stringently applied in circumstances where competition exists for scarce resources and the legislature is forced to strike a compromise. Should legislative compromises directed at assuaging the claims of competing groups attract the same measure of judicial deference as legislative initiatives aimed at protecting vulnerable members of society? I do not believe that the remarks of this Court in *Irwin Toy* dictate such a result.

325 It seems to me that in a period of economic restraint competition over scarce resources will almost always be a factor in the government distribution of benefits. Moreover, recognition of the constitutional rights and freedoms of some will in such circumstances almost inevitably carry a price which must be borne by others. Accordingly, to treat such price (in this case the alleged consequent lack of job opportunities for young academics) as a justification for denying the constitutional rights of the appellants would completely vitiate the purpose of entrenching rights and freedoms.

326 On the other hand, there may be circumstances in which other factors militate against interference by the courts where the legislature has attempted a fair distribution of resources. For example, courts should probably not intervene where competing *constitutional* claims to fixed resources are at stake. The allocation of resources ought not, in other words, to be approached in an acontextual manner. It should always be open to the Court to examine the government's reasons for making the particular allocation and to measure those reasons against the values enshrined in [the Constitution](#).

327 In this case, as I have noted, it is solely because of the government's policy of economic restraint that appointment opportunities for younger academics are limited. Younger academics are not *per se* a vulnerable group and no other factor presents itself which would justify the application of a deferential standard of review. The issue comes down plainly and simply to whether some members of the academic community, i.e., the younger ones, have to forego job opportunities in a period of

economic restraint in order to protect the constitutionally entrenched rights of their senior colleagues. In my opinion, this is not the sort of situation in which the requirements of *Oakes* should be relaxed.

328 In any event, even if the fact of fiscal restraint *simpliciter* were a sufficient reason to take a more relaxed approach to the minimal impairment requirement, it is my view that the facts of this case do not support the application of this standard of review. As my colleague L'Heureux-Dubé J. has noted, there does not exist a one to one ratio between the retirement of senior faculty and the hiring of junior faculty. I agree with La Forest J., however, that the absence of this close relationship does not render the fact of the relationship irrelevant for s. 1 purposes. But it is my view that because the correlation between retiring and hiring is indirect, it is not appropriate to apply the relaxed standard of minimal impairment. This Court has stressed that the standard which presumptively applies is that of *Oakes*. It is only in exceptional circumstances that the full rigours of *Oakes* should be ameliorated. The onus in this case was on the respondent universities to show that the application of a more relaxed test under s. 1 was appropriate. In my respectful view that onus has not been met.

329 I should add that even if I were to find that the less stringent application of the minimal impairment test was appropriate in this case, I would nonetheless hold that such a standard has not been met. In assessing reasonableness pursuant to this standard two factors remain relevant: (1) the objective; and (2) the availability of alternative means. In *Edwards Books* it was held that the Court should not interfere with legislative wisdom if there are no alternative means of achieving the objective which are *clearly* better in terms of both minimizing the impairment of *Charter* rights and meeting the objective. In the context of these appeals it has not been established that clearly better means are not available. Indeed, the appellants have pointed to the mechanism of voluntary retirement coupled with strong incentives to retire as not only a viable but an equally effective way of meeting the objective. The adoption of such a mechanism has the obvious advantage of not impairing the rights of senior academics and not completely sacrificing the admittedly important objective of achieving faculty renewal. Particularly when the documented success of such alternative techniques is taken into account, I find it difficult to accept that there do not exist *clearly* better alternatives within the meaning of *Edwards Books*.

330 My colleague La Forest J., in considering whether s. 9(a) of the *Human Rights Code, 1981, S.O. 1981, c. 53*, can be justified under s. 1 of the Charter, advances the proposition that mandatory retirement may be accompanied by an attractive "package deal" and that some categories of employees may be prepared to sacrifice their right to continue in their employment beyond age 65 in exchange for substantial pension and other benefits. I do not doubt that this is so. The concern under the *Human Rights Code, 1981*, however, has to be for those to whom such attractive "package deals" are not available and more will be said of this later in dealing with the constitutionality of s. 9(a) of the Code.

331 The immediate question which the "package deal" argument raises in relation to the Charter is whether citizens can contract out of their equality rights under s. 15 or whether public policy would prevent this. This Court has already held that some of the legal rights in the Charter may be waived but it has not yet been called upon to address the question whether equality rights can be bargained away. Having regard to the nature of the grounds on which discrimination is prohibited in s. 15 and the fact that the equality rights lie at the very heart of the Charter, I have serious reservations that they can be contracted out of. I believe that each right or freedom under the Charter must be considered separately in order to determine whether its central focus is personal privilege or public policy. I note with interest that the Supreme Court of India has held that if the right is in the nature of a prohibition addressed to government and inserted in *the Constitution* on grounds of public policy, it cannot be waived by an individual even although he or she may be primarily benefited by it: see *Behram Khurshid v. State of Bombay*, A.I.R. (42) 1955 Supreme Court 123, and *Basheshar Nath v. Commissioner of Income tax*, A.I.R. (46) 1959 Supreme Court 149. The adoption of such an analysis would allow only those rights which can be classified as personal privileges to be waived or contracted out of.

332 The American courts appear to have adopted a similar approach, holding that legal rights such as the right to counsel (*Johnson v. Zerbst* 304 U.S. 458 (1938); *Bute v. Illinois* 333 U.S. 640 (1948)); the right to trial by jury (*Brookhart v. Janis* 384 U.S. 1 (1966)); the privilege against self-incrimination (*Escobedo v. Illinois* 378 U.S. 478 (1964)); the protection against double jeopardy (*Haddad v. U.S.* 349 F. 2d 511 (1965)); the benefits of the prohibition against unreasonable search and seizure (*Zap v. United States* 328 U.S. 624 (1946)) can all be waived.

333 I have found no authority in any jurisdiction to support the proposition that equality rights guaranteed in the constitution may be waived or contracted out of and I prefer to leave this important question for decision in a case in which it is essential to the result. It is unnecessary to make that determination in this case because, in my view, the alternative means suggested by the appellants (i.e., voluntary retirement) is plainly a more constitutionally desirable way of achieving the objective of faculty renewal than any contract which forces a person to leave their employment against their will in return for economic gain.

334 For the reasons given by my colleague L'Heureux-Dubé J., as reinforced by the above, I conclude that the universities' provisions mandating retirement at age 65 cannot be justified under s. 1.

IV. What Is the Appropriate Remedy?

335 I turn now to the issue of the appropriate and just remedy under s. 24(1).

336 The appellants have requested: (1) a declaration that the universities have acted in a manner which infringes ss. 7 and 15 of the Charter; (2) a declaration that the appellants retain their status as full-time faculty and librarians and that they continue to be entitled to all the rights, privileges, benefits and remuneration of regular full-time appointments; (3) a permanent injunction restraining the universities from mandatorily retiring faculty and librarians contrary to their will; (4) an interlocutory injunction restraining the universities from mandatorily retiring full-time faculty and librarians upon their attaining the age of 65 and from restraining them from taking any steps toward depriving them of such status and such rights; and (5) damages for loss of the rights, benefits, privileges and remuneration attaching to regular full-time appointments.

337 One of the unique aspects of the Charter as a constitutional document is the fact that it includes several express provisions dealing with the authority of the Court to remedy *Charter* violations. In particular, s. 24(1) confers a broad discretion upon the Court to award such relief as it considers appropriate and just in the circumstances. It is s. 24(1) which gives this Court jurisdiction to award, if appropriate and just, the types of relief sought by the appellants in these appeals.

338 Dealing first with the suitability of a declaration that the universities have acted in a manner contrary to the Charter, the University of Toronto argues that this declaration should not be awarded. Counsel contends that the practical effect of the declaration will be the striking out of the termination provisions in the employment contracts between the University and the appellants. The University of Toronto maintains that this remedy is not appropriate because the term governing termination is a fundamental term of the contract and is therefore not severable. Consequently, either the entire employment contract must be done away with or any declaration which recognizes the continuation of the contract should provide that the contract is one of indefinite duration subject to termination for cause or upon due notice.

339 I do not agree with counsel for the University of Toronto that ordinary principles of contract should necessarily dictate which remedies are appropriate and just within the meaning of s. 24(1) of the Charter. The history of the enactment of this provision has been usefully canvassed by Dale and Scott Gibson in their article, "Enforcement of the Canadian Charter of Rights and Freedoms," in Beaudoin and Ratushny (eds.), *The Canadian Charter of Rights and Freedoms* (2nd ed. 1989), at pp. 784-86. This history demonstrates that the remedial scope of s. 24(1) was not intended to be limited to that available at common law.

340 Additionally, I believe that different considerations respecting appropriate remedial relief should prevail when constitutional rights and freedoms as opposed to common law rights are at stake. Remedies in contract are guided by the principle of freedom of contract. Because bargaining is seen as a wholly consensual activity, it is regarded as inappropriate for courts to award remedies which result, practically speaking, in the imposition of a new and different agreement. Where constitutional interests are implicated, on the other hand, freedom of contract must, in my opinion, necessarily play a lesser role. I believe that in the Charter context the courts should strive to preserve agreements while ridding them of their unconstitutional elements. To do otherwise, I think, would render a plaintiff's victory rather hollow since, if the entire contract is struck down, there would be no incentive for an unhappy defendant to enter into a new one with its erstwhile adversary.

341 While I am prepared to acknowledge that the preservation of the basic contract of employment would not in all cases be appropriate, I do not agree that ridding the contract of employment of its discriminatory terms in this case would be tantamount

to re-writing the agreement. The universities will retain their common law and statutory rights to terminate the employment of faculty. Those rights will be limited only in so far as their exercise violates the Charter. I do not believe that the imposition of this limitation fundamentally alters the nature of these agreements or that the declaration will turn them into contracts of permanent employment.

342 I hasten to add that even if this Court were to decide that the contract should be struck down in its entirety the respondents would be left in largely the same position as if only the termination clause were struck down. I do not believe that, if the contract were struck down, the respondents would be perfectly free to refuse to enter into another agreement with the appellants. Such a refusal, in my view, would smack of unconstitutional animus and might well provide the appellants with another cause of action under s. 15.

343 I think therefore that the appellants are entitled to a declaration that the policies adopted by the universities mandating retirement at age 65 violate s. 15 of the Charter and that the provisions in their contracts implementing this policy are of no force or effect.

344 With respect to the request for the second affirmative declaration, it is my opinion that the awarding of this remedy is also appropriate and just in the circumstances. The declaration sought closely resembles what are known in the labour law context as "reinstatement orders". While reinstatement has not generally been awarded in cases of wrongful dismissal, it is quite frequently awarded by the more specialized labour adjudicators, such as labour arbitrators, labour boards, and human rights tribunals. In my opinion, the Court in exercising its discretion under s. 24(1) should follow this more generous trend of the labour relations specialists.

345 The circumstances in this case strongly suggest that reinstatement is an appropriate and just remedy. The evidence demonstrates the paucity of academic positions currently available in the universities. For older academics improperly ousted from their positions the probability of locating comparable work will be slight. The fact that the appellants are older, coupled with the fact that they have all been granted full tenure, militates against the likelihood of their finding suitable and similar employment. Additionally, it should be noted that the rights of the appellants which have been infringed pertain to their dignity and sense of self-worth and self-esteem as valued members of the community, values which are at the very centre of the Charter. It would be insufficient, in my view, to make any order which does not seek to redress the harm which flows from the violations of this interest. Reinstatement is clearly the most effective way of righting the wrong that has been caused to the appellants. I would therefore order full reinstatement with all the attendant benefits.

346 Similarly, I believe it is appropriate and just in these circumstances to award compensatory damages for the loss of income and benefits sustained by the appellants through the breach of their s. 15 rights. Compensation for losses which flow as a direct result of the infringement of constitutional rights should generally be awarded unless compelling reasons dictate otherwise. Such compelling reasons have not been advanced in this case. I recognize that the enforced retirement of the appellants was not motivated by unconstitutional animus but rather by the severe fiscal restraints under which the universities have been forced to operate. I also appreciate that an award of damages in addition to reinstatement will place an additional monetary burden on these already financially strapped institutions. Impecuniosity and good faith are not, however, a proper basis on which to deny an award of compensatory damages. Such damages are clearly part of the web of remedies that go to make an injured party whole. Accordingly, I would award compensation for losses suffered, the matter to be remitted back to the trial judge for his determination.

347 Finally, with respect to the request for both an interlocutory and a permanent injunction, I do not believe that they should be awarded in this case. In my view the appellants are "made whole" by virtue of their having been awarded the declaration, the order for reinstatement and the order for damages. There is no apparent need for additional relief and I would deny it on that basis.

V. Does Section 9(a) of the Human Rights Code, 1981 Infringe Section 15 of the Charter?

348 In light of the conclusion I have reached respecting the applicability of the Charter to the universities, it is not strictly necessary for me to address the constitutional questions relating to the *Human Rights Code, 1981*. However, as my colleagues have approached the mandatory retirement issue through the Code, it might be helpful for me to express an opinion on this as well. The relevant provisions of the *Human Rights Code, 1981*, are as follows:

4. — (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

9. In Part I and in this Part,

(a) "age" means an age that is eighteen years or more, except in subsection 4(1) where "age" means an age that is eighteen years or more and less than sixty-five years;

23. The right under section 4 to equal treatment with respect to employment is not infringed where,

.....

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

349 Section 9(a) does not impose mandatory retirement. Rather, it limits the protections offered by the Code in the employment context to those between the ages of 18 and 65. For those who fall within this age spectrum the Code protects them from discrimination in employment except in so far as the "discrimination" results from the operation of a *bona fide* occupational qualification. As we are dealing in these appeals with discrimination against those over 65, I express no comment on the legislated threshold age of 18 in s. 9(a). The question to be addressed by this Court, therefore, is whether the Charter is infringed when all protection against employment discrimination based upon age is denied those over the age of 65.

350 It has been argued by the respondents as well as by some of the interveners that this limit upon the reach of the Code does not offend the Charter because the province was under no obligation to provide any protection against discrimination in the first place. They say that absent such an obligation there is no room for constitutional scrutiny of the state's failure to go far enough in legislating human rights protection. It is not self-evident to me that government could not be found to be in breach of the Charter for failing to act. Whether the Constitution is implicated when the state fails to do something is a question which has plagued the American courts for many years. Indeed, Tribe has commented that it is precisely when the state has not acted that the court is called upon to make the most difficult determinations regarding the scope of the Constitution: see *Constitutional Choices*, supra, at pp. 246 *et seq.* Since this is not an instance where the province has completely failed to act, we are happily relieved from deciding such a difficult question on these appeals, and I refrain from doing so. I do, however, consider it axiomatic that once government decides to provide protection it must do so in a non-discriminatory manner. It seems clear to me that in this instance the province has failed to provide even-handed protection. The contention that the Charter has no application in this circumstance must therefore be emphatically rejected: see *Re Blainey and Ontario Hockey Association* 198654 O.R. (2d) 513(C.A.).

351 As noted in the factum of the appellants, s. 9(a) discriminates because it does not distinguish between those who are and those who are not able to work. In this way, the section operates to perpetuate the stereotype of older persons as unproductive, inefficient, and lacking in competence. By denying protection to these workers the Code has the effect of reinforcing the stereotype that older employees are no longer useful members of the labour force and their services may therefore be freely and arbitrarily dispensed with. Thus, s. 9(a) of the Code infringes s. 15 of the Charter.

VI. Can Section 9(a) of the Human Rights Code, 1981 Be Justified Under Section 1 of the Charter?

352 It is submitted on behalf of the respondents that because the government was under no obligation to enact human rights legislation in the first place, and because the overall thrust of such legislation is to extend rather than limit rights, the Code

should be subject to less strict scrutiny than would otherwise be the case. For the reasons I have already expressed, it is my view that this approach is not acceptable. Indeed, I would have thought that, if anything, human rights legislation which is intended to preserve, protect and promote human dignity and individual self-worth and self-esteem should be subjected to more rigorous scrutiny than other types of legislation. I therefore reject the submissions advanced in support of a less stringent standard of review of s. 9(a) of the Code.

353 The joint operation of s. 9(a) and s. 4 of the Code results in mandatory retirement's being permitted without limitation or restraint. Since I have agreed with L'Heureux-Dubé J. that mandatory retirement in the universities is constitutionally invalid, it follows that s. 9(a) infringes the Charter at least to the extent that it allows this discriminatory practice. I believe, however, that s. 9(a) of the Code infringes the Charter on much broader grounds.

354 Section 9(a) not only implicitly permits mandatory retirement; it also implicitly operates to permit all forms of age discrimination in the employment context for those over the age of 65. For instance, discriminatory discipline, remuneration and job classification are also not prohibited by the Code. Thus, even although the Attorney General has confined his submissions respecting the Code to the value of mandatory retirement in furthering the objectives of the legislature, it is clear that s. 9(a) is not so limited. In my view, because this provision of the Code does not deal exclusively with mandatory retirement and confine itself to the stated objectives of the legislature in enacting it, the rational connection branch of the *Oakes* test is not met. This point is extremely important since in choosing the appropriate disposition of the constitutional challenge, the Court must be guided by the extent to which the provision is inconsistent with the Charter. In my view, the scope of the breach is so great in this instance there is little alternative but to strike down s. 9(a) as a whole. I would therefore concur with my colleague L'Heureux-Dubé J. that the section in its entirety is unconstitutional and of no force or effect.

355 Even although I would be prepared to base my decision on this aspect of these appeals on this ground alone, I join my colleague in finding that s. 9(a) would not, in any event, pass the second branch of the *Oakes* proportionality test, i.e., minimal impairment.

356 The Attorney General has sought to justify the section on the ground that it preserves freedom of contract. In particular, the Attorney General asserts that mandatory retirement comes as a "package deal" through which older employees get a number of benefits in return for the forfeiture of their constitutional right to work past the age of 65. In my view, even if this Court were to hold that citizens can contract out of their s. 15 rights (which is an important question which I do not find it necessary to decide in these appeals) attractive "package deals" are not universally available to all employees. For instance, with respect to the argument concerning pensions advanced by the Attorney General, it is clear that a great many workers in the Province of Ontario are not fortunate enough to be members of private pension schemes. The evidence has established that there is a very high correlation between the existence of such pension plans and unionization. But the statistics show that the vast proportion of the work-force is unorganized. The preservation of pension schemes has therefore very little relevance in the case of the majority of working people in Ontario. This problem is exacerbated when the demographics of this portion of the workforce is examined. Immigrant and female labour and the unskilled comprise a disproportionately high percentage of unorganized workers. This group represents the most vulnerable employees. They are the ones who, if forced to retire at age 65, will be hardest hit by the lack of legislative protection.

357 In addition, even in relation to the organized sector of the work force, serious problems remain. The statistics show that women workers generally are unable to amass adequate pension earnings during their working years because of the high incidence of interrupted work histories due to child bearing and child rearing. Thus, the imposition of mandatory retirement raises not only issues of age discrimination but also may implicate other s. 15 rights as well.

358 In my view, when the majority of individuals affected by a piece of legislation will suffer disproportionately greater hardship by the infringement of their rights, it cannot be said that the impugned legislation impairs the rights of those affected by it as little as reasonably possible. I conclude therefore that, even if it is acceptable for citizens to bargain away their fundamental human rights in exchange for economic gain (and I see some real dangers to the more vulnerable numbers of our society in this), the fact of the matter is that the majority of working people in the province do not have access to such arrangements. I do not believe, therefore, that the minimal impairment requirement is met.

VII. Disposition

359 I would allow the appeal on the basis that the Charter applies to the respondents, that the respondents' mandatory retirement policy violates s. 15 of the Charter and that it is not saved by s. 1.

360 I would issue a declaration that the respondents have acted in a manner contrary to the Charter, direct the respondents to reinstate the appellants, and award the appellants damages in an amount to be determined by the trial judge. I would deny the claim for a permanent and interlocutory injunction.

361 I would answer the constitutional questions posed by Chief Justice Dickson as follows:

1. Does s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

362 Yes.

2. Is s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

363 No.

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

364 Yes.

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

365 Yes.

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

366 No.

367 I would award the appellants their costs both here and in the courts below.

The following are the reasons delivered by *L'Heureux-Dubé J.* (dissenting):

368 I have had the opportunity of reading the opinion of my colleague Justice La Forest and, with respect, I must dissent. While I do not entirely disagree with his contention that universities are not part of government for the purposes of the *Canadian Charter of Rights and Freedoms*, I cannot concur with my colleague's conclusions regarding s. 9(a) of the *Human Rights Code, 1981, S.O. 1981, c. 53*. The following constitutional questions were stated by Chief Justice Dickson on August 30, 1988:

1. Does s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. Is s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guarantee by s. 15(1) of the *Charter*?

369 My colleague addresses questions 3, 4, and 5 first and while I agree that universities may not have all of the necessary governmental touchstones so as to be considered public bodies, neither can they be considered as wholly private in nature. In addition to establishing that a university's internal decisions are subject to judicial review, *Harekin v. University of Regina*, [1979] 2 S.C.R. 561, recognized that their creation, funding, and conduct are governed by statute.

370 The fact that universities are substantially publicly funded cannot, in my view, be easily discounted. My colleague deals with this when he says at p. 274:

It is true that there are some cases where United States courts did hold that significant government funding constitutes sufficient state involvement to trigger constitutional guarantees, but these were largely confined to cases of racial discrimination which was the prime target of the 14th Amendment.

However, it must be recalled that in Canada, unlike the U.S., age is on par with race, sex, religion, etc., in terms of s. 15 equality protection. Furthermore, the private versus state university distinction, so prevalent in the U.S., is substantially diluted in Canada.

371 Nevertheless, while universities may perform certain public functions that could attract *Charter* review, I am able to accept that the hiring and firing of their employees are not properly included within this category. In *Harrison v. University of British Columbia* 1988 21 B.C.L.R. (2d) 145, a companion case heard and delivered concurrently with the present appeal, the British Columbia Court of Appeal examined the relationship between the government and the university by looking at the legislation under which the university operates, and the legislation to which it is subject. The University of British Columbia is a statutory body, whose mandate is functionally identical to those of the respondent universities for the purposes of this case. Following a careful analysis of the relationship between government and the university, the court concluded, at pp. 152-53, that:

...the fact that the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case.

...Neither the legislature nor the executive ordered, suggested or in any way caused the university to adopt its mandatory retirement scheme...

[Furthermore], [i]t is the university's private contracts of employment which are alleged to conflict with the Charter, not its delegated public functions. *Without wishing to suggest that the conduct of the university might never be subject to the Charter, it appears clear that the conduct represented by those contracts is not.* [Emphasis added.]

372 I agree. In so saying, however, I do not mean to disagree with the test proposed by my colleague, Justice Wilson, as to the scope of government and government action for the purposes of s. 32(1) of the Charter. But, even under that broad test, I remain of the view that the respondent universities do not qualify for essentially the reasons outlined by my colleague La Forest J. I would only add that an historical analysis yields the same result as the functional approach: universities do not pass the test. Canadian universities have always fiercely defended their independence. This dates back to the founding of the French and British colonies. At Confederation there were 17 degree-granting institutions in the founding provinces. The University of King's College, now in Halifax, was founded in 1789. One of the original colleges of higher learning was the Séminaire de Québec, founded by Monseigneur Laval in 1663, which later spawned Laval University in 1852. The educational tradition at Laval has remained a confessional and self-sufficient university for hundreds of years. Still today, while funded to a great extent out of public money, it is autonomous: it is governed by a body of its own choice and determines its policies without government intervention. Similarly, McGill University has a Board of Governors which acts independently, although it needs government

funding to survive. The same can be said of most, if not all, of Canada's universities. One can even think of the survival of universities without government funding. Government funding cannot *per se* imply "government", otherwise even small business, which receives government subsidies, could be labelled "government" for the purposes of s. 32 of the Charter. I have no doubt that this meaning was never intended nor can s. 32 be reasonably interpreted in that fashion. The word "government", as generally understood and in my view, never contemplated universities as they were and are currently constituted.

373 Hence, given this conclusion with respect to the third constitutional question, that the impugned contractual arrangement between the universities and their employees is not "governmental" in character, questions four and five need not be answered. The complex role of universities should nevertheless be recognized when assessing proportionality and minimum impairment considerations under the *Human Rights Code, 1981* the various bodies it attaches to, and its lack of protection against mandatory retirement of university professors and other employees over the age of 65. I turn then to the discussion of constitutional questions one and two, which address these concerns.

Section 9(a) of the Human Rights Code, 1981

374 The *Human Rights Code, 1981* was enacted in 1981, and therefore pre-dates the *Canadian Charter of Rights and Freedoms* which was promulgated in April, 1982. As Blair J.A., dissenting at the Court of Appeal (1987), 63 O.R. (2d) 1, stated at p. 66:

Thus, when the Code was passed, the legislature had untrammelled authority to deprive persons over the age of 65 of any protection with respect to employment. The extracts from the debates of the legislature referred to by my brothers show that the Code was adopted with the knowledge that employees in the province could be compulsorily retired at the age of 65. It is idle to speculate whether the Code would have been enacted in this form after s. 15(1) of the Charter took effect in 1985. The Code must be accepted as it is.

Furthermore, as MacKinnon A.C.J.O. maintained regarding pre-Charter legislation in *Re Southam Inc. and The Queen* (No. 1) 198341 O.R. (2d) 113(C.A.), at p. 125:

This supreme law was enacted long after the *Juvenile Delinquents Act* and there can be no presumption that the legislators intended to act constitutionally in light of legislation that was not, at that time, a gleam in its progenitor's eye.

The question then becomes: Does s. 9(a) of the *Human Rights Code, 1981* infringe upon s. 15 of the Charter?

Section 15 of the Charter

375 Section 9(a) of the *Human Rights Code, 1981* provides that:

9. (1) In Part I and in this Part,

(a) "age" means an age that is eighteen years or more, except in subsection 4(1) where "age" means an age that is eighteen years or more and less than sixty-five years;

376 Section 4(1) stipulates that:

4. — (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, record of offences, marital status, family status or handicap.

Section 15(1) of the Charter provides as follows:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

377 It is by now firmly established that constitutionally guaranteed rights and freedoms should be given a broad and liberal construction. The prohibition against discrimination set out in s. 15 is intended to ensure that those entities subject to the Charter treat every individual "on a footing of equality, with equal concern and equal respect, to ensure each individual the greatest opportunity for his or her enhancement": *Re Blainey and Ontario Hockey Association* 198654 O.R. (2d) 513(C.A.), at p. 529. Section 15 prescribes that individuals be treated on the basis of his or her own worth, abilities and merit, and not on the basis of external or arbitrary characteristics which artificially restrict individual opportunity.

378 In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. defined discrimination in the following manner at pp. 174-75:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.* [Emphasis added.]

379 As Judge Abella explained in "Limitations on the Right to Equality Before the Law", in de Mestral et al., eds., *The Limitation of Human Rights in Comparative Constitutional Law*, at p. 226:

Equality means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity fully to develop his or her potential, we have achieved a kind of equality. This is what section 15 of the *Charter* affirms: equality defined as equal freedom from discrimination.

Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth. [Emphasis added.]

380 Section 9(a) is discriminatory on its face. It clearly excludes designated segments of society from the ambit of protection otherwise provided by the Code. Furthermore, the exclusion is predicated strictly on age, a ground specifically enumerated in s. 15(1). As MacGuigan J.A. held in *Headly v. Canada (Public Service Commission Appeal Board)*, [1987] 2 F.C. 235(C.A.), at p. 245:

The *Constitution* itself, I believe, compels this distinction between enumerated and non-enumerated grounds. In particular, the fact that the drafters spelled out as grounds the principal natural and unalterable facts about human beings ... can only mean, I believe, that non-trivial pejorative distinctions based on such categories are intended to be justified by governments under section 1 rather than to be proved as infringements by complainants under section 15. In sum, some grounds of distinction are so presumptively pejorative that they are deemed to be inherently discriminatory.

381 The inclusion of specific enumerated grounds in s. 15(1) of the Charter was intended to avoid many of the difficulties which U.S. courts have faced in attempting to determine the extent of protection afforded by the Fourteenth Amendment, which has no such express delineation. As Finkelstein expressed in "Sections 1 and 15 of the Canadian Charter of Rights and Freedoms and the Relevance of the U.S. Experience" (1985-86), 6 *Advocates' Q.* 188, at p. 192:

...the Fourteenth Amendment does not give the courts any guidance about what kinds of classifications should be most closely scrutinized. The provision is textually absolute. This may be contrasted with s. 15(1) of the Charter which, while prohibiting all discrimination, at least sets out a list of categories for greater particularity. *Canadian courts are put on*

notice that they should make a careful inquiry into the reasons and purpose behind any law which makes differentiations based upon any of the listed classifications. [Emphasis added.]

382 Like my colleague La Forest J., and for the reasons he expresses, I conclude that s. 9(a) overtly denies the equal protection and equal benefit of the Code, and thereby discriminates against individuals solely on the basis of age, a ground specifically enumerated in s. 15 of the Charter. Section 9(a) constitutes an arbitrary and artificial obstacle which prevents persons aged 65 and over from complaining where their right to equal treatment with respect to employment has been infringed on the ground of age. Hence the provision is inconsistent with the fundamental values enshrined within s. 15(1): the protection and enhancement of human dignity, the promotion of equal opportunity, and the development of human potential based upon individual ability. As the Ontario Court of Appeal stated in *Blainey*, at p. 530:

Indeed, it is somewhat of an anomaly to find in a statute designed to prohibit discrimination a provision which specifically permits it.

Section 1 of the Charter

383 Given my conclusion regarding s. 15(1), I now turn to the question of whether the equality violation can be justified under s. 1. As articulated by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, and *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, the government must first discharge its burden of proving that the objective served by the challenged measure relates to concerns which are of pressing and substantial importance, sufficient to warrant overriding a constitutionally protected right. Second, if it can establish such an objective, it must show that the means chosen are proportional or appropriate. This latter criterion can only be fulfilled if three elements are satisfied:

- (a) the limiting measure must be carefully designed, or rationally connected, to the objective, and cannot be arbitrary, unfair or based on irrational considerations;
- (b) the right in question must not be impaired by the limiting measure any more than is reasonable having regard to the context and surrounding circumstances; and
- (c) the effects of the limiting measure must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

1. The Objective

384 I agree with my colleague La Forest J.'s conclusion that the Ontario Court of Appeal was too restrictive when evaluating the constitutionality of s. 9(a) of the *Human Rights Code, 1981* exclusively in the university context. However, this setting does provide a welcome background in which the ramifications of the provision can be appraised. In his "default" *Charter* analysis, i.e., assuming that it does indeed apply to universities, La Forest J.'s underlying theme seems to be that mandatory retirement is the *quid pro quo* for a tenure system with minimal peer evaluation and necessary to ensure that younger aspirants are provided with a meaningful opportunity to pursue their livelihood. My colleague also regards the existing pension scheme as a worthy objective, and one supportable only through the institution of mandatory retirement.

385 In my view, there is no convincing evidence that the mandatory retirement scheme and the tenure system are as intimately related as my colleague suggests. Peer evaluation does not, and should not, pose a threat to academic freedom, and such assessments are quite common even in those universities which have chosen to continue imposing mandatory retirement. Merit rather than age should be the governing factor. The value and status of tenure may actually be enhanced through the sustained endorsement of one's colleagues. In his reasons, La Forest J. indicates at p. 283 that academic freedom will be undermined through abolition of the existing mandatory retirement scheme:

Mandatory retirement is thus intimately tied to the tenure system. It is true that many universities and colleges in the United States do not have a mandatory retirement but have maintained a tenure system. That does not affect the rationality of the policies, however, because mandatory retirement clearly supports the tenure system. Besides, such an approach, as the

Court of Appeal observed, would demand an alternative means of dismissal, likely requiring competency hearings and dismissal for cause. Such an approach would be difficult and costly and constitute a demeaning affront to individual dignity.

386 This raises several points with which I beg to differ. The value of tenure is threatened by incompetence, not by the aging process. Such incompetence can manifest itself at any stage, and the presumption of academic incapacity at age 65 is not well founded. If the abolition of mandatory retirement results in a more stringent meritocracy, tenure is not depreciated. Its significance may actually be enhanced, as tenure status will reflect continued academic excellence rather than a "certificate", irrevocable once granted.

387 The fear that aging professors will rest on their laurels and wallow in a perpetual and interminable quagmire of unproductivity and stagnation may be a real one. Yet it applies with equal force to younger tenured faculty as well. Peer review, so long as it is predicated on the premise of unbiased good faith, provides a healthy injection of critical evaluation and will serve to promote the scholastic standards indispensable to a flourishing university.

388 I find it difficult to accept the proposition that abolition of mandatory retirement of university faculty and librarians would threaten tenure as a result of increased performance evaluations. In fact, performance evaluations of faculty are an integral and ongoing part of university life, and it has never been suggested that this process threatens tenure, collegiality or academic freedom. Performance evaluations take place at the hiring stage, as well as in the process of determining whether to grant tenure, whether to promote tenured faculty, which tenured faculty to select for administrative posts and research grants, and whether and in what amount merit increases are to be awarded to tenured faculty.

389 Those jurisdictions which have eliminated mandatory retirement of university faculty or librarians have not experienced any increase in so-called destructive performance evaluations, or any infringement of academic freedom or collegiality. The tenure system remains firmly in place. In the United States, for example, not a single university has abolished tenure, notwithstanding that 15 per cent of universities have no mandatory retirement age for tenured faculty. The 1986 amendments to the *Age Discrimination in Employment Act*, which now preclude any university from forcibly retiring a tenured faculty member until age 70, provide that the age cap will be removed altogether when the transitional provisions expire in 1993: see 29 U.S.C. § 631(d).

390 Moreover, any "alternative means of dismissal" necessitated by the abolition of mandatory retirement will be rather inconsequential. The number of those choosing to maintain an active and productive academic life after age 65 is relatively small. Furthermore, tenure will continue to exist, and tenured faculty will enjoy a powerful presumption of job retention. However, this presumption should not be irrebuttable, neither at 45 nor at 65. With respect to La Forest J.'s description (at p. 284) of a "closed system with limited resources" it is neither clear that we are dealing with a fixed pie nor that allowing aging professors to enjoy their earned slices will result in younger prospects' going hungry.

391 To conclude that excellence in our educational institutions can only be maintained through the replacement of aging faculty with younger professors is overbroad. Professorial calibre should be gauged on a meritocratic rather than on a chronological basis. Employment opportunities for the young cannot be generated by using the elderly as exclusive sacrificial victims. The Charter prohibits this type of isolation of a specific target group explicitly protected by an enumerated constitutional provision.

392 Moreover, this scheme cannot be supported by either scholarly justification or necessity. There is no indication that the aged are less competent. The empirical track record of esteemed and venerable universities across North America which are progressively abolishing mandatory retirement reveals that the retention of such a system is not necessary in order to remain effective and efficient. This trend reflects what can be considered "reasonable" when assessing the rationale of mandatory retirement and its proportionality to any alleged objectives.

393 I do not disagree with my colleague La Forest J.'s assertion, at p. 289, that "While the aging process varies from person to person, the courts below found on the evidence that on average there is a decline in intellectual ability from the age of 60 onwards". But this simple assertion does not, in my view, invariably lead to the conclusion that the cut-off age for any occupation

or profession must be 65. This is precisely what age discrimination is all about. What then about federally appointed judges, whose retirement age is set at 75? What of self-employed business people, or politicians and heads of state, some of whom (including Sir Winston Churchill) serve their country well beyond the age of 65? Declining intellectual ability is a coat of many colours — what abilities, and for which tasks? The discrepancies between physical and intellectual abilities amongst different age groups may be more than compensated for by increased experience, wisdom, and skills acquired over time.

394 Mandatory retirement would have to be justified on some basis other than mental decay. Agility and nimbleness of mind are highly subjective — they vary substantially from person to person. While senility is far more common among the very old, lucidity is the norm. Furthermore, people are generally sensitive to their own degenerating faculties, in academe as well as in sport. Many an athlete is "washed up" by the age of 35, and can no longer perform at the same level. However, many can remain competitive well into their forties, while some younger athletes continue to strive for, but never quite attain, professional status.

395 The difficulty and cost of the evaluation process cannot defeat the merits of such a scheme, especially given that some sort of assessment procedure is already in place. Empirically, the financial burden argument is specious. Some pension programs now offer retiring professors up to 90 per cent of their average annual salary of their last five working years. Economically it makes sense to allow them to contribute fully at a marginal "cost" to the universities of only 10 per cent of their salaries.

396 La Forest J. reminds us of this Court's traditional deference to legislative judgment. At page 305 my colleague states:

...that the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, *given the government's pressing and substantial objectives*. [Emphasis added.]

397 The evidence refutes the emphasized conclusion. In the very next paragraph, my colleague himself concedes at p. 306 "that there is an increasing trend towards earlier retirement", and at p. 306 that "[t]he estimates of workers who would voluntarily elect to work beyond the age of 65 vary from 0.1 to 0.4 per cent of the labour force". These figures hardly pose a "pressing and substantial" quandary that the government must contend with. According to my colleague, at p. 312, mandatory retirement:

...is an arrangement negotiated in the private sector, and it can only be brought into the ambit of the *Charter* tangentially because the legislature has attempted to protect, not attack, a *Charter* value.

Any protection offered here is strictly illusory. The excluded ages are most in need of sanctuary from arbitrary employment decisions.

398 The threat that an evaluation scheme will "constitute a demeaning affront to individual dignity" (at p. 284) is difficult to accept. Are objective standards of job performance a demeaning affront to individual dignity? Certainly not when measured against the prospect of getting "turfed-out" automatically at a prescribed age, and witnessing your younger ex-colleagues persevere in condoned relative incompetence on the strength of a "dignifying" tenure system. The elderly are especially susceptible to feelings of uselessness and obsolescence. If "[i]n a work-oriented society, work is inextricably tied to the individual's self-identity and self-worth" (at p. 300), does this mean that upon reaching 65 a person's interest in self-identity and stake in self-worth disappear? That is precisely when these values become most crucial, and when individuals become particularly vulnerable to perceived diminutions in their ability to contribute to society.

399 Forced removal from the work force strictly on account of age can be extraordinarily debilitating for those entering their senior years. Aging is not a reversible process. Those yearning to carry on with their livelihood, career, and ambitions cannot have this aspiration stultified or decimated by some arbitrary scheme. The fact that we all experience the aging process is not a safeguard which prevents discriminatory acts by the majority. The prospect that current decision-makers may some day be 65 and older is no guarantee against their acting in a discriminatory fashion against older individuals today, or against their acting on the basis of negative stereotypes.

400 Moreover, as stated in McDougal, Lasswell and Chen, "The Protection of the Aged from Discrimination", in *Human Rights and World Public Order* (1980), pp. 781-82:

The traumatic impact of the sudden loss of accustomed roles, precipitated by involuntary retirement, is immense and profound. As Rosow has sharply summarized:

[T]he loss of roles excludes the aged from significant social participation and devalues them. It deprives them of vital functions that underlie their sense of worth, their self-conceptions and self-esteem. In a word, they are depreciated and become marginal, alienated from the larger society. Whatever their ability, they are judged invidiously, as if they have little of value to contribute to the world's work and affairs.

.....

The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression. The ordinary process of aging aside, the psychosomatic condition of the elderly may be brutally and unduly impaired and exacerbated by the shock of involuntary retirement. Formerly useful skills are consigned to the scrap heap overnight. [Emphasis in original.]

401 In my view, such undesirable repercussions seriously undermine the alleged objective in the instant case. The forced attrition of elderly participants in the work force should not lightly be considered an objective "sufficient to warrant overriding a constitutionally protected right". However, on the assumption that a legitimate objective does in fact exist, I will now assess whether the means chosen satisfy the second part of the "s. 1 test".

2. *The Means*

402 In its Report entitled *Equality For All*, at p. 21, the 1985 Federal Parliamentary Committee on Equality Rights described mandatory retirement as follows:

In the view of the Committee, mandatory retirement is a classic example of the denial of equality on improper grounds. *It involves the arbitrary treatment of individuals simply because they are members of an identifiable group.* Mandatory retirement does not allow for consideration of individual characteristics, even though those caught by the rule are likely to display a wide variety of the capabilities relevant to employment. It is an easy way of being selective that is based, in whole or in part, on stereotypical assumptions about the performance of older workers. In the result, *it denies individuals equal opportunity to realize the economic benefits, dignity and self-satisfaction that come from being part of the workforce.* [Emphasis added.]

403 The *Human Rights Code, 1981* limits the protection against discrimination on the basis of age to those between the ages of 18 and 65. Persons over the age of 65 are excluded from protection solely because of their age; not for any reason related to *bona fide* qualifications, or inability to perform a required function. Thus, regardless of the circumstances, people over 65 who encounter discrimination merely because of their age are denied access to protective and remedial human rights legislation.

404 In his detailed historical investigation, La Forest J. notes at p. 292 that "Bismark is generally credited with establishing 65 as the age for retirement". However, Bismark governed quite some time ago. Advances in medical science and the living conditions achieved since have significantly extended life expectancy and have improved the quality of life as well. On average, today's 65-year-old is a healthier, more invigorated specimen than his or her 45-year-old counterpart of the industrial revolution. Furthermore, the physical exertion component of many vocations has been diminished through the introduction of computers and employment differentiation. With all sorts of developing specialties people can mature concordantly with their evolving job descriptions.

405 The fact that "mandatory retirement has become part of the very fabric of the organization of the labour market in this country" (at p. 295) is inapposite to the present analysis in so far as it ignores the promulgation of both the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code, 1981*. Furthermore, I strongly disagree with the assertion, at p. 299, that "[t]hose over 65 are by and large not as seriously exposed to the adverse results of unemployment as those under that age". While this may be true for an "elite" sub-group that can afford to retire, it certainly does not apply to the majority of retirees, especially during periods of high inflation. The adverse effects of mandatory retirement are most painfully felt by the poor. The elderly often face staggering financial difficulties; indexed pensions have not kept pace with inflation, and a dollar saved at an

earlier time in anticipation of retirement buys only pennies worth of goods today. This is predominantly true when applied to non-unionized employees, who presently constitute 50 per cent of the Canadian work force.

406 The median income of those over 65 is less than half the median income of average Canadians, and there is a wide disparity among these individuals many of whom have no, or very small, private pension incomes. Moreover, women are particularly affected by this deficiency. Upon attaining the age of 65, women often have either lower or no pension income since a greater proportion of them are in jobs where they are less likely to be offered pension plan coverage. Women are more susceptible to interrupted work histories, partly as a result of childcare responsibilities, thereby losing potential pension coverage. Furthermore, women are prone to have lower lifetime earnings upon which pension benefits are based.

407 Section 9(a) denies protection against employment discrimination to those over 65 whether or not there is an adequate, or indeed any, pension plan at the particular work place, whether or not the integrity of the existing pension plan would be affected if employees did not retire at age 65, and whether or not the employer intends to or actually does replace retired employees with younger workers. In short, s. 9(a) permits discrimination against older workers even where retired employees are not replaced by younger employees, and where the pension plan is not affected in any way. As was stated in *Edwards Books*, supra, at p. 770:

The requirement of rational connection calls for an assessment of how well the legislative garment has been tailored to suit its purpose.

When assessing the material repercussions of the provision at issue the fabric comes apart at the seams. Furthermore, it is not the function of the courts to mend constitutional infirmities by patching those areas of the legislation which violate the Charter with a more restrictive meaning.

408 The internal age restrictions imposed on the application of the *Human Rights Code, 1981* emasculate its very purpose. The "traditional" retirement age of 65 was chosen at a time wholly different from today; medical science and job differentiation have changed the world in which we live and work. The Code is designed as remedial legislation — it is paradoxical to exclude from its ambit a group desperately in need of its protection.

409 The argument of legislative necessity loses much of its force when assessed in light of the ongoing adoption of voluntary retirement across the continent, and the federal government's abolition of mandatory retirement for its employees. Moreover, three Canadian provinces, Quebec, New Brunswick, and Manitoba, have eliminated mandatory retirement, and have not suffered any of the adverse effects allegedly associated with the eradication of such schemes. Universities have not been required to abandon the tenure system, the existing pension programs have remained intact, and there is no evidence of consequential rising unemployment among younger aspirants seeking work.

410 In response to the proportionality argument my colleague expresses the view, at p. 304, that "there is nothing irrational in a system that permits those in the private sector to determine for themselves the age of retirement suitable to a particular area of activity." But the Code provides no protection for the elderly. Whatever impositions are placed on them cannot be redressed by review under the Code because that group is specifically excluded from its application. Hence, that justification becomes circular, and the scheme he purports to rationalize actually encourages mandatory retirement. It allows for the manipulation of the entitlements of a group whose rights and recourses have been neutered by the legislation! An attempt to defend this procedure on the basis of minimal impairment is especially disturbing.

411 On the whole there seems to be no reasonable justification for a scheme which sets 65 as an age for compulsory retirement. It is discriminatory, in the most prejudicial sense of the word, to make generalizations about diminished competence or productivity purely on the basis of the attainment of a certain age. Since the number of people who (a) attain that age, and (b) wish to continue working after that age and are physically and intellectually capable of doing so, is not overwhelming, it is difficult to conclude that the labour force will be adversely affected.

412 The definitions provided in the *Human Rights Code, 1981* must be assessed under s. 1 in a somewhat broader manner. While having an obvious effect on mandatory retirement, these definitions also fail to protect those over 65 from far more pervasive discrimination. For example, an employer who decided to pay all workers over the age of 65 less than those under

65 could not be challenged under human rights legislation because that legislation does not recognize discrimination against persons over 65 as being discrimination on the basis of age.

413 I agree with the proposition that human rights legislation has a purpose consistent with that of the Charter itself, the promotion of human rights. It has been argued that since such legislation operates in an area which otherwise would remain unaffected by the Charter (private transactions), then the least rigid and most flexible standard of review under the Charter should be applied. I admit that there is in fact a delicate balance to be achieved. The Charter should serve to prevent overt discrimination in human rights legislation, but it should not be applied in such a manner as to discourage the use of such legislation by the provinces, or to interfere with a legitimate provincial legislative decision not to provide rights in a given area.

414 However, there are limits within which this approach should apply. For example, in my view, if the provinces chose to enact human rights legislation which only prohibited discrimination on the basis of sex, and not age, this legislation could not be held to violate the Charter. However where, as in the present case, the legislation prohibits discrimination on the basis of age, and then defines "age" in a manner that denies this protection to a significant segment of the population, then the Charter should apply. Thus, if the province chooses to grant a right, it must grant that right in conformity with the Charter.

415 As the impugned definition denies protection from age discrimination to a segment of the population simply on the basis of age, I do not believe it can be justified under s. 1. I espouse here the reasons of Blair J.A., dissenting at the Court of Appeal, at p. 77:

Section 9(a), in my opinion, does not satisfy the third requirement of the *Oakes* test that the measure adopted "should impair 'as little as possible' the right or freedom in question" ... *Section 9(a)* does not merely limit or restrict the appellants' Charter right under s. 15(1). It eliminates it because, under the Code, no protection against age discrimination in employment is provided after the age of 65. The absence of any qualification to the complete denial of the Charter right ... results in the failure of s. 9(a) to meet the *Oakes* test. [Emphasis added.]

416 Consequently, s. 9(a) of the Human Rights Code, 1981 constitutes unreasonable and unfair discrimination against persons over age 65 for the following reasons:

- (a) the failure to afford individuals aged 65 or over the protection of the Code against employment discrimination is unwarranted in the absence of any evidence that such individuals cannot perform in employment;
- (b) section 9(a) of the Code prohibits employees from complaining about any form of employment discrimination, including hiring, demotion, transfer or salary reduction, even though its stated objective was solely to permit mandatory retirement;
- (c) with respect to mandatory retirement itself, its negative effects significantly outweigh any alleged benefit associated with its continuation. Mandatory retirement arbitrarily removes an individual from his or her active worklife, and source of revenue, regardless of his or her actual mental or physical capacity, financial wherewithal, years of employment in the work force, or individual preferences. The continued opportunity to work provides many individuals with a sense of worth and achievement, as well as a source of social status, prestige, and meaningful social contact; and
- (d) on the evidence, there is no basis for denying to a segment of the population, i.e., those aged 65 and over, the protection of legislation which is of fundamental importance in the area of employment discrimination, particularly since the objectives allegedly served by s. 9(a) of the Code could be attained through alternative measures, which do not have such severe effects on individuals.

417 The Charter breach resulting from the application of the Code is not justified under s. 1. There is no evidence that the government is confronted with an urgent or compelling dilemma with respect to a profusion of elderly persons seeking to linger on beyond their prescribed term of productivity. Whatever legislative needs may exist to anchor an age discrimination procedure regarding access to the Code, they are not proportional to the blanket exclusion of all persons over the age of 65.

The exclusion of all those over age 65 is a substantial impairment of the constitutional right to equal treatment of all ages, specifically enumerated in s. 15 of the Charter.

Remedy

418 Even if mandatory retirement programs were justified for *all* employees over the age of 65, the repercussions of s. 9(a) extend far beyond such a scheme. While the original motivation may have been to allow employers and employees to set their own retirement ages, the effect is to deny a wide range of benefits to people over 65. They will receive no protection whatsoever from age discrimination. The protection they may require is in no way limited to retirement. After the age of 65, employees would be prohibited from making claims relating to age discrimination in the area of wages, employment conditions, and other employment related benefits. Employees under the age of 65 will have all of these protections merely as a function of their age.

419 However, even if we confined the application of s. 9(a) to mandatory retirement, the provision does not differentiate between industries or occupations in establishing age 65 as an appropriate age for retirement. While there may be certain jobs for which mandatory retirement can be justified, on the ground that it is a reasonable and *bona fide* occupational qualification, s. 9(a) permits mandatory retirement in many industries where age is clearly not a *bona fide* occupational qualification.

420 Hence, while limiting s. 9(a) to mandatory retirement would certainly remove some of its objectionable elements, the indiscriminate application of mandatory retirement would remain. In my view, a case-by-case application, secured by proper occupational considerations, would be the preferable alternative. The *Human Rights Code, 1981* already allows for this and hence s. 9(a) can be struck in its entirety. Any legitimate justification for distinguishing among employees on the basis of age can be vindicated through other provisions of the Code.

421 Section 10(a) of the Code provides:

10. A right of a person under Part I is infringed where a requirement, qualification or consideration is imposed that is not discrimination on a prohibited ground but that would result in the exclusion, qualification or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or consideration is a reasonable and *bona fide* one in the circumstances; ...

422 Section 23(b) provides that:

23. The right under section 4 to equal treatment with respect to employment is not infringed where,

.....

(b) the discrimination in employment is for reasons of age, sex, record of offences or marital status if the age, sex, record of offences or marital status of the applicant is a reasonable and *bona fide* qualification because of the nature of the employment;

423 These provisions can contain certain mandatory retirement schemes when justified by the particular job description at issue. In *Ontario Human Rights Commission v. Etobicoke*, [1982] 1 S.C.R. 202, this Court considered a policy mandating retirement at age 60 for firefighters. McIntyre J., for the Court, articulated the appropriate procedure for dealing with the *bona fide* occupational qualification ("BFOQ") provisions of the Code, at p. 208:

Once a complainant has established before a board of inquiry a *prima facie* case of discrimination, in this case proof of a mandatory retirement at age sixty as a condition of employment, he is entitled to relief in the absence of justification by the employer.

On the issue of what constitutes a *bona fide* occupational qualification, McIntyre J. stated, at p. 208, that:

To be a *bona fide* occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of

the adequate performance of the work involved with all reasonable dispatch, safety and economy, *and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code.* [Emphasis added.]

At page 209, McIntyre J. distinguished mandatory retirement for purely economic reasons from mandatory retirement motivated by public safety concerns:

In cases where concern for the employee's capacity is largely economic, that is where the employer's concern is one of productivity, and the circumstances of employment require no special skills that may diminish significantly with aging, or involve any unusual dangers to employees or the public that may be compounded by aging, it may be difficult, if not impossible, to demonstrate that a mandatory retirement at a fixed age, without regard to individual capacity, may be validly imposed under the Code. *In such employment, as capacity fails, and as such failure becomes evident, individuals may be discharged or retired for cause.* [Emphasis added.]

424 In *Alberta (Human Rights Commission) v. Central Alberta Dairy Pool*, [1990] 2 S.C.R. 489, Wilson J. sets out McIntyre J.'s tests in *Etobicoke*, as well as their application to *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, and *Bhinder v. Canadian National Railway Co.*[1985] 2 S.C.R. 561, and concluded, at p. 514 that:

Where a rule discriminates on its face on a prohibited ground of discrimination, it follows that it must rely for its justification on the validity of its application to all members of the group affected by it. There can be no duty to accommodate individual members of that group within the justificatory test because, as McIntyre J. pointed out, that would undermine the rationale of the defence. Either it is valid to make a rule that generalizes about members of a group or it is not. By their very nature rules that discriminate directly impose a burden on all persons who fall within them. If they can be justified at all, they must be justified in their general application. That is why the rule must be struck down if the employer fails to establish a BFOQ.

425 Furthermore, as Sopinka J. wrote for the Court in relation to ascertaining appropriate *bona fide* occupational requirements in *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297, at pp. 1313-14:

While it is not an absolute requirement that employees be individually tested, the employer may not satisfy the burden of proof of establishing the reasonableness of the requirement if he fails to deal satisfactorily with the question as to why it was not possible to deal with employees on an individual basis by, *inter alia*, individual testing. *If there is a practical alternative to the adoption of a discriminatory rule, this may lead to a determination that the employer did not act reasonably in not adopting it.* [Emphasis added.]

426 It should be noted here that the effect of finding s. 9(a) of the Code to be unconstitutional does not abolish mandatory retirement. Rather, it simply allows individuals aged 65 or over to complain to the Human Rights Commission that their mandatory retirement constituted age discrimination in employment, contrary to s. 4 of the Code. It would still be open to an employer to establish before the Commission, as it can presently attempt in the case of mandatory retirement under age 65, that age is a "reasonable and *bona fide* qualification" under s. 23(1)(b) of the Code.

427 The structure of the *Human Rights Code, 1981* easily permits the striking down of the definition of "age" without removing the protection against discrimination on the basis of age. As the British Columbia Court of Appeal stated in *Harrison*, at p. 164:

In our opinion, when that test [of severance] is applied to the provisions of the *Human Rights Act*, the definition of age is not so inextricably bound up with the balance of the Act that the balance cannot independently survive.

The result would be similar to that achieved in *Blainey*, where the exception to the general principle prohibiting sex discrimination was removed, leaving the principle to stand unrestricted.

Conclusion

428 Labelling universities "governmental bodies" is unnecessary, yet the indicia of public functions elevate these institutions to a higher standard *under the Code*. Furthermore, the Code must be read purposively. Excluding those over the age of 65

virtually immunizes all mandatory retirement schemes from the scope of human rights review. This should not be the purpose of remedial legislation. Other provinces, notably Quebec, New Brunswick, and Manitoba, have embraced voluntary retirement, and have endured none of the apprehended repercussions. The Code provides the apparatus through which the benefits of the Charter can flow to persons in the appellants' position. Excluding such persons from the Code's application would leave them without recourse against flagrant inequality. As it reads at present, Ontario's anti-discrimination Act is blatantly discriminatory.

429 Therefore, I would allow the appeal and answer the constitutional questions presented as follows:

1. Does s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, violate the rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

430 Yes.

2. Is s. 9(a) of the *Ontario Human Rights Code, 1981, S.O. 1981, c. 53*, demonstrably justified by s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

431 No.

3. Does the *Canadian Charter of Rights and Freedoms* apply to the mandatory retirement provisions of the respondent universities?

432 No.

4. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, do the mandatory retirement provisions enacted by each of them infringe s. 15(1) of the *Charter*?

433 Need not be answered.

5. If the *Canadian Charter of Rights and Freedoms* does apply to the respondent universities, are the mandatory retirement provisions enacted by each of them demonstrably justified by s. 1 of the *Charter* as a reasonable limit on the rights guaranteed by s. 15(1) of the *Charter*?

434 Need not be answered.

The following are the reasons delivered by Sopinka J.:

435 I have had the advantage of reading the reasons of my colleagues Justices La Forest, Wilson and L'Heureux-Dubé. They have arrived at different conclusions in resolving the difficult legal and social problem which is the main subject of these appeals. The issue of mandatory retirement is a most important one for our country and will affect the lives of millions of Canadians. It is an issue on which Canadians of good will are sharply divided. This division is reflected in the opinions of my colleagues. They also reflect the powerful arguments that can be marshalled on both sides of the question. In these circumstances, I feel obliged to state my reasons, albeit briefly, as to why I share the opinion of my colleague La Forest J. that mandatory retirement is not unconstitutional.

436 I agree with the reasons of La Forest J. for concluding that a university is not a government entity for the purpose of attracting the provisions of the *Canadian Charter of Rights and Freedoms*. I would not go so far as to say that none of the activities of a university are governmental in nature. For the reasons given by my colleague, I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to the Charter. This applies *a fortiori* to the university's relations with its staff which in the case of those in these appeals are on a consensual basis.

437 With regard to whether the policies and practices of the universities relating to mandatory retirement are law, I would prefer not to express a final opinion on that question in this appeal. I find it difficult to classify the activities of an entity on the basis of an assumption that it is something which it is not. Not all actions of a governmental body will qualify as law.

Indeed not all activities of an entity that is generally carrying on the functions of government will be governmental in nature. In attempting to classify the conduct of an entity in a given case it is important to know, first, that it is a governmental body and, second, that it is acting in that capacity in respect of the conduct sought to be subjected to *Charter* scrutiny. After all, we must bear in mind that the role of the Charter is to protect the individual against the coercive power of the state. Or, as one counsel put it, "to enable the citizen to fight City Hall". This suggests that there must be an element of coercion involved before the emanations of an institution can be classified as law. Many of the factors whose absence led La Forest J. to conclude that a university is not a government entity are highly relevant to determine whether its policies and practices are law. In order to make this determination I would have to assume that these factors were present. Such a determination would have a wholly artificial foundation and would simply distort the law. In these circumstances, I would prefer not to decide this question and in order to reach the key issue in this appeal I would assume not only that a university is a governmental entity, as La Forest J. does, but as well that its policies and practices are law.

438 A key issue in this appeal is whether the policies and practices of the University of Guelph in providing for mandatory retirement of its teaching staff at age 65 contravene s. 15 of the Charter. A favourable decision to the appellants on this issue would result in mandatory retirement's being proscribed in respect of all government employees. In addition, an equally important issue is whether human rights legislation, in failing to protect persons against discrimination on the basis of age beyond the age of 65, offends s. 15 of the Charter. A decision favourable to the appellants on this issue would extend the prohibition of mandatory retirement to the private sector.

439 In respect of these two key issues, my colleague, Wilson J., with whom L'Heureux-Dubé J. agrees, has determined that both the policies and practices and the provisions of the [Human Rights Code, 1981, S.O. 1981, c. 53](#), violate s. 15 and are not saved under s. 1. On the other hand, my colleague La Forest J., holds that both are justified under s. 1 and therefore mandatory retirement does not contravene the Charter. With all due respect to the opinions to the contrary, I find that I agree with the conclusion reached by La Forest J. and with his reasons. In addition to a preference for his reasoning, I am of the opinion that his solution to the problem is more in accord with the democratic principles which the Charter is intended to uphold.

440 The current state of affairs in the country, absent a ruling from this court that mandatory retirement is constitutionally impermissible, is the following. The federal government and several provinces have legislated against it. Others have declined to do so. These decisions have been made by means of the customary democratic process and no doubt this process will continue unless arrested by a decision of this Court. Furthermore, employers and employees through the collective bargaining process can determine for themselves whether there should be a mandatory retirement age and what it should be. They have done so in the past, and the position taken by organized labour on this issue indicates that they wish this process to continue. A ruling that mandatory retirement is constitutionally invalid would impose on the whole country a regime not forged through the democratic process but by the heavy hand of the law. Ironically, the Charter would be used to restrict the freedom of many in order to promote the interests of the few. While some limitation on the rights of others is inherent in recognizing the rights and freedoms of individuals the nature and extent of the limitation, in this case, would be quite unwarranted. I would therefore dispose of the appeal as proposed by La Forest J.

The following are the reasons delivered by Cory J.:

441 I am in agreement with the reasons of my colleague Justice Wilson with regard to the tests she suggests for determining whether entities that are not self-evidently part of the legislative, executive or administrative branches of government are nonetheless a part of the government to which the *Canadian Charter of Rights and Freedoms* applies.

442 As well, I am in agreement with her findings that universities form part of "government" for purposes of s. 32 of the Charter and, as a result, that their policies of mandatory retirement are subject to scrutiny under s. 15 and that those policies discriminate on the basis of age and thus contravene s. 15.

443 However, I am in agreement with the conclusion reached by my colleague Justice La Forest that the mandatory retirement policies of the universities come within the scope of s. 1 and thus survive *Charter* scrutiny.

444 Further, I am in agreement with La Forest J. that, although s. 9(a) of the Human Rights Code, 1981, S.O. 1981, c. 53, contravenes s. 15(1) of the Charter by discriminating on the basis of age, it is a reasonable limit prescribed by law within the purview of s. 1 of the Charter.

445 My colleague Wilson J. indicated that, although it was not necessary to her decision, she was doubtful whether an individual could contract out of the rights to equality provided by s. 15. I do not wish to be taken as agreeing entirely with that position. I am not certain that such a conclusion can be correct in relation to matters pertaining to age. For example, in the course of negotiating a collective bargaining agreement, it may become apparent that the union membership is overwhelmingly in favour of an agreement that embraces compulsory retirement as part of the consideration for obtaining higher wages at an earlier age — an age when houses must be bought and children raised and educated. That is to say, at a time when the need for family funds is at the highest.

446 It is often the case that, before a collective bargaining agreement is ratified, the union members will have received very careful advice concerning its terms and their significance not only from union officials, but also from skilled economists and lawyers. The collective agreement represents a total package balancing many factors and interests. It represents the considered opinion of its members that it would be in their best interests to accept the proposed contract. Bargains struck whereby higher wages are paid at an earlier age in exchange for mandatory retirement at a fixed and certain age, may well confer a very real benefit upon the worker and not in any way affect his or her basic dignity or sense of worth. If such contracts should be found to be invalid, it would attack the very foundations of collective bargaining and might well put in jeopardy some of the hard won rights of labour.

447 The collective agreement reflects the decision of intelligent adults, based upon sound advice, that it is in the best interest of themselves and their families to accept a higher wage settlement for the present and near future in exchange for agreeing to a fixed and certain date for retirement. In those circumstances, it would be unseemly and unfortunate for a court to say to a union worker that, although this carefully made decision is in the best interest of you and your family, you are not going to be permitted to enter into this contract. It is a position that I would find unacceptable.

Appeal dismissed, Wilson and L'Heureux-Dubé JJ. dissenting.

Solicitors of record:

Solicitors for the appellants: *Sack, Charney, Goldblatt & Mitchell*, Toronto.

Solicitors for the respondent Board of Governors of the University of Guelph: *Hicks, Morley, Hamilton, Stewart, Storie*, Toronto.

Solicitors for the respondent Board of Governors of Laurentian University: *Tory, Tory, DesLauriers & Binnington*, Toronto.

Solicitors for Board of Governors of York University: *Campbell, Godfrey & Lewtas*, Toronto.

Solicitors for the respondent Governing Council of the University of Toronto: *Cassels, Brock & Blackwell*, Toronto.

Solicitor for the respondent the Attorney General for Ontario: *The Attorney General for Ontario*, Toronto.

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Footnotes

* Chief Justice at the time of hearing.

Tab 10



Original

2012 ABCA 139

Alberta Court of Appeal

Pridgen v. University of Calgary

2012 CarswellAlta 797, 2012 ABCA 139, [2012] 11 W.W.R. 477, [2012] A.W.L.D. 4173, [2012] A.W.L.D. 4174, [2012] A.W.L.D. 4175, [2012] A.W.L.D. 4176, [2012] A.W.L.D. 4177, [2012] A.W.L.D. 4178, [2012] A.W.L.D. 4179, [2012] A.W.L.D. 4186, [2012] A.W.L.D. 4188, [2012] A.W.L.D. 4194, [2012] A.W.L.D. 4195, [2012] A.W.L.D. 4196, [2012] A.W.L.D. 4250, [2012] A.W.L.D. 4251, [2012] A.W.L.D. 4424, [2012] A.W.L.D. 4425, [2012] A.W.L.D. 4426, [2012] A.J. No. 443, 258 C.R.R. (2d) 134, 350 D.L.R. (4th) 1, 41 Admin. L.R. (5th) 99, 524 A.R. 251, 545 W.A.C. 251, 66 Alta. L.R. (5th) 215

**Keith Pridgen and Steven Pridgen (Respondents/ Applicants) and
The University of Calgary (Appellant/ Respondent) and Association
of Universities and Colleges of Canada, Canadian Civil Liberties
Association and The Governors of the University of Alberta (Interveners)**

Marina Paperny, J.D. Bruce McDonald, Brian O'Ferrall JJ.A.

Judgment: May 9, 2012^{*}

Docket: Calgary Appeal 1001-0298-AC

Proceedings: affirming *Pridgen v. University of Calgary* (2010), [2011] 1 W.W.R. 660, 33 Alta. L.R. (5th) 152, 219 C.R.R. (2d) 330, 17 Admin. L.R. (5th) 133, 2010 CarswellAlta 2032, 2010 ABQB 644, 497 A.R. 219, 325 D.L.R. (4th) 441 (Alta. Q.B.)

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Headnote

Education law --- Colleges and universities — Administration of university — Board of Governors

Scope of right of appeal in disciplinary matters — Two undergraduate university students posted comments about their professor on social networking website — University dean determined that students' conduct constituted non-academic misconduct and imposed discipline, including probation — On appeal university review committee upheld determination of non-academic misconduct but varied length of probation — University board of governors refused to hear students' further appeal on ground that appeal to board of governors was not open to students on probation — Students successfully applied for judicial review, and decision of review committee was quashed — University appealed — Appeal dismissed — Court concurred that review committee's decision was unreasonable, but court split three ways as to reasons — Chambers judge found that plain language of s. 31(1)(a) of *Post-secondary Learning Act* provides that disciplinary decisions are subject to right of appeal to board [defined as board of governors of public post-secondary institution] — Students were entitled to statutorily mandated right of appeal to board of governors, regardless of nature of sanction imposed — Board of governors breached its statutory duty by refusing to hear students' appeal.

Education law --- Colleges and universities — Students — Discipline

Scope of right of appeal in disciplinary matters — Two undergraduate university students posted comments about their professor on social networking website — University dean determined that students' conduct constituted non-academic misconduct and imposed discipline, including probation — On appeal university review committee upheld determination of non-academic

misconduct but varied length of probation — University board of governors refused to hear students' further appeal on ground that appeal to board of governors was not open to students on probation — Students successfully applied for judicial review, and decision of review committee was quashed — University appealed — Appeal dismissed — Court concurred that review committee's decision was unreasonable, but court split three ways as to reasons — Chambers judge found that plain language of [s. 31\(1\)\(a\) of Post-secondary Learning Act](#) provides that disciplinary decisions are subject to right of appeal to board [defined as board of governors of public post-secondary institution] — Students were entitled to statutorily mandated right of appeal to board of governors, regardless of nature of sanction imposed — Board of governors breached its statutory duty by refusing to hear students' appeal.

Education law --- Colleges and universities — Students — Miscellaneous

Scope of right of appeal in disciplinary matters — Two undergraduate university students posted comments about their professor on social networking website — University dean determined that students' conduct constituted non-academic misconduct and imposed discipline, including probation — On appeal university review committee upheld determination of non-academic misconduct but varied length of probation — University board of governors refused to hear students' further appeal on ground that appeal to board of governors was not open to students on probation — Students successfully applied for judicial review, and decision of review committee was quashed — University appealed — Appeal dismissed — Court concurred that review committee's decision was unreasonable, but court split three ways as to reasons — Chambers judge found that plain language of [s. 31\(1\)\(a\) of Post-secondary Learning Act](#) provides that disciplinary decisions are subject to right of appeal to board [defined as board of governors of public post-secondary institution] — Students were entitled to statutorily mandated right of appeal to board of governors, regardless of nature of sanction imposed — Board of governors breached its statutory duty by refusing to hear students' appeal.

At least ten university students, including the respondent students KP and SP, joined a Facebook group created in relation to a course in which they were enrolled. From November 12, 2007 to August 26, 2008, twenty-five posts were made to the group's public "wall". Many of the posts were highly critical of the course professor's qualifications, teaching skills, and assessment practices. KP and SP each made one post. All of the members of the Facebook group, regardless whether or not their comments were critical, or if they had commented at all, were found guilty of non-academic misconduct pursuant to the provisions of the [Post-secondary Learning Act \(PSL Act\)](#) and the university calendar.

Sanctions imposed on KP by the university dean included 24 months' probation and the requirement to write an "unqualified letter of apology" to the course professor. Sanctions imposed on SP included a letter of apology to the course professor and an agreement to refrain from posting or circulating defamatory material.

On appeal an *ad hoc* review committee upheld the dean's finding of non-academic misconduct and his decision to impose sanctions. The review committee also increased the probationary period for SP from no probation to four months, and decreased the probation period for KP from 24 months to six months.

The university's board of governors refused to hear the students' appeal. It was cited, on behalf of the board, that an appeal was not an avenue open to students who were on probation for non-academic misconduct.

The students brought a successful application for judicial review. The chambers judge found that the plain language of [s. 31\(1\)\(a\)](#) of the PSL Act provides that disciplinary decisions are "subject to a right of appeal to the board [defined as the board of governors of a public post-secondary institution]". The chambers judge further held that the students were entitled to a statutorily mandated right of appeal to the board of governors, regardless of the nature of the sanction imposed. The board of governors breached this statutory duty by refusing to hear the students' appeal.

The chambers judge went on to find that the review committee "generally" satisfied its duty of fairness, but failed to provide adequate reasons for its finding of non-academic misconduct. The chambers judge quashed the decision of the review committee on the grounds the decision breached the students' [Charter](#) rights and could not be saved by [s. 1 of the Canadian Charter of Rights and Freedoms](#), and the decision was unreasonable under administrative law principles. The university appealed.

Held: The appeal was dismissed.

Per Paperny J.A.: The decision of the review committee was unreasonable. Non-academic misconduct was defined in the policy on student misconduct as including "conduct which causes injury to a person". The review committee failed to discuss whether the conduct of the students either caused injury or constituted another form of non-academic misconduct. The reasons of the review committee further failed to identify whether it was the site itself, the fact of the postings or the content of the postings that constituted the alleged misconduct. The review committee made no distinction between inflammatory postings versus factual

postings or questions, and did not assess students' comments on an individual basis. The university relied on hearsay evidence of an extremely vague nature from unnamed sources. It was not reasonable for the review committee to conclude any injury had occurred, and this ground of appeal was dismissed.

The chambers judge applied s. 32 of the Charter to determine that the provision of post-secondary education is a specific objective of the Alberta legislature. The activity undertaken by the university, in particular the imposition of disciplinary sanctions, falls within the analytical framework of statutory compulsion. Under s. 31 of the PSL Act the university has authority to fine, suspend or expel students from the university. Consequently, in disciplining students pursuant to this statutory authority, the university must comply with the Charter, and ensure protection of students' fundamental freedoms, including freedom of expression.

The students and the university did not merely have a contractual relationship. The university's authority to impose sanctions under the PSL Act exists regardless of any consent by or contractual relationship with the students. Regulation of student speech in the context of non-academic misconduct was not merely an internal matter. A public dimension exists to the relationship between the university and its students, specifically with regard to misconduct of a non-academic nature. Student opinion about the quality of education offered by the university is of interest to current and future students, as well as the larger academic world. Access to post-secondary education is a pressing public concern. By denying access to post-secondary education through the use of disciplinary sanctions, the actions of the review committee are akin to the actions of a professional regulator. The review committee must therefore interpret and apply the policy of student misconduct with a view to the students' Charter rights, including their freedom of expression. This approach does not threaten the university's academic freedom or institutional autonomy as these values do not compete or conflict with freedom of expression and can comfortably coexist.

Neither the review committee nor the board of governors undertook a Charter inquiry, and consequently did not attempt to balance their statutory mandate with the students' right to freedom of expression. As conceded by the university, the decision to breach the students' right to freedom of expression could not be saved by s. 1 of the Charter. The chambers judge did not err in determining the decision of the review committee must be quashed. The university's appeal was dismissed.

Per McDonald J.A. (concurring in the result): The reasonableness standard applies both to whether the board of governors erred in their refusal to hear the students' appeal and to whether there was non-academic misconduct by the students.

Notwithstanding its internal, non-statutory documents to the contrary, the university's board of governors was compelled under s. 31(1)(a) of the PSL Act to hear an appeal from the decision of the review committee. The board of governors was in breach of its statutory duty to hear the students' appeal from the decision of the review committee. Right of appeal arose from any discipline imposed, not merely a right of appeal from fines, suspensions or expulsions. So as to not usurp the functions entrusted to statutory delegates, the court would normally grant an order in the nature of *mandamus*. However, it was improvident to remit the matter to the board of governors at this late stage. The chambers judge correctly concluded that the students' comments did not constitute non-academic misconduct, and the review committee's decision was unreasonable. The decision of the review committee should be quashed, and the university's appeal dismissed. A Charter analysis was neither appropriate nor necessary.

Per O'Ferrall J.A. (concurring in the result): The review committee's decision was clearly unreasonable because it gave no consideration to the possibility the postings made by the students might be protected by their Charter rights of freedom of expression or freedom of association. The review committee ought to have considered whether or not the discipline it imposed violated these rights. The review committee was in the best position to explore the potential infringement of Charter rights, and it was incumbent on the review committee to balance students' rights with any discipline imposed. The failure of the review committee to undertake this analysis was sufficient justification for the chambers judge to quash its decision. The board of governors further denied the students their statutory right of appeal by refusing to hear the appeal from the review committee's decision. The university's appeal was dismissed.

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Generally — referred to

s. 1 — considered

s. 2(b) — considered

s. 15 — considered

s. 32 — considered

s. 32(1) — considered

Charte des droits et libertés de la personne, L.R.Q., c. C-12

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s. 43(1) — considered

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Generally — referred to

Post-secondary Learning Act, S.A. 2003, c. P-19.5

Generally — referred to

s. 31 — considered

s. 31(1)(a) — considered

s. 31(1)(b) — considered

s. 26 — considered

s. 26(1)(g) — considered

s. 26(1)(h) — considered

s. 26(1)(l) — considered

s. 31(1) — considered

s. 60(1)(a) — considered

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Generally — referred to
Post-secondary Learning Act, S.A. 2003, c. P-19.5

Generally — referred to

s. 31(1) — considered

s. 31(1)(a) — considered

Statutes considered by *Brian O'Ferrall J.A.*:

Alberta Bill of Rights, R.S.A. 2000, c. A-14

Generally — referred to

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Generally — referred to

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R. 753.06 [en. Alta. Reg. 457/87] — considered

R. 753.07 [en. Alta. Reg. 457/87] — considered

R. 753.04(1) [en. Alta. Reg. 457/87] — considered

***Marina Paperny J.A.*:**

I. Introduction

1 Are students at public universities entitled to use social networking to criticize the instruction they receive? The University of Calgary (the University) said "no", and disciplined the students who did. The students sought judicial review, arguing the University acted unreasonably and infringed their right to freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The chambers judge agreed with the students. The University appeals, arguing that its students do not have the right to freedom of expression because the *Charter* does not apply to it or to universities generally.

2 This appeal raises an important issue, namely whether a university campus is a *Charter*-free zone. In arguing that the *Charter* does not apply to it, the University relies on two concepts which it says immunize it from the scrutiny of the *Charter*, institutional independence and academic freedom; two concepts that, it says, effectively shield universities from government or other outside influences, including the obligation to protect *Charter* rights.

3 There are two aspects to the appeal. The first is an administrative law challenge to the reasonableness of the University's decision to impose disciplinary sanctions on these students in the circumstances.

4 The second aspect, and the one which is of particular concern to the University and the interveners supporting it (the Association of Universities and Colleges of Canada and The Governors of the University of Alberta), is whether the University is obliged to consider the *Charter* rights of students in disciplinary proceedings. They argue that the Supreme Court of Canada's decision in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 (S.C.C.), definitively precludes the application of the *Charter* to public universities. I do not read *McKinney* this way. There are many routes by which the *Charter* can apply to non-governmental bodies. The jurisprudence on section 32, including *McKinney*, does not, in my view, preclude the application of the *Charter* to universities in all circumstances.

II. Background

i. The Impugned Conduct

5 The facts and the history of the proceedings are germane to the analysis of both issues on appeal. Accordingly, they are set out in considerable detail. In the fall of 2007, the respondents, twin brothers Keith and Steven Pridgen, were full time undergraduate students at the University. Both were enrolled in "Law and Society" (LWSO), a legal survey course offered by the Faculty of Communication and Culture. Professor Aruna Mitra was teaching the course for the first time. The Pridgens, and several other students, posted comments critical of the course to a public "wall" on Facebook. All were found guilty of non-academic misconduct in University disciplinary proceedings held pursuant to the provisions of the *Post-Secondary Learning Act, SA 2003, c. P-19.5 (PSL Act)* and the University calendar. The specifics of the student actions that gave rise to those proceedings are important to the judicial review of the University's decision.

6 Some of the students in the LWSO course were decidedly unimpressed with the course as presented by Professor Mitra. One dissatisfied student created a Facebook group entitled "I no longer fear hell, I took a course with Aruna Mitra." At least ten students from the course, including the Pridgens, joined the Facebook group. The page included a public "wall", accessible to anyone searching the Internet, on which members posted comments. Between November 12, 2007 and August 26, 2008, seven student members made a total of twenty-five posts to the wall. The vast majority of those posts, twenty out of the twenty-five, were made by three students. The Pridgen brothers made one post each.

7 Steven Pridgen was among the first to post a comment. In response to an early discussion about grades (and in specific response to two posters who had received 65% on an assignment), he made the following comment on November 13, 2007:

some how I think she just got lazy and gave everybody a 65....that's what I got. does anybody know how to apply to have it remarked?

8 That was his only post.

9 Another student soon responded to Steven Pridgen's query, advising that he should attend a university office "within 15 days of receiving [his] mark to appeal the grade." The student further commented that she would "most definitely" be doing so. In fact, several students did successfully appeal their grades from the course.

10 Other students continued to post comments throughout November 2007, many of them highly critical of Professor Mitra's qualifications, teaching skills, and assessment practices. She was variously described as "inept", "awful", "illogically abrasive" and "inconsistent." Perhaps the most inflammatory post suggested that Professor Mitra should be "drawn and quartered during a special presentation at Mac Hall." The Pridgen brothers did not post in response to any of these comments.

11 No further posts were made until approximately two months later, after the completion of the LWSO course. On February 1, 2008, a student expressed enthusiasm for her new law class and observed that Professor Mitra did not appear to be teaching any courses that semester. After an additional six months, on August 26, 2008, Keith Pridgen offered this apparent response:

Hey fellow LWSO homees. So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C !!!!! Remember when she told us she was a long-term professor? Well actually she was only sessional and picked up our class at the last moment because another prof wasn't able to do it ... lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future LWSO students!

12 Keith Pridgen's comment was based on his understanding of a conversation he had with Associate Dean Brent regarding student concerns over Professor Mitra's marking. This was his first and only post to the wall.

ii. Finding of Non-Academic Misconduct

13 On September 4, 2008, Professor Mitra complained about the Facebook page to Dean Tettey, Interim Dean of the Faculty of Communication and Culture. By that time, Professor Mitra was no longer employed as an instructor with the University. She indicated to Dean Tettey that she had been alerted to the page by colleagues and was concerned about its contents.

14 Dean Tettey treated the complaint as an allegation of non-academic misconduct. The University's calendar contains a Student Misconduct Policy, which includes a section on "Disciplinary Action for Non-Academic Misconduct." Non-academic misconduct is defined in [section 1](#) of the Student Misconduct Policy as:

1. Definition

The term "non-academic misconduct" includes but is not limited to:

- a. conduct which causes injury to a person and/or damage to University property and/or the property of any member of the University community;
- b. unauthorized removal and/or unauthorized possession of University property;
- c. conduct which seriously disrupts the lawful educational and related activities of other students and/or University staff.

15 When a case of alleged non-academic misconduct is brought to the attention of a dean, the student is required to appear before the dean to respond to the allegations: [section 2\(b\)](#). Where the severity of misconduct does not warrant suspension, the dean may place a student on probation for a specified period of time, with conditions as deemed necessary.

16 In accordance with the procedures set out in the Student Misconduct Policy, the Dean summoned ten students who were members of the Facebook group to attend a meeting on September 18, 2008 to respond to the allegations. Some of those students had not posted comments, but were simply members of the Facebook group. The meeting was attended by Dean Tettey and four other professors from the faculty, including Associate Dean Brent, who had previously spoken with students in the LWSO course about their concerns, and Dr. Chloe Atkins, who had served as a substitute lecturer to the LWSO course on more than one occasion and who is Professor Mitra's spouse.

17 After a brief group meeting, each of the students was required to meet individually with the Dean and the four faculty members and asked to justify his or her participation in the Facebook group. Ultimately, Dean Tettey found all of the student members of the Facebook group guilty of non-academic misconduct, regardless of the nature of their comments and, in some cases, even though they had made no comments at all.

18 The Dean notified Keith Pridgen of his finding of non-academic misconduct and the sanctions to be imposed in a letter dated November 20, 2008. His letter expressed particular concern that "information on the site" called into question Professor Mitra's qualifications and alleged a lack of due diligence in the University's hiring processes, leading the Dean to conclude "that the conduct you displayed on this publicly accessible site has clearly caused unwarranted professional and personal injury to Prof. Mitra and clearly meets the criteria for non-academic misconduct as outlined in the University of Calgary Calendar".

19 The Dean imposed sanctions on Keith Pridgen, including the following:

1. 24 months' probation;
2. that he write an "unqualified letter of apology" to Prof. Mitra, which was to include "a demonstration of your understanding of why your actions constitute academic [sic] misconduct; an acknowledgment of the repercussions of your action on Prof. Mitra's person and professional standing; a recognition of the implications of your action for the Faculty of Communication and Culture's reputation; and lessons that you have learnt from this experience; and a commitment to conduct yourself appropriately in the future"; and

3. that he "refrain from posting or circulating any material that may be defamatory of Prof. Mitra and any other members of the university community, or unjustifiably bring the University of Calgary and/or the Faculty of Communication and Culture into disrepute".

20 The Dean's letter concludes:

In arriving at this decision, I took into account the following factors: i) the fact that your postings contained factual inaccuracies that impugned Prof. Mitra's professional standing and unjustifiably questioned her integrity; ii) your intransigence during the meeting with me and my colleagues; and iii) the lack of genuine remorse for your actions and their impact.

...

I want to state emphatically that you are not being sanctioned for expressing your opinions on this site. You are at liberty to do so. It is important, however, that your views are not based on false premises, conjectures, and unsubstantiated assertions that are injurious to individuals or institutions and their hard-won reputations. The University of Calgary has mechanisms for addressing students' concerns and I encourage you to use those channels if you have issues with your classes or instructors, instead of resorting to actions that not only hurt others unjustifiably but could also create problems for you.

21 Steven Pridgen received a similar letter, also dated November 20, 2008. His involvement with the Facebook page was a single post to the wall about his grade and an inquiry as to how to apply to have his assignment re-marked. During his meeting with the Dean, he expressed a willingness to apologize for any harm his comment may have occasioned. The Dean found Steven Pridgen guilty of non-academic misconduct on the basis of his association with the site and with the comments of others. The Dean's letter stated, in part:

It is my conclusion that the conduct displayed on this publicly accessible site has clearly caused unwarranted professional and personal injury to Prof. Mitra and clearly meets the criteria for non-academic misconduct as outlined in the University of Calgary Calendar. You lent credence to this misconduct by your association with the site and the tacit concurrence with the tenor of its name.

22 The Dean imposed sanctions on Steven Pridgen, including a requirement that he write a letter of apology and that he refrain from posting or circulating defamatory material, in the same terms as that imposed on Keith Pridgen. Both students were also advised that a failure to comply with the sanctions and conditions imposed might result in further sanctions "including, but not limited to, suspension or expulsion".

iii. Appeal to the General Faculties Council's Review Committee

23 Pursuant to the Student Misconduct Policy, a student may appeal the imposition of probation to the General Faculties Council Review Committee: [section 2\(c\)](#). The Policy also sets out the composition of and process to be followed by the Review Committee on an appeal. [Section 3\(b\)](#) provides that the dean, or other members of the University community, and the student shall be called to appear and give evidence before the Review Committee.

24 The Pridgens and some of the other students launched an appeal of the Dean's decision in accordance with the Student Misconduct Policy, and an *ad hoc* Review Committee was convened (Review Committee).

25 The Pridgens set out several grounds of appeal including: (1) that the participation of Professor Mitra's spouse in the initial meeting created an apprehension of bias; (2) that there was a lack of evidence of injury to Professor Mitra; (3) that the Pridgens' fundamental freedoms under [the Charter](#) had been violated; and (4) that there was an apparent disconnect between a University "known for its promotion of freedom of expression and opinion" then denying those same freedoms to its students.

26 Keith Pridgen's hearing was held in January 2009. His counsel questioned the Dean on the lack of evidence of actual injury to Professor Mitra or the University. The Chair of the Review Committee significantly constrained this line of inquiry,

stating that injury was not a question of fact but of interpretation, to be left to the determination of the Committee. On the issue of appropriateness of sanctions, the Dean opined that membership in the Facebook group alone was sufficient to ground a sanction, but the fact that a member made a posting "was beyond" just "being involved in something like this", and called for stiffer penalties.

27 The Dean called his colleagues from the initial sanctioning panel as witnesses in support of his position. One of them was Associate Dean Brent who, on being questioned by Keith Pridgen's counsel, agreed that, "prior to the Facebook incident", he had arranged for regrading of student papers from the LWSO class in response to a "mass appeal by the students".

28 As part of his presentation, Keith Pridgen challenged Professor Mitra's competence as an educator. He cited various factual inaccuracies in Professor Mitra's lectures, recalling two particular incidents where Professor Mitra had informed the class that the notwithstanding clause had "not been used in Canada", and that Magna Carta was a document written "in the 1700s for native North American human rights purposes". He stated:

... I concluded that she was not a capable instructor, it was a fair comment that I wrote on Facebook, based on the facts which I had personally experienced about her, and since she had opened herself up to critique by being based out of the academic community.

29 Keith Pridgen also recalled that Professor Mitra, in response to questions regarding her qualifications:

...told our class that she was tenured and that she had the authority to teach from the Dean, who believed she was an excellent instructor. Associate Dean Brent told myself and several others in a meeting with had [sic] within the [winter] 2008 semester, that she was sessional and not tenured ... Dr. Brent said that due to the evaluations done at the University, Miss Mitra would not be rehired by the University.

30 Keith Pridgen also stated that he had intentionally waited until after Professor Mitra was no longer teaching at the University to make his post, and that:

My comment on the site was written assuming the information I had received from Dr. Brent was true, and it was an opinionated posting.

31 On January 15, 2009, the Review Committee met with Steven Pridgen and Jonathan McGill, another student member of the Facebook group. Steven Pridgen was not accompanied by counsel. That hearing also started with a statement from Dean Tettey that Steven Pridgen was "adamant" about his right to make the post, but acknowledged that "he was going to be very careful about what he said about people" in the future. Dean Tettey perceived Steven Pridgen to be someone who had "learned from what had gone on" and, as such, considered a lesser sanction of an apology was appropriate.

32 Steven Pridgen took exception to Dean Tettey's finding that he had "lent credence to this misconduct by ... association with this site... and the tenor of its name". He maintained that his post was a justifiable comment that should be protected "as freedom of expression". Regarding the forum itself, Steven Pridgen had this to say:

Facebook is a very — it's a social networking site, things that are said on here are not designed to be held up to intense scrutiny, it is merely the equivalent of having an online conversation. It is as public as having, standing in the middle of the University of Calgary hallway and saying the exact same thing. It is openly, publicly available to anybody who is walking by, but its not being advertised for anybody else to come and give their opinions on this. How this would affect her professional standing, I hesitate to believe that future employers will go to Facebook sites looking for statements made by first year students and take them with any degree of seriousness.

33 On February 20, 2009, the Review Committee issued written decisions upholding Dean Tettey's finding of non-academic misconduct. Despite the fact that the Dean had imposed no probationary period on Steven Pridgen in the original proceedings, the Review Committee imposed a probation of four months. Keith Pridgen's original twenty-four month probation period, by contrast, was decreased to a six month period. The decision regarding Steven Pridgen is set out in part below:

...

The Review Committee thoroughly read all of the written submissions, including those of Mr. Pridgen and the Dean, prior to the meeting.

The Dean outlined his reasons for the sanctions imposed on Mr. Pridgen, which revolved around a Facebook site, "I no longer fear Hell, I took a course with Aruna Mitra." The Dean also described the investigative procedures used to obtain information and explained the procedures he used to arrive at his decision. The Appellant presented his perspective on both the web site and the investigative procedures. There was a full and fair hearing and the Review Committee members asked a large number of questions of both the Dean and the Appellant.

After the January 15th meeting, the Dean submitted a written statement and the Appellant also submitted a written statement to the Review Committee outlining his case. These statements were read thoroughly by the Review Committee and the Review Committee met further to consider all of the testimony and submissions. In its determination the Review Committee took account of the comments made by the Appellant on the Facebook site in the context of the site at the time of his post, and the disrespectful nature of the Facebook site on which he was participating

Decision

It is the decision of the Review Committee that, based on the balance of probabilities, Mr. Steven Pridgen's posting on the Facebook site constitutes non-academic misconduct. The Review Committee places Mr. Steven Pridgen on probation for a period of four months beginning on November 20, 2008 and ending on March 20, 2009.

Note that the University Regulations state:

A Student's record is cleared of a probation notation when the probationary periods has been completed, or upon completion of a degree program in another Faculty, or after three years have elapsed, whichever comes first.

34 No further explanation for the finding of non-academic misconduct or for the increase in sanction was offered. The written decision regarding Keith Pridgen is identical, except that his period of probation was reduced from 24 months to six months.

iv. Attempted Appeal to the Board of Governors

35 The Pridgens tried unsuccessfully to appeal the decisions of the Review Committee to the University's Board of Governors. [Section 31\(1\)\(a\) of the PSL Act](#) provides that disciplinary decisions of the general faculties council are "subject to a right of appeal to the board [defined as the board of governors of a public post-secondary institution]". Nevertheless, the University's Board of Governors declined to hear the Pridgens' appeal. The Secretary to General Faculties Council took the position that, as the Pridgens "were placed on probation for non-academic misconduct [as opposed to being fined, suspended or expelled], an appeal to the Board of Governors is not an avenue open to them". The Pridgens delivered detailed notices of appeal to the University, but the University's position remained unchanged.

v. Judicial Review to Court of Queen's Bench

36 The Pridgens filed an application for judicial review in the Court of Queen's Bench. The application raised several issues, including whether [the Charter](#) applies to disciplinary proceedings taken by the University (the chambers judge concluded that it does apply) and whether the [Pridgens' Charter](#) rights were infringed (the chambers judge concluded that they were infringed and that the breach was not saved by section 1). The University has not appealed the finding that the [Pridgens' Charter](#) rights were infringed, nor the conclusion regarding [section 1 of the Charter](#). However, the threshold issue of whether [the Charter](#) applies to university disciplinary proceedings at all is raised on this appeal. I propose to deal with that question in the second part of my analysis.

37 The judicial review application also raised a number of administrative law issues, questioning:

- a. the fairness of the processes before the Dean and before the Review Committee;
- b. the refusal of the Board of Governors to hear an appeal from the Review Committee's decision;
- c. the adequacy of the Review Committee's reasons for decision; and
- d. the reasonableness of the Review Committee's conclusion that the Pridgens had committed non-academic misconduct.

38 The chambers judge found that the procedure followed by the Review Committee "generally" satisfied its duty of fairness. However, the involvement of Professor Mitra's spouse, Dr. Atkins, in the initial meeting with the Dean gave rise to a reasonable apprehension of bias, which was cured by the subsequent hearing before the Review Committee, at which Dr. Atkins did not participate as decision-maker.

39 The chambers judge also held that the plain language of [section 31\(1\)\(a\) of the PSL Act](#) provides a statutorily mandated right of appeal to the Board of Governors from any discipline imposed by the General Faculties Council and is not limited by the nature of the sanction. Accordingly, the Board of Governors breached its statutory duty in refusing to hear the Pridgens' appeals from the Review Committee decision.

40 The chambers judge further concluded that the reasons for decision provided by the Review Committee were not adequate, in that they did not explain the basis for the Review Committee's conclusion that the Pridgens had committed non-academic misconduct. She found that, based on the reasons given, the Pridgens would be unable to understand how their actions constituted non-academic misconduct, and it would be impossible for other students to use the reasons as a benchmark for their own behaviour on campus.

41 The University takes issue with the chambers judge's determination that the Review Committee's finding of non-academic misconduct was unreasonable and that it breached the provisions of [the Charter](#). The chambers judge found that there was no evidence to conclude that the Pridgens' comments caused injury and amounted to non-academic misconduct; she noted that there was no suggestion by the University that the Pridgens had committed defamation, nor had Professor Mitra brought a civil action in defamation.

42 The chambers judge quashed the decision of the Review Committee. Her decision was based on two grounds: (1) that the decision breached the Pridgens' charter rights and could not be saved by section 1, and (2) that the decision was unreasonable under administrative law principles.

III. Grounds of Appeal

43 The University appeals on two fronts. It submits that the chambers judge erred, firstly, by substituting her own opinion for that of the Review Committee and applying a correctness standard to her review of the Committee's decision rather than the appropriate standard of reasonableness.

44 Secondly, the University argues that the chambers judge erred in her approach to the question of the [Charter's](#) applicability; that she erred by deciding that issue in a vacuum and by misapplying the law on whether [the Charter](#) applies to the actions of a university. The University does *not* appeal the chambers judge's conclusions that the University's actions infringed the Pridgens' freedom of expression as guaranteed by [section 2\(b\) of the Charter](#), and that the infringement cannot be justified under [section 1 of the Charter](#).

45 I intend to deal first with the administrative law issue, and then with the application of [the Charter](#) in this circumstance. But first, it is useful to set out the relevant legislation and regulatory context.

IV. Legislative & Regulatory Context

i. Post-Secondary Learning Act, SA 2003, c P-19.5 (PSL Act)

46 Universities in Alberta are established by order of the Lieutenant Governor in Council pursuant to authority granted under *the PSL Act*, which also governs the operation of those universities. One of the purposes of *the PSL Act*, as set out in its preamble, is to ensure "that Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system".

47 The *PSL Act* provides for the establishment of a board of governors and a general faculties council for each public university. The board of governors is responsible to "manage and operate the public post-secondary institution in accordance with its mandate": section 60(1)(a). The general faculties council, subject to the authority of the board, is granted responsibility for the academic affairs of a university, including the preparation of the university calendar (section 26(1)(g)); recommending the establishment of faculties and programs of study (section 26(1)(l)); and determining admissions standards and policies for students (section 26(1)(h)).

48 The *PSL Act* specifically deals with a university's authority to discipline students. [Section 31](#) provides:

31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may

(a) subject to a right of appeal to the board, discipline students attending the university, and the power to discipline includes the power

i. to fine students,

ii. to suspend the right of students to attend the university or to participate in any student activities, or both, and

iii. to expel students from the university;

(b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper; ...

ii. The University Calendar

49 As noted above, the general faculties council is empowered to create and publish a university calendar pursuant to [section 26 of the PSL Act](#). The University calendar created under that authority includes the Student Misconduct Policy, which contains the definition of non-academic misconduct applied by the Dean and the Review Committee (and set out earlier in these reasons), as well as the procedures to be followed in student disciplinary proceedings.

50 The University's calendar also includes a *Statement on Principles of Conduct*. This Statement reads as follows:

1. The University of Calgary community has undertaken to be guided by the following statements of purpose and values:

- To promote free inquiry and debate
- To act as a community of scholars
- To lead and inspire societal development
- To respect, appreciate, and encourage diversity
- To display care and concern for community

2. The University seeks to create and maintain a positive and productive learning and working environment, that is, an environment in which there is:

- Respect for the dignity of all persons
- Fair and equitable treatment of individuals in our diverse community
- Personal integrity and trustworthiness
- Respect for academic freedom
- Respect for personal and University property

3. Those persons appointed by the University to positions of leadership and authority have particular responsibility, not only for their own conduct, but also for ensuring, to the extent of their authority and ability:

- That a positive and productive learning and working environment is created and maintained
- That conflicts and concerns are addressed in a positive, timely, reasonable, and effective manner
- That persons within their jurisdiction are informed of their rights and responsibilities with respect to conduct

4. The University undertakes to ensure that its policies, systems, processes, and day-to-day operations foster the goals in #1 and #2 above.

5. The University encourages and undertakes to support all members of the University community in resolving conflicts and concerns in a positive, timely, reasonable, and effective manner.

6. The University undertakes to ensure that the protection afforded by the principles of natural justice is extended to all members of the University community.

7. The University undertakes to provide resources through various offices to generate awareness related to this Statement on Principles of Conduct throughout the University community and to assist in resolving conflict in a positive way.

51 It is apparent from the principles of conduct that the University aspires to lofty goals, including upholding the promotion of free inquiry, debate, fairness, respect and natural justice. The extent to which these principles were applied in these circumstances is considered in this appeal.

V. Analysis

i. Was the Decision of the Review Committee Reasonable?

52 The chambers judge concluded that the decision of the Review Committee to find the Pridgens guilty of non-academic misconduct should be reviewed on the standard of reasonableness. She determined that "there was no reasonable basis, having regard to the evidence before the Review Committee" that would support the Committee's conclusion that the comments made by the Pridgens constituted non-academic misconduct within the meaning of the University's Student Misconduct Policy. The University argues that, in reaching that determination, the chambers judge improperly rejected the evidence heard by the Review Committee and substituted her own opinion on that evidence for that of the Committee, effectively applying the wrong standard of review and subjecting the decision to a review for correctness.

53 I cannot accede to that submission. The majority decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at para 47 defines a reasonable decision as one which demonstrates "justification, transparency and intelligibility within the decision-making process", and which "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law". The Supreme Court of Canada recently clarified the task of a reviewing court in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.). It is not necessary to

assess the adequacy of a tribunal's reasons separately from the reasonableness of its ultimate decision. Rather, as Justice Abella said at [14] and [15]:

... It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at 'the qualities that make a decision reasonable, referring both to the process of articulating reasons and to outcomes'.

In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show 'respect for the decision-making process of adjudicative bodies with regard to both the facts and the law' (*Dunsmuir*, at para 48). *This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.*

(emphasis added)

54 In this case, the Review Committee was tasked with hearing an appeal that the students had committed non-academic misconduct by posting comments about Professor Mitra on a Facebook wall. In other words, the *Review Committee* was required to consider whether the conduct amounted to non-academic misconduct, defined in the Student Misconduct Policy as including "conduct which causes injury to a person". The reasons of the Review Committee refer to the definition but, as the chambers judge noted, those reasons do not discuss whether the conduct of the Pridgens, in particular, caused injury, or constituted some other form of non-academic misconduct. In each of the two relevant decisions, the Committee states that "[i]n its determination the Review Committee took account of the comments made by the Appellant on the Facebook site in the context of the site at the time of his post, and the disrespectful nature of the Facebook site on which he was participating". The Review Committee then makes the conclusory statement that the student's posting "constitutes non-academic misconduct". No further explanation as to how or why is attempted.

55 Because the sparse reasons of the Review Committee fail to articulate the basis for its conclusion, it was necessary for the chambers judge to look to the record in order to assess whether that conclusion was one of the "possible, acceptable outcomes" that are "defensible in respect of the facts and law". She had to consider whether a reasonable interpretation of the definition of non-academic misconduct in the Student Misconduct Policy could capture the conduct of the students here.

56 The reasons of the Review Committee do not disclose any consideration of what exactly constituted the misconduct: Was it the existence of the site? The fact of the postings? The content of the postings, viewed independently or as a whole? If the misconduct was the content of the postings broadly, there is no discussion as to whether a defence of justification or fair comment would or could apply in the circumstances.

57 Nor is there any distinction made between comments that might be gratuitous or inflammatory versus those that state facts or ask questions. There is no attempt to assess the students' comments on an individual basis. The most that can be said is that the Review Committee focussed not on the comments, but on the nature of the site and those who chose to "associate" with it by posting comments or becoming members. On the basis of the record, it is unreasonable to hold the Pridgens accountable for the comments and actions of other students or one another. This is particularly apparent in the case of Steven Pridgen; the more inflammatory comments of others did not even exist at the time of his posting about his grade.

58 Dean Tettey concluded that the Pridgens' conduct had "caused injury" to Professor Mitra. The reasons of the Review Committee do not reveal whether it reached the same conclusion, but I will, for the purpose of this analysis, infer that it did. Professor Mitra did not appear before the Review Committee (or before the original sanctioning panel) to speak to any effect the Facebook postings may have had on her, professionally or otherwise. Nor did she seek to tender any affidavit material or any written statement regarding the incident. The only information before the Review Committee that touched on that issue at all came in the form of statements by Dean Tettey. The University concedes that there was no direct evidence of injury presented to the Review Committee, but argues that hearsay evidence is admissible in administrative proceedings. It relies on statements

made by Dean Tettey at the Review Committee hearing to the effect that he was told by Professor Mitra that she had been alerted to the existence of the site by some "colleagues and associates".

59 It is generally open to administrative tribunals to admit hearsay evidence. But the relaxation of the rules of evidence does not relieve an administrative decision-maker of the responsibility to assess the quality of the evidence received in a reasonable manner in order to determine whether it can support the decision being made. And in a subsequent judicial review, the reviewing court must consider whether the decision is "one of a range of possible outcomes", based on the evidence that was received and assessed by the decision-maker. It is not an error for a reviewing judge to consider the quality of the evidence and the manner in which it was assessed in conducting that analysis.

60 The evidence on which the University relies is not merely hearsay, it is double or triple hearsay of an extremely vague nature from an unnamed source or sources. It is simply not reasonable to conclude that "injury" within the meaning of the Student Misconduct Policy has been established on the basis of the information provided to the Review Committee, and the chambers judge committed no error in reaching that conclusion.

61 For all of these reasons, the decision of the Review Committee is unreasonable and this ground of appeal is dismissed.

ii. Are University Disciplinary Proceedings Subject to the Charter?

62 As a preliminary matter, the University submits that the chambers judge should not have addressed *the Charter* arguments; that the question of the *Charter's* applicability to the University was decided in an evidentiary vacuum, and that it was unnecessary to address *the Charter* question because the matter could have been decided under the principles of administrative law.

63 I disagree. The chambers judge dealt with the constitutional issues at length as one basis for setting aside the Review Committee's decision. She was entitled to do so. There was no difficulty in deciding the constitutional issues on the basis of the record before the court; no constitutional facts were missing. The "factual vacuum" now alleged by the University consists of the context and history of *the PSL Act*, matters that led the chambers judge to conclude the University is implementing "government policy". These are matters of statutory interpretation and legal argument, not evidence. The parties were given an opportunity to argue the constitutional issues both orally and in subsequent written submissions to the chambers judge. As Professor Hogg has noted in his *Constitutional Law of Canada*, 5th ed, at p 59-22:

If a constitutional issue has in fact been fully argued on the basis of an adequate factual record, and if the issue is likely to recur, there is much to be said for deciding the issue then and there, even if the case could be disposed of on a non-constitutional or narrower constitutional basis.

64 Following argument on all the constitutional issues, the chambers judge concluded that the actions taken by Dean Tettey and the Review Committee violated the Pridgens' fundamental right under section 2(b) to freedom of expression, and that this infringement could not be justified under *section 1 of the Charter*. The University did not dispute those conclusions at the appeal. The only live constitutional issue on appeal, whether *the Charter* applies to the University's actions at all, was fully argued before us by both the University and the Pridgens. It was also argued at some length, both orally and in writing, by three interested parties, the Association of Universities and Colleges of Canada, the Canadian Civil Liberties Association, and the Governors of the University of Alberta, all of whom were granted leave to intervene on the appeal for the sole purpose of addressing the applicability of *the Charter*. It is neither appropriate nor necessary for this Court to now decline to determine the issue. Nor would it be appropriate to remit the question of *Charter* applicability, a legal question, to the Review Committee or to the University's Board of Governors for determination. Deciding the issue now will settle the question and render future relitigation unnecessary.

65 The University argues that the Supreme Court of Canada's 1990 decision in *McKinney v. University of Guelph*, is the final word on the issue of *Charter* applicability. It says that, pursuant to *McKinney*, universities are not part of government and that *the Charter* therefore has no application on university campuses or to a university's relationship with its students. In my view, the decision in *McKinney* and the requisite analysis do not make the answer that simple or obvious.

66 *McKinney* did not rule out *Charter* applicability on university campuses for all purposes. The issue in that case was whether the University of Guelph had infringed the section 15 rights of its employees by imposing mandatory retirement at age 65 on professors. It did not deal, as does this case, with the imposition of discipline or the relationship between university administration and students. The majority of the seven-member panel in *McKinney* concluded that the professors' *Charter* rights had not been infringed, although the various decisions reach that conclusion by different routes. The classification of the activities of the universities as "governmental" or not was divided. LaForest J., writing for himself and two others, held that the university was not "government" for purposes of section 32 and that accordingly, *the Charter* does not apply to its activities. Two other justices (L'Heureux-Dubé and Sopinka JJ., writing independently) agreed that the university's activities in its relationships with its employees could not be considered governmental, and that therefore *the Charter* did not apply to proscribe the university's mandatory retirement policy. All three decisions, however, acknowledged that certain activities of universities could be considered governmental in nature, such that they would attract *Charter* scrutiny.

67 For example, LaForest J. said, at para 42:

... There may be situations in respect of specific activities where it can fairly be said that the decision is that of the government, or that the government sufficiently partakes in the decision as to make it an act of government, but there is nothing here to indicate any participation in the decision by the government and, as noted, there is no statutory requirement imposing mandatory retirement on the universities.

68 L'Heureux-Dubé J. said, at para 371: "... while universities may perform certain public functions that could attract *Charter* review, I am able to accept that the hiring and firing of their employees are not properly included within this category".

69 Sopinka J. said, at para 436:

I would not go so far as to say that none of the activities of a university are governmental in nature. For the reasons given by my colleague, I am of the opinion that the core functions of a university are non-governmental and therefore not directly subject to *the Charter*. This applies a fortiori to the university's relations with its staff which in the case of those in these appeals are on a consensual basis.

70 Justice Wilson, with whom Justice Cory agreed, wrote a dissenting judgment in *McKinney* and would have found that the university was "government" for purposes of the application of *the Charter*, based on the following conclusions, at para 273:

... the fact that the universities are so heavily funded, the fact that government regulation seems to have gone hand in hand with funding, together with the fact that the governments are discharging through the universities a traditional government function pursuant to statutory authority leads me to conclude that the universities form part of "government" for purposes of section 32.

71 We must, in my view, look beyond *McKinney* to fully address the issue raised in this appeal.

72 Since the enactment of *the Charter*, courts have struggled to find a conceptual framework for the determination of when and to whom it applies. The law has developed somewhat idiosyncratically and the various frameworks do not always fit comfortably with one another. However, there has always been widespread agreement among Canadian jurists and legal commentators that, at the least, the *Charter's* purpose is to protect individual autonomy and freedom from the coercive power of the state. In *McKinney* at para 22, LaForest J. noted:

Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual.

But that is far from the end of the matter.

73 Section 32(1) of the *Charter* states that it applies to the "Parliament and government of Canada" and to the "legislature and government of each province" in respect of all matters within their respective legislative authority. The Supreme Court of

Canada has interpreted this section to mean that *the Charter* applies only to government actors and government action, and not to purely private activity: *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 (S.C.C.). The Court cautioned against a narrow definition of government action. McIntyre J., writing for the majority, stated at para 45 that "it is difficult and probably dangerous to attempt to define with narrow precision that element of governmental intervention which will suffice to permit reliance on *the Charter* by private litigants in private litigation". He went on to note that *the Charter* would apply to "many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the legislatures," and that "[w]here such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of *the Charter* rights of another, *the Charter* will be applicable": *Dolphin Delivery* at para 46.

74 The jurisprudence in the 25 years since *Dolphin Delivery* bears this out. *Charter* applicability stretches well beyond a narrow conception of "government" as enactor of coercive laws. Wilson J., in her dissent in *McKinney*, also resisted viewing government action narrowly, noting at para 189 that "the concept of government as oppressor of the people and the function of government as the enactment of 'coercive laws' is no longer valid in Canada, if indeed it ever was". She argued that, given Canada's political and legislative history, governmental action must be viewed more broadly. She said, at para 220:

... a concept of minimal state intervention should not be relied on to justify a restrictive interpretation of "government" or "government action." Governments act today through many different instrumentalities depending upon their suitability for attaining the objectives governments seek to attain. The realities of the modern state place government in many different roles vis-a-vis its citizens, some of which cannot be effected, or cannot be best and most efficiently effected, directly by the apparatus of government itself. We should not place form ahead of substance and permit the provisions of *the Charter* to be circumvented by the simple expedient of creating a separate entity and having it perform the role. We must, in my opinion, examine the nature of the relationship between that entity and government in order to decide whether when it acts it truly is 'government' which is acting.

75 In *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (S.C.C.) LaForest J., who had earlier authored the majority judgment in *McKinney*, embraced a similarly broad view and wrote:

We no longer expect government to simply be a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare.... To say that *the Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before *the Charter* was enacted.

76 The reality and complexity of modern government has led to a plethora of jurisprudence assessing the "governmental" characteristics of various entities in order to determine if they or their activities attract *Charter* scrutiny. The Supreme Court of Canada has recently confirmed that, broadly speaking, there are two ways to determine whether *the Charter* applies to an entity's activities: by enquiring into the nature of the entity (whether the entity itself is "government", in which case all of its activities will be subject to *the Charter*), or by enquiring into the nature of the particular activity in question: *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2009 SCC 31, [2009] 2 S.C.R. 295 (S.C.C.) at para 16.

77 The second part of that analysis was described by LaForest J. in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 (S.C.C.) at para 44 as follows:

... an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly 'governmental' in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under *the Charter* only in respect of that act, and not its other, private activities.

a. Classification of section 32 cases

78 Despite these statements, the task of determining who is a government actor or what is a government act remains a challenge. A review of the authorities yields five broad categories of government or government activities to which *the Charter* applies.

1. Legislative enactments;
2. Government actors by nature;
3. Government actors by virtue of legislative control;
4. Bodies exercising statutory authority; and
5. Non-governmental bodies implementing government objectives.

The categories can be described as follows:

1. Legislative enactments

79 *The Charter* operates as a limitation on the powers of Parliament and the legislatures. As such, any statute enacted by those legislative bodies which is inconsistent with *the Charter* will be outside the power of the enacting body and will be invalid: Hogg, *Constitutional Law of Canada*, 5th ed supp, p 37-9. The same is true of subordinate legislation passed pursuant to statutory authority, including, for example, regulations and by-laws: Hogg, *Constitutional Law of Canada*, 5th ed supp, at 37-13. The case before us is not a challenge to legislation, but rather to actions taken pursuant to statutory authority.

2. Government actors by nature

80 As noted above, the Supreme Court of Canada has developed a two-pronged approach to determining whether *the Charter* applies to a particular entity. The first prong considers whether the entity is a government actor. The applicable principles were summarized by LaForest J. in *Eldridge* at para 44:

... *the Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of section 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, *either by its very nature or in virtue of the degree of governmental control exercised over it*, properly be characterized as "government" within the meaning of section 32(1). In such cases, all of the activities of the entity will be subject to *the Charter*, regardless of whether the activity it is engaged in could, if performed by a non-governmental actor, correctly be described as "private".

(emphasis added)

81 Municipalities have been found to be "government" by their very nature: *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844, 219 N.R. 1 (S.C.C.). LaForest J., writing for a minority of the Court (the majority chose to deal with the case under *the Quebec Charter*), noted a number of qualities that make municipalities "governmental". For instance, they are democratically elected, have general taxing powers, are empowered to make, administer and enforce laws, and, most significantly, they

... derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the *Canadian Charter* clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority.: *Godbout* at para 51.

3. Government actors by virtue of legislative control

82 Other entities have been found to be "government" not because of their governmental nature, but because of the degree of governmental control exercised over them, generally determined through a detailed review of the entity's constituent statute.

This was the case, for example, with community colleges: see *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94 (S.C.C.) and *Lavigne v. O.P.S.E.U.*, [1991] 2 S.C.R. 211 (S.C.C.). In *Douglas College*, the determining factor seemed to be that the college's constituent Act expressly described it as an agent of the Crown, established by government to implement government policy: *Douglas College* at para 16. In *Lavigne* it was sufficient that the Act gave the Minister the power to conduct and govern the colleges, "assisted" by the college's Council: pp 311-12. In both cases, the Court determined that the government had "routine or regular control" over the college such as to bring it within the meaning of "government".

83 Universities, on the other hand, notwithstanding significant government funding and regulation, have been characterized as autonomous bodies, not under sufficient government control to be classified as essentially "governmental": see *McKinney* and *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (S.C.C.), both companion cases to *Douglas College*. It has been pointed out that this distinction leads to inconsistent and illogical results. For example, collaborative programs between universities and colleges can lead to the anomalous result that a student's freedom of expression will be protected, or not, depending on whether he is involved in the university or college portion of his education: see C. Henderson, *Searching for 'government action': post-secondary education as a case study in the conceptual weakness of the Charter's government action doctrine*, (2006) 15 Educ & LJ 233 at 259. Moreover, the reclassification of a college as a degree-granting institution (as has happened in Alberta with respect to, for example, Mount Royal University), could mean that students' *Charter* rights would be protected one day and not the next.

84 The Supreme Court has most recently applied the government control test in *Greater Vancouver Transit Authority v Canadian Federation of Students* to find that two corporations that operate public transit systems in British Columbia are subject to *Charter* scrutiny in the development of policies for advertising on buses. One of the corporations, British Columbia Transit, was a statutory body designated by legislation as an "agent of the government", with a board of directors all appointed by the Lieutenant Governor in Council. On this basis, the Court unanimously concluded that it was "clearly a government entity". The other, the Greater Vancouver Transit Authority (TransLink), was not an agent of government, but the Court concluded that it was substantially controlled by a local government entity (the Greater Vancouver Regional District), making TransLink itself a government entity.

4. Bodies exercising statutory authority

85 As discussed in the preceding section, *the Charter* will apply to entities that are under sufficient government control. That category does not address the problem of governments "contracting out" of their *Charter* obligations, something the Supreme Court has cautioned against in several decisions: see, for example, Wilson J. in dissent in *McKinney* at para 231; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 (S.C.C.); *Eldridge* at para 42. Governments must not be permitted to avoid their constitutional obligations by delegating to outside individuals or organizations the authority to exercise their powers.

86 The second prong of the section 32 analysis described in *Eldridge*, that particular entities will be subject to *Charter* scrutiny in respect of the performance of "governmental activities" even if the entity itself cannot be described as "governmental", attempts to address that concern. Unfortunately, what constitutes "governmental activity" is not easy to articulate or discern. In *Godbout*, LaForest J. stated at para 49 that the body in question must do more than perform a public service; it must be "acting in what can accurately be described as a 'governmental' ... capacity". He went on to note that "[t]he factors that might serve to ground a finding that an institution is performing 'governmental functions' do not readily admit of *a priori* elucidation".

87 It is perhaps appropriate, then, to undertake an *a posteriori* analysis to determine what courts have classified as 'governmental activities'. This brings us to what I see as the fourth broad category of section 32 cases: bodies exercising statutory authority.

88 Professor Hogg points out that in many (although not all) of the cases where *the Charter* has been found to apply to non-governmental actors, the entity in question is exercising a power of compulsion delegated to it by statute; that is, the statutory

delegate is exercising some form of coercive power that belongs to government alone and that is not exercisable by a private individual or organization. He says, at 37-13 of his *Constitutional Law of Canada*, 5th ed supp:

Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of [the Charter](#), neither body can authorize action which would be in breach of [the Charter](#). Thus, the limitations on statutory authority which are imposed by [the Charter](#) will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

89 On this basis [the Charter](#) has been applied, for example, to the power of a Human Rights Commission to compel documents: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.). At paras 37-38, Bastarache J. held:

One distinctive feature of actions taken under statutory authority is that they involve a power of compulsion not possessed by private individuals (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed), vol 2, at p 34-12). Clearly the Commission possesses more extensive powers than a natural person. The Commission's authority is not derived from the consent of the parties. The *Human Rights Code* grants various powers to the Commission to both investigate complaints and decide how to deal with such complaints. Section 24 of the *Code* specifically allows the Commissioner to compel the production of documents.

[...]

The Commission in this case cannot therefore escape [Charter](#) scrutiny merely because it is not part of government or controlled by government. In *Eldridge*, a unanimous Court concluded that a hospital was bound by [the Charter](#) since it was implementing a specific government policy or program. The Commission in this case is both implementing a specific government program *and exercising powers of statutory compulsion*.

(emphasis added)

90 There are many other examples of bodies exercising powers of statutory compulsion. A similar analysis has led to the application of [the Charter](#) to a university in the creation and enforcement of parking bylaws prohibiting the distribution of pamphlets (*R. v. Whatcott*, 2002 SKQB 399 (Sask. Q.B.)), and to a first nation purporting to prevent band members from protesting at the band council office (*Horse Lake First Nation v. Horseman*, 2003 ABQB 152 (Alta. Q.B.)). In both cases, it was noted that the body's authority to govern and regulate the activity in question, where it was greater in scope than the authority of a private citizen or corporation, was derived from statute.

91 Where a statutory authority is being exercised, [the Charter](#) will apply not only to rules and regulations enacted pursuant to that authority, but also to the application and interpretation of those rules in making decisions: *Slaight Communications*. At 1077-78 of that case, Lamer J. articulated the principle as follows (quoted with approval recently by Bastarache J. in *Société des Acadiens & Acadiennes du Nouveau-Brunswick Inc. c. R.*, 2008 SCC 15, [2008] 1 S.C.R. 383 (S.C.C.) at para 20):

The fact that [the Charter](#) applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe [the Charter](#), unless, of course, that power is expressly conferred or necessarily implied Legislation conferring an imprecise discretion must therefore be interpreted as not allowing [the Charter](#) rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of [the Charter](#), and he exceeds his jurisdiction if he does so.

(emphasis of Bastarache J.)

92 Professional bodies also exercise statutory powers in the regulation of their members. This is a subset of cases that I find to be of particular relevance to the case before us. *The Charter* has often been held to apply to the rules, policies and decisions of bodies that affect the autonomy and livelihood of regulated individuals. Unlike the internal affairs of a purely private organization, the regulation of a profession often has a public dimension as, for example, in affecting the manner in which the professional may interact with the public through advertising. There are many examples of cases where a public aspect to regulation or disciplinary proceedings have led courts to conclude that limits placed on the regulated individual's freedom of expression and association are subject to *the Charter*: see *Rocket v. Royal College of Dental Surgeons (Ontario)*, [1990] 2 S.C.R. 232 (S.C.C.); *Costco Wholesale Canada Ltd. v. British Columbia (Board of Examiners in Optometry)* (1998), 55 B.C.L.R. (3d) 253 (B.C. S.C.); *Bratt v. Veterinary Medical Assn. (British Columbia)* (1999), 19 Admin. L.R. (3d) 81 (B.C. S.C.); *Histed v. Law Society (Manitoba)*, 2007 MBCA 150 (Man. C.A.); *Whattcott v. Assn. of Licensed Practical Nurses (Saskatchewan)*, 2008 SKCA 6, 289 D.L.R. (4th) 506 (Sask. C.A.).

93 In a limited number of cases, where the matter in issue has only internal effect and is without public dimension, *the Charter* has been held to be inapplicable to professional regulators: see, for example, *Tomen v. F.W.T.A.O.* (1987), 43 D.L.R. (4th) 255 (Ont. H.C.), aff'd (1989), 61 D.L.R. (4th) 565 (Ont. C.A.), where a by-law of the Ontario Teachers' Federation requiring membership in a particular sub-section was said to affect only members of the organization; and *Keenan v. Certified General Accountants Assn. (British Columbia)*, [1999] B.C.J. No. 351, 12 Admin. L.R. (3d) 199 (B.C. S.C. [In Chambers]), where a pre-hearing investigation into a member's conduct was said to be directed to an "entirely internal purpose". This has been contrasted with regulatory decisions that attempt to restrict mobility rights (*Black v. Law Society (Alberta)*, [1989] 1 S.C.R. 591 (S.C.C.)), freedom of expression in advertising (*Klein v. Law Society of Upper Canada* (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.) and *Rocket v. Royal College of Dental Surgeons (Ontario)*, and the manner in which the regulated individual may interact with the public and other organizations (*Costco* and *Bratt*). In all the latter circumstances, the actions of the regulator, and the activities it purports to regulate or restrict, have a public dimension to which *the Charter* should apply.

5. Non-governmental bodies implementing government objectives: Eldridge v British Columbia (Attorney General)

94 Like Professor Hogg, I conclude that the "statutory compulsion" category captures many of the governmental activities performed by non-governmental entities. Arguably, it does not capture all of the instances of delegation of governmental activities, particularly where there is no obvious element of "compulsion" involved. It seems to me that the Supreme Court of Canada decision in *Eldridge*, described in this section, was an attempt to close that gap.

95 In *Eldridge*, LaForest J. concluded that, in providing the medical services specified in the *Hospital Insurance Act*, hospitals are undertaking a "governmental" act; in providing medically necessary services, the hospital is carrying out a specific governmental objective and is subject to *Charter* scrutiny in the manner in which it carries out that objective. Importantly, no coercive power of the state was at play.

96 The rationale for extending the reach of *the Charter* in this way flows from the principle that Parliament and the legislatures should not be able to avoid their constitutional obligations by delegating their authority or the implementation of their policies and programs to non-governmental entities. As LaForest J. explained at para 42:

Just as governments are not permitted to escape *Charter* scrutiny by entering into commercial contracts or other 'private' arrangements, they should not be allowed to evade their constitutional responsibilities by delegating the implementation of their policies and programs to private entities.

97 He went on to refer to his earlier decision in *Slaight Communications*, in which the actions of a labour arbitrator attracted *Charter* scrutiny, noting:

Although the arbitrator in *Slaight Communications Inc.* was entirely a creature of statute and performed functions that were exclusively governmental, the same rationale applies to any entity charged with performing a governmental activity, even if that entity operates in other respects as a private actor.

98 In concluding that the *Charter* should apply to hospitals with respect to some of their "governmental" activities, LaForest J. distinguished the activity in question from that at issue in *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (S.C.C.), which, similar to *McKinney*, dealt with mandatory retirement provisions being imposed on hospital employees. He characterized the hospital's mandatory retirement policy as "a matter of internal hospital management". In contrast, the delivery of medical services was characterized as a public matter, defined and structured by government, to which the *Charter* should apply.

Conclusion on the classification of section 32 jurisprudence

99 The five categories of cases identified above illustrate the factors that may lead a court to classify an entity as "governmental", either in and of itself or in some of its activities, for the purposes of section 32 of the *Charter*. This classification is neither exhaustive nor closed. Nor do the categories operate as independent silos; a particular entity or its activities may have elements of one or more of them. For example, in *Blencoe*, the Supreme Court concluded that the Human Rights Commission was both exercising statutory powers of compulsion and implementing a specific government program. In *Greater Vancouver Transit Authority*, the corporations in question were characterized as government actors but, as Professor Hogg points out, it is also possible to view them as exercising powers of statutory compulsion. Less obvious cases may require a court to consider and weigh all of the factors to determine if the *Charter* should apply.

b. Application to this case

100 In my view, the decision in *Eldridge* was a move towards clarifying the broad statements in *Stoffman* and *McKinney* that could be interpreted as insulating some entities, like hospitals and universities, from the *Charter* with respect to all of their activities, even those that have significant public consequences. The ultimate conclusion in *Eldridge*, that otherwise private entities will be subject to *Charter* review if they are involved in governmental activities, such as "the implementation of a specific statutory scheme or governmental program", could reasonably be found to apply to any number of government policies and programs being administered by agencies, bodies and institutions of various types, public and private. Interestingly, this approach has rarely been applied since.

101 The chambers judge applied it here to find that the provision of post-secondary education is a specific objective of the Alberta legislature, which led her to the conclusion that universities are acting as government agents in regard to the delivery of post-secondary education. She stated at para 59 of her reasons:

In my view, the circumstances in this case are analogous to those in *Eldridge* as the University is acting as the agent of the provincial government in providing accessible post-secondary education services to students in Alberta pursuant to the provisions of the *PSL Act*.

102 She held further at para 63:

... I find that the University is tasked with implementing a specific government policy for the provision of accessible post secondary education to the public in Alberta, thus bringing the facts of this case into line with *Eldridge*. The structure of the *PSL Act* reveals that in providing post-secondary education, universities in Alberta carry out a specific government objective. Universities may be autonomous in their day-to-day operations, as both universities and hospitals were found to be when dealing with employment issues involving mandatory retirement, however, they act as the agent for the government in facilitating access to those post-secondary education services contemplated in the *PSL Act*, just as the hospitals in *Eldridge* were found to be acting as the agent for the government in providing medical services under the *Hospital Insurance Act*, RSBC 1979, c 180 (now RSBC 1996, c 204).

103 This is a logical approach. On the basis of the *Eldridge* analysis, the provision of post-secondary education by universities is not dissimilar from the provision of medical services by hospitals. As Wilson J. noted in dissent in *McKinney*, "education at every level has been a traditional function of governments in Canada." She stated at para 272:

It is beyond dispute that the universities perform an important public function which government has decided to have performed and, indeed, regards it as its responsibility to have performed.... Moreover, justification for state activity in this area is not hard to find. The state's interest in education in today's society does not and cannot stop at the point of ensuring basic literacy. The promotion of higher learning and the provision of access to opportunities for study at this level is clearly in the public interest. The state readily acknowledges the important role universities play not only in the education of our young people but also more generally in the advancement and free exchange of ideas in our society.

104 That education at all levels, including post-secondary education as provided by universities, is an important public function cannot be seriously disputed. The rather more fine distinction the University seeks to draw here is that it is not a "specific governmental objective", which it says *Eldridge* requires. I find this distinction to be without merit. *Eldridge* does not require that a particular activity have a name or program identified, but rather that the objective be clear. The objectives set out in the *PSL Act*, while couched in broad terms, are tangible and clear.

105 Applying the *Eldridge* analysis to the facts of this case is one possible approach. However, I find that the nature of the activity being undertaken by the University here, imposing disciplinary sanctions, fits more comfortably within the analytical framework of statutory compulsion. The issue is whether in disciplining students pursuant to authority granted under the *PSL Act*, the University must be *Charter* compliant. The statutory authority includes the power to impose serious sanctions that go beyond the authority held by private individuals or organizations. Those sanctions include the power to fine, the power to suspend a student's right to attend the university, and the power to expel students from the university: *PSL Act*, section 31. Accordingly, *Charter* protection for students' fundamental freedoms, including freedom of expression, applies in these circumstances. This goes to the fundamental purpose of the *Charter* as noted by Wilson J. at 222 of her dissent in *McKinney*, where she stated that those who enacted the *Charter* "were concerned to provide some protection for individual freedom and personal autonomy in the face of government's expanding role".

106 The University argues that student discipline is an internal matter and a matter of contract, and that it is not "governmental" in nature, relying on the decision of *Freeman-Maloy v. York University* (2005), 253 D.L.R. (4th) 728 (Ont. S.C.J.); aff'd (2006), 208 O.A.C. 307, 267 D.L.R. (4th) 37 (Ont. C.A.). The issue in that case was whether the president of a university was a "public officer" who could be sued for misfeasance of public office. As a subsidiary issue, the court relied on *McKinney* to conclude that the university was independent of government for purposes of student discipline. There was no direct *Charter* challenge to the discipline imposed, as we have in this case, and a full section 32 analysis was not conducted. It does not appear that *Eldridge* was considered.

107 I do not accept the characterization of the University's relationship with its students as a purely contractual matter, particularly when it comes to discipline for non-academic misconduct. The argument ignores the fact that the legislature has seen fit to expressly authorize sanctions for student discipline in the legislation establishing the University. The University could impose such discipline regardless of, or in addition to, any consent by or contractual relationship with the student (assuming one exists). Moreover, the regulation of student speech in the context of non-academic misconduct is not merely an internal matter. It is, in my view, analogous to the regulation of expression by professional regulatory bodies.

108 As in the professional discipline cases reviewed earlier, the actions of the General Faculties Council and its delegate, the Review Committee, in disciplining students for their public comments are not solely private or internal in nature. The relationship between a university and its students, at least when it comes to misconduct of a non-academic nature, has a public dimension that is missing in purely private situations. Student opinions about the quality of education they are receiving and comments regarding a particular course are of obvious interest to current and future students of the institution and to the standing of that institution in the academic world. That expression has as much a public dimension as does advertising for dental services (*Rocket*) or the manner in which veterinarians may hold themselves out to the public (*Bratt*). Moreover, the regulation of non-academic misconduct on a university campus ensures a standard of behaviour in a public institution for the benefit of the public generally, not just for some narrow and arguably outdated conception of a community of scholars. A public university is neither a private club nor a true private corporation; it does not exist purely for or within itself. Rather it is a place for advanced learning, study, research, dialogue and discussion for the benefit of society as a whole.

109 Moreover, access to post-secondary education is a pressing public concern. The sanctions available to the Review Committee here, which include denial of access to public post-secondary education for the affected students, can have consequences as serious for one's ability to practice in one's chosen field as the actions of a professional regulator. In the case of many professional schools, such as medicine, dentistry or law, the university acts as gatekeeper to the profession as much as any regulatory body.

110 Some of the professional discipline cases (such as *Rocket*) involved challenges to the validity of rules purporting to regulate expression directly. In this case, of course, the *Charter* challenge is not to the validity of the legislation nor to the University's Student Misconduct Policy, but rather to the manner in which that Policy has been interpreted and applied. But it is equally the case that rules that are constitutionally valid on their face must not be applied in a way that violates the *Charter*, "since a body exercising authority on behalf of, or as a delegatee of, the state is bound by the *Charter* as though it were government": *Histed* at para 84, citing *Slaight Communications* and Cameron, "Back to Fundamentals: Multidisciplinary Partnerships and Freedom of Association under section 2(d) of the Charter" (2000), 50 UTLJ 261 at p 266.

111 In *Multani c. Marguerite-Bourgeois (Commission scolaire)*, 2006 SCC 6, [2006] 1 S.C.R. 256 (S.C.C.), Charron J., in majority reasons, made it clear that the discretionary decision of a statutory delegate would be constitutionally invalid if the discretion was exercised in a way that infringed a person's freedom of expression under the *Charter*. The same principle was applied by the Saskatchewan Court of Appeal recently in reviewing the constitutionality of a finding of professional misconduct made by a nursing body against a member for words publicly expressed against Planned Parenthood in his personal time: *Whatcott v. Assn. of Licensed Practical Nurses (Saskatchewan)*, 2008 SKCA 6, 289 D.L.R. (4th) 506 (Sask. C.A.). In *Whatcott*, the Committee's decision denied the member "the ability both to express himself in the way he has chosen and to work". The decision was found to have breached Mr. Whatcott's freedom of expression in a way that could not be justified under section 1 of the *Charter*.

112 The same principle is applicable here. In exercising its statutory authority to discipline students for non-academic misconduct, it is incumbent on the Review Committee to interpret and apply the Student Misconduct Policy in light of the students' *Charter* rights, including their freedom of expression.

c. Academic Freedom, Institutional Autonomy and section 1 of the Charter

113 I reject the argument by the University, supported by the intervener Association of Universities and Colleges of Canada, that the application of the *Charter* in these circumstances undermines or threatens the University's academic freedom or institutional autonomy. Academic freedom, as that idea has come to be understood, is an important value in Canadian society. LaForest J. in *McKinney* described it as the "free and fearless search for knowledge and the propagation of ideas" (para 62), that is "essential to our continuance as a lively democracy" (para 69). But, it does not follow that it trumps freedom of expression. The Supreme Court of Canada has described the purpose of the section 2(b) guarantee of free expression "to promote truth, political and social participation, and self-fulfilment" (*Attis v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 (S.C.C.) at para 59), and has commented that "[i]t is difficult to imagine a guaranteed right more important to a democratic society": *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.) at p 1336.

114 Academic freedom and freedom of expression are not conceptually competing values. Freedom of expression, of course, is guaranteed to all Canadians. Academic freedom is usually confined to the professional freedom of the individual academic in universities and other institutions of higher education; the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution. It has also been described as having an aspect of academic self-rule — the right of academic staff to participate in academic decisions of the university, and, more broadly, an aspect of institutional autonomy — the right of the institution to make decisions, at least with respect to academic matters, free from government interference: see Eric Barendt, *Academic Freedom and the Law* (Oxford: Hart Publishing, 2010) at pp 23-34.

115 Academic freedom and freedom of expression are inextricably linked. There is an obvious element of free expression in the protection of academic freedom, whether limited to the traditional conception of academic freedom as protecting the

individual academic professional, or applied more broadly to promote discussion in the university community as a whole. Interestingly, the protection of free speech on campus is not universally seen as a threat to academic freedom. The United States Supreme Court has linked the two concepts, noting that:

... state colleges and universities are not enclaves immune from the sweep of the First Amendment.... the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.... The college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas', and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.: *Healy v James*, 408 U.S. 169 (1972) at 180.

116 The United Kingdom has also recognized the obligation of universities to promote freedom of speech on campus. The *Education (No. 2) Act 1986* imposes an obligation on universities and colleges to take the steps that "are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment, and for visiting speakers": section 43(1), quoted in Barendt, 2005, at 501.

117 In my view, there is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in *the Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge. There is no apparent reason why they cannot comfortably co-exist. That said, if circumstances arise where these values actually collide, a section 1 analysis would be required to properly balance them. That circumstance does not arise in this case.

118 A pressing concern of the University and of the interveners supporting it is to protect their institutional autonomy and remain free of government interference in core academic functions. The university community actively resists control by government and therefore claims not to be a government actor for any purpose, leading to the conclusion that *the Charter* does not apply to any of its activities. This appears to be a backwards approach. It equates the application of *the Charter* with a lack of autonomy and independence from government control. The two are not synonymous. As has been seen, there are many routes to *Charter* applicability; government control is only one. The following statement from the decision of Bastarache J. at para 34 of *Blencoe* is instructive:

The mere fact that a body is independent of government is not determinative of *the Charter's* application, nor is the fact that a statutory provision is not impugned. Being autonomous or independent from government is not a conclusive basis upon which to hold that *the Charter* does not apply.

119 In my view, the converse is also true. Being obliged to respect *the Charter* in disciplinary proceedings does not mean that the University loses its autonomy or independence from government in other respects, particularly when it comes to its core academic functions.

120 It would also be wrong to overlook the changing relationship between universities, government, private industry and the public generally. Universities have cultivated partnerships and other similar collaborative relationships with government and industry. Universities are heavily reliant on state funding, as well as on funding from private and corporate donors. Their role in society has become more prominent, public and accessible. Today, universities are an integral part of our societal fabric, offering opportunities for learning and research to a diverse student body for the benefit of all Canadians. To suggest that institutional autonomy is undermined by their relationship to government or "other outside influences" including industry, ignores that those relationships already exist, appear to have been embraced by, if not fostered by, universities and do not appear to have diminished the institutional autonomy so highly valued by them.

121 That governments in Canada share this view of universities as instrumental to the economic and social well-being of the country is evidenced by legislation such as Alberta's *PSL Act*. The legislation represents a commitment by the government to ensure that "Albertans have the opportunity to enhance their social, cultural and economic well-being through participation in an accessible, responsive and flexible post-secondary system": *PSL Act*, preamble.

122 One can no longer maintain a pastoral view of university campuses as a community of scholars removed from the rest of society. This does not mean that a university should not be able to direct its own affairs, certainly in academic matters, free from government interference. It should. Respecting *Charter* rights in disciplining students will not, in my view, inhibit it in the exercise of that institutional independence or the exercise of academic freedom. Rather, it will promote the institution as a place of discourse, dialogue and the free exchange of ideas; all the hallmarks of a credible university and the foundation of a democratic society.

123 Although the University has not couched its arguments regarding academic freedom and institutional autonomy in terms of an analysis under section 1 of the *Charter*, those concepts would inform a thorough analysis of whether a particular infringement is justifiable as a reasonable limit on *Charter* rights. For example, the University expressed a concern that an obligation to respect *Charter* rights could interfere with decisions in areas central to its autonomy, such as admission standards and curriculum development. If in some future case a university can establish that the protection of a *Charter* right will interfere with academic freedom or institutional autonomy, the latter could, in my view, adequately be protected as a reasonable limit pursuant to section 1.

124 The chambers judge in this case considered whether the infringement of the Pridgens' freedom of expression was justifiable under section 1. She rightly noted that freedom of expression, while vitally important in a democratic society, is not an unqualified right. The University must be able to place reasonable limits on speech on campus in order, for example, to maintain a learning environment where there is respect and dignity for all. Criticism and debate are essential to ensuring the place of universities as centres for discussion.

125 In this case, however, the chambers judge concluded that the critical opinions made by the students, although some were not particularly gracious, had utility in encouraging discussion and providing feedback to current and future students. The imposition of discipline in this case went beyond what was necessary to achieve the objective of the Student Misconduct Policy to maintain an appropriate learning environment. The University did not challenge these conclusions on appeal, and, in any event, I agree with the chambers judge that the actions of the dean and the Review Committee in this case went too far to be considered a reasonable limit on the exercise of free expression.

126 The chambers judge did not have the benefit of the Supreme Court of Canada's recent decision in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.). That decision provides guidance on how to determine whether administrative decision makers have properly exercised their statutory discretion in accordance with the *Charter*, emphasizing that "the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it": [4]. Among other things, the decision in *Doré c. Québec (Tribunal des professions)* emphasizes the question of proportionality that is at the heart of a section 1 analysis. The question to be asked is whether the administrative decision maker properly balanced its statutory mandate with the *Charter* right and its fundamental importance.

127 Neither the Review Committee nor the Board of Governors undertook any *Charter* inquiry. No attempt was made to balance the statutory mandate with freedom of expression. That was a result of the University's position that its statutory mandate precludes the application of the *Charter*. Notwithstanding that position, the chambers judge was alive to the competing policies that would inform the section 1 analysis. In the context here, those might include the types of issues described above — access to education, fostering an environment of open exchange of ideas, the prevention of incivility, intimidation, disrespect and fear, and the fostering of a safe environment to discuss and debate contemporary issues within and among a diverse student body. The balance to be struck is between the seriousness of the impugned conduct and its effect on the tenor of debate, and the student's ability to criticize, comment on or refute the quality of education he or she receives. The University's actions in disciplining the Pridgens did not balance their expressive rights with the University's statutory objectives; indeed, the University denied the existence of those rights entirely.

VI. Conclusion

128 The *Canadian Charter of Rights and Freedoms* applies to the disciplinary proceedings undertaken by the University. The decision of the Review Committee failed to take into account the Pridgens' right to freedom of expression under the *Charter*. The decision breached the Pridgens' freedom of expression and cannot be saved by section 1. Moreover, the Review Committee's decision was unreasonable from an administrative law perspective. The decision of the chambers judge to quash the Review Committee's decision is upheld and the appeal of the University is dismissed.

VII. Costs

129 The parties have 40 days from the date of these reasons to speak to costs. In default of any further order of this Court respecting costs, the respondents shall have their costs of this appeal, including any costs occasioned by the role of the interveners herein; said costs to be paid by the appellant. The interveners shall all bear their own costs throughout.

J.D. Bruce McDonald J.A.:

I. Introduction

130 This appeal by the University of Calgary is from a judicial review judge's order quashing a finding of non-academic misconduct as against two students (the respondents) sanctioned by the University of Calgary for posting comments about one of their professors on a social networking site. The judicial review judge also concluded that the Board of Governors (the Board) was in breach of its statutory duty when it refused to hear the respondents' appeal.

131 I agree with the judicial review judge that, given the lengthy history of this matter and the efforts made to date by all of the parties, it would unnecessarily prolong matters to remit the matter to the Board. In my view, the judicial review judge's decision that the respondents' comments did not constitute non-academic misconduct was correct.

132 While it may be time to reconsider whether or not universities are subject to the *Charter*, it was unnecessary for the judicial review judge to do so in this case. And, in my respectful view, this Court ought not to compound that error by undertaking such an analysis now.

II. Background

133 The facts are not in dispute and are set out in detail in the judicial review decision: *Pridgen v. University of Calgary*, 2010 ABQB 644 (Alta. Q.B.) at paras 2-15, (2010), 497 A.R. 219 (Alta. Q.B.). Consequently, only the facts essential to this appeal follow.

134 Two full-time undergraduate students, Steven Pridgen and Keith Pridgen (the respondents), each posted a single comment to a social networking site created by another student. The ground on the site was titled "I no longer fear Hell, I took a course with Aruna Mitra". Including the respondents and their comments, 25 comments were posted to the site by seven students enrolled in Professor Mitra's class. The 25 comments ranged from supportive to neutral to pejorative.

135 In response to a student's comment that the course marks were available for viewing, a second student's post asking "how did everybody do??", and two responses that said they received a grade of 65, Steven Pridgen commented: "somehow I think she just got lazy and gave everybody a 65 ... that's what I got. does anybody know how to apply to have it remarked?".

136 After the course had ended, one of the students inquired how everyone's new semester was going and stated that, for her, the "best part is NO MITRA". Keith Pridgen commented:

Hey fellow LWSO [Law and Society] homees.

So I am quite sure Mitra is NO LONGER TEACHING ANY COURSES WITH THE U OF C!!!! Remember when she told us she was a long-term prof? Well actually she was only sessional and picked up our class at the last moment because

another prof wasn't able to do it. lucky us. Well anyways I think we should all congratulate ourselves for leaving a Mitra-free legacy for future LWSO students!

Faculty Hearing and Decision

137 Following a complaint by Professor Mitra, the interim Dean of the applicable faculty emailed each student stating that their comments may constitute academic misconduct, and summoned them to a meeting.

138 After that meeting, the Dean's letter to Keith Pridgen noted that Keith Pridgen had "albeit reluctantly" acknowledged that the information on the site included personal attacks about the professor's qualifications and professionalism that lacked merit and supporting evidence, and had maligned her. Further, it contained derogatory comments about the hiring practices of the applicable faculty, and by extension, the University "claims that you contributed to in whole or in part and which neither you nor any member of the Facebook group has been able to substantiate". He sanctioned Keith Pridgen to 24 months' probation, required him to write an apology, and prohibited him from posting or circulating defamatory material or otherwise unjustifiably bringing the faculty or the University into disrepute.

139 The Dean "state[d] emphatically that you are not being sanctioned for expressing your opinions on this site. You are at liberty to do so. It is important however that your views are not based on false premises, conjectures, and unsubstantiated assertions that are injurious to individuals or institutions and their hard-won reputations."

140 The letter concluded with the statement that the sanctions could be appealed to the General Faculties Council (GFC) in accordance with the University's rules. The letter to Steven Pridgen was similar but his sanctions were a letter of apology and a prohibition on posting or circulating defamatory and unjustified material.

GFC Hearing and Decision

141 The respondents appealed to the GFC, which appointed an *ad hoc* committee (the Review Committee) to hear the appeal. In general terms, the issues on appeal concerned whether the statements constituted non-academic misconduct, and whether the Dean's decision was reasonable and justified.

142 After hearing the respondents' appeals, the Review Committee concluded that each of the respondents' posts "constitutes non-academic misconduct" and sanctioned Steven Pridgen to four months' probation and Keith Pridgen to six months' probation.

Unsuccessful Attempt to Appeal to the Board of Governors

143 The respondents served an appeal of the Review Committee decision on the Board. Their covering letter was addressed to the Board's "Governance Coordinator". The grounds of appeal were under three headings: lack of jurisdiction, bias, and breaches of natural justice (procedural fairness). On the same day, the GFC Secretary, Osler, wrote the respondents' lawyer. She attached and referred to section 5.3 of the *The Board of Governors Student Discipline Appeal Committee Principles and Guidelines* and [section 31\(1\) of the Post Secondary Learning Act](#) (set out in full below), which permit appeals to the Board when the GFC has imposed a fine, suspension or expulsion. She concluded by writing "[t]herefore, as both Keith Pridgen and Steven Pridgen were placed on *probation* for non-academic misconduct, an appeal to the Board of Governors is not an avenue open to them" (emphasis in original).

144 The same day, the respondents' lawyer responded, asserting that this view was "inconsistent with basic principles of statutory interpretation"; the Guidelines were immaterial to the interpretation of the governing legislation; and [section 31\(1\)](#) made it clear that the GFC's right to discipline was subject to a right of appeal to the Board. Accordingly, any discipline meted out by the GFC was *ipso facto* subject to a Board appeal. The letter also pointed out the "absurdity" of the University's position: either the GFC's right of sanction is limited by [section 31\(1\)](#) (to fines, suspensions or expulsions), in which case the sanctions it imposed on the respondents were without jurisdiction; or it had jurisdiction to impose broader sanctions, in which case the Board, by the same principles of interpretation, was obliged to hear appeals from those sanctions.

145 The letter also noted that, as secretary to the GFC, Osler should not also be advising the Board, the GFC's appellate body. On March 12, Osler wrote the respondents' lawyer advising him "that the University's position remains unchanged".

146 The respondents sought judicial review. It is convenient to set out the governing legislation and the University's Guidelines as a framework for understanding the judicial review decision.

III. Legislation and University Guidelines

147 Section 31(1) of the *Post-Secondary Learning Act*, SA 2003, c P-19.5 ("*Act*") sets out the process for student discipline at Alberta's universities.

Student discipline

31(1) The general faculties council has general supervision of student affairs at a university and in particular, but without restricting the generality of the foregoing, the general faculties council may

(a) **subject to a right of appeal to the board** [defined as the board of governors of a public post-secondary institution], discipline students Page: 35 attending the university, and the power to discipline includes the power

(i) to fine students,

(ii) to suspend the right of students to attend the university or to participate in any student activities, or both, and

(iii) to expel students from the university;

(b) delegate its power to discipline students in any particular case or generally to any person or body of persons, subject to any conditions with respect to the exercise of any delegated power that it considers proper;

(c) give to a student organization of the university the powers to govern the conduct of students it represents that the general faculties council considers proper.

[emphasis added]

148 The University of Calgary has (non-statutory) policies in place to govern the student discipline process before the matter reaches the GFC. Of importance is the part of the University Calendar that contains the *Student Misconduct Policy*, which includes a section on "Disciplinary Action for Non-Academic Misconduct". It provides:

1. Definition The term "non-academic misconduct" includes but is not limited to:

a. conduct which causes injury to a person and/or damage to University property and/or the property of any member of the University community;

...

c. conduct which seriously disrupts the lawful educational and related activities of other students and/or University staff.

149 The non-statutory *The Board of Governors Student Discipline Appeal Committee Principles and Guidelines* (adopted by the Executive Committee of the Board of Governors on June 7, 2004) governs appeals from the GFC.

150 It provides, among other things, that the Board may delegate up to five of its members (the Student Discipline Appeal Committee) to hear discipline appeals, and three of the five members shall hear a particular appeal: ss 4.1, 4.4. The procedures governing such appeals include the following: a student wishing to appeal from a GFC decision "delivers an appeal to the Secretary to the Board of Governors within fifteen calendar days of the GFC decision, in accordance with Section 31(1) of the

Act [defined as the *Post Secondary Learning Act*] ...": s 7.1. Thereafter the "Secretary undertakes the following activities: (a) sends a letter of acknowledgment to the Appellant; and (b) sends a copy of the appeal to the Chair of the Student Discipline Appeal Committee...": s 7.3.

151 "Discipline, as it relates to **section 31(1) of the Act**, means only academic or non-academic misconduct as defined by the *Calendar* and determined by the General Faculties Council, upon which a decision was made by the GFC that resulted in fines, suspension from the University, and/or expulsion from the University": s 3.6, (bolding in original). Section 5.3 provides that:

Except for cases of student discipline, as provided under **Section 31(1)(a) of the Act** the Board does not have jurisdiction to act as an appellate body in any other matter and, specifically, there is no other right to appeal a decision of GFC to the Board of Governors under the *Post-Secondary Learning Act*.

152 *The Act* is silent as regards the process to be followed once a right of appeal to the Board is exhausted.

IV. Standard of Review

153 Once a Court of Queen's Bench judge has undertaken judicial review, an appeal of that review is governed by the standard of review common to all appeals from that Court as established by *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.).

154 The judicial review judge's selection and application of the standard of review are each reviewed on a correctness standard: *Q. v. College of Physicians & Surgeons (British Columbia)*, 2003 SCC 19 (S.C.C.) at para 43, [2003] 1 S.C.R. 226 (S.C.C.); *Alberta (Minister of Municipal Affairs) v. Alberta (Municipal Government Board)*, 2002 ABCA 199 (Alta. C.A.) at paras 24-26, (2002), 312 A.R. 40 (Alta. C.A.). In other words, this Court does not defer to the judicial review judge's selection of the standard of review or to the application of that standard to the issues raised by the tribunal's actions.

155 The judicial review judge did not have the benefit of recent Supreme Court jurisprudence, which indicates that, absent a few exceptions (none of which apply here), judicial review proceeds on the reasonableness standard: see generally *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.) at paras 15-24. Accordingly, the reasonableness standard (not the correctness standard as she concluded at para 89) applies to the assessment of whether the Board erred in refusing to hear the appeal. She properly determined that the reasonableness standard applied to the issue of whether there had been non-academic misconduct by the respondents.

V. Judicial Review

156 Given my conclusions on this appeal, only two of the judicial review judge's conclusions are relevant: (a) the Board was in breach of its statutory duty by refusing to hear the respondents' appeals (para 92); and (b) the respondents' comments did not constitute non-academic misconduct (para 114).

(a) Board's Refusal to Hear the Appeal

157 In coming to the conclusion that the Board was in breach of its statutory duty when it refused to hear the respondents' appeals, the judge had regard to **section 31(1)(a) of the Act** and the University's submission that the right of appeal it contemplates is only available if the discipline imposed is a fine, suspension or expulsion.

158 The judicial review judge concluded that such an interpretation was inconsistent with a plain reading of the provision, in that it "clearly provides a statutorily mandated right of appeal to the board of governors of a university from any discipline imposed by the general faculties council ('GFC'), not merely a right of appeal from discipline which resulted in fines, suspensions or expulsions": para 91. She observed that the word "includes" indicates that the three listed sanctions "are simply examples of discipline that could be imposed by the GFC": *ibid*. Moreover, nothing in *the Act* "prevents the GFC from imposing probation as a form of discipline provided that whatever discipline is imposed is subject to a right of appeal to the board of governors": *ibid*. She concluded at para 91:

If the word discipline was narrowly construed to only include fines, suspension or expulsion, not only would that interpretation fail to give meaning to the word "includes" but there would be no statutory basis for other forms of discipline (such as probation) to be imposed by the GFC. If the GFC has the statutory authority to impose a form of discipline, the exercise of such authority is subject to a right of appeal to the board of governors, by virtue of [section 31\(1\)\(a\)](#).

159 However, rather than remitting the matter to the Board, the judge said at para 118:

[T]his is not a case where the matter need be referred to the Board of Governor's Student Discipline Review Committee to consider an appeal from that decision. Although normal practice would be to correct the error and refer the application back to the administrative body, there is nothing to be gained from doing that in the present circumstances. The facts are not in dispute nor is the Board of Governor's Student Discipline Review Committee in a better position to decide the matters at issue. Hence, the decision of the Review Committee is quashed.

(b) Did the Respondents' Comments Constitute Non-academic Misconduct?

160 The judicial review judge determined that the issue of whether the respondents engaged in non-academic misconduct involved a question of mixed fact and law subject to review on a standard of reasonableness. She had regard to the inadequacy of reasons, and properly concluded at paragraph 107 that her task was to assess whether the finding of non-academic misconduct fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", citing *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at para 47, [2008] 1 S.C.R. 190 (S.C.C.).

161 In considering the question, she concluded that each respondent should only be held responsible for his own statement or those he endorsed, not for other statements on the site posted by other students.

162 She rejected the respondents' submission that "injury" (as defined in the Misconduct Policy) should be limited to physical harm, because "[t]here is no grammatical or policy reason to justify such narrow interpretations that are not consistent with the ordinary meaning of the words": para 110. She also dismissed the contention that the Misconduct Policy did not apply because Professor Mitra was no longer employed at the University when Keith Pridgen posted his comment.

163 She did not accept the University's argument that all defamatory statements made by a student about a professor constituted non-academic misconduct. She concluded that she was not required to decide the issue of defamation, and whether it would have been established "is not relevant to whether the students committed non-academic misconduct as defined in the Policy": para 111.

164 On the question of whether there was an "injury", the judicial review judge noted that Professor Mitra was not called as a witness; therefore, the only evidence was the Dean's hearsay and second hand hearsay that he had received a complaint from Professor Mitra, "who indicated that she had been told by unidentified colleagues and associates of that website which in their and her estimation seemed to bring her into disrepute and impacted her professional stature in some unspecified manner": para 112. The judge concluded this was inadequate to assess whether Professor Mitra suffered injury as a result of the respondents' comments.

165 This led her to conclude that "there was no reasonable basis, having regard to the evidence before the Review Committee, that would support the conclusion that the comments made by each of the Applicants on the Facebook Wall caused injury to Professor Mitra and that their conduct constituted non-academic misconduct within the meaning of the Policy": para 114.

VI. Analysis

(a) Board's Refusal to Hear the Appeal

166 A fundamental principle of administrative law is that the statutory scheme established by a Legislature or Parliament must be used; it is not discretionary, and courts ought not usurp the functions entrusted to statutory delegates. Administrative delegates ensure the expeditious and proper functioning of the schemes of which they are a part. It is unnecessary to discuss the

benefits of such schemes, other than to observe that they are an essential element of Canada's regulatory scheme and without them the judicial system would be overwhelmed.

167 The traditional common law discretion to refuse relief on judicial review includes the existence of adequate alternative remedies: see for example *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.). This Court has repeatedly cited *Harelkin* and confirmed that "[j]udicial review is discretionary and an application for judicial review should be declined if an adequate statutory right of appeal exists": *Foster v. Alberta (Transportation & Safety Board)*, 2006 ABCA 282 (Alta. C.A.) at para 14, see also *Merchant v. Law Society (Alberta)*, 2008 ABCA 363 (Alta. C.A.); *KCP Innovative Services Inc. v. Alberta (Securities Commission)*, 2009 ABCA 102 (Alta. C.A.).

168 The discretion to refuse relief on judicial review when an alternate remedy is available may have been elevated to a question of jurisdiction. In *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129 (S.C.C.), the Court said that "[e]xcept in special circumstances, it is the practice of the courts to decline jurisdiction in favour of the statutory appeal procedure — this is the 'adequate alternative remedy' principle.": see *Foster*. A useful overview of the jurisprudence, the principles and their purpose is found in *C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61 (F.C.A.) at para 30 - 33, which is reproduced as *Appendix A* to this judgment.

169 As mentioned above, procedural rules also inform the judicial review process. At the relevant time, these were found in Part 56.1 of the *Alberta Rules of Court*, Alta Reg 390/68. The rules authorized courts to grant the following relief on applications for judicial review: "an order in the nature of *mandamus*, prohibition, *certiorari*, *quo warranto* or *habeas corpus*; and "a declaration or injunction": r 753.04(1). The other permitted remedies included a setting aside order (r. 735.05), directing a reconsideration and determination (r. 735.06), or correcting technical defects (r. 735.07). The list is likely exhaustive when there is no statutory right of appeal or language in the constating statute granting the court additional jurisdiction.

170 As noted, the respondents filed an appeal of the Review Committee's decisions to the Board, and, by way of letter from the GFC's secretary, were advised that "an appeal to the Board of Governors is not an avenue open to them": para 12. Despite concluding that the Board "was in breach of its statutory duty in refusing to hear the respondents' appeals": (para 92), the judge did not remit the matter back to the Board because "there is nothing to be gained from doing that in the present circumstances": para 118.

171 As a general proposition, circumventing the process established by the Legislature for student discipline is not the proper approach. Courts can — and should — give guidance to statutory delegates to ensure the proper functioning of the statutory scheme. Not granting an order in the nature of *mandamus* on these facts would normally constitute an error: see e.g., *KCP Innovative Services Inc.* at para 13, and *Foster* at para 16-22. Of note in the latter are the majority's comments that the process was less than ideal, but the solution lay with the Legislature, not the courts.

(b) Did the Respondents' Comments Constitute Non-academic Misconduct?

172 Although the better course would be to remit this question to the Board and direct it to hear the appeal, it would be improvident to do so at this late stage of these protracted proceedings. The dispute has continued far too long, and the respondents deserve to have the matter now ended with finality. I agree with the judicial review judge's conclusion that "conduct which causes injury to a person" (part of the definition of non-academic misconduct in Misconduct Policy) is not limited to physical injury.

173 Accordingly, had the University proven injury, whether to reputation, mental distress, or something else, there may have been a basis upon which to conclude that the respondents' posts, however innocuous they might appear when parsed or viewed in isolation, constituted non-academic misconduct. However, as the judge noted, no such evidence was tendered, nor can injury be inferred. For these reasons, the Review Committee's decisions were unreasonable and must be quashed.

VII. Conclusion

174 The judicial review judge refused to decline jurisdiction to hear the judicial review on the basis that the Board was the proper body to hear the respondents' appeals from the Review Committee's decisions. Notwithstanding the University's

non-statutory documents to the contrary, [section 31\(1\)\(a\)](#) compels the Board to hear appeals from the GFC (which, of course, includes its Review Committee).

175 The judicial review judge correctly concluded that the Review Committee's decisions — the respondents' comments on the social networking site constituted non-academic misconduct — were unreasonable.

VIII. Application of the Charter to this Case

176 Subsequent to this appeal being argued, the Supreme Court of Canada released its reasons in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.). In my view, *Doré* does not alter my analysis herein. Furthermore, the Supreme Court of Canada did not deal expressly with the issue raised in *McKinney*. As this matter can be decided solely on well established administrative law grounds, there is no need to resort to a *Charter* analysis in this case.

IX. Disposition of the Appeal

177 The appeal is dismissed on the grounds that the judicial review judge properly held that the Review Committee's decisions were unreasonable. However, in my view it was neither appropriate nor necessary for the judicial review judge to have embarked on a *Charter* analysis. Given the prolonged and protracted history of this unfortunate matter, I decline to exercise our jurisdiction to refer these matters back to the Board, which after all had wrongfully declined to hear the respondents' appeals in the initial instance. In the result, I hold that the decisions of the Review Committee are quashed as being unreasonable.

[30] The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. The importance of this rule in Canadian administrative law is well-demonstrated by the large number of decisions of the Supreme Court of Canada on point [citations omitted].

[31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[32] This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway [citations omitted]. Further, only at the end of the administrative process will a reviewing court have all of the administrative decision-maker's findings; these findings may be suffused with expertise, legitimate policy judgments and valuable regulatory experience [citations omitted]. Finally, this approach is consistent with and supports the concept of judicial respect for administrative decision-makers who, like judges, have decision-making responsibilities to discharge [citations omitted].

[33] Courts across Canada have enforced the general principle of non-interference with ongoing administrative processes vigorously. This is shown by the narrowness of the "exceptional circumstances" exception. Little need be said about this exception, as the parties in this appeal did not contend that there were any exceptional circumstances permitting early recourse to the courts. Suffice to say, the authorities show that very few circumstances qualify as "exceptional" and the threshold for exceptionality is high [citations omitted]. Exceptional circumstances are best illustrated by the very few modern cases where courts have granted prohibition or injunction against administrative decision-makers before or during their proceedings. Concerns about procedural fairness or bias, the presence of an important legal or constitutional issue, or the fact that all parties have consented to early recourse to the courts are not exceptional circumstances allowing parties to bypass an administrative process, as long as that process allows the issues to be raised and an effective remedy to be

granted [citations omitted]. ..., the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts.

Brian O'Ferrall J.A.:

178 I agree with my colleagues that the appeal must be dismissed. I also agree that the decision of the Review Committee of the General Faculties Council was unreasonable. It was unreasonable for any number of reasons identified by the chambers judge and by my colleagues on the panel.

179 One of the reasons I believe the decision was unreasonable was that no consideration was given to the students' rights to freedom of expression and freedom of association. However, in my view, the issue in this case is not whether the University is a "*Charter*-free zone". The issue is simply whether, in disciplining the students for their comments or for their association with the social media site which was critical of one of the University's sessional lecturers, the University's disciplinary body, the General Faculties Council, ought to have considered whether its discipline violated the students' rights to freedom of expression and freedom of association.

180 Freedom of expression and freedom of association have enjoyed legal protection in this country long before *the Charter* was promulgated. Civil liberties are protected in various ways. *The Charter* is one of them. The common law is another. One of the ways the common law protects civil liberties is to give citizens the right to apply for the administrative law remedies which are available when those citizens have been aggrieved by illegal or unauthorized official action. These were the remedies sought in this case. There were no applications for *Charter* declarations or *Charter* remedies in this case. The students simply applied for the administrative law remedy of an order setting aside the General Faculties Council Review Committee's decision. One of their grounds was that their freedom of expression was protected by the *Alberta Bill of Rights*.

181 While civil liberties enjoy protection, they also must be balanced against other recognized values. This case is an example. In discharging its "core function" (that of educating students), it may be that the University may properly discipline students in ways which have the effect of limiting their freedom of expression and association. But when student discipline has the effect of limiting the students' civil liberties, there must be evidence that the disciplinary body at least considered the students' civil liberties and then balanced them against the value or values which limiting the students' freedom was intended to protect.

182 The General Faculties Council Review Committee's decision was clearly unreasonable because no consideration appears to have been given to the possibility that the students' postings and/or their association with the social media site might be protected by their rights to freedom of expression and association. In addition to that failure, the students were denied their statutory right to appeal the General Faculties Council Review Committee's decision to the Board of Governors of the University.

183 A ruling on either *the Charter*'s applicability to university student discipline or a ruling on whether the students' rights, as guaranteed by *the Charter*, had been infringed upon in this case was not necessary to the chambers judge's disposition of the students' complaint or to our disposition of the University's appeal. The chambers judge's ruling that the students' *Charter* rights had been violated was perhaps even undesirable because the issue of *Charter* infringement was not explored at first instance where the Supreme Court in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.) suggests it is preferable that such analysis be undertaken, namely at the General Faculties Council Review Committee. The Review Committee is in the best position to weigh the students' rights to freedom of speech and association against considerations such as academic freedom, encouraging a respectful learning environment, and perhaps, other factors which the Court might not be familiar with. Unfortunately, the Review Committee failed to engage in such analysis. That failure alone was all that was necessary to justify setting aside the General Faculties Review Committee's decision, given that the University's Board of Governors declined to hear the students' appeal of that decision.

184 In conclusion, I would dismiss the University's appeal on the basis that the decision of the General Faculties Council's Review Committee was unreasonable for the reasons given by the chambers judge, including the fact that no consideration appears to have been given to the students' civil liberties. I would also dismiss the appeal on the basis that the Board of Governors'

refusal or failure to hear the students' appeal contravened [section 31\(1\)\(a\) of the *Post-Secondary Learning Act*, SA 2003, c P-19.5](#).

Appeal dismissed.

Appendix "A"

Footnotes

- * A corrigendum issued by the Court on May 9, 2012 has been incorporated herein.

Tab 11

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Wallwork v. Toyota Manufacturing Canada Inc.](#) | 2021 ONSC 6785, 2021 CarswellOnt 14197 | (Ont. Div. Ct., Oct 13, 2021)



Original

2020 ONCA 830

Ontario Court of Appeal

Longueépée v. University of Waterloo

2020 CarswellOnt 18852, 2020 ONCA 830, 153 O.R. (3d) 641, 325 A.C.W.S. (3d) 556, 455 D.L.R. (4th) 641

Roch Longueépée (Applicant / Respondent) and University of Waterloo and Human Rights Tribunal of Ontario (Respondents / Appellant / Respondent)

G.R. Strathy C.J.O., P. Lauwers, K. van Rensburg JJ.A.

Heard: June 1, 5, 2020

Judgment: December 21, 2020

Docket: CA C67862

Proceedings: varying *Longueépée v. University of Waterloo* (2019), 439 D.L.R. (4th) 326, 96 C.H.R.R. D/145, 2019 ONSC 5465, 2019 CarswellOnt 14914, D.L. Corbett J., F.L. Myers J., Graeme Mew J. (Ont. Div. Ct.); allowing application for judicial review *Longueépée v. University of Waterloo* (2017), 2017 CarswellOnt 22836, 2017 HRTO 575, Jennifer Scott V-Chair (Ont. Human Rights Trib.); and allowing application for judicial review *Longueépée v. University of Waterloo* (2017), 2017 CarswellOnt 22837, 2017 HRTO 1698, Jennifer Scott V-Chair (Ont. Human Rights Trib.); refusing reconsideration / rehearing *Longueépée v. University of Waterloo* (2017), 2017 CarswellOnt 22836, 2017 HRTO 575, Jennifer Scott V-Chair (Ont. Human Rights Trib.)

Counsel: Frank Cesario, Amanda P. Cohen, for Appellant

David Baker, Laura Lepine, for Respondent, Roch Longueépée

Brian A. Blumenthal, Jason Tam, for Respondent, Human Rights Tribunal of Ontario

Headnote

Human rights --- Duty to accommodate — Undue hardship

Applicant attended university for two terms, withdrawing after receiving D grade — Applicant applied to attend different university — Accepting that applicant had previously undiagnosed and unaccommodated disabilities, university considered application — Applicant was refused admission — Human rights tribunal dismissed application alleging discrimination on basis of disabilities, and denied request for reconsideration — Divisional Court granted application for judicial review, concluding that tribunal erred in finding university had reasonably accommodated applicant when it had anchored its admission decision to unaccommodated grades — Divisional Court remitted matter to admissions committee with directions — University appealed — Appeal allowed in part, only with respect to remedy — Order referring question of remedy to tribunal was to be substituted — Divisional Court was correct in setting aside tribunal's decisions — Stepping into place of Divisional Court and applying new framework for "reasonableness", tribunal's decisions were unreasonable — After confirming that university adopted procedure to accommodate applicant by permitting his application package to be considered, tribunal unreasonably concluded that university met its duty to accommodate when admissions committee then considered only applicant's unaccommodated grades in refusing him admission — Tribunal also unreasonably accepted that accommodation applicant was seeking would require university to take unreasonable measures, in effect accepting "undue hardship" defence where none was advanced by university or supported by record.

Human rights --- Remedies — Miscellaneous

Applicant attended university for two terms, withdrawing after receiving D grade — Applicant applied to attend different university — Accepting that applicant had previously undiagnosed and unaccommodated disabilities, university considered application — Applicant was refused admission — Human rights tribunal dismissed application alleging discrimination on basis of disabilities, and denied request for reconsideration — Divisional Court granted application for judicial review, concluding that tribunal erred in finding university had reasonably accommodated applicant when it had anchored its admission decision to unaccommodated grades — Divisional Court remitted matter to admissions committee with directions — University appealed — Appeal allowed in part, only with respect to remedy — Order referring question of remedy to tribunal was to be substituted — Divisional Court did not explain why, having allowed application for judicial review, it was sending matter back to admissions committee with directions on how to assess application, and not to human rights tribunal to determine appropriate remedy — Conclusion that university discriminated against applicant in admissions process was inevitable on record that was before tribunal, but appropriate remedy was not — It was preferable to return matter to tribunal for its further disposition in light of these reasons so that it could fashion remedy that, in its opinion, would promote compliance with [Human Rights Code](#).

Human rights --- Practice and procedure — Judicial review — Standard of review

Applicant attended university for two terms, withdrawing after receiving D grade — Applicant applied to attend different university — Accepting that applicant had previously undiagnosed and unaccommodated disabilities, university considered application — Applicant was refused admission — Human rights tribunal dismissed application alleging discrimination on basis of disabilities, and denied request for reconsideration — Divisional Court granted application for judicial review, concluding that tribunal erred in finding university had reasonably accommodated applicant when it had anchored its admission decision to unaccommodated grades — Divisional Court remitted matter to admissions committee with directions — University appealed — Appeal allowed in part, only with respect to remedy — Order referring question of remedy to tribunal was to be substituted — Tribunal's decisions were unreasonable — It was unnecessary and unwise in this appeal to determine whether decisions of tribunal were subject to "patent unreasonableness" standard of review, and whether, in this context, review for "patent unreasonableness" was something different from "reasonableness" review — Even assuming that "patent unreasonableness" had meaning that tribunal sought to attribute to this term, decisions of tribunal were patently unreasonable — In this appeal, nothing turned on any distinction there might be between different standards of review advocated by parties.

The applicant was a survivor of institutional child abuse who completed high school equivalency. The applicant attended Dalhousie University for two terms, withdrawing after receiving a D grade in both terms. The applicant was later diagnosed with moderate traumatic brain injury and post-traumatic stress disorder. The applicant applied to attend the University of Waterloo (the "University"). Accepting that the applicant had undiagnosed and unaccommodated disabilities when he attended Dalhousie, the University convened an admissions committee to consider the application (on a transfer student basis), consisting of academic transcripts, volunteer work information, and reference letters, despite that the applicant did not meet the minimum admissions requirements and had applied late. The admissions committee concluded that the application did not demonstrate the ability to succeed at university, and the applicant was refused admission. The applicant brought an application to the human rights tribunal, alleging discrimination under the [Human Rights Code, R.S.O. 1990, c. H.19](#) on the basis of his disabilities.

The vice chair of the tribunal dismissed the application alleging discrimination by the University. The vice chair accepted that the grades-based admissions standards had a discriminatory effect on the applicant because he had unidentified and unaccommodated disabilities when he obtained the relevant grades, but the vice chair concluded that the University reasonably accommodated the applicant's disabilities in the admissions process. The vice chair denied a request for reconsideration of her decision. The applicant brought an application for judicial review. In granting the application, the Divisional Court concluded that the tribunal erred in finding that the University had reasonably accommodated the applicant when the admissions committee had anchored its admission decision to the unaccommodated grades the applicant achieved when he had undiagnosed disabilities. The Divisional Court remitted the matter to the admissions committee with directions. The University appealed.

Held: The appeal was allowed in part, only with respect to the remedy imposed.

Per van Rensburg J.A. (Strathy C.J.O. concurring): The remedy imposed by the Divisional Court was to be set aside. An order declaring that the University discriminated against the applicant and referring the question of remedy to a different member of the human rights tribunal for determination was to be substituted.

The Divisional Court was correct in setting aside the vice chair's decisions. Stepping into the place of the Divisional Court and applying the new framework for "reasonableness" described in [Canada \(Minister of Citizenship and Immigration\) v. Vavilov, 2019 SCC 65](#), the vice chair's decisions were unreasonable. After confirming that the University adopted a

procedure to accommodate the applicant by permitting his application package to be considered, the vice chair unreasonably concluded that the university met its duty to accommodate when the admissions committee then considered only the applicant's unaccommodated grades in refusing him admission. The vice chair also unreasonably accepted that the accommodation the applicant was seeking would require the University to take unreasonable measures, in effect accepting an "undue hardship" defence where none was advanced by the University or supported by the record.

It was unnecessary and unwise in this appeal to determine whether, post *Vavilov*, decisions of the tribunal were subject to a "patent unreasonableness" standard of review, and whether, in this context, a review for "patent unreasonableness" was something different from a "reasonableness" review. Even assuming that "patent unreasonableness" had the pre-*Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9) meaning that the tribunal sought to attribute to this term, the decisions of the vice chair were patently unreasonable. In this appeal, nothing turned on any distinction there might be between the different standards of review advocated by the parties.

The Divisional Court did not explain why, having allowed the application for judicial review, it was sending the matter back to the admissions committee with directions on how to assess the application, and not to the human rights tribunal to determine the appropriate remedy. The conclusion that the university discriminated against the applicant in the admissions process was inevitable on the record that was before the vice chair, but the appropriate remedy was not. In these early post-*Vavilov* days, it was preferable to return the matter to the tribunal for its further disposition in light of these reasons so that it could fashion the remedy that, in its opinion, would promote compliance with the Code.

Per Lauwers J.A. (concurring): There was agreement with the reasons of the majority, although it was appropriate to add some reflections on the unique position of universities in the landscape of public institutions. A measure of deference was owed to universities with respect to core academic decisions including admissions. Deference did not completely insulate academic institutions from public scrutiny, including scrutiny applied by tribunals for compliance with the [Human Rights Code](#), but it had to inform that scrutiny. There were historical and functional reasons for a cautious approach. The human rights tribunal had to be cautious not to override the admissions standards of universities in its mission to ensure accommodation. In this case, the tribunal was too cautious.

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Generally — referred to

s. 11(1) — considered

s. 11(2) — considered

s. 34 — considered

s. 45.8 [en. 2006, c. 30, s. 5] — considered

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Generally — referred to

University of Waterloo Act, S.O. 1972, c. 200

s. 22(d) — considered

***K. van Rensburg J.A.*:**

A. OVERVIEW

1 This is an appeal of an order of the Divisional Court.

2 The respondent, Roch Longuepée, brought an application to the Human Rights Tribunal of Ontario (the "HRTO") alleging discrimination under the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code") against the appellant, University of Waterloo

(the "University"). He alleged that the University discriminated against him on the basis of his disabilities, in refusing him admission to the Faculty of Arts (the "Faculty") for the fall of 2013.

3 Mr. Longueépée had attended Dalhousie University ("Dalhousie") several years before he applied for admission to the University, where he achieved grades that were well below the University's minimum admission requirements for transfer students. Accepting that Mr. Longueépée had undiagnosed and unaccommodated disabilities when he attended Dalhousie, the University convened an admissions committee (the "Admissions Committee") to consider his application, consisting of academic transcripts, information about his volunteer work, and reference letters, despite the fact that he did not meet the minimum admission requirements and had applied late. The Admissions Committee concluded that Mr. Longueépée's application did not demonstrate the ability to succeed at university, and he was refused admission.

4 Vice Chair Jennifer Scott of the HRTO dismissed Mr. Longueépée's application alleging discrimination by the University. The Vice Chair accepted that the University's grades-based admissions standard had a discriminatory effect on Mr. Longueépée because he had unidentified and unaccommodated disabilities when he obtained the relevant grades. She concluded however that the University had reasonably accommodated Mr. Longueépée's disabilities in its admissions process. The Vice Chair also denied a request for reconsideration of her decision.

5 On judicial review, a three-judge panel of the Divisional Court concluded that the HRTO erred in finding that the University had reasonably accommodated Mr. Longueépée when the Admissions Committee anchored its admission decision to the unaccommodated grades Mr. Longueépée had achieved at Dalhousie, when he had undiagnosed disabilities. The court remitted the matter back to the Admissions Committee with directions.

6 The University appeals. The University contends that the Divisional Court erred in its application of the reasonableness standard of review, and, in the alternative, in remitting the matter to its Admissions Committee, rather than to the HRTO, as the administrative decision maker whose decision was under review.

7 The HRTO, a respondent to the appeal, takes no position on the outcome of the appeal, but asserts that this court, post-*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (S.C.C.), should give effect to the "patently unreasonable" standard of review prescribed by s. 45.8 of the Code. Essentially the HRTO asks that this court revisit the leading authority, *Phipps v. Toronto Police Services Board*, 2010 ONSC 3884, 325 D.L.R. (4th) 701 (Ont. Div. Ct.) ("*Shaw (ONSC)*"), aff'd on other grounds at 2012 ONCA 155, 347 D.L.R. (4th) 616 (Ont. C.A.) ("*Shaw (ONCA)*"), that holds that decisions of the HRTO are to be reviewed on a "reasonableness" standard. The other two parties to this appeal assert that the standard of review is reasonableness. There is no dispute that the content of the reasonableness review has been modified by *Vavilov*.

8 For the reasons that follow, I would allow the appeal only to the extent of setting aside the remedy imposed by the Divisional Court, and substituting an order declaring that the University discriminated against Mr. Longueépée and referring the question of remedy to the HRTO for determination.

9 Briefly, in my view the Divisional Court was correct in setting aside the Vice Chair's decisions. Stepping into the shoes of the Divisional Court and applying the new framework for "reasonableness" described in *Vavilov*, I conclude that the Vice Chair's decisions were unreasonable. After confirming that the University adopted a procedure to accommodate Mr. Longueépée by permitting his application package to be considered by an Admissions Committee, the Vice Chair unreasonably concluded that the University met its duty to accommodate when the Admissions Committee then considered *only* Mr. Longueépée's unaccommodated grades in refusing him admission. The Vice Chair also unreasonably accepted that the accommodation Mr. Longueépée was seeking would require the University to take unreasonable measures, in effect accepting an "undue hardship" defence where none was advanced by the University or supported by the record.

10 It is both unnecessary and unwise in this appeal to determine whether, post-*Vavilov*, decisions of the HRTO are subject to a "patent unreasonableness" standard of review, and indeed whether, in this context, a review for "patent unreasonableness" is something different from a "reasonableness" review. Even assuming that "patent unreasonableness" has the pre-*Dunsmuir*

(Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.)) meaning that the HRTO seeks to attribute to this term, the decisions of the Vice Chair were patently unreasonable. In this appeal, nothing turns on any distinction there might be between the different standards of review advocated by the parties.

B. FACTS

11 Mr. Longueépée is a survivor of institutional child abuse. He suffered severe physical, psychological and sexual trauma during his childhood. Mr. Longueépée completed his high school equivalency in Nova Scotia in the form of a General Educational Development ("GED") assessment in February 1999, receiving a grade ranking in the 52nd percentile for his writing skills. He also attended Dalhousie for two terms in 1999-2000, withdrawing after he received a D grade in both terms.

12 Years later Mr. Longueépée was diagnosed with moderate traumatic brain injury and post-traumatic stress disorder ("PTSD"). He was not aware of these conditions when he completed his high school equivalency and when he attended Dalhousie.

13 In July 2013, Mr. Longueépée contacted the University seeking admission as a full-time undergraduate student for the 2013-14 school year in the Faculty of Arts. He applied as a mature student. Mr. Longueépée had not applied through the normal Ontario Universities' Application Centre ("OUAC") process, and when he applied the University's admissions process had already closed for the 2013-2014 academic year, and it had filled all its student positions.

14 Mr. Longueépée advised the University that when he attended Dalhousie, he had undiagnosed and unaccommodated disabilities which impacted his prior pursuit of post-secondary education. He explained that he was a survivor of institutional child abuse and had a moderate traumatic brain injury and PTSD. He provided evidence that this was the case. Mr. Longueépée's application package consisted of more than 100 pages, including transcripts, an outline of his experience and volunteer activities, reference letters and testimonials, writing samples, and medical information.

15 Because of his prior studies at Dalhousie, the University considered Mr. Longueépée to be a transfer student, rather than a mature student, in the admissions process. The University had established academic standards for an applicant to be considered for admission. For transfer students, the standard was 65% for university courses and 70% in Grade 12 English. If an applicant to the Faculty did not meet such criteria and identified extenuating circumstances, the Faculty's Admissions Committee could evaluate the application and grant or deny admission. Recognizing that Mr. Longueépée presented extenuating circumstances, and accepting that he had disabilities that were undiagnosed when he attended Dalhousie, the University convened the Admissions Committee to consider his application.

16 In August 2013 the University's Assistant Registrar sent Mr. Longueépée an email advising: "[t]he Faculty of Arts Admissions Committee undertook a comprehensive review of your supporting documents, references and testimonials with a view to determining your admissibility. After careful consideration, the committee concluded that you are not admissible ... and an offer of admission will not be extended to you." In response to an email from Mr. Longueépée requesting clarification, the Assistant Registrar confirmed that Mr. Longueépée did not "meet the minimum admission requirements needed for consideration to the ... Program." The email also informed Mr. Longueépée that the Admissions Committee recommended that he consider academic upgrading through Athabasca University, Ryerson Continuing Education, or Guelph Open Learning (open universities/programs that offer distance education courses) by completing a minimum of four courses at the university level, and stated that he would need to pass each course and achieve an overall average of 65 percent in order to be considered for admission to the University in the future.

17 In November 2013, Mr. Longueépée filed an application with the HRTO under [s. 34 of the Code](#), alleging discrimination on the basis of disability with respect to goods, services and facilities. His complaint alleged that the denial of his admission based on his past academic record was discriminatory. He sought various remedies, including monetary compensation, the option of admission to the University, and that the University develop more flexible assessment criteria to account for unusual situations where past academic results may not be a reliable predictor of future academic success.

C. THE DECISIONS BELOW

(1) *The HRTO's Decision*

18 At the hearing before the Vice Chair, the University's witnesses were the Assistant Registrar and an Admissions Officer in the Faculty (both of whom were on the Admissions Committee), and the University's former registrar. Mr. Longueépée called Dr. Donna Ouchterlony, a specialist in the field of neurorehabilitation.

19 The Vice Chair summarized the role of the Admissions Committee in determining the admissibility of individuals who do not meet the admissions criteria but present extenuating circumstances. She stated, at para. 15 of her reasons:

The purpose of the Admissions Committee is to consider applications from individuals who do not meet the criteria for admission and who have identified extenuating circumstances. The issue before the Admissions Committee is whether an exception should be made to admit a student who has not met the academic criteria for admission. Members of the Admissions Committee are aware of the kinds of supports provided to students with disabilities by the [University's] Accessibility Services department.

[Emphasis added.]

20 Referring to the evidence of the Admissions Officer, the Vice Chair noted that applications that come before the Admissions Committee usually fall under a grey area — where a student is very close to meeting the academic standard: at para. 22. While there is no precise deviation from the grade standard for transfer students to fall within the grey area because the length and depth of their education varies, the Admissions Committee "takes into account everything that the student has done. It asks for the applicant's high school marks, university marks and a statement of what the applicant has been doing, in order to obtain a more holistic view of the applicant. The ultimate question before the Admissions Committee is whether the applicant will be successful in his/her academic studies": at para. 23. The Admissions Officer testified that he did not know why the applicant was "in the grey area" because he was ten percent below the academic standard, and that Mr. Longueépée should be petitioning Dalhousie to get his grades revised: at para. 24.

21 The Assistant Registrar testified about the reasons for the decision of the Admissions Committee. First, it was evident that Mr. Longueépée was not successful at high school and university. The gap between his 55 percent at Dalhousie and the University's admissions requirement of 65 percent was too large to make an exception. The Admissions Committee believed the best course of action was for Mr. Longueépée to attend an alternative institution to show academic success. Second, Mr. Longueépée had been offered admission to York University, and it was unknown whether he had attended. There was a reasonable amount of time between his diagnoses and his application for Mr. Longueépée to have pursued undergraduate studies with accommodation elsewhere, and he had not done so. The Assistant Registrar testified that it was not about the ten percent gap itself, but that Mr. Longueépée had not demonstrated that he would be successful at university: at para. 25.

22 The Vice Chair noted that the issue to be determined was whether the University had discriminated against Mr. Longueépée in its admissions process: at para. 28.

23 First, she considered whether Mr. Longueépée had a disability. Although the Admissions Committee had accepted that Mr. Longueépée had undiagnosed disabilities that impacted his academic performance while at Dalhousie, at the HRTO hearing, the University accepted that Mr. Longueépée had PTSD, but not that he had suffered a brain injury. Dr. Ouchterlony testified that Mr. Longueépée had a moderate brain injury. There was no evidence to contradict her opinion, and it was accepted by the Vice Chair. She concluded that Mr. Longueépée's moderate brain injury and PTSD fell within the definition of "disability" under [the Code](#) and existed at the time he applied for admission to the University: at paras. 30-34.

24 The Vice Chair then turned to whether Mr. Longueépée was discriminated against in the admissions process and his argument that the University's admissions standard of 65 percent for transfer students was discriminatory because he had undiagnosed and unaccommodated disabilities when he obtained his grades at Dalhousie. She accepted that "[Mr. Longueépée's]

disabilities impacted his ability to meet the [University's] admissions standard for transfer students and in this way, he was adversely impacted by the standard": at para. 35.

25 Having made a finding of *prima facie* discrimination (that is not challenged in this appeal), the Vice Chair identified the issue as "whether the [University] accommodated [Mr. Longueépée] in the admissions process to the point of undue hardship pursuant to [section 11 of the Code](#)": at para. 36.

26 [Section 11 of the Code](#) provides:

11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

(a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or

(b) it is declared in this Act, other than in [section 17](#), that to discriminate because of such ground is not an infringement of a right.

(2) The Tribunal or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

27 The Vice Chair agreed with Mr. Longueépée that the duty to accommodate has both procedural and substantive components. She concluded that the University met its procedural duty to accommodate Mr. Longueépée by considering his application for admission although it was submitted late, and not through the normal OUAC process, and after all the student positions in the Faculty had been filled. The University convened a meeting of the Admissions Committee to consider Mr. Longueépée's application because he presented extenuating circumstances. The Admissions Committee was aware of his academic background, his disabilities, and the fact that his disabilities were diagnosed after he attended Dalhousie: at para. 38.

28 The Vice Chair also concluded that the University met its substantive duty to accommodate. She noted that the purpose of the Admissions Committee is to determine whether a student will be successful in the academic program to which he applies. She referred to the significant gap between the University's admission requirements and Mr. Longueépée's past academic performance, and his failure to take any university courses after his diagnoses. The Vice Chair noted that it was clear that the Admissions Committee considered Mr. Longueépée's previous academic performance when assessing his ability to be successful at school. Addressing Mr. Longueépée's argument that his grades are not reflective of his academic abilities, she observed: "That may be true. But, we cannot expect the [University] to presume that [Mr. Longueépée] would be successful in university merely because his grades were unaccommodated by another university. Unaccommodated grades and academic success are two separate issues": at para. 42.

29 The Vice Chair rejected the argument that the Admissions Committee should have involved the University's Accessibility Services department in the assessment of Mr. Longueépée's application. In her view, the failure to involve Accessibility Services was part of the procedural duty to accommodate and did not mean that the University failed in its duty to substantively accommodate Mr. Longueépée. She concluded that, in any event, there was no evidence that the decision to deny Mr. Longueépée admission would have been different had Accessibility Services been involved in the assessment process: at paras. 43-44. The Vice Chair also rejected the argument that the Admissions Committee should have determined whether Mr. Longueépée could have been successful in part-time studies. The University had assessed the application Mr. Longueépée made, which was specifically for full-time studies: at para. 45.

30 The Vice Chair considered the evidence of Dr. Ouchterlony about what the Admissions Committee should have done in considering Mr. Longueépée's application. The Vice Chair noted that the University had treated Mr. Longueépée with compassion and recognized that his marks were obtained when his disabilities were unknown and unaccommodated and

accepted that he would need support. She stated: "The only way the Committee deviated from Dr. Ouchterlony's view is there is no indication that it considered [Mr. Longueépée's] volunteer work on behalf of child abuse survivors and reference letters given for that work as relevant to his ability to succeed in university." According to the Vice Chair, "that was a judgment call the Committee was able to make. It did not breach its substantive duty to accommodate": at para. 48.

31 The Vice Chair concluded that there was "no information" before the Admissions Committee that Mr. Longueépée could succeed at university. She stated that the University did not breach its substantive duty to accommodate in requiring some indicator of academic success and by not simply assuming that Mr. Longueépée could succeed based on the fact that he was not accommodated when he attended university in the past: at para. 49. The University accepted that Mr. Longueépée had undiagnosed and unaccommodated disabilities when he attended Dalhousie and that this would have impacted his grades. Indeed, it was because of these "extenuating circumstances" that he "received an individualized assessment by the Admissions Committee": at para. 50. The Vice Chair concluded that grades are reflective of the ability to succeed academically and that it was appropriate for the University to impose academic standards. She stated at para. 51:

The [University] has academic standards for admission because it believes past academic performance is the best indicator of future academic performance. [Mr. Longueépée] challenged the [University's] use of grades as a measure of his ability to succeed. The difficulty is that in an academic setting, the ability to succeed is measured by grades: there is no other measure to evaluate success. In this way, academic standards are different from other standards that may be assessed in a number of different ways. All students, including students with disabilities, must provide sufficient information to show that they have the ability to succeed. This is especially so when the gap between the student's qualifications and the academic standard is large. [Mr. Longueépée] failed to provide sufficient information to the Admissions Committee to show he could succeed at university.

[Emphasis added]

32 The application was accordingly dismissed.

(2) The HRTO's Reconsideration Decision

33 Mr. Longueépée argued that the test for reconsideration was met because the Vice Chair's decision failed to properly analyze the procedural duty to accommodate by not identifying its components and not assessing whether the University had satisfied its procedural duty to accommodate when, among other things, it had not involved the Accessibility Services department in the assessment of his application.

34 The Vice Chair denied Mr. Longueépée's request for reconsideration. She reaffirmed her findings that the involvement of Accessibility Services, whether part of the substantive duty to accommodate or the procedural duty to accommodate, would not have changed the decision of the Admissions Committee. She rejected the assertion that a different process, involving Accessibility Services, would have made a difference: at paras. 10-12.

35 The Vice Chair also rejected the challenge to her finding that "the Admissions Committee was entitled to disregard reference letters and volunteer work as indicators of potential academic success": at paras. 11, 16. She confirmed that Mr. Longueépée, like all students, was required to show that he could be successful in university and she rejected his argument that her decision created a "Catch-22" for students with disabilities applying for admission to post-secondary education based on grades achieved while they were unaccommodated. She noted that her decision, like all decisions, was based on the facts of the particular case. Although Mr. Longueépée did not meet the required academic standard, his application was considered precisely because his grades were obtained at a time when his disabilities were unknown and unaccommodated. The Vice Chair observed that to accept his argument "would have the effect of requiring universities to complete an in-depth assessment of every application by every student with a disability regardless of the extent of the gap between the admissions standard for the particular program and the individual student's grades": at paras. 16-17. This would require universities to involve accessibility services in every admission application made by a student with a disability so that the university could determine whether the student would be successful in meeting the academic requirements of the program. In Mr. Longueépée's case, where his

previous grades were obtained at another university, it would effectively require one university to sit in review of how another university accommodated its students: at para. 18.

36 The Vice Chair confirmed that, while the University was responsible for accommodating Mr. Longuepée in the admissions process, it met its procedural duty to accommodate by conducting an individualized assessment of his application and it met its substantive duty to accommodate by recognizing that his previous grades were obtained at a time when his disabilities were unknown and unaccommodated and by accepting the fact that he would need support if admitted: at para. 19.

(3) The Decision of the Divisional Court

37 The Divisional Court allowed Mr. Longuepée's judicial review application, concluding that the University failed in its duty to accommodate his disabilities in its admissions process.

38 Mew J., in reasons concurred in by Corbett and Myers JJ., began by reviewing the matter's background and confirming that the applicable standard of review was reasonableness. The court noted that "the reasonableness standard accords 'the highest degree of deference ... with respect to [the HRTO's] determinations of fact and the interpretation and application of human rights law': at para. 34, citing *Shaw (ONCA)*, at para. 10. The court then set out the issues and the parties' submissions and explained that "the heart" of the application was whether "[the University] discriminated against [Mr. Longuepée] by anchoring its admission decision to the grades he obtained at Dalhousie at a time when his disability had not been diagnosed and, hence, had not been accommodated": at para. 45.

39 The Divisional Court referred to the three-part test in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) ("*Grismer*"), at para. 20, that applies when a requirement or standard has been shown to be *prima facie* discriminatory. The responding party must prove on a balance of probabilities that:

- 1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
- 2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
- 3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

40 The Divisional Court was satisfied that the University had discharged the first two elements. The adoption of an academic standard for admission based on past academic performance as the best indicator of future academic performance is rational. It reflects the good faith belief that the standard is necessary to fulfil the purpose of admitting students who have the ability to succeed in their university studies.

41 The Divisional Court was not satisfied, however, that the University met the third prong of the *Grismer* test. The Court noted that the Admissions Committee had professed an "accommodation dialogue", but the dialogue was "firmly anchored to the very grades which [the Admissions Committee] implicitly, if not expressly, recognised as not being reflective of Mr. Longuepée's abilities": at para. 53. In the court's view, the Admissions Committee "seem[ed] to have deflected its responsibility to evaluate Mr. Longuepée's application as presented": at para. 53. While it purported to consider information other than Mr. Longuepée's grades, the explanation for its decision was bereft of any evaluation of that information: at paras. 54-56. The University did not have to presume that Mr. Longuepée would be successful in university merely because his previous grades were unaccommodated, but it did have to establish that it accommodated him in the admissions process to the point of undue hardship: at para. 55.

42 The Divisional Court concluded that because the University acknowledged that it could not interpret Mr. Longuepée's grades free from their discriminatory effect, it either had to: (1) assess Mr. Longuepée's candidacy without recourse to his marks; or (2) establish that it would result in undue hardship for it to do so: at para. 57. It failed to do either of these things: at para. 58. The University did not consider an approach that placed no reliance on prior marks, and so it could not now establish that no such approaches are available or would cause it undue hardship: at para. 60.

43 The Divisional Court noted that, in her reconsideration decision, the Vice Chair had suggested that accommodation of Mr. Longueépée's disabilities in the admissions process could lead to undue hardship (in the requirement to conduct an in-depth assessment of every application from a person asserting a disability). However, undue hardship had not been advanced by the University and there was no evidence in the record to support this conclusion: at para. 61.

44 The Divisional Court acknowledged that this was an unusual case because Mr. Longueépée was unaware of his disabilities in high school and at Dalhousie, and so he could not seek accommodation at that time: at para. 62. Given the passage of time, accommodation for his high school and undergraduate marks was not reasonably available from the original institutions, so it was the University's obligation to accommodate Mr. Longueépée in the admissions process to the point of undue hardship: at para. 62.

45 The Divisional Court allowed the judicial review application, set aside the Vice Chair's decisions, and remitted the matter to the Admissions Committee "for consideration by way of an accommodated admissions process that is consistent with [the court's] reasons": at para. 63.

D. ISSUES

46 The following issues are raised in this appeal:

1. Did the Divisional Court appropriately identify "reasonableness" as the standard of review or is the standard post-*Vavilov* "patent unreasonableness"?
2. Did the Divisional Court correctly apply the standard of review? And, if the standard was "reasonableness", does a post-*Vavilov* approach lead to a different result?
3. If the Vice Chair's decisions were properly set aside, did the Divisional Court err in its remedy, in sending the matter back to the Admissions Committee rather than to the HRTO?

E. ANALYSIS

47 On an appeal of a judgment of the Divisional Court disposing of a judicial review application, this court must determine whether the Divisional Court identified the appropriate standard of review and applied it correctly. In doing so, this court will "step into the shoes" of the Divisional Court and focus on the administrative decision under review: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.), at paras. 45-47; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471, 131 O.R. (3d) 1 (Ont. C.A.), at para. 49, rev'd on other grounds 2018 SCC 27, [2018] 1 S.C.R. 772 (S.C.C.); *Ball v. McAulay*, 2020 ONCA 481 (Ont. C.A.), at para. 5.

48 Accordingly, what is required in order to address the issues on appeal is for this court: (1) to determine the appropriate standard of review; (2) to apply that standard of review to the decisions of the Vice Chair; and if her decisions were properly set aside, (3) to determine the appropriate remedy.

49 I turn to the first question, the appropriate standard of review.

(1) What Is the Applicable Standard of Review of the Vice Chair's Decisions?

50 When this matter was before the Divisional Court, all three parties agreed that the appropriate standard of review on the judicial review application of the decisions of the HRTO was reasonableness. After the Divisional Court allowed the application for judicial review, and before this appeal was heard, the Supreme Court released its decision in *Vavilov*.

51 The University and Mr. Longueépée agree that the reasonableness standard of review applies to the judicial review of a decision of the HRTO, although they accept that the framework and approach to determining whether a decision is reasonable

has been modified by the Supreme Court's decision in *Vavilov*. They differ only on the application of the reasonableness standard of review, and hence the outcome of the appeal.

52 The HRTO asserts that post-*Vavilov*, its decisions should be reviewed under the "patent unreasonableness" standard, which is the standard of review prescribed by s. 45.8 of the Code. Section 45.8 functions as a privative clause and, as applied to the decision affecting Mr. Longueépée, provides that the HRTO's decision is final, not subject to appeal, and "shall not be altered or set aside in an application for judicial review or in any other proceeding unless the decision is patently unreasonable."

53 The Divisional Court's decision in *Shaw (ONSC)* held that "patent unreasonableness" in s. 45.8 of the Code, which was enacted pre-*Dunsmuir* but proclaimed in force post-*Dunsmuir*, must be interpreted to mean "reasonableness" as defined in *Dunsmuir*. That standard has been applied since 2010. The HRTO has accepted the "reasonableness" standard of review in numerous reported cases since *Shaw (ONSC)*¹.

54 The HRTO now seeks to revisit the standard of review applicable to its decisions post-*Vavilov*. It has done so in three recent cases before the Divisional Court: *Intercounty Tennis Association v. Human Rights Tribunal of Ontario*, 2020 ONSC 1632, 446 D.L.R. (4th) 585 (Ont. Div. Ct.), *Ontario v. Association of Ontario Midwives*, 2020 ONSC 2839 (Ont. Div. Ct.), leave to appeal to Ont. C.A. granted, M51703 (December 16, 2020), and *Xia v. Board of Governors of Lakehead University*, 2020 ONSC 6150 (Ont. Div. Ct.), leave to appeal to Ont. C.A. requested, M52029. In each case the Divisional Court rejected the HRTO's argument and confirmed that reasonableness is the standard of review for the decisions of the HRTO post-*Vavilov*.

55 The HRTO defines a decision that is patently unreasonable as one that is "clearly irrational" and "evidently not in accordance with reason", citing *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.), at pp. 963-64, and, although it takes no position on the outcome of the appeal, it urges this court on this appeal to apply this and other pre-*Dunsmuir* authorities to the assessment of whether the Vice Chair's decisions were patently unreasonable. The HRTO advances a number of arguments in support of its position that *Vavilov* has reanimated a separate "patent unreasonableness" standard of review for its decisions.

56 In my view, it is both unwise and unnecessary for the proper disposition of this appeal, to embark on the analysis that the HRTO asks this court to undertake: that is, to determine whether post-*Vavilov* the statutory standard of review in s. 45.8 of the Code should be given effect, and if so, whether a court's review of an administrative decision for "patent unreasonableness" would be different from a review for "reasonableness". It is unwise to do so because these issues should be decided in a case where the standard of review makes a difference to the outcome, and where the parties with a stake in the dispute have joined issue on the point. It is unnecessary in this case because the result would be the same under both standards of review. Even assuming that "patent unreasonableness" can be given a pre-*Dunsmuir* meaning as proposed by the HRTO, for the same reasons that I find that the decisions of the Vice Chair were unreasonable, I also find that the decisions were patently unreasonable. The reasoning and logical errors are immediate and obvious, such that the decisions are "clearly irrational" and "evidently not in accordance with reason".

(2) Did the Divisional Court correctly apply the reasonableness standard of review?

(a) Reasonableness Review Under Vavilov

57 The parties point to the majority reasons in *Vavilov* to describe what constitutes a reasonable decision and to define the role of the reviewing court in conducting a reasonableness review.

58 The majority in *Vavilov* describes the review for reasonableness as one that focuses on the decision actually made by the decision maker and considers both the rationale for the decision and the outcome to which it led: at para. 83. A principled approach to a reasonableness review puts the reasons first. The reasons must be examined by a reviewing court with "respectful attention", seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: at para. 84. The court notes that "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that

is justified in relation to the facts and law that constrain the decision maker": at paras. 85, 102-4. The shortcomings or flaws relied on to challenge the decision must be "sufficiently central or significant to render the decision unreasonable": at para. 100.

(b) *Were the Vice Chair's decisions reasonable?*

59 As noted earlier, this court must step into the shoes of the Divisional Court when considering this appeal. As such, the focus is not on the reasoning of the Divisional Court, and whether it reveals error, but on the reasoning in the Vice Chair's decisions and their result. That said, and despite the fact that the Divisional Court conducted its review for reasonableness pre-*Vavilov*, I am in substantial agreement with that court's analysis and conclusions: in effect that the logical errors in the Vice Chair's decisions, and her implicit finding of undue hardship when the University had not relied on this defence, rendered her decisions unreasonable.

(i) Positions of the Parties

60 The University submits that the Vice Chair's decisions were reasonable: her analysis is internally rational and coherent and is justified on the facts and the law. The University asserts that the Divisional Court erred by focusing on grades out of context, by failing to take proper account of the University's academic standards, and by failing to defer to the Vice Chair's findings about the role and weight to be given to the supplemental or non-academic materials provided by Mr. Longueépée.

61 Mr. Longueépée submits that the Vice Chair's decisions were unreasonable. Specifically, he contends that the Vice Chair's reasons contain a logical error: once she concluded that the 65 percent grade standard for transfer students was discriminatory, she could not rationally conclude that the application of that standard to him constituted reasonable accommodation of his disabilities. The error was in determining that the University accommodated Mr. Longueépée when it based its admissions decision on his unaccommodated grades. He also argues that the decisions were unreasonable because the Vice Chair applied the defence of undue hardship when this defence had not been pleaded by the University and no evidence had been tendered on this point.

(ii) Discussion

62 I agree with Mr. Longueépée that the Vice Chair's decisions were unreasonable. In essence, after accepting that the University had met what the Vice Chair characterized as the procedural duty to accommodate Mr. Longueépée's inability to comply with its grades criteria for admission due to disability by conducting an individualized assessment of his application, the Vice Chair concluded that the University met its substantive duty to accommodate when it considered only the unaccommodated grades to be relevant to his ability to succeed in university. The Vice Chair's reasons do not support her conclusion that the University met its obligation to accommodate Mr. Longueépée's disabilities in its admissions process. As I will explain, the Vice Chair ultimately failed to grapple with the core issue, and the effect of her decision was to recognize that the University, although embarking on a process to provide accommodation, in fact had no duty to carry through with that process to accommodate Mr. Longueépée in his application for admission. Further, the Vice Chair effectively recognized an undue hardship defence, even though the University did not argue or present evidence of undue hardship. These shortcomings rendered the Vice Chair's decisions unreasonable.

63 As *Vavilov* instructs, the reasonableness review begins with the reasons of the decision maker, which must be examined with respectful attention, seeking to understand the reasoning process.

64 I begin with what is not in dispute.

65 The Vice Chair accepted that Mr. Longueépée had established a *prima facie* case of discrimination. She determined that "[Mr. Longueépée's] disabilities impacted his ability to meet the [University's] admissions standard for transfer students and in this way, he was adversely impacted by the standard": at para. 35. The finding of *prima facie* discrimination resulting from the University's grades-based admissions standard was not challenged by the University in this court.

66 I also note that there is no disagreement between the parties as to the proper framework that was to guide the Vice Chair's analysis. Although not articulated in her reasons, the three-step test prescribed by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("*Meiorin*") and *Grismer* applies to determine whether a *prima facie* discriminatory requirement is reasonable and *bona fide*. Under the *Meiorin/Grismer* test, the University had the obligation to establish:

- a. that the grades standard for transfer students was adopted for a purpose or goal that is rationally connected to the function being performed;
- b. that it adopted the grades standard in good faith in the belief that it was necessary for the fulfilment of that purpose or goal; and
- c. that the standard was reasonably necessary to accomplish its purpose, in the sense that the University could not accommodate persons with the characteristics of Mr. Longueépée without incurring undue hardship.

67 There is no question that the first two steps were met by the University in this case. This was accepted by the Divisional Court as implicit in the Vice Chair's decisions, and the respondent does not take issue with this conclusion. The University's grades-based admission standard for transfer students is rationally connected to the admissions process as a predictor of the ability to succeed at university, and the standard was adopted in an honest belief that it was necessary to ensure that admitted students would have the ability to succeed.

68 The issue before the HRTO was whether the University accommodated Mr. Longueépée in its admissions process to the point of undue hardship. As McLachlin J. (as she then was) stated in *Grismer*: "Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship": at para. 22. Indeed, in this case, the University asserted that it had accommodated Mr. Longueépée by providing an individualized assessment of his application by the Admissions Committee with a view to determining whether he was likely to succeed at university.

69 The parties are also in agreement that the duty to accommodate can be said to have both procedural and substantive components. This distinction was briefly made by McLachlin J., at para. 66 of *Meiorin*, where she wrote, in the context of an employment standard, that "it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which is adopted to assess the issue of accommodation and, second, the *substantive content*, of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard" (emphasis in original).

70 The procedural component typically involves the identification of the process or procedure to be adopted in providing accommodation to the person who would be subject to the discriminatory standard: see *Lane v. ADGA Group Consultants Inc.* (2008), 295 D.L.R. (4th) 425 (Ont. Div. Ct.), at para. 106; *Roosma v. Ford Motor Co. of Canada* (2002), 164 O.A.C. 252 (Ont. Div. Ct.), at para. 210, *per* Lax J. (dissenting, but not on this point). Because it requires an understanding of the person's needs, and requires the person to provide information, procedural accommodation is sometimes referred to as the "accommodation dialogue": see *Liu v. Carleton University*, 2015 HRTO 621 (Ont. Human Rights Trib.), at para. 18. Once the institution has an understanding of the claimant's specific needs, it must ascertain and seriously consider possible accommodations that could be used to address those needs, including the option of undertaking an individualized assessment in the case of a discriminatory standard: see *Grismer*, at para. 42; *ADGA*, at para 106. The substantive component of accommodation can refer to the steps taken to implement the accommodation to the point of undue hardship. It involves the consideration of what was actually done in the accommodation process to meet the individual's needs: see *Roosma*, at para. 210.

71 It is sometimes difficult, and not always helpful to the analysis, to separate out the procedural and substantive components of accommodation. What is identified as procedural accommodation can shade into substantive accommodation because it is the particular measure or method of accommodation identified through procedural accommodation that is to be assessed as substantive accommodation. In this case there was no indication that the University engaged in an "accommodation

dialogue" with Mr. Longueépée or undertook any other measures to assess how his disabilities might impact his ability to meet the University's grade standard. Instead, it decided that Mr. Longueépée's application would be assessed by an Admissions Committee to determine his ability to succeed in university. This was considered by the Vice Chair to have fulfilled the procedural component of accommodation — a conclusion that is not challenged by the respondent in this court. How the Admissions Committee went about the assessment of Mr. Longueépée's application was then considered as the substantive component of the University's accommodation. In the end however the issue was whether the University reasonably accommodated Mr. Longueépée's disabilities in its admissions process.

72 I turn to how the Vice Chair analyzed the issue of accommodation and why I consider her decisions to be unreasonable.

73 The Vice Chair concluded that the University met the procedural component of its duty to accommodate when, in response to his extenuating circumstances, it accepted Mr. Longueépée's application for consideration even after it was submitted late and outside of the normal process, and convened the Admissions Committee to determine Mr. Longueépée's ability to succeed in university: at paras. 23, 38. In her reconsideration decision the Vice Chair observed that the University met its procedural duty to accommodate when the Admissions Committee conducted an individualized assessment of Mr. Longueépée's application for admission: at para. 19.

74 The Vice Chair then turned to what she identified as the issue in the case — whether the University met its substantive duty to accommodate: at para. 39.

75 The Vice Chair concluded that the Admissions Committee met its substantive duty to accommodate when it considered *only* Mr. Longueépée's unaccommodated grades and disregarded the other non-academic materials he had submitted with his application. Yet, there was no indication that the Admissions Committee made any effort to understand how Mr. Longueépée's disabilities might have affected his Dalhousie grades, or to analyze whether his grades, interpreted in light of his disabilities, might assist in showing his ability to succeed at university.

76 The Admissions Committee's failure to question how it should interpret Mr. Longueépée's Dalhousie grades amounted to a decision to take those grades at face value. This was symptomatic of the underlying contradiction in the Committee's approach. In the words of the Divisional Court, the Admissions Committee professed an "accommodation dialogue", but the dialogue was "firmly anchored to the very grades which [the Admissions Committee] implicitly, if not expressly, recognized as not being reflective of Mr. Longueépée's abilities: at para. 53.

77 The fact that the Admissions Committee considered only Mr. Longueépée's grades was inconsistent with the "individualized" and "holistic" (based on "everything that the student has done") process that was described by the University's witnesses and relied on by the Vice Chair when she concluded that the University met its procedural duty to accommodate.

78 The University argues that the Admissions Committee did in fact consider all of the materials Mr. Longueépée submitted, and that the Vice-Chair did not err in deferring to Waterloo's exercise of "academic judgment" in evaluating the *weight* to be given to the non-academic materials.

79 I disagree. The Admissions Committee did not consider whether Mr. Longueépée's supplementary materials demonstrated an ability to succeed at university. It is true that the University's email to Mr. Longueépée refusing him admission stated that the Admissions Committee had "[undertaken] a comprehensive review of [his] supporting documents, references and testimonials with a view to determining [his] admissibility", and the Admissions Committee's summary of its meeting stated that it concluded that Mr. Longueépée was not admissible "after a comprehensive review of the supporting documents, references and testimonials". The Vice-Chair however found at para. 48 that "there is no indication that [the Admissions Committee] considered [Mr. Longueépée's] volunteer work on behalf of child abuse survivors and reference letters given for that work as *relevant* to his ability to succeed in university", which she considered to be "a judgment call the Committee was able to make". Further, at para. 11 of her reconsideration decision, the Vice Chair referred to her "finding that the Admissions Committee was entitled to disregard reference letters and volunteer work as indicators of potential academic success." In other words, she found

that the Admissions Committee considered everything other than grades to be irrelevant to Mr. Longueépée's ability to succeed in university, and that the Committee was entitled to have done so.

80 There is no evidence in the case the University presented to the HRTO that the Admissions Committee had actively engaged with the additional material provided by Mr. Longueépée in order to determine whether it demonstrated his ability to succeed at university. As the Divisional Court correctly observed, while the Admissions Committee purported to consider information other than Mr. Longueépée's grades, the explanation for its decision was bereft of any evaluation of that information: at paras. 54-56.

81 The core issue before the Vice Chair was the following: if the Admissions Committee only considered Mr. Longueépée's unaccommodated grades to be relevant to his ability to succeed in university, and considered irrelevant the other materials that it had undertaken to review, how could the University demonstrate that it had reasonably accommodated Mr. Longueépée in the admissions process?

82 The Vice Chair did not grapple with this core issue. Instead, she adopted the University's point of view, stating that there was "no information" before the Admissions Committee that Mr. Longueépée could succeed: at para. 49. She accepted, at para. 51, that "in an academic setting, the ability to succeed is measured by grades: there is no other measure to evaluate success". This conclusion was incompatible with the Vice Chair's finding that the University's grades standard was discriminatory because Mr. Longueépée's Dalhousie grades were achieved when he had unaccommodated disabilities. In the absence of any process for interpreting those grades, it was not open to the Vice Chair to find that the consideration of *only* those grades could constitute reasonable accommodation.

83 Based on the record, the Vice Chair's decisions were constrained by several facts. First, Mr. Longueépée applied with unaccommodated grades and other non-academic materials. The grades were, as the Divisional Court said, "marks that were the process of an unaccommodated disability." Second, although the Faculty had established grade standards for admission, recognizing that Mr. Longueépée had a disability and that his grades were unaccommodated, the Admissions Committee was meant to use a "holistic" process to evaluate his application. Yet, the Vice Chair concluded that there was substantive accommodation based on the finding that the Admissions Committee was entitled to rely solely on Mr. Longueépée's unaccommodated grades in refusing him admission.

84 The Vice Chair's decisions do not reflect an internally coherent chain of analysis justified on these facts because she simultaneously accepted that Mr. Longueépée's grades were unaccommodated and that the Admissions Committee was entitled to disregard his other application materials and to base its decision to deny him admission solely on his unaccommodated grades. Without resolving these contradictory findings, her conclusion that there was substantive accommodation is unreasonable. It is not in fact a finding that the University had reasonably accommodated Mr. Longueépée, but a finding that there was no duty to accommodate. The Vice Chair in effect bypassed the third step of the *Grismer* test when she concluded that it was sufficient for the University to consider only Mr. Longueépée's grades in refusing him admission. Reasonable accommodation could not take the form of simply applying the discriminatory grade standard to his unaccommodated grades. If the University was going to do so, it needed to establish undue hardship.

85 This brings me to the second significant problem with the Vice Chair's reasons. In her reconsideration decision the Vice Chair stated, at para. 17: "[t]o accept [Mr. Longueépée's] argument would have the effect of requiring universities to complete an in-depth assessment of every application by every student with a disability regardless of the extent of the gap between the admissions standard for the particular program and the individual student's grades." She observed that in Mr. Longueépée's case, because his previous grades were obtained at another university, it would effectively require one university to sit in review of how another university had accommodated its students: at para. 18. Although the Vice Chair did not express her conclusion in terms of "undue hardship", that is one way of construing what she concluded.

86 The University however did not rely on an undue hardship defence before the HRTO. Had it done so, it would have had the burden of leading evidence on that issue: see *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, 279

D.L.R. (4th) 1 (S.C.C.), at paras. 109, 142, and 226; *Grismer*, at paras. 41-42. By addressing the issue through the lens of an undue hardship analysis, the Vice Chair decided an issue that was not before her and for which she had no evidence.

87 In summary, the Vice Chair's reasons contain a fundamental gap that renders them unreasonable. Rather than inquiring into the steps taken by the Admissions Committee in response to the *prima facie* discrimination that would result from the application to Mr. Longueépée of the Faculty's grade standard, she accepted that Mr. Longueépée had been substantively accommodated when the Admissions Committee had based its decision solely on his unaccommodated grades. The Vice Chair also effectively gave credit to an undue hardship argument when the University did not present evidence on or rely on this defence. For these reasons, I conclude that the decisions of the Vice Chair that led to her dismissal of Mr. Longueépée's application under the Code were unreasonable and patently so, such that the Divisional Court was correct in setting aside the decisions on judicial review.

88 Before leaving this issue, I note that nothing in these reasons is intended to discourage or disparage the University's grades-based admissions standards. The conclusion that the University did not accommodate Mr. Longueépée's disabilities does not impugn its academic standards or its usual discretion in applying such standards. The issue before this court was the reasonableness of the Vice Chair's finding in the context of his human rights complaint, that the University discharged its duty to accommodate Mr. Longueépée's disabilities in its admissions process. The finding was unreasonable because the University fell short in the performance of its express undertaking to provide accommodation in the ways I have described.

(3) *What is the appropriate remedy in the circumstances?*

89 The order of the Divisional Court allowing the application for judicial review of the decisions of the HRTO, states at para. 1:

THIS COURT ORDERS THAT the application for judicial review is allowed; the decision and reconsideration decisions of the HRTO dated 25 May 2017 and 22 December 2017 (respectively) are set aside; and the matter is remitted to the Admissions Committee for consideration by way of an accommodated admissions process that is consistent with the Court's reasons.

90 In considering the question of remedy, the majority in *Vavilov* held that "where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons": at para. 141. However the court went on to say that "[d]eclining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose": at para. 142. Indeed, this is what the Supreme Court did in *Vavilov*.

91 By contrast, in *Canadian Broadcasting Corporation v. Ferrier*, 2019 ONCA 1025, 148 O.R. (3d) 705 (Ont. C.A.), leave to appeal refused, [2020] S.C.C.A. No. 59 (S.C.C.), this court quashed the decision of the administrative decision maker and remitted the matter for reconsideration. An important factor was that the administrative decision maker had not had a genuine opportunity to weigh in on the issue in question.

92 The University argues that it was inappropriate for the Divisional Court to bypass the HRTO and to remit the matter directly to the Admissions Committee without conducting an analysis as to whether this was an exceptional case where such a remedy was warranted. It submits that this approach is incompatible with the approach required under *Vavilov*.

93 Mr. Longueépée submits that the Divisional Court was right to send the matter back to the Admissions Committee. Although the court did not have the benefit of the majority reasons in *Vavilov*, this is an exceptional case where a particular outcome is inevitable: the University discriminated in its admissions process when it relied on Mr. Longueépée's unaccommodated grades and reasonable accommodation would require the reassessment of Mr. Longueépée's application without relying on the gap between his prior grades and the 65 percent grade standard. Mr. Longueépée also notes that because all of the parties are publicly funded, the Divisional Court's remedy avoids wasting public funds litigating an issue where there is only one possible result.

94 The Divisional Court did not explain why, having allowed the application for judicial review, it was sending the matter back to the Admissions Committee with directions on how to assess Mr. Longueépée's application, and not to the HRTO to determine the appropriate remedy. I am satisfied that the conclusion that the University discriminated against Mr. Longueépée in the admissions process is inevitable on the record that was before the Vice Chair. That said, the appropriate remedy is not. In my view, in these early post-*Vavilov* days, it is preferable to return the matter to the HRTO for its further disposition in light of these reasons so that it may fashion the remedy that, in its opinion, would promote compliance with [the Code](#).

F. CONCLUSION AND DISPOSITION

95 For these reasons, I would allow the appeal but only to the extent that I would substitute for para. 1 of the order of the Divisional Court an order: (1) setting aside the decision and reconsideration decision of the HRTO, (2) declaring that the University, contrary to [the Code](#), discriminated against Mr. Longueépée when it failed to reasonably accommodate his disabilities in its admissions process in the 2013-14 academic year, and (3) remitting the matter back to a different member of the HRTO to determine, with such directions respecting additional evidence and/or submissions as may be required, the appropriate remedy under [the Code](#).

96 If the parties cannot agree on the costs of this appeal, the court will accept written submissions no more than five pages in length beginning with Mr. Longueépée, to be served and filed with the court at coa.e-file@ontario.ca within two weeks of the release of this decision, followed one week later by the respondents' costs submissions, and any reply within one further week thereafter.

G.R. Strathy C.J.O.:

I agree.

P. Lauwers J.A. (concurring):

97 I concur without reservation with my colleague's reasons. I wish to add some reflections on the unique position of universities in the landscape of public institutions.

98 Universities enjoy a measure of autonomy in the pursuit of their mission that must be understood and respected. This consideration forms the context of this appeal. In my view, a measure of deference is owed to universities with respect to core academic decisions including admissions. Deference does not completely insulate academic decisions from public scrutiny, including the scrutiny applied by tribunals for compliance with the *Human Rights Code*, R.S.O. 1990, c. H.19, but it must inform that scrutiny.

99 Courts have treated universities with some caution. The borders of university autonomy are implicated by legal debates over the proper limits to be placed on executive and judicial oversight into the internal affairs of universities, for example, whether and how universities are subject to the *Charter*: See *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.); *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (S.C.C.); *Yashcheshen v. University of Saskatchewan*, 2019 SKCA 67 (Sask. C.A.), leave to appeal to S.C.C. refused, [2020] S.C.C.A. No. 320 (S.C.C.); *BC Civil Liberties Assn. v. University of Victoria*, 2016 BCCA 162 (B.C. C.A.), leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 289 (S.C.C.); *Pridgen v. University of Calgary*, 2012 ABCA 139, 350 D.L.R. (4th) 1 (Alta. C.A.). There are also ongoing debates about the degree to which university actions are subject to judicial review in accordance with administrative law principles: See for example *UAlberta Pro-Life v. Governors of the University of Alberta*, 2020 ABCA 1, 441 D.L.R. (4th) 423 (Alta. C.A.). And this court was recently required to examine the interaction between university discipline and labour law principles when the employees in question are also students: *Ball v. McAulay*, 2020 ONCA 481 (Ont. C.A.).

100 There are historical and functional reasons for a cautious approach. In Ontario, as this court explained in *Ball*, at para. 59, the backdrop was set by the seminal *Report of the Royal Commission on the University of Toronto* (Toronto: Queen's Printer, 1906). The court noted that universities in Ontario enjoy a considerable measure of self-governance flowing from the principle

of university autonomy. Affirming that principle, the Report recommended that the internal administration of the University of Toronto be separated from the provincial government where it had previously reposed. Subsequent university legislation in Ontario is built on the same template. As this court noted in *Ball*, the autonomy of universities "must be taken seriously": at para. 59.

101 The feature of university autonomy at issue in this case is the admissions process. I see the admissions process as a core feature of university autonomy. The *University of Waterloo Act, 1972*, S.O. 1972, c. 200 invests internal control over the admissions process in the Senate, at s. 22(d). That the conditions of admission are determined by the Senate confirms that the admissions process is at the heart of the university's *academic* mission and should attract a high degree of deference. As this court stated in *Mulligan v. Laurentian University*, 2008 ONCA 523, 302 D.L.R. (4th) 546 (Ont. C.A.), at paras. 20-21:

[I]t has long been accepted that courts should be reluctant to interfere in the core academic functions of universities. [Citations omitted.]

Here, the decision whether to admit the appellants to the Department of Biology M.Sc. Program was a decision going to the core of a university's functions.

See also *Gauthier c. Saint-Germain*, 2010 ONCA 309, 325 D.L.R. (4th) 558 (Ont. C.A.), leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 257 (S.C.C.).

102 The deference owed to academic decisions reflects both the legal autonomy of universities as institutions and the important normative value society attaches to academic freedom, as La Forest J. wrote in *McKinney*. In *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), Beetz J. noted, at p. 594: "The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy."

103 In my view, tribunals and courts should be equally careful to preserve the integrity of the university admissions process. As this court noted in *Mulligan*, at para. 16:

The school has considerable discretion in choosing who among the pool of persons who meet the admission standards will be admitted. In exercising that discretion the school may take into account matters that it believes will best enable it to provide the highest quality program in the interests of the students and to enhance the calibre and reputation of the school itself.

[Emphasis added.]

104 Although Ontarians have a right to elementary and secondary publicly funded education, they do not have the same right to university education. Because admission to university is not a right or entitlement, an applicant's obligation to demonstrate the cognitive capacities and the other competencies to succeed at university plays a role throughout the admissions process and is not entirely displaced by the positive duty to accommodate that is cast on the university under *the Code*.

105 The difficult reality is that certain claimants will still fall short of the standards that universities have set, even with accommodation. For example, even if every possible accommodation were investigated and assessed, a claimant might still be evaluated as lacking the cognitive capacity and other competencies necessary to succeed at university and would therefore not be eligible for admission.

106 The deference owed to universities does not completely insulate academic decisions from tribunal or judicial scrutiny, but the Human Rights Tribunal of Ontario must be cautious not to override the admissions standards of universities in its mission to ensure accommodation. In this case, the HRTTO was too cautious. Other cases will be different and we will be feeling our way on how these tensions of deference to university decisions in the core areas of their mandates and the duty to accommodate get worked out on the ground. I add these observations to explain why I agree strongly with my colleague's statement that: "nothing in these reasons is intended to discourage or disparage the University's grades-based admissions standards."

Appeal allowed in part; judgment varied as to remedy.

Footnotes

- 1 See for example: *Audmax Inc. v. Ontario (Human Rights Tribunal)*, 2011 ONSC 315, 328 D.L.R. (4th) 506 (Ont. Div. Ct.), at para. 32; *Stepanova v. Human Rights Tribunal of Ontario*, 2017 ONSC 2386 (Ont. Div. Ct.), at para. 18, leave to appeal to Ont. C.A. refused, M47977 (January 19, 2018); *Abbey v. Ontario (Community and Social Services)*, 2018 ONSC 1899, 408 C.R.R. (2d) 219 (Ont. Div. Ct.), at para. 20; and *Konesavarathan v. Middlesex-London Health Unit*, 2019 ONSC 3879 (Ont. Div. Ct.), at para. 42, leave to appeal to Ont. C.A. refused, M50638 (November 26, 2019).

Tab 12

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Kandiah v. Canada \(Citizenship and Immigration\)](#) | 2021 FC 1388, 2021 CF 1388, 2021 CarswellNat 6535, 2021 CarswellNat 6536 | (F.C., Dec 9, 2021)



Original

2012 CAF 22, 2012 FCA 22

Federal Court of Appeal

Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency

2012 CarswellNat 126, 2012 CarswellNat 487, 2012 CAF 22, 2012

FCA 22, [2012] A.C.F. No. 93, [2012] F.C.J. No. 93, 428 N.R. 297

**Association of Universities and Colleges of Canada and The
University of Manitoba, Applicants and The Canadian Copyright
Licensing Agency operating as "Access Copyright", Respondent**

David Stratas J.A.

Judgment: January 23, 2012

Docket: A-395-11

Counsel: Patricia J. Wilson (written), Glen A. Bloom (written), for Applicant
Nancy Brooks (written), for Respondent

Headnote

Administrative law --- Practice and procedure — Miscellaneous

Procedure on application for judicial review of decision of Copyright Board — Propriety of advance ruling on admissibility — Admissibility of affidavit evidence on judicial review.

Intellectual property --- Copyright — Copyright Board — Judicial review of decisions

Admissibility of affidavit evidence on judicial review — Copyright Board made decision denying applicants' request — Applicants applied for judicial review of board's decision — Applicants filed affidavit in support of judicial review application — Respondent brought motion to strike out applicants' affidavit — Motion granted — Affidavit struck — Advance ruling on admissibility would allow hearing to proceed in timelier and more orderly fashion — As general rule, evidentiary record before court on judicial review is restricted to evidentiary record that was before board — Affidavit offered evidence that was not before board and that went to merits of matter before board — Affidavit did not raise matters that fell into any identified exceptions — Admission of affidavit would offend demarcation of roles between judicial review court and board as fact-finder and merits-decider — Affidavit did not supply necessary context and background that would be useful for present court on judicial review of board's decision.

Table of Authorities

Cases considered by *David Stratas J.A.*:

A.T.A. v. Alberta (Information & Privacy Commissioner) (2011), 339 D.L.R. (4th) 428, 2011 CarswellAlta 2068, 2011 CarswellAlta 2069, 2011 SCC 61, (sub nom. *Alberta Teachers' Association v. Information & Privacy Commissioner (Alta.)*) 424 N.R. 70, 52 Alta. L.R. (5th) 1, 28 Admin. L.R. (5th) 177, [2012] 2 W.W.R. 434, (sub nom. *Alberta (Information & Privacy Commissioner) v. Alberta Teachers' Association*) [2011] 3 S.C.R. 654 (S.C.C.) — considered

Armstrong v. Canada (Attorney General) (2005), 2005 FC 1013, 2005 CarswellNat 2083, 2005 CF 1013, 2005 CarswellNat 4190 (F.C.) — referred to

Bekker v. R. (2004), 2004 FCA 186, 2004 CarswellNat 1303, 323 N.R. 195, [2004] 3 C.T.C. 183, 2004 D.T.C. 6404, 2004 CAF 186, 2004 CarswellNat 3333 (F.C.A.) — referred to

Chopra v. Canada (Treasury Board) (1999), 168 F.T.R. 273, 1999 CarswellNat 1050 (Fed. T.D.) — referred to
Gitxsan Treaty Society v. H.E.U. (1999), (sub nom. *Gitxsan Treaty Society v. Hospital Employees' Union*) [2000] 1 F.C. 135, (sub nom. *Gitxsan Treaty Society v. Hospital Employees' Union*) 249 N.R. 37, 1999 CarswellNat 1488, 177 D.L.R. (4th) 687, 1999 CarswellNat 3056 (Fed. C.A.) — considered
Kallies v. R. (2001), 2001 FCA 376, 2001 CarswellNat 2761, [2002] 1 C.T.C. 197, 2002 D.T.C. 6707 (Fed. C.A.) — referred to
Keeprite Workers' Independent Union v. Keeprite Products Ltd. (1980), 1980 CarswellOnt 762, 114 D.L.R. (3d) 162, 29 O.R. (2d) 513 (Ont. C.A.) — referred to
Kelley Estate v. Canada (Attorney General) (2011), 2011 FC 1335, 2011 CarswellNat 4861, 2011 CF 1335, 2011 CarswellNat 5371, [2012] 3 C.T.C. 11 (F.C.) — referred to
McConnell v. Canada (Human Rights Commission) (2004), 2004 CarswellNat 5176, 2004 CF 817, 2004 FC 817, 2004 CarswellNat 1788, 51 C.H.R.R. D/228 (F.C.) — referred to
McConnell v. Canada (Human Rights Commission) (2005), 2005 FCA 389, 2005 CarswellNat 3792, 2005 CAF 389, 2005 CarswellNat 5563 (F.C.A.) — referred to
P.S. Part Source Inc. v. Canadian Tire Corp. (2001), (sub nom. *P.S. Partsource Inc. v. Canadian Tire Corp.*) 11 C.P.R. (4th) 386, (sub nom. *Canadian Tire Corp. v. P.S. Partsource Inc.*) 200 F.T.R. 94 (note), 2001 FCA 8, 2001 CarswellNat 292, 267 N.R. 135 (Fed. C.A.) — referred to

Statutes considered:

Copyright Act, R.S.C. 1985, c. C-42

Generally — referred to

Federal Courts Act, R.S.C. 1985, c. F-7

Generally — referred to

s. 18.4(1) [en. 1990, c. 8, s. 5] — considered

David Stratas J.A.:

1 The applicants have filed the affidavit of Gregory L. Juliano in support of their application for judicial review of a decision of the Copyright Board. The respondent, Access Copyright, moves to strike it out.

A. The nature of the proceedings before the Copyright Board

2 The Copyright Board has been conducting proceedings into a proposed tariff sought by Access Copyright for the reproduction of published works by post-secondary institutions located outside Quebec.

3 In the course of its proceedings, the Copyright Board issued an interim tariff. This interim tariff is to remain in place until the Copyright Board decides upon Access Copyright's proposed tariff.

4 The Association of Universities and Colleges of Canada was unhappy with the interim tariff. It requested the Copyright Board to amend it by forcing Access Copyright to grant transactional licences to the Association's members. This would permit them to copy published works in Access Copyright's repertoire. On September 23, 2011, the Copyright Board denied the Association's request.

B. The applicants' judicial review

5 The applicants have brought an application for judicial review of the Copyright Board's decision to deny the Association's request. Broadly speaking, the applicants allege that the Copyright Board acted in a manner contrary to or inconsistent with the *Copyright Act*, R.S.C. 1985, c. C-42, the proper principles for awarding interim relief, and its earlier decisions. They do not allege bias, a denial of natural justice, or lack of procedural fairness.

6 In support of their application, the applicants filed two affidavits. The first affidavit provides the complete record before the Copyright Board when it made its decision. It is the second affidavit, that of Gregory L. Juliano, that is under attack.

C. The affidavit under attack

7 Broadly speaking, the body of the Juliano affidavit asserts that transactional licences are needed from Access Copyright and that the absence of transactional licences causes adverse effects on the University of Manitoba. It offers evidence in support of these propositions.

8 The need for transactional licences from Access Copyright was the very issue raised by the Association and rejected by the Copyright Board. The evidence in the Juliano affidavit could have been provided in the hearing before the Board on this issue.

9 The Juliano affidavit appends ten exhibits. With a small exception, none of these exhibits were provided to the Copyright Board. The small exception concerns certain emails that were before the Board. The other affidavit filed by the applicants includes these emails and will be before this Court.

D. Analysis

(1) Should the admissibility of the affidavit be determined now?

10 At the outset, the applicants suggest that the issue of the admissibility of the Juliano affidavit should be determined by the panel hearing the application, not by way of advance ruling.

11 Whether the Court should provide an advance ruling is a matter of discretion. This discretion is constrained by the instruction in [subsection 18.4\(1\) of the *Federal Courts Act*, R.S.C. 1985, c. F-7](#), that applications for judicial review be "heard and determined without delay and in a summary way." As a result, the Court will only exercise its discretion to provide an advance admissibility ruling where it is clearly warranted. Those embarking upon an interlocutory foray to this Court to seek such a ruling will not often find a welcome mat when they arrive.

12 Consistent with the instruction in [subsection 18.4\(1\)](#), one matter to consider is whether an advance ruling would allow the hearing to proceed in a timelier and more orderly fashion: *McConnell v. Canada (Human Rights Commission)*, 2004 FC 817 (F.C.), aff'd 2005 FCA 389 (F.C.A.). Another consideration is whether the issue of admissibility turns on discretionary matters over which reasonable minds may differ, rather than a clear question of law. Finally, and related to that, the Court is more likely to make an advance ruling where the issue is relatively clear cut or obvious: *P.S. Part Source Inc. v. Canadian Tire Corp.*, 2001 FCA 8 (Fed. C.A.).

13 As shall be seen, the issue of admissibility in this case is mainly one of law and is not discretionary. It is relatively clear cut. An advance ruling on admissibility would allow the hearing to proceed in a timelier and more orderly fashion. The admissibility of the Juliano affidavit should be determined now.

(2) The merits of the motion to strike the affidavit

(a) Applicable principles

14 Judicial review courts are often confronted with procedural questions such as the one posed in this case. The answers to these questions often rest in an appreciation of the different roles played by judicial review courts and the administrative decision-makers they review.

15 A good example can be seen in the Supreme Court's recent consideration of whether a judicial review court can entertain new arguments on the merits (*i.e.*, arguments that were not made to the administrative decision-maker): *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.). In that case, the Supreme Court adopted a restrictive approach to new arguments because of the differing roles played by the judicial review court and the administrative decision-maker under review. It noted that the former was limited to its judicial review powers while the latter was the forum for arguments on the merits, including the fact-finding necessary for those arguments (paragraphs 23-28). In the case before it, the Supreme

Court held that an exception applied, finding that "the rationales for the general rule have limited application [in this case]" (at paragraph 28).

16 In my view, the Supreme Court's approach in *Alberta Teachers' Association* is a useful analytical tool for deciding a number of procedural issues in judicial review courts, such as the one before this Court in this case: whether the Juliano affidavit should be admitted. As we shall see, the Supreme Court's approach is really nothing new in this Court: it is embodied in this Court's existing case law on the admissibility of affidavits. This Court's case law shows that concerns about the differing roles played by judicial review courts and administrative decision-makers have shaped the law in this area.

17 In determining the admissibility of the Juliano affidavit, the differing roles played by this Court and the Copyright Board must be kept front of mind. Parliament gave the Copyright Board - not this Court - the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it. As part of that task, it is for the Board - not this Court - to make findings of fact, ascertain the applicable law, consider whether there are any issues of policy that should be brought to bear on the matter, apply the law and policy to the facts it has found, make conclusions and, where relevant, consider the issue of remedy. In this case, the Copyright Board has already discharged its role, deciding on the merits to make an interim tariff and to refuse to amend it.

18 Now before the Court is an application for judicial review from this decision on the merits. In such proceedings, this Court has only limited powers under the *Federal Courts Act* to review the Copyright Board's decision. This Court can only review the overall legality of what the Board has done, not delve into or re-decide the merits of what the Board has done.

19 Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitksan Treaty Society v. H.E.U.* (1999), [2000] 1 F.C. 135 (Fed. C.A.) at pages 144-45, "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. R.*, 2001 FCA 376 (Fed. C.A.) at paragraph 3; *Bekker v. R.*, 2004 FCA 186 (F.C.A.) at paragraph 11.

20 There are a few recognized exceptions to the general rule against this Court receiving evidence in an application for judicial review, and the list of exceptions may not be closed. These exceptions exist only in situations where the receipt of evidence by this Court is not inconsistent with the differing roles of the judicial review court and the administrative decision-maker (described in paragraphs 17-18, above). In fact, many of these exceptions tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker. Three such exceptions are as follows:

(a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, e.g., *Kelley Estate v. Canada (Attorney General)*, 2011 FC 1335 (F.C.) at paragraphs 26-27; *Armstrong v. Canada (Attorney General)*, 2005 FC 1013 (F.C.) at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 (Fed. T.D.) at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider. In this case, the applicants invoke this exception for much of the Juliano affidavit.

(b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: e.g., *Keeprite Workers' Independent Union v. Keeprite Products Ltd.* (1980), 29 O.R. (2d) 513 (Ont. C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.

(c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite, supra*.

(b) Applying these principles

21 In defending Access Copyright's motion to strike the Juliano affidavit, the applicants submit that the affidavit is necessary to support the standing of the University of Manitoba as an applicant in the application for judicial review and to provide necessary context and background for the issues before the Court. They add that the information supplied in the Juliano affidavit is consistent with information already before the Copyright Board and does not prejudice Access Copyright.

22 I reject these submissions.

23 For the most part, as I have explained in paragraphs 7 to 9, above, the Juliano affidavit offers evidence that was not before the Copyright Board and that goes to the merits of the matter before the Board. It does not raise matters that fall into any of the exceptions identified above. It would offend the demarcation of roles between this Court as a judicial review court, and the Board as a fact-finder and merits-decider.

24 In the record before me, no objections have ever been made to the standing of the University of Manitoba. Indeed, University of Manitoba is one of the moving parties on this motion and Access Copyright does not object.

25 Assuming without deciding that Access Copyright can launch an objection at a later time to the University's standing, the University of Manitoba may then seek leave to file an affidavit showing that it is sufficiently affected by the Copyright Board's decision to have standing. However, such an affidavit will not be necessary if the proper record placed before this Court is sufficient to deal with the issue.

26 Finally, in my view, the Juliano affidavit does not supply necessary context and background that would be useful for this Court when it reviews the Copyright Board's decision. Much of the Juliano affidavit that is said to be "context and background" is really evidence that goes to the merits of the matter before the Board. The parties' memoranda of fact and law can supply much context and background by relying upon the Board's decision, the applicable legal framework, and the complete record that was before the Board.

E. Disposition of the motion

27 Therefore, Access Copyright's motion shall be granted. The Juliano affidavit shall be struck. That affidavit and any transcript of cross-examinations conducted thereon shall not appear in the records filed before this Court. Access Copyright shall have its costs of the motion.

Motion granted.

Tab 13

Most Negative Treatment: Recently added (treatment not yet designated)

Most Recent Recently added (treatment not yet designated): [Syndicat de l'enseignement de la région de Québec c. Centre de services scolaire des Premières-Seigneuries](#) | 2021 QCCA 1645, 2021 CarswellQue 18605, EYB 2021-417771 | (C.A. Que, Nov 3, 2021)



Original

2015 CAF 117, 2015 FCA 117
Federal Court of Appeal

Delios v. Canada (Attorney General)

2015 CarswellNat 1331, 2015 CarswellNat 4840, 2015 CAF 117, 2015 FCA 117, [2015] F.C.J. No. 549, 100 Admin. L.R. (5th) 301, 2015 C.L.L.C. 220-045, 253 A.C.W.S. (3d) 199, 472 N.R. 171

Stephanie Delios, Appellant and The Attorney General of Canada, Respondent

David Stratias, A.F. Scott, Richard Boivin JJ.A.

Heard: April 29, 2015

Judgment: May 4, 2015

Docket: A-508-14

Proceedings: reversing *Delios v. Canada Revenue Agency* (2014), (sub nom. *Canada (Attorney General) v. Delios*) 2015 C.L.L.C. 220-007, 2014 CarswellNat 6502, 2014 CF 1042, 2014 CarswellNat 4401, 2014 FC 1042, Henry S. Brown J. (F.C.); allowing application for judicial review *Delios v. Canada Revenue Agency* (2013), 2013 PSLRB 133, 2013 CRTFP 133, 2013 CarswellNat 4852, 2013 CarswellNat 4851, David P. Olsen Adjud. (Can. P.S.L.R.B.)

Counsel: Steven Welchner, for Appellant
Richard E. Fader, for Respondent

Headnote

Labour and employment law --- Labour law — Collective agreement — Absence from work — Leave of absence
Employee worked for Canada Revenue Agency (CRA), which was represented by two unions under two collective agreements, both which allowed employees to take one day of personal leave — Employee took up new position within CRA and was represented by different union — Employee had already taken personal leave during year, and new request for personal leave was refused on basis that she had exhausted her entitlement under previous collective agreement — Labour Adjudicator upheld employee's grievance and ordered CRA to pay employee one day of salary — CRA's application for judicial review was granted and adjudicator's order was set aside — Employee appealed — Appeal allowed — Federal Court's judgment was set aside, application for judicial review was dismissed, and adjudicator's order was restored — Standard of review was reasonableness, and overall result reached by adjudicator was acceptable, defensible on fact and law, and thus reasonable — Although Federal Court correctly identified reasonableness as standard of review, it actually performed correctness review — Adjudicator identified precise issue before him, finding that employee's entitlement to personal leave benefit stemmed from Art. 17.21 of Professional Institute of Public Service of Canada's collective agreement, and looking to other provisions of collective agreement to assist in interpretation of article — Federal Court should not have relied upon facts and figures contained in paragraphs 20-21 of CRA's affidavit to make finding of fact about financial hardship that would have been visited upon CRA as result of adjudicator's interpretation of Art. 17.21 of collective agreement — Paragraphs 20-21 of CRA's affidavit did not supply general background information designed to assist reviewing court in understanding issues, and rather offered additional evidence on factual merits designed to encourage reviewing court to form its own views on factual merits contrary to demarcation of roles between it and adjudicator.

Table of Authorities

Cases considered by *David Stratas J.A.*:

- Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)* (2013), 360 D.L.R. (4th) 411, 2013 CarswellNat 1983, 2013 CarswellNat 1984, 2013 SCC 36, 52 Admin. L.R. (5th) 183, 16 Imm. L.R. (4th) 173, [2013] 2 S.C.R. 559, 446 N.R. 65 (S.C.C.) — referred to
- Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency* (2012), 2012 CarswellNat 126, 2012 FCA 22, 428 N.R. 297, 2012 CarswellNat 487, 2012 CAF 22 (F.C.A.) — considered
- British Columbia Public School Employers' Assn. and BCTF (Supplemental Employment Benefits), Re* (2014), (sub nom. *British Columbia Teachers' Federation v. British Columbia Public School Employers Association*) [2014] 3 S.C.R. 492, 2015 C.L.L.C. 220-001, 16 C.C.P.B. (2nd) 223, 380 D.L.R. (4th) 191, 2014 SCC 70, 2014 CSC 70, 2014 CarswellBC 3956, 2014 CarswellBC 3957, 65 B.C.L.R. (5th) 1, (sub nom. *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*) 464 N.R. 316, (sub nom. *British Columbia Public School Employers' Association et al. v. British Columbia Teachers' Federation et al.*) 362 B.C.A.C. 1, (sub nom. *British Columbia Public School Employers' Association et al. v. British Columbia Teachers' Federation*) 622 W.A.C. 1 (S.C.C.) — referred to
- British Columbia (Securities Commission) v. McLean* (2013), (sub nom. *McLean v. British Columbia Securities Commission*) 347 B.C.A.C. 1, (sub nom. *McLean v. British Columbia Securities Commission*) 593 W.A.C. 1, 64 Admin. L.R. (5th) 237, 2013 CarswellBC 3618, 2013 CarswellBC 3619, 2013 SCC 67, [2014] 2 W.W.R. 415, 366 D.L.R. (4th) 30, (sub nom. *McLean v. British Columbia Securities Commission*) 452 N.R. 340, 53 B.C.L.R. (5th) 1, (sub nom. *McLean v. British Columbia (Securities Commission)*) [2013] 3 S.C.R. 895 (S.C.C.) — referred to
- C.J.A., Local 579 v. Bradco Construction Ltd.* (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — referred to
- Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha* (2014), 2014 CAF 56, 2014 CarswellNat 3008, (sub nom. *Farwaha v. Canada (Minister of Transport, Infrastructure and Communities)*) 303 C.R.R. (2d) 246, 2014 CarswellNat 457, 2014 FCA 56, (sub nom. *Farwaha v. Canada (Minister of Transport, Infrastructure and Communities)*) 455 N.R. 157 (F.C.A.) — considered
- Catalyst Paper Corp. v. North Cowichan (District)* (2012), 34 Admin. L.R. (5th) 175, 2012 CarswellBC 17, 2012 CarswellBC 18, 2012 SCC 2, 11 R.P.R. (5th) 1, [2012] 2 W.W.R. 415, 340 D.L.R. (4th) 385, 26 B.C.L.R. (5th) 1, 93 M.P.L.R. (4th) 1, 425 N.R. 22, 316 B.C.A.C. 1, 537 W.A.C. 1, [2012] 1 S.C.R. 5 (S.C.C.) — referred to
- Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273, 1999 CarswellNat 5072, 1999 CarswellNat 1050 (Fed. T.D.) — considered
- Connolly v. Canada (Attorney General)* (2014), 2014 CAF 294, 2014 CarswellNat 6236, 466 N.R. 44, 2014 CarswellNat 5117, 2014 FCA 294, 2014 C.E.B. & P.G.R. 8110 (F.C.A.) — referred to
- Douglas Aircraft Co. of Canada v. McConnell* (1979), 29 N.R. 109, 23 L.A.C. (2d) 143n, 79 C.L.L.C. 14,221, 1979 CarswellOnt 710, [1980] 1 S.C.R. 245, 99 D.L.R. (3d) 385, 1979 CarswellOnt 710F (S.C.C.) — referred to
- Irving Pulp & Paper Ltd. v. CEP, Local 30* (2013), 52 Admin. L.R. (5th) 1, (sub nom. *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*) 1048 A.P.R. 1, (sub nom. *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*) 404 N.B.R. (2d) 1, (sub nom. *C.E.P.U., Local 30 v. Irving Pulp & Paper, Ltd*) 77 C.H.R.R. D/304, 2013 SCC 34, 2013 CarswellNB 275, 2013 CarswellNB 276, 359 D.L.R. (4th) 394, (sub nom. *Irving Pulp & Paper Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 30*) 445 N.R. 1, 231 L.A.C. (4th) 209, (sub nom. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*) 285 C.R.R. (2d) 150, D.T.E. 2013T-418, (sub nom. *CEPU, Local 30 v. Irving Pulp & Paper*) 2013 C.L.L.C. 220-037, (sub nom. *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*) [2013] 2 S.C.R. 458 (S.C.C.) — referred to
- Khosa v. Canada (Minister of Citizenship & Immigration)* (2009), 82 Admin. L.R. (4th) 1, 2009 SCC 12, 2009 CarswellNat 434, 2009 CarswellNat 435, 304 D.L.R. (4th) 1, 77 Imm. L.R. (3d) 1, 385 N.R. 206, (sub nom. *Canada (Citizenship & Immigration) v. Khosa*) [2009] 1 S.C.R. 339 (S.C.C.) — referred to
- Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* (2004), 45 B.L.R. (3d) 161, 41 C.C.P.B. 106, 2004 C.E.B. & P.G.R. 8112, 242 D.L.R. (4th) 193, 324 N.R. 259, 189 O.A.C. 201, 17 Admin. L.R. (4th) 1, [2004] 3 S.C.R.

152, 75 O.R. (3d) 479 (note), 2004 CSC 54, 75 O.R. (3d) 479, 2004 CarswellOnt 3172, 2004 CarswellOnt 3173, 2004 SCC 54 (S.C.C.) — referred to

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Statutes considered:

Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2

Generally — referred to

s. 229 — referred to

s. 233 — referred to

David Stratas J.A.:

1 Ms. Delios appeals from the judgment dated November 5, 2014 of the Federal Court (*per* Justice Brown): 2014 FC 1042 (F.C.). The Federal Court ruled that a labour adjudicator's order was unreasonable and quashed it.

2 The adjudicator (David P. Olsen) upheld Ms. Delios' grievance, accepting her interpretation of a provision in a collective agreement, and awarded her one day's pay: 2013 PSLRB 133 (Can. P.S.L.R.B.). The Attorney General applied for judicial review to quash the adjudicator's order.

3 In allowing the Attorney General's application, the Federal Court disagreed with the adjudicator's interpretation of the collective agreement. Ms. Delios now appeals to this Court.

4 In my view, in assessing the reasonableness of the adjudicator's order, the Federal Court was insufficiently deferential. The Federal Court should not have set it aside. The arbitrator's order was reasonable. Therefore, I would allow Ms. Delios' appeal and restore the adjudicator's order, with costs.

A. The basic facts

5 At all material times, Ms Delios worked at the Canada Revenue Agency. Many who work there are unionized. Roughly 28,000 belong to a bargaining unit represented by the Public Service Alliance of Canada and are covered by a collective agreement. Roughly 12,000 belong to a bargaining unit represented by the Professional Institute of the Public Service of Canada and are covered by another collective agreement.

6 Both collective agreements allow for employees to take 7.5 hours of personal leave, which amounts to one working day, every fiscal year.

7 The facts giving rise to this appeal arose at the start of 2008. At that time, Ms. Delios worked in a position covered by the PSAC collective agreement. In January 2008, she took a day of personal leave, exhausting her entitlement under the PSAC collective agreement to one day of personal leave.

8 At the end of January, she took a new position within the Agency. That position was covered by the PIPSC collective agreement, not the PSAC collective agreement. A couple of months later, still within the same fiscal year, she asked for a day of personal leave under the PIPSC collective agreement. Her manager refused. She grieved the refusal.

9 In Ms. Delios' view, after she changed positions she was governed by the personal leave provision in the PIPSC collective agreement. She had not taken any leave under that provision during the fiscal year. Thus, her request for personal leave under the PIPSC collective agreement should have been granted.

10 In the Agency's view, having taken her personal leave for the fiscal year under the PSAC collective agreement, Ms. Delios could not take personal leave under the PIPSC collective agreement.

11 The personal leave provision in the PIPSC collective agreement does not explicitly address the situation of employees in Ms. Delios' situation, *i.e.*, those who transfer from the bargaining unit governed by the PSAC collective agreement - or for that matter a bargaining unit governed by a collective agreement elsewhere in the public service - into the bargaining unit covered by the PIPSC collective agreement. The personal leave provision in the PIPSC collective agreement reads as follows:

17.21 Personal Leave

(a) Subject to operational requirements as determined by the Employer, and with an advance notice of at least five (5) working days, the employee shall be granted in each fiscal year, up to seven decimal five (7.5) hours of leave with pay for reasons of a personal nature.

(b) The leave will be scheduled at times convenient to both the employee and the Employer. Nevertheless the Employer shall make every reasonable effort to grant the leaves at such times as the employee may request.

12 Following denials of Ms. Delios' grievance at various levels within the Agency, her grievance was referred to adjudication under the *Public Service Labour Relations Act*, S.C. 2003, c. 22.

13 The adjudicator upheld Ms. Delios' grievance. He interpreted article 17.21 of the PIPSC collective agreement and found that it supported Ms. Delios' view of the matter. He ordered that the Agency pay Ms. Delios one day of salary at the rate existing at the time of her grievance. Below, I shall examine the adjudicator's reasoning in much more detail.

14 The Attorney General applied to the Federal Court for judicial review of the adjudicator's order. The Federal Court purported to apply the reasonableness standard of review to the order and found it unreasonable for two reasons. First, the Federal Court disagreed with the adjudicator's interpretation of the collective agreement. Second, it admitted a new affidavit tendered by the Agency and then relied on part of it to find that the adjudicator's interpretation of the collective agreement would result in significant additional cost and so it was unreasonable. As a result, the Federal Court set aside the adjudicator's order and remitted the matter to a different adjudicator for re-determination. Below, I shall examine the Federal Court's reasoning in much more detail.

15 Ms. Delios appeals to this Court, seeking reinstatement of the adjudicator's order.

B. Analysis

16 Our task on appeal from an application for judicial review is to assess whether the Federal Court correctly selected the standard of review and then to determine whether it properly applied that standard of review: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (S.C.C.) at paragraphs 45-47.

17 The parties agree that the Federal Court correctly selected the standard of review of reasonableness. However, the agreement of the parties on the standard of review does not bind us: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 (S.C.C.) at paragraph 6. We must assess the matter for ourselves.

18 Here, I agree with the parties. In determining the standard of review, the first step is to assess what is really in issue in the judicial review. In this case, we are concerned with the adjudicator's interpretation of article 17.21 of the PIPSC collective agreement.

19 For decades now, the standard of review of adjudicators' interpretations of collective agreement provisions has been the deferential standard of reasonableness or, under earlier law, the deferential standard of patent unreasonableness: *C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 (S.C.C.); *British Columbia Public School Employers' Assn. and BCTF (Supplemental Employment Benefits), Re*, 2014 SCC 70, [2014] 3 S.C.R. 492 (S.C.C.); *T.U.A.C., local 503 c. Cie Wal-mart du Canada*, 2014 SCC 45, [2014] 2 S.C.R. 323 (S.C.C.); *Irving Pulp & Paper Ltd. v. CEP, Local 30*, 2013 SCC 34, [2013] 2 S.C.R. 458 (S.C.C.); and many, many others. Even before we had patent unreasonableness as a standard, reviewing courts were urged to defer to adjudicators' interpretations of collective agreement provisions: see, e.g., *Douglas Aircraft Co. of Canada v. McConnell* (1979), [1980] 1 S.C.R. 245 (S.C.C.) at page 275, (1979), 99 D.L.R. (3d) 385 (S.C.C.).

20 This makes sense. For one thing, labour adjudicators' decisions are often protected by privative clauses. Here, we have one: the *Public Service Labour Relations Act*, above, section 233, adopting subsections 34(1) and (3) of the *Public Service Labour Relations and Employment Board Act*, S.C. 2013, c. 40. And interpretations of collective agreement provisions involve elements of factual appreciation, specialization and expertise concerning collective agreements, the disputes that arise under them, the negotiations that lead up to them and, more broadly, how the management-labour dynamic swirling around them plays out in various circumstances. These elements all point to the standard of reasonableness, not correctness: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at paragraphs 52-55.

21 These elements of factual appreciation, specialization and expertise also affect the manner in which reviewing courts should conduct reasonableness review of a labour adjudicator's decision. When conducting reasonableness review, reviewing courts assess whether the adjudicator's interpretation of the collective agreement falls within a range of acceptability or defensibility or, put another way, whether a decision is within the decision-maker's margin of appreciation: *Dunsmuir*, above at paragraph 47. But that range or margin can be narrow or wide depending on the nature of the question and the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 (S.C.C.) at paragraphs 17-18 and 23; *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) at paragraph 59; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.) at paragraphs 37-41. In a case like this, the elements that go into interpreting collective agreement provisions - matters of factual appreciation and specialized expertise outside of the ken of the courts - entitle labour adjudicators to a wide margin of appreciation: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 (F.C.A.) at paragraphs 90-99.

22 Ms. Delios submits that although the Federal Court said it was conducting reasonableness review, it did not. In her view, the Federal Court substituted its own interpretation of article 17.21 of the PIPSC collective agreement for that of the adjudicator.

23 Ms. Delios points to various things the Federal Court did, including enunciating and imposing a "correct" interpretive test (at paragraphs 48 and 52), deploying its own interpretation of the collective agreement provisions (at paragraphs 49, 53 and 70), reproaching the adjudicator for reading words out of the collective agreement or rewriting it when he did no such thing (at paragraphs 51 and 54-55), referring to the intentions of the parties outside of the words they used in the collective agreement (at paragraphs 54 and 62), using words of correctness review (e.g., heading B, the "trueconstruction of the terms of the collective agreement" [my emphasis]), making its own assessment whether a labour relations result was "absurd" (at paragraph 62), admitting new evidence to show why its own interpretation of the collective agreement was superior to that of the adjudicator (at paragraphs 63-66), finding that the language of article 17.21 was plain and clear when even the Agency suggested it was not (at paragraphs 47 and 50), finding that another adjudicator's decision was perfectly clear and completely on point when even the Agency suggested it was only similar (at paragraph 69), and using that decision (that was not binding on the adjudicator) to conclude that the adjudicator was wrong (at paragraph 69).

24 The Attorney General supports the Federal Court's decision. He asserts many of the same points set out in the preceding paragraph.

25 I agree with Ms. Delios' submissions. Although the Federal Court correctly identified reasonableness as the standard of review, it actually performed correctness review.

26 The Supreme Court has told us that reasonableness review involves, among other things, a respectful attention to the decision and reasons of the administrative decision-maker: *Dunsmuir*, above at paragraphs 48 and 56. This means that we begin by identifying the precise issue that was before the administrative decision-maker, noting any legislative methodologies or authorizing provisions that must be followed. To the extent the administrator interpreted those methodologies or authorizing provisions, the reasonableness of those interpretations also falls to be considered. Then we proceed to the core of reasonableness review. Bearing in mind the margin of appreciation that the administrator should be given - a margin that can be narrow, moderate or wide according to the circumstances - we examine the administrator's decision in light of the evidentiary record and the law, to examine whether the decision is acceptable and defensible on the facts and the law.

27 The evidentiary record, legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards help to inform acceptability and defensibility. Here, certain indicators, sometimes called "badges of unreasonableness," may assist: *Farwaha*, above at paragraph 100. For example, a decision whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well raise an apprehension of unreasonableness: *Montréal (Ville) c. Administration portuaire de Montréal*, 2010 SCC 14, [2010] 1 S.C.R. 427 (S.C.C.) at paragraphs 42 and 47. In that sort of case, the quality of the explanations given by the administrator in its reasons on that point may matter a great deal. Another badge of unreasonableness is the making of key factual findings with no rational basis or entirely at odds with the evidence. But care must be taken not to allow acceptability and defensibility in the administrative law sense to reduce itself to the application of rules founded upon badges. Acceptability and defensibility is a nuanced concept informed by the real-life problems and solutions recounted in the administrative law cases, not a jumble of rough-and- ready, hard-and-fast rules.

28 Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter - correctness review.

29 Here, applying the proper approach to reasonableness, the adjudicator's decision must be held to be reasonable.

30 First, the adjudicator identified the precise issue before him: whether article 17.21 of the PIPSC collective agreement addressed the situation of employees in Ms. Delios' situation. The adjudicator asked whether the provision imports "a notion of 'public-service-wide' application as the [Agency] contends that they do" (at paragraph 16).

31 Next, the adjudicator found that Ms. Delios' entitlement to the personal leave benefit stemmed from Article 17.21 of the PIPSC collective agreement and not elsewhere (at paragraph 18). So the task was to interpret the article (at paragraphs 16 and 18). And the words "in each fiscal year" did not themselves resolve the task (at paragraph 18).

32 Next, the adjudicator looked to other provisions of the collective agreement to assist in the interpretation of article 17.21. This is the sort of thing that adjudicators experienced in the interpretation of collective agreements do: D.J.M. Brown & D.M. Beatty, *Canadian Labour Arbitration*, 4th ed., looseleaf (Toronto: Carswell, 2006) at chapter 4. The adjudicator noted that where restrictions on leaves were present, the collective agreement provided for them in other provisions (at paragraphs 19-21). He concluded from the existence of these other provisions that "where the parties...have agreed to place a temporal or other limitation on a leave entitlement arising under the collective agreement, they have done so explicitly" (at paragraph 22).

33 In its submissions to the adjudicator, the Agency urged the adjudicator to follow another adjudicator's decision. The adjudicator considered the decision and concluded that "the outcome of that case rested on factors considered by the adjudicator that are not present in the instant case" (at paragraph 23). In addition to distinguishing the decision, the adjudicator could have added that it was not binding on him, but he did not.

34 The adjudicator, obeying the prohibition set out in section 229 of the *Public Service Labour Relations Act*, declined to modify the text of article 17.21.

35 Lastly, the adjudicator dealt with a particular controversy placed before him. In her submissions to the adjudicator, Ms. Delios suggested that her interpretation of article 17.21 would not result in any hardship because relatively few people transfer between bargaining units. The Agency responded that in fact the cost would be "quite serious" and "costly." The Agency did not provide any facts or figures to support this. On this state of this evidence, the adjudicator declined to make any factual finding on this. Instead, he concluded that "[a]ny perceived unfairness or inequity resulting from the application of the collective agreement [as he interpreted it] should be resolved at the bargaining table" (at paragraph 24).

36 Behind this finding is the adjudicator's specialized and expert appreciation that in any collective agreement - often a document of considerable length and complexity - there will be issues left on the table, unresolved. Collective bargaining can be tough, each side must make difficult compromises, and so there are any number of things in the final deal that can seem unfair or inequitable to the parties. As the adjudicator noted, it is not for him to modify the text of the agreement to address those issues. Rather, as the adjudicator held, it is for the next round of bargaining.

37 Overall, all of the above observations and findings of the adjudicator are rooted within his factual appreciation and labour relations specialization and expertise. To use the language of reasonableness review, they are within his margin of appreciation. To the extent there is any unfairness, inequity or additional cost resulting from his interpretation of the collective agreement, it is an artifact of the collective bargaining process. The overall result reached by the adjudicator is acceptable and defensible on the facts and the law and, thus, reasonable.

38 One last issue remains. In support of its application for judicial review in the Federal Court, the Attorney General filed an affidavit containing evidence of the cost associated with the adjudicator's interpretation. The Federal Court relied upon paragraphs 20-21 of this affidavit to find that the adjudicator's interpretation of article 17.21 of the PIPSC collective agreement would cost the Agency roughly an extra one million dollars a year. The Federal Court considered that result to be "absurd" in a freestanding policy sense and used it to find that the adjudicator's interpretation was unreasonable.

39 As explained above, this was an instance of correctness review, not reasonableness review. And, as a matter of law, in conducting reasonableness review and assessing whether an administrative decision is outside the margin of appreciation we give to the administrator, we consider the evidentiary record, the legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards - not freestanding policy divorced from those considerations. We all have freestanding policy views. But judicial review is about applying legal standards, not our views.

40 Further, the Federal Court should have disregarded paragraphs 20-21 of the affidavit filed before it. They were inadmissible.

41 In administrative regimes such as this, Parliament has given the administrative decision-maker, not the reviewing court, the job of finding the facts. Because of this demarcation of roles, the reviewing court cannot allow itself to become a forum for fact-finding on the merits of the matter. See generally *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22, 428 N.R. 297 (F.C.A.) [hereinafter *Access Copyright*] at paragraph 17.

42 Accordingly, as a general rule, the evidentiary record before the Federal Court on judicial review is restricted to the evidentiary record that was before the administrative decision-maker. In other words, as a general rule, evidence that was not before the administrative decision-maker and that goes to the merits of the matter before the Board is not admissible on judicial review. As a result, most affidavits filed on judicial review only attach the record that was before the administrative decision-maker, without commentary. This is proper. See generally *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44 (F.C.A.) at paragraph 7, citing *Access Copyright*, above at paragraphs 19-20.

43 There are narrow, principled exceptions to the general rule against filing evidence on judicial review that was not before the administrative decision-maker: *Access Copyright*, above at paragraph 20. In the case before us, the Federal Court invoked one of the exceptions, the "general background" exception. The discussion that follows is limited to this exception.

44 Under this exception, a party can file an affidavit providing "general background in circumstances where that information might assist [the review court to understand] the issues relevant to the judicial review": *Access Copyright*, above at paragraph 20(a).

45 The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the affidavit does not engage in spin or advocacy - that is the role of the memorandum of fact and law - it is admissible as an exception to the general rule.

46 But "[c]are must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider": *Access Copyright*, above at paragraph 20(a).

47 In this case, the first 18 paragraphs of the Agency's affidavit filed before the Federal Court are helpful and orienting. In the relatively simple record we have here, it was not necessary for the affidavit to do that, but no objection can be taken to it. Those paragraphs are permissible under the general background exception.

48 But paragraphs 19-21 of the affidavit cross the line. Paragraph 19 is argumentative, much like a paragraph in a memorandum of fact and law, urging a particular result upon the reviewing court. And paragraphs 20 and 21 speak further on the factual merits of the matter, something that was for the adjudicator, not the Federal Court.

49 The Federal Court should not have relied upon the facts and figures contained in paragraphs 20-21 of the affidavit to make a finding of fact about the financial hardship that would be visited upon the Agency as a result of the adjudicator's interpretation of article 17.21 of the PIPSC collective agreement. The adjudicator, as the fact-finder on the merits, declined to make such a factual finding. It was not for the Federal Court, restricted to its role as a reviewing court, to make it.

50 Even if the adjudicator had made a factual finding on that point, in the absence of another recognized exception to the general rule of inadmissibility applying, the Federal Court could not entertain evidence varying or supplementing it.

51 The Federal Court considered the evidence in paragraphs 20-21 of the affidavit to be familiar to the parties, accurate, disclosed in a timely way, and not prejudicial (at paragraph 41). All that may be so, but that does not make the evidence admissible. To the extent that *Chopra v. Canada (Treasury Board)* (1999), 168 F.T.R. 273 (Fed. T.D.), relied upon by the Federal Court, says otherwise, it should not be followed.

52 The test set out at paragraphs 44-46, above, was not met here. Paragraphs 20-21 of the affidavit do not supply general background information designed to assist the reviewing court in understanding the issues. Rather, they offer additional evidence on the factual merits designed to encourage the reviewing court to form its own views on the factual merits contrary to the demarcation of roles between it and the adjudicator. That evidence should have been placed before the adjudicator for his assessment as the fact-finder, not before the Federal Court on review.

53 Even though no formal motion was brought against paragraphs 20-21 of the affidavit, Ms. Delios did not accept they could be used in the way the Federal Court used them. In those circumstances, the Federal Court should have regarded them as improper and should not have considered them.

54 Overall, I conclude that the adjudicator's decision passes muster under reasonableness review.

C. Proposed disposition

55 I would allow the appeal, set aside the judgment of the Federal Court dated November 5, 2014 in file T-1957-13, dismiss the application for judicial review and restore the order dated November 1, 2013 of the adjudicator in file 566-34-3487.

56 In the event of this disposition, counsel helpfully agreed on the issue of costs. In accordance with their agreement, I would award Ms. Delios her costs of this appeal and the application in the Federal Court in the total amount of \$5,000, all inclusive.

A.F. Scott J.A.:

I agree

Richard Boivin J.A.:

I agree

Appeal allowed.