

**TWENTY-FOURTH ANNUAL REPORT TO THE BOARD OF GOVERNORS
UNIVERSITY APPEALS COMMITTEE
MCGILL UNIVERSITY**

1. The University Appeals Committee last reported to the Board of Governors on August 25, 2005.
2. During the academic year 2005 – 2006 the members of the Committee were as follows (termination dates appear next to each name):

Professor Annmarie Adams	March 31, 2006
Professor Barbara Hales	March 31, 2007
Professor Patrick Healy	March 31, 2008
Professor Charles Lin	March 31, 2007
Professor Georg Schmidt	March 31, 2006

The Committee elected Professor Healy as chair and Professor Schmidt as vice-chair.

3. In the year under review the University Appeals Committee decided two cases. One was an appeal by a member of academic staff. The other was an appeal by a librarian.
4. Upon receipt of the notice of appeal in each case the Sub-Committee invited the University to state its position. In both cases the University agreed that there was at least one ground that would justify hearing the appeal on the merits. This position dispensed with the need for a preliminary determination whether there were grounds for the appeal. Accordingly, the two cases were heard on the merits.

II Presence of Secretariat

5. With the consent of the parties, a representative of the Secretariat was present throughout the hearing of the two appeals. This greatly facilitated the Sub-Committees' work and in its view should be continued in future cases. The Secretariat is neutral as between the parties and bound by the same duty of confidentiality as applies to all participants in the deliberations. The Committee wishes to record in this report its gratitude to the staff of the Secretariat for their assistance.

III Procedure

6. Following its decisions that the two appeals should be heard on the merits, the Committee adopted measures to clarify the issues between the parties. It did so as follows:

In preparation for a hearing on the merits, the Sub-Committee also requested each party to file with the Secretariat a written summary of the case that it intended to present. The following criteria were established for the preparation of each summary:

The parties shall identify the precise questions in issue and, in particular, they shall state whether all or only some of the three (3) categories of assessment are in dispute.

The parties shall itemize the evidence (written and oral) that will be adduced at the hearing and, in particular, they shall specify any proposed evidence that has not previously been tendered for consideration by the Department or University in this case. Fresh evidence is only admissible under the conditions stated in section 8.12.3 of the Regulations.

The summary shall be a brief or outline of the respective positions of the parties and shall contain neither argument nor evidence. The summary of each party should not exceed five (5) pages.

The parties followed this procedure and it significantly eased the conduct of proceedings. The Committee expresses its thanks to the parties for their cooperation and recommends that this procedure should be followed in the future when cases proceed to a hearing of the merits.

IV Fresh Evidence

7. An issue in both cases was the extent to which the parties may adduce fresh evidence. In this context fresh evidence means oral or written information that was not already part of the dossier considered by the departmental tenure committee, the University Tenure Committee and the Principal.

8. The admissibility of fresh evidence is governed by section 8.12.3 of the Regulations:

The subcommittee may permit new evidence to be adduced before it in the presence of the parties, but only to clarify some new issue that arises during the course of its review or to establish a failure to follow proper procedures, bias, or inconsistency of the decision with the existing record of the case or with the established University practice.

The interpretation of this provision calls for some clarification.

9. A tenure appeal is an appeal against the decision of the Principal not to recommend tenure. It is not a fresh application for tenure; nor is it an occasion to constitute the dossier afresh. This is made plain in section 8.7 of the Regulations:

It is intended that the Appeals Committee should not proceed to a hearing *de novo* but should determine whether the appellant's case has received fair and reasonable consideration.

The University Appeals Committee is not bound by any previous decision in the case by the departmental tenure committee, the University Tenure Committee or the Principal. The Committee will consider the appeal on the basis of the record previously constituted except to the extent that it permits a party to present fresh evidence under section 8.12.3. Neither party has a right to present fresh evidence. Whether such evidence will be allowed is a decision within the discretion of the Sub-Committee that hears the case. This discretion should be exercised if a party can persuade the Sub-Committee that additional information is necessary to ensure a reliable and fair disposition of the appeal.

10. The admissibility of fresh evidence was considered more fully by the Committee in the following terms.

The tenure procedure is designed to ensure that the applicant and the University have the opportunity to assemble relevant information concerning the application that will allow for a full, fair and reliable determination of the merits. The Regulations provide elaborate procedures for this purpose, especially as regards the opportunity of the applicant to present a thorough exposition of the merits of his or her application. It also provides an opportunity for the University Tenure Committee to obtain appraisals of a candidate's scholarship and other contributions from referees outside McGill.

[...]

While the Regulations require the University Appeals Committee to decide an appeal on the basis of the existing record of the case, the Regulations also grant to the Committee a discretion to permit the production of fresh evidence upon application to this effect by a party. This discretion may be exercised to clarify an issue that arises for the proper interpretation of the record of the case. Just as an appeal is not a fresh application for tenure, the discretion to allow fresh evidence is not a power to reopen or reconstitute the record of the case. As contemplated by the Regulations, a request to produce fresh evidence may be made by a party or it may be requested by the Committee itself.

[...]

Decisions made by successive panels of the University Appeals Committee concerning fresh evidence do not bind subsequent panels because such decisions are discretionary in nature and are tailored to ensure a just outcome of an appeal. Some panels might be more liberal in the exercise of this discretion than others but these variations in practice do not change in any way the underlying structure of an appeal on the merits. The Committee would signal to future appellants, the University and future panels of the University Appeals Committee that the discretion to admit fresh evidence should be used sparingly to clarify or correct factual issues arising in the course of an appeal. As a general rule, this discretion should be exercised only where the applicant can show that the existing record of the case is corrupt, misleading or otherwise defective in a material aspect. An application to present fresh evidence is not an opportunity to simply to multiply opinion evidence favouring one position or another. It must serve a useful probative purpose in reaching a just outcome.

V Academic Duties of Librarians

11. One appeal this year required the Committee to consider the criteria for tenure of librarians.
12. The procedure for a grant of tenure to librarian staff is substantially the same as for academic staff. The substantive criteria are not the same. Section 1.3.2 provides as follows:

“Academic duties” of a member of full-time librarian staff include:

- i) position responsibilities, which can include the exercise of subject, bibliographic, or technical expertise; the use of administrative and managerial skills; the presentation formal informal instruction; and
- ii) research and other original scholarly activities, and professional activities; and
- iii) other contributions to the University and scholarly communities.

Section 5.20 of the Regulations stipulates that an assessment of superior in the category of position responsibilities is essential for a grant of tenure.

13. This year a Sub-Committee heard evidence that within the Library the three categories of assessment are not regarded as being of equal value and that the first is given greater weight. The evidence was unanimous that the first criterion is given greater weight but there was no consensus on the quantum. Of course, the uneven weight among the three criteria is not stated explicitly in the Regulations. In the past year this did not affect the outcome of the case but the Committee recommends that this point should be clarified for future cases in which the different weighting might be critical.

The definition of academic duties for librarians is identical to that prescribed for academic staff, with the exception of subparagraph 1.3.2(i). Indeed, the Regulations for tenure governing these two groups within the University are substantially the same. In view of this explicit parallelism, an important question is whether, or to what extent, the criteria for the grant of tenure should be applied in a manner that is substantively the same as between the two groups.

The Regulations affirm that a superior performance in the discharge of position responsibilities is necessary for the award of tenure to librarian staff. The evidence on this point was not entirely consistent but the consensus was undoubtedly that most of a librarian's time would be spent in the performance of position responsibilities. The definition, assignment and evaluation of an assistant librarian's responsibilities are determined by the administrative librarian to whom the assistant librarian reports.

A recurring point in this appeal concerns the assessment of scholarship and other service in the community. Given that so much weight is placed upon position responsibilities and, correspondingly, that less weight is given to the other two categories, how can one distinguish superior and reasonable performance in categories of diminished expectations?

One view is that these are not equal categories but categories of variable expectations and, accordingly, an applicant might do less work in two of three categories but still do that lesser amount of work in a superior way. Another view, more radical and seemingly shared among some librarians at McGill, is that apart from position responsibilities the other categories do not impose significant demands because they are so much less important than position responsibilities.

This Sub-Committee must follow the Regulations and give meaning to the provisions it contains. This means that the Appellant can only succeed if the performance of his or her position responsibilities is superior and that his performance in one of the other two categories is superior – even if it is conceded that position responsibilities should be considered quantitatively of greater importance.

This conclusion gives effect to the parallelism between the criteria for tenure of academic staff and librarians. It also makes allowance for differences between the two contexts. It was apparent at the hearing that original scholarship and other contributions are indeed categories of diminished expectations with respect to librarians, especially among librarians themselves. But this does not imply that the practice and expectations of librarians can allow expectations imposed by the Regulations to be so diminished as to disappear. To do so would contradict the plain meaning of the Regulations and trivialize the importance attached to scholarship and other contributions in the performance of academic duties by librarian staff.

[...]

Before leaving this point, we wish to express some disquiet. The evidence in this case makes plain that research and scholarship are not considered priorities by and among librarians at McGill. The paltry allocation of time to librarians for these purposes confirms this, as does the absence of institutional encouragement in this regard from senior and tenured librarians. Further, the support of research and original scholarship by librarian staff does not appear in the Mission Statement of the Library. In short, the Appellant's failure to meet a standard of superior performance in scholarship is quite plausibly due, at least in part, to a failure within the Library to give adequate support of an academic duty that is expressly imposed by the governing Regulations.

With regard to the last point in this extract, the Committee recommends firmly that the Library institute a programme of mentoring and advice to inform untenured librarians, from the time of initial appointment to the application for tenure, of the expectations they should meet for a grant of tenure. The Library should put in place a programme that will give meaning and weight to all three of the academic duties of librarians.

VI Composition of Committees

14. The Regulations set out rules for the composition of tenure committees at the departmental or faculty level and at the University level. This year the Committee was asked to consider an issue relating to the composition of committees and, in particular, conflicts of interest.
15. With regard to the composition of tenure committees, the rules provided in the Regulations are intended to ensure the fairness and legitimacy of the process. In this report it is unnecessary to discuss this subject at length but it is appropriate to underscore the importance of following the rules for the composition of committees scrupulously. The Committee had this to say on the matter:

[I]t is imperative to follow the procedures prescribed for the composition of departmental and University tenure committees. These procedures are essential to the fairness of assessment. There have been several cases in which it would appear that strict adherence to these procedures has lapsed. There is no reason why this should occur. The procedures are clear and compliance with them is mandatory rather than discretionary.

16. With regard to conflicts of interest in the tenure process, the Committee made the following observations:

First, a conflict of interest concerning anyone involved in the evaluation of the application – whether the conflict is real or perceived – will taint the integrity of the process and the outcome. For this reason anyone who is called upon to evaluate an application for tenure must be satisfied, *before* undertaking any participation in the case, that there is no conflict that would impugn the integrity of his or her assessment. There is, of course, no finite list of conflicts and the question calls for the prompt exercise of judgment.

A conflict will exist if there is any demonstrable reason, whether it is personal or professional, that would lead a reasonable person who is fully apprised of all relevant circumstances to doubt that a participant in the evaluation of a tenure application can render an opinion that is strictly objective, based on applicable criteria, and devoid of extraneous considerations.

Although not required by the Regulations, it might be prudent for the chair of a departmental or University tenure committee to inquire at the outset whether anyone involved is in a conflict of this sort.

It is appropriate to add here that in one case this year the Sub-committee learned that the departmental chair had sent to the University Tenure Committee a letter concerning the applicant's case. It was not a favourable letter. The applicant was not provided with a copy and had no opportunity to prepare a response before meeting with the UTC. This breach of procedure was never explained, let alone explained satisfactorily. In its deliberations the Sub-committee disregarded this letter. There can be no justification for such a breach in the tenure process.

VII Miscellaneous Matters

17. A variety of other matters arose in the past year and the following extracts from the reasons of the Committee speak for themselves.

External Evaluations

[W]hen external evaluations are sought by the University Tenure Committee, these letters are helpful if they are full and comprehensive. To ensure that they are, we recommend that external referees should be supplied with a copy of the Regulations and any applicable guidelines within the relevant unit in the University. These referees should be asked to assess the applicant's scholarship on its own and its place within the discipline. Further, the record of the case in any tenure case before the University Tenure Appeal Committee, the Principal and the University Appeals Committee should include a copy of the letter of invitation sent to external evaluators.

Advice on Previous Work

[W]e recommend that any applicant for tenure should be clearly advised of the extent to which work done before coming to McGill may be considered and weighed in a tenure application. Again, the record of the case should include this information. This clarification is especially important in those departments where work done prior to McGill may be valued in one context and not another.

Comparisons among Applicants

[W]e must remind all persons involved in the assessment of tenure applications that it is inappropriate to make express comparisons between one applicant and other applicants within the same cohort of applicants.

Advice on Expectations

[W]e urge units within the University to renew their diligence in ensuring that prospective applicants for tenure should be clearly advised in a timely manner of expectations for tenure in each of the three categories of academic duties. They should also be advised as clearly as possible of the manner in which items should be placed and counted within the three categories.

Classification

[A]n application for tenure, and in turn the record of the case, should identify clearly how items are classified within the three categories of academic duties so as to minimize the risk that items might shift or slide among categories.

Changes in Guidelines

[I]f a member of academic staff is subject to departmental or faculty guidelines that change between the date of that member's initial appointment and an application for tenure, the applicant should be given the choice of applicable guidelines. In the absence of a clear choice, the application for tenure must be assessed on the basis of guidelines most favourable to the applicant.

With regard to the last of these points, the Committee would like to make one observation. In many departments there are guidelines concerning criteria for the grant of tenure. These guidelines might be helpful to prospective applicants. It must be understood, however, that the grant of tenure is governed by the Regulations and not by departmental guidelines. In this sense guidelines may complement the Regulations but cannot prevail over them. To the extent of any inconsistency, the Regulations prevail. Prospective applicants for tenure should be informed of these matters and members of departmental tenure committees should bear them in mind.

The whole is respectfully submitted,

Patrick Healy
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Chair, University Appeals Committee

October 11, 2006