

# news from CUASA

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## PRESIDENT'S ADDRESS TO THE ANNUAL GENERAL MEETING

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This is my one opportunity to stand back from the day-to-day business of being president and to expound publicly the framework within which individual decisions have been taken, to show that a philosophy or at least a pattern connects the individual decisions. It is also a rare chance for me to state how I see things, rather than be obliged to be a disinterested or neutral chairman.

I will address three main topics or problems which the Association is facing and will continue to face. Rather than have a separate section of my report dealing specifically with events of the last nine months, I will implicitly review what has happened since last July as I develop my remarks. I will discuss first, the form and process of negotiations; second, the need for the Association to continue to press the University's case for improved funding with politicians, the media, and directly with the public; and third, the need to continue to attract talented and committed people to executive office in the association.

Negotiations became a public issue in the recent election of the President-Elect for 1982-83; the polarised viewpoints revealed by the candidates are public expressions of arguments raised repeatedly within the Steering Committee. To the extent that some of the arguments are critical of things that happened during my Presidency, I feel entitled to put forward my point of view now that the election is over. I also think that the arguments should be put squarely before the members, as this cleavage is over a fundamental issue, one not likely merely to evaporate.

The basic criticism of CUASA's recent performance is that the Association has backed away from "proper" negotiations, has allowed too much to be taken on by the Article 19 Committee (Academic Career Planning Committee), and has shown to management a lack of relish for trench-warfare, without which we will, it is claimed, lose face, respect, and ultimately, authority. To the extent that we have moved away from a knock-down, drag-out style of negotiating, these charges are true; but they presuppose that there is, and always will be, only one true and pure style of negotiating, regardless of changes in the negotiating environment. It may be necessary sometime in the future to return to confrontation and attrition to achieve our aims, but I suggest that to behave this way at the moment is to allow dogma to overwhelm our more pragmatic judgement.

In negotiations between CUASA and Carleton University -- despite our past conceit that "we are the university", the front cover of the Collective Agreement says otherwise -- there appear to be only two parties, "us" and "them". But I suggest that if you really think about who "we" and "they" are, you will see why flexibility in the form and process of negotiation is vital. There are at least five groups involved.

On the CUASA side there is the Association membership -- which is not, of course, perfectly synonymous with bargaining unit membership -- and there is the Association executive, the Steering Committee, elected to serve the members' interests. The executive tries to divine and execute the wishes of the majority of CUASA members -- but as in all hierarchical organisations, the flows of information are less than perfectly efficient up and down the hierarchy. There is less than perfect conformity in information, and therefore in viewpoint and goals between these two parts of the "us" group.

On the other side lies . . . . . who? One often hears the terms "employer", "management", and "the administration" used interchangeably. This is conceptually sloppy; and when it comes to negotiating practices, it can be fatally sloppy. The employer sensu stricto is the Board of Governors. The academic management (President, Vice-Presidents Academic and Planning, the Deans and Directors) are themselves employees, answerable to the Board of Governors. The "administration" includes "management", plus a lot of people who are themselves members of fellow unions. When we negotiate we do so not directly with our employer (the Board of Governors) but with the employer's agents, "management".

The mutual pursuit of self-interest may make for the convergence of viewpoints between CUASA and management. Less cynically, management are as capable of altruism as we are, so there is also the possibility that the two parties directly involved in the negotiations may share a common interest in the University's academic mission. That is not to argue that this is necessarily true, but that it may be true; and if it is we should recognise it, and adjust our tactics to take advantage of the situation.

Furthermore, the Board of Governors is not a static, easily definable body. The turnover in membership can, over a few years, greatly alter the tenor of that body. Just as the academic reputations of universities and individual departments ebb and flow as their constituents change, so we should recognise that our "employer" can shift politically and philosophically over time.

The limiting cases for our terms of employment are no contract (where we started) and the perfect contract (our ideal finishing point). Progress is along an S-curve, with the upper part probably being asymptotic to perfection. Early gains are niggardly and small, then they become larger as the basis of agreement expands, until they diminish again as less remains to be done. We are currently in the upper reaches of that curve.

What all this leads to is the proposition that the style of negotiating appropriate in the early years, given an employer and management philosophically opposed to surrendering any significant powers -- indeed, initially opposed to unionisation at all -- is not necessarily always appropriate at later stages.

During the frontal assault on employer intransigence, the heavy artillery of traditional negotiation is probably necessary. As less and less of a fundamental nature remains disputed, more sensitive, subtle, and continuous processes are needed. These should deal with problems as they arise, rather than leave them all to be bargaining chips at a future -- perhaps far distant -- contract negotiating session.

I believe that the current employer, and the management, conceive of the true "enemy" as being the Government of Ontario; when in the past the University was the province's hand-maiden in enforcing its misguided parsimony, we were right to attack the most vulnerable, local and visible target, the employer, by protracted, formal, and punishingly tedious negotiations. To continue to do so when there is evidence that the University is indeed prepared to bite the hand that feeds it is probably unwise. At the moment there is simply no need to return to earlier models of labour relations; we are doing quite well from the current model.

However, the learning-curve analogy should not blind us to one sobering aspect of my argument; there is no historical or chronological inevitability to all of this, no guarantee that things will always improve with time. There is a temptation to see the evolution of the contract as analogous to life-cycle stages, childhood, adolescence, maturity and so forth. But in our case the clock can be turned back; the employer could decide at some future contract expiration to seek not renewal of the contract but major excisions from it. It is more likely that change would be sought by chipping away at the contract over a long time, so as to dissipate CUASA's energy and will to oppose. Should the employer ever seek to substantially do away with the current contract, or try to renege on any part of it, we may have to return to appropriately unsubtle behaviour; should that ever happen I hope we will remember how to do it.

The personal frustration and anger which has often been assuaged by prolonged negotiations should be directed not at our de jure employer but at the de facto employer, the Province of Ontario. The government is the fifth group involved in negotiations, in practice it is far removed from the conflict, but in truth it is the cause of many of our woes, by having quite successfully made the struggle for scarce resources an internal fight within the university system, down to the level of rivalry between parts of individual universities. This brings me to my second topic, establishing our case with politicians and the public.

#### PUBLIC RELATIONS

Until very recently my attitude towards public relations was parochial and pessimistic; I could not work up much enthusiasm for lobbying politicians and educating the public, largely because the effort so often seemed ineffective. But having argued that our contractual adversary is really the provincial government, I must recognise the logical conclusion to my own argument, and say that we -- the Association as an Association and as individual academics -- must become much more involved in safeguarding our own individual and institutional futures. Like it or not, public support of universities is a political issue; we should recognise it as such and we should be prepared to establish our right to be heard in public debates over the issues.

Direct pressure can be applied to provincial and federal politicians; OCUFA and CAUT respectively are the umbrella organisations who can and do orchestrate lobbying activities. The recent CAUT lobby of federal MP's was lamentably supported by people from Carleton, which was noticed by the politicians. The point here is not what was achieved by the lobbying so much as it is that Carleton suffered a self-inflicted black eye by being so poorly represented. This should not happen again.

Indirect pressure on the politicians who control the purse-strings can be applied locally. This comes in two forms. First, municipal politicians can be persuaded to sponsor and pass resolutions deploring the way in which more senior levels of government have treated post-secondary education institutions in their area. CAUT, CUASA, and APUO persuaded Ottawa City Council to adopt such a resolution at the council meeting of April 7th. Mayor Dewar was most helpful and sympathetic in making this possible, at very short notice. Similar motions have been passed by over a dozen municipal governments who have post-secondary establishments in their bailiwicks, and who recognise the importance to the economic, social, and cultural life of the city and region of having a thriving university or college locally available. Municipal politicians are in turn quite capable of supporting our case through their connections with the province.

We should seek invitations to address local business and citizen groups -- we should not wait to be invited, but should actively recruit opportunities to make our case directly to the taxpayers. On my few journees into the outside world I have been impressed by and appalled at the monumental ignorance and misconception in the public view of what it is that universities do. We should speak at meetings of Chambers of Commerce, Boards of Trade, service clubs, neighbourhood groups, etc., explaining the university's function, and internal structure and dynamics. We should avoid basing our arguments on narrow instrumentalism, because although occupational training is part of our avocation, it is far from being our sole, or even over-riding purpose. The public needs to be told that formal education at this the highest level is inefficient in any positivist sense, is labour-intensive, and is very expensive. If the public is not willing to face these truths, then higher education will have to cease to have any element of concern for the individual realisation of intellectual potential, and will become totally a mass-training process.

Buttons worn by academics in Britain at a rally in early March, protesting against Thatcher's savage cuts to university funding read: "If you think education is expensive, try ignorance". We need to get that message across.

CUASA must learn to cooperate with the University on this issue, whilst retaining our willingness to defend the contract. We must avoid the temptation to link internally and externally orientated management behaviour; there is nothing inconsistent about praising the management when it makes the right moves with respect to OCUA or to MCU for example, whilst lambasting them when they make mistakes over contractual procedures. Cooperation on some issues should not be misread by anyone as implying cooptation in general.

## PRESIDENT'S ADDRESS (concluded)

### CUASA'S SURVIVAL

In this report I have repeatedly said "we" must do . . . whatever. More often than not this means the CUASA executive must do these things or must organise the membership to do them. I am worried over the long-term that the success of CUASA in resolving local difficulties will lead to the organisation's withering away through a combination of benign neglect -- if you'll pardon the Nixonism -- and simple apathy. In the recent election for President-Elect you were presented with a philosophically clear choice between two experienced, long-serving, and most valuable members of the Steering Committee, and the size of the vote showed that members will react when faced with this fortunate situation. But in many years we have to beat the bushes for candidates for union office. Apart from the President and the Grievance Chairman, all work done for the Association comes on top of a normal academic load, and this probably weighs in the scales for some people when they think of getting involved. Over the next two years we are faced with the task of either finding replacements for the large number of Steering Committee members coming to the ends of their terms or of persuading them to serve again or some combination of these two courses. It is not healthy to allow -- by default -- the running of your Association to depend on a few willing people; the need for a mixture of veterans and "rookies" should be obvious.

No doubt there will be a steady stream of problems affecting individuals, and CUASA will no doubt continue its remarkable record of quietly resolving these disputes in the favour of the individual. With a three year contract, a feeling of security (false?), and no obvious major issues to galvanise the members, CUASA runs the danger of going to sleep. I have no off-the-peg solution for this, and I could be wrong in the emphasis I have put on our fading away. Ultimately the involvement of the membership and the willingness of talented people to seek office in the Association will determine our future.

My report would not be complete without my thanking the Council, the Steering Committee, and the negotiating team for the work they have put in this year. I have been impressed by the way in which divergent views have been forcefully expressed without the giving and taking of personal affronts; I have been grateful -- as chairman of Steering Committee and Council -- for the civilised and usually good-humoured tone of debate. I have been impressed by the willingness of those with views contrary to the majority to continue to press their case constructively whilst for the moment either supporting or being studiously neutral towards the policies adopted over their expressed opposition. I guess that comes down to saying that tolerance has been the prevailing sentiment.

I will single out only one person by name for a public "thank you": Pat Finn, our Business Agent. Two years ago Muni Frumhartz in his President's report commented on Pat's "winsome abrasiveness", and I cannot improve on that phrase; those who know Pat will know what the phrase summarises! On a professional level I have been impressed by her superb memory for the bits and pieces of the current and past contracts, memoranda of agreement, exchanges of memos on arcane subjects, etc. Her judgement is generally excellent, and her sure handling of members' queries and complaints often helps nip problems or misunderstandings in the bud. Pat is perhaps most valuable for her willingness to bully anyone without favour or fear of title or position, either in the CUASA organisation or "across the tracks". The bullying is usually deserved, usually is effective, and usually charmingly done. What more could you ask for?

## UNIVERSITY PROFESSORS ARE ENTITLED TO DUE PROCESS

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Howard Goldblatt

### Introduction

Over the last decade, university faculty in Canada have in large numbers organized under labour legislation, and now enjoy the protection of collective agreements. However, unorganized faculty have only those rights which exist under that branch of the common law appropriately called the law of master and servant. This means that, if a university breaches a professor's employment contract, all he or she can do is to sue for damages, because the common law courts have traditionally declined to reinstate discharged employees to employment. The courts say, in legalese, that they will not grant "specific performance of a personal service contract". In the vernacular, this simply means that they will not force a dissatisfied employee upon an unwilling employer.

To some extent, however, this situation has now changed. The Ontario courts have recently held that university professors have a public status which entitles them to a fair hearing guaranteed by public or administrative law remedies. If a fair hearing is not afforded, the proceedings may be quashed by the courts, and the faculty member involved may be restored to his previous status.

### The Paine Case

In this case, Professor Paine, an Assistant Professor of Fine Arts, applied for tenure at the University of Toronto. The granting of tenure simply means that a faculty member has a permanent appointment subject to dismissal for cause. The problem arose when Paine was denied tenure and then found out that one of the members of the Tenure Committee had already made up his mind before the Committee met that tenure should not be granted. Paine took proceedings before the Supreme Court of Ontario.

The University took the position before the Court that Paine's tenure rights were simply a matter of contract, and that if that contract was breached, Paine was confined to a suit for damages. The Ontario Divisional Court disagreed. In its view, judicial review proceedings were available because there was a sufficient "element of public employment and support by statute" to give rise to a requirement of due process. To quote the Divisional Court:

"In our view, there is that element of public employment and support by statute that requires us to consider whether or not essential procedural requirements were observed by the University, its President and Governing Council in carrying out their respective functions with respect to the application of Mr. Paine for tenure."

The Divisional Court concluded that Paine had been treated unfairly because of the presence on his Tenure Committee of a member who had prejudged the issue.

On appeal, the Ontario Court of Appeal upheld the ruling of the Divisional Court giving faculty a right to due process enforceable by public or administrative law remedies. The Court of Appeal stated as follows:

"The right to be considered for tenure is one of the terms of employment of members of the teaching staff of the University. It is a contractual right; but the consequence of a denial of tenure is the termination of the employment of the disappointed candidate. An action for damages for breach of the employment contract is probably not an adequate remedy. The Divisional Court found in the present case that there was 'that element of public employment and support by statute that requires us to consider whether or not essential procedural requirements were observed by the University, its President and Governing Council in carrying out their respective functions with respect to the application of Mr. Paine for tenure'. I agree with that conclusion ..."

The Court went on, however, to observe that it ought to intervene only reluctantly in university affairs, and concluded that this was not an appropriate case to do so. The Court stated that members of a Tenure Committee, as colleagues of the faculty member concerned, act on their own knowledge of the candidate, as well as the assessments and references that are provided to them. In the view of the Court, Mr. Paine was not treated with "such manifest unfairness as to call for intervention by the Court".

#### The Ruizperez Case

The Paine case has since been relied upon to support review of a tenure decision involving another university. In this case, Professor Ruizperez was an Associate Professor in the Department of Sociology at Lakehead University. Throughout the entire tenure process — involving consideration by a Tenure Committee, Tenure Appeals Committee and the Board of Governors — Professor Ruizperez was not given access to the material on which the decision was based. In the Court's view, it was

"mandatory that the applicant be told the essence of the information considered by those who made recommendations unfavourable to him ..... He ought to have been given the opportunity either orally or in writing to respond to it."

Because of the legitimate interest in maintaining confidentiality, the Court stated that it did not think that it was necessary that the sources of information be identified, but that Professor Ruizperez should at least have been given the essence of any detrimental information considered at the various levels of the tenure process, as well as the opportunity of responding to it before the Executive Committee of the Board of Governors. Accordingly, the tenure decision was quashed.

#### Conclusion

In *Nicholson v. Haldimand-Norfolk*, decided in 1978, the Supreme Court of Canada held that a Police Commission must deal fairly with a police constable, since a police officer is not simply an employee, but a person who holds public office: see LLN October, 1978. The Paine case extends this duty of fairness to university faculty because of the public element of their employment and the statutory framework under which they operate. The interesting question is, how many other employees, working in a public capacity for a public authority, will follow the lead of police officers and university professors?

## OTTAWA CITY COUNCIL PASSES MOTION OF SUPPORT FOR CARLETON AND OTTAWA UNIVERSITY

On April 7th, 1982, Ottawa City Council passed the following motion of support for Carleton University and the University of Ottawa:

Whereas the University of Ottawa and Carleton University are cultural, scientific and educational resources of the greatest importance to the City of Ottawa and to the country as a whole;

and Whereas the University of Ottawa and Carleton University are vital to the development of the social, educational, business, political and religious leadership in the City of Ottawa and in Canada as a whole;

and Whereas Carleton University and the University of Ottawa are essential to the development and continued good health of industry in the City and Region, notably the high technology industries;

and Whereas Carleton University and the University of Ottawa are vital to the maintenance and development of bio-medical studies and health care facilities in the City of Ottawa and Region;

and Whereas (1) Carleton University employs 1,552 faculty and staff and the University of Ottawa employs 2,158 faculty and staff, thus making the two universities one of the largest employers in the region, and (2) Carleton University enrolls 9,428 full-time and 5,844 part-time students and the University of Ottawa enrolls full time 11,742 and part-time 7,117 who have an important economic impact on the retail trade of the City and Region and (3) Carleton University spends 70.08 million dollars and the University of Ottawa spends 94 million dollars, a significant proportion of which is spent in the City of Ottawa, all of which indicate the important economic impact of the universities on the City of Ottawa.

Therefore be it resolved that the Government of Ontario and the Federal Government be exhorted to fund post-secondary education institutions at levels which will permit them to continue and to develop their present educational, scientific, and cultural activities;

and That both levels of government be requested to support the demand of the Canadian Association of University Teachers for a joint federal/provincial public inquiry into the functioning and funding of post-secondary educational institutions.