3-23-1983

Re The University of British Columbia and Kane

Innis Christie

Peter Burns

Roland Gray

Case 0356

IN THE MATTER OF THE UNIVERSITY OF BRITISH COLUMBIA AND
DR. JULIUS KANE

Report of a Hearing Committee constituted in accordance with Article 10.02(f) of the Agreement on Conditions of Appointment for Faculty between The University of British Columbia and The Faculty Association of the University of British Columbia.

Re: Decision of President Douglas E. Kenny to recommend to the Board of Governors that Professor Julius Kane's appointment be terminated forthwith for gross misconduct.

Hearing: December 6, 28, 29 and 30, 1982 at Vancouver, B.C.

Before: Professor Innis Christie, Dalhousie University, Chairman.

Dr. Peter Burns, The University of British Columbia, Nominee of the President

Professor Roland F. Gray, The University of British Columbia, Nominee of Professor Kane

Appearances:

For The University of British Columbia

D.M.M. Goldie, Q.C. – Counsel
Geoff Cowper – Counsel
Wendy Dawson
Dr. Charles Bourne - Adviser to the President

Dr. Julius Kane on his own behalf

Observer for The University of British Columbia Faculty Association

Margaret C5 apo

Witnesses:

Called by the University

Dr. Casimir Charles Lindsey - Director of the Institute of Animal Resource Ecology
Dr. G.G.E. Scudder - Head of Zoology
Dr. Peter A. Larkin - Dean of Graduate Studies

Dr. Kane testified under oath on his own behalf.

REPORT

The Agreement on Conditions of Appointment for Faculty between The University of British Columbia and the Faculty Association of The University of British Columbia dated May 1, 1980 provides that where a faculty member is advised in writing by the President that he is to be terminated the faculty member may request that a Hearing Committee be constituted. We were constituted as a Hearing Committee in accordance with Article 10.02(f) of the Conditions of Appointment after the President advised Dr. Julius Kane that he proposed to terminate his appointment at The University of British Columbia.

The President's letter to Dr. Kane, dated September 16, 1982, sets out six grounds which in the President's view constituted gross misconduct justifying termination. After four days of hearings, one dealing with preliminary matters and three with evidence and argument by Dr. Kane and by Counsel for the University, we have decided by vote, for the reasons set out below, that one of the charges or grounds of termination for gross misconduct is substantiated and that that charge or ground is in itself serious enough to warrant termination.

To fully explain our decision we shall put the charges against Dr. Kane in context by sketching the background, stating the relevant facts as we have found them, outlining the procedures leading up to the appointment of this Hearing Committee and describing more fully our own procedures. We will then deal with each of the grounds put forward by the President for the termination of Dr. Kane's appointment, explaining why we think it is substantiated or not.

The Background.

Dr. Kane was first appointed to the University in 1968 as a professor of mathematical ecology, with a joint appointment to the Institute of Animal Ecology and the Departments of Zoology and Mathematics. He was deeply involved in computer science and had a special interest in bridging the gap between the sciences and the humanities using the computer as a tool. His earliest contact with The University of British Columbia was with Dean Peter Larkin who met with him in California prior to his coming to U.B.C. Dr. Kane was on the University's payroll for several months in 1968 before he actually arrived at the U.B.C. campus and in that period Dean Larkin was instrumental in supporting a successful grant application to the Ford Foundation. That was the first of a number of successful grant applications.

In the summer of 1976 Dr. Kane was working under a grant from the National Research Council, the funds for which were in the possession of the University. During that summer he had also embarked on a private venture known as Waterflame Productions. On behalf of Waterflame he had applied to the British Columbia Department of Labour for one of the grants which it gave to encourage employment.

During that summer in one capacity or another Dr. Kane employed at least three students, two of whom, Arlene Francis and Bruce Wilson, are referred to throughout the documents in these proceedings. For purposes of this Report it suffices to say that Francis and Wilson went to the R.C.M.P. with evidence which they thought showed misuse by Dr. Kane of his N.R.C. grant.

The R.C.M.P. investigation led, eventually, to a criminal trial which commenced on May 26, 1980 and lasted two weeks. Dr. Kane was convicted of two counts of theft and acquitted of five counts of fraud. He appealed from those convictions and in a unanimous decision dated June 8, 1982 the Court of Appeal dismissed the appeal. At page 14 of its unreported decision the Court states:

> The appellant, who appeared in person, although represented by counsel at the trial, attacked the charge to the jury but was unable to show that the learned trial judge erred in any way. The law relating to theft and the defences pertaining thereto were carefully and clearly explained to the jury and during the course of argument it became evident that the only ground of any substance was whether the Crown had proved beyond a reasonable doubt that the National Research Council had a 'special property or interest' in the grant monies capable of being stolen.

At the end of its judgment the Court held:

> that the National Research Council had a beneficial interest in the grant monies and moreover, that the Council specified in clear and explicit terms that the monies were to be utilized only for the purposes of the designated research project. It follows that the National Research Council had a 'special property or interest' in the money received by the appellant.

In February of 1977 the Dean of Graduate Studies, Peter A. Larkin, undertook an academic investigation into Dr. Kane's use of his grant funds. As a result of this investigation Dr. Larkin and Dr. G. Volkoff, then Dean of Science, recommended to the President that Dr. Kane be terminated for gross misconduct on the grounds that he had made improper use of University computer facilities, that he had made improper use of his N.R.C. grant for supporting private work and that he had made improper use of his N.R.C. grant in purchasing hardware items that were not related to the purposes for which the grant was awarded. Following their participation in the ensuing discussion which the President had with Dr. Kane, Deans Larkin and Volkoff revised their recommendation. In a letter which they signed together with Dr. Scudder, Head of the Department of Zoology and Dr. Wellington, the then Director of the Institute of Animal Resource Ecology, they recommended a lesser penalty of suspension and restitution.

It was in the context of Dean Larkin's investigation in February of 1977 that Dr. Kane was to subsequently charge that Dean Larkin acted fraudulently. We leave a full discussion of the evidence relating to that point for consideration in connection with the relevant charges against Dr. Kane.

Under date of April 14, 1977 President Kenny wrote to Dr. Kane advising him that he had decided that Dr. Kane should be suspended for three months without salary and that he should make restitution and warned him that in future he had to comply strictly with the University's regulations concerning the use of computer and other facilities. Dr. Kane appealed to the Board of Governors of the University pursuant to section 58(3) of the Universities Act, now R.S.B.C. 1979, c. 419. The Board approved the President's action. However, there was a flaw in the Board's procedure. After hearing Dr. Kane and following an adjournment for dinner the Board had deliberated further, with the President answering questions directed to him by Board members. On this basis Dr. Kane challenged the decision of the Board of Governors in the courts on the grounds of denial of natural justice. In the end, by a judgment of the Supreme Court of Canada dated March 3, 1980 the resolution of the Board of Governors was quashed. See Kane v. Board of Governors of The University of British Columbia, [1980] 3 W.W.R. 125 (S.C.C.). There is at least one passage in the judgment of the Court which is particularly relevant to these proceedings but it too is more appropriately quoted in connection with our consideration of the relevant ground for termination.

The original disposition of his appeal having been quashed, Dr. Kane's appeal from the 1977 disciplinary action came again before the Board of Governors on April 8 and April 14, 1980. The Board again upheld the President's action, this time apparently without any procedural misstep, and Dr. Kane served his three months suspension without pay. That, however, did not end matters.

As was mentioned above, in May and June of 1980 Dr. Kane's criminal trial took place. Evidence led during the trial disclosed improprieties on Dr. Kane's part in connection with the provincial Labour Department grant to Waterflame Productions Limited which had not been taken into consideration by the President or the Board of Governors in suspending him for three months. Based on this new knowledge, by a letter to Dr. Kane dated September 5, 1980, President Kenny initiated proceedings for the termination of Dr. Kane's appointment. On October 3, 1980 the President met with Dr. Kane and his counsel. Under date of October 6, the President informed Dr. Kane of his decision to recommend to the Board of Governors that Dr. Kane's appointment at the University be terminated forthwith for gross misconduct on the seven grounds set out in the memorandum attached to his letter of September 5. All of this was done in accordance with Article 10.02 of the Conditions of Appointment.

Those Conditions, of course, gave Dr. Kane the same right to request a Hearing Committee that he exercised to bring about the constitution of the Hearing Committee upon which we sit, and he exercised that right in 1980 as well. The constitution of a Hearing Committee to consider the President's letter of October 6, 1980 resulted in the establishment of and report by a Hearing Committee consisting of Professor C.R.B. Dunlop of The University of Alberta as Chairman, Dr. W. E. Fredeman, as Nominee of The University of British Columbia and Professor J. P. Taylor who was, in the end, appointed by the Chief Justice of the Supreme Court of British Columbia because no one was effectively nominated by Dr. Kane. Because of difficulties in getting it constituted the Dunlop Committee did not hold its hearings until September and October

of 1981 and reported on February 22, 1982. Its conclusion was that two of the grounds put forward for Dr. Kane's termination were the same as those for which he had received his three months suspension and could not be proceeded with; three other of the seven grounds were not substantiated and two were. The Committee was unanimously of the view that the University does not fail as to all charges if they fail to prove one or some of them. The Committee found that the two charges substantiated amounted to gross misconduct but found that the gross misconduct was not serious enough to warrant termination and concluded that Dr. Kane should be suspended without salary and benefits for eighteen months.

Relevant Facts.

Much of what concerns us in these proceedings occurred between October 6, 1980, the date of the President's letter advising Dr. Kane that he was recommending termination, and the release of the award of the Dunlop Committee. On October 23, 1980, Dr. Kane commenced an action in the United States District Court, Central District of California. The complaint, which bore the date October 11, 1980, alleged breach of contract obligations, torts and denial of civil rights. Among the defendants named were the Board of Governors of U.B.C., C. B. Bourne, Adviser to the President, Peter Larkin, G.G.E. Scudder and their wives. The wives were added, apparently, in accordance with common practice in civil actions in California. Over the months that followed documents far too numerous even to list here were filed with the California court. It suffices to say that on April 30, 1981 the District Court dismissed Dr. Kane's action on some six grounds including forum non conveniens, finding, in effect, that the California court was not the appropriate forum for an action by Dr. Kane against The University of British Columbia. The next day Dr. Kane filed an appeal. The appeal was not argued until July 8, 1982 and in a judgment filed August 13, 1982 the Court of Appeal confirmed the decision of the District Court on the ground of forum non conveniens "without reaching the other bases for the dismissal". In the numerous memoranda and other documents filed in support of his action in the California courts Dr. Kane charged Dean Larkin, President Kenny, The University of British Columbia generally and others with a wide range of frauds, misrepresentation and other mistreatment of him.

Dr. Kane was not content to leave his allegations buried in the California court files. Sometime in the period April - July 1981 he released the following document:

PRESS RELEASE — for immediate distribution

PERJURY and OBSTRUCTION of JUSTICE CHARGED

Does a Canadian have to go to the United States to get truth and justice? In British Columbia, Bruce Wilson gave extensive testimony that Professor Julius Kane used bin as a "personal lackey" while supposedly doing NRC research. In U.S. court actions, a different story emerges. In a dramatic counter-attack, Professor Julius Kane has filed information of new evidence with the Minister of Justice, setting out perjury and theft on the part of Bruce Wilson together with allegations of destruction and

manipulation of evidence on the part of other, unnamed "officials," presumably eagre RCMP officers anxious to manufacture a "computer crime." In a 9-page Information and Affidavit, filed both with the Minister of Justice and U.S. federal court, Kane describes a series of frauds that began in California and New York when Dean Peter Larkin mace bogus representations to Kane and the FORD FOUNDATION, concerning unique inter-disciplinary work Larkin wished to see done at the University of British Columbia.

According to Kane, be encountered disaster when he hired Arlane Francis, presumably U3C's "best all-around student," who is also a radical activist and police informer. In his affidavit, he says "that she and her husband did little or no academic work and spent their university years in personality manipulation and political intrigue, including espousal of Maoist and terrorist groups."

In addition to perjury, Kane provides information that Wilson "burglarized my hones and office some time between 5 Sept 1976 and 7 December 1976," and also charges that Wilson fabricated computer output. In addition, he alleges:

> "Kerry's administration has been well aware of these frauds, thefts, and perjuries of Francis and Wilson and have ratified their actions by raking full, self-serving uses of these frauds, fabrications, and perjuries."

Kane claims that Wilson tells the truth in the United States because there he has no immunity from prosecution. In the Information presented to the Minister of Justice, Kane describes a series of explicit tamperings with evidence on the part of officials, including the crucial "loss" of some Deptartment of Labour forms and a computer "dump" obtained by Pres. Kenny under conditions of "fraud, duress, threat, and intimidation."

In 1981, the Supreme Court of Canada ruled in Kane's favor and in his written decision, Justice Dickson declared:

> "administrative officers of the university have been lax in discharging their duties to such a degree as to mislead Dr. Kane ..."

— 3 WWR at p. 132

In his affidavit, Kane targets Dean Larkin as the prime mover of a series of frauds, deceptions, and evasions. In British Columbia, both Judges Campbell and MacDonnel have refused to admit the notes and memoranda of Larkin's as evidence.

Ever since 1976, the battle between Kane and UBC has been a marathon effort, taking heavy toll in tine and money on all parties. In his petition to the Board of Governours, Kane asks:

— Is it a crime at U3C for a professor to write a book?

— Is it a crime at UBC for a professor to hire its "best all around student?

It appears there will be further battles before these and other questions will be fully answered.

Julius Kane
PO Box 100
B'ham, WA 98227

(206) 734-9125

* CORRECTION *

Upon advice of Ministry of Justice,
the INFORMATION has been filed
with Attny General, 5C, RCMP —
Internal Affairs, and

In addition to the circulation noted on this document it was received by the Chancellor of the University, members of the Board of Governors and, apparently, the press. We return below to a detailed consideration of this document which, we have concluded, is by far the most important piece of evidence before us.

Sometime before July 23, 1981 this "Press Release" came to the attention of Dr. Kenny. On that date he wrote a letter to Dr. Kane in accordance with the procedure set out under Article 10.02 of the Conditions of Appointment. The letter invited Dr. Kane to meet with the President and that meeting occurred on August 7, 1981, Minutes of that meeting are in evidence and will be referred to more fully below in connection with the relevant grounds for termination. For the moment it suffices to say that following upon that meeting, under date of August 12, 1981, President Kenny wrote to Dr. Kane as follows:

> Dear Dr. Kane:
>
> I have now considered the submissions you made at the meeting held on Friday, August 7, 1981, in the Board and Senate Room of the University. The purpose of that meeting was to discuss my proposal to add two further grounds for your dismissal from the faculty of this University, and to submit them to the Hearing Committee already constituted under Section 10 of the Agreement on Conditions of Appointment to hear your appeal against my decision to recommend your dismissal to the Board of Governors.
>
> I have decided to add only the first of these grounds for your dismissal to those already referred to the Hearing Committee, and I now inform you of my decision to do so.
>
> This additional ground for your dismissal is stated in the attached memorandum.

Sincerely,

Douglas T. Kenny
President

MEMORANDUM

ADDITIONAL GROUND FOR THE TERMINATION OF DR. JULIUS KANE

Background

On or about October 23rd 1980, Dr. Julius Kane, acting on his own behalf, commenced proceedings in the United States District Court, Central District of California, against various people including, but not limited to, P. Sandhu, B. Peters, L.R. Peterson and Jane Doe Peterson, the Board of Governors U.B.C., C.B. Bourne and Jane Doe Bourne, Peter Larkin and Jane Doe Larkin, C.G.E. Scudder and Jane Doe Scudder. Other persons have been added to the complaint filed by Dr. Kane and some of the above have been dropped in the course of the said action.

On behalf of certain of the persons named in the complaint filed by Dr. Kane, the jurisdiction of the U.S. District Court in California to entertain an action in respect of matters occurring in the Province of British Columbia was contested.

In addition to documents filed by Dr. Kane in the course of this action, a press release, entitled "Perjury and Obstruction of Justice Charged" (the "Information"), was mailed by him to persons in British Columbia who were not parties in the said proceeding. A copy of the Information is attached.

Additional Ground

It is gross misconduct, having regard to all the relevant circumstances, on the part of a member of the Faculty of The University of British Columbia to allege in a press release that the Administration of The University of British Columbia has knowingly condoned and participated in criminal activities, namely, fabricating false evidence and committing perjury, and to impute to colleagues behaviour of a fraudulent and disgraceful nature.

Before the Dunlop Committee counsel for Dr. Kane took the position that the Committee did not have jurisdiction to deal with this additional ground as Article 10 of the Conditions of Appointment negated any right in the President to add grounds to those set out in the letters initiating the proceedings which, it will be recalled, had been sent in September and October of the previous year, 1980. After careful consideration the Dunlop Committee concluded that it had no jurisdiction to consider the additional ground. At pages 11 and 12 of the Committee Report the following appears:

> The result may be inconvenient although it was and is open to the University to pursue this additional ground in separate dismissal proceedings. ...

> There is another reason for coming to this conclusion. The effect of the University being permitted to add a charge to the proceedings before the Committee was to deprive Dr. Kane of the opportunity to decide whether he wanted the additional ground heard by this Committee or by a different body. That is an important right and it should not be stripped from the faculty member by the unilateral action of the University unless the agreement expressly so provides.
>
> As a result, the Committee unanimously sustained the objection of counsel for Dr. Kane. This board had no jurisdiction to consider the additional ground raised in the President's letter of August 12, 1981.

As has already been stated it was in September and October 1981 that the Dunlop Committee initially refused to consider President Kenny's additional charge (or ground for termination based on gross misconduct) and the Committee reported on February 22, 1982. The next significant development in this chronology occurred on March 2, 1982 when Dr. Kane filed his "opening brief" with the Ninth Circuit United States Court of Appeal. That brief differs from earlier documents in the court docket principally in that it makes allegations against Dean Larkin with respect to his testimony before the Dunlop Committee. Once again, it will be more convenient to consider this document in connection with the ground of termination to which it is relevant, if we are to consider it at all.

On March 3, 1982 Dr. Kane was interviewed on CBC Radio Evening News, broadcasting in the Vancouver area. The transcript of the broadcast was put into evidence before us. The only relevant statement by Dr. Kane was the following, in which he refers to the period of his suspension:

> During that period of time I have still been producing my work. That is going into publication. That work has been published, has been made available, has been disseminated. It has been used as the basis for billion dollar decision-making. And that is while I am doing my work under adversity, carrying the University on my shoulders, carrying unethical conduct on my shoulders!

In the hearing before us Dr. Kane agreed that he had made a statement to that effect. The interviewer closes the interview by stating:

> Kane is bitterly critical of U.B.C. Administration saying the whole problem stems from his original disciplinary hearing held more than two years ago. He said that hearing was held under dishonest circumstances and he is suing the civil court.

When questioned in the hearing before us on this statement Dr. Kane refused to acknowledge that he had made any such statement. The interviewer not having been called as a witness, no reliance can be placed on this secondhand information.

On April 1, 1982 Dr. Kane was interviewed on television by Jack Webster, a program that was repeated later that same night. A transcript of the Webster interview

was put in evidence before us and in the presence of Dr. Kane and Counsel for the University we viewed the videotape of the interview. Dr. Kane took no relevant objection to the transcription of the interview, although with his assistance we were able to correct a few words. The main thrust of the interview, from Dr. Kane's point of view, was an attempt to explain his work, his view of what a university is or should be and his notion of who owns grant money and how it should be used.

Given a tolerant interpretation by people who understand academic freedom most of what Dr. Kane said in the Webster interview is unobjectionable. As a public relations exercise, however, it must have been a disaster. Viewed by laymen with a less than generous disposition to universities or to academics in general Dr. Kane could well have been seen as an unworldly academic refusing to be held accountable either to his employer, the University, or to granting agencies that had entrusted him with considerable amounts of public money. Nevertheless, the main point to be made about the Webster interview is that poor public relations is no ground for the termination of a university professor. We make this point because the University's witnesses, specifically Dr. Lindsey and Dr. Scudder, suggested that many of Dr. Kane's colleagues were very upset by the bad impression he created by the opinions expressed in the Webster interview. We too disagree with much of what Dr. Kane said there, or at least with the way it was expressed, but we have concluded that statements other than those which constituted a direct attack on officers of the University or the Administration in general are irrelevant to these proceedings.

The only possibly relevant statements made in the course of the Webster interview were the following:

> The problem is Kenny doesn't understand what a University is (at p. 9).
>
> I feel the whole thing was created because the University Administration does not understand their job (at p. 10).
>
> Well, Dr. Kenny, on or about July 23, 1981, Dr. Kenny tried to institute proceedings to fire me because I used the courts. He also tried to institute firing proceedings against me because I was telling the truth (at p. 13).
>
> Webster: 'You're saying that any attempt to fire you on the grounds of your suing in the United States is a restriction of academic freedom'.
>
> Kane: 'It's worse than that it's a crime. It's called obstruction of justice' (at p. 13).
>
> I say, the University Administration does not know what a University is about. I say the University Administration does not know the work that I do and the particular kind of work that I do and they incompetently and incorrectly described it to the police. I say that the University Administration has acted improperly and unethically trying to cover up their own mistakes. They are accusing me of their failures. (at p. 14).

It will be recalled that on June 8, 1982 Dr. Kane's appeal against his criminal conviction was dismissed. On June 9 he was again interviewed by CBC Radio. The transcript of that interview is in evidence and it was acknowledged as accurate by Dr. Kane. The relevant parts of it are the following:

Kane: "How are you?"

Interviewer: "Fine, thank you. What do you think of Mr. Kenny's words with response to the decision by the Appeals Court yesterday, that he's still going to be looking at ways that you might not come back?"

Kane: "Mr. Kenny is going to have a lot to answer for at the meeting of the Board of Governors on July 6, 1982."

Interviewer: "What do you mean by a lot to answer for?"

Kane: "I think, and all the factual evidence will show, that everything in this confrontation can be traced to improprieties on the part of Douglas Kenny."

[Dr. Kane testified that he may have added "and his advisors"]

Interviewer: "Would you care to be specific?"

Kane: "Oh, yes, well, the Supreme Court of Canada has already ruled on the actions of Douglas Kenny and indicated that his actions were not consistent with the role of being a university president and he has, Mr. Kenny, has not been truthful to the public or to the community at large as to the other features of his activities and his truth, his conduct will be the subject of the enquiry at the hearing before the Board of Governors on July 6 th."

Under Article 10(2) (1) of the Conditions of Appointment Dr. Kane had the right to appeal the decision of the Dunlop Hearing Committee to the Board of Governors. Section 57(3) of the University Act R.S.B.C. 1979, c.419 appears to give him that right. In any event the Board of Governors heard Dr. Kane's appeal on July 6, 1982 and confirmed the Hearing Committee's decision.

Under date of July 30, 1982 the President, for the third time, initiated proceedings against Dr. Kane in accordance with Article 10.02 of the Conditions of Appointment.

Procedure Preceding the Hearings Before this Committee.

We have referred to previous procedures under Article 10.02 of the Agreement on Conditions of Appointment for Faculty between The University of British Columbia and the Faculty Association of British Columbia, dated May 1, 1980.

It is convenient here to quote Article 10.02 in full:

10.02 *Termination for Cause, and Suspension*

(a) The University may terminate an appointment for cause or may suspend a faculty member.

(b) When the President decides that appropriate grounds for the termination of an appointment for cause or for suspension exist, he shall inform the faculty member concerned.

(c) The President shall initiate proceedings for termination of an appointment for cause or for suspension by inviting the faculty member concerned to meet with him to discuss the matter in the presence of the Dean concerned, the Head of the faculty member's Department and a professor holding an appointment without term acceptable to both the President and the President of the Faculty Association. The President and the faculty member concerned shall each be entitled to bring counsel or other advisor to this meeting. Unless the faculty member objects, the Chairman of the Personnel Services Committee or his representative may attend the meeting.

(d) If, following this meeting, the President decides to proceed with the termination for cause or with the suspension, he shall inform the faculty member in writing of the grounds for the proposed termination or suspension.

(e) Within thirty (30) days after receipt of this notice the faculty member may request that a Hearing Committee be constituted.

(f) The Hearing Committee shall be composed of two faculty members holding appointments without term in Canadian universities, including The University of British Columbia, and a chairman holding an appointment without term in a Canadian university other than The University of British Columbia. One member shall be nominated by the President "and one by the faculty member concerned, provided that if either fails to nominate his member within fifteen (15) days of the request that the Committee be constituted, the other party may request the Chief Justice of the Supreme Court of British Columbia to appoint that member. The chairman shall be appointed by the two members of the Committee, provided that if they are unable to agree on a chairman within fifteen (15) days of their appointment, they shall request the said Chief Justice to appoint the chairman.

(g) The Hearing Committee shall be convened within thirty (30) days of its being constituted. All parties involved shall be permitted to appear before the Hearing Committee with counsel or other advisor at any stage in the procedure and shall have the right to cross-examine. Except by agreement the hearing shall be in private. The parties, their counsel or other advisors and, unless the faculty member objects, the Chairman of Personnel Services Committee or his

representative, shall be entitled to be present at all meetings of the Committee at which evidence is presented orally.

(h) In proceedings before the Hearing Committee the burden of proof shall be on the University.

(i) Subject to (g) above the Hearing Committee shall determine its own procedure.

(j) The Hearing Committee shall decide by majority vote if the charges are substantiated and, if so, whether they are serious enough to warrant termination or suspension.

(k) The Hearing Committee may decide that a lesser penalty than that proposed by the President is appropriate. It may also take into account action taken under (m) blow.

(l) The decision of the Hearing Committee shall be communicated to the President within sixty (60) days after the Committee is constituted. The decision of the Hearing Committee shall be final and binding, subject to any right of appeal under the Universities Act.

(m) Until the Hearing Committee's decision that the appointment of the faculty member concerned be terminated or that he be suspended is received by the President, the faculty member shall retain his position in the University and his salary but he may at his request or at the discretion of the President, be temporarily relieved of his duties.

In accordance with Article 10.02(c) the President sent Dr. Kane the following letter, dated July 30, 1982:

Dear Dr. Kane:

I enclose a copy of my letter to you of August 12th, 1981, to which is attached a copy of the memorandum to which I refer in my letter.

The additional ground described in the memorandum was referred to the Hearing Committee already then constituted under Section 10 of the Agreement on Conditions of Appointment to hear your appeal against my decision to recommend your dismissal to the Board of Governors.

The Hearing Committee, in its Award dated February 22nd, 1982, set out the reasons why it declined to hear this additional ground. It stated at page 11:

> "The result may be inconvenient although it was and is open to the University to pursue this additional ground in separate dismissal proceedings."

Since the Hearing Committee's Award, and while awaiting the outcome of your appeal to the Board of Governors from my decision to suspend you in accordance with its terms, I have considered whether separate dismissal proceedings should be instituted against you and I have concluded they should be.

My conclusion is based upon the matters referred to in the memorandum attached to this letter headed Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause.

These include the additional ground referred to the Hearing Committee last August as well as others which have, in my opinion, become appropriate to consider at this time.

Accordingly, I now initiate proceedings for the immediate termination of your appointment.

GROUNDS FOR THE TERMINATION OF THE APPOINTMENT OF DR. JULIUS KANE FOR CAUSE

In respect of Dr. Julius Kane, a member of the Faculty of the University of British Columbia, it is gross misconduct having regard to all the circumstances involving him and the University of British Columbia since 1977:

1. For Dr. Kane to make the allegations against the administration of the University of British Columbia and his colleagues set out in a document entitled "Press Release" which refers to allegations of a similar nature more extensively stated in documents available to the public, namely, the records of the United States District Court, Central District of California, Los Angeles, California.

2. For Dr. Kane to fail to substantiate such allegations when he had an opportunity and a duty to do so before a Hearing Committee constituted at his request to decide whether grounds determined to be appropriate by the President for the termination of his appointment were substantiated.

3. For Dr. Kane, subsequent to the Award of the said Hearing Committee, to allege that the evidence of a colleague before the Hearing Committee demonstrated fraud, amounted to abuse of process and was given in bad faith.

4. For Dr. Kane to make allegations of scandalous and scurrilous behaviour by members of the administration and faculty of the University of British Columbia after the Award of the Hearing Committee.

5. For Dr. Kane to interfere with the course of internal disciplinary

proceedings of the University of British Columbia by threatening process in a court of law if the said proceedings were not discontinued.

6. For Dr. Kane to pursue a course of conduct as set out in Grounds 1 to 5 above which is disruptive of the relationships which must prevail within the academic community.

The meeting referred to in Article 10.02(c) was held and under date of September 16, 1982 the President wrote Dr. Kane in accordance with paragraph (d). In his letter the President canvassed each of the grounds set out in the memorandum attached to his letter of July 30 but those specific comments are omitted here. They are quoted below in connection with our detailed consideration of each of the grounds for termination for gross misconduct. The general parts of the letter stated:

> Dear Dr. Kane:
>
> I have now considered the statements you made at the meeting held on Wednesday, September 8th, 1982 in the Board and Senate Room at the University for the purpose of obtaining your views on the memorandum entitled 'Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause' enclosed with my letter of July 30th, 1982. This meeting was held in accordance with the provisions of Section 10.02(c) of the Agreement on Conditions of Appointment for Faculty dated May 1, 1980.
>
> You acknowledged that you had received my letter of July 30th in which I set out the reason for our meeting and the rights you have under the Agreement on Conditions of Appointment.
>
> I asked you to comment on each of the grounds set out in the memorandum and I referred you to various documents (copies of which were given you) that related to these grounds.
>
> Some of these documents were copies of what you filed in proceedings you instituted in the District Court, Central District of California. Since you stated, on a number of occasions during our meeting, that these documents were privileged and that the proceedings I have initiated for the termination of your appointment constituted interference with your access to the courts, it is perhaps well I should repeat what I said to you at the meeting: no ground we discussed rests upon the fact that you commenced proceedings in California. The documents are referred to because they set out, in your own terms, views which you have repeated publicly on a number of occasions, one of the most recent being the meeting of the Board of Governors on July 6 of this year. You invited the press to attend that meeting. You reaffirmed these views at our meeting. The action you commenced in California has, in any event, been dismissed but even if it had not been dismissed, its existence would not relieve me of my responsibilities.

> I propose to review briefly the grounds set out in the memorandum in light of what you said at our meeting.
>
> ...
>
> In view of all the evidence placed before me at the meeting and your explanations with respect to that evidence, I have concluded that the grounds in the memorandum enclosed in my letter of July 30, 1982 constitute cause for the termination of your appointment. I have, therefore, decided to proceed with this termination. Accordingly, acting under the provisions of Section 10.02, paragraph (d), of the Agreement on Conditions of Appointment, I now inform you of my decision to recommend to the Board of Governors that your appointment at this University be terminated forthwith for cause, namely gross misconduct.

In accordance with Article 1.02(e) Dr. Kane requested that a Hearing Committee be constituted and this Committee came into being in accordance with paragraph (f).

Hearing Procedures.

Dr. Kane and Mr. Goldie, Counsel for the University, agreed at the outset of the hearings on the merits, on December 28, that this Hearing Committee was properly constituted in accordance with Article 10.02 of the Conditions of Appointment. It was also agreed that the six charges or grounds for dismissal for gross misconduct attached to the President's letter of July 30, 1982 and considered in his letter to Dr. Kane of September 16, 1982 were the only grounds justifying termination to be considered by this Hearing Committee.

The Hearing Committee has proceeded throughout on the basis that all involved have waived any failure to comply with time limits prior to our appointment. At the conclusion of the hearings on September 30 it was clearly agreed by Dr. Kane and Counsel for the University that all time limits, including that set out in Article 10.02(*l*) of the Conditions of Appointment were waived.

Prior to the hearing on the merits, held on December 28, 29 and 30 in the Senate and Board Room of the Old Administration Building at U.B.C., the Hearing Committee met with Dr. Kane and Mr. Cowper of Counsel for the University on December 6, 1982 to deal with certain preliminary procedural issues. In addition to reaching an agreement on dates and times we dealt with requests for production of documents by Dr. Kane, some requests for admission by him and certain "legal" issues that he put before us. Insofar as our determinations are of any continuing significance they are captured in the following passage from the Chairman's letter to the other two members of the Hearing Committee dated December 15, 1982:

> If the University chooses to attempt to prove the falsehood of the statements that Kane made, which led to the President's recommendation of termination, then if Professor Kane through cross examination discloses that any specific documents

are relevant we may rule that the University has to produce them.

None of the matters on Professor Kane's 'Requests for Admission' were specifically admitted. Mr. Cowper did agree to provide more particulars but any statement was not to be regarded as formal particulars preventing further fair elaboration upon the facts.

With respect to Professor Kane's document headed 'Pracipe' we decided:

1. That we had no jurisdiction to order restoration of salary.

2. That any argument based on estoppel en pais was rejected.

3. That the parole evidence rule had no direct relevance. That we would not consider staying our proceedings on the basis of any court action contemplated by Professor Kane, and furthermore that he had no basis to assume that we would stay our proceedings even if an action were commenced in British Columbia.

4. That there were no restrictions on the evidence that we would hear except those arising out of relevance and privilege.

The understanding was reached that if the University does not call evidence to show that the statements that Professor Kane made were false they will be assumed to be true for our purposes. If the University does call such evidence Professor Kane then must choose whether or not to controvert that evidence and if Professor Kane does call evidence the University will have an opportunity to rebut. More specifically it was decided that following opening statements the University will present its evidence first. Any move for dismissal by Professor Kane must be in the context of an election on his part not to call any evidence. Presuming that he does not elect to move for dismissal at that point, Professor Kane will then present his evidence, followed by rebuttal evidence by the University. Then the University will present its argument, followed by Professor Kane's argument and, finally, a strictly limited reply by the University.

Witnesses will be excluded prior to being called to give evidence. There will be no official reporter or taping of the proceedings although either of the parties is free to record the proceedings in any way they think fit.

It should be reiterated that Article 10.02(h) of the Conditions of Appointment provides,

In proceedings before the Hearing Committee the burden of proof shall be on the University.

Our task as Hearing Committee is that set out in paragraphs (j) and (k) of the

Conditions:

> (j) The Hearing Committee shall decide by majority vote if the charges are substantiated and, if so, whether they are serious enough to warrant termination or suspension.
>
> (k) The Hearing Committee may decide that a lesser penalty than that proposed by the President is appropriate...

We must decide whether the University has cause", as required by Article 10.02(a), to terminate Dr. Kane's appointment. According to Article 10.01,

> 'cause' means incompetence, gross misconduct, or refusal or repeated failure to carry out one's reasonable duties,...

The "cause" relied upon by the University here is "gross misconduct" and the President has charged Dr. Kane with gross misconduct on six grounds. The question for us is whether the University has discharged the burden of proving that Dr. Kane has been guilty of gross misconduct. In other words, the University had to satisfy this Hearing Committee that Dr. Kane in fact conducted himself as charged and that the conduct in question constituted gross misconduct as defined.

The Dunlop Committee also considered a number of "charges" or alleged grounds for a finding of gross misconduct on Dr. Kane's part. We agree with that Committee's conclusion that to establish "cause" the University need not prove all of the grounds. If any one of the University's alleged grounds for finding gross misconduct on Dr. Kane's part is borne out by the facts as we find them, and if we are satisfied that by itself it constitutes gross misconduct, the University will have discharged its burden of proof. On this point the Dunlop Committee stated, at pp. 65-6:

> Our unanimous view is that the University does not fail as to all charges if they fail to prove one or some of them. To require 100% success would impose an absurd and unintended interpretation on article (j). It might lead to the result that the University in a case similar to the present one, to be safe, would be required to commence six separate dismissal proceedings for each of the six charges in order to prevent failure in one resulting in failure in all. We therefore conclude that the proper and sensible reading of article (j) is that the Committee shall decide if each of the charges is substantiated and, if one, some or all are substantiated, the Committee shall go on to consider termination or suspension. ...
>
> It is arguable that there is only one charge or ground before this Committee, namely, gross misconduct, and that the failure to prove some of the specific grounds discussed above does not affect that central charge which remains before the Committee.

> On either view, the Committee can proceed to consider termination or suspension, despite the failure of the University to prove some of the specific charges discussed above.

We now turn to a consideration of each of the "Grounds for the Termination of Appointment of Dr. Julius Kane for Cause" set out in the memorandum attached to the President's letter of July 30, 1982 and elaborated upon in his letter of September 16.

Ground 1.

> It is gross misconduct having regard to all the circumstances involving him and the University of British Columbia since 1977:
>
> 1. For Dr. Kane to make the allegations against the administration of the University of British Columbia and his colleagues set out in a document entitled 'Press Release' which refers to allegations of a similar nature more extensively stated in documents available to the public, namely, the records of the United States District Court, Central District of California, Los Angeles, California.

In his letter of September 16 to Dr. Kane the President elaborated as follows:

> You make, in the "Press Release", allegations about Dean Larkin and the administration of the University. You admitted this "press release" was sent to a number of people in British Columbia and to the press and I have concluded that in doing this you intended to publicize allegations of the gravest kind against the University and Dean Larkin. To my knowledge these allegations are false and I have concluded that your attempt to publicize them by the distribution of this "press release" constitutes gross misconduct and I accordingly confirm that Ground 1 constitutes, in my view, ground for the termination of your appointment.

This ground of termination for gross misconduct is the most substantial of the six put forward by the University. It is the basis for our conclusion that the University has discharged its burden of proof; that Dr. Kane has, in fact, been guilty of gross misconduct and that it is serious enough to warrant termination. In reaching our conclusion on Ground 1 we have taken account of a number of considerations that bear generally on the grounds of gross misconduct with which Dr. Kane is charged. They can usefully be set out here.

The inescapable difficulty with the University's termination of Dr. Kane on Ground 1., and the other grounds put forward here, is that he is being terminated for what he said and in the University context, perhaps more than any other, limitations on a person's freedom to say what he or she wishes are matters of the most extreme gravity.

Whether a professor at The University of British Columbia is to be regarded as an employee or, because of the statutory basis for his or her appointment, an office

holder (section 56 of the University Act, R.S.B.C. c.419, s. 56 s.57 appears to differentiate between "members of the teaching...staffs and...employees of the University"), there is no room to doubt that he or she owes the University a general duty to "serve honestly and faithfully". (Christie, Employment Law in Canada (1980), at p. 290). This duty has been recognized by arbitrators acting under collective agreements in both the private and public sectors. Its most relevant articulation has been by Professor Weiler as sole arbitrator in Ministry of Attorney-General, Corrections Branch and British Columbia Government Employees Union (1931), 3 L.A.C. (3d) 140 at p. 162:

> What is clear is that an employee will be in breach of the duty of fidelity owed to his employer if he makes false public statements when the employee either knows them to be false or is reckless as to the truth of the statements.

The immediate question is whether such a breach of the normal employee's duty to his employer can constitute "gross misconduct" by a member of The University of British Columbia teaching staff.

There is nothing explicit in the Conditions of Appointment which elaborates the term "gross misconduct". However, both Counsel for the University and Dr. Kane referred to the "Guidelines Concerning Professional Ethics" prepared by the U.B.C. Faculty Association for the guidance of its members and found in the Faculty Handbook commencing at p. G-8. Counsel for the University referred to item IV.2 of the Guidelines which states:

> They [faculty members] should refrain from denigration of the character and confidence of their colleagues. When presenting a professional judgment on a colleague at the request of an appropriate university committee or authority (e.g. a committee dealing with appointments, tenure, dismissal or research grants) or in any other forum, they have the obligation both to the colleague and to the University to be fair and objective [emphasis added].

Dr. Kane, on the other hand, pointed to item IV.3 in the Guidelines:

> They [faculty members] have an obligation to abide by the rules and regulations established for the orderly conduct of the affairs of the University, provided that these rules and regulations do not infringe the academic freedom of faculty and students and the principles of ethical conduct set forth in this statement or in codes established by recognized professional or academic societies. At the same time, they have a responsibility to seek reforms which would, in their judgment, improve the University.

He also pointed to item VI.1:

> In statements outside the University, they retain the responsibility of seeking the truth and of stating it as they see it. ... [emphasis added].

These Guidelines are nowhere explicitly made part of Dr. Kane's appointment or conditions of employment. Nevertheless, in attempting to flesh out the undefined standard of "gross misconduct" that we must apply here, the Guidelines are a legitimate source because they represent an apparent consensus on proper conduct within the U.B.C. Faculty. In the end, of course, the "Guidelines Concerning Professional Ethics" may provide no clear answer where there is a tension between, on the one hand, seeking reforms that would, in the opinion of the faculty member, improve the University or stating the truth as the faculty member sees it and, on the other, denigrating the character and confidence of colleagues. Whether Dr. Kane was seeking reforms that would in his judgment improve the University or stating the truth as he saw it are questions about his state of mind which, ultimately, nobody can know but himself. They are, nevertheless, questions of fact upon which we can make findings by inference from objective facts before us.

Dr. Kane's claim of justification in the release of the "Press Release" in the early summer of 1981 is an appeal to academic freedom. Academic freedom is a concept to be cherished at The University of British Columbia as it is at any university worthy of the name but it is not a concept that admits of clear definition, however strong the consensus as to its core. In our opinion it is not appropriate for this Hearing Committee to rule that any one or other standard definition of academic freedom delineates the limits of "gross misconduct" as cause for termination under The U.B.C. Conditions of Appointment, but to test the validity of Dr. Kane's claim that the statements he made in his "Press Release" were an exercise of academic freedom we may use the "Model Clause on Academic Freedom for Collective Agreements and Faculty Handbooks" approved by the Council of the Canadian Association of University Teachers in May of 1977:

> 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 duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.

Before setting the facts relied upon by the University under Ground 1. against the standard of gross misconduct elaborated by reference to these external considerations

we must deal with Dr. Kane's claim that the California court documents and the "Press Release" are privileged in the legal sense that they may not be relied upon by the University to establish gross misconduct on his part. This claim of privilege was the focus of the legal argument before us, an argument which did not assist us to any easy answers. This may have been because Dr. Kane was unrepresented by legal counsel, but more probably it was because there are legal issues involved upon which there appear to be no precedents.

In the first place "privilege" as a defence applies in actions for defamation. We know of no case in which it has been raised in an action for wrongful dismissal or proceedings such as these where the issue is whether there was cause for termination. However, in Christie and Mullan, "Canadian Academic Tenure and Employment: An Uncertain Future?" (1982) 7 Dalhousie Law Journal 72 (jointly authored by the chairman of this Hearing Committee) the following appears at p. 100:

> To some, academic freedom means the right to think what they wish to think and to write and to say, in the classroom and elsewhere, what they think to be true, within the limits of the laws of libel and slander, without fear that their employment situations will be adversely affected. [emphasis added].

We are satisfied that no concept of academic freedom which could be legitimately invoked here would in fact countenance unlawful defamation (that is libel or slander) in denigration of colleagues or the University itself. If gross misconduct under the U.B.C. Conditions of Appointment is delineated by the concept of academic freedom and if that concept in turn is limited by the laws of libel and slander then the defence of privilege under those laws is directly relevant here. We therefore turn to a consideration of whether Dr. Kane's statements in the California court documents or in the "Press Release" could be considered to be privileged. We leave unresolved the question of whether the defence of privilege has any direct application in an action for wrongful dismissal or other proceedings in which the termination of employment is sought to be justified.

> The general rule is that
>
> no action will lie for defamatory statements, whether oral or written, made in the course of judicial proceedings before a court of justice or a tribunal exercising functions equivalent to those on an established court of justice. (Gatley on Libel and Slander (7th ed. - 1974) para. 383)

However, neither the leading English text, Gatley on Libel and Slander, nor the only Canadian text, Williams, The Law of Defamation (1976), addresses the question of whether this absolute privilege applies in respect of statements, written or oral, made in the course of foreign judicial proceedings. Counsel for the University appeared to concede that the California court documents themselves were privileged but submitted that the reference to them in Dr. Kane's "Press Release" amounted to a waiver of privilege. Further, he submitted that the fact that the binder of California court

documents was put before us by agreement constituted waiver of privilege.

With respect, we are unable to accept either of the submissions by Counsel for the University as waiver of privilege. Counsel's arguments and the authority which he submitted in support of them, Rogers v. Hunter (1981), 34 B.C.L.R. 206 (B.C.S.C), relate to a quite different concept of privilege, that of solicitor-client privilege. Solicitor-client privilege is an evidentiary doctrine. Because it is concerned with admission of evidence it can be waived by the person for whose protection the doctrine exists. Privilege as a defence in a defamation action is a quite different, and apparently unrelated, doctrine. It is a rule of law which precludes reliance on written statements made in the course of judicial proceedings in a defamation action and "is founded on public policy which requires that...a party in preferring...a legal proceeding...shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel". (Gatley on Libel and Slander (7th ed. - 1974) para. 384). We are left, therefore, with the concession by Counsel for the University that the California court documents are privileged, notwithstanding the lack of authority with respect to the proceedings of a foreign court.

Counsel for the University referred us to one case, which, while it does not deal directly with the issue of whether privilege applies to the proceedings in a foreign court, is very useful. In Webb v. Times Publishing Co. Ltd., [1960] 2 Q.B. 535 the question was whether a report in an English newspaper of a murder trial in a Swiss court was privileged. On the face of it the case is involved not with the absolute privilege attaching to court proceedings but with the qualified privilege attaching to reports of such proceedings, to which we turn below in considering whether Dr. Kane's "News Release" was privileged, as he claimed. However, the Webb case is of some use on the issue of absolute privilege because Mr. Justice Pearson was forced by lack of precedent to base his decision on the underlying reasons justifying the qualified privilege and to decide whether those reasons applied to the reports of foreign judicial proceedings. By the same token the answer to the legal question whether absolute privilege applies to statements made in foreign judicial proceedings must be sought in the reason for that privilege.

Can it be said that Canadian public policy requires that a party commencing an action in California must be able to do so "with his mind uninfluenced by the fear of an action for defamation or prosecution for libel" in this country? Obviously, we are not the appropriate body to answer that question definitively but the answer, as between countries with broadly similar systems and traditions, would appear to be "yes". Remembering that Counsel for the University conceded that the California court documents were "privileged" and given our conclusion with respect to Dr. Kane's "Press Release", to which we now turn, we have proceeded on the assumption that the University cannot rely on the California court documents themselves to establish gross misconduct on the part of Dr. Kane.

The "Press Release" which Dr. Kane distributed in the early summer of 1981 is quite a different matter from the California court documents. Dr. Kane admitted that it

was circulated widely, including to the press, although there is no evidence that it was published in any but a legal sense. It was, however, mailed to the Minister of Justice, the Attorney-General of British Columbia, the R.C.M.P., the Chancellor of the University and Members of the Board of Governors. Clearly, the "Press Release" must be regarded as having been disseminated to the public by Dr. Kane. He claimed for it the qualified privilege which protects reports of judicial proceedings. Section 3 of the Libel and Slander Act, R.S.B.C. 1979, c.234 provides:

> 3. (1) A fair and accurate report in a public newspaper or other periodical publication or in a broadcast of proceedings publicly heard before a court exercising judicial authority if published contemporaneously with the proceedings, is privileged.

The statute does not oust the common law privilege which long predates it and "this common law privilege is not confined to reports in a newspaper. It attaches to reports in a pamphlet or in a broadcast or any form of publication" (Gatley on Libel and Slander (7th ed. - 1974), para. 613). However, at common law as under the statute it is a qualified privilege in that the report must be "fair and accurate" and "without malice". (Id., quoting Lord Esher M.R. in Kimber v. Press Association, [1893] 1 Q.B. at p. 68). In our opinion for the reasons we set out below, Dr. Kane's "Press Release" was not fair or accurate and therefore cannot be considered to be privileged.

We reiterate that we are not here concerned with whether an action in defamation would lie. Probably it would, but the question for us is whether the dissemination by Dr. Kane of the statements in the "Press Release" constituted gross misconduct. In satisfying ourselves that those statements were defamatory and would not be protected by the defence of privilege we have satisfied ourselves that Dr. Kane went beyond the exercise of academic freedom as that concept can reasonably be considered to limit the definition of gross misconduct under the Conditions of Appointment.

The C.A.U.T. model clause on academic freedom states that academic members of the community are entitled to freedom to criticize the University but it ties academic freedom to teaching and research and scholarship. It is impossible to see anything of "an honest search for knowledge" in Dr. Kane's "Press Release". Quite apart from those apparent contextual limitations on the "right to criticize the University" asserted by the C.A.U.T. model clause we are satisfied that no right to criticize the University which exists at The University of British Columbia extends to making defamation acceptable.

We now turn to a detailed consideration of the text of the "Press Release", which is set out above, to substantiate our conclusions that it is not fair and accurate and that it goes beyond the limits of academic freedom and constitutes gross misconduct.

At the end of the first paragraph of the "Press Release" the following appears:

Kane describes a series of frauds that began in California and New York when

> Dean Peter Larkin made bogus representations to Kane and the FORD FOUNDATION, concerning unique inter-disciplinary work Larkin wished to see done at the University of British Columbia.

Fraud is a crime, so this statement is clearly defamatory unless it is true. Additionally, the allegation that the Dean of Graduate Studies made false representations to a major funding foundation is obviously intentionally damaging both to Dean Larkin and the University. There is no evidence before us to support the suggestion that any representations made by Dean Larkin to Dr. Kane or the Ford Foundation were "bogus" or that he was engaged in any other fraud.

Dean Larkin testified with respect to his negotiations with Dr. Kane when he was first hired at the University and with respect to the application to the Ford Foundation made around that time, The only rationale for Dr. Kane's assertion of fraud and misrepresentation appears to be his submission that he was doing the same kinds of work in 1977 that he was doing when he was first hired. Therefore, he says, if what he was doing when the University initially suspended him for three months and then for eighteen months was "non-U.B.C. work" and therefore illegitimate so must his work have been illegitimate at the time he was first hired. Dean Larkin, he is suggesting, misrepresented to him that he would be allowed to do such work throughout his time at U.B.C. In stating Dr. Kane's position this way we have put what seems to us to be the fairest possible interpretation on it. However, even in this perspective there is simply no evidence to support the conclusion that Dr. Larkin told Dr. Kane to do the things for which he was subsequently disciplined by the University and convicted criminally.

Dr. Kane's three month suspension followed upon an uncontested conclusion with respect to aspects of his work supported by the N.R.C. grant and the Dunlop Committee's report followed upon a careful consideration of his work in connection with the provincial Department of Labour grant. There is nothing before us to suggest that those conclusions were incorrect.

The "Press Release" goes on to state that in addition in his California action Kane alleges

> Kenny's administration has been well aware of these frauds, thefts, perjuries of Francis and Wilson and have ratified their actions by making full, self-serving uses of these frauds, fabrications, and perjuries.

There was no evidence before us in relation to, and it is not within our jurisdiction to deal with, Dr. Kane's allegations against Bruce Wilson and Arlene Francis, the two students whom he hired in the summer of 1976 and who, apparently, informed the police of his activities. Dr. Kane testified that the students stole from him and perjured themselves. The University offered no evidence on these points. Even if we assume for purposes of these proceedings that the students did commit fraud, theft and perjury, the testimony of Dr. Larkin makes it clear that the University had nothing whatever to do with any such activities by Wilson and Francis. Nothing in Dr. Kane's testimony has

convinced us otherwise. He would have us believe that when Dr. Larkin summoned him in February of 1977 at the commencement of his inquiry that he, Dean Larkin, was acting for the police. There was no suggestion of any connection between Dean Larkin and the students. On the evidence we are satisfied that Dean Larkin was simply reacting to the administration's concern that the R.C.M.P. had received complaints alleging that Dr. Kane was making improper use of the University's computer and his N.R.C. grant. On the evidence before us we must conclude that the course of events in early 1977 is accurately represented by the memorandum which the President sent to all members of the Faculty on September 20, 1977. It stated as follows:

> In December 1976 it came to my attention that the R.C.M.P. had received complaints alleging, among other things, that Dr. Kane had been making improper use of the University's computer and of his N.R.C. grant. Thereupon, I requested Vice-President Shaw to have the matter investigated.
>
> This investigation proceeded during January and February. Those principally involved in it were, in the early stages, Dr. Shaw and Dr. Kennedy, the Director of the Computer Centre, and, later, Dean Larkin of the Faculty of Graduate Studies and Dr. Wellington, the Director of the Institute of Animal Resource Ecology (Dr. Kane is attached mainly to this Institute). By the middle of February, some of the evidence collected seemed to support the allegations made against Dr. Kane, He was therefore interviewed by Dr. Shaw, Dean Larkin, and Dr. Wellington and asked to explain matters arising out of this evidence. Thereafter Dean Larkin had a number of discussions with Dr. Kane on the subject. Dr. Kane also authorized me to examine the contents of his computer files and this was subsequently done in his presence.
>
> On February 18, Dean Larkin and Dean Volkoff in an interview with Dr. Kane informed him that Dr. Wellington and Dr. Acton, the Acting Head of the Department of Zoology (Dr. Kane is also a member of this Department), had recommended that he be dismissed, and that they concurred with this recommendation. On February 21, they sent me such a recommendation.
>
> I then dealt with the matter as I was required to do so by Section 10.03(a) of the Agreement on Conditions of Appointment between the University and the Faculty Association. I invited Dr. Kane to meet with me to discuss the recommendation of Dean Larkin and Dean Volkoff in the presence of these two Deans and of the Heads of the two Departments concerned, of the chairman of the Faculty Association's Personnel Services Committee, and of a professor holding an appointment without term acceptable to Dr. Kane and the two Deans. This meeting took place on March 1. In addition to those listed, Dr. Kane's lawyer and Dr. Bourne, my legal adviser, were present. At this meeting Dr. Kane and his lawyer had full opportunity to meet the case against him. Furthermore, after Dr. Kane and his lawyer had withdrawn, I had the benefit of a discussion of the problem with those present including Dr. J. G. Foulks, the chairman of the Personnel Services Committee, and Dr. R.A.H. Robson, the tenured professor

> chosen by Dr. Kane and acceptable to the Deans.
>
> After considering the representations of Dr. Kane and his lawyer and the subsequent discussion, the Heads of the Departments and the Deans concerned decided that their previous recommendation of dismissal was too severe and that lesser disciplinary action was appropriate. Consequently, they wrote me a letter withdrawing their earlier recommendation and recommending instead that Dr. Kane be suspended for three months, and that he should be required to make full financial restitution to the University for all charges relating to his private business.
>
> Taking into account the evidence before me and all the circumstances of the case, I concluded that the recommended suspension and financial restitution were the appropriate steps for me to take. Accordingly, acting under the provisions of Section 58 of the Universities Act, I suspended Dr. Kane and so informed the Board of Governors.

On these facts it was not fair or accurate to say that "Kenny's administration" ratified or made full, self-serving uses of anybody's "fraud, thefts, and perjuries" or fabrications. Given the fact that fraud, theft and perjury are all criminal offences this statement too is defamatory.

> The "Press Release" further states that Kane's California court information
>
> described a series of explicit tamperings with evidence on the part of officials, including the crucial 'loss' of some Department of Labour forms and a computer 'dump' obtained from Pres. Kenny under conditions of 'fraud, duress, threat, and intimidation'.

In the first place this is not a fair or accurate statement in that it quite clearly implies that the "officials" described in the information as tampering with evidence are University officials. In fact the Information suggests that government officials were guilty of those acts.

Reference to "conditions of 'fraud, duress, threat, and intimidation' " is again a reference to Dr. Kane's thesis that Dean Larkin misrepresented himself as being involved in an academic investigation when he first asked Dr. Kane for access to his computer file in February of 1977. In fact, as we have found, that was not a misrepresentation by Dean Larkin. The computer dump was obtained by Dean Larkin on the condition that it be kept confidential to people directly involved in the academic investigation, but it was subpoenaed, leaving Dean Larkin no choice but to put it before the Court. Dr. Kane suggested that Dean Larkin must have known that that would happen and therefore acted fraudulently in suggesting that the dump would be kept confidential. The evidence simply does not support such a suggestion of fraud.

Because Dean Larkin was Dr. Kane's superior in the academic hierarchy there

may have been some element of duress and, possibly, threat in the sense of a threat of academic discipline if Dean Larkin's request for the computer dump was not complied with. That, however, does not amount to fraud or intimidation, unless the latter term is used in a very extended sense.

The "Press Release" goes on:

> In 1981, the Supreme Court of Canada ruled in Kane's favour and in his written decision, Justice Dickson declared:
>
> > Administrative officers of the University have been lax in discharging their duties to such a degree as to mislead Dr. Kane... - 3 WWR at p. 132.

While there is nothing defamatory in this passage it is patently intentionally misleading and therefore anything but "fair and accurate". In his decision, at the page referred to, Dickson, J. speaking for a majority of the Supreme Court of Canada, sets out the facts leading up to Dr. Kane's initial three months suspension. His Lordship states:

> Following a meeting called by the president of the university, Dr. Douglas T. Kenny, at which Dr. Kane and his counsel were present, the deans recommended that, instead of terminating Dr. Kane's appointment, he should be suspended without salary for three months and be required to make financial restitution to the university. The deans were influenced by the argument that the irregular procedures followed by Dr. Kane were the result of a misunderstanding rather than a deliberate attempt to deceive, and that administrative officers of the university may have been lax in discharging their duties to such a degree as to mislead Dr. Kane as to the proper procedures to be followed.

Two things are readily apparent in his "Press Release". First, Dr. Kane has deliberately distorted the context of Mr. Justice Dickson's statement to make it appear as if it were a finding of laxity by the Court rather than attempt by the U.B.C. deans to be fair to Dr. Kane. Second, the passage quoted in the "Press Release" omits the word "may", with a considerable distortion of meaning. In the context we do not think these were unintentional distortions of the meaning of what the Supreme Court of Canada was saying. Clearly, in this and other aspects of its "reportage" the "Press Release" was not intended to be fair and accurate.

In its penultimate paragraph the "Press Release" states "in his affidavit Kane targets Dean Larkin as the prime mover of a series of frauds, deceptions, and evasions". We have already addressed ourselves to the question of fraud on the part of Dean Larkin, in the context of Dr. Kane's original hiring and in the context of the academic investigation into Dr. Kane's wrongdoings in February of 1977. There was no fraud by Dean Larkin. Dr. Kane's statements are therefore untrue, undoubtedly defamatory, and beyond the limits of academic freedom.

Finally, in the same paragraph the "Press Release" states "In British Columbia,

both Judges Campbell and MacDonnel have refused to admit the notes and memoranda of Larkin's as evidence". Like the quotation from the Supreme Court of Canada judgment this statement is not so much defamatory as an indication of a total lack of any intention to be fair or accurate in the "Press Release". Dean Larkin's testimony based on his notes of what Dr. Kane said to him when he was interviewed in February of 1977 were held to be inadmissible in Dr. Kane's criminal trial because the evidence constituted hearsay statements which had been made to a person in authority and were therefore not admissible as statements against interest. Refusal to admit the testimony for that reason could not conceivably be considered to have reflected badly on Dean Larkin and yet the "Press Release" statement that Dean Larkin's evidence was not admitted is coupled intentionally with the allegation that Dean Larkin was the prime mover of a series of frauds, deceptions and evasions.

In sum, the "Press Release" was not fair and accurate. By no stretch could it be considered to be a privileged document in a defamation action against Dr. Kane by Dean Larkin or by the University. The issue before us is whether these statements constituted gross misconduct which gave the University cause for the termination of Dr. Kane. We repeat that to conclude that anything said can constitute cause for the termination of a University faculty member is a very grave matter. Academic freedom must be cherished, but in our opinion Dr. Kane's academic freedom did not permit him to defame either his colleague, Dean Larkin, or the University Administration. Clearly he did so in the Press Release in a way potentially harmful not just to Dean Larkin and President Kenny but to the University as an institution which must maintain the confidence of its faculty, funding agencies and the public at large. In our opinion the "Press Release" in itself constituted gross misconduct and gave the University cause for termination quite apart from any of the other five grounds, to which we now turn.

Ground 2.

The second of the grounds set out in the memorandum attached to the President's letter of July 30, 1982 states:

> It is gross misconduct having regard to all the circumstances involving him and The University of British Columbia since 1977:
>
> 2 for Dr. Kane to fail to substantiate such allegations [those set out in the "Press Release"] when he had an opportunity and a duty to do so before a Hearing Committee constituted at his request to decide whether grounds determined to be appropriate by the President for the termination of his appointment were substantiated.

In his letter of September 16 which followed upon their meeting of September 8, 1982 the President stated to Dr. Kane, with respect to Ground 2:

> In the fall of 1980 you requested that a Hearing Committee be constituted under the terms of the Agreement on Conditions of Appointment. That Committee met

> in September and October 1981 to hear your appeal against my decision to recommend termination of your appointment. The allegations you have been making about the University Administration and Dean Larkin, such as set out in the "Press Release" were, if true, relevant to the matters before the Hearing Committee. You gave me no satisfactory explanation why you did not seek to substantiate these allegations before the Hearing Committee. I consider you had a duty to do so at the earliest possible moment or to withdraw them. You have done neither and, after considering what you said at our meeting, I confirm that your failure to bring evidence before the Hearing Committee of these allegations (if such exists) was gross misconduct and I confirm that this ground, in my view, constitutes a valid reason for termination of your appointment.

Before us Dr. Kane objected that this ground of alleged gross misconduct on his part consisted of holding him responsible for failing to pursue before the Dunlop Committee a matter which that Committee had ruled it had no jurisdiction over. It is true that the Dunlop Committee reached that conclusion because Dr. Kane's counsel objected to the Committee dealing with the "Press Release" as an additional ground for termination in proceedings which had been started before dissemination of the "Press Release". Nevertheless, as the passage that we have already quoted from the Dunlop Committee makes clear, that Committee clearly ruled that it "had no jurisdiction to consider the additional ground..." (at p. 12). In our opinion Dr. Kane can not be faulted for failing to pursue before the Dunlop Committee a matter over which the Committee held it had no jurisdiction.

Ground 3.

In the memorandum attached to the President's letter of July 30, 1982 the third of the "Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause" is that:

> It is gross misconduct having regard to all the circumstances involving him and the University of British Columbia since 1977:
>
> 3. For Dr. Kane, subsequent to the Award of the [Dunlop] Hearing Committee, to allege that the evidence of a colleague before the Hearing Committee demonstrated fraud, amounted to abuse of process and was given in bad faith.

In his letter of September 16 to Dr. Kane, following upon their meeting of September 8, the President stated with respect to Ground 3:

> I referred you to a brief you filed in the California Court after the Award of the Hearing Committee was made public. You confirmed the date of this document and that in it you referred to the evidence of Dean Larkin before the Hearing Committee as "demonstrating" fraud. You repeated the substance of that statement to me and you gave me no explanation that excused your conduct in

> attacking a colleague's reputation in this manner and I confirm this ground, in my opinion, warrants my recommendation that your appointment be terminated for gross misconduct.

A document entitled "Opening Brief" which Dr. Kane filed with the Ninth Circuit United States Court of Appeals is in evidence before us by agreement. On page 10 the following appears:

> Larkin went to the Ford Foundation because he wanted to do work that was outside regimen of UBC's activities. He wanted a half million to do 'non-UBC' work. There is no dispute that he was instrumental in hiring Kane to do 'non-UBC' work. There is no doubt but that at the Salk Institute Kane and Larkin discussed this 'non-UBC' work and that Kane received Larkin's full approval. There is no doubt but that Kane did this 'non-UBC' work in California for a full year on full salary. Then, relying on Larkin's inducements and representations, Kane moved his family and profession to Vancouver where he continued this 'non-UBC' work and obtained a measure of international recognition for its development. The panel was unanimous in the observation that Kane's record was 'unblemished' in all his contacts with UBC prior to 1976. However, in 1977 [after UBC has spent Ford's half-million] Kane is suddenly brought to task for doing 'non-UBC' work. And who is an author of these charges? Larkin. From 1977 to the present day, Kane fights successfully -- going even to the Supreme Court of Canada -- to maintain his title of professor, his honor, his dignity. Kane prevails. But Larkin insists in invoking process. He insists on giving testimony to a hearing panel about Kane's 'non-UBC' work and tells them nothing about UBC's representations to the Ford Foundation. Weary in his grief, Kane does not even attend this diatrabe. His counsel, D. Roberts Esq. responds to the invecetive. Larkin misrepresents Kane's duties. Larkin cannot even describe Kane's technical work correctly. Despite all this abuse before the hearing committee, Kane prevails and his title is sustained.
>
> Has ever fraud or abuse of process been more evident?

We will not repeat what has already been said in connection with Ground 1. relating to the truth of the allegation of fraud against Dean Larkin. On the evidence before us the University has discharged the burden of proof upon it to show that the charges of fraud Dr. Kane made against Dean Larkin in the "Press Release" were not true and were, therefore, probably defamatory. If we were entitled to take account of statements contained in the California court documents, the same would undoubtedly be true of the statement that Dean Larkin misrepresented Dr. Kane's duties to the Dunlop Committee and was guilty of fraud or abuse of process. However, as we have explained in connection with Ground 1., privilege as a defence in an action for defamation was not and could not be waived by Dr. Kane agreeing that the California court documents are properly in evidence before us. While it is a difficult jurisdiction for us to exercise, we have concluded that statements made in the California court proceedings are to be treated as privileged.

While this is not an action in defamation, we are not prepared to find that statements which, because they are privileged, could not found an action in defamation can be invoked as constituting gross misconduct under Article 10.02 of the Conditions of Appointment. The C.A.U.T. Model Clause on Academic Freedom states that "academic staff shall not be hindered or impeded in any way by the University...from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights". We reiterate that this document is not binding upon us in any way and we acknowledge that commencement of an action in the American courts is in no sense the legal right of a Canadian citizen. Nevertheless, to hold that gross misconduct and cause for termination may be found in the making of statements that are legally privileged, in the sense that they were made in a context which affords a defence in an action for defamation, would be to unduly infringe on academic freedom as it should be understood at The University of British Columbia.

According to the President's letter of September 16, 1982 and other corroborating evidence introduced at the hearing, Dr. Kane repeated at the September 8 meeting with the President the substance of his allegation in the California court documents about Dean Larkin's testimony to the Dunlop Committee, but that does not help the University's case. That meeting was part of the proceedings under Article 10.02 of the Conditions of Appointment which culminated in the hearings before us. If the University did not have a basis for Ground 3 at the commencement of the proceedings the proceedings themselves could not provide that base. This conclusion is in accord with the reasoning of the Dunlop Committee which lead it to the conclusion that an additional ground for termination could not be added after proceedings leading to their appointment had commenced. See pp. 8-13 of the Report of the Hearing Committee, especially at p. 10.

In conclusion with respect to Ground 3, the University has not discharged its burden of proof because we are not prepared to rely on the California court documents in finding gross misconduct constituting cause for termination of Dr. Kane.

Ground 4.

In the memorandum attached to his letter of July 30 the President states that the fourth of the "Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause" is that:

> It is gross misconduct having regard to all the circumstances involving him and The University of British Columbia since 1977:
>
> 4. For Dr. Kane to make allegations of scandalous and scurrilous behaviour by members of the Administration and Faculty of the University of British Columbia after the Award of the Hearing Committee.

In his letter of September 16 to Dr. Kane, following their meeting of September 8, the President states with regard to Ground 4:

> I provided you with transcripts of radio and television interviews you participated in after the Award of the Hearing Committee. You stated these transcripts sounded familiar to you. You said you could not be responsible for comments made by the interviewers and I accept this. Nevertheless, it appears that you stated in one interview that I had been untruthful and in yet another that the statements made in the California Court documents were true. You also appear to have stated that my conduct would be the subject of an inquiry before the Board of Governors and, again, that I had not told the truth. You have provided me with no satisfactory reason why these statements do not constitute gross misconduct on your part and I confirm that this ground also constitutes grounds for termination of your appointment.

Determination of whether the University has discharged the burden of proof with respect to this ground of gross misconduct requires us to examine the evidence of the two radio interviews and the television interview with Jack Webster described above.

In the C.B.C. radio interview of March 3, 1982 the only direct statement by Dr. Kane to which exception could be taken is that in which he stated that his work has been the basis for billion dollar decision-making and went on,

> While I am doing my work under adversity, carrying the University on my shoulders, carrying unethical conduct on my shoulders!

While the implication was obviously open that the University had been treating him unethically we could not conclude that such a statement constitutes gross misconduct.

The second C.B.C. radio interview, the text of which is set out above, contained more objectionable statements. While it was not, in our opinion, gross misconduct for Dr. Kane to state that "Mr. Kenny is going to have a lot to answer for" to the Board of Governors nor for him to state that "The Supreme Court of Canada has already ruled on the actions of Douglas Kenny and indicated that his actions were not consistent with the role of being a university president", both of those statements distorted the truth. The Supreme Court of Canada did find that, in the context of their initial decision to suspend Dr. Kane, the Board of Governors breached the rules of natural justice by discussing Dr. Kane's case with Dr. Kenny after Dr. Kane and his counsel had withdrawn, but that finding by the Court was nothing like as critical of President Kenny as Dr. Kane's statement would indicate. Similarly, while President Kenny, predictably, was going to have to explain his decision to terminate Dr. Kane at the meeting of the Board of Governors on July 6, 1982 he was not going to "have a lot to answer for" in the common understanding of that phrase. Even more obviously, his conduct would not "be the subject of the inquiry at the hearing before the Board of Governors on July 6" in the sense of the meaning that the public probably would have taken from Dr. Kane's words.

Those three passages from the second C.B.C. radio interview demonstrate clearly that Dr. Kane was being less than straightforward in his fight with President Kenny and the University. They do, however, contain enough literal truth that, standing

alone, we would not make them the basis for a finding of gross misconduct amounting to cause for termination.

More seriously, Dr. Kane also stated in that radio interview,

> I think, and all the factual evidence will show, that everything in this confrontation can be traced to improprieties on the part of Douglas Kenny [or Douglas Kenny and his advisers].

This is an explicit charge of "improprieties", a charge which on the evidence led by the University is untrue and which Dr. Kane has not substantiated by his evidence before us. This statement cannot be condoned. Once again, standing alone, it would not constitute gross misconduct justifying discharge but, in light of our conclusion in respect of Ground 1., it does not stand alone.

Most seriously, in the second C.B.C. radio interview Dr. Kane stated:

we have given serious consideration. The first is where Dr. Kane stated,

> On or about July 23, 1981, Dr. Kenny tried to institute proceedings to fire me because I used the courts. He also tried to institute firing proceedings against me because I was telling the truth.

These are evidently references to the President's attempt to add the "Press Release" as an additional ground for dismissal before the Dunlop Hearing Committee. Once again the facts are distorted by Dr. Kane. Dr. Kenny had attempted to add to already existing firing proceedings a charge that Dr. Kane had defamed Dean Larkin. This misrepresentation cannot be condoned but we doubt strongly that standing alone it would constitute gross misconduct.

The second seriously objectionable passage was where Dr. Kane stated:

> I say the University Administration does not know what a university is about. I say the University Administration does not know the work that I do and the particular kind of work that I do and they incompetently and incorrectly described it to the police. I say that the University Administration has acted improperly and unethically of trying to cover up their mistakes. They are accusing me of their failures.

The statement that the University Administration does not know what a university is about can, in our opinion, be treated as a statement of disagreement within the limits of academic freedom. The same is true of the statement that the University Administration does not know the kinds of work a particular professor does. The allegation that they incompetently and incorrectly described the professor's work to the police probably does not carry the matter much further, unless there is the implication that the incorrect description was intentional. That, of course, appears to be the implication of Dr. Kane

going on to say that the University Administration acted improperly and unethically. Those statements would appear to go beyond the limits of academic freedom and may well amount to gross misconduct although, once again, we do not need to decide whether standing alone they would constitute cause for termination.

In summary with respect to Ground 4, because it is unnecessary for us to decide the question, we are not prepared to find that the statements that Dr. Kane made in the radio and television interviews referred to would have given cause for his termination. As we have indicated, there were instances in which his statements went beyond what we consider the limits of academic freedom. Probably those statements would have justified discipline but we need not find whether standing apart from Ground 1. they would have constituted cause for termination. Certainly they buttress our conclusion, reached on Ground 1., that Dr. Kane has been guilty of gross misconduct which constitutes cause for termination.

Ground 5.

In the memorandum attached to his letter of July 30 to Dr. Kane the President sets out as the fifth of the "Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause" that it was:

> Gross misconduct having regard to all the circumstances involving him and The University of British Columbia since 1977:
>
> 5. For Dr. Kane to interfere with the course of internal disciplinary proceedings of the University of British Columbia by threatening process in a court of law if the said proceedings were not discontinued.

In his letter of September 16, following upon their meeting of September 8, the President stated to Dr. Kane with respect to Ground 5:

> Although stating that the minutes of the meeting with me of August 7th, 1981 were in some respects garbled, you did not deny that you stated that the California Courts were brutal, nor did you challenge that the purpose of this statement, evident from the minutes, was to dissuade me from carrying out my duties as President of this University. Your explanation is that you felt yourself to be threatened. If you had come forward in the subsequent proceedings before the Hearing Committee to substantiate the allegations you have made, I would have accepted this explanation. In the circumstances, however, I cannot accept that explanation and I confirm that this ground too warrants termination of your appointment.

The minutes of the meeting of August 7, 1981 between the President, Dr. Kane and others, which was held pursuant to the President's attempt to add the "Press Release" as an additional ground for termination to be considered by the Dunlop Hearing Committee, are in evidence before us. They were put to Dr. Kane and he admitted that

they captured the statements in that meeting. The context for Ground 5 is found in the following excerpts from those minutes of statements by Dr. Kane to President Kenny:

> I have spoken to your attorney at length and this thing can become very ugly. I submit, Dr. Kenny, that you may wish to state that you have been misinformed. Dr. Larkin may wish to make a similar statement. I invite you. I also remind you that California courts are brutal. ...I would point out to you that these proceedings here are an obstruction of justice.

The submission by Counsel for the University was that for Dr. Kane to commence or threaten legal action against his employer constituted cause for termination. That submission was supported by only one legal precedent. In Cunningham v. Kwikasair Ltd. (1980), 22 B.C.L.R. 231 (B.C.S.C.) Locke, J. dealt with a quite similar issue in a wrongful dismissal action. The plaintiff in that case worked as a dock supervisor for the defendant trucking company. The plaintiff was under investigation by his employer in the context of an incident connected with loading trucks. He became aware that his immediate superior had obtained statements from other employees to the effect that the plaintiff had been drinking at the time in question. He had his lawyer write a letter to his superior threatening an action in defamation if those allegedly false statements were "published" to anyone. The lawyer's letter was shown to the defendant's operations manager, and he ordered the plaintiff to withdraw it. The plaintiff refused and was fired. Citing no authority, other than cases supporting the general proposition that an employee has a duty to obey, Locke J. held at pp. 237 and 238:

> I am of the view that the investigation by the employer of an employee's conduct on the job is an inherent right and that the publication of any reports, written or oral, concerning the conduct of a junior executive to the executive hierarchy as a whole is proper, in the interests of the company and in the interest of society as a whole (citing Gatley on Libel and Slander, (7th. ed. - 1974) para. 451 on the doctrine of qualified privilege)...I consider the requests in the letter to suppress and destroy evidence which ought to be available to superiors to be quite wrong... I think the refusal to retract the letter involves an unwarranted and harmful interference with the internal management of this company and, even though an isolated act, such as to warrant dismissal. ...Because of the nature of the act involved here, the consequent loss of confidence of a superior through what I feel was an ill-adjudged letter and course of action, and the effect not only upon a very small local management group but the relationships of the company with the trade union, Cunningham's continued employment as a probable rising executive was rendered impossible.

With respect, it does not appear to follow from the fact that the report on the plaintiff's drinking was subject to a qualified privilege under the law of defamation that he was in breach of his contract of employment either in taking or threatening legal action to protect his rights, but it is not for us to question the decision in the Cunningham case. It suffices to say that Dr. Kane's threat of legal action occurred in a

very different context. He was not part of a "small local management group". He was employed as a university professor with the academic freedom which impliedly attaches to that position.

We do not think that for Dr. Kane to threaten legal proceedings amounted to misconduct, gross or otherwise, and it could not give The University of British Columbia cause for his termination.

Ground 6.

In the memorandum attached to his letter of July 30 to Dr. Kane the President states, as the sixth of the "Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause", that it was,

> Gross misconduct having regard to all the circumstances involving him and The University of British Columbia since 1977:
>
> 6. For Dr. Kane to pursue a course of conduct as set out in Grounds 1 to 5 above which is disruptive of the relationships which must prevail within the academic community.

In his letter of September 16 to Dr. Kane, following upon their meeting of September 8, the President stated in relation to Ground 6:

> I invited you to comment on the evident disruptive effect your conduct has had within the University community. Again you offered no explanation of your persistence in making untrue and harmful statements. In reviewing the whole of your behaviour it seems quite clear that you are doing all in your power to injure the reputation of the administration of The University of British Columbia and of your colleagues and, in particular, that of the Dean of Graduate Studies. I have concluded the whole course of your behaviour in this sense constitutes gross misconduct and constitutes grounds for recommending termination of your appointment.

It is apparent that Ground 6 adds nothing to the preceding Grounds. Had we reached the conclusion that no one of the other grounds provided a basis for a finding of gross misconduct amounting to cause for the termination of Dr. Kane's appointment at The University of British Columbia we would have had to consider, whether under the heading of an additional "ground" or not, if Dr. Kane's actions taken cumulatively constituted gross misconduct. That, however, is not necessary because we have found that the dissemination of the "Press Release", which the University considered as Ground No. 1, itself constituted gross misconduct giving cause for Dr. Kane's termination. We have therefore found it unnecessary to consider further the University's so-called Ground No. 6.

Conclusion.

We have considered separately each of the "Grounds for the Termination of the Appointment of Julius Kane for Cause" set out in the memorandum attached to the President's letter to Julius Kane of July 30, 1982. In consideration of all of the evidence and argument we have concluded that the facts comprising Ground 1 are established and that they constitute gross misconduct amounting to cause for termination in accordance with Article 10.02 of the Agreement on Conditions of Appointment for Faculty between The University of British Columbia and The University of British Columbia Faculty Association dated May 1, 1980. Our conclusion is based on the "Press Release" disseminated by Dr. Kane in the early summer of 1981, which we consider defamatory and beyond the limits of academic freedom. Our conclusion does not depend on any statements in the California court documents, which we have treated as privileged for purposes of the law of defamation and therefore not to be relied upon in determining whether Dr. Kane made public statements which went beyond the limits of academic freedom and constituted gross misconduct. Although it refers to the California proceedings the "Press Release" is not priviledged in that sense.

We do not think that Ground 2 adds anything because Dr. Kane could not be required to substantiate allegations before the Dunlop Hearing Committee which that Committee held it had no jurisdiction to deal with. We do not think that Ground 3 was properly before us because, except in the California court documents, the allegations there referred to were not made until after the process culminating in our appointment had commenced. Certain of Dr. Kane's statements on radio and television buttress our conclusion under Ground 1. that Dr. Kane was guilty of gross misconduct giving cause for termination. We have not, however, decided that Ground 4, standing alone, would constitute cause for termination as it was unnecessary for us to reach any decision on that point. We do not think that Ground 5 constitutes cause for termination or that Ground 6 adds anything.

In our opinion the University has discharged its burden of proof under Article 10.02(h) of the Agreement on Conditions of Appointment for Faculty by establishing that any one of the "Grounds for the Termination of the Appointment of Dr. Julius Kane for Cause" which it has put forward constitutes gross misconduct. Our conclusion, therefore, in the words of Article 10.02(j), is that the charges are substantiated and that they are serious enough to warrant termination.

March 23, 1983
Halifax, N.S.

Innis Christie
Chairman

Peter T. Bains Concurs

In the Matter of the University of British Columbia
and
Professor Julius Kane
relating to
President D. E. Kenny's Intention to Recommend Dismissal
for the cause of Gross Misconduct

A Minority Report

I have carefully considered the majority report in this matter and although I am in substantial agreement with much of the reasoning and analysis, I find I cannot agree with a recommendation for dismissal. Certainly, there was evidence before us to support a finding of misconduct, and to some extent, gross misconduct, but due concern for the entire context from which this hearing arose, reveals to me sufficient evidence of extenuating circumstance that leads to mitigation of the disciplinary action that can properly be recommended.

In essence, the majority report finds that the Press Release, the first of the six grounds for termination before this committee, was substantiated and by itself constitutes gross misconduct of sufficient severity to warrant dismissal. Except for ground four, having to do with radio and television interviews, all other grounds were rejected for one reason or another. The majority, in the case of ground four, did not decide whether alone this would constitute grounds for dismissal because the events described in ground four occurred in the broader context of Dr. Kane's over-all record.

I should like to open my discussion by commenting first on the analysis of ground four. Although the report did not find that the radio interviews, (particularly the second C.B.C. interview) alone constituted grounds for dismissal, the door is left somewhat ajar so-to-speak. I would reject ground four outright for the reason that, although Professor Kane admitted having said something "to that effect," he also testified that both were edited versions of longer taped interviews. Certainly, I have no quarrel with the serious characterization given by the majority to some statements that were aired. However, not having the entire original transcripts before me, I have no way of knowing whether the context would or would not have softened the harshness of what actually was broadcast. Given this situation, I am forced to accept that the chances are equal either way, and would therefore reject ground four as having been unsubstantiated.

Before presenting my view of the severity of the contents of the Press Release, let me assert at the outset, that I am in complete agreement with the majority on the following points.

1. The Press Release fails of its privilege and is properly before the committee for the reasons cited in the majority report.

2. The objectionable portions of the Press Release as noted, are not covered by any principle of academic freedom as academic freedom is generally understood.

3. The allegations made by Professor Kane of fraud, fabrication or perjuries on the part of the University and/or its officers who were parties to these proceedings, were not substantiated by the evidence before the committee.

There was however, just enough evidence presented to the hearing to lead me to conclude that Professor Kane believed his allegations to be true, as he has long protested to be the case, even though they turned out in the conclusions of the committee not to be true. Let me begin almost with the beginning of the case.

In his letter to Faculty, of September 7, 1977, President Kenny indicated that his concerns were aroused when he was approached by the R.C.M.P. in December 1976. However, the investigation of Professor Kane in February 1977, was conducted as an academic inquiry. Professor Kane testified that the first he knew of the police involvement was when he read about it in President Kenny's letter. He believes he should have been told of the R.C.M.P. involvement from the outset. He also agreed in February 1977, to provide the University with a "dump" of his computer files and tapes with the provision that no one be permitted to view the material except in his presence. As we know, these computer tapes were later supoenaed by the police. What might have transpired had professor Kane known of the police interest in February 1977, or had he refused to provide the computer dump, we of course do not know. However, the circumstances leading to the academic inquiry and production of the computer dump as they became known to him, led Professor Kane to believe he had been dealt with improperly.

Professor Kane also believed the Dunlop committee was being misled in 1981, when testimony was given to the effect that the sole or primary focus of the February 1977 investigation had to do with misuse of the computer. In fact, the actual grounds for dismissal given Professor Kane in 1977, contained two grounds having to do with misuse of N.R.C. grant money. This added to Professor Kane's apprehensions about the propriety of the treatment he was receiving.

These events, plus his views about the arrangements relating to his initial appointment, led him to believe, erroneous though it may have been, that frauds, fabrications etc., had been practiced against him. He used these terms in a legal sense to provide a basis for his court action in California in which he hoped to gain some remedy for what he felt, despite all the evidence before him, had been a miscarriage of justice. These charges were never tried in California as his actions were dismissed for lack of jurisdiction.

Now permit me to retrace briefly, the events leading up to the issuance of the Press Release which apparently was made public in early 1981.

1. Since 1977, Professor Kane had been appealing his initial suspension, first to the

Board of Governors, and then through the courts to the Supreme Court of Canada, which rendered its judgement in March of 1980. Subsequently, in April 1980, the Board of Governors upheld the original suspension.

2. In June 1980, Professor Kane was tried on two counts of theft and five counts of fraud. He was convicted on the two counts of theft, but acquitted of five counts of fraud. Professor Kane appealed and the appeal was dismissed in June 1982.

3. In September 1980, new dismissal proceedings were commenced, based on part of the testimony given by Professor Kane and others at his trial. Although the Hearing Committee for various reasons was not convened until September 1981, Professor Kane was at this time faced with a second dismissal proceeding. (1980-81)

4. In October 1980, Professor Kane began the aforementioned proceedings in the California courts.

The complexities and stress of a multi-faceted course of litigation lead me to view Professor Kane as a man distraught by his failure to clear himself and unable to accept the judgements rendered to date, taking a further and rash step to arouse public sympathy and to attack his accusers. He issued the Press Release. I look upon this conduct as an ill advised and intemperate outburst from a person who, in normal circumstances, should have known better, and hopefully would not have produced such a document.

What I have stated above, in no way justifies Professor Kane's behaviour. It can serve only as a possible explanation. The contents of the Press Release remain well beyond the conduct, the measured judgement and the respect for accuracy the university has a right to expect from its members. The Press Release is as it is described in the majority report, a collection of misleading statements and apparently deliberate distortions. Some of the statements constitute gross misconduct as stated in the majority report. However, given the general context I have described above, I am led to the conclusion that the misconduct is not sufficiently severe to warrant dismissal. It is my view that the disciplinary action meted out to date in this case, is sufficient to cover the severity of the offences committed and that no further sanction is warranted.

Finally, when conviction for theft and a finding of the Dunlop committee of his having made misleading and erroneous statements to a government agency cannot support the dismissal of Professor Kane, I find it difficult to accept that issuance of a Press Release can of itself provide sufficient grounds for dismissal.

Respectfully submitted

Roland F. Gray, Professor
April 6, 1983