

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

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

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

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

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

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

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

# Academic Freedom

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

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

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

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

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

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

Specifically, academic freedom ensures:

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

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

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

# The Investigation

## a) The J.S. Woodsworth Chair

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

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

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

## b) The Appointment Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Duguid stated that on Jan. 23 dean Pierce told him that:

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

In later correspondence with the Academic Freedom and Tenure Committee,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Vice president Waterhouse then listed the following concerns:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- A fuller CV for the nominee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This recommendation led to a resumption of the appointment process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Policy A10.01 sets out the grounds for review:

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

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

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

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

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

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

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

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

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

The SUAC found the following:

1. On whether there were procedural irregularities:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Conclusions

Two questions were posed to this inquiry:

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

### a) Academic Freedom

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The SUAC notes in its report that it was:

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

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

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

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

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

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

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

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

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

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

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

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

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

## **b) The Appointment Process**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The *Oxford English Dictionary Online*<sup>7</sup> defines bias as follows:

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

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

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

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

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

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

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

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

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

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

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

# Recommendations

## **a) Appointment of the J.S. Woodsworth Chair**

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

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

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

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

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

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

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

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

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

## **b) Thorough Review of Appointments Policies**

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

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

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

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

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

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

Matters that require investigation include the following:

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

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

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

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

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

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

### **c) Advertising**

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

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

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

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

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

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

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

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

#### **d) Training**

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

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

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

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

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

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

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

#### **e) CAUT Policies**

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

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

# Appendices

## a) CAUT Policy

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

Clause 6 of the CAUT policy statement states:

*The report of the committee of inquiry shall state:*

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

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

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

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

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

Under clause 2 of the CAUT policy:

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

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

## b) Committee Procedures

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

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

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

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

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

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

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

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

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

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

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

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

#### c) Interviews

Cooperation from all parties was as follows:

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

#### d) Abbreviations Used in this Report

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

## Endnotes

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

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

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

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

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

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

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

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