

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

THE UNIVERSITY OF BRITISH COLUMBIA

(the “University”)

-and-

THE FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

(the “Association”)

(Dr. Steven Lund Grievance)

ARBITRATOR: John B. Hall

APPEARANCES: Thomas A. Roper, Q.C., for the
University
Allan E. Black, Q.C. and Jitesh Mistry,
for the Faculty Association

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TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	THE COLLECTIVE AGREEMENT	4
III.	BACKGROUND	8
IV.	THE PRESIDENT’S EVIDENCE	24
V.	COLLECTIVE BARGAINING	31
VI.	TENURE AND REVIEW	33
VII.	ALLEGATIONS OF PROCEDURAL ERROR	34
	(a) Failure to Apply Correct Criteria/Application of Irrelevant Factors	36
	(i) “Successful” Graduate Teaching/Mentoring Graduate Students “To Completion”	37
	(ii) Ability to Publish “Independently”	38
	(iii) Improper Focus on the Quantity of Publications	40
	(iv) “Inputs” and “Outputs”	43
	(b) Failure to Apply Full Range of Scholarly Activity	44
	(c) Failure to Apply Criteria Consistently	45
	(d) Applying the Criteria for Promotion Generally	46
	(e) Breach of Article 5.02	49
	(f) The President’s Conversation(s) with Dean Isman	51
	(g) Lack of Detailed and Specific Reasons	55
	(h) Whether Procedural Error(s) Resulted in a Wrong Decision	56
VIII.	ALLEGATIONS THAT DECISION UNREASONABLE	58
IX.	CONCLUSION	65

AWARD

I. INTRODUCTION

This award concerns a grievance initiated by the Faculty Association on behalf of Dr. Steven Lund. The grievance originally appealed a decision by the University's President dated January 18, 2010 to not recommend tenure or promotion for Dr. Lund. However, as the grievance was presented at arbitration, only the decision to not recommend tenure is in dispute.

In support of its position, the Faculty Association invokes both grounds of appeal available under the Collective Agreement: first, it submits the President's decision was grounded in procedural error(s) that may have resulted in a wrong decision; and second, it argues the decision was unreasonable. On both of these bases, the Faculty Association asserts the decision must be set aside. The University joins issue with the Faculty Association on both grounds, and submits the appeal should be dismissed. In the event that one or more grounds of appeal is successful, the parties agree I should reserve jurisdiction with respect to remedy.

This admittedly sparse and pedestrian description of the present proceeding does little to convey the complexity of the issues raised by the parties' positions, including various subsidiary issues related to some of the main grounds for appeal. Some indication of the detailed level at which the case was argued can be appreciated from the fact that the arguments of counsel collectively constitute 160-plus pages of single-spaced written submissions, in addition to their oral presentations. In order to produce an award of manageable proportions, I have attempted to focus on those areas which have been most prominent to my assessment of the issues; however, I have certainly given full consideration to other evidence and argument that is not recounted in what follows.

II. THE COLLECTIVE AGREEMENT

The Collective Agreement between the University and the Faculty Association is actually a compendium of agreements addressing various subjects. The Agreement on the Framework for Collective Bargaining (the “Framework Agreement”) includes the general grievance and arbitration provisions.

Most of the terms relevant to the present appeal are found in the Agreement on Conditions of Appointment for Faculty (the “Appointment Agreement”). Dr. Lund was hired as an Assistant Professor, a rank contemplated by Article 3.05 of the Appointment Agreement:

3.05 Assistant Professor

- a) Appointment at or promotion to the rank of Assistant Professor normally requires completion of academic qualifications, and evidence of ability in teaching and scholarly activity. Evidence will ordinarily be required to demonstrate that the candidate for an appointment or promotion is involved in scholarly activity, is a successful teacher, and is capable of providing instruction at the various levels in his or her discipline, but it is sufficient to show potential to meet these criteria. The evidence may include the opinion of scholars familiar with the candidate's work and capability.
- b) Initial appointments at this rank are normally for a term of three years, but in exceptional circumstances may be for a lesser period. Renewal of an individual's appointment is for a term of three years. If an additional renewal is granted, it is for two years.
- c) Decisions on the award of tenured appointments are made in accordance with the provisions of Article 2.03. ...

The next rank is Associate Professor:

3.06 Associate Professor

- a) Appointment at or promotion to the rank of Associate Professor normally requires evidence of successful teaching and of scholarly activity beyond that expected of an Assistant Professor. The candidate for appointment or promotion will be judged on teaching as defined in

Article 4.02, on sustained and productive scholarly activity, on ability to direct graduate students, and on willingness to participate and participation in the affairs of the Department and the University. Promotion to this rank is not automatic or based on years of service and it is expected that some persons who may be granted tenured appointments will not attain this rank. ...

Article 4 of the Appointment Agreement is headed “Criteria for Appointment, Reappointment, Tenure and Promotion” and begins as follows:

4.01

- a) Candidates for appointment, reappointment, tenure or promotion, other than those dealt with in paragraph (b), are judged principally on performance in both teaching and in scholarly activity. Service to the academic profession, to the University, and to the community will be taken into account but, while service to the University and the community is important, it cannot compensate for deficiencies in teaching and in scholarly activity. Competence is required both in teaching and in scholarly activity, provided that a candidate who does not meet the criterion of scholarly activity but who is judged to be an excellent teacher may be given a tenured appointment as Senior Instructor when, in the view of the University, its needs will be best served by that appointment. Appointments without term are granted to individuals who have maintained a high standard of performance in meeting the criteria set forth below and show promise of continuing to do so.

Thus, as the Faculty Association emphasizes, Article 4.01(a) contemplates appointments without term; that is, tenure may be awarded without promotion where individuals “have maintained a high standard of performance in meeting the criteria ... and show promise of continuing to do so”. Candidates for tenure or promotion “are judged principally on performance in both teaching and in scholarly activity”, which are more extensively described as follows:

4.02 Teaching

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion, supervision of individual students' work, or other means by which students, whether in degree or

non-degree programs sponsored by the University, derive educational benefit. An individual's entire teaching contribution shall be assessed. Evaluation of teaching shall be based on the effectiveness rather than the popularity of the instructor, as indicated by command over subject matter, familiarity with recent developments in the field, preparedness, presentation, accessibility to students and influence on the intellectual and scholarly development of students. The methods of teaching evaluation may vary; they may include student opinion, assessment by colleagues of performance in university lectures, outside references concerning teaching at other institutions, course material and examinations, the calibre of supervised essays and theses, and other relevant considerations. When the opinions of students or of colleagues are sought, this shall be done through formal procedures. Consideration shall be given to the ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

4.03 Scholarly Activity

Judgement of scholarly activity is based mainly on the quality and significance of an individual's contribution. Evidence of scholarly activity varies among the disciplines. Published work is, where appropriate, the primary evidence.

Scholarly activity is also defined in Article 1.01 of the Appointment Agreement:

“Scholarly activity” means research of quality and significance, or, in appropriate fields, distinguished, creative or professional work of a scholarly nature; and the dissemination of the results of that scholarly activity; ...

Article 5 is headed “Procedures for Appointment, Reappointment, Tenure and Promotion”. As part of the process, Article 5.02 contemplates two different meetings with a faculty member “to identify any potential difficulties with the candidature and to assist the candidate with any concerns”:

5.02 Meetings with the Head

- a) At the beginning of the academic year preceding the year in which a faculty member may be considered for promotion under Article 9 below, or will be considered for reappointment, or for tenure, the Head

shall meet with the faculty member. *The purpose of the meeting is to identify any potential difficulties with the candidature and to assist the candidate with any concerns.*

- b) When a faculty member is to be considered for promotion under Article 9 below, or for reappointment, or for tenure, the Head shall meet with the candidate before the submission by the candidate of information to be supplied by the candidate. *The purpose of this meeting is:*
 - i) to advise the candidate that it is the responsibility of the faculty member to provide an up-to-date curriculum vitae and other relevant information to the Head, prior to a date set by the Head, provided that this date is no earlier than September 1; and
 - ii) *to identify any potential difficulties with the candidature and to assist the candidate with any concerns.*

* * *

- d) At the conclusion of each of these meetings the matters discussed should be recorded in an agreed memorandum. Any concerns or opinions of the Head are his or her own views. (emphasis added)

The ensuing provisions in Article 5 leading to tenure and/or promotion contemplate various levels of consultation and recommendation, as well as letters of appraisal from external referees. The decision as to whether a recommendation for tenure and/or promotion is forwarded to the Board of Governors is ultimately left to the President. Under Article 5.03, a candidate has the right to supplement the file (referred to as “the dossier”), up to the stage of the President’s decision, with information such as publication of an additional article or a response to particular concerns that emerge in the relevant documentation. Under Article 5.14(b), the President may request a further review of a case by the Dean whose recommendation is being considered. Article 5.15 addresses how candidates are informed of the President’s decision:

5.15 President: Informing the Candidate

- a) Except in the case of initial appointments, the President shall, at the time a decision is made on whether or not a recommendation is to be forwarded to the Board of Governors respecting a candidate, inform the candidate in writing of that decision with a copy to the Faculty Association.

- b) If the recommendation of the President is negative, the President shall provide detailed and specific reasons in writing to the candidate including the respects in which he or she is deemed to have failed to satisfy the applicable criteria and send a copy to the Association.

A decision by the President to deny tenure or promotion is subject to arbitration in accordance with Article 13 of the Appointment Agreement headed "Appeal of Decisions on Reappointment, Tenure and Promotion":

13.01 Interpretation

For the purpose of this Article:

"Arbitration" means arbitration proceeding in accordance with Articles 21.11 to 21.15 of the *Agreement on the Framework for Collective Bargaining* as modified by this Article.

"Decision" means a determination made by the President not to recommend reappointment, tenure, or promotion after periodic review.

"Evidence" means the information that was, or should have been, considered at each stage of the process leading to a decision.

"Procedural error" means a failure or failures to follow required procedures or a failure or failures to consider relevant evidence.

* * *

13.04 Arbitration

The Arbitration Board shall be constituted and shall conduct its proceedings pursuant to Articles 21.11 to 21.15 inclusive of the *Agreement on the Framework for Collective Bargaining*.

* * *

13.06 Burden of Proof

In proceedings before the Board, the burden of proof shall be on the appellant.

13.07 Jurisdiction

- a) A decision may be appealed on the ground that it was arrived at through procedural error or on the ground that it was unreasonable.
- b) When procedural error is a ground of appeal and a Board decides that there was a procedural error, a Board may:
 - i) dismiss the appeal if it is satisfied the error has not resulted in a wrong decision;
 - ii) if the error may have resulted in a wrong decision:
 - a) direct that the matter in question be reconsidered commencing at the level of consideration at which the error occurred. In so ordering the Board shall specifically identify the error, shall give specific directions as to what is to be done on the reconsideration, and shall adjourn the hearing until reconsideration has taken place; or
 - b) if it decides that the error was of such a nature that it would not be possible for the matter to be fairly dealt with on a reconsideration, decide the appeal on the substantive merits.
 - c) When unreasonableness is a ground of the appeal the Board shall reverse the decision if it finds that on the evidence the decision is unreasonable; otherwise it shall dismiss the appeal.
 - d) When procedural error and reasonableness are grounds of appeal a Board may exercise any of the powers conferred by (b) and (c) above.

As noted, the Faculty Association appeals on the grounds that the President's decision to deny Dr. Lund's tenure application was arrived at through procedural error(s) and was unreasonable.

III. BACKGROUND

Dr. Lund's educational credentials include a PhD in Plant Biological Sciences from the University of Minnesota where he was a Research Assistant from 1990-1995 while working on

his doctorate degree. He then spent two years as a Post-doctoral Fellow at the University of Florida, before becoming a Senior Staff Scientist with a New Zealand research company in 1998.

The University approached Dr. Lund in 2002 to fill a Viticulture/Plant Genomics position, which was created jointly by the Faculty of Agricultural Sciences and the Biotechnology Laboratory. The September 24, 2002 letter to then Dean Moura Quayle recommending his appointment noted the following background attributes:

The Selection Committee searching to fill the Viticulture/Plant Genomics position was seeking someone who had been trained in plant genomics and who had had hands-on-experience using state-of-the-art equipment in molecular biology and experience developing relevant methodologies. The Committee was also hoping to find someone experienced in successfully training technical staff and in managing a molecular biology laboratory. It did not want an incumbent who would be tied to the bench top for a long period of time after arriving at UBC. Dr. Lund was the only candidate who met these requirements. After receiving training in a wide range of skills required for leading edge plant genomics research at the PhD and post-doctoral levels he gained experience developing a microarray facility, for example, and in training technical assistance in New Zealand. ...

The Selection Committee also sought someone who could interact comfortably with industry. With his 3.7 years of industrial experience and because of his overall interests and abilities in working with [the] public the Committee concluded that Dr. Lund is an excellent choice for the Viticulture/Plant Genomics position which requires considerable interaction with grape producers.

Dr. Lund has published four refereed articles in leading international journals and one book chapter. He has not been able to publish manuscripts in the scientific literature based on his current work because of its confidentiality. An appealing aspect of the UBC position to Dr. Lund is that he will again be able to publish his work in the international literature.

Dr. Lund has not had formal responsibility for teaching a university level course. However, he has had experience teaching undergraduate laboratories in the field and at the bench, and he has contributed to a graduate colloquium on plant disease. ...

[A reference letter] speaks highly of Steven's ability to adapt to a new research area and quickly develop a funded research program. The Colleagues Committee believe that Steve has the ability to quickly adapt to a new area of plant science, in this case viticulture, immediately applying his sound knowledge of plant molecular biology to research, teaching and industrial issues addressed by the

Wine Research Centre. We unanimously recommend his appointment at the level of Assistant Professor.

This recommendation was accepted, and Dr. Lund was offered the Assistant Professor appointment in a letter from the Dean dated September 25, 2002. The letter identified when he would be subject to reviews for re-appointment, promotion and tenure, and summarized some of the arrangements made on his behalf (e.g. \$300,000 of start up funds to be followed by new laboratory space). The letter also set out certain expectations which included the following points:

You will be expected to maintain an active research program, to participate fully and with distinction in both undergraduate and graduate education, as needed, and to carry out your share of advising duties and committee assignments. ...

We propose that you will have no teaching assignments until January 2004 to allow ample time to prepare the Canada Research Chair and Canada Foundation for Innovation proposals. It is our expectation that the applications be completed before the UBC deadline of March 13, 2003. As we discussed, you will be a key player in completing these applications ...

Faculty members are expected to supervise graduate students. The number to be supervised at any one time is typically the decision of an individual faculty member. Faculty members are encouraged to maintain a realistic number of graduate students.

Dr. Lund's start date with the University was December 1, 2002. This meant that his "tenure clock" began running as of July 1 in that year. As events unfolded, Dr. Lund was relieved from teaching responsibilities until January 2005. He successfully applied during this period for a \$3.1 million grant from Genome Canada for the Grape Genome project, and made the hiring of post-doctorate fellows and laboratory technicians a priority in order to support his research activities. The curriculum vitae ("cv") which Dr. Lund later prepared to support his promotion and tenure application highlighted the following initiatives during his first two years at the University:

I was appointed in December 2002 as Assistant Professor of Viticulture/Plant Genomics. During my recruitment from an industry research position in plant genomics, then-Dean Quayle and UBC Wine Research Centre (WRC) Director,

Dr. Hennie van Vuuren, explained that my role in the Faculty was expected to be research-intensive. In my first few years, I was also expected to contribute significantly to the establishment and growth of the WRC; throughout my career, I have always welcomed the challenges that come with building things - I am a builder, not a maintainer - so this new role sounded ideal for me. To reach this objective, in 2003 and 2004, I achieved the following:

- contributed to the final design and supervision of renovations to my lab in 330 FNH, which opened in April 2004;
- established a collaborative relationship with Dr. Joerg Bohlmann, UBC Michael Smith Laboratories, on grapevine biochemistry. Dr. Bohlmann is a world expert in plant secondary metabolism who can make significant contributions to research into the biosynthesis of grape berry quality components;
- established a collaborative relationship with key scientists at the UVic-Genome BC Proteomics Centre and the Michael Smith Genome Sciences Centre, including Drs. Marco Marra, Steven Jones, and Robert Holt;
- established a collaborative relationship with Dr. Jose Miguel Martinez-Zapater, a leading plant molecular biologist at the National Centre for Biotechnology in Madrid, Spain. This was initiated through travel to Madrid in Jan. '03 one month after I arrived at UBC;
- successfully secured \$6.2 million in funding from Genome Canada and Genoma Espana with the collaborators listed, above. As Project Leader, Canada, I was responsible for \$3.1 million in funding for the GrapeGen project. For publications, the Canadian participants agreed that Dr. Pat Bowen (previous collaborator) would be listed as PI (final author) on those dealing with histology and physiology, Dr. Bohlmann would be PI on those dealing with metabolite analyses and biochemistry, and I would be PI on those dealing with any aspect of signal transduction (e.g. hormone perception, transcriptional regulation) and genome-scale analyses (e.g. expression profiling, proteomics, and bioinformatics);
- traveled fairly extensively worldwide (for an assistant professor) in order to promote the new grape omics project and the WRC internationally;
- grew active in the international grapevine research community, which was recognized by my selection in June '04 for membership on the Steering Committee of the International Grape Genome Program (IGGP; see also 11(b), below). (pp. 3-4/21)

Dr. Lund's first reappointment review occurred during 2003-2004 and he was reappointed as of July 1, 2005 for a three year term. The December 9, 2004 letter to the Dean from the Faculty Colleagues Committee recommending reappointment noted Dr. Lund's successes to date:

Dr. Lund was appointed to the position of Assistant Professor in December, 2002 and was informed at that time that an active research program in the area of grapevine genomics would be of primary importance to his position in the Faculty. The general consensus of the Colleagues Committee for reappointment was that Dr. Lund had prepared a clear and concise dossier that demonstrated successful advancement in research activity at this very early stage of his University research career. In addition, he was also making important strides in developing graduate teaching courses, contributing to new undergraduate program areas and connecting with the industry sector. The general consensus of the committee was that Dr. Lund was a valuable addition to the Faculty and possessed the potential to be a major contributor to the University community. At the end of the meeting, the members of Dr. Lund's Faculty Colleagues Committee stated unanimously that reappointment be recommended. (p. 1)

The Colleagues Committee also noted Dr. Lund had been successful “in obtaining a large competitive, research grant from Genome Canada” (i.e. the \$3.1 million grant); it was also impressed with his activities in developing “a modern and well equipped research laboratory”, and acknowledged “the significance of his presence and accomplishments to the growth of the Wine Research Center in general” (*ibid*, pp. 1-2).

A letter to Dr. Lund from the Dean dated January 27, 2005 advised that a unanimous recommendation for his reappointment had been made to then President Martha Piper. The letter went on to offer advice “in the spirit of constructive suggestions [because] there are some concerns that will need to be addressed to ensure a successful outcome towards tenure and promotion”. The letter noted Dr. Lund had taken the initiative to supervise a graduate-level Directed Studies course and was working on a graduate course; however, it strongly recommend[ed]” that he begin teaching at the undergraduate level, and advised that “[d]emonstrating excellence in undergraduate and graduate teaching is critical to tenure and promotion” (p. 1). It was also suggested that “the generation of more publications in strong journals in your research area *is a serious priority in order to increase your publication record* and your capacity to attract other grants” (p. 2; emphasis added). When directed during cross-examination to this statement in the Dean’s letter, Dr. Lund agreed it referred to the “quantity” of publications but maintained the required number was “vague”.

Dr. Lund had a Section 5.02(a) meeting on September 7, 2006 with Dr. David Kitts, the Program Director of Food Nutrition and Health in the re-named Faculty of Land and Food Systems. The purpose of the meeting was to have an open discussion on the progress being made by Dr. Lund on issues related to teaching, scholarly activity and service to the University. The agreed-upon summary of the meeting records that some time was spent reviewing the criteria for tenure and promotion. In relation to graduate students, Dr. Lund advised that the next six months or so would see “one, and possibly two new MSc. students entering [his] research program”. Evidence of scholarly activity was:

... starting to appear in the form of both academic contributions to scientific meetings as well as success with peer-reviewed scientific papers. One paper was published in 2006 in *Science* and two more original works are currently under review. There are at least 4 papers that have been, or will be published by 2007, that identify SL as the principle investigator. There are many paper presentations given to both national and international scientific audiences.

Dr. Lund testified that the only potential difficulty identified during this meeting related to his reappointment was a lack of undergraduate teaching; however, he was “gearing up” to teach in that area. About three months after the meeting, the new Dean of the Faculty, Murray Isman, apparently expressed some concern about Dr. Lund not having graduate students working under his sole supervision in his laboratory, and raised the point that this might cause difficulty for his tenure application. The Dean’s concerns were passed along by Dr. Hennie van Vuuren, the Director of the Wine Research Center in the Faculty, and caused Dr. Lund to send an email to the Dean on December 7, 2006. The email reviewed how he had “worked hard to build a viticulture omics program in three phases”. The third phase spoke to the present and into the future:

... With tools and resources now in place, I am beginning to generate focused projects for Master’s and PhD students, more ‘traditional’ molecule and hypothesis-driven research. ...

So I am optimistic about my 'balance sheet' for a tenure application one year from now, with the exception of grad student training. I did take on one PhD student in 2005 from Sweden but due to complex personal reasons that still aren't entirely clear to me, he left UBC at the end of the year. I am not sure what his plans are but he is still communicating with us as we submit the two manuscripts I

mentioned earlier (he is second author on each). Unfortunately, he did not make his final decision until the end of this past March, which has made it very difficult for me to recruit new students for this Fall, even though I now have projects that can be undertaken. It will be impossible for me to graduate a PhD student by the final year I am eligible for tenure and I will be close as to whether I will have time to graduate MSc students even if 1-2 start in January 2007. ...

Murray, at this point as I start my fifth year at UBC, I wanted to outline my history here for you in some detail (that which is not necessarily evident from my CV) and communicate where I expect to be positioned for a tenure application within the next 1-2 years. Why I am writing today is because I want to clarify the potential strength for my tenure case, assuming the information I've written above transpires as planned in the next 9-12 months. My view is that given the nature of the challenge that I excitedly took on in 2002 and the approaches I have deemed necessary to achieve success in the long-term (building and leading an internationally recognized viticulture omics research program), it has taken me 3-4 years to get to a point where perhaps many other asst profs in molecular biology are at when they start or within 1 year thereafter. My program is continually building and I think there is good reason for optimism for sustainable productivity - but is this all coming too late and will this be unclear to reviewers of my tenure application?

In a memorandum dated January 31, 2008 the Colleagues Committee struck to consider Dr. Lund's reappointment as Assistant Professor unanimously recommended that he be reappointed for another two-year term. Dr. Lund received a copy of the memorandum, which noted that he had been the recipient of a level of research funding "that is exceptional for a junior faculty member" and that such awards "also bring with them an exceptional level of management responsibility, including concrete deliverables and quite onerous reporting requirements". The memorandum next noted Dr. Lund's publications and, while they represented "useful contributions to the research arena", the published body of work was not regarded as "high productivity over the past three years, especially when measured against the funding available to him since 2004". Thus, the Committee recommended early publication of the manuscripts which Dr. Lund had indicated were being prepared. The Dean's letter of April 16, 2008 to President Stephen Toope supporting the Committee's recommendation for reappointment, as well as similar recommendations by the Advisory Committee, included the following assessment of Dr. Lund's performance:

Dr. Lund has established an active and extremely well-funded research program that is beginning to produce valuable outputs, both in terms of creating new knowledge and in respect to the potential applications of that knowledge. His teaching contributions have been somewhat limited in scope, but only as a consequence of the teaching assignments given to him; he has repeatedly indicated a willingness to make additional contributions to teaching. He has developed a new course, "Integrated Functional Genomics", which has been welcomed by the UBC community and for which he is well-equipped to teach. Student evaluations of his teaching to this point have been very favourable. I keenly anticipate his future success in all facets of his professorial career.

About the same time as Dr. Lund's second reappointment was being put forward, he was notified of his compulsory tenure review during the next year (July 1, 2008 to June 30, 2009), with the option of being reviewed for promotion to Associate Professor. He was asked to provide a list of at least four possible arm's length referees, two of whom would be asked to provide letters assessing his work. He was also asked to ensure his cv was up-to-date and provided no later than September 1, 2008. As part of this process, Dr. Kitts held another Section 5.02 meeting with Dr. Lund on September 12, 2008. I will review the meeting and the resulting agreed-upon summary later in this decision as it comprises one of the procedural errors alleged by the Faculty Association.

Four external letters of review were submitted regarding Dr. Lund's tenure and promotion application. The first noted his large grant from Genome Canada and the fact he had been required to establish a new technology platform. The reviewer commented that the latter can be "very time consuming, and usually ends up diverting the new faculty member from establishing a strong record of primary publications". The reviewer went on to portray Dr. Lund's work as "far from cutting edge" and described the number and impact of his publications since coming to the University as "disappointing". The reviewer additionally observed that most of Dr. Lund's speaking engagements had been in British Columbia, before concluding:

Because of the above, I find it hard to recommend promotion of Dr. Lund to Associate Professor with tenure. At my institute, it is unlikely that he would be promoted to Associate Professor level at this stage. However, you might want to consider his contributions to research infrastructure and teaching at UBC, and, if these meet the criteria, retention at his current grade would be appropriate. If delaying the promotion process is an option, I would recommend giving Dr. Lund

an additional two years to demonstrate that he can produce innovative work resulting in high impact publications.

The second external letter was decidedly more positive. Dr. Lund's research work was described as "exciting, proactive, and significant", and he was regarded as "very successful in mentoring graduate students, postdoctoral associates, visiting scientists, as well as undergraduates and graduates who take his courses". The reviewer also spoke positively about Dr. Lund's publication record:

... He has published in high quality journals and his articles are highly significant contributions to the field of grapevine genetics and physiology. Though there are not a large number of publications to this point, I would put more weight on the fact that the publications are excellent, and there is great promise ahead as he builds on research leads that have been developed by the very active program of the past few years. Several interesting publications are described that are soon to be ready for submission. Taken all together, I judge that Steve's program has excellent promise and potential.

The second reviewer concluded with "my strongest vote of support in favor of the promotion of Dr. Lund to the rank of Associate Professor with Tenure".

The third external letter was positive as well. The reviewer opined that Dr. Lund's "research effort" and "teaching efforts" both met the criteria for tenure and advancement to Associate Professor. His research, publishing activities and presentation at international conferences were summarized as follows:

Although Dr. Lund has not published many papers since his arrival at UBC (7 refereed publications) they are of very high quality and most published in highly regarded journals. He is clearly on an upward trajectory to increase his publication record as evidenced by 2 submissions and 4 more papers in preparation at this point. Many of these papers deal with the "omics" of flavor and aroma in wine grapes, a critical area for the definition and manipulation (both cultural and genetic) of fruit quality. His lab is at the forefront of these efforts, which will be greatly helped by the recently published Pinot noir genome sequences. Dr. Lund has been a very active conference attendee and often as an invited speaker (seven invited talks at international conferences), and has prepared 13 proceedings papers. Perhaps the most exciting area of his research is the development of biomarker proteins for fruit quality parameters (aromas, colors,

etc.) that could be utilized in a field-based immunoassay to allow rapid and inexpensive of (sic) fruit quality in the field. This could revolutionize the sampling for fruit quality and allow the rapid and precise manipulation of vines (through irrigation and light dynamics) to improve fruit quality in the field and “on the fly”. In my opinion his research effort meets the criteria for tenure and advancement to Associate Professor.

* * *

In summary, Dr. Lund has developed an internationally recognized and acclaimed grape genomics facility and program that has also attracted the attention of the Canadian wine industry and the worlds grape genetics community. He has a strong publication record and is poised to increase the quantity of his publications. He has an adequate teaching record and also seems willing to take on a larger teaching role both in the classroom and in terms of the number of graduate students he is able to train.

The final external reference letter also recommended that Dr. Lund be promoted to Associate Professor and be granted tenure. The reviewer commented on various achievements, including the following: Dr. Lund had directed a number of students towards Masters and PhD study, although this was “clearly still a growth area”; Dr. Lund had demonstrated he was willing to engage in collaborative research and had co-supervised several students successfully based on these collaborations; the publications that had appeared with Dr. Lund as co-author or lead author were all “valuable and contribute to the scientific knowledge in the field”; and, it appeared as if he would become “the lead author on many of the manuscripts in preparation [and was] moving to an established position”. The reviewer, who was self-described as “active in the field”, concluded by writing that Dr. Lund had delivered on both teaching and research objectives and , “[a]lthough these achievements could probably still be improved on, it is clear that an excellent start had been made”.

The external review letters were summarized in the December 13, 2008 memorandum by the Colleagues Committee to Dean Isman and sent over the signature of Dr. van Vuuren. The memorandum noted “several incorrect statements” in the third review letter, such as Dr. Lund having only published four good papers in reputable journals and one two-page manuscript, and not having “seven referred publications of a very high quality”. The Colleagues Committee also offered its own assessment of Dr. Lund’s performance. In relation to the training of graduate

students, it was noted he had made a decision to limit the intake of graduate students to be productive in the field of research, and “[n]o graduate student has thus graduated from Dr. Lund’s laboratory since his appointment to UBC in 2002”. In respect of scholarly activity, the Committee recorded he had four scientific papers published so far, and had indicated two scientific research papers had recently been submitted. The Committee ultimately expressed its recommendation in these terms:

Based on the evidence compiled on his performance in teaching, scholarly activity and service, the Colleague’s Committee is unanimous that Dr. Lund should be appointed with tenure. However, three out of four Committee Members as well as one of the external reviewers felt that his research performance was not acceptable. He was provided one of the best and fully equipped molecular laboratories on the UBC campus 15 months after his arrival, he had significant research funding available, he recruited five outstanding post-doctoral researchers ([two] have been in his laboratory since 2003/2004, respectively), he has not completed training of a single graduate student in six years and he has had a very low teaching and administrative load. The Faculty Colleagues Committee members suggest that he should be promoted to Associate Professor when his publication record and training of graduate students meet expectations required by UBC.

Dr. Lund submitted a three-page update to his cv on February 19, 2009. He wrote to Dean Isman a few days later to respond to the “Colleagues Committee recommendation letter regarding my tenure applications” and the external review letters. Among other things, Dr. Lund maintained that “a much better productivity indicator” was to evaluate his laboratory’s number of publications per year “starting from when we were able to begin publishing original research data in Fall 2006”. The latter, he asserted, showed “a strong level of research productivity with substantial publications in journals with good impact factors”, and he expressed the view that this level of productivity would be maintained and “further increased”. He complained that the requirement to oversee a graduate student to completion had not been communicated to him earlier:

Regarding graduate student training, I wish to underscore that I have been active in the Faculty of LFS and elsewhere at UBC in serving on graduate thesis and examination committees and do consider graduate student advising as a key component of my role as an academic. The only reason that I have not graduated a student from my lab by now is my decision discussed earlier in this letter

regarding hiring of skilled hands early on for my new lab's resource development objectives. That said, I also wish to respectfully point out that while I have definitely understood the importance of graduate student training, it was never communicated to me at any time that I would be required to demonstrate completion of a graduate student dissertation from my lab in order to be granted both tenure and promotion. Had this been clearly communicated to me early on, I would have planned accordingly. ...

Nonetheless, on the whole, Dr. Lund wrote that he was “fulfilling my role as a UBC academic well and [the above] achievements merit both tenure and promotion to the Associate Professor rank”.

Dean Isman wrote Dr. Lund on March 10, 2009 to advise that his recommendation to the President would be in favour of tenure but “against your promotion to the rank of Associate Professor at this time”. The Dean explained that the issues raised by his Advisory Committee did not differ fundamentally from those identified by the Colleagues Committee, and continued:

... my Advisory Committee did not find sufficient evidence of successful teaching and of scholarly activity beyond that expected of an Assistant Professor. While you have attracted an admirable amount of extramural funding for research, the Committee feels that the outputs and impacts of the research are not yet commensurate with that level of funding. Further evidence of successful mentoring of graduate students and postdoctoral fellows is needed, as well as greater contributions to undergraduate teaching.

However, both Committees noted the positive trajectory in the past 18 months, both with respect to your publication record and to your engagement in teaching. It is because of these trends that my Advisory Committee agrees with the Colleagues' Committee that you deserve to hold a tenured appointment, and that your record will merit promotion to Associate Professor in due course.

Dr. Lund testified that he had been informed of this recommendation by Dr. van Vuuren before he met with the Dean on March 10 and received the formal letter. Dr. Lund told Dr. van Vuuren what he really wanted was tenure, and recalled being advised “don't fight it” in reference to the recommendation against promotion. It was Dr. Lund's further testimony that the Dean indicated during their meeting that he had done everything necessary for tenure, but promotion would require “six or seven more papers”. Based on the information he had received, Dr. Lund sent a short letter to the Dean the day after their meeting:

I am writing in response to your letter dated 10 March 2009 regarding your recommendation to the President on my tenure and promotion application. I have read and understand the issues raised in your letter and I greatly appreciate your meeting with me to discuss your decision. *I wish to express herein my support for your recommendation of tenure without promotion.* I understand that should tenure be granted in 2009, I may be eligible to re-apply for promotion to the Associate Professor rank within two years. (emphasis added)

Dr. Lund maintained at arbitration that this letter of March 11, 2009 was intended to withdraw his application for promotion to the rank of Associate Professor. The Faculty Association submits the President's failure to recognize the letter as serving that purpose constituted another procedural error.

The Dean's recommendation to President Toope was formally communicated by correspondence dated April 20, 2009. He did not repeat the information documented in the Colleagues Committee report and, instead, offered his "own perspective on the case for tenure". After noting Dr. Lund had been "extremely successful" in securing the \$3.1 million Genome Canada grant, as well as two other grants totaling \$5 million where he was "lead co-PI", the Dean wrote:

This high level of funding provided the luxury of building a large research team that would normally be expected to generate considerable research outputs. Rather than recruiting graduate students in the first few years, he chose to hire postdoctoral fellows and research technicians which should have ensured productivity in the form of peer-reviewed publications. Unfortunately the record shows otherwise: a relatively small number of publications though mostly in high-impact journals. ...

Dr. Lund has not seen much success in mentoring graduate students to date. One doctoral student withdrew early in the program and he currently supervises 1 MSc and 1 PhD student. He co-supervised one MSc to completion. ... In Dr. Lund's defense, neither I nor Dr. Kitts, the Director of the Food, Nutrition and Health undergraduate program (of which Dr. Lund is nominally a member) have demanded more teaching from him - it is not a case of Dr. Lund shirking teaching duties but rather our failure to find appropriate opportunities to assign teaching to him.

My overall analysis is that Dr. Lund spent the first five years of his appointment doing things "his way", sometimes at odds with direct advice he was given during reappointment reviews and less formal consultations with faculty mentors. Over the past 18-24 months he has begun fulfilling the expectations of his appointment - he is accepting graduate students, is making a normal level of contribution to teaching, and his research productivity is on an upward trajectory. It is readily apparent promotion to the rank of Associate Professor is not commensurate with his present record of teaching, research and service, but there is consensus among those who have reviewed this case at all levels that he is now on track to earn promotion in the near future.

That leaves the question of tenure; do we want to invest in Dr. Lund as a member of the UBC Vancouver professoriate in the long term? The answer from his colleagues, other senior members of the Faculty of Land and Food Systems and the external referees is that we should. I have met with Dr. Lund since apprising him of the concerns raised by the Colleagues' Committee and my APT Committee, and he has acknowledged that he has not fully met our expectations thus far but confirmed his willingness and enthusiasm to meet, if not exceed, these in the very near future. I therefore recommend that Dr. Lund be granted tenure at the rank of Assistant Professor at this time.

Dr. Lund submitted a further two-page supplement to his cv on October 7, 2009 which, among other subjects, updated his teaching contributions, publications and works submitted. The Senior Appointments Committee met with Dean Isman two days later to discuss the latter's recommendation regarding Dr. Lund. The meeting was a reconsideration of an earlier negative vote on tenure by the Committee. The record of the meeting reveals that the Senior Appointments Committee was concerned about whether Dr. Lund had been asked to provide timely written responses to the decisions of the Colleagues Committee and the Dean to not recommend promotion. Dean Isman reassured the Senior Appointments Committee that Dr. Lund had been notified; however, he had only responded to the Colleagues Committee and not the Dean's recommendation "as the same points had been covered in his first response". The record from the meeting continues (bold in original):

SAC's substantive concerns related to the research record and the recommendation to grant the candidate tenure but not promotion. The Dean recognizes that this split recommendation is rare. The Colleagues Committee was not satisfied that the candidate's research record met the criteria for promotion but was unanimous that his teaching, scholarly activity and service met the criteria for tenure. As a result, he merited the university's investment in him as a tenured member, although another 2-3 years of research evidence would have made the

decision easier. The candidate had a slow start, but the last 3-4 years of research record indicates a high standard of performance. From 2006, there has been an upward trajectory of high quality publications with good impact factors. In 2009, 3 publications are already out and 1 submitted. The Genome Canada grant awarded earlier this year attests to quality of the work. While the candidate has collaborated with others on this grant, the Dean says that half of that project is in the candidate's field. The candidate is the only one working in his field in Canada. His excellent funding should ideally translate into training of graduate students, and this is now happening, albeit later than would have been desired. The Dean expects the candidate to have a successful career. His learning curve coming out of an industry position has been considerable but he has now grasped the requirements of an academic colleague. As for the two failed CRC nominations, the Dean explained the adjudicators did not look favourably on the candidate's industry work.

Vote on Promotion to Associate Professor: 0 in favour, 13 against, 0 abstentions. Vote on the grant of Tenure: 9 in favour, 4 against, 0 abstentions.

SAC recommendation: Grant tenure but do not award promotion to Associate Professor.

The negative votes in relation to promotion reflected concerns about the publication record and the lack of clear demonstration of ability to publish independently in high impact journals. The negative votes in relation to tenure reflected concerns about an insufficient research record such that he has not met the expectation of a high standard of performance for UBC to invest in tenure.

The SAC's votes regarding promotion and tenure for Dr. Lund were conveyed to President Toope (along with its votes respecting other candidates) by letter dated October 19, 2009.

Dr. Lund recalled at arbitration having been told by Dean Isman that the President would take four to six weeks to make his decision following the Senior Appointments Committee vote. He called Dean Isman in mid-November and was advised "to be patient". He then learned that the President's Office had scheduled a telephone conference with the Dean for November 26. Dr. Lund was out of town, and arranged to call Dean Isman later the same day. According to Dr. Lund, the Dean's mood "was distressing for me" and "there was immediately concern in his voice stemming from concern in the President's voice". It was Dr. Lund's evidence that Dean

Isman “passed along” that the President did not like “split cases” -- that is, a recommendation for tenure without promotion -- because the President thought it was “a loophole for weak cases”. The discussion between the President and Dean Isman form yet another alleged procedural error, and will likewise be recounted in greater detail below.

Dr. Lund spoke again with Dean Isman during December but did not learn anything aside from the possibility of a decision being made before Christmas. The President’s decision was in fact conveyed by way of a letter dated January 18, 2010:

Dear Dr. Lund:

I am writing to inform you of my decision in the case of your tenure and promotion to Associate Professor. As you know, your colleagues, the Head, the Faculty Committee and the Dean recommended in favour of tenure but not promotion. The Senior Appointments Committee also recommended in favour of tenure but against promotion. However, after considerable deliberation, my decision is to not recommend tenure or promotion. The following are the reasons for my decision.

Article 3.06 of the *Agreement on Conditions of Appointment for Faculty* sets out the criteria for promotion to the rank of Associate Professor:

3.06 Associate Professor

[omitted]

Article 4.01 a) of the *Agreement on Conditions of Appointment for Faculty* sets out that tenure is granted to those "who have maintained a high standard of performance in meeting the criteria ... and show promise of continuing to do so."

It is with respect to teaching and more importantly, scholarly activity that your record has not, in my view, met the criteria for promotion to Associate Professor or for tenure.

Your teaching record is good but does not demonstrate evidence of the necessary level of successful graduate teaching. In particular, the evidence of your ability to successfully mentor graduate students to completion is weak.

Judgement of scholarly activity, under the Agreement, is based on the quality and significance of your research and the dissemination of the results of that scholarly activity. My concern is that your scholarly record does not demonstrate the significance of your contributions or the dissemination of the

results of your activity expected for promotion or for tenure. In particular, there is insufficient evidence of your ability to publish independently in venues with high impact. As such, I do not believe that you meet the requirement of sustained and productive scholarly activity for promotion to the rank of Associate Professor. I also do not believe that your research record demonstrates that you have maintained the high standard of performance in your scholarly activity required for tenure.

I am pleased to see that you have shown willingness to participate in academic and professional affairs.

Overall, however, I do not believe that you have met the appropriate standards for promotion to the rank of Associate Professor or for tenure.

As a consequence of not being granted tenure, your appointment will terminate on June 30, 2011, at which time your employment with the University will end. During your terminal appointment, you will continue to receive full salary and benefits.

I draw your attention to the provisions on appeal (including time limits) that are found in Article 13 of the *Agreement on Conditions of Appointment for Faculty*.

It is the above letter, of course, which is the subject of the present appeal.

IV. THE PRESIDENT'S EVIDENCE

The President gave evidence in this appeal on two different dates and, between direct and cross-examination, testified for several hours. I will have more to say about the scope of the President's evidence later in the award. In order to avoid repetition, some of the testimony will be canvassed at the appropriate point in my analysis. This includes the President's recollection of his telephone conversation with Dean Isman after all of the lower level recommendations had been received. Those exceptions aside, the more salient aspects of his evidence-in-chief can be recounted as follows:

- The President must pay "very careful attention" to the decisions at each level of the tenure process, but they are ultimately recommendations and he has the authority under

the *University Act* to make his own recommendation to the Board of Governors. There are certainly cases where he does not concur with lower level recommendations although that is “unusual”.

- In making a tenure recommendation, the President is “firmly constrained” by the Collective Agreement. That is the starting point, and he must also ensure consistency and coherence across the University. He is “very well aware that there are particular contexts to consider and disciplinary differences to consider that [he] must be very attuned to” regarding scholarly activity.
- Each file is “independent” and must be assessed in a “fair way” according to the criteria in the Collective Agreement. There are cases where the President has disagreed with recommendations for and against tenure.
- The Collective Agreement article regarding tenure requires candidates to maintain a high standard of performance; this means not just potential but actual performance.
- The President is sensitive to disciplinary differences in relation to the mentoring of graduate students. In sciences, it is common to see more graduate students because of how laboratories are structured. In this case, no graduate student had been mentored to completion, and there was very limited engagement of graduate students.
- The President was aware there was a period of time when Dr. Lund could not fully occupy his laboratory, and that he was given about two years of teaching release which is “quite a long time”. Dr. Lund had access to considerable grant funding which allowed him to hire a number of post-doctorate fellows (i.e. “scientists with a bit of a track record”). The President believed Dr. Lund enjoyed “very strong support” for his first few years, and continued:

Unfortunately, my evaluation was that the level of scholarly research was not commensurate at all with the “inputs”. Even extracted from the context, this was one of the weaker files I’ve seen in my five years,

especially with scholarly papers. There was very limited production [and] that is uncharacteristic of scientific disciplines ... [and] the impact after arrival at UBC, as well as the production of papers and placement in journals, was inferior to pre-UBC given the impact figures of the journals.

- Later, the President repeated his view that Dr. Lund had a “significant cohort” of PhDs and technicians working under his supervision and the lack of productivity caused him concern; that is, there were “lots of inputs, but not enough outputs”.
- According to the President, impact figures are “extremely important” because they give a sense of the ability of the scholar to place work in journals with a wide readership and influence, and the measure in sciences is quite precise. Although the number of publications is never determinative for the President, the number here was also low. Thus, based on the “entire contribution” (i.e. the raw numbers and the impact) he concluded Dr. Lund did not meet the high standard required for tenure.
- The phrase “publish independently” relates to the language of the Collective Agreement in trying to assess the intellectual contributions of a candidate. This is especially important in the sciences because it is typical that an individual will publish with a range of scientists -- collaboration is the current and future state of science. There are various ways within specific sciences that contributions are acknowledged. Here, the President “tried to assess whether there was significant evidence to confirm intellectual contribution to a high standard of performance, and concluded there was not”.
- The grants obtained by Dr. Lund “were certainly relevant because they were given [after] peer review”. However, grant funds have to be matched with scholarly achievement and the primary evidence to consider is the publication record. In this case, there was “lots of activity and resources [but] extremely modest scholarly activity”.
- The President considered Dr. Lund’s presentation at conferences in British Columbia and around the world. They “were certainly relevant but did not overcome the lack of publication and impact that is [the] primary assessment tool”.

- The President found the Colleagues Committee letter to be “somewhat unusual”, and there were many comments which caused him concern; nor was he entirely convinced that the contents justified the conclusion. Among other things, the four scientific papers published Dr. Lund was a “deeply unimpressive” figure, especially as there was evidence of declining impact factors. The President regarded portions of the Committee’s recommendations (reproduced above) to be “a set of reasons why he should have done better”, and the comments regarding promotion “undermine[d] the recommendation for tenure”.
- The Dean’s letter was also “somewhat unusual” and carried much of the same tenor. Comments regarding promotion again undermined the recommendation for tenure, and caused the President concern when he read the file. He must look for evidence of success, and not just promise. Likewise, in relation to the Dean’s portrayal of the “positive trajectory” in his letter of March 10, 2009, the President stated:

At this level, I don’t believe I am to assess promise -- it is performance. And given that it is possible to supplement [the file], by the time I reached my decision I had not been given additional evidence that supported the upward trajectory ... I could not simply say I hope it will happen -- that’s not what I’m asked to do [in a tenure case].

- The President did not read Dr. Lund’s letter of March 11, 2009 as withdrawing his candidacy for promotion. He stated it would not have made a difference to his decision because tenure and promotion “are not inter-related decisions ... [and] in accordance with the Collective Agreement, I must consider them separately”.
- The split vote by the Senior Appointments Committee meant “a great deal” to the President. The vast majority of files he receives are unanimous, and a split vote is an indication that he must read the file very carefully. The President focused on the third paragraph in the SAC’s report, and found it largely repeated what he had seen in the recommendations from the Colleagues Committee and the Dean. That is, the paragraph

was “primarily about promise” for the future, versus having already met a high standard of performance.

I will record the main elements of the President’s cross-examination in a similar fashion:

- There was nothing in the January 18, 2010 decision saying the President disagreed with recommendations by the lower levels; however, he “obviously” disagreed as he did not recommend tenure to the Board of Governors, and gave two reasons on the second page of the decision. The President did not state why he disagreed with the lower levels because “I don’t think that’s the process -- I communicate to the candidate”.
- Dr. Lund was “vigourously reviewed” by each of the lower levels as contemplated by the Foreward to the *Guide to Reappointment, Promotion and Tenure Procedure at UBC* (a document prepared by the University).
- The requirement to publish “independently” is not found in the Guide or the Collective Agreement. The President used the word in his decision because of his overall assessment that Dr. Lund had not met the high standard of performance, not only in terms of numbers but also venue and impact. He likewise agreed that the phrase “venues with high impact” is not found in the definition of scholarly activity, but said it relates to the dissemination of publications.
- There is no specific reference in Article 4.02 to mentoring graduate students “to completion”. However, it falls within the framework of determining whether a candidate can teach at all levels, and the President was trying to indicate where there was a failure - - or “gap in the ability” -- to teach graduate students. More specifically, the President is asked to consider whether a candidate has the ability to teach at various levels and, at the graduate level, it requires that students have the ability to graduate. Also, the number of graduate students under Dr. Lund was “very low”.

- In relation to the “ability to direct graduate students” as set out in Article 3.06(a), the President agreed it does not say “to completion”. However, in his view, its “absolutely obvious that the goal is to have them graduate [because] the goal of universities is to graduate students”. His decision did not state Dr. Lund lacked “the ability to direct graduate students” because this “would simply repeat the sentence [in the Collective Agreement] and give no idea how I reached my decision”.
- While Dr. Lund did not meet the “necessary level” of successful graduate teaching, there is no fixed number. The President pays attention to the context, and the Faculty of Land and Food Systems has “one of the highest levels at UBC”. The President was unable to give a precise number of graduate students that might have been required by Dr. Lund as that depends “on an overall assessment”. There was “very little evidence” here given “no successful completion and the few graduate students”.
- The statement in the President’s decision regarding “sustained and productive scholarly activity” related to the promotion application and not tenure.
- The SAC’s report indicated Dr. Lund had “high quality publications with good impact figures”. However, in the President’s view, the figures were not high. He understands how impact figures are determined in science, and concluded the SAC had “overstated” Dr. Lund’s record.
- The President also disagreed with the Dean’s assessment that Dr. Lund’s publications were “mostly in high impact journals” when he looked at all the information together. He did not state this disagreement in his decision, as “I don’t think I’m required to -- I’m required to give my reasons and that’s what I said [referring to the decision]. It’s obvious I think they were wrong because I reached a different conclusion”.
- The reference in the President’s decision to “insufficient evidence” of publications was intended to capture both the quantity and quality of publications based on a “holistic

understanding of the file”. The President did not see “enough [publications] of sufficient quality”.

- The President considered the research grant obtained by Professor Lund as part of scholarly activity, especially as it followed a “serious peer review”; however, the primary evidence is published work. Also, with the substantial funding and post-doctorate fellows, the President would have wanted to see “significant productivity”. He described the grant as “a complicating factor in this file”.
- The recommendation of the Colleagues Committee was clear to the President, but it was not clear to him that the report justified the conclusion. Further, a “red flag went up” because there was “a lot of internal discussion”. This was unusual, and most files “are a lot cleaner” with the majority being unanimous at all levels. Also, the fact that Dr. Lund’s pre-UBC publications had higher impact figures caused a concern that there was not “an upward trajectory”.
- The President’s reading of the external reference letters as a whole suggested there were “balancing factors”; further, they were not “glowingly positive” as one often sees at this level, and it is rare to see negative letters.
- The President had “two observations” regarding the “positive trajectory” concerning publications and teaching noted in the Dean’s letter to Dr. Lund dated March 10, 2009:

I looked at that, and went to the file and did my own analysis. I concluded it was an overstatement on either graduate students or the publication record. And second, I looked at the file many months later, [knowing] its possible for candidates to add [information] as many routinely do ... so [there were] additional months to see if it was playing itself out. Unfortunately, it wasn’t. I did not see significantly enhanced graduate student supervision or a strong publication record. I came to a different assessment than the Dean, and the supplemental [evaluation] reaffirmed my view.

V. COLLECTIVE BARGAINING

Dr. Nancy Langton is the President of the Faculty Association. She identified bargaining proposals tabled by the University on February 1, 2010 for renewal of the 2006-2010 Collective Agreement. One of the University's proposals was to "[r]evise the existing tenure and promotion processes to allow for tenure in the professoriate only in conjunction with promotion to Associate Professor". This proposal was tabled in more specific terms on March 15, 2010 (the underlining was new language while the struck out portions denoted deletions to previous language):

Article 2. Types of Appointments

2.03 Term Appointments with Review

f) In the case of an Assistant Professor

i) if at any time before, or if in, the seventh year of service an Assistant Professor is promoted to the rank of Associate Professor, a tenured appointment will also be granted;

ii) if an appointee is not granted a tenured appointment pursuant to (i) above, then in the seventh year of service a recommendation either to promote to the rank of Associate Professor with tenure ~~grant a tenured appointment at the rank of Assistant Professor or otherwise~~, or not to renew the appointment, must be made. A candidate may not be tenured at the rank of Assistant Professor;

This proposal remained on the table and was discussed at a bargaining session held on May 26, 2010. The Faculty Association stated that the current practice of individuals being tenured at the Assistant Professor rank appeared to be "a pretty small [number] but is not growing"; its spokesperson said the Faculty Association was "[b]affled by what problems you're trying to solve". The University explained in part:

[The] standard for tenure is maintaining high standard of performance, standard for associate professor is higher. What the university is saying is there's not room

to stay at university at this level. It's no longer sufficient to show potential for 40 years.

A settlement package tabled by the University on November 9, 2010 deleted its proposal to eliminate tenure at the rank of Assistant Professor.

In cross-examination, Dr. Langton was directed to the University's minutes from the May 26, 2010 bargaining session. The minutes record the Faculty Association's spokesperson as additionally stating that the practice of granting tenure without promotion to Associate Professor "[h]as continued with Pres. Toope". Dr. Langton testified: "I think that's correct". She later added: "We did acknowledge that he has granted tenure [at Assistant Professor] on occasion -- we said we did not see a problem that UBC was trying to solve". Nor did Dr. Langton dispute statistics produced by University counsel which show that President Toope has granted tenure without promotion in each year he has been at the University (some followed tenure and promotion reviews, while others were tenure only considerations). Finally, towards the end of her cross-examination, Dr. Langton acknowledged that the Faculty Association had not been successful in securing a proposal which would have removed the number of graduate students as a measure of teaching performance. The proposal was tabled on March 8, 2010 and would have added the following sentence to the definition of Teaching in Article 4.03 of the Appointment Agreement:

If relevant, consideration may be given to a candidate's performance in directing graduate students; however, the number of graduate students directed shall not be considered as a measure of teaching performance.

Dr. Langton could not recall whether this had been a response to a University proposal but, in any event, agreed it had not been accepted by the University.

All of the above proposals were exchanged during collective bargaining after the President's letter of January 18, 2010 concerning Dr. Lund. However, other evidence indicates that both parties had been working on their respective proposals prior to the initial session, as would be expected. Among other things, Dr. Langton stated that the Faculty Association and the University had met during the fall of 2009 in preparation for bargaining. Further, President

Toope acknowledged in cross-examination that “the idea” of eliminating tenure without promotion “was being discussed at the time [Dr. Lund’s] case was being decided”.

VI. TENURE AND REVIEW

Much has been written by other adjudicators on the subject of tenure. The most extensive distillation of the authorities can probably be found in *University of British Columbia -and- Faculty Association of the University of British Columbia* (August 20, 2007), unreported (Taylor). That appeal decision was quoted liberally by Arbitrator Germaine in *University of British Columbia -and- Faculty Association of the University of British Columbia (Oliver Lang)*, unreported (February 25, 2008), and several of the same paragraphs are relied upon here by the University. It relies additionally on the testimony of President Toope in this proceeding that tenure is one of the most important decisions he is called upon to make and is “an absolutely crucial decision”. This is because granting tenure means “awarding a significant amount of support over a potentially long period of time [from] scarce public resources” and “shapes the future of the university for potentially decades to come”.

On the other hand, the Faculty Association highlights the “profound and far-reaching consequences” when an academic is denied tenure. This means that a high standard of justice is required, and all elements of the tenure application process must be properly followed: see *Ruiperez and Board of Governors of Lakehead University* (1983), 41 OR (2d) 552 (CA); and *Grande Prairie Regional College and Grande Prairie Regional College Academic Staff Assn.* (April 4, 1994), unreported (Elliott).

As was the case before Arbitrator Taylor, there is no material disagreement between the parties to this appeal regarding tenure, or regarding the importance of a tenure decision to both the University and the candidate under consideration. And, while the Faculty Association properly espouses a “high standard of justice” regarding every aspect of the tenure process, it does not contest the authorities which accord “curial deference” to the department and faculty members’ assessments of a candidate and, ultimately, to the recommendation of the President

when those decisions are made in accordance with the system established by the parties: see *Lang*, at para. 135, citing *Wade v. Strangway and the University of British Columbia* (1994), 116 DLR (4th) 714 (BCSC), appeal dismissed by (1996), 132 DLR (4th) 406 (BCCA).

VII. ALLEGATIONS OF PROCEDURAL ERROR

As reproduced above, Article 13.01 of the Appointment Agreement defines “procedural error” to mean “a failure or failures to follow required procedures or a failure or failures to consider relevant evidence”. Under Article 13.07(b), where an arbitration board decides there has been a procedural error, the board may: (i) dismiss the appeal if “it is satisfied the error has not resulted in a wrong decision”, or (ii) exercise certain remedial powers “if the error may have resulted in a wrong decision”.

The Faculty Association relies on *University of British Columbia and University of British Columbia Faculty Assn. (Dodek Appeal)*, [1997] BCCAAA No. 82 (Kelleher), for the proposition that an arbitration board should only dismiss an appeal if it is satisfied that a procedural error “has not resulted in a wrong decision” in the sense that the arbitration board “must be able to make a positive finding that the error made no difference to the decision” (para. 35).

The nature of procedural error was examined more recently and in greater detail by Arbitrator Germaine in the *Lang* proceeding:

Having found there were procedural errors in the peer review leading to the decision under appeal, the question is whether the decision can stand. Despite the importance of procedural fairness, not all such errors are fatal. This is doubtless a positive feature of the appeal regime because a candidate's peers are seldom experts in administrative law and procedure. In my view, the adequacy of the fairness provided by a particular review must be assessed on all of the facts according to the test established by the parties. The test here is prescribed in Article 13.07 of the Appointments Agreement quoted in paragraph 10 above. On the language of the provision, the parties plainly agreed that procedural error may

or may not result in a wrong decision; procedural error alone is not sufficient to endow this board with remedial powers.

To succeed, the Appellant must show the decision was "arrived at through procedural error" (13.07(a)) or the error "may have resulted in a wrong decision" (13.07(b)(ii)). By either of these alternative formulations of the test, more than procedural error is required for an appeal to succeed. It is apparent the parties recognized that procedural error may not significantly impair the essential fairness of a review process or, alternatively, the effect of procedural error may be corrected before the decision is made.

The test - especially the second formulation which speaks to any error that "may have resulted in a wrong decision" - appears to open a broad avenue of appeal. In theory, virtually any procedural error *might possibly* have consequences. But, in my view, it would be a mistake to construe the provision to mean an appeal must succeed if there is *any* possibility of a wrong decision, regardless of how remote the possibility may be.

Having regard to the first formulation of the test in clause (a) and the nature of the review process, I am persuaded an appeal should succeed only if there is a real possibility the decision was wrong because of the procedural error. To make this determination, the error must be examined in the context of the evidence as a whole. It is essential to understand the essence of the decision and the basis on which it was made, as well as the procedural error. The question is whether, on the balance of probabilities in this context, it is realistic to conclude the decision could have been influenced by the procedural error. (paras. 103-106)

At first glance, the *Dodek* and *Lang* appeals may appear to have articulated different thresholds for arbitral intervention based on procedural error. However, in my view, the formulations are more properly viewed as "different sides of the same coin". That is, if there is a real possibility that a decision was wrong because of procedural error (*Lang*), this will necessarily preclude a positive finding that the error made no difference to the decision (*Dodek*). With this admittedly brief review of the relevant framework, I turn next to the various procedural errors alleged by the Faculty Association.

(a) Failure to Apply Correct Criteria/Application of Irrelevant Factors

The Faculty Association submits the President's decision shows that he failed to apply the correct criteria for tenure applications and, instead, applied irrelevant factors respecting Dr. Lund's application. More particularly, the Faculty Association maintains the President applied

criteria that are not found in the Collective Agreement, and applied others that are applicable only to applications for promotion to Associate Professor.

(i) “Successful” Graduate Teaching/Mentoring Graduate Students “To Completion”

The President’s letter of January 18, 2010 was reproduced in full above. After referring to the applicable Collective Agreement terms regarding promotion to Associate Professor and the granting of tenure, the President advised Dr. Lund of his conclusion: “It is with respect to teaching and more importantly, scholarly activity that your record has not, in my view, met the criteria for promotion to Associate Professor or for tenure”. The ensuing paragraph conveyed the President’s assessment of Dr. Lund’s teaching:

Your teaching record is good but does not demonstrate evidence of the necessary level of successful graduate teaching. In particular, the evidence of your ability to successfully mentor graduate students to completion is weak.

The Faculty Association submits that “successful graduate teaching” may be a criterion for promotion but has no application to a tenure case. Further, there is no suggestion in the Collective Agreement that mentoring graduate students “to completion” is an appropriate criterion for either promotion or tenure.

I accept the University’s point in reply that it would be untenable to suggest that “unsuccessful” teaching is consistent with having “maintained a high standard of performance in meeting the criteria” applicable to tenure applications. Nonetheless, the difficulty is that the President’s letter contains only a brief evaluation of Dr. Lund’s teaching which is apparently intended to address both promotion and tenure, and that assessment is couched in terms which are more directly applicable to promotion cases.

To elaborate, the description of Assistant Professor in Article 3.05 of the Appointment Agreement contemplates a candidate who is “a successful teacher” and “is *capable* of providing instruction at the various levels in his or her discipline, *but it is sufficient to show a potential to meet these criteria*”. In contrast, under Article 3.06, promotion to Associate Professor “normally

requires evidence of successful teaching ... beyond that expected of an Assistant Professor”, with candidates being judged on “teaching as defined in Article 4.02 [and] *on ability to direct graduate students*”. As the University observes, Article 4.01(a) provides that appointments without term (i.e. tenure) may be granted to individuals who have “maintained a high standard of performance” in meeting the criteria. However, in relation to the criterion of teaching, Article 4.02 directs that “[c]onsideration shall be given to the ability *and willingness* of the candidate to teach ... at various levels of instruction”.

The University asserts that the Faculty Association’s arguments in this area “would require a dramatic reading down of Articles 3.05 and 4.02 when there is no basis to do so”. Given my view of the matter, there is no need to make any definitive pronouncement regarding the extent to which a candidate must teach and mentor graduate students in order to satisfy the criterion of teaching as it relates to tenure. The determinative point is more fundamental: the Collective Agreement uses quite different language to describe what is necessary for promotion to Associate Professor versus what may be sufficient for appointments without term at the rank of Assistant Professor. The President’s letter unfortunately conflated the tests, and used language which more closely resembles what is required for promotion to the exclusion of considerations relevant to tenure. To this extent, I find the letter reveals a procedural error.

(ii) Ability to Publish “Independently”

The President’s conclusion regarding Dr. Lund’s scholarly activity is found in the following paragraph from his decision:

Judgement of scholarly activity, under the Agreement, is based on the quality and significance of your research and the dissemination of the results of that scholarly activity. My concern is that your scholarly record does not demonstrate the significance of your contributions or the dissemination of the results of your activity expected for promotion or for tenure. *In particular, there is insufficient evidence of your ability to publish independently in venues with high impact.* As such, I do not believe that you meet the requirement of sustained and productive scholarly activity for promotion to the rank of Associate Professor. I also do not believe that your research record demonstrates that you have

maintained the high standard of performance in your scholarly activity required for tenure. (emphasis added)

The Faculty Association maintains that the above sentence in italics was relied upon by the President to deny both promotion and tenure; i.e. the requirement to publish “independently”. It submits this is not a proper criterion for evaluating tenure; is not a factor relevant to judging scholarly activity; and the requirement to publish “independently” cannot be found anywhere in the Collective Agreement.

There is no dispute that the Collective Agreement does not expressly contain a requirement to publish “independently” for either promotion or tenure. The real question is whether the President’s use of this term reveals a procedural error, or can be accepted as a valid descriptor for “an individual’s contribution” to scholarly activity as contemplated by Article 4.03 of the Appointment Agreement.

The Faculty Association relies in part on evidence given by Dr. Kitts. He was asked in cross-examination what was meant by the phrase “publish independently”, and replied: “I’m not familiar with that phrase -- I don’t use it, so can’t give an answer”. The Faculty Association also points to another decision by the President where the candidate was granted tenure at the rank of Assistant Professor, and encouraged “to strengthen your scholarly record through *first authored publications*” (emphasis added).

On the other hand, the answers given by Dr. Lund in cross-examination remove any uncertainty on his part about what the President was communicating and what was required for tenure. More specifically, he agreed that he understood the words “publish independently” to mean in effect a paper where he was the senior author based on independent research and design in his laboratory. Dr. Lund was later taken to the agreed-upon summary from the Section 5.02(a) meeting held on September 7, 2006 which uses the term “principle investigator” (sic). He agreed with the suggestion by University counsel that this meant independent research, in the sense of him being the lead investigator and doing the research design, although possibly with others.

Additionally, it cannot be said that publishing “independently” is entirely foreign to scholarly activity as that criterion is apparently understood in the broader university setting. For instance, in *University of Windsor -and- The Faculty Association (Goldman)*, unreported (December 16, 1987), Arbitrator Pamela Picher used the phrase “independent scholarship” to distinguish between graduate student scholarship that is, “in varying degrees, directed and supervised” and what is expected of an academic deserving of tenure. Nor is the term unheard of at this University -- it will be recalled that the Senior Appointments Committee explained its recommendation as follows:

The negative votes in relation to promotion reflected concerns about the publication record and the lack of clear demonstration of ability *to publish independently* in high impact journals. The negative votes in relation to tenure reflected concerns about an insufficient research record such that he has not met the expectation of a high standard of performance for UBC to invest in tenure. (emphasis added)

This rationale by the SAC displays a strong parallel to the President’s decision. More particularly, the lack of evidence regarding Dr. Lund’s “ability to publish independently in venues with high impact” led directly to his conclusion regarding promotion (“As such ...), and also informed the President’s conclusion regarding scholarly activity as it related to tenure.

I am accordingly unable to find any procedural error resulting from use of the words “publish independently” in the President’s decision.

(iii) Improper Focus on the Quantity of Publications

The Faculty Association submits next that scholarly activity must be assessed based on the quality and significance of a tenure candidate’s publications, and that the quantity of publications is an irrelevant consideration under Article 4.03 of the Appointment Agreement. It argues the latter may be a valid consideration for promotion to Associate Professor because the judgment under Article 3.06(a) is based in part on “sustained and *productive* scholarly activity”. Thus, says the Faculty Association, “the express inclusion of such additional quantitative criteria

must lead to the conclusion that these factors are not part of the evaluation of candidacy for tenure without promotion” (underlining in original).

The University defends the decision on the basis that the quantity of publications is a valid criterion for tenure. I am satisfied its position is supported by past appeal decisions and, indeed, by common sense. In terms of the former, a tenure appeal decision of some vintage is *Professor W. G. Mallett -and- President Douglas T. Kenny* (March 12, 1981), unreported (Hickling et al). Counsel for the University in that appeal took issue with a statement in a prior case to the effect that an “argument based on quantity, i.e. the number and length of articles ... is not acceptable” because the decision “has to be made on the quality of the work”. In considering language still found in Article 4.03 of the Appointment Agreement, the appeal board in *Mallett* reasoned:

... As section 4.03 notes, the judgment of scholarly activity is to be based mainly on the significance and quality of an individual’s contributions. *The number and length* of publications are not determinative in themselves. That does not mean that the University is not entitled to require that *a candidate for tenure attain a level of productivity commensurate with that which one could reasonably expect of a person at that stage of his or her career in the particular discipline and bearing in mind the kind of scholarly activity involved*. The Board will ordinarily defer to the assessment of the candidate’s peers on that score. A level of productivity below the norm might, not unreasonably, cause one to question a candidate’s ability to maintain a satisfactory standard of performance, as [University counsel] suggested. (pp. 9-10; emphasis added)

This reasoning was followed in *Professor P. Braun -and- President Douglas T. Kenny* (November 12, 1982), unreported (Hickling et al), which was also an appeal against a denial of tenure. The “problem” in that case related to the assessment of scholarly activity and, more specifically, the fact the candidate’s productivity had diminished since his arrival at the University. The appeal board found:

So far as publications are concerned it is not disputed that Dr. Braun’s productivity had diminished since his arrival. *The number and length of publications are not determinative in themselves*, but as was pointed out in the Mallett case at p. 9 the University is entitled to expect that a candidate for tenure attain a level of productivity commensurate with that which one could reasonably

expect of a person at that stage of his or her career in the particular discipline and bearing in mind the kind of scholarly activity involved. One might add that the University might reasonably expect a person who has attained that standard to maintain it. (p. 25; emphasis added)

More recently, in an appeal decision put forward by the Faculty Association, the arbitrator remarked that “the issues of quality and quantity are linked”: *University of British Columbia -and- University of British Columbia Faculty Association (Preston Appeal)*, [2004] BCCAAA No. 15 (Pekeles), at paras. 64 and 68. As the arbitrator explained:

... Suppose, for example, that a candidate had produced a number of books of very modest quality and significance. In my view, that candidate would not necessarily be a superior candidate to one who produce just one book that was appraised as having immense quality and significance in his or her field. ... (para. 64)

I am mindful that *Preston* was both a tenure and promotion appeal. However, it is evident that the arbitrator regarded the quantity of an individual’s publications to be part of the judgment regarding scholarly activity. In my view, it is inherently included in the directive to consider the “*significance* of an individual’s contribution”. This is consistent with the statement in *Braun* that there was “no question about the quality of [the candidate’s] earlier work” (p. 25) - - rather, as noted above, productivity had diminished since his arrival at the University. It seems axiomatic as well that the significance of an individual’s contribution to scholarly activity will depend on their entire body of work; that is one must evaluate the extent of publication (i.e. quantity) and the overall importance of those publications. Thus, as the Faculty Association suggests, “a paradigm-shifting article in an elite high-impact journal does not lack quality or significance because the achievement is not repeated over and over again”; therefore, a single publication may be a sufficient contribution. On the other hand, it seems reasonable to postulate that several publications may collectively amount to an equally significant contribution, although none of them approach the importance of the single “paradigm-shifting article”.

I acknowledge the Faculty Association’s submission that promotion to Associate Professor is dependant in part on “sustained and productive scholarly activity”. However, for the reasons given, I am unable to conclude that the judgment of scholarly activity relevant to tenure

excludes a quantitative assessment of a candidate's publications as a factor in the determination of the "*significance* of an individual's contribution". The Faculty Association has accordingly failed to establish a procedural error on this basis.

(iv) "Inputs" and "Outputs"

The Faculty Association next objects to the President's references to "inputs" and "outputs" and, more specifically, the notion that Dr. Lund's "inputs" (i.e. the considerable funding and resulting staff of post-doctorate fellows and technicians) did not match his "outputs" (i.e. the quantity and impact of publications). The objection rests on the proposition that the assessment of scholarly activity is not limited to articles in peer-reviewed journals, and the evidence of both the President and Dr. van Vuuren that grant funding of the type attracted by Dr. Lund is a relevant consideration when assessing scholarly activity. The Faculty Association says the categorization of scholarly activity as inputs/outputs is "a wholesale unilateral revision of the Collective Agreement". Further, this unilateral categorization of Dr. Lund's record will always be deemed to be negative regardless of the candidate. The argument is that a candidate who is unable to attract significant grant funding will be viewed as underachieving, while a candidate who is able to secure considerable funds will be held to a higher standard.

This alleged procedural error is founded entirely on the President's testimony (in distinction to the text of his decision), and can be answered on the same basis. The President candidly described the significant grant resources attracted by Dr. Lund through a serious peer-reviewed process as a "complicating factor in the file". It is evident that he turned his mind to the subject, and considered it as part of scholarly activity. The Faculty Association's reliance on *Rucker, infra*, under this heading for the proposition that scholarly activity is not limited to articles in peer-reviewed journals is somewhat misplaced; that was a professional case where additional considerations apply. Dr. Lund's application was a traditional case where "[p]ublished work is ... the primary evidence" of scholarly activity.

I agree as well with the University's submission that, in order to assess "the significance of an individual's contribution", it is relevant to know what resources were available to the

candidate. It is not a question of a higher standard being imposed for those who obtain grants as the Faculty Association suggests; rather, it is a matter of assessing the candidate's scholarly activity in the context of the available resources to determine whether the resulting contribution represents "a high standard of performance". It is perhaps worth noting that the President was not alone in taking this view of Dr. Lund's record. The Dean's letter of March 10, 2009 opined that "the outputs and impacts of [his] research" were not yet commensurate with the level of funding he had received.

I find no procedural error was occasioned by the President's references to "inputs" and "outputs" when assessing Dr. Lund's scholarly activity in light of his grant funding.

(b) Failure to Apply Full Range of Scholarly Activity

The Faculty Association submits the President committed a procedural error and/or made an unreasonable decision by failing to apply "relevant criteria" to Dr. Lund's application -- specifically, his success in attracting grant funding and his international reputation in the field as evidenced by his numerous invited presentations throughout the world. It argues there is nothing in the President's decision to suggest these achievements were considered, let alone applied, when evaluating Dr. Lund's scholarly activity. The authorities put forward in support of this alleged procedural error include *University of British Columbia and Faculty Association of the University of British Columbia (Rucker)* (April 15, 2004), unreported (Jackson); and *Dr. Garry David Grams -and- The President of the University of British Columbia* (January 8, 1993), unreported (Bergersen).

There is no dispute that substantial grant funding through a peer-reviewed process and international presentations such as those given abroad by Dr. Lund are relevant to the criterion of scholarly activity. Nor is it suggested by the University that either of these contributions was even alluded to in the President's decision (this is one notable area where "detailed and specific reasons" were lacking). The University is on solid ground, however, in distinguishing *Rucker* and *Grams* on the basis that they were both "professional" cases. In those circumstances, the Appointment Agreement contemplates a different approach than academic or "traditional" cases

where (as here) published work is “the primary evidence” of scholarly activity. In *Rucker*, the President only considered peer-reviewed publications and failed to consider “other evidence” which Article 4.03 of Appointment Agreement directs “shall be considered” in a professional case (see pp. 18-19). The error in *Grams* was that the candidate’s professional work was treated as “service” and not regarded as scholarly activity (see pp. 8-9).

I am not prepared to infer from the brevity of President’s decision that he completely overlooked Dr. Lund’s grants and international speaking engagements, particularly when both subjects were repeatedly identified by the lower levels and the external referees. In any event (but with a caveat to be explained later in this decision), the Faculty Association does not challenge the University’s reliance on the President’s testimony at arbitration to defend this alleged procedural error. In this regard, the President stated in cross-examination that he considered the research grant obtained by Dr. Lund (especially as it followed a “serious peer review”), as well as his presentations at conferences in British Columbia and around the world. These were “certainly relevant” but did not overcome the lack of publication and impact which comprise the “primary assessment tool”.

(c) Failure to Apply Criteria Consistently

The Faculty Association tendered two past decisions of the President where he granted tenure at the rank of Assistant Professor to other faculty members. One has been referred to already, and included encouragement for the successful candidate to “strengthen your scholarly record through first authored publications”. In the other decision, the President “strongly encourage[d]” the faculty member to “refine and improve your abilities in the area of teaching”. The Faculty Association submits those decisions demonstrate the President applied a different standard to Dr. Lund’s application, and complains this amounts to a repeated trend of “moving goal posts”.

The University maintains that evidence relating to other candidates is not admissible aside, perhaps, for the limited purpose of showing the “phrasing” used by the President.

I find the University's objection is sound. As stated in *Dr. Sarah A. Bell -and- President Douglas T. Kenny* (February 16, 1982), unreported (Hickling et al), there is "some element of comparison" when assessing candidates; however, performance is to be measured against the standards in the Collective Agreement (pp. 4-5). See also *Dr. Barbara Heldt -and- Dr. George K. Petersen* (March 19, 1985), unreported (Hickling et al). Moreover, and even making the unlikely assumption that the information regarding other candidates would be admissible "evidence" under Article 13.01 of the Appointment Agreement, I do not have sufficient details regarding the two other faculty members to reach a conclusion about how the President assessed their applications for tenure to find that he applied a different standard. Further, as the University submits, those tenure applications came forward in different disciplines where the context for assessment against the Collective Agreement standards may be quite different. Thus, even if admissible, I find the other decisions do not demonstrate any procedural error respecting Dr. Lund's application.

(d) Applying the Criteria for Promotion Generally

The Faculty Association maintains that the President's decision rested upon "a foundation of procedural error given that it purports to apply the criteria for tenure *and promotion* when Dr. Lund's application was restricted to the question of whether tenure should be granted" (italics in original). The various submissions under this heading are predicated on what the Faculty Association says is the "absolutely clear" evidence that Dr. Lund withdrew his candidacy for promotion to Associate Professor, and limited his application to tenure at the rank of Assistant Professor. The evidence includes Dr. Lund's conversation on March 10, 2009 with Dean Isman, and the letter he sent the following day which is now repeated in its entirety for closer examination:

I am writing in response to your letter dated 10 March 2009 regarding your recommendation to the President on my tenure and promotion application. I have read and understand the issues raised in your letter and I greatly appreciate your meeting with me to discuss your decision. I wish to express herein my support for your recommendation of tenure without promotion. I understand that should tenure be granted in 2009, I may be eligible to re-apply for promotion to the Associate Professor rank within two years.

The first point that can be observed regarding this letter is that Dr. Lund did not expressly “withdraw” his application for promotion; he expressed “support” for [the Dean’s] recommendation of tenure without promotion”. This is consistent with Dr. Lund’s testimony that Dr. van Vuuren advised him to focus on tenure and not “fight” the recommendation against promotion, and the understanding he expressed about being “eligible to re-apply for promotion ... within two years” should tenure be granted in 2009. The Faculty Association submits this can only be interpreted as a statement by an applicant focused exclusively on tenure. I do not concur. Such a statement is equally consistent with Dr. Lund continuing to “ride two horses” and await the outcome. There was nothing for him to lose by having the promotion application continue to go forward as well, because he could re-apply within two years if granted tenure.

The next consideration is Dean Isman’s letter to the President dated April 20, 1989. The Faculty Association argues at various junctures that an adverse inference should be drawn against the University for its failure to call the Dean as a witness. However, I do not see how calling him would have been unfavourable to the University’s case on this point. The undeniable fact is that the Dean’s letter, which is dated more than a month after Dr. Lund’s purported withdrawal, spoke fully to both applications. The only reasonable inference is that he did not understand Dr. Lund’s letter to have the import now asserted by the Faculty Association.

The next document of significance is the recommendation of the Senior Appointments Committee. The record at arbitration shows that Dr. Lund’s March 11, 2009 letter was put before the SAC on June 10, 2009. Yet it is obvious once more that it was not construed as a withdrawal of his promotion application because the Committee discussed and voted on both applications (see the record of the SAC’s second meeting on October 9, 2009 reproduced in part above).

The proceedings of Senior Appointments Committee take on even greater significance in light of Dr. Lund’s testimony that Dean Isman “emailed” the Committee’s decision to him. The evidence establishes that Dr. Lund was aware of the SAC’s decision on October 9, 2009 before it was formally communicated to the President (along with recommendations regarding other candidates) on October 19, 2009. One must logically ask: Given the continuing

recommendations regarding both applications, had Dr. Lund intended at the time to withdraw his promotion application, why did he not take steps to clarify the situation by submitting supplementary information as he had on other occasions?

But there is more. The grievance of January 26, 2010 which commenced this proceeding appealed “the University’s decision regarding the denial of tenure and promotion of Dr. Steven Lund”. I acknowledge the Faculty Association’s point that, when the grievance was launched, it did not have in its possession any of the materials which led to the President’s decision. Nonetheless, the Faculty Association’s letter providing formal particulars to the University on January 17, 2011 (or almost one year after the decision) indicated it was appealing the decision “not to recommend promotion and/or tenure”. It was not until February 3, 2011 (or about three weeks before the hearing began) that the Faculty Association advised the University it was only appealing the decision to deny tenure and “[t]he decision to deny promotion to Associate Professor is not an issue under appeal”. However, even at that stage, the Faculty Association did not assert or even make reference to Dr. Lund having withdrawn his promotion application.

There is no need to determine exactly what Dr. Lund intended to accomplish through his March 11, 2009 letter to Dean Isman. The relevant point is that no one who read the letter at the relevant times construed it in the manner now argued on appeal. More critically, Dr. Lund failed to advise others that he had intended to withdraw his promotion application when it should have been obvious to him that they held a contrary understanding. In these circumstances, the President cannot be faulted for proceeding to consider both applications, especially as both had been considered by the Senior Appointments Committee. In any event, I accept his evidence that the applications were considered “independently” in accordance with the Collective Agreement terms.

(e) Breach of Article 5.02

The Faculty Association submits the Appointment Agreement includes “firm and unequivocal requirements” for a meeting with a tenure candidate’s Department Head. Under Article 5.02(b)(ii), the purpose of the meeting is “to identify any potential difficulties with the

candidature and to assist the candidate with any concerns”. The Faculty Association points to the agreed-upon summary resulting from the meeting between Dr. Lund and Dr. Kitts on September 9, 2008 and asserts there is nothing in the text that might remotely be considered as identifying “potential difficulties”. It maintains this was another procedural error that may have resulted in a wrong decision -- that is, the failure to identify any problems deprived Dr. Lund of the opportunity to adequately correct any of the alleged shortcomings cited by the President in his decision. As one example, the Faculty Association relies on Dr. Lund’s testimony that he was not aware of the requirement to demonstrate completion of a graduate student dissertation until the Colleagues Committee report in December 2008.

In my view, the September 2008 meeting between Dr. Kitts and Dr. Lund cannot be viewed in isolation. His appointment letter in September 2002 conveyed the expectation that he would “maintain an active research program”, “supervise graduate studies” and, additionally, “maintain a realistic number of graduate students”. The letter of January 27, 2005 regarding his first reappointment suggested “the generation of more publications in strong journals in your research area is a serious priority in order to increase your publication record”. The agreed-upon summary from the Section 5.02(a) meeting in September 2006 identified the significance of publications where Dr. Lund was “the principle investigator”. Contrary to the Faculty Association’s arguments, Dr. Lund’s email to Dean Isman in December 2006 reveals he was quite aware that graduating MSc and PhD students was an integral part of “my ‘balance sheet’ for a tenure application”. The importance of research and publications, together with the supervision of graduate students, were also reinforced at the time of his second reappointment.

The agreed-upon summary from the September 2008 Section 5.02 meeting confirms Dr. Lund’s prior awareness of potential deficiencies. The memorandum records him noting “...that he had made considerable progress with training graduate students since his last 5.02 meeting ... [and] is expecting to further increase his graduate students group this coming year ...”. In terms of research progress, Dr. Lund apparently advised there were “... 2-3 new publications this year and another number of papers that are very close to submission [and] realizes the importance of translating research data into publications ...”; further, his research “... is finding a place in some very good biochemistry and plant research journals and his work is being cited by other

laboratories”. The summary concludes by recording Dr. Lund’s confidence that “... his research activities and scholarly output in the next few years will enable him to be recognized as a leader in plant genomic research”.

It was suggested to Dr. Kitts in cross-examination by the Faculty Association’s counsel that there was nothing in the summary to identify potential difficulties as required by Article 5.02(b)(ii), and he replied: “It is not meant to be negative -- it is a translation of the discussion regarding teaching, scholarly activities and service [and] it is understood how important they are”. In reference to the “progress” regarding research and publications reported by Dr. Lund, Dr. Kitts indicated this was recorded in the summary because “I wanted to make it clear that it was important to publish”. When pressed further that there was nothing in the summary to identify potential difficulties regarding Dr. Lund’s candidature, Dr. Kitts replied: ‘You could come to that conclusion, but that is not what went on in the meeting”.

Based on the evidence of Dr. Kitts, the unavoidable inference is that the agreed-upon summary from September 2008 failed to fully capture the possible implications of his discussion with Dr. Lund. Such omissions undermine the clear objective of Section 5.02 and risk misleading a candidate by leaving a false sense of security. Nevertheless, in all of the circumstances here, I am satisfied that Dr. Lund was well aware of the expectations for promotion and tenure; additionally, he knew there were two key issues that were potential difficulties for his candidature -- and, as events transpired, his candidature for tenure. Thus, and unlike the *Goldman* decision cited by the Faculty Association, this is not a situation where the University made “not the slightest negative remark” about Dr. Lund until the decision denying him tenure.

On a minor point raised by the Faculty Association, it would have made little difference if the requirement to supervise graduate students to “completion” had been spelled out in the September 2008 Section 5.02 meeting, rather than in the December 2008 report of the Colleagues Committee -- especially as that was not the main reason for denying tenure. Moreover, as I have found, it is evident from Dr. Lund’s December 2006 email to the Dean that he appreciated the failure to graduate a PhD or MSc student could be a problem.

A further answer to the Faculty Association's complaints under this heading is that the progress reported by Dr. Lund in September 2008, combined with his assurances of increased graduate students and research publications in the near future, effectively removed from Dr. Kitts an obligation to more strongly sound the proverbial warning bells beyond what he canvassed with Dr. Lund and they agreed to in the summary. The evidence indicates there could well have been a different outcome to the tenure process had Dr. Lund delivered on those assurances. In short, there was no breach of Article 5.02 that constituted a procedural error.

(f) The President's Conversation(s) with Dean Isman

The Faculty Association says the evidence establishes that President Toope and Dean Isman had at least one conversation, and probably two conversations, after the Senior Appointments Committee issued its report and before the January 18, 2010 decision was issued. According to the President's testimony, one conversation was at least five to ten minutes, suggesting that it extended well beyond simple confirmation of the date Dr. Lund's laboratory was completed. Further, the President acknowledged that he may have expressed his negative views regarding the Collective Agreement provisions allowing for tenure at the rank of Assistant Professor without contemporaneous promotion to the rank of Associate Professor. The Faculty Association notes that Dean Isman was not called to clarify what transpired during these conversations, and submits an adverse inference must be drawn against the University for its failure to call the Dean as a witness: *Barbara-Jean Steele*, BCLRB No. B77/2001, 69 CLRBR (2d) 45.

This is one of several grounds advanced by the Faculty Association which the University says were not found in the pre-hearing particulars exchanged in accordance with Article 21.14(a) of the Framework Agreement that sets out the general arbitration procedures; consequently, the grounds should not be entertained.

I do not agree. Leaving aside the Faculty Association's rather technical argument as to what constitutes "particulars", Article 21.14(c) provides an arbitration board with the discretion,

on terms it see fit, “to admit evidence or hear testimony not exchanged under (a) or (b)”. This is consistent with the statutory authority of an arbitrator under Section 89(e) of the *Labour Relations Code* to relieve against breaches of procedural requirements set out in a collective agreement on just and equitable terms. There is no reasonable basis for the University to claim prejudice resulting from any of the additional grounds being considered, given that the evidence was heard over several months and the University had ample opportunity to investigate any issues that may have caught it “off guard”. Nor is prejudice asserted. The University additionally had ample opportunity to formulate its response to all of the Faculty Association’s submissions, given a seven day adjournment between the Faculty Association’s primary argument and the University’s reply. All of the added grounds were fully argued on the merits. In my opinion, given the scope of this proceeding and the interests at stake, this ground of appeal in particular (as well as others) should not be rejected for procedural non-compliance.

According to Dr. Lund’s evidence, the President spoke with Dean Isman on November 26, 2009. During the course of the conversation, the President expressed a negative view of “split cases” (i.e. tenure without promotion) because they are “a loophole for weak cases”.

President Toope was asked about his communication with the Dean in direct examination, and said there was “a brief discussion ... mostly to ensure I was interpreting some statements correctly” about the time taken by Dr. Lund to establish his laboratory. The President allowed that he may have indicated a concern with Dr. Lund’s application, but would not have indicated whether he was tending to a positive or negative decision because “I don’t typically do that”. When asked whether he had expressed a view to Dean Isman about tenure without promotion the President stated:

I don’t remember, but I might have because I have been quite public on this. I wish it wasn’t in the Collective Agreement and we tried to negotiate it out unsuccessfully. I don’t think it’s a great provision, but we must abide by the Collective Agreement and assess tenure independently from promotion and I have done that; [there have been] cases where I have recommended tenure without promotion.

In cross-examination, the President reiterated that he spoke with Dean Isman because he was unsure about how long it took to set up Dr. Lund's laboratory. He added that he also inquired about the length of Dr. Lund's teaching release, recalling that there were "two factual points that lacked clarity" in the dossier. The President then stated that he only recalled one conversation, but it was "possible" there were two and he had no recollection of any discussion beyond the length it took to establish the laboratory and the period of Dr. Lund's teaching release. In response to the suggestion that he described applications for tenure without promotion as "weak cases", the President replied: "I honestly do not remember, but I have been public about that provision for those sorts of reasons [and] the Collective Agreement does allow weaker cases to be managed through the process". Thus, it was "possible" he had repeated his public comments during the conversation. After further questioning regarding the University's proposals in collective bargaining that were being discussed at the time of his decision, the President again acknowledged his "personal position" but reiterated he "had to abide by the Collective Agreement".

Earlier in cross-examination, in the context of questions about his consideration of impact figures for Dr. Lund's publications, the President was asked whether he had made any inquiries regarding what he saw in the dossier, and volunteered: "That may be one of the questions I asked the Dean [in order] to understand impact figures in the field". Finally, and returning to questions by Faculty Association counsel regarding the extent of the conversation, the President allowed that "we could have talked about other things ... but I don't recall getting any other information from Dean Isman" beyond the laboratory and teaching release time.

I reject the Faculty Association's assertions that the President's personal views regarding tenure without promotion had any impact -- let alone an improper influence -- on his assessment of Dr. Lund's application. His testimony to the contrary is supported by objective evidence of tenure being granted in other cases where that was the only application under consideration, as well as in cases where both tenure and promotion were being sought.

The Faculty Association also asks "... if Dr. Lund was applying for both tenure and promotion to Associate Professor why would President Toope even raise this comment [about

weak cases] with the Dean?” (underlining in the original). It submits this demonstrates the President was “well aware” that Dr. Lund was only applying for tenure. I disagree, as the comment is at least equally consistent with the President’s obligation to make two “independent” assessments where the SAC had recommended against promotion but had voted in favour of tenure.

Nonetheless, the unavoidable fact remains that the President “stepped outside” the process contemplated by the Appointment Agreement when he spoke with Dean Isman. Article 5.14 allows the President to “request a further review of a case by the Dean”. This was the process followed in *Lang* when the President decided “he needed additional information” regarding an issue that was central to the criterion of teaching (para. 47). The resulting report was forwarded to the candidate who provided a response (para. 49), and this was “critical” (para. 130) to Arbitrator Germaine’s ruling:

The upshot is that the procedural errors did not result in a wrong decision. The risk was eliminated when the President took the extraordinary step of obtaining the further information and giving Professor Lang the opportunity to respond. The student evaluation material provided by Dean Isaacson conveyed to Professor Lang the impediments to his candidacy very clearly and he responded to them.

... With respect to the issues which formed the essence of this decision, the steps he took ensured that he and the grievor were fully informed. Professor Lang took the opportunity to respond to the issues and the President took his response into account. (paras. 132-133)

In my view, it is not an acceptable answer for the University to submit that the matters discussed by the President and Dean Isman “were facts contained in the dossier, known to Dr. Lund”. That may be true respecting the start-up time for the laboratory and the period of teaching release. However, the Faculty Association’s cross-examination of the President opens the door to the very real prospect that other subjects were discussed as well. I am prepared to draw an adverse inference from the University’s failure to refute the implications by calling Dean Isman as a witness to clarify exactly what was discussed (in this regard, it is reasonable to postulate that he would have had a better recollection of the conversation given the larger number of tenure/promotion applications that come before the President). I accordingly find that

the President “may have talked about other things” with the Dean, including publications, in order to “understand impact figures in the field”. This, of course, bears directly on the central determination in the January 18, 2010 decision that there was “insufficient evidence of [Dr. Lund’s] ability to publish independently *in venues with high impact*” (emphasis added).

The inevitable consequence of the foregoing is a finding of procedural error to the extent that the President sought additional information from the Dean outside the processes prescribed by the Appointment Agreement. The conversation also breached the natural justice principle of *audi alteram partem* because Dr. Lund did not have an opportunity to hear what was said by Dean Isman and/or to respond before the President made his decision.

(g) Lack of Detailed and Specific Reasons

Article 5.15(b) of the Appointment Agreement provides that, where a recommendation is negative, “... the President shall provide *detailed and specific reasons* in writing to the candidate including the respects in which he or she is deemed to have failed to have satisfied the applicable criteria ...” (emphasis added). To a certain extent, this alleged procedural error overlaps with the Faculty Association’s separate allegation that the President’s decision was unreasonable given the contemporary test for that ground of appeal. I will be examining the reasons provided by the President more closely in that context in the next part of this award.

For immediate purposes, I note the University’s characterization of the President’s decision letter in this case as being “very similar in terms of the level of detail, to his decision in the *Oliver Lang* case”. I agree, and adopt Arbitrator Germaine’s conclusion that “... the letter sent by the President did not meet the required standard and therefore constituted another procedural error” (para. 102). Parenthetically, it is unfortunate that the shortcoming identified by Arbitrator Germaine in *Lang* has not been addressed in practice, because it has contributed to some of the grounds for appeal in this proceeding.

(h) Whether Procedural Error(s) Resulted in a Wrong Decision

For the reasons set out above, I have found that the Faculty Association has demonstrated three procedural errors. The question which thus arises is whether there is a real possibility that the decision under appeal was wrong because of those errors (per *Lang*) or, conversely, whether it can be said that the errors made no difference to the decision (per *Dodek*).

The failure to comply with Article 5.15(b) can be removed immediately from the equation for the reason expressed in *Lang*: the error could not have contributed to a wrong decision because it occurred after the decision was made (para. 122). Nor, in my view, could the apparent conflation of the tests for promotion and tenure in respect of the criterion of Teaching have made a difference to the outcome: the decision plainly states that the criterion of scholarly activity was the “more important” basis for denying tenure.

This leaves the discussion between the President and Dean Isman. Arbitrator Germaine accepted in *Lang* that the “duty of fairness” applies to the process, citing *Wade v. Strangway* (1996), 132 DLR (4th) 406 (BCCA). The University submits that the Court of Appeal’s decision, along with judgments such as *Kane v. University of British Columbia*, [1980] 1 SCR 1105, and *Knight v. Indian Head School Division No. 19* [1990] 1 SCR 653, have been overtaken and overruled by *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190. I do not believe that *Dunsmuir* has such far-reaching effects. Indeed, at paragraph 114, the Court expressly affirmed that “[t]he principles in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect rights, privileges or interests of individuals are valid and important”. The true import of *Dunsmuir* is that, where an employment relationship is contractual, “a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance” (para. 84).

I accordingly accept the Faculty Association’s position that *Wade v. Strangway* remains good law, and the duty of procedural fairness applied to the process under appeal, regardless of whether the President was acting in a “quasi-judicial” manner. Further, as I understand the arguments, the Faculty Association does not merely allege that the discussion with Dean Isman was a “procedural error” as contemplated by Articles 13.01 and 13.07 of the Appointment Agreement. It submits additionally:

... the principles of procedural fairness apply to the University and specifically the President in assessing Dr. Lund's application for tenure. In discussing various matters with Dean Isman without providing any information about those discussions or even their existence to Dr. Lund and without providing him any opportunity to respond, Dr. Lund was denied procedural fairness as established in the above stated jurisprudence. (written submission of June 30, 2011; emphasis added)

The Faculty Association accordingly argues that the failure to observe the *audi aletram partem* rule invokes the remedial approach in *Kane*; namely, “[t]he court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so” (at QL p. 8).

There is certainly some attraction to the Faculty Association's position that natural justice principles and “procedural fairness” should not be equated with “procedural error” as defined in the Appointment Agreement. On that analysis, the appeal must succeed because, without knowing what information was in fact provided by Dean Isman, one cannot conclude there was no possibility of prejudice in accordance with the test in *Kane*. But there is no need to decide the point, because I have reached the same conclusion under Article 13.07(b) for essentially the same reason. Once again, the testimony of Dean Isman might have been especially helpful in clarifying the scope of November 26, 2009 conversation. Unfortunately, without his evidence, one does not know exactly what information might have been provided, including what he may have said about “impact figures in the field”. The latter subject lay at the heart of the President's decision. What is certain is that Dr. Lund was not afforded any opportunity to correct or otherwise comment on what Dean Isman told the President on this and other subjects. In these circumstances, I am not prepared to make a positive finding that the procedural error did not result in a wrong decision.

VIII. ALLEGATIONS THAT DECISION UNREASONABLE

The Faculty Association submits that the President's decision was unreasonable "in light of all the evidence, including the entirety of Dr. Lund's application and the fact that there was no reasonable basis for the President to disagree with the lower levels of evaluations, all of whom recommended tenure". These submissions inherently require a close examination of the President's decision, as well as a detailed examination of the materials in the dossier and the evidence at arbitration.

Before considering the Faculty Association's various submissions that the decision should be set aside because it was "unreasonable", it is necessary to identify the applicable test or standard for this ground of appeal as contemplated by Section 13.07(a) of the Appointment Agreement. A review of past appeal decisions reveals that divergent approaches have at times been taken to the issue of what constitutes an unreasonable decision (see, for instance, the *Mallett* versus *Braun* decisions). Some of the variances may be attributable to modifications that have been made over the years to the governing language. Fortunately, there is no need to dwell on past formulations, as a fairly consistent line of authority has emerged more recently, and there is no controversy between the parties regarding its applicability to the present appeal.

The contemporary line of authorities begins with *Rucker*, where Arbitrator Jackson noted that "unreasonableness" is not defined in the Collective Agreement and cited a passage from *Dr. Godwin Eni v. The President of the University of BC* (March 14, 1994), unreported (MacIntyre et al). She next observed that the question of how to determine whether a decision is unreasonable had been addressed by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, and quoted several relevant paragraphs before stating:

I agree with counsel for the University that the appropriate test to adopt to determine whether the President's decision was reasonable is as follows: "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" (p. 14)

This approach was followed by Arbitrator Gordon in *University of British Columbia - and- Faculty Association of the University of British Columbia (Chiu-Duke Grievance)*, [2005] BCCA AAA No. 29:

As Arbitrator Jackson remarked in *Rucker*, cases arising in the judicial review context assist in terms of how an adjudicator determines if a decision is unreasonable. For instance, in *Law Society of New Brunswick v. Ryan*, [2003] S.C.J. No. 17, 2003 SCR 20, the Supreme Court of Canada held that the standard of reasonableness involves asking whether a decision is supported by the reasoning of a decision-maker. The Court explained that the question to be asked is whether there is a line of analysis within the reasons that could reasonably lead the decision-maker from the evidence before it to the conclusion it reached. A decision may satisfy the reasonableness test if, “after a somewhat probing examination, the reasons given, when taken as a whole support the decision”. See *Rucker*, at pages 13-14. The Court's comments in this regard are helpful. At the same time, the parties have agreed that an arbitrator is not limited to a consideration of the reasons. Rather, the parties have agreed that the arbitrator may assess whether, “on the evidence”, the decision is unreasonable: section 13.07(c).

... While deference is contemplated in the above-noted test of reasonableness, I find the parties have agreed to a scheme granting the arbitrator an authority that effectively displaces the usual arbitral view that management is in a superior position to assess a candidate against the contractual standard: see sections 13.07(b)[(ii)(b) and (c)]. (paras. 105-106)

The test formulated by the Supreme Court of Canada in *Ryan* was also embraced in the *Lang* appeal, where Arbitrator Germaine noted it had been supplemented in *Chiu-Duke* with the requirement that reasonableness entails “a line of analysis from the evidence to ... [the] decision on the express criteria in the Agreement” (para. 143).

The appeal in *Chiu-Duke* was successful. An essential aspect of Arbitrator Gordon's reasoning can be found in the following paragraph:

[President] Piper's second reason is that Dr. Chiu-Duke did not demonstrate potential to supervise graduate students in the area of her research. Again, and leaving aside the issue of procedural error in relation to the application of this criterion, *Dr. Piper simply stated her conclusion. She provided no line of analysis from the evidence before her to her decision.* Due to the absence of any reference to the evidence, and any analysis linking the evidence to her decision, I am unable to conduct an examination of Dr. Piper's reasoning on the face of the decision. This deficiency was not repaired at the hearing as Dr. Piper did not appear and explain her line of analysis. *In my view, a decision by the President to not recommend Dr. Chiu-Duke for promotion that provides no line of analysis from*

the evidence to her decision on the express criteria in the Agreement constitutes an unreasonable decision. Deference cannot be accorded to reasons that remain elusive. (para. 109; emphasis added)

Arbitrator Gordon then turned to consider whether there was “a tenable explanation for the decision” based on “the evidence that was before Dr. Piper and is before me” having regard to her interpretation of the Collective Agreement.

The appeal in *Lang* was not successful for the following reasons:

President Toope's written decision was less than fulsome. As I have said in paragraphs 101 and 102 above, a more detailed and specific explanation could have been provided. The decisions appealed in *Rucker* and *Chiu-Duke* were similarly or perhaps even more succinct. One is forced to consider whether the brevity of decision is by convention, based perhaps on the respectable premise that brief reasons limit the potential for injury in the academic community.

Nevertheless, I find the minimalist decision does meet the applicable tests. On its face, it provides a line of analysis by stating that, on an evaluation of Professor Lang's entire teaching contribution, the decision was primarily based on "a lack of evidence of accessibility to students and the lack of evidence overall of successful teaching of an appropriate range of subject matter". Effectiveness is the overarching criterion specified in Article 4.02. Accessibility to students is a particular criterion specified in Article 4.02. Ability to teach a range of subject matter is also expressly stipulated in Article 4.02. President Toope's line of reasoning was that, simply put, Professor Lang had not established that he had, as required by Article 4.01(a), "maintained a high standard of performance in meeting" these criteria or that he showed any promise of doing so.

If this analysis is not a sufficiently rigorous application of the *Chiu-Duke* test, I am persuaded it is open to me to rely on the evidence given at the hearing. Contrary to the Faculty Association's submission in this regard, it is not necessary to ignore the evidence when conducting the "probing examination" contemplated in *Rucker*. The *Law Society of New Brunswick* test may have intended such a restriction, but the *Rucker* award canvassed the then President's evidence in the course of deciding that her decision was not reasonable. In *Chiu-Duke*, no such evidence was considered because the President was not called as a witness. But the award observed that:

...the parties have agreed that an arbitrator is not limited to a consideration of the reasons... [expressed in the decision]. Rather, the parties have agreed that the arbitrator may assess whether, "on

the evidence", the decision is unreasonable: section 13.07(c). (page 36)

In the context of the evidence here, of course, the line of analysis is solid. Based on the confirmation provided by the student evaluation material requested and considered by President Toope, his analysis was plain. There was evidence to support the reasons he stated and those reasons, taken as a whole, supported the decision. (paras. 145-147)

Thus, and perhaps at the risk of oversimplification, a tenure or promotion decision will be unreasonable unless there is a "line of analysis from the evidence ... to [the] decision" (*Chiu-Duke*, at para. 109). As stated in both *Chiu-Duke* and *Lang*, the test under the Collective Agreement is broader than *Ryan*, in the sense that an appeal board is not confined to the face of the decision and may "rely on the evidence given at the hearing" (*Lang*, at para. 147; and *Chiu-Duke*, at para. 110).

Turning to the decision which is the subject of this appeal, and adopting the phraseology in *Lang*, the President's recommendation regarding Dr. Lund can likewise be described as "less than fulsome". But one must remain mindful of the earlier context -- in *Lang*, the lower levels had all recommended against tenure and promotion, and the President concurred with those recommendations. Thus, there existed a substantial body of consistent evidence to support the decision. The record here is quite different. Although not unanimous, the lower levels consistently supported granting tenure. Without repeating all of the statements made in support of those recommendations, at least one reviewer believed Dr. Lund had been "very successful in mentoring graduate students" and had "published in high quality journals and his articles are highly significant"; another said his publications were "of a very high quality and mostly published in highly regarded journals"; and, while the Dean referred to "an upward trajectory", he wrote that Dr. Lund's "small number of publications" were "mostly in high-impact journals".

I accept the University's submissions that the lower levels of the tenure and promotion process are intended to be advisory, and the President may reach a different conclusion; further, positive recommendations at the lower levels and positive letters from external referees do not raise a presumption in favour of the candidate: *Mallett*, at p. 10. The University also maintains that the President is not required under Article 5.15(b) to explain why he disagrees with the

lower levels, and need only provide the reasons for his decision. I have some difficulty embracing that submission fully, given the stipulation before me that the President's decision was also written to satisfy the requirements of Article 5.14(c) which provides: "If the President's decision respecting a candidate is not in accord with the recommendation of a [committee], the appropriate committee shall be informed of this fact *and the reasons for it*" (emphasis added). The same linkage was made in *President of the University of British Columbia -and- Dr. J. R. Doheny* (July 24, 1990), unreported (MacIntyre), where it was stated that "[t]he Agreement emphasizes the obligation to give reasons for such a reversal to the candidate and to the Department", citing then Articles 5.06(b)(ii) and 5.06(c).

The University argues further that there was no disagreement with the lower levels in this case because "the divergence of opinion is fully explained and understandable on the evidence". Leaving aside for now what is meant by "on the evidence", the immediate point is that the "divergence of opinion" is not explained, and cannot be understood, on the face of the President's decision. There is admittedly a statement that "... there is insufficient evidence of your ability to publish independently in venues with high impact". With respect, this is a rather generic finding. In my view, it cannot survive "a somewhat probing examination" to determine how the conclusion was reached given the information and recommendations in this dossier -- and, especially, the statements from several participants that Dr. Lund had indeed published in high impact venues. Put somewhat differently, it is impossible to determine from the text of the decision why the evidence was found to be insufficient. That finding was, of course, the primary basis for the President's assessment that Dr. Lund had not met the necessary "high standard of performance" for scholarly activity.

The extent of reasons will be dependent on the context. Where a recommendation is consistent with lower level recommendations, past decisions suggest that reasons can be less "fulsome" (*Lang* and *Dodek*). On the other hand, decisions such as *Doheny* indicate that more extensive reasons should be given where the recommendations by lower levels are reversed in order for the candidate (and an appellate body) to understand the basis for the contrary conclusion. As stated in *Doheny* by Arbitrator MacIntyre, "where the reasons do little more than summarize the conclusion, the exact ground for the reversal has to be conjectural" (p. 14). Or,

put in the language of *Chiu-Duke*, where there is only a general conclusion without details specific to the candidature, the reasons “remain elusive” (para. 109).

At the risk of belabouring the point, the most striking feature of the decision in this case is that it does not contain the fundamental basis for the recommendation against Dr. Lund’s tenure. The President testified that his review of the file disclosed no more than “potential”, based on an “upward trajectory” and “forthcoming publications” that had not materialized by the time of his recommendation. Had these assessments of the evidence been recorded, they would have gone a considerable distance towards demonstrating -- and would probably have been sufficient to show -- that the “decision is supported by the reasoning of the decision-maker” (*Chiu-Duke*, at para. 105).

This leads to the broader question of whether the decision was unreasonable “on the evidence”. There was some argument before me regarding the extent to which the President’s evidence can be relied upon to assess the reasonableness of his decision. Based on *Chiu-Duke* and *Lang*, the University does not recognize any restriction. For its part, the Faculty Association characterizes *Lang* as a case where the evidence was consistent with the line of analysis set out in the written decision, as opposed to an entirely new line of analysis or an attempt to replace the line of analysis found in the decision. Here, the Faculty Association submits the University has attempted through the President’s testimony to insert a completely different line of analysis not found in the written decision (i.e. considering grants and presentations, the suggestion that lower levels based their recommendations on “promise” or “potential”), and to rehabilitate the fact that the written decision relied on criteria not found in the Collective Agreement.

In preparing this award, I set out the President’s testimony in some detail as it was referred to extensively by both parties in support of their respective submissions. However, in the course of my deliberations, it has occurred to me that there may be a limitation on the “evidence” which can be admitted at arbitration in relation to the second ground of appeal. This limitation does not appear to have been squarely considered in the past, and flows from the language of the Appointment Agreement.

Once again, an arbitration board has jurisdiction to reverse a decision that is unreasonable “on the evidence”. Article 13.01 defines the word “evidence” to mean “the *information* that was, or should have been, considered at each stage of the process *leading to* a decision” (emphasis added). This definition potentially precludes testimony about *how* the information was analyzed and/or about the decision itself. If so, it would logically follow that the President cannot be called upon to provide a “line of analysis” which is not found in a decision, or to otherwise explain the basis for a recommendation, in order to satisfy the reasonableness test.

Without being exhaustive, the combination of Articles 13.01 and 13.07(b)(ii)(c) would seemingly leave the door open to evidence regarding the process followed by the President “leading to a decision”, and evidence explaining what information was or was not considered. That is essentially what occurred in *Lang*, and I repeat the concluding portion of paragraph 147 reproduced earlier:

... In the context of the evidence here, of course, the line of analysis is solid. Based on the confirmation provided by the student evaluation material requested and considered by President Toope, his analysis was plain. There was evidence to support the reasons he stated and those reasons, taken as a whole, supported the decision.

Consistent with the above interpretation of the Collective Agreement, Arbitrator Germaine relied on the evidence before him (i.e. the requested student evaluation material) and the reasons found in the President’s decision to dismiss the appeal. It is perhaps important to also repeat Arbitrator Germaine’s earlier finding that the President’s “minimalist decision” had met the applicable test of reasonableness because “[o]n its face, it provides a line of analysis” (para. 146). However, the potential limitation flowing from the definition of “evidence” would mean that Dr. Piper should not have been permitted in *Rucker* to give *viva voce* evidence “explaining her decision” (p. 14). I note the definition of evidence was referred to in that decision, but was not considered from this perspective. The point did not arise in *Chui-Duke* because Dr. Piper was not called as a witness.

The reason why the Appointment Agreement limits “evidence” on appeal is perhaps bolstered by the observation that this proceeding effectively became a hearing *de novo* having

regard to the scope of the evidence and the argument -- yet the parties readily accept such is not contemplated by the process. And, to the extent the reasonableness standard is now based on the *Ryan* test, it would be a truly remarkable event for a decision-maker to testify on review/appeal respecting the merits of a decision (or to be subjected to cross-examination on matters otherwise protected by “deliberative secrecy”) as occurred in this arbitration.

The submissions of counsel did not fully explore what is meant by the phrase “on the evidence”, and I stop short of making a firm determination. However, I do not believe it would be appropriate to proceed any further on this ground until the question has been resolved. The issue may well be moot in any event, given my conclusion regarding procedural error. I accordingly reserve jurisdiction should it be necessary to make a final ruling regarding whether the decision was unreasonable “on the evidence”, after hearing supplemental submissions.

IX. CONCLUSION

I have concluded that the President’s recommendation of January 18, 2010 regarding Dr. Lund was arrived at through a procedural error that “may have resulted in a wrong decision” and must therefore be set aside. I have also found that the decision itself was unreasonable to the extent it failed to provide a “line of analysis” in accordance with the test applicable to the Faculty Association’s second ground of appeal. For reasons expressed above, I reserve jurisdiction to decide whether the decision was unreasonable “on the evidence” if that determination is necessary. By agreement, I also reserve jurisdiction to determine any remedial matters that cannot now be resolved by the parties.

Dated at Vancouver, British Columbia on January 18, 2012

A handwritten signature in black ink, appearing to read "John B. Hall", written over a large, loopy circular flourish.

JOHN B. HALL
Arbitrator