

Case Name:
**University of British Columbia v. Faculty Assn. of
the University of British Columbia
(Chiu-Duke Grievance)**

**IN THE MATTER OF an Arbitration
Between
University of British Columbia (the "university"),
and
Faculty Association of the University of British
Columbia (the "association")**

[2005] B.C.C.A.A.A. No. 66

138 L.A.C. (4th) 104

LAX/2005-238

Award No. A-021/05(a)

British Columbia
Collective Agreement Arbitration

J.M. Gordon (Arbitrator)

Heard: November 23, 2004, February 4, 15
and 28, 2005.

Supplementary Award: March 21, 2005.

(48 paras.)

[Editor's note: Original Award filed January 17, 2005. See [2005] B.C.C.A.A.A. No. 29.]

Dr. Josephine Chiu-Duke: Denial of Promotion to Assistant Professor

Appearances:

For the University: Donald J. Jordan, Q.C.

For the Association: Allan E. Black, Q.C.

SUPPLEMENTARY AWARD

Introduction

1 In an award dated January 17, 2005 (the "Award"), I upheld both grounds of the Association's appeal of the President's September 6, 2003 decision (the "Decision") not to recommend Dr. Chiu-Duke for promotion to Assistant Professor. I determined that the Decision was unreasonable and had been arrived at through procedural error that may have resulted in a wrong decision. As the Association had not anticipated certain of the University's arguments relating to remedy, further submissions were requested and received from the parties. Counsel's thorough submissions and authorities have been considered and will only be very briefly summarized in this award.

2 The Association's position is that the remedy of reversal of the Decision, as provided for in Article 13.07(c) of the parties' Agreement on Conditions of Appointment for Faculty (the "Agreement"), is mandatory where, as here, an arbitration board finds the Decision to be both unreasonable and arrived at through procedural error. The Association maintains that once reversed, the Decision is deemed to be a decision recommending promotion. See *University of British Columbia -and- Faculty Association of the University of British Columbia (Lance M. Rucker)*, unreported, April 15, 2004 ("Rucker"); upheld on review in B.C.L.R.B. No. B330/2004 (B.C.L.R.B.), ("B.C.L.R.B. No. B330/2004"). The Association contends that if this arbitration board decides to consider other remedial options under Article 13.07(b), the result would be the same because it would not be possible for the matter to be fairly dealt with on a reconsideration, and the findings made so far in this dispute effectively constitute a decision on the substantive merits.

3 The University's position is succinctly summarized in its February 15th submission:

The arbitrator has upheld the Association's grievance on the grounds of procedural error and unreasonableness. Under these circumstances the arbitrator may exercise any of the remedies set out in Article 13.07(b) and (c). In the circumstances of this case, where there has been no express finding that it would not be possible for the matter to be fairly dealt with on reconsideration, the University submits that the presumption of regularity governs and the matter should be remitted for reconsideration. There is no evidence that the President, properly directed as to the criteria to be applied, would not or could not reconsider the matter and render a decision.

The University submits that proceeding in this manner is preferable to granting the remedy of reversal sought by the Association. An exercise of remedial authority to reverse the President's decision would create an inconsistency between the collective agreement and the powers granted to the President and the Board of Governors pursuant to the University Act. Furthermore, a direction to the President to exercise her statutory authority in a particular manner is inconsistent with the guarantee of freedom of speech in Section 2(b) of the Charter.

The University requests an order that the matter be remitted to the President for reconsideration with directions as set out in the Award as to the proper criteria to be applied in assessing Dr. Chiu-Duke's application for promotion.

4 In advancing its position the University relies on the following authorities: *Zundel v. Citron* [2002] 4 F.C. 225 (FCA); *Adams v. British Columbia (Workers' Compensation Board)* (1989), 42 B.C.L.R. (2d) 228 (B.C.C.A.); *Johnson v. British Columbia (Superintendent of Motor Vehicles)* [2002] B.C.J. No. 89 (B.C.S.C.); *Vernon (City) v. Vernon Professional Firefighters' Assn., IAFF, Local 1517*, [1996] B.C.J. No. 1750 (B.C.S.C.); *C.D. Lee Trucking Ltd. v. Industrial Wood and Allied Workers of Canada*, [1998] B.C.J. No. 2776 (B.C.S.C.); *Canada Post Corp. and P.S.A.C. (Guevremont)* (1993), 34 L.A.C. (4th) 104 (Blasina); *Canadian National Railway and Canadian Telecommunications Union* (1978), 17 L.A.C. (2d) 142 (Adams); *B.C.G.E.U. v. British Columbia (Government Personnel Services Division)* (1987), 12 B.C.L.R. (2d) 97 (B.C.C.A.); *Durham Regional Police Assn. v. Durham (Regional) Police Commissioners*, [1982] 2 S.C.R. 709; *Birkdale District Electric Supply Co. v. Southport (Corp.)* [1926] A.C. 355; *Vancouver (City) v. Vancouver (Registrar Land Registration District)*, [1955] 2 D.L.R. 709 (B.C.C.A.); and, *Pacific National Investment Ltd. v. Victoria (City)* (2000), 193 D.L.R. (4th) 385 (S.C.C.).

5 In reply, the Association submits that the University's reliance on a presumption of regularity is "misconceived" because the issue of real or apprehended bias on the part of the original decision-maker does not arise and is not germane when the legal process of appeal to an independent arbitrator authorizes a decision on the merits and a substantive remedy for breach of a collective agreement provision. The Association alternatively submits that any presumption of regularity is displaced when there is a reasonable apprehension that the original decision-maker may not act in a fair and impartial manner. In the Association's view, the facts and circumstances of this case clearly give rise to a reasonable apprehension that the President may not act in an entirely impartial manner on reconsideration.

6 The Association emphasizes that the University's arguments were advanced and rejected by the Labour Relations Board (the "Board") in B.C.L.R.B. No. B330/2004. The Association also emphasizes the fact that the parties have expressly agreed the President's discretion under the University Act regarding employment decisions is "subject to being substantively judged as right or wrong and ... substantively altered by the process of independent arbitration in cases where the provisions of the Agreement have not been complied with." In the Association's view, the University's argument based on the University Act would deprive employees of the University of any remedy other than reconsideration by management. As such, it is contrary to all prior authorities, is inconsistent with the full remedial powers assigned to arbitrators under the Labour Relations Code and "flies squarely in the face of the Agreement made by the parties themselves." See *Town of Summerside*, [1960] S.C.R. 591; *Simon Fraser University* (1966), 58 B.C.L.R. (2d) 571 (B.C.S.C.); *Faculty Association of the University of Saint Thomas v. Saint Thomas University* (1975), 11 N.B.R. (2d) 379 (N.B.C.A.); and, *Dyck v. Governing Council of the University of Toronto* (1983) 4 D.L.R. (4th) 62 (Ont. H.C.).

7 As to the Charter, the Association says it is unclear on what basis the University claims it applies given that the University has convinced the Supreme Court of Canada that the Charter has no direct application to it as a "government actor", and given that no issue of interpretation of the remedial language of the Agreement arises. Assuming, without conceding, that the Charter has application, the Association submits that as found by the Board in B.C.L.R.B. No. B330/2004, the re-

remedy of reversal of the Decision involves no limitation on freedom of expression. The President was making a management decision under the Agreement. She was not expressing an opinion. And, the remedy of reversal does not direct the President to do or say anything or associate herself with any view she does not hold. Finally, the remedy of reversal is fully justified under Section 1 of the Charter.

Analysis

8 Article 13.01 of the Agreement defines a "decision" in this way:

13.01 Interpretation

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

9 The jurisdiction of this arbitration board is provided for in Article 13.07 of the Agreement:

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 the 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.

10 The parties dispute the proper application of Article 13.07(d). The University contends that where there is a finding that both grounds of appeal succeed, the arbitrator is given a choice of remedies and must consider the remedies in Article 13.07(b) and (c). The Association's position is that the remedy of reversal is mandatory under Article 13.07(c) once the arbitrator makes a finding of unreasonableness. The Association submits that Article 13.07(d) simply confirms the arbitrator's

ability to exercise the power in Articles 13.07(b) and (c) and does not provide for any remedial actions.

11 As discussed briefly in the Award, Arbitrator Jackson recently considered the provisions of Article 13.07 in Rucker:

If the arbitration board decides that the University has committed a procedural error that may have resulted in a wrong decision, it may either refer the matter back to the level of consideration where the error was made or decide the matter on its merits. If the arbitration board is satisfied that the decision is not reasonable, it must reverse the decision. However, where both procedural error and lack of reasonableness are grounds of appeal, the board may exercise any of the powers conferred in Article 13.07.
(page 3; emphasis added)

Then, at page 23, Arbitrator Jackson said this:

I have determined that Dr. Piper's decision was unreasonable. These parties have agreed in Article 13.07(c) that where a decision is found to be unreasonable it shall be reversed by the arbitration board. Although Article 13.07(d) appears to provide that this board could exercise one of the options set out in Article 13.07(b) since a procedural error has also occurred, in my view it would be inappropriate to do so in this case. In light of my finding that on the evidence the decision of Dr. Piper was unreasonable, that decision is reversed and becomes a determination that recommends Dr. Rucker's promotion. It follows that it is unnecessary to deal with the procedural error. (pp. 23-24; underlining in original; emphasis added)

12 Arbitrator Jackson's award in Rucker is the only prior award under the Agreement I was referred to in respect of this issue. As noted earlier, her award was upheld by the Board in B.C.L.R.B. No. B330/2004, although that decision is currently under reconsideration at the Board. In relation to this issue the Board said the following:

... Article 13.07(c) of the Agreement gives an arbitration board no discretion if it determines that a challenged decision was unreasonable. ...

Article 13.07(d) appears to give an arbitration board a remedial discretion to do something other than what is required to do under Article 13.07(c) when, in addition to being unreasonable, a challenged decision is also found to have been the result of procedural error.

...

Moreover, given the provisions of the Agreement, there is evidently a rational connection between the breach found and the remedy issued. Had the President's decision only been unreasonable, then, by virtue of Article 13.07(c) of the Agreement, the Arbitrator would have had no discretion to remit it to the President, regardless of why she found it to be unreasonable. Given that fact (which the Arbitrator noted) I find she did not act in an unreasonable, arbitrary or capricious manner when she declined to exercise any discretion she may have had because the President's decision was both unreasonable and the result of procedural error. (pp. 10-12; emphasis in original; underlining added)

13 Both Arbitrator Jackson and the Board used the word "appears" in relation to Article 13.07(d). This may be due to the somewhat "puzzling", to use the Board's word at page 10, nature of Article 13.07(d) in the context of Article 13.07 as a whole and/or the absence of any extrinsic evidence to assist with the proper construction of the parties' mutual intention. No extrinsic evidence was presented to this arbitration board to assist in determining the parties' intention, and a determinative finding regarding the proper interpretation of this provision is best left to a proceeding where such evidence is presented.

14 I find Arbitrator Jackson's award and the Board's decision in Rucker provide some support for the University's submission that where findings of both unreasonableness and procedural error are made, an arbitrator has remedial options under Article 13.07(d). For the purposes of this determination I will proceed, without deciding, on the basis that the parties appear to have conferred on this arbitration board a remedial discretion to exercise any of the powers provided for in Articles 13.07(b) and (c).

15 In exercising my remedial discretion I do not find that, before I am entitled to choose the remedy under Article 13.01(c), I must rule out the applicability of Article 13.07(b)(ii)(A) by making a finding that it would not be possible for the matter to be fairly dealt with on a reconsideration. This is effectively another way of saying that a presumption in favour of reconsideration applies. In my view, the language and structure of Article 13.07, and more particularly Article 13.07(d), does not support a finding that the parties intended an arbitrator's discretion to be exercised in any particular order. I find the parties instead intended an arbitrator to exercise her remedial discretion in a manner that is responsive to all of the circumstances of the case.

16 If, however, it is necessary to first determine the matter would not be fairly dealt with on a reconsideration, I agree with the Association's submission that the circumstances of this case and the findings in the Award, as summarized below, support such a determination.

17 The University submits that it is

... only in unusual cases that statutory decision makers are not given the opportunity to reconsider a decision once direction as to the proper criteria have been given. The presumption of regularity or impartiality holds that it must be presumed, in the absence of any evidence to the contrary, that public officers will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of the case.

18 In my view, this is an unusual case. In addition to the statutory regime in the University Act, the statutory decision makers -- the President and the Board of Governors -- have negotiated and

ratified a collective bargaining agreement with the Association providing for an appeal of the President's "decision" under the Agreement to an independent arbitrator. The President and the Board of Governors have agreed that where such an appeal succeeds on the ground of unreasonableness, the arbitrator "shall" reverse the decision. And even in respect of an appeal based on procedural error, the President and the Board of Governors have agreed that the arbitrator has the discretion to "decide the appeal on the substantive merits". The arbitrator's discretion to direct reconsideration is simply one of a number of remedial options. Any general presumption in favour of reconsideration has been displaced by agreement. The parties' agreement that an arbitrator has the remedial authority to reverse an unreasonable "decision", as defined in the Agreement, and/or decide the matter on its merits is, of course, entirely consistent with the statutory mandate of arbitrators to "provide a final and conclusive settlement of a dispute". See Section 89 of the Labour Relations Code.

19 Further, this is not a case where the President simply applied the wrong criteria as provided for in the Agreement. The findings in the Award establish unreasonableness on several bases as well as procedural error that may have resulted in a wrong decision. Those findings can be summarized as follows:

- Contrary to the parties' agreement in Article 5.15(b), which requires "detailed and specific written reasons" to explain negative recommendations for promotion, the President's reasons provide no line of analysis from the evidence before her to her decision. The President simply quoted the definition of "scholarly activity" and then stated a conclusion without identifying the body of scholarly activity she considered, the quantity of scholarly activity that was insufficient, or the quantity of scholarly activity that would have been sufficient. (page 37)
- Similarly, the President's reasons provide no line of analysis from the evidence before her to her decision that Dr. Chiu-Duke did not demonstrate potential to supervise graduate students in the area of her research. (page 38)
- On the evidence, there is no tenable explanation supporting the President's decision that Dr. Chiu-Duke's record of scholarly activity failed to satisfy the low level of involvement in scholarly activity required under Article 3.05, or at least, potential to meet that criterion. (pp, 38-39)
- Dr. Chiu-Duke's evidence established that she had provided instruction at various levels of her discipline. Thus, "on the evidence, and given the express criteria in section 3.05, ... Dr. Piper's decision falls outside the range of reasonableness". (page 39)
- The President mis-described the second criterion in Article 3.05 and then transformed the criterion into one bearing "no resemblance" to the language in section 3.05. (page 39)
- On any reasonable line of analysis, Dr. Chiu-Duke's evidence must be viewed as demonstrating potential to supervise graduate students in the area of her research. On the evidence, the President's decision is not tenable. (page 40)

20 Thus, the findings in the Award extend beyond a determination that the President applied the wrong criteria. This is an unusual case where, despite the clear direction in the Consent Order to

assess Dr. Chiu-Duke's application for promotion to Assistant Professor "on the basis of the criteria set out in Article 3.05", the President failed to do so and, on the evidence, rendered an untenable decision.

21 In deciding how to exercise my remedial discretion I have also considered another factor. Dr. Chiu-Duke's promotion request originated in the fall of 1999. The Consent Order was issued by this board on November 5, 2002. The Consent Order specified that Dr. Chiu-Duke's application for promotion was to be assessed on the basis of the criteria in Article 3.05, and a recommendation in favour of promotion would be effective July 1, 2002. The President's decision was made on September 6, 2003. In reaching my conclusions regarding the grounds of appeal, it was established, on the evidence before the President and this board, that Dr. Chiu-Duke has satisfied the criteria in Article 3.05. In my view, Dr. Chiu-Duke should not be required to endure any further delay. The University noted that in an earlier case -- Dr. Dodek -- the arbitrator referred Dr. Dodek's application back for reconsideration on several occasions. However, that case involved procedural error. Dr. Chiu-Duke's case involves both procedural error and unreasonableness.

22 In all of these circumstances, and recognizing that under Article 13.07(d) I appear to have the discretion to exercise any of the powers conferred in Article 13.07(b) and (c), I conclude that my discretion is most appropriately exercised in favour of the remedy the parties have expressly agreed to under Article 13.07(c) -- reversal of the Decision. Appreciating that B.C.L.R.B. No. B330/2004 is under reconsideration, I simply note that the exercise of my discretion in this manner finds support in the Board's reasoning at pages 11-12:

The University's fourth ground of review involves the claim that, given the reason the President's decision was found to be unreasonable -- what it describes as "... simply ... applying the wrong criteria" -- the arbitrator exercised her remedial discretion unreasonably and in an arbitrary or capricious manner by not remitting the decision to the President.

I do not agree with this characterization of the award. On a sympathetic reading of it, it is clear that the arbitrator did not simply conclude that the President had applied the wrong criteria; the arbitrator also concluded that when all the relevant evidence is considered, the Faculty Association had established that Dr. Rucker had engaged in sustained and productive scholarly activity.

Moreover, given the provisions of the Agreement, there is evidently a rational connection between the breach found and the remedy issued. Had the President's decision only been unreasonable, then, by virtue of Article 13.07(c) of the Agreement, the Arbitrator would have had no discretion to remit it to the President, regardless of why she found it to be unreasonable. Given that fact (which the Arbitrator noted) I find she did not act in an unreasonable, arbitrary or capricious manner when she declined to exercise any discretion she may have had because the President's decision was both unreasonable and the result of procedural error. (emphasis in original)

23 Does the exercise of my remedial authority under Article 13.07(c) create an operational inconsistency between the powers granted to the President and the Board of Governors under the University Act and the Agreement?

24 Under Section 27(2)(g) of the University Act, the Board of Governors has the ultimate authority to appoint individuals such as Dr. Chiu-Duke to the rank of Assistant Professor:

Powers of board

27. ...

(2) ... the board has the following powers:

(g) subject to section 28, to appoint ... Assistant Professors ...

25 However, the Board of Governors cannot exercise that power unless the President has recommended promotion. This is the effect of Section 28(3) of the University Act:

(3) A member of ... any faculty of the University must not be promoted ... except on the recommendation of the president.

26 The President's authority to recommend promotions is found in Section 59(2)(a):

President and powers

...

(2) Without limiting subsection (1), the president has the following powers:

(a) to recommend ... promotion ...

27 As noted already, in the face of this statutory scheme, the University has negotiated collective bargaining agreements with the Association including an Agreement on the Framework for Collective Bargaining and the Agreement. These agreements are signed by the President of the University and the President of the Faculty Association. Both of these agreements enter into force upon the signature of these officials following ratification by the Board of Governors and the Association. See Articles 21 and 18 respectively.

28 The University is presumed to have been aware of the provisions of the University Act when it agreed to Article 13.07(c). When the University, and more particularly the President and the Board of Governors, ratified the Agreement containing the language of Article 13.07(c), they are presumed to have been aware of the prevailing authorities standing for the proposition that unless the existing statute clearly excludes the operation of a collective agreement, it must be read in a way that harmonizes it with the later-negotiated collective agreement: BCGEU, *supra*, and Durham Regional Police Assn., *supra*.

29 The scheme designed under Article 13 of the Agreement is elegant in its effectiveness. Consistent with the mandate in Section 89 of the Labour Relations Code, the parties agreed to arbitration as the dispute resolution forum for grievances relating to negative recommendations by the President. Given the inter-relationship between the President's statutory power to recommend promotions and the President's decision-making role in the promotion process under the Agreement, the parties defined a negative recommendation as a "decision", and authorized an arbitrator, who

has determined on the evidence that the President has reached an unreasonable "decision", to reverse it. The negative recommendation thereby becomes a positive recommendation and the Board of Governors is then able to exercise its statutory authority to appoint. I conclude that, in negotiating the remedy of reversal for cases where the President makes an unreasonable decision under the Agreement, the parties devised a mutually agreeable contractual mechanism that was intended to harmonize the operation of the appeal provisions of the Agreement with the powers conferred on the President and the Board of Governors under the University Act. In circumstances where the President is found to have made an unreasonable decision, the remedy of reversal provides the necessary basis for the Board of Governors to exercise its statutory power under Section 27(2)(g) to appoint professors, and still leaves the President free to exercise her statutory powers reasonably in other cases.

30 I find the principle enunciated by the British Columbia Court of Appeal in *BCGEU*, supra, and the Supreme Court of Canada in *Durham Regional Police Assn.*, supra, applies. The existing legislation -- the University Act -- must be read in such a way as to harmonize it with the later-negotiated collective agreement unless the Legislature has excluded the statutory provision from collective bargaining. Here, as was the case in *Durham Regional Police Assn.*, supra, the entities with the statutory powers are the same authorities involved in the negotiation and ratification of the Agreement. The Legislature has not excluded the relevant provisions of the University Act from collective bargaining. Hence, the statute must be read so as to be in harmony with the Agreement. Article 13.07(c) leaves Section 59(2)(a) of the University Act operative in those instances where the President renders reasonable decisions.

31 The University does not quarrel with the Association's submission that the President's decision not to recommend promotion may be subject to arbitration. The University submits, however, that this cannot lawfully constitute an agreement that an arbitrator can "direct the President to exercise her discretion in a particular manner" under Article 13.07(c). In my view, this argument misconceives the effect of the jurisdiction conferred on the arbitrator by agreement under Article 13.07(c). That provision does not constitute an agreement that the arbitrator can direct the President to exercise her statutory power in a particular manner. As the facts of this case establish, the effect of granting the remedy does not direct the President to do anything. The effect of the remedy is that an unreasonable "decision" under the Agreement is reversed and becomes a positive recommendation such that the Board of Governors can exercise its statutory power to appoint.

32 Finally, the proper forum for the determination of the University's specific concerns regarding the Board's reasoning in B.C.L.R.B. No. B330/2004 is the outstanding application for reconsideration.

33 Turning to the University's submission that the remedy of reversal is inconsistent with the freedom of expression guaranteed under Section 2(b) of the Charter, it is important to understand the basis on which this argument is advanced. The University's contention is that the remedy of reversal "requires the President to put forward a recommendation to the Board of Governors pursuant to her statutory authority under the University Act as her recommendation when, in fact, the recommendation is contrary to the recommendation made by the President".

34 Section 2(b) of the Charter provides that everyone has "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

35 For several reasons, I conclude that the University's contention lacks merit.

36 First, it follows from what has just been said that the granting of the remedy of reversal by this arbitration board does not require the President to do or say anything pursuant to her statutory authority under the University Act. The parties have devised a remedial mechanism that avoids that requirement. Reversal means that a decision to not recommend promotion becomes a decision to recommend promotion.

37 Second, and in any event, it is doubtful that the Charter has any application to the substance of the issue in dispute. The University's challenge is linked to the exercise of my discretion under Article 13.07 of the Agreement. I was appointed and constituted as an arbitration board under the parties' contract, not a statute. It is the case that the Labour Relations Code applies to these proceedings, but in granting the remedy of reversal I am exercising a jurisdiction expressly conferred on me by agreement of the parties. I need not rely on the broad remedial jurisdiction granted to arbitrators under the Labour Relations Code.

38 Third, assuming, without deciding, that the Charter applies, I accept the Association's submission that in determining whether or not to recommend promotion in any particular case, the President is not engaged in the expression of an opinion or belief as contemplated by Section 2(b) of the Charter. When the President is making her determination to recommend or not recommend promotion, she is engaged in a function akin to management decision-making under the terms of a collective agreement; i.e., the assessment of an application for promotion against a set of agreed-to criteria. In making a "decision" for the purposes of the Agreement, the President is engaged in an employment-related activity which innumerable managers carry out on a daily basis under collective agreements -- an evaluation of whether a particular employee satisfies the specified qualifications for promotion. In my view, this activity does not engage the fundamental freedoms in Section 2(b) of the Charter. Indeed, insulating unreasonable decisions from reversal by characterizing them as expressions of opinion or belief creates the potential for the Charter to protect decisions which are unreasonable and/or discriminatory and thereby emasculate the appeal provisions in the parties' Agreement.

39 Fourth, if the President's decision constitutes the expression of an opinion or belief for the purposes of Section 2(b) of the Charter, the granting of the remedy of reversal does not constitute compelled speech as discussed in the cases cited by the University. Prior to the exercise of any jurisdiction by an arbitrator under Article 13.07 of the Agreement, the President's opinion is expressed in a "decision". The granting of the remedy of reversal under Article 13.07(c) does not associate the President with a contrary recommendation. It will, in fact, be apparent to the Board of Governors that the President did not recommend in favour of promotion. It will be apparent to the Board of Governors that the recommendation for promotion is a remedy granted under the agreed-to appeal process in the Agreement. The President is free to continue to hold and express her contrary opinion.

40 Fifth, I find the remedy authorized under Article 13.07(c) distinguishes this case from those considered by the Courts in the decisions cited by the University. In *National Bank of Canada*, [1984] 1 S.C.R. 269, the Canada Labour Relations Board (the "Canada Board") had ordered a bank to create a trust fund to promote the objectives of the Canada Labour Code among all of its employees. The Canada Board further ordered the president of the bank to send a letter, written by the Canada Board, to all employees informing them of its decision and the creation of the trust fund. The Supreme Court of Canada overturned those statutory remedial orders for essentially two reasons. First, the orders were punitive in nature and the Canada Board had no power to impose puni-

tive measures. Second, although required to sign the letter prepared by the Canada Board, the president could not disclose that element of coercion without infringing the order which prohibited any alteration of the text or the addition of any other document. The Court found that the creation of the fund and the content of the letter were open to the interpretation that the bank and the president approved of the Canada Labour Code and the objectives the fund was designed to promote. The Court determined that Section 2(b) of the Charter prohibits a statutory authority from compelling individuals to utter opinions that are not their own.

41 In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, an adjudicator had ordered an employer to provide an unjustly dismissed employee with a letter of recommendation with specific contents. The adjudicator also ordered the employer to answer any request for information about the employee by sending only that letter. The Supreme Court of Canada (two justices dissenting) found that the second aspect of the order infringed the Charter because it was an attempt to prevent the employer from expressing its opinions about the employee's qualifications beyond the facts set out in the letter. However, under Section 1 of the Charter, the Court upheld the remedy of providing a positive recommendation because it was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and an employee. The Court noted that, in the required letter, the employer was not forced to state opinions which were not its own.

42 In *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2004] O.J. No. 190, the Ontario Superior Court of Justice considered a challenge to the constitutional validity of a City of Toronto bylaw requiring restaurant operators to publicly disclose the results of a food premises inspection by posting those results in a conspicuous location. One aspect of the challenge was whether the bylaw breached the freedom of expression protected by Section 2(b) of the Charter. The appellant's position was that the order constituted forced expression because restaurant owners were compelled to convey the city's message, a message they would not have chosen to convey. In reaching its decision, the Court considered the analysis in *Lavigne v. Ontario Public Service Employees' Union*, [1991] 2 S.C.R. 211. There, Mr. Lavigne had been required to pay dues to a union under a mandatory check-off clause in a collective agreement. The employee objected to certain expenditures by the union, such as contributions to the New Democratic Party, and sought declaratory relief alleging an infringement of his Charter rights. Four justices of the Supreme Court of Canada found Mr. Lavigne's contributions to the union were not an attempt to convey meaning and therefore his Section 2(b) Charter right had not been infringed. Three other justices found Mr. Lavigne was denied the right to boycott the union's causes which prevented him from conveying a meaning he wished to convey. Applying the analysis in *Lavigne*, supra, the Court in *Ontario Restaurant Hotel & Motel Assn.*, supra, held that if the government's purpose was to put a particular message into the mouth of restaurant owners, it would run foul of the Charter. The Court found, however, that the government's purpose was otherwise: it included the protection of the public from health hazards, the education of the public to make informed choices, and so forth. As such, the government's purpose was not to restrict freedom of expression.

43 The appellant in *Ontario Restaurant Hotel & Motel Assn.*, supra, also contended that its members were being forced to express information with which they disagreed. Following the analysis of the Supreme Court of Canada decisions in *National Bank*, supra, and *Slaight Communications*, supra, the Court concluded that the food safety inspection notices were clearly attributed to the City of Toronto, as opposed to the individual restaurant owners, such that a cursory examination of them would lead a member of the public to conclude that the information was attributable to no

other person or entity than Toronto Public Health. Further, the bylaw did not in any way prohibit restaurant owners from disavowing whatever message the notices contained and expressing a contrary opinion. Consequently, no infringement of the appellants' Charter rights arose.

44 I find that, unlike the remedial order of the Canada Board in *National Bank*, supra, the reversal of the President's decision pursuant to the parties' agreement in Article 13.07(c) does not require the President to create and send any document to the Board of Governors. Unlike the remedy in *Slaight Communications*, supra, this arbitration board will not order the President to send a letter drafted by the board to the Board of Governors. Nor will the granting of the remedy of reversal prevent the President from expressing her opinion about Dr. Chiu-Duke's promotion request. Unlike the remedial order in *Lavigne*, supra, the remedy of reversal does not require the President to pay funds to a cause she disavows and does not put a particular message in her mouth. Like the bylaw in *Ontario Restaurant Hotel & Motel Assn.*, supra, the remedy of reversal has a protective purpose -- the protection of University employees from unreasonable promotion decisions under the Agreement. And, like the notices posted pursuant to the bylaw in *Ontario Restaurant Hotel & Motel Assn.*, supra, the award of this board will be attributable to no other entity.

45 Finally, if the remedy of reversal contravenes Section 2(b) of the Charter, the reasoning of the Court in *Slaight Communications*, supra, is applicable. As the Association aptly submits, the evidence in this case establishes a salient factor to be considered under Section 1 of the Charter: "... the parties in this case have expressly agreed that an arbitrator may, on the evidence and the merits, reverse the recommendation of the President when it is found to be [unreasonable]" (underlining in submission).

Decision

46 For all of the foregoing reasons, I have decided that the appropriate remedy in all of the circumstances is to reverse the Decision under Article 13.07(c) of the Agreement.

47 In its submission dated February 4, 2005, the Association requested a make-whole order reflecting July 1, 2002 (as specified in the Consent Order) as the effective date of Dr. Chiu-Duke's promotion, plus the reservation of my jurisdiction in the event the parties are unable to agree to the appropriate compensation and related terms. The University has not disputed these elements of the Association's remedial request. I grant the requested remedy. I will retain jurisdiction to determine any and all issues arising out of the implementation of this award.

48 It is so awarded.