

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" or
"UBC"), and
Faculty Association of the University of British
Columbia (the "Association")**

[2005] B.C.C.A.A.A. No. 29

LAX/2005-179

Award No. A-029/05

British Columbia
Collective Agreement Arbitration

J.M. Gordon (Arbitrator)

Heard: (Vancouver, B.C.) November 22-23, 2004.
Award: January 17, 2005.

(122 paras.)

[Editor's note: Supplementary Award filed March 21, 2005. See [2005] B.C.C.A.A.A. No. 66.]

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.

AWARD

Introduction

1 Dr. Chiu-Duke is a tenured Senior Instructor in the Department of Asian Studies, Faculty of Arts, at UBC. This is an appeal from President Martha Piper's ("Dr. Piper") decision to deny Dr. Chiu-Duke a promotion to the rank of Assistant Professor.

2 Section 3.05 of the Agreement on Conditions for Appointment for Faculty (the "Agreement") governs promotion to the rank of Assistant Professor. The relevant portion of that provision is 3.05(a):

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 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.

3 Dr. Chiu-Duke's promotion request originated in the fall of 1999. The Departmental Standing Committee recommended promotion and the Acting Head of the Department, Dr. Joshua Mostow, concurred with that recommendation. The Dean of Arts' Advisory Committee voted in favour of promotion, but the then Dean of Arts, Dr. Alan Tully, recommended against promotion.

4 The Association filed a grievance against the Dean's negative recommendation and the dispute was referred to me as arbitrator. Prior to the commencement of the arbitration hearing, the parties negotiated a settlement agreement which was incorporated into a Consent Order issued by this board on November 5, 2002. The terms of the Consent Order are these:

1. The Grievor (Dr. Chiu-Duke) will have her application for promotion to Assistant Professor assessed on the basis of the criteria set out in Article 3.05 of the collective agreement (i.e., not taking into consideration service to the University, the academic profession and the community).
2. The Dean of Arts will consider the recommendation of the Department of Asian Studies Standing Committee to promote Dr. Chiu-Duke to the rank of Assistant Professor and will consider such supplemental material, as contemplated in Article 5.03 of the Conditions of Appointment for Faculty, as Dr. Chiu-Duke may wish to submit (which was not available to Dean Tully in May 2001). In addition, the current Dean will have before her all the information which was available to Dean Tully (as re-submitted by Dr. Chiu-Duke).
3. The decision by the Dean of Arts will be considered a decision on a periodic review (which must be the subject of a decision by the President).
4. If the President recommends in favour of the promotion, the effective date of the promotion will be July 1, 2002.

5 Dr. Chiu-Duke's application was then considered by the current Dean of Arts, Dr. Nancy Gallini, and her Advisory Committee. The Advisory Committee voted in favour of promotion. Dr. Gallini recommended against promotion.

6 In a letter dated September 6, 2003, Dr. Piper rendered her decision to not recommend Dr. Chiu-Duke for promotion. The Association appealed that decision on September 24, 2003, and the appeal was referred to this board for determination pursuant to the provisions of Article 13.

7 The Association's position is that Dr. Piper's decision was both unreasonable and arrived at through procedural error. The Association contends that Dr. Chiu-Duke's application for promotion was assessed in a manner inconsistent with the Consent Order and the Agreement. The Association says that Drs. Gallini and Piper ignored or were willfully blind to the overwhelming evidence supporting Dr. Chiu-Duke's satisfaction of the applicable criteria for promotion to the rank of Assistant Professor. To remedy these and other defects, the Association seeks the reversal of the decision or a decision on the merits.

8 The University's position is that all of the procedural requirements of the Agreement were satisfied on the referral back pursuant to the Consent Order. The University says Dr. Chiu-Duke's application was properly assessed against the general standard of excellence applicable to promotion to all ranks of the professorate. The University contends that Dr. Piper was entitled to assess the quantity of Dr. Chiu-Duke's scholarly activity. The University further contends that Dr. Piper's conclusion regarding Dr. Chiu-Duke's failure to demonstrate potential to supervise graduate students in the area of her research does not constitute an unreasonable decision. In terms of remedy, the University maintains that a reversal of Dr. Piper's decision would be inconsistent with the provisions of the University Act, R.S.B.C. 1996, c. 468 (the "University Act"), and contrary to her freedom of expression guaranteed in the Canadian Charter of Rights and Freedom (the "Charter").

Background

9 In 1983, Dr. Chiu-Duke was hired by UBC as a Sessional Instructor in Chinese language in the Department of Asian Studies. She continued in that role until 1985 when she began her doctoral studies. Dr. Chiu-Duke resumed that role during the 1990-1991 academic year, and then successfully competed for the position of Instructor I. She completed her dissertation while on leave during the 1991-92 academic year, and was awarded her Ph.D. in 1992. In 1993, the Assistant Professor responsible for pre-modern Chinese history left the Department of Asian Studies. As a result, Dr. Chiu-Duke was assigned to teach a number of undergraduate courses, as well as the graduate research methods seminar, in pre-modern Chinese history. In 1997, she was promoted to the rank of Senior Instructor with tenure. Dr. Chiu-Duke was granted study leave during the 1999-2000 academic year. Since returning from that leave she has taught Chinese language courses.

10 Dr. Chiu-Duke's ability as an excellent teacher is not in dispute in these proceedings. Her student evaluations in all courses taught have consistently been glowing, above the departmental average and often close to the maximum score of 5.0. In addition, peer evaluators characterize her teaching achievement in terms such as "superlative" and "simply extraordinary". During the initial review of Dr. Chiu-Duke's application for promotion, four external referees were asked to give their opinions on her scholarly activity. Despite the negative remarks made by one of the external referees about Dr. Chiu-Duke's ability to advise dissertations in political and intellectual history, the Departmental Standing Committee and Dr. Mostow discussed Dr. Chiu-Duke's graduate level teaching

and reached a consensus that she is a "successful teacher" as required under section 3.05 of the Agreement.

11 As of 2001, when Dr. Chiu-Duke's promotion review was considered by the Department of Asian Studies, she had published one book with State University of New York Press ("SUNY Press"), and six refereed scholarly articles, including one in an important journal, *Asia Major*. She had also been invited to contribute another piece in Chinese to a published book.

12 As noted above, the Department of Asian Studies consulted four external referees in the process of evaluating Dr. Chiu-Duke's promotion request (referees A to D). These individuals were asked to assess her "scholarly and professional achievements". They were provided with the language of section 3.05 of the Agreement, and were asked to make a recommendation based on that provision and the other information available to them. Among other things, the referees had Dr. Chiu-Duke's curriculum vitae ("CV").

13 The referees all had high praise for Dr. Chiu-Duke's research scholarship and sinology (i.e., the study of Chinese history and culture). Their comments included these: "a meticulous scholar and a judicious critic and analyst"; "a solid study"; "thoughtful study"; "Dr. Chiu-Duke's recent publications demonstrate her sinological skills and intellectual foundations"; "[work] of high calibre indeed"; "important to the field"; "Dr. Chiu-Duke's sinology is wonderful"; "the quality and quantity of scholarship that went into this book will, I think, ensure that it stands as the authoritative account of Lu Zhi's life and statecraft"; "a major contribution, not only to T'ang, but to the more general topic of Chinese scholars-officials"; "it is a major contribution to our understanding of how Imperial China was governed".

14 One referee, who read both Dr. Chiu-Duke's book and her *Asia Major* article, compared her book to earlier studies and found her work to be "of wider scope and of broader context, and, in this sense, path-breaking". That referee also opined that Dr. Chiu-Duke's "forthcoming book will be a very significant one and will give her a prominent position in T'ang Studies". Commenting on Dr. Chiu-Duke's forthcoming research and publication, another referee said this: "that would be a welcomed contribution to complement scholarship on more recent dynastic periods"; "at my university, these projects would be noteworthy in a tenure decision because we like to see promise of continuing scholarship"; and, "her evident persistence in pursuing her academic goals gives me confidence that she will make progress on these significant projects".

15 Three of the four external referees gave unqualified recommendations in favour of promotion in terms such as these: "I urge you, without reservation, to promote Dr. Chiu-Duke to Assistant Professor. I feel certain she will continue to be a great asset to your department, and to the scholarly study of Chinese history"; "her publications ... demonstrate to me that she has the scholarly training and accomplishments required for promotion to Assistant Professor. Indeed, I believe it would be grossly unfair to deny her promotion."

16 Certain referees, including referee D, also commented on Dr. Chiu-Duke's teaching. One referee noted the wide range of courses Dr. Chiu-Duke has taught "including upper division courses on Chinese history and politics". That referee expressed the view that: "It would be in the best interests of your department to promote this individual. Her courses might then attract even larger numbers of students. Moreover, she would then probably be able to contribute more to the department's graduate program".

17 Referee D had some criticism of Dr. Chiu-Duke's contribution to the study of Chinese history. S/he recommended Dr. Chiu-Duke as "imminently qualified for ... promotion [if it involved] teaching graduate sinology seminars and reading courses in historical documents". Although referee D stated that s/he could not tell from the CV "what Dr. Chiu-Duke teaches, s/he recommended against promotion for "teaching and advising dissertations in political and intellectual history".

18 Dr. Chiu-Duke was given an opportunity to respond to referee D's comments. Following a review of all of the materials on Dr. Chiu-Duke's dossier, as well as section 3.05 of the Agreement, Dr. Mostow and the Departmental Standing Committee concluded that, "Dr. Chiu-Duke has demonstrated that she is involved in scholarly activity, is a successful teacher and is capable of providing instruction at the various levels in her discipline." This conclusion was recorded in Dr. Mostow's letter of recommendation to Dean Tully dated April 20, 2001.

19 In respect of scholarly activity other than published work, Dr. Mostow noted Dr. Chiu-Duke's participation in conferences, one as a co-organizer. He noted she had received no research grants, but referred to Dr. Chiu-Duke's explanation for this -- Instructors at UBC are "not eligible to apply for HSS research funds". At the same time, and in what he characterized as "a rather exceptional move", Dr. Mostow noted that Dr. Chiu-Duke was granted study leave during the 1999-2000 academic year despite the fact that her position as Senior Instructor has no research component.

20 The Departmental Standing Committee voted overwhelmingly to recommend in favour of Dr. Chiu-Duke's promotion to the rank of Assistant Professor. Dr. Mostow concurred.

21 Dr. Gallini considered Dr. Chiu-Duke's application for promotion in the spring of 2003 following the issuance of the Consent Order. Dr. Gallini had Dr. Chiu-Duke's letter of response to the Departmental Standing Committee as well as her updated CV and supplemental materials. In her evidence at the hearing, Dr. Chiu-Duke highlighted several aspects of her updated CV as of the date of Dr. Gallini's review. I digress briefly to summarize her evidence in this regard.

22 In terms of scholarly activity, Dr. Chiu-Duke noted that since 2000, she had been invited to participate in and/or present papers at 10 prestigious national and international conferences where she networked with other scholars, exchanged papers and was motivated to write articles based on some of the presented papers. She noted her book reviews of other scholars' work and emphasized that such reviews are listed in the UBC Publications Record. Dr. Chiu-Duke expressed the view that book reviews constitute evidence of research activity, engagement in one's discipline and the scholarly pursuit and exchange of new ideas. She also noted that in addition to the fact that her published work had been cited in numerous scholarly articles and commented on favorably by prestigious scholars in her field, she had been invited, on numerous occasions, to appear as an expert on the television program "Straits Today". That program is a national current events program with academic content. It is broadcast in the Mandarin language.

23 Turning to the issue of her ability to provide instruction at the various levels in her discipline -- Chinese Studies -- Dr. Chiu-Duke emphasized her excellent teaching record in a variety of courses ranging from Chinese language and literature, to all of the Asian Studies courses in pre-modern intellectual and political history, to graduate research methodology. She noted that from 1993 until 2003, she only taught one Chinese language course. From 1993 to 1996, she taught intellectual and political Chinese history courses at the undergraduate level. She has also taught Asia 417 and 501. Her evidence was that Asia 417 is comparable to a graduate seminar in Chinese political thought and

institutions, and Asia 501 is a graduate level Chinese Studies course in research methods and source materials.

24 With respect to the supervision or direction of graduate students, Dr. Chiu-Duke opined that this is not a criterion for promotion to Assistant Professor. She testified that the Faculty of Graduate Studies at UBC prohibits Senior Instructors from supervising graduate students and/or serving on graduate student committees, except in extraordinary circumstances. Her evidence was that Assistant Professors in the Department of Asian Studies are not allowed to act as the sole supervisor of graduate students, and no Instructor in the department has ever served as an advisor or informal member of a graduate student's dissertation committee. In addition, from 1995 to the present, the department has had no graduate students in Chinese history.

25 At the same time, Dr. Chiu-Duke testified about several facts relating to her potential to supervise graduate students if this is, in fact, a criterion for promotion to Assistant Professor. In early 1997, she was asked by the Head of the Philosophy Department to supervise one of that department's graduate students in the area of Confucian thought. The Philosophy Department had no faculty member capable of supervising that element of the graduate student's work. That supervision is recorded in the appropriate location on Dr. Chiu-Duke's CV together with this notation: "I had several conferences with student, reviewed student's thesis outline, provided written comments and suggestions." Dr. Chiu-Duke also referred to documents attesting to the fact that potential graduate students, both here and abroad, have written to her directly or the Department of Asian Studies seeking an opportunity to study under her supervision. Moreover, two major university presses, Harvard and SUNY, asked her to read a doctoral thesis manuscript prior to publication. Her corrections improved the manuscript and facilitated the eventual publication of that research. Finally, Dr. Chiu-Duke emphasized the excellent student and peer evaluations of her teaching at all levels in her discipline and for all courses taught.

26 Returning to the chronology of events, Dr. Gallini forwarded a draft letter to Dr. Chiu-Duke recommending against promotion. Dr. Gallini concluded that as Dr. Chiu-Duke's research record was "modest", factors such as invitations to present papers and attendance at conferences, research grants, and promise of graduate student supervision "would have to be strong". Dr. Gallini found these factors were not satisfied because Dr. Chiu-Duke had not presented an invited paper or participated in a conference "outside British Columbia", had not received any research grants, and did not show "clear potential to supervise graduate dissertations in the area of her research".

27 Dr. Chiu-Duke provided a written response to Dr. Gallini's draft, and the response was forwarded to Dr. Piper with Dr. Gallini's negative recommendation dated May 2, 2003.

28 In the May 2nd letter to Dr. Piper, Dr. Gallini "slightly revised" the draft she had sent to Dr. Chiu-Duke. Dr. Gallini concluded that Dr. Chiu-Duke is a successful teacher. Hence, the case rested on "evidence of scholarly activity" and whether Dr. Chiu-Duke is "capable of providing instruction at various levels in ... her discipline". Under the heading "Teaching", Dr. Gallini noted that as a Senior Instructor, Dr. Chiu-Duke could not be a graduate supervisor, yet Dr. Gallini went on to express this view: "one might expect that she would have served as an advisor or informal member of the committee of some graduate students, especially since she had the opportunity to teach in the graduate program."

29 In terms of scholarly activity, Dr. Gallini assessed whether Dr. Chiu-Duke's "quality and rate of research activity [for someone with 10 years of experience since her Ph.D.] meet UBC's standard

for Assistant Professor appointments". When summarizing her assessment of this criteria, Dr. Gallini expressed the view that UBC's standard is "a standard of excellence". Following a review of Dr. Chiu-Duke's scholarly activity, Dr. Gallini described her "research output" since obtaining her Ph.D. in this way:

While respectable, this rate of output is not, in my view, sufficient "evidence of ability in scholarly activity" at the required level, nor is it sufficient to establish potential to meet the criteria for promotion. Therefore, I ask if other features of Dr. Chiu-Duke's record might bolster the case for promotion. I examine first, Dr. Chiu-Duke's research output trajectory over the 10 years, her record on grants, conference participation and invited talks, and second, the quality of her work as assessed by external reviewers.

30 Dr. Gallini stated that from 1992-97, Dr. Chiu-Duke had no significant publications, research grants, invitations or conferences "outside of British Columbia". Dr. Gallini found that after Dr. Chiu-Duke's promotion to a tenured Senior Instructor position in 1997, her research activity began to increase: she completed the revision of her dissertation for publication as a book; published a refereed article in a major journal; had one invited book chapter forthcoming; and, some "minor pieces". Dr. Gallini noted that Dr. Chiu-Duke gave seminars and attended conferences during this period, but again noted that none were held "outside British Columbia". Dr. Gallini briefly summarized the four external referees who reviewed the quality and significance of Dr. Chiu-Duke's research. Referee D's evaluation is featured most prominently in that review.

31 Dr. Gallini also identified research grants and promise of graduate supervision as factors appropriately considered as evidence of scholarly activity. In regards to invitations to present papers and attendance at national and international conferences, Dr. Gallini opined that "sharing research output through invitations and conferences is expected of all scholars" at UBC aspiring to become members of the professorate and is "fundamental to the scholarly pursuit and exchange of new ideas". She acknowledged the fact that Dr. Chiu-Duke is not permitted to supervise graduate students, and then relied on referee D's opinion to support her conclusion that Dr. Chiu-Duke had not demonstrated promise to "supervise dissertations in the area of her research".

32 Dr. Gallini's reasons are summarized at the end of her recommendation in this way:

The Advisory Committee discussed Dr. Chiu-Duke's scholarly activity at length. Although she has published her thesis with a good publisher, it took eight years (including a year's sabbatical) to turn her dissertation into a book. Since participation in prestigious conferences often stimulates faculty to write articles based on their papers and to make useful professional contacts with others in the discipline, her noted lack of participation in such conferences outside of British Columbia may account for the modest number of substantial publications. Faculty seeking to be promoted or applicants seeking to join our faculty should be actively engaged with the appropriate international and national conferences in their discipline. Research grants are also absent and, while they may be more difficult to obtain when an applicant is not in professorial ranks, they have been awarded to Sessional Instructors at UBC. Finally, notwithstanding Dr. Chiu-Duke's response to [referee

D's] conclusion, I found the probing observations raised in [that] report regarding her supervisory capacity to be an important concern.

Taking all things into consideration, I have concluded that Dr. Chiu-Duke's research record neither constitutes sufficient scholarly engagement for promotion at UBC nor demonstrates potential to meet this standard. I therefore recommend that Dr. Josephine Chiu-Duke not be promoted to the rank of Assistant Professor.

33 Dr. Gallini's assertion that research grants have been awarded to Instructors at UBC is inconsistent with Dr. Chiu-Duke's evidence as recorded in Dr. Mostow's letter dated April 20, 2001. It is also inconsistent with Dr. Chiu-Duke's testimony at the hearing. Dr. Gallini did not testify at the hearing and no other evidence in support of her assertion was tendered.

34 As earlier mentioned, Dr. Chiu-Duke prepared a response to Dr. Gallini's negative recommendation, and that response was forwarded to Dr. Piper. I turn now to Dr. Chiu-Duke's evidence in that regard.

35 Dr. Chiu-Duke believes that Dr. Gallini applied several criteria falling outside section 3.05, namely: "sustained and productive scholarly activity"; "ability to direct graduate students"; and, "participates significantly in academic and professional affairs". Dr. Chiu-Duke notes that these criteria are applicable to promotion to the ranks of Associate Professor and/or Professor under sections 3.06 and/or 3.07.

36 In cross-examination Dr. Chiu-Duke testified that among other things, her excellent teaching record satisfies the requirement to be "capable of providing instruction at the various levels in her discipline". In her view, the definition of teaching in section 4.02 does not apply to section 3.05, and the ability to direct/ supervise graduate students applies to promotion to Associate Professor. Her opinion in this regard is based on the reference in both sections 3.06 and 3.07 to section 4, plus the absence of any such reference in section 3.05. Dr. Chiu-Duke also opined that if the supervision of graduate students is a requirement of section 3.05, she satisfies that criterion because she: co-supervised a graduate student in 1997; has taught and received excellent evaluations from graduate students in research methodology in her own department; and, was invited to read and correct the manuscript of a graduate student who turned his 1996 Harvard University dissertation into a book manuscript. Dr. Chiu-Duke agreed that as a Senior Instructor she is not responsible for the day-to-day supervision of graduate students, does not supervise their writing and is not responsible for the content of their work. But she believes her record clearly establishes, at a minimum, her potential to do so. Dr. Chiu-Duke conceded that when she became a Senior Instructor in the Department of Asian Studies she knew she would not be allowed to supervise graduate students. She also explained in her evidence that if she had not applied for a Senior Instructor position in 1997, she would not have achieved tenure and would have been asked to leave UBC.

37 Dr. Chiu-Duke's evidence was that in her view, attendance at conferences constitutes "academic and professional affairs", not "dissemination of scholarly activity". She agrees that being a participant at conferences constitutes scholarly activity, but she stressed that there is no requirement in the Agreement to attend conferences "outside British Columbia". Dr. Chiu-Duke pointed to her CV which establishes that she has been invited to, and has participated in, a number of conferences, both national and international in scope, and she opined that Dr. Gallini should not have held the location of these conferences against her.

38 Dr. Chiu-Duke also testified about several "errors" evident in Dr. Gallini's reasons, including the following:

- Dr. Gallini said it took eight years (including a year of sabbatical) to turn her dissertation into a book. Dr. Chiu-Duke said her manuscript was completed in March 1998 and accepted for publication in September 1998, less than six years following her Ph.D. She also said she was granted study leave for the 1999-2000 academic year partly on the basis of her book having already been accepted. She agreed in cross-examination that the publication date listed in her CV is 2000. However, she emphasized that she corrected this fact in her letter to Dr. Gallini, yet Dr. Gallini repeated the eight-year figure in her letter to Dr. Piper.
- Dr. Gallini stated that Dr. Chiu-Duke was promoted to the rank of Senior Instructor with tenure primarily on the strength of her teaching in Chinese language and history at the undergraduate level. Pointing to her CV, Dr. Chiu-Duke noted that this statement is not accurate; she was promoted on the basis of all of her teaching up to that point.
- Dr. Gallini characterized the student evaluations of Dr. Chiu-Duke's teaching as demonstrating that students "appreciated her approach to teaching". Referring to specific and glowing student evaluations, Dr. Chiu-Duke said they demonstrate much more -- i.e., the delivery and receipt of real educational benefit.
- Dr. Gallini referred to most of Dr. Chiu-Duke's published articles as "minor pieces". Dr. Chiu-Duke testified that her invited, peer-reviewed book chapter entitled Significant Paradoxes in Contemporary Chinese Communist Theoretical Discourse was a 37-page manuscript containing completely new and original research in modern intellectual and political Chinese history. She also stated that the Wenhua Zhongguo journal, which Dr. Gallini referred to as "not well known", was in fact a reputable Chinese Studies journal to which major American and Chinese universities and research institutions subscribe. When asked in cross-examination whether that journal was part of UBC's selection of journals, Dr. Chiu-Duke thought the first few series were part of the Asian Studies library, but she was not sure about others.
- Dr. Gallini stated that Dr. Chiu-Duke had no significant publications and no research activity during the 1992-1997 period. Dr. Chiu-Duke's evidence was that this is incorrect. She said the Asia Major article, which was characterized by Dr. Gallini as a "major" article, was researched and written during this period and at a time when she had a heavy teaching load and was the Coordinator of the Chinese Language Program. Dr. Chiu-Duke also noted that the referees who read that article gave it high praise. Additionally, she revised her dissertation during this period and then researched and published other scholarly articles and translations.
- Dr. Gallini said that referee D did not agree with the other three external referees about the "high quality" of her book. Dr. Chiu-Duke stressed that on the contrary, referee D attested to both the high quality and quantity of

scholarship that went into her book. She also emphasized that she had corrected referee D's error regarding her (Dr. Chiu-Duke's) failure to take three major works into account, and the Departmental Standing Committee agreed with that correction. And, she noted that although none of the other seven arm's length scholars who have reviewed her book agreed with referee D's comments, their positive comments are not included in Dr. Gallini's letter. Overall, Dr. Chiu-Duke said she believes Dr. Gallini misquoted referee D regarding the quality of her book, and relied unduly on that referee's negative remarks in the face of considerable opinion to the contrary.

- Dr. Gallini relied on referee D's comments to find no promise to supervise graduate students. Dr. Chiu-Duke noted that referee D made both positive and negative remarks regarding her ability to teach and supervise graduate students. She also highlighted the fact that referee D's negative remark is inconsistent with both referee B's recommendation that she could teach graduate students and the Departmental Standing Committee's consensus that she was an excellent teacher of graduate and undergraduate students.
- Dr. Gallini characterized the rate and quantity of her scholarly activity as "respectable" and "modest". Dr. Chiu-Duke referred in this regard to a published Guide entitled Arts 2000 and Beyond: An Academic Plan for the Faculty of Arts at UBC. She said that document states that in the Faculty of Arts, "a much lower rate of publication in the best venues with quality research is favoured".

39 Finally, Dr. Chiu-Duke testified about the revisions to her CV during the period between Dr. Gallini's recommendation and Dr. Piper's decision. Dr. Chiu-Duke supplemented her CV in three areas during this period: published work; invitations to participate in conferences both here and abroad; and, expert appearances on the nation-wide television program "Straits Today".

40 After May 15, 2003, Dr. Chiu-Duke published three articles/papers. The first was an invited, peer-refereed article entitled Political Reforms and Self-Strengthening in Chinese History and Their Contemporary Significance. That article was published as the "special" article in the March 2003 issue of the Wenhua Zhongguo journal. In June 2003, her November 20, 2002 lecture to The University of British Columbia Taiwan Association entitled Thoughts on Establishing a Cosmopolitan View was published by invitation in the Shenzhou Shibao journal. In August 2003, she published, again by invitation, a previously-presented scholarly conference paper entitled Beyond Perilous Polarities: Reflections on China-Taiwan Relations. That paper was published in the Zhonghua Shibao journal.

41 Since May 15, 2003, Dr. Chiu-Duke also completed two chapters of her forthcoming book, Women, Confucian Teaching and State Building in T'ang China. A third chapter of that book was scheduled to be completed before classes commenced on September 2, 2003.

42 On July 11, 12, 20 and August 22 and 23, 2003, Dr. Chiu-Duke was invited to appear as an expert panelist on the "Straits Today" television program.

43 As alluded to in relation to the publication update, following Dr. Gallini's negative recommendation, Dr. Chiu-Duke was invited to participate in three conferences, two of which were held outside B.C. In May 2003, she presented a lecture on The Role of Traditional Chinese Intellectuals in Institutional Reform at the Tenth Annual Cultural China Symposium sponsored by the Culture Re-

generation Research Society in Vancouver. She was invited to present a paper entitled T'ang Mothers in Action at the Western Conference of the Association for Asian Studies, October 9-11, 2003, in Phoenix, Arizona. And she was invited to present a paper, "T'ang Wives: Predicament and Prospects", at the Sixth International Conference on T'ang Studies in Taipei, Taiwan, in November 2003.

44 Dr. Piper's decision dated September 6, 2003 is as follows:

I am writing to inform you of my decision in the case of your promotion to Assistant Professor. As you know, your Department, Acting Head and the Faculty Committee recommended promotion, while the Dean recommended against promotion. My decision concurs with the Dean's recommendation.

My negative decision is based on concerns with respect to your scholarly activity and your ability to provide instruction at all levels in your discipline. First of all, scholarly activity is defined in the Agreement as "research of quality and significance" and includes the dissemination of the results of that scholarly activity. I have reviewed your body of scholarly activity and I am not persuaded that the quantity of activity justifies promotion. Secondly, I am not persuaded that you have demonstrated potential to supervise graduate students in the area of your research. I do not believe that you have met the criteria for promotion to the rank of Assistant Professor nor do you show potential to meet this level. Although I have concluded that your case does not warrant promotion at this time, I agree with your colleagues that your teaching is clearly at a high level and your service contributions are admirable.

45 It is this decision that is the subject of appeal under section 13 of the Agreement.

The Guide to Promotion and Tenure Decisions at UBC, Curriculum Vitae and Publications Record

46 The parties did not present any extrinsic evidence of negotiating history as an aid to the interpretation of the disputed elements of the Agreement. The Association tendered and referred to the University's Guide to Promotion and Tenure Decisions at UBC, 2001/02 edition (the "Guide"), and Dr. Chiu-Duke's CV and Publications Record. The latter two documents are, among other things, addressed in the Guide.

47 In section 1.02.2 of the Guide, the issue of external referees is addressed. That information clarifies that the opinion of such scholars is primarily sought in relation to the quality and significance of a candidate's scholarly activity -- i.e., "scholarly, professional and/or creative achievements", and in particular, "publications".

48 Under section 1.02.4, the issue of teaching evidence is discussed. The Guide explains that the amount of evidence relating to the quality of a candidate's teaching will vary depending on the particular circumstances of the case, and there is a minimum necessary to enable committees beyond the department to ensure that the University's standards for teaching performance have been met. In respect of evidence related to the quality of teaching, the Guide clarifies that such evidence is derived from student and peer evaluations, and that peer evaluators need to be familiar with the candidate's "instructional content area" and capable of making qualitative judgements regarding "instruction". The Guide also identifies three teaching components: 1) type of teaching - undergraduate, graduate,

practice-based, etc.; 2) instructional formats - lectures, problem-based tutorials, etc.; and, 3) context - classroom, small group, laboratory, practice site, etc.

49 The Guide refers to the UBC CV for Faculty Members. That document, as exemplified by Dr. Chiu-Duke's CV, has 14 sections. Section 8 pertains to teaching. Graduate student supervision is listed as a subsection of teaching. Section 9 relates to scholarly and professional activities. Research grants, invited presentations, other presentations, conference participation and "other" are all listed under this section.

50 The Guide also refers to the UBC Publications Record. That document, again, as exemplified by Dr. Chiu-Duke's Publications Record, contains nine sections: 1) Refereed Publications - journals, book chapters, conference proceedings, and book reviews; 2) Non-Refereed Publications - journals, conference proceedings, translations and other; 3) Books - authored, edited, and chapters; 4) Patents; 5) Special Copyrights; 6) Artistic Works, Performances, Designs; 7) Other Works; 8) Work Submitted (including publisher and date of submission); and, 9) Work in Progress.

51 In Dr. Chiu-Duke's CV, her areas of special interest and accomplishments are described in this way: traditional Chinese social and intellectual and cultural theory, specializing in T'ang and Sung Dynasty (607-1274), modern Chinese social, intellectual and cultural history, and twentieth century Chinese fiction. Under the "Other" section for scholarly activity, Dr. Chiu-Duke notes her regular invitation as an expert panelist on the television program "Straits Today". She also notes that many well known Professors in Chinese Studies from UBC, Simon Fraser University, and University of Victoria are invited panelists, as are visiting government officials from China, Taiwan and Hong Kong.

Provisions of the Agreement

52 The parties' submissions raise issues of both interpretation and application requiring a consideration of the following language in the Agreement:

1.01 For the purpose of this 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;

3. Titles and Rank

3.04 Senior Instructor

The rank of Senior Instructor is for those individuals who are given a tenured appointment and are not expected to proceed through the professorial ranks. It is normally awarded only to those who are excellent teachers. Persons appointed to this rank may subsequently be promoted to professorial rank.

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 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.

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 Section 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. In exceptional circumstances, initial appointment at this rank may be based upon evidence of the candidate's potential to meet these criteria, including the opinion of scholars or other qualified persons familiar with the candidate's work and capability.

3.07 Professor

- (a) Appointment at or promotion to the rank of Professor is reserved for those whose contributions (judged by the criteria as set out in Section 4) are considered outstanding.
 - (b) These persons will have met appropriate standards of excellence and will have wide recognition in the field of their interest. They must have shown high quality in teaching and sustained and productive scholarly activity, have attained distinction in their discipline, and have participated significantly in academic and professional affairs. Promotion to this rank is not automatic nor based on years of service and it is expected that some persons will not attain this rank.
4. Criteria for Appointment, Reappointment, Tenure and Promotion

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 a Senior Instructor when, in the view of the University, its needs will be best served by that appointment. Appointments without terms are granted to individuals who have maintained a high standard of performance in meeting the criteria set below and show promise of continuing to do so.

- (b) Candidates for appointment or reappointment to the rank of Instructor I are judged principally on performance in teaching. Service to the academic profession, to the University, and to the community may be taken into account. Instructors I who are candidates for a tenured appointment are judged on the ground of excellence in teaching.
- (c) Judgments of an individual should be made objectively.

4.02 Teaching

Teaching includes all presentations 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

Evidence of scholarly activity varies among the disciplines. Published work, where appropriate, is the primary evidence

5. Procedures for Appointment, Reappointment, Tenure and Promotion

5.01 General Provisions

- (a) Appointments, reappointments, tenure decisions and promotions are made by the Board of Governors upon the recommendation of the President.

5.03 Recommendations: Supplementing Files

In the case of recommendations on reappointment, promotion or tenure, the candidate or the University has the right, up to the stage of the President's decision, to supplement the file by the addition of new, unsolicited information (such as a new set of student evaluations, the publication of an additional book or article, the receipt of a grant, a published review of the candidate's work, etc.) or a response to particular concerns that emerge in the relevant documentation.

5.10 Review by the Dean

- (a) The Dean shall review the recommendations received from the Head to ensure that proper procedures have been followed, that all relevant materials has been considered, and that recommendations made are consistent with the evidence presented.
- (b) In the case of recommendations concerning tenure, promotion, or reappointment (when the Dean is considering not recommending in favour of reappointment) the Dean shall consult with an advisory committee. In the case of other recommendations the Dean may consult with an advisory committee.

* * *

- (d) The Dean may request further information from the Head and the department standing committee, and may also obtain such further information as is deemed appropriate.
- (e) The Dean, after considering the advice of the advisory committee, (i) may refer the case back to the Head and the departmental standing committee for reconsideration; or (ii) make a recommendation to the President pursuant to 5.11.

5.11 Dean: Recommendation to the President

- (a) The Dean shall, except when his or her decision concerning an initial appointment or a promotion not arising out of a periodic review under Section 9 below is negative, forward his or her recommendation to the President together with the recommendations received from the Department.
- (b) If the recommendation of the Dean is negative, in opposition to the recommendation of the Head or the departmental standing committee, or for reasons not raised by the Head or the departmental standing committee, the Dean shall provide detailed and specific reasons in writing to the candidate including the respect in which he or she is deemed to have failed to satisfy the applicable criteria.
- (c) The Dean may provide detailed and specific reasons by giving the candidate a copy of the Dean's recommendation to the President but if that is done the recommendation shall be modified to the extent necessary to protect the

confidentiality under Section 5.01(c) and to protect the identity of the referees.

- (d) The candidate shall be asked to make a timely written response, which shall be added to the file pursuant to Section 5.03.

5.14 Review by President

* * *

- (b) The President may request a further review of the case by the Dean.
- (c) If the President's decision respecting a candidate is not in accord with the recommendations of a departmental standing committee, the standing committee shall be informed of this fact and the reasons for it.

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.
- (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 of the Association.

5.16 Arbitration

The President's decision to deny reappointment, tenure, or promotion may be subject to arbitration following the procedures as provided in Section 13 of this agreement.

13. Appeal of Decisions on Reappointment, Tenure and Promotion

13.01 Interpretation

* * *

"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.

53 Article 13.06 places the burden of proof on the appellant. The jurisdiction of this board is provided for in Article 13.07:

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 decided 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.

54 The effect of the jurisdiction the parties agreed to in section 13.07 was recently discussed by Arbitrator Jackson in University of British Columbia -and-Faculty Association of the University of British Columbia (Lance M. Rucker), unreported, April 15, 2004; upheld on review in BCLRB B330/2004 (B.C.L.R.B.); currently under reconsideration by the British Columbia Labour Relations Board ("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)

Argument

55 Counsel's thorough and helpful submissions can be summarized as follows.

The Association

56 The Association submits that Drs. Gallini and Piper ignored or were willfully blind to the clear and overwhelming evidence of Dr. Chiu-Duke's ongoing involvement in scholarly activity, successful teaching and capability to provide instruction at various levels in Chinese Studies. In this way, their decisions were unreasonable and/or were arrived at through procedural error.

57 The Association notes that in Rucker, Arbitrator Jackson found that Dr. Piper had failed to consider any evidence other than published work in peer-reviewed journals even though she admitted that the presentation of invited lectures, papers and reports at scholarly meetings/conferences constitutes evidence of the dissemination of scholarly activity. Relying on that reasoning, the Association submits that Dr. Piper failed to consider the ample relevant evidence demonstrating that Dr. Chiu-Duke's performance in both teaching and scholarly activity met the standard required under section 3.05.

58 The Association accepts that the positive recommendations at all levels in the review process prior to Dr. Gallini were not binding on Dr. Piper and do not render her decision unreasonable. The Association further accepts that the positive recommendations of all of the external scholars who reviewed Dr. Chiu-Duke's work are not binding on Dr. Piper and do not render her decision unreasonable. Nonetheless, the Association says these facts are relevant and must be considered when assessing the reasonableness of Dr. Piper's analysis.

59 From the Association's perspective, the requirement to be "involved in" scholarly activity has no quantitative measure. It says all that is required at this first level of the professorate is some involvement in scholarly activity. Thus, by deciding that Dr. Chiu-Duke's quantity of scholarly activity was "insufficient" to warrant promotion, Drs. Gallini and Piper applied a criterion reserved for promotion to the ranks of Associate Professor and Professor where the test is "sustained and productive" scholarly activity. Additionally, the Association argues that by assessing Dr. Chiu-Duke's rate of scholarly activity over a 10-year period since receiving her Ph.D., Dr. Gallini applied a criterion not found in section 3.05 and treated Dr. Chiu-Duke in an unequal and discriminatory manner. The Association says no language in the Agreement entitles Drs. Gallini and/or Piper to assess Dr. Chiu-Duke's application differently from any other candidate's application because she has been at UBC for 10 years.

60 The Association also points to an inconsistency in Dr. Gallini's decision regarding Dr. Chiu-Duke's scholarly activity. On the one hand, Dr. Gallini characterizes her record of scholarly activity as "respectable" and "modest", yet on the other hand she decides it is "insufficient" to satisfy the criterion in section 3.05. The Association maintains that a respectable quantity of scholarly activity satisfies the standard of involvement simpliciter under section 3.05. The Association says that both components of scholarly activity -- research of quality and significance and the dissemination of the results thereof -- must be assessed on the basis of Dr. Chiu-Duke's published work because the parties have agreed that published work is the primary evidence of scholarly activity: section 4.03.

Here again, the Association emphasizes there was ample evidence of published work supporting Dr. Chiu-Duke's application.

61 In terms of the capability to provide instruction at the various levels in Chinese Studies, the Association contends that this criterion falls under the rubric of teaching, not scholarly activity. And the Association emphasizes the overwhelming evidence of Dr. Chiu-Duke's superlative teaching capability both at undergraduate and graduate levels of instruction.

62 The Association further submits that Dr. Gallini's and Dr. Piper's decisions are unreasonable and/or are arrived at through procedural error because the reasons are not tenable in light of the evidence: Rucker. The Association contends that as Dr. Chiu-Duke's capability and potential to supervise students is part of teaching, and as her excellent teaching at all levels is amply evidenced in her application, the decision that she lacks even potential to supervise graduate students, if this is a requirement, must be viewed as untenable.

63 The Association argues that Dr. Gallini's and Dr. Piper's decisions are unreasonable and/or arrived at through procedural error because Dr. Chiu-Duke's candidacy was improperly assessed against a "standard of excellence" not specified in section 3.05.

64 The Association maintains that Dr. Piper failed to apply the criteria specified in section 3.05 and applied instead two criteria not specified in section 3.05, namely, the "ability to provide instruction at all levels in your discipline" and the "potential to supervise graduate students in the area of your research". And, the Association argues that Dr. Chiu-Duke was treated unfairly by Drs. Gallini and Piper. It says numerous errors of fact and interpretation are evident in Dr. Gallini's decision, yet Dr. Gallini neither amended her letter in response to Dr. Chiu-Duke's corrections, nor commented on those corrections one way or the other. This, says the Association, left Dr. Piper in a difficult situation, and she neither requested further information from Dr. Chiu-Duke nor explained how she dealt with these issues.

65 The Association also argues that by evaluating Dr. Chiu-Duke's application against factors such as her participation in conferences "outside British Columbia", access to research grants and the supervision of graduate students, Drs. Gallini and Piper applied criteria reserved for promotion to the ranks of Associate Professor (i.e., ability to direct graduate students, and willingness to participate and participation in the affairs of the Department and UBC), and Professor (i.e., wide recognition, distinction in the discipline, significant participation in academic/professional affairs). The Association asserts that as Dr. Piper adopted or accepted Dr. Gallini's decision, Dr. Piper's decision was unreasonable and/or arrived at through procedural error.

66 The Association urges this board to draw an adverse inference from the University's failure to call Drs. Gallini and Piper to testify at the hearing. The Association submits that in the circumstances of this case, an onus to explain their reasons shifted to the University. The Association further emphasizes the fact that no reasons of any kind were given for Dr. Piper's finding that Dr. Chiu-Duke had not even demonstrated potential to supervise graduate students in the area of her research, a criterion not found in section 3.05. In the face of the overwhelming evidence of Dr. Chiu-Duke's excellence in teaching, as well as the evidence of her other involvement with graduate students, the Association maintains the burden shifted to Dr. Piper to give reasons for her decision. In the Association's view, this board should conclude that if Dr. Piper had testified, her evidence would either have been injurious to the University's case or would not have supported her decision. See Barbara-Jean Steele and International Union of Operating Engineers, Local 963, BCLRB No. 77/2001.

67 For all of these reasons, the Association's position is that Dr. Piper's decision must either be reversed under section 13.07(c) such that this award will constitute a decision to recommend promotion, or, this board should decide the matter on its merits under section 13.07(b)(B) of the Agreement.

The University

68 The University submits that candidates for promotion to all ranks in the professorate must address the criteria in section 4.01. That provision, says the University, establishes a general "standard of excellence" for all ranks. Then, the provisions applicable to the different ranks establish different applications of that standard of excellence. The University contends that adjectives such as "involved in" and "sustained and productive" do not diminish the required standard of excellence for both teaching and scholarly activity.

69 In terms of scholarly activity, the University submits that the definition of this term -- "research of quality and significance" -- does not include book reviews or comments on other scholars' work. The University accepts that in Dr. Chiu-Duke's case, evidence of published work is the primary evidence of scholarly activity: see section 4.03 which expands the definition of scholarly activity in section 1.01. At the same time, the University contends that evidence of published work is insufficient; a candidate must provide evidence of both elements of scholarly activity -- "research of quality and significance" and "the dissemination of the results of scholarly activity".

70 From the University's perspective, the concepts of "quality", "significance" and "dissemination" all comfortably contemplate an assessment of the quantity of scholarly activity. Referring to Arbitrator Pেকেles' award in University of British Columbia and University of British Columbia Faculty Association (Preston), unreported, January 30, 2004 ("Preston"), the University submits that the quality and quantity of scholarly activity are linked. Thus, Dr. Piper's focus on the insufficient quantity of Dr. Chiu-Duke's involvement in scholarly activity cannot be viewed as unreasonable. Further, says the University, as the supervision of graduate students is an aspect of scholarly activity, ample evidence of excellent teaching performance does not satisfy this criterion. Moreover, as the supervision of graduate students "in the area of one's research" is an important component of scholarly activity, Dr. Piper's conclusion that Dr. Chiu-Duke's limited evidence of involvement in this kind of scholarly activity failed to demonstrate potential to supervise graduate students in the area of her research cannot be viewed as untenable. See Rucker. The University also notes that this element of the Association's argument is based on Dr. Chiu-Duke's erroneous interpretation of the term of the Agreement.

71 The University's position is that the assessment of scholarly activity is a matter of judgement. Here, says the University, Dr. Piper reviewed the body of Dr. Chiu-Duke's scholarly activity and her judgement was that the quantity of scholarly activity did not justify promotion to the rank of Assistant Professor. The University contends that this board should approach the Association's challenge to the reasonableness of Dr. Piper's judgement with several considerations in mind. First, Dr. Piper was making a decision given to her to make under the University Act.

72 Second, management is in a superior position to an adjudicator to assess candidates for promotion. The consensus among arbitrators is that once the test for a promotion under a collective agreement is identified, deference should be accorded to management's judgement: Board of School Trustees of School District No. 68 (Nanaimo) and Canadian Union of Public Employees, Local 606

(1985), 19 L.A.C. (3d) 176 (Germaine); *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] S.C.J. No. 51.

73 Third, an arbitrator's review of the merits of Dr. Piper's decision must focus on its reasonableness. An arbitrator may not agree with the decision, but it may nonetheless be reasonable in the sense that "the reasons" support the decision: *Dr. Godwin O.N. Eni -and- the President of the University of B.C.*, unreported, March 14, 1994 (MacIntyre); *Rucker*; and, *Cartaway Resources Corp.*, [2004] 1 S.C.R. 672.

74 Fourth, in terms of procedural error, an arbitrator should only render a decision on the merits where she determines the matter cannot be referred back because the candidate will not receive a fair and objective decision: *University of British Columbia Faculty Association -and- University of British Columbia (Dodek)*, [1997] B.C.C.A.A.A. No. 82 (Kelleher). The University submits that Dr. Gallini's decision is only in issue here because the Association relies on the ground of procedural error. The University maintains that Dr. Gallini's failure to correct or amend her recommendation following her receipt of Dr. Chiu-Duke's response cannot be viewed as a procedural error or an unfair process. The Agreement does not require such a correction; it simply requires Dr. Gallini to do what she did -- forward Dr. Chiu-Duke's response to Dr. Piper: see section 5.03.

75 In further response to the Association's claims of procedural error, the University submits there is no evidence Drs. Gallini and/or Piper ignored or were wilfully blind to the evidence submitted by Dr. Chiu-Duke in support of her application. Similarly, there is no evidence they improperly applied the criteria in section 3.06 or 3.07, and no evidence Dr. Piper adopted Dr. Gallini's decision. Her decision expressly refers to Dr. Chiu-Duke's request for promotion to Assistant Professor, and an adverse inference cannot be used to prove facts not yet established in the Association's case. See *R.C. Purdy Chocolates Ltd.*, [2001] B.C.L.R.B.D. No. 412 (BCLRB).

76 Finally, the University submits that if I determine Dr. Piper's decision was unreasonable, I should not reverse her recommendation to the Board of Governors as Arbitrator Jackson did in *Rucker*. The University maintains such a remedy is inconsistent with the statutory scheme in the University Act. The University further submits that the effect of such a remedy would be to compel Dr. Piper to utter an opinion that is not her own, or to associate her with an opinion she does not agree with, contrary to her freedom of expression guaranteed in the Charter. See *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269 ("National Bank"); *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 ("Slaight Communications"); and, *Ontario Restaurant Hotel & Motel Association v. Toronto (City)*, [2004] O.J. No. 190 (Ontario Superior Court of Justice Divisional Court) and cases cited therein ("Ontario Restaurant"). The University says the reasoning of the Labour Relations Board in BCLRB No. B330/2004 upholding Arbitrator Jackson's award in *Rucker* is "facile" and incorrect, and is currently the subject of an application for reconsideration at the Labour Relations Board.

The Association's Reply

77 In response to the University's position on remedial jurisdiction, the Association notes it had no notice the University intended to argue the Charter. The Association offered to provide written submissions on the issues raised in the University's argument relating remedial jurisdiction if this board requests the same. The Association submits that it relies on the award of Arbitrator Jackson in *Rucker*, and BCLRB No 330/2004.

78 The Association agrees that an adverse inference does not create evidence or prove facts. The Association's point is that, on the facts before both this board and Dr. Piper, there was ample evidence demonstrating Dr. Chiu-Duke's potential to supervise graduate students if that is found to be an applicable criterion. Indeed, says the Association, a prima facie case of the actual supervision of graduate students has been established. Thus, the onus shifted to Dr. Piper to explain her conclusion that Dr. Chiu-Duke failed to demonstrate even potential to supervise graduate students. Similarly, as there was ample evidence of Dr. Chiu-Duke's involvement in scholarly activity, the onus shifted to Dr. Piper to explain how and why that evidence was insufficient.

79 With respect to Dr. Gallini's and Dr. Piper's assessment of the quantity of scholarly activity, the Association emphasizes that when the parties intended to include a quantitative measure for scholarly activity, they expressly said so: see the language in sections 3.06 and 3.07. In the Association's view, the University's interpretation requires the addition of words establishing an intention to include a quantitative measure. The Association contends that the presence of words expressing a quantitative measure in sections 3.06 and 3.07, together with the absence of such words in section 3.05, establishes that the parties intended the concept of involvement in scholarly activity to mean a minimal requirement of some involvement. As to the University's reliance on the Preston award, the Association notes that Arbitrator Pekeles linked quality and quantity in the context of a promotion to the Associate Professor rank where the quantitative measure of "sustained and productive" scholarly activity expressly pertains.

80 The Association maintains that the University's reliance on arbitration awards standing for the proposition that arbitrators should give deference to management's decisions in promotion cases do not apply where, as here, the parties have agreed to give arbitrators the authority to decide the appeal on the substantive merits for procedural error, and/or reverse the decision if it finds on the evidence the decision is unreasonable.

81 In terms of the University's argument that the supervision of graduate students does not fall within the concept of teaching, the Association submits that the University's approach requires this board to read the concept of student supervision out of the definition of teaching in Article 4.02. Finally, if supervision of graduate students is an applicable criterion, the Association disputes the University's assertion that there is no evidence of graduate student supervision in Dr. Chiu-Duke's discipline. The Association points to both Dr. Chiu-Duke's CV, which clearly identifies her supervision of a graduate student.

Analysis

82 The issues before me are whether Dr. Piper's decision was unreasonable and/or arrived at through procedural error. The dispute focuses on the assessment of Dr. Chiu-Duke's involvement in scholarly activity and capability to provide instruction at the various levels in her discipline, Chinese Studies. Before turning the grounds of appeal, I will address several interpretative issues raised in the parties' submissions.

83 Does section 4 of the Agreement establish a general standard of excellence that is not diminished by the adjectives applicable to the criteria in sections 3.05, 3.06 and 3.07? Or, is the standard of performance for each rank expressed in the applicable provision under section 3?

84 The criteria for promotion are specified in Article 4.01. Candidates are to be judged on performance in two areas, teaching and scholarly activity. Candidates must be "competent" in both areas: "competence is required both in teaching and in scholarly activity ... ". Where a higher level of per-

formance -- excellence -- is required, the parties say so. They expressly require excellence in two circumstances: 1) a candidate who does not meet the criterion of scholarly activity but is judged to be an "excellent teacher" may be given a tenured appointment as a Senior Instructor (section 4.01(a)); and, 2) Instructors I who are candidates for a tenured appointment are judged on "excellence in teaching" (section 4.01(b)).

85 Nor do sections 4.02 and 4.03 establish a general standard of excellence for all ranks. In section 4.02, the parties specified the various types of "presentations" that will be viewed as "teaching", and they agreed that a candidate's entire teaching contribution must be assessed. They specified the basis on which, and the methods by which, teaching must be evaluated, and they required consideration to be given to a candidate's "ability and willingness to teach a range of subject matter and at various levels of instruction".

86 In section 4.03, the parties specified the way(s) in which the criterion of scholarly activity, as defined in section 1.01, can be proven and what can be used as evidence of scholarly activity. Recognizing that evidence of scholarly activity varies among the disciplines, the parties agreed that "where appropriate" published work is the "primary evidence" of scholarly activity. There is no dispute in this case that published work constitutes the "primary" evidence of Dr. Chiu-Duke's scholarly activity.

87 I find the standards applicable to promotion to the different ranks of the professorate provided for under section 3 are expressed in the relevant provision of section 3. A standard of excellence is specified in two provisions in section 3: candidates seeking promotion to Senior Instructor must demonstrate they are "excellent teachers" (section 3.04); and, candidates seeking promotion to Professor must prove they have "met appropriate standards of excellence" (section 3.07). The parties did not specify a standard of excellence for candidates seeking promotion to Assistant Professor. They instead specified a standard of "ability" in teaching and scholarly activity to be demonstrated through evidence that the candidate is "involved in" scholarly activity, is a "successful" teacher and is "capable" of providing instruction at various levels in his or her discipline. However, for promotion to this rank, the parties agreed it is sufficient for candidates to demonstrate their "potential to meet these criteria". The parties also specified one particular type of evidence that may be considered: "the opinion of scholars familiar with the candidate's work and capability".

88 Hence, it is not consistent with the structure and language of the Agreement to say that excellence is a general or minimum standard required of every candidate seeking promotion to the professorate.

89 Does the assessment of a candidate's involvement in scholarly activity under section 3.05 properly include the quantity of scholarly activity? No extrinsic evidence was presented to aid the interpretation of the Agreement. However, I find the plain meaning of the words "involved in scholarly activity" connotes a level of participation in, or quantity of, scholarly activity. At the same time, I find the absence in section 3.05 of any modifying words, such as those found in sections 3.06 and 3.07, expresses an intention to require only a minimal level of participation in, or quantity of, scholarly activity. When the language of section 3.05 is read in the context of sections 3.06 and 3.07, where the parties more definitively express a quantitative measure of scholarly activity, I find the parties intended the level of participation in, or quantity of, scholarly activity for promotion to Assistant Professor to be relatively low or small, and considerably less than that required for promotion to Associate Professor and Professor. This is evident in the language the parties agreed to: i.e., "involved in" as compared with "sustained and productive". While the quantitative measure of scholarly

activity under section 3.05 is not defined with certainty, I am satisfied that a record of scholarly activity that can be characterized as "respectable" and "modest" satisfies this criterion.

90 My conclusion that the parties' agreement to the words "involved in scholarly activity" in section 3.05 expresses an intention to require a low level of participation in, or small quantity of, scholarly activity, is reinforced when section 3.05 is read in the context of section 3.04, and when these two provisions are viewed in the context of Dr. Chiu-Duke's evidence. The rank of Senior Instructor immediately precedes the rank of Assistant Professor. Senior Instructors are not generally expected to proceed through the ranks of the professorate, but the parties expressly permit such promotions. This case is one example of the exception to the general expectation. Dr. Chiu-Duke's evidence was that Instructors at UBC are not eligible to apply for research grants. And, during the initial review of her promotion request at the departmental level, Dr. Chiu-Duke advised Dr. Mostow that her position as Senior Instructor had no research component. Despite these limitations, Dr. Chiu-Duke engaged in research and disseminated her scholarly activity through, among other means, published work. Her evidence was that she has done so for many years on a self-funded basis. I find the institutional limitation on Instructors' access to research funding, together with the parties' express allowance of promotion from Senior Instructor to Assistant Professor provides some support for my conclusion that they intended the criterion of involvement in scholarly activity in section 3.05 to require a low level of participation in, or small quantity of, scholarly activity.

91 My conclusion in this regard also finds some support in the Preston award. It is true, as the Association notes, that Arbitrator Pekeles' remarks were made in the context of promotion to the rank of Associate Professor where the standard of "sustained and productive scholarly activity" pertains. At the same time, Arbitrator Pekeles' reasoning was that the concepts of quality and quantity are linked. His reasoning flowed from the definition of scholarly activity which is applicable to all ranks in section 3.

92 The University argues that book reviews and comments on other scholars' work cannot be relied on as evidence of involvement in scholarly activity because that term is narrowly defined in the Agreement as "research" of quality and significance and the dissemination of the results of scholarly activity. I do not agree. Section 4.03 addresses evidence of scholarly activity. The language of that provision refers broadly to published "work", not published "research". Thus, I find the parties have agreed that candidates for promotion may rely on such published work as some evidence of scholarly activity. This conclusion, based on the language of the Agreement, finds support in the UBC Publications Records. As noted above, "book reviews" and "other works" are expressly contemplated as components of published work.

93 The parties differ on the nature of the criterion in section 3.05 relating to a candidate's "capability to provide instruction at various levels in his or her discipline". The University says this refers to scholarly activity and contemplates an evaluation of candidates' ability to supervise graduate students in the area of their research. The Association says this criterion refers to teaching and does not involve an evaluation of candidates' ability to supervise graduate students in the area of their research. That type of supervision of graduate students, says the Association, is reserved for Associate Professors.

94 The parties' submissions in this regard, briefly summarized above, raise certain interpretive issues that are best left for a case where they are clearly engaged and where the parties present evidence to aid the interpretation. For instance, the difference between supervision and direction. It may well be that the criterion in section 3.06 requiring the "ability to direct graduate students" constitutes

scholarly activity if, by those words, the parties were referring to the classic situation of an individual professor's supervision and direction of a graduate student's advanced scholarly research for dissertation purposes. I need not determine the nature and scope of that criterion. The issue here is whether the parties intended the third criterion in section 3.05 to involve an assessment of a candidate's teaching ability or scholarly activity.

95 In my view, the words the parties used to describe this criterion fall much more comfortably within the notion of teaching as defined in section 4.02 than the notion of scholarly activity as defined in section 1.01. Scholarly activity is defined as "research of quality and significance and the dissemination of the results of that scholarly activity" (emphasis added). And, scholarly activity is primarily demonstrated for the purposes of promotion by "published work": section 4.03. Thus, this concept contemplates a scholar conducting his or her research and disseminating the results of it, primarily by publishing the research. Teaching, on the other hand, is defined as a wide variety of means by which instruction is delivered to students who thereby derive an educational benefit. The notion of teaching fits comfortably within the broad words the parties used at the outset of this criterion "capable of providing instruction".

96 I further find that the closing words of this criterion -- "provides instruction at various levels in his or her discipline" -- suggests that the parties had in mind a teaching capability. Dr. Chiu-Duke's discipline in Chinese Studies. On the evidence, Chinese Studies is a discipline offering courses in a wide range of subject matter and at various levels of instruction. The concept of providing instruction at various levels "in her discipline" fits comfortably within the concept of teaching as discussed in section 4.02: "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". Research, on the other hand, is not an activity performed by an individual at various levels in her discipline. Research relates instead to specific subject matter of interest to the scholar and intended for dissemination through published work.

97 My conclusion based on the language of the Agreement is reinforced by one aspect of the Guide. In the Guide, evidence of teaching quality is evaluated by those familiar with a candidate's "instructional content area" and capable of making qualitative judgements about a candidate's "instruction". While the Guide is supplementary to the Agreement, which is the key factor for consideration, the Guide is a document compiled by the University and may be given some consideration in assessing the interpretation of the Agreement. See Rucker, at page 17.

98 For these reasons, I find the parties intended this to be a teaching criterion.

99 The requirement that candidates must be capable of providing instruction at the various levels in their discipline, or at least demonstrate potential to do so, contemplates the possibility that they may be required to provide instruction at the graduate level in their discipline. And section 4.02 contemplates that in the teaching or instructional role, an individual may "supervise an individual student's work", i.e., the work required in the course being taught. But there is no language in section 3.05 linking the supervision of an individual student's work in a teaching or instructional role to either the supervision of graduate students in particular, or the supervision of that specific category of students in the area of the candidate's research. The plain meaning of the words used to describe this criterion, together with a consideration of this criterion in the context of the Agreement as a whole, satisfies me that the Association's contention is to be preferred. No evidence was presented to support a finding that the parties mutually intended this criterion in section 3.05 to have a meaning different than that which arises from the structure and language of the Agreement.

100 Hence, while providing instruction at various levels in one's discipline may involve the supervision of individual student's work, the language the parties used to express their agreement regarding this criterion does not support a finding they intended to include in it the supervision of graduate students in the area of the candidate's research. The parties clearly turned their minds to the specific relationship between a Professor and graduate students, and to a particular capability vis-à-vis graduate students -- the ability to direct them -- when they negotiated the provisions of the Agreement. If the parties had intended to require candidates for promotion to Assistant Professor to demonstrate a specific ability in relation to an identified category of students, they surely would have agreed to include in section 3.05 words similar to those they agreed to in section 3.06. They did not do so. Nor did they specifically link the concept of supervision to either graduate students or a candidate's area of research.

101 The rank of Assistant Professor is the first level of the professorate. Although it is not the norm, Senior Instructors are permitted to seek promotion to the professorate under the Agreement. The evidence is that the Faculty of Graduate Studies prohibits Instructors from supervising graduate students. In her letter to Dr. Piper, Dr. Gallini acknowledges this institutional limitation, but goes on to suggest that a relevant expectation for Dr. Chiu-Duke's candidacy, given the fact that she has taught in the graduate program, was service as an advisor or informal member of the committee of some graduate students. As Dr. Gallini did not testify at the hearing, the basis for this expectation is unknown. Dr. Chiu-Duke testified at the hearing. Her evidence was that Instructors in her department are not permitted to function in such roles. Indeed, her evidence was that Assistant Professors in the Department of Asian Studies are not permitted to act as sole supervisors for graduate students. In these circumstances, Dr. Chiu-Duke's evidence must be accepted. Given this institutional limitation, and given that Instructors are permitted to seek promotion to the professorate, I find it unlikely the parties intended this criterion in section 3.05 to mean that candidates who are Instructors must demonstrate their capability to supervise graduate students in the area of their research thereby disqualifying Instructors. Rather, they intended candidates to demonstrate their capability or potential to "provide instruction at various levels in their discipline".

102 I turn now to the grounds for appeal.

103 Procedural error is defined in section 13.01 as "a failure or failures to follow required procedures or a failure or failures to consider relevant evidence".

104 Unreasonableness is not defined in the Agreement. This ground of appeal has, however, been considered by arbitrators in prior decisions under the Agreement. The test of unreasonableness has also been considered by the Supreme Court of Canada in the context of judicial review of administrative action. Arbitrator Jackson reviewed the law in this area in Rucker. She noted that in Dr. Godwin O.N. Eni -and- The President of the University of British Columbia, unreported, March 14, 1994 ("Eni"), Arbitrator MacIntyre ascribed this meaning to the notion of unreasonableness under the Agreement: "a decision outside the range of reasonableness based on the express criteria." Arbitrator MacIntyre found that a decision may be wrong on the merits but may still be reasonable in the sense that an arbitrator could "contemplate others coming to a different conclusion" (page 14).

105 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) S.C.R. 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).

106 The University urges me to adopt the usual arbitral deference to management's judgement in relation to promotion decisions. Typically, arbitrators ensure that management has properly applied the test specified in the collective agreement, but recognize that managers are in a better position than themselves to assess a candidate's qualifications, abilities and so forth: see Board of School Trustees of School District No. 68 (Nanaimo), supra. 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) (B) and (c).

107 Turning to Dr. Piper's brief decision, she gave two reasons for her decision to not promote Dr. Chiu-Duke to Assistant Professor. The quantity of Dr. Chiu-Duke's scholarly activity does not justify promotion, and Dr. Chiu-Duke did not demonstrate potential to supervise graduate students in the area of her research. I find Dr. Piper's decision to be unreasonable for two reasons. First, her reasons provide no line of analysis from the evidence before her to her decision. The requirement of section 5.15(b) is relevant in this regard. Section 5.15(b) obliges Dr. Piper to explain negative recommendations for promotion in "detailed and specific" written reasons. Second, on the evidence, her decision is not tenable. It falls outside the range of reasonableness.

108 In respect of Dr. Piper's first reason, she simply quoted the definition of scholarly activity in section 1.01 of the Agreement, and then stated this conclusion: "I have reviewed your body of scholarly activity and I am not persuaded that the quantity of activity justifies promotion". Dr. Piper did not identify the "body of scholarly activity" she considered. Similarly, she did not say what quantity of scholarly activity was insufficient, or what quantity of scholarly activity would, in her view, have been sufficient. Nor did Dr. Piper explain whether her concern about the quantity of Dr. Chiu-Duke's scholarly activity related to one or both of the elements of that defined term. Thus, while an assessment of the level of involvement in, or quantity of, scholarly activity is permissible under section 3.05, her reasons fail to elucidate her line of analysis from the evidence to her decision.

109 Dr. 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.

110 Turning then to the evidence that was before Dr. Piper and is before me, and applying the Agreement as I have interpreted it, is there a tenable explanation for the decision?

111 In respect of scholarly activity, as of May 2003, Dr. Gallini found Dr. Chiu-Duke's record of scholarly activity to be: "respectable" and "modest". Prior to Dr. Piper's review, Dr. Chiu-Duke supplemented her evidence of scholarly activity. She published three works, all by invitation: a refereed journal article; a conference paper; and, an invited lecture. She completed two chapters of her forthcoming, second book, and was nearing completion of a third chapter. In addition, she had made three more invited presentations on the "Straits Today" television program, and had delivered an invited paper at a symposium of international scope. Finally, her evidence referred to two forthcoming conference participations in October and November 2003, both of which were to be held outside British Columbia.

112 Thus, during the relevant period, Dr. Chiu-Duke's evidence demonstrated she had published a peer-reviewed book with a major university press, four refereed articles, an invited non-refereed article, two translations (one refereed), an invited journalistic piece, and two book reviews. She had completed two, almost three, unpublished chapters of her forthcoming, second book, and she had participated in 12 conferences. Moreover, she had been a regular, invited expert panelist on the "Straits Today" television program, having appeared in that role on more than 30 broadcasts. All of this evidence was before Dr. Piper, and I have found that Dr. Chiu-Duke was entitled to rely on this evidence in support of her scholarly activity contribution.

113 In my view, there is no tenable explanation supporting Dr. Piper's decision that this level of ongoing participation in, or quantity of, scholarly activity failed to satisfy the low level of involvement in scholarly activity required under section 3.05; or, at least, "potential" to meet this criterion. On the evidence, I cannot contemplate how Dr. Piper came to the opposite conclusion: *Eni*.

114 In terms of the requirement for Dr. Chiu-Duke to demonstrate either that she is capable of providing instruction at the various levels in Chinese Studies or has the potential to do so, I find her evidence establishes that she has, in fact, provided instruction at various levels in her discipline. Her CV clearly demonstrates the range of subject matter she has taught and the levels at which she has provided instruction, including course instruction at the graduate level, co-supervision of a graduate student's work and correction of a graduate student's dissertation prior to publication. Those familiar with Dr. Chiu-Duke's "capability" to "provide instruction" at the various levels in Chinese Studies -- her students and peer evaluators -- have consistently rated her capability to do so in glowing terms such as "excellent" and "superlative". On the evidence, and given the express criteria in section 3.05, I find Dr. Piper's decision falls outside the range of reasonableness.

115 I further find Dr. Piper's decision was arrived at through procedural error that may have resulted in a wrong decision. In the opening words of her decision, Dr. Piper described the second criterion as the "ability to provide instruction at all levels of your discipline" (emphasis added). This is inconsistent with the language in section 3.05. And then, in rendering her decision, Dr. Piper transformed the criterion into this: "You have [not] demonstrated potential to supervise graduate students in the area of your research". This latter formulation bears no resemblance to the language in section 3.05. Absent any explanation from Dr. Piper about this newly-formulated criterion, her decision appears on its face to be based on the application of a criterion not found in section 3.05, thereby constituting a procedural error that may have resulted in a wrong decision. I have found that the supervision of graduate students in the area of one's research is not a requirement under section 3.05. If my conclusion in this regard is in error, I nonetheless find Dr. Piper's decision that Dr. Chiu-Duke's evidence fails to demonstrate potential to supervise graduate students in the area of her research to be unreasonable.

116 Again, the reasons provide no line of analysis from the evidence before Dr. Piper to her decision. Nor is there any reference to the evidence giving rise to Dr. Piper's concern in this regard. The best evidence of Dr. Chiu-Duke's capability at the graduate student level emanates from student and peer evaluators. In Dr. Chiu-Duke's case, the relevant evaluations were highly supportive of her capacity at the graduate level. Dr. Chiu-Duke also presented other evidence demonstrating her potential to supervise graduate students in the area of her research, if that is the meaning of this criterion. She briefly co-supervised a graduate student in the Philosophy Department in the area of Confucianism, and she participated in the pre-publication supervision of a graduate student's dissertation at the request of reputable university press. Dr. Chiu-Duke's evidence also included student solicitations to herself and the Department of Asian Studies to act in a supervisory capacity. On any reasonable line of analysis, this evidence, together with the evidence of her excellent teaching at the graduate level, must be viewed as demonstrating "potential" to supervise graduate students in the area of her research. After a somewhat probing examination, and on the evidence, I find Dr. Piper's decision is not tenable.

117 Some of the Association's submissions regarding procedural errors committed by Dr. Gallini that may have resulted in a wrong decision have merit. For example, Dr. Gallini relied on referee D's negative assessment of Dr. Chiu-Duke's ability to supervise graduate students in the area of her research. Where the opinion of a scholar is relied on as evidence of a "capability" expressed in section 3.05, the scholar must be "familiar with the candidate's ... capability". Referee D expressly disqualified him/herself as a scholar whose opinion could be relied on for the assessment of Dr. Chiu-Duke's capability to provide instruction at various levels in her discipline: "I cannot tell from the CV what Dr. Chiu-Duke teaches". Cases cited in the parties' submissions establish that considerable weight may be placed on external referees' views of a candidate's scholarly activity, but Dr. Gallini based the formulation of an inapplicable criterion on one negative remark made by only one of four external referees. While my finding of procedural errors by Dr. Gallini may relate to issues of remedial relief, I cannot find that Dr. Piper accepted Dr. Gallini's reasoning or decision, as opposed to concurred with her recommendation. There is no evidence that Dr. Piper accepted Dr. Gallini's decision, and Dr. Piper's decision does not support such a finding. Her decision records her concurrence with Dr. Gallini's recommendation.

118 Finally, given my determinations this far, it is not necessary for me to address the remaining issues raised in the parties' submissions.

Remedy

119 Having upheld both of the Association's grounds of appeal, I must determine how to exercise my jurisdiction under Article 13.07 of the Agreement.

120 As mentioned above, the Association did not appreciate that the University would advance the arguments it did, and in particular the arguments based on the Charter, in relation to remedy. Thus, the Association was not in a position to fully address the University's submissions. The Association expressed its willingness to provide submissions on these issues if this board requested the same. I wish to consider the remedial issues fully. I will request submissions in this regard from the Association and the University in reply and will retain jurisdiction. My decision on remedy will be issued following a consideration of all of the parties' submissions.

Summary

121 For all of the foregoing reasons, both grounds of appeal succeed. I retain jurisdiction to determine the issues relating to remedial relief following the receipt of further submissions from the parties.

122 It is so awarded.