

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE UNIVERSITY OF BRITISH COLUMBIA

("the University")

AND:

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

("the Association")

(Lance M. Rucker - Denial of Promotion to Professor)

AWARD

Arbitrator: Marguerite Jackson, Q.C.

Counsel for the University: Donald J. Jordan, Q.C.
Counsel for the Association: Allan E. Black, Q.C.

Place of Hearing: Vancouver, B.C.

Dates of Hearing: October 30th & 31st, 2003
(Written Submissions:
November 12th, 20th & 25th, 2003)

Dr. Lance Rucker is an Associate Professor in the Department of Oral Health Sciences, Faculty of Dentistry at the University of British Columbia. This is an appeal by Dr. Rucker from a decision of the University to deny him a promotion to Professor. The appeal is made in accordance with the provisions of the Agreement on Conditions of Appointment for Faculty ("the Agreement"). Article 13.06 of that Agreement provides that the burden of proof is on the appellant.

Dr. Rucker was appointed an Assistant Professor in 1983, was granted tenure in 1988 and promoted to Associate Professor in 1992. In the summer of 2001 Dr. Rucker was advised of his right to apply for a review that would entitle him to be considered for promotion to Professor. The process for consideration is a long one that proceeds through various levels of consideration culminating in a decision by the University President.

Article 5 of the Agreement on Conditions of Appointment for Faculty sets out the following steps:

- i) The Departmental Standing Committee considers all relevant information and makes a recommendation based on the view of the majority of its members: article 5.06
- ii) If serious concerns about the candidacy arise in the Departmental Standing Committee, before that Committee makes its recommendation the Head of the Department must inform the candidate of the reasons for those concerns so that the candidate can respond and introduce further evidence if he so chooses. The candidate must also be provided with a summary of the opinions provided by the external referees: article 5.06(f).
- iii) The Head of the Department makes her recommendation: article 5.07.
- iv) The Dean makes a recommendation: article 5.10.
- v) The Senior Appointments Committee reviews the various recommendations and makes its own recommendation to the President: article 5.14(a).
- vi) The President makes her decision concerning the promotion: article 5:14.

In the case of Dr. Rucker the Departmental Standing Committee voted against promotion. Initially the Head of the Department of Oral Health Sciences supported that decision. However, she altered her position after considering a submission from Dr. Rucker and recommended his promotion.

The Dean of the Faculty of Dentistry also recommended Dr. Rucker's promotion after a review of the case by the Senior Faculty Committee for Promotion of which he was the chairperson. The vote was split two in favour, two against and the Dean cast the deciding vote in favour of promotion.

The 16-member Senior Appointments Committee unanimously recommended Dr. Rucker's promotion. However the President, Dr. Martha Piper, disagreed with that recommendation and advised Dr. Rucker of her decision in a letter dated July 4th, 2002:

I am writing to inform you of my decision in the case of your promotion to Professor. As you know, your Department, Department Head, and Dean recommended in favour of your promotion. The Faculty Committee was divided in its vote but the Senior Appointments Committee has recommended in favour of your promotion. However, my decision does not concur with their recommendations.

I note that you have a good teaching record and have been active in serving the university and in working with the external community. The reason for my negative decision is the small number of publications in peer-reviewed journals. Peer review establishes a level of credibility that is the hallmark on which we anchor decisions on the quality of scholarly work. My decision is supported by members of the Departmental Committee who were not in favour of promotion. I urge you to put more energy into publishing your work in venues that receive a rigorous and critical review.

I draw your attention to the provisions on appeal (including time limits) that are to be found in section 13 of the Agreement, published in the *Guide for UBC Faculty, Librarians and Program Directors*.

A grievance concerning the denial of Mr. Rucker's promotion was filed later that month by the Faculty Association:

As per Article 5 (Procedures for Appointment, Reappointment, Tenure and Promotion), the Faculty Association hereby initiates a grievance in the matter of the University's decision regarding the promotion of Dr. Lance Rucker (Oral Health Sciences). The remedy sought is the promotion of Dr. Rucker to the rank of Professor.

The jurisdiction of this arbitration board is described 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 decides that there was a procedural error, a Board may:
 - (i) dismiss the appeal if it is satisfied the error has not resulted in a wrong decision;
 - (ii) if the error may have resulted in a wrong decision;
- (A) direct that the matter in question be reconsidered commencing at the level of consideration at which the error occurred. In so ordering the Board shall specifically

identify the error, shall give specific directions as to what is to be done on the reconsideration, and shall adjourn the hearing until reconsideration has taken place; or
(B) if it decides that the error was of such a nature that it would not be possible for the matter to be fairly dealt with on a reconsideration, decide the appeal on the substantive merits.

(c) When unreasonableness is a ground for 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.

The effect of these provisions is that a decision may be appealed on the ground that the University has committed a procedural error or on the ground that the decision was unreasonable. 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.

The position of the Faculty Association is that the decision of the University was wrong as a result of procedural errors and was also unreasonable. With respect to the latter argument the Association submits that the proper remedy is a reversal of the decision as contemplated by article 13.07(c).

The University concedes that there was a procedural error at the Departmental level which was not remedied at subsequent levels in the process. The specifics of that error will be set out shortly. The University was prepared to grant the grievance and to submit Dr. Rucker's dossier to the Departmental Standing Committee for reconsideration. However the Association takes the position that the defect cannot be cured and it is not appropriate to remit this matter back for reconsideration. Instead the Association argues that as a result of the procedural error, this board should decide the appeal on the merits in accordance with article 13.07(b)(ii)(B).

II

Dr. Rucker is an excellent teacher and a dental pioneer in the field of clinical ergonomics. His testimony highlighted his achievements which were summarized in the following passages in the letter from the Dean to the Senior Appointments Committee in which the Dean recommended Dr. Rucker's promotion:

Dr. Rucker has pursued a very non-traditional path in scholarly activity through the study and experimentation of the application of ergonomic principles to optimize the effectiveness and productivity of dental surgical procedures. This has led to the development of educational programs that instill these principles and subsequent operatory techniques in novice clinicians (dental students) that will not only improve their short term clinical performance but will protect their long term career viability against disability. In doing so, Dr. Rucker has established himself as an international authority on performance logic with regards to dental surgery in terms of ergonomics in the dental operatory.

... Dr. Rucker's theories of performance logic for dental clinical operators have influenced educators to train clinicians to operate optimally with minimal physical strain, despite the intense and prolonged nature of most dental surgical procedures. Aside from establishing norms for body posture using physiological principles, Dr. Rucker has integrated the positioning of the operator's head and upper body through the control of the visual focal length of the operator. Surgical telescopes, as adjusted to Dr. Rucker's criteria, control operator posture. This technique is now adopted by many dental school programs and of course establishes the baseline for all further training by other specialty areas.

Dr. Rucker has been one of the pioneers worldwide in developing simulation technology for training dental students and has played a leadership role in establishing and growing the number of dental educators from around the world to continue development of advanced simulation technology to flatten the learning curve for novice clinical operators. UBC annually attracts educators from as far as Thailand and Poland who wish to learn how to adapt this approach into their respective curricula. Dr. Rucker has been consulted recently by the University of Illinois, the University of Nebraska, and the University of Missouri at Kansas City in addition to schools in Asia and Europe in the past. Insurance companies consult Dr. Rucker for evaluation of disabilities of clinicians due to ergonomic factors, which costs millions of dollars annually.

The letters from external reviewers all attest to his international reputation and the impact that he has had. Dr. Rucker has made scholarly presentations to the Board of the American Dental Association (largest dental association in the world), WHO, FDI (Fédération Dentaire Internationale) in addition to the American Dental Educators Association.

Candidates for promotion are judged principally on two areas of performance: teaching - which is not in issue here - and scholarly activity. There are two recognized streams of "scholarly activity": the academic and the professional. When Dr. Rucker made his application for promotion he did so as a professional case.

The significance of traditional peer reviewed publications in a professional case was addressed by both the Department Head and the Dean in their letters recommending promotion:

As Head of the Department, I understand the need for increasing the body of sound peer-reviewed literature in clinical and applied fields. However, I am supporting his promotion to Professor because I believe his professional achievements and pioneering contributions in establishing significant new areas in clinical dentistry and dental education, outweigh the limitations in his publication record, particularly as a professional case.

(Department Head's letter)

In summary, this is an excellent teacher who has applied ergonomic principles to a field that not only improves the development of clinical competency for students but also enhances the effectiveness and productivity of graduate dentists to the benefit of patient care in the community. While traditional publications do not offer a convenient measure of this impact, the response from external reviewers, and the demand for presentations by dental organizations and institutions, continuing education circles and ongoing contributions to the Faculty mission will attest to the outstanding significance of Dr. Rucker's contributions.

(Dean's letter)

It is also apparent from the Senior Appointments Committee's summary of its long and detailed deliberations on the "focal issue [of] what constitutes scholarly activity" that the Committee considered the question of traditional publications in a professional case:

- SAC affirmed that in its view there is no such thing as a purely "Professional Case" in a University - that there should not be a sharp dichotomy drawn between the "professional" and the "academic". But there are certainly cases with a strong professional component, and Dr. Rucker is one of these.
- Dr. Rucker's professional work, which involves ergonomics, is highly unusual in a Faculty of Dentistry, and this non-traditional nature of his work seems to be the reason for the split votes at the Department and Faculty levels.
- SAC focussed its discussion on the *originality* and *impact* of Dr. Rucker's work in ergonomics.
- The *originality* of Dr. Rucker's work is evident in the external letters.
- The *impact* cannot be assessed in the way that one would with traditional peer-reviewed publications, but it was clear to SAC that Dr. Rucker's work has had a considerable impact in the world of dental education. One kind of evidence is the favourable nature of the external letters, and another is his presentations of his work at scientific meetings.
- SAC concluded that Dr. Rucker's work is indeed a valid form of scholarly contribution; hence the 16-0 vote to recommend promotion to Professor.
- There was also some discussion of the lack of graduate students, which Dean Yen attributed to the unusual nature of Dr. Rucker's field of inquiry. But I don't think this was a crucial issue in SAC's discussion.

Dr. Rucker's accomplishments were described by the referees in glowing terms and summarized in the Dean's letter supporting Dr. Rucker's promotion:

The five letters from external referees were available from the following:

...
None of the reviewers has published with Dr. Rucker. The four senior dental academics and administrators are aware of Dr. Rucker's creative and professional achievements through his publications and presentations at special meetings, professional conferences and other environments. All the assessments are positive in the areas of contributions to the profession and to dental education. ... states "his publications and professional contributions as being extremely original and creative". He considers him to be a true visionary, and rates his scholarly activities as abundant and of superb quality. ... views him as one of the few people in the world who are educationally and experimentally qualified to conduct work in the scientific evaluation of new equipment and equipment operator interface. ... emphasizes the importance of the work that Dr. Rucker is doing. He refers to him as "an intelligent and effective protagonist of the central importance of learned skill performance in both conceptual and operative activities". In the field of dental clinical ergonomics, he considers him to be outstanding in both Canada and the United States and one of a small group that are experts world wide. ... finds his contributions to be most creative and extensive. He ranks him at a superior level compared to similar individuals. All of the above senior dental educators consider Dr. Rucker to be a strong or very strong candidate for promotion. ... finds "his achievements to be significant to development of his domain and expertise, in Canada and internationally". He considers his inventions, his international reputation, his service and creativity to be outstanding, and classifies him above average compared with similar background.

I turn now to the testimony and the decision of Dr. Martha Piper. Dr. Piper has been the University President since 1997. One of her responsibilities under the *University Act*, R.S.B.C. 1996, c. 468 is to recommend - or deny - promotions such as the promotion Dr. Rucker sought to Professor.

Dr. Rucker's application was one of 50 to 60 such applications Dr. Piper receives each year, although not all were for full Professor status and not all were professional cases. She received the dossier that had gone to the Senior Appointments Committee, Dr. Rucker's curriculum vitae, a summary of the Senior Appointments Committee deliberations as well as the background of the Faculty's and the Department's recommendations. Dr. Piper testified she reviewed that material carefully, deliberated and made her decision.

Dr. Piper indicated that she had looked at a variety of professional cases during her years at the University and she was aware that Dr. Rucker's application was a professional case. What she

looks for in a professional case is evidence of professional scholarly activity, that is, activity that represents the scholarship upon which the profession is based and is practised.

Dr. Piper said that professional contribution is important but professional scholarly activity is different. The role of a professional scholar is to contribute to and advance and inform that unique body of knowledge. In assessing a professional case what Dr. Piper looks for as “professional scholarly activity” is that the contribution or the individual work has been evaluated by peers in the field: “In most cases this involves peer related publications as the way to validate and assess the contributions to the body of knowledge”.

Dr. Piper testified that in addition to reviewing all the material that came before her she reviewed the Agreement and the *Guide to Promotion and Tenure Procedures* (“the Guide”). I will refer to the Guide later in this award.

The reason for Dr. Piper’s decision is found in the following paragraph from her July 4th, 2002 letter:

I note that you have a good teaching record and have been active in serving the university and in working with the external community. The reason for my negative decision is the small number of publications in peer-reviewed journals. Peer review establishes a level of credibility that is the hallmark on which we anchor decisions on the quality of scholarly work. My decision is supported by members of the Departmental Committee who were not in favour of promotion. I urge you to put more energy into publishing your work in venues that receive a rigorous and critical review.

When asked about her concern about “the small number of publications”, she explained she was looking for sustained and productive scholarly activity. In looking at Dr. Rucker’s case and the amount of time that he had had between his appointment as an Associate Professor and this consideration for full Professor, she felt the quantity of peer review publications was not sufficient to meet the test of sustained and productive contributions. Her concern was the lack of evidence through peer reviewed publications that Dr. Rucker met the requirements for promotion to full professor; the lack of evidence of validation of his research by peers; the lack of quantitative evidence as well.

Dr. Piper did review Dr. Rucker's response of December 5th, 2001 to the Department Head after he was advised that the Departmental Standing Committee did not recommend his promotion. Dr. Piper considered his point that very few peers would be qualified to review his work and few journals qualified to publish his work but she did not agree. She thought there were a variety of journals and peers who could review his work. She agreed his areas of interest were important and critical but said there were a number of journals that publish ergonomics work and a variety of journals in occupational health as well as journals in education that could have assessed his innovative teaching.

Dr. Piper was asked if the following passage from Dr. Rucker's response concerning "peer review" met the standard for peer review she was applying. That passage states:

For peer review of the studies themselves, we have had to rely upon direct (including electronic) contact and report dissemination with the other researchers and clinicians most interested in the field. Hence my many reports and paper presentation since 1991 which relate as much (or more) to the clinical significance of the studies as to the complete data which was acquired in the course of the studies.

Dr. Piper said this did not meet the standard. Peer review is not just for those interested in the field. Peer review involves experts in the field with a written document they can carefully assess and make a judgment on its validity.

The letters from the referees which Dr. Piper reviewed spoke of Dr. Rucker's excellent record in teaching - and she concurred - and of his professional contributions. But Dr. Piper said she was not convinced those letters addressed her concerns about Dr. Rucker's scholarly activity.

Dr. Piper stressed the importance in all research and in all scholarship of testing and validating hypotheses, procedures or applications. That is the critical foundation of a university professional program.

Dr. Piper was aware of the various recommendations in favour of Dr. Rucker's promotion. However, she denied the promotion because upon review she did not believe he met the criteria in terms of demonstrating professional scholarly activity as judged by validation of his work by peers. It was not a question of the areas he researched or the methods he used. Rather it was a

lack of validation. She added that she believed his professional contributions had been outstanding.

In cross-examination Dr. Piper agreed that she had no concern about Dr. Rucker's professional contribution but her concern was about scholarly activity in the sense his work had not been adequately peer reviewed. Put another way she agreed the validation of his scholarly contributions by peer review was her concern.

Dr. Piper disagreed with the recommendation of the Department Head. She felt the criteria for appointment to full Professor were clear. Dr. Rucker had made significant contributions to dental education but he had not met the criteria for sustained productive scholarly activity. She believed the Dean applied inappropriate criteria in terms of scholarly activity and she disagreed with the Dean's reason for supporting Dr. Rucker's promotion. Finally, Dr. Piper testified that she believed the assessment of scholarly activity by the Senior Appointments Committee was not appropriate.

In Dr. Piper's view contributions cannot be considered "valid" until they are validated in peer review journals as real contributions to the field. Dr. Piper was cross-examined extensively with respect to her disagreement with the various positive recommendations as well as with the positive opinions in the letters from the 5 referees. Dr. Piper's explanation for her differing opinion remained the same - there were too few publications in peer reviewed journals to meet the criteria of scholarly activity and she was not convinced the referees adequately addressed the level of scholarly activity.

III

Analysis and Decision

There are two issues before this board. The first concerns a procedural error. The second is whether the President's decision was unreasonable.

I The Procedural Error

“Procedural error” is defined in the Interpretation sub-section of the Promotion Appeal article:

13.01 Interpretation

For the purpose of this Section:

...

“procedural error” means a failure or failures to follow required procedures or a failure or failures to consider relevant evidence.

The University has conceded there was a procedural error. The procedural error was made when it became apparent that members of the Departmental Standing Committee had serious concerns about Dr. Rucker’s candidacy but Dr. Rucker was not provided with an opportunity to respond to those concerns before that Committee voted on his application. That was a violation of article 5.06(f) of the Agreement. The vote recommended against promotion. It was only after that vote was taken that Dr. Rucker had the opportunity to respond. The Department Head had initially supported the Committee’s negative recommendation. However, after an assessment of Dr. Rucker’s letter of response and a thorough review of his dossier she changed her mind and recommended Dr. Rucker’s promotion to Professor.

The University has also conceded that the procedural error may have resulted in a wrong decision. The significance of the latter concession is that article 13.07(b)(ii) sets out the options for this board in such a circumstance:

13.07 Jurisdiction

...

(b) ... a Board may:

(i) ...

(ii) if the error may have resulted in a wrong decision;

(A) direct that the matter in question be reconsidered commencing at the level of consideration at which the error occurred. In so ordering the Board shall specifically identify the error, shall give specific directions as to what is to be done on the reconsideration, and shall adjourn the hearing until reconsideration has taken place; or

(B) if it decides that the error was of such a nature that it would not be possible for the matter to be fairly dealt with on a reconsideration, decide the appeal on the substantive merits.

The University argued that this board should direct reconsideration and adjourn the hearing (13.07(ii)A). The Association submitted that the appeal should be decided on the substantive

merits (13.07(ii)B). So the question is which avenue this board should take in light of the acknowledged procedural error.

The Association cited numerous authorities as support for the proposition that reconsideration by the original decision-maker was not appropriate as it is unrealistic to think that a decision-maker could reach a new and balanced conclusion from a completely unbiased perspective: see **Hotel & Restaurant Employees & Bartenders' Association, Local 636 and Drifter Motor Hotel**, BCLRB No. 29/78 (Germaine); **Kelowna (City) v. CUPE, Local 338** [1998] B.C.J. No. 88 (BCSC); **Re International Nickel Co. of Canada and International Association of Mine, Mill & Smelter Workers, Local 637** (1959) 19 D.L.R. (2d) 380 (Ont. C.A.); **Re Automatic Screw Machine Products Ltd. and USWA et al** [1971] 3 O.R. 30.; **Re Dayco (Canada) Ltd. v. C.A.W.** (1990) 73 D.L.R. (4th) 718 (Ont. C.A.); **Retail Store Employees Association Local No. 832 v. Canada Safeway Ltd.** [1973] 4 W.W.R. 375 (Man. Q.B.); **Re Lasalle Machine Tool of Canada Ltd. and International Association, United Automobile Aerospace and Agricultural Implement Workers of America** (1973) 35 D.L.R. (3d) 665 (Ont. Div. Ct); **Re Canadian General Electric Co. Ltd. and Oil, Chemical & Atomic Workers International Association, Local 9-832** (1974) 53 D.L.R. (3d) 118 (N.S.S.C.); **Kalichuk v. Liquor Control Board of Ontario** [1985] O.J. No. 1108, No. 548/84; **OPSEU and Board of Governors of Seneca College et al** [1989] 68 O.R. (2d) 593; **Ford Motor Co. of Canada Ltd. v. International Association, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 707** (1966) 66 CLLC para. 14, 158; **United Nurses of Alberta, Local No. 34 v. Didsbury General & Auxiliary Hospital and Nursing Home District No. 33** [1994] A.J. No. 24 (Alta. Q.B.); **Hamilton v. Alberta (Labour Relations Board)** [1993] A.J. No. 675 (Alta. Q.B.).

The University acknowledged that there are situations in which it is not appropriate to refer matters back to the original decision-maker: see **Pacific Communications Ltd. and IBEW, Local 213** BCLRB No. 66/87 (Hall); **BCNU v. British Columbia Labour Relations Board** [1995] B.C.J. No. 2383 (BCSC); **BCNU v. British Columbia's Women's Hospital** [1997] B.C.J. No. 855 (BCCA). However, the University distinguished these decisions from the case at

hand since in **Pacific Communications** there had been a denial of a fair hearing and in the **BCNU** decision, findings of credibility would have to be revisited.

In another case the matter was referred back to the same arbitrator since, as stated in the headnote, “there was no evidence that the arbitrator was no longer able to hear evidence objectively and ... the misapplication of the applicable legal test occurred through no fault of the arbitrator ...”: see **Vernon (City) v. Vernon Professional Fire Fighters Assn., IAFF, Local 1517** [1996] B.C.J. No. 1750 (BCSC).

I agree with the University that referring matters back is not unusual in the university context: see, *inter alia*, **University of British Columbia and University of British Columbia Faculty Assn. (Dodek Appeal)** [1997] B.C.C.A.A.A. No. 82, Award No. A-48/97 (Kelleher):

... The test for us under Article 13.07(b)(ii)(B) is whether “it would not be possible for the matter to be fairly dealt with”. We reach no such conclusion. Reconsideration is a normal part of the tenure and promotion process. Errors are not unheard of. The evidence in this case does not establish that the decision-makers at the various levels have lost their ability to consider Dr. Dodek’s application in a fair and objective manner.

(para. 41)

However, in my opinion the question of how best to deal with this procedural error cannot be properly answered until the issue of unreasonableness has been addressed. I turn to that ground of appeal next.

II Was the President’s decision unreasonable?

The second issue is whether the decision by the President not to recommend Dr. Rucker for promotion to Professor was unreasonable on the evidence.

(i) What is an unreasonable decision?

“Unreasonableness” is not defined in the Agreement. However, in a tenure case the board gave the following meaning to the term “unreasonable” - a decision outside the range of reasonableness based on the express criteria: see **In the Matter of Dr. Godwin O.N. Eni and The President of the University of B.C.** Unreported, March 14th, 1994 (MacIntyre). That board went on to state that:

A decision may be “wrong” on the merits (i.e. we would have made the opposite decision) but still be “reasonable” in the sense that we can contemplate others coming to a different conclusion.

(at p. 14)

The question of how to determine if a decision is unreasonable was addressed by the Supreme Court of Canada in **Law Society of New Brunswick v. Ryan** [2003] S.C.J. No. 17, 2003 SCC 20 in a case involving the exercise of a statutory power:

Judicial review of administrative action on a standard of reasonableness involves deferential self-discipline. A court will often be forced to accept that a decision is reasonable even if it is unlikely that the court would have reasoned or decided as the tribunal did (see **Southam, supra**, at paras. 78-80). If the standard of reasonableness could “float” this would remove the discipline involved in judicial review: courts could hold that decisions were unreasonable by adjusting the standard towards correctness instead of explaining why the decision was not supported by any reasons that can bear a somewhat probing examination.

The content of a standard review is essentially the question that a court must ask when reviewing an administrative decision. The standard of reasonableness basically involves asking “after a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?” This is the question that must be asked every time the pragmatic and functional approach in **Pushpanathan, supra**, directs reasonableness as the standard. Deference is built into the question since it requires that the reviewing court assess whether a decision is basically supported by the reasoning of the tribunal or decision-maker, rather than inviting the court to engage **de novo** in its own reasoning on the matter. Of course, the answer to the question must bear careful relation to the context of the decision, but the question itself remains constant. The suggestion that reasonableness is an “area” allowing for more or less deferential articulations would require that the court ask different questions of the decision depending on the circumstances and would be incompatible with the idea of a meaningful standard. I now turn to a closer examination of what a reviewing court should do when engaging in its somewhat probing examination of an administrative decision.

(paras. 46 - 47)

(2) What Does the Reasonableness Standard Require of a Reviewing Court?

...
A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after “significant searching or testing” (**Southam, supra**, at paras. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

How will a reviewing court know whether a decision is reasonable given that it may not first inquire into its correctness? The answer is that a reviewing court must look to the reasons given by the tribunal.

A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not

interfere (see **Southam, supra**, at paras. 56). This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see **Southam, supra**, at paras. 79).

(paras. 53 - 55)

I agree with counsel for the University that the appropriate test to adopt to determine whether the President's decision was reasonable is as follows: "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" (**Law Society of New Brunswick v. Ryan, supra** at para. 47).

(ii) Was Dr. Piper's decision not to recommend Dr. Rucker be promoted to Professor unreasonable?

a) What reason did Dr. Piper give for her decision?

There was a single reason for Dr. Piper's decision. That reason was set out in her July 4th, 2002 letter to Dr. Rucker:

The reason for my negative decision is the small number of publications in peer-reviewed journals. Peer review establishes a level of credibility that is the hallmark on which we anchor decisions on the quality of scholarly work.

Dr. Piper also gave *viva voce* evidence explaining her decision. In essence Dr. Piper was of the view that "the small number of publications in peer-reviewed journals" was not appropriate to meet the test of "sustained and productive scholarly activity". The latter term is found in article 3.07 where it refers to persons at the rank of professor as those who, among other things, "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." (Article 3.07(b)).

b) Does the reason given support Dr. Piper's decision? Is the explanation for the decision tenable?

Let me dispose of two issues at the outset. The fact that there was unanimous support for the promotion from the referees, and positive recommendations from the Department Head, the Dean and the Senior Appointments Committee, does not automatically mean that a contrary decision by the President was unreasonable: see **In the Matter of Dr. Christo Zouves and the**

President of the University of B.C. Unreported, February 27th, 1991 (MacIntyre). I also accept that the referees' opinions are not binding on the University: see **In the Matter of Dr. Godwin O.N. Eni and The President of the University of B.C. supra**. Those opinions are, however, evidence that should be considered.

This case turns on the assessment of evidence of "scholarly activity" in a professional case.

Counsel for the University acknowledged that there are two recognized fields of scholarly activity - the academic and the professional. He argued, however, that both the academic and the professional streams require work of a "scholarly nature" and the dissemination of the results of that research or work. This necessitates a review of the publication record. In the context of the scholarly community the professional case is not subject to a different or lesser standard of review. Professional activity alone does not equal scholarly activity. The work may be different but the method of evaluation is the same in both streams and requires peer validation.

This point was reinforced in the following excerpt from the University's written submission:

At the end of the day, the positions advanced by the Association and the University are like two ships which pass in the night. In the concluding portion of its submission the Association argues that Dr. Rucker's work is original and of "high professional quality". Further, they state that his work has a "high degree of public recognition, creativity and great distinction in the eyes of a significant audience". Finally, they assert that Dr. Rucker's "distinguished professional work" is evidenced by his reputation. With respect to all of these arguments they simply do not address the notion inherent in the definition of "scholarly activity" that the distinguished professional work must be "of a scholarly nature". The evidence of Dr. Piper addressed this within the context of the mission of a University. **In order for Dr. Rucker's work to be considered work of a scholarly nature the work must make an addition to that unique body of knowledge which underlies the field of dentistry. The only manner in which the University can evaluate that is by reference to the work in peer review journals acknowledging that the work has made a contribution to that unique body of knowledge.** Dr. Piper testified that a University is the repository of research related to that unique body of knowledge and that is what separates it from the college context or a highly successful professional work environment. To accept the Association's perspective would mean that the University would just become another place to practice one's profession, albeit very successfully. It is respectfully submitted that this is not consistent with the language of the agreement and negates the portion of the definition of "scholarly activity" requiring distinguished professional work to be of a "scholarly nature".

(emphasis added)

I agree with University counsel that the professional stream requires work of a scholarly nature and the dissemination of the results of that work. However, I do not accept that under the Agreement between these parties the only way in which it can be proven that the professional work is “of a scholarly nature” and has been disseminated is by publication in peer review journals. My reasons follow.

“Scholarly activity” is defined in article 1.01 of the Agreement. The portions of the definition of “scholarly activity” that are relevant to a professional case such as Dr. Rucker’s are highlighted below:

1. Interpretation
- 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.

“Scholarly activity” is again mentioned in article 4 which establishes the criteria for promotion. Article 4.01(a) provides that a candidate for promotion is “judged principally on performance in both teaching and in scholarly activity”. The teaching criterion is not an issue in Dr. Rucker’s case. Scholarly activity is.

How can “scholarly activity” be proven? Article 4.03 states that evidence of “scholarly activity” varies among the disciplines and then sets out the type of evidence necessary:

- (i) Published work is the primary evidence where appropriate.
- (ii) Such evidence as, inter alia, distinguished performance in professional fields shall be considered in appropriate cases.
- (iii) In professional (or clinical) studies scholarly activity may be evidenced by:
 - research on or the creation of significant applications of fundamental theory;
 - research on or the creation of significant forms and applications of professional or clinical practice;
 - work with professional or other organizations (or with scholarly publications) which falls within the definition of scholarly activity may also be considered. Judgment of scholarly activity is based mainly on the quality and significance of an individual’s contributions.

“Evidence” is defined in article 13.01:

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

Article 4.03 specifies what can be used as evidence of “scholarly activity”. That article provides that “published work is, where appropriate, the primary evidence”. It is significant, in my view, that the phrase “where appropriate” is used. What follows from the use of that term is that the parties have recognized and agreed that there are situations where it is not appropriate for published work to be the primary evidence.

Article 4.03 goes on to mention other evidence of scholarly activity that “shall be considered in appropriate cases”. That evidence includes “distinguished performance in ... professional fields”. The article also provides that in a professional case “scholarly activity may be evidenced by research on or the creation of ... significant forms and applications of professional ... practice”.

As I read this section it provides that in a professional case evidence other than published work can establish scholarly activity in a candidate. The type of evidence that can do so is defined in article 4.03.

I referred earlier in this award to the *Guide to Promotion and Tenure Procedures at UBC*. This Guide is introduced in the Foreword by the University’s Vice-President Academic and Provost and is a document compiled by the University. While the Guide is supplementary to the Agreement which is acknowledged as the final authority, the Guide - which apparently sets out the views of the University - is supportive of my interpretation of article 4.03. The relevant excerpts are these:

3. Professional Contributions: Their Nature and Assessment

- 3.01 See *Agreement on Conditions of Appointment for Faculty*, Section 4.03
- 3.02 Under the *Agreement’s* provisions on “Scholarly Activity” creative or professional work of distinction ranks equally with scholarly research. Since it is not easy to assess the quality of this work, the following notes are offered in order to assist in assembling the evidence concerning it and in evaluating it.
- 3.03 To make a positive addition to a case for appointment, promotion or granting of tenure, professional contributions should not be of a routine or repetitive character. Merely practising a profession as an average consultant or professional might do, is insufficient. Thus, consulting per se does not constitute a professional contribution of high quality.

- ...
- 3.05 A definition of a meritorious professional contribution is more difficult to agree upon. Creativity has been mentioned as a criterion of excellence, but creativity is difficult to define. Nevertheless, it is felt that a positive case has been made if it has shown that an individual is a leader in a field or possesses outstanding stature or rare expertise in a field.
- ...
- 3.07 A useful guideline for assessing the stature and appropriate rank of faculty members who are making professional or artistic contributions is the following: promotion to professor should require the candidate to have achieved a national reputation, and promotion to associate professor should require the candidate to have made an impact and have achieved a reputation at a regional level, but *at least* outside UBC.
- 3.08 Work which is not published in conjunction with a refereeing system and upon which major emphasis is being laid in building the case for appointment, promotion or tenure should be specifically referred to in referees' letters so that its merit is clearly apparent.
- 3.09 Written work (arising, for example, from consulting or other professional activity) must be available for peer assessment if it is to form part of the case for appointment, promotion or tenure, and, as above, referees' reports should assess its merits. Reports which are strictly confidential should not be listed as publications, although the professional activity which led to them (e.g., membership in a Commission) may well be significant evidence of the professional stature of the candidate and should be presented as such.

It is evident from these provisions that work that is not in peer reviewed publications can still constitute evidence of scholarly activity.

Dr. Piper was only prepared to accept one way by which the test of "scholarly activity" could be met and that was by publications in peer reviewed journals. Article 4.03 says that in appropriate cases other evidence "shall be considered". As noted earlier, that other evidence includes "distinguished performance in ... professional fields". This is not to say that Dr. Rucker's scholarly publications - and there were a number - could not be considered. But the parties have agreed in article 4.03 that this is not the only evidence of "scholarly activity".

The definition of "scholarly activity" in article 1.01 includes within it the following two components: one, distinguished, creative or professional work of a scholarly nature; and, two, the dissemination of the results. The dissemination is part of the definition of "scholarly activity" as is the reference to "work of a scholarly nature". It follows that the type of evidence - other than published work - that the parties have agreed in article 4.03 can be used to establish "scholarly

activity” in appropriate cases is evidence that satisfies *both* components that are included within the definition of that term.

Dr. Piper failed to consider that other evidence in assessing the fundamental question of “scholarly activity”. Her decision was unreasonable as she acted contrary to, or ignored, the agreement between these parties. It is obvious from Dr. Piper’s decision and from her *viva voce* evidence that she did not consider the possibility of evidence of scholarly activity other than peer reviewed publications. A decision is unreasonable when evidence that the parties have agreed should be considered is ignored or excluded from consideration. Dr. Piper was obligated under the terms of the agreement to consider evidence beyond that of peer reviewed publications. She did not.

It was evident from Dr. Rucker’s testimony and his curriculum vitae that in addition to his publication record, he has presented papers and reports at meetings at numerous regional, national and international level invited lectureships. I note that Dr. Piper agreed in cross-examination that presentation at such conferences was one way to disseminate professional work.

In the case of Dr. Rucker there was an amplitude of evidence of “distinguished performance” in the professional field of dentistry including research on and the creation of significant forms and applications of professional practice.

In answer to a question from the Senior Appointments Committee, the Dean described the main scholarly contribution made by Dr. Rucker’s work this way:

Dr. Rucker has established an international reputation for UBC and for himself as a dental pioneer in the new field of clinical ergonomics. His innovative work in the development of many aspects of clinical simulation performance, with its applications to clinical ergonomics for dental practitioners worldwide, has garnered invitations to lecture, to direct clinical courses, and to consult in design and development of clinical hardware (including surgical magnification devices) and professional educational programs around the world.

Developments attributed to Dr. Rucker which address various aspects of clinical and simulation performance include:

...

- Developer of **hybrid numeric terminology** for teaching psychomotor (clinical) skills, 1986-89.

- ...
 - Developer of clinical simulation in an actual **dental clinic setting**, 1996.
- ...
 - Inventor and designer of **declination angle measurement device** (manufactured by *Designs For Vision*) for surgical telescopes, 1990.
- ...
 - Inventor and designer of **portable declination angle measurement device** (manufactured by *GSC SurgiTel*) for surgical telescopes, 1998.

All of these innovations and developments have contributed to measurable reduction in symptoms associated with certain Cumulative Trauma Disorders among dental professional graduates.

An excerpt from one of the referee's letters provides further evidence:

Dr. Rucker teaches in the field of restorative dentistry and has published, with colleagues, in that area. He is best known, however, for his work in simulation and ergonomics, equipment design, and computer interfaces - all as they relate to learning and practicing restorative dentistry. In these fields, Dr. Rucker is internationally known and respected. His innovations are understood to be creative, useful, and scientifically grounded. It is in this last regard that Dr. Rucker has made the most significant professional contributions. He has combined the practical and entrepreneurial spirit of the innovator with the rigor and scientific evaluation of new equipment and equipment-operator interface typical of a scholar. He is one of only a handful of individuals in the world who are educationally and experientially qualified to conduct this work. Having done so, he bridges the fields of ergonomics and dentistry in an effective fashion.

An example of the effective breadth of Dr. Rucker's work is the evolution it has undergone. From the early investigations of "performance logic", he has progressed (*sic*) to studying the connections between dentists and their equipment. Performance logic was a prescriptive system for proper positioning of patient and operator that considered the work of the dentist as given and was passive with regard to equipment. The development of a simulation laboratory for preclinical training at UBC that Dr. Rucker helped create grew out of this model and was one of the first of its type in North America. But Dr. Rucker has gone beyond this passive model to explore more effective equipment design and to study the interface between dentist, equipment and dental work - being willing to modify all three to discover the best combination. In this respect, he is among the leaders in the world.

Dr. Piper's decision was unreasonable. It was unreasonable because it was based on her view that professional work of a scholarly nature can only be evaluated by its dissemination in peer review journals. That was the foundation for Dr. Piper's decision as spelled out in her letter and there was nothing in her *viva voce* testimony that suggested otherwise. Her decision failed to recognize that in a professional case dissemination can take more than one form and that work of a scholarly nature can be evidenced without a large number of peer review publications. This failure ignored article 4.03 which points to other types of evidence that can establish scholarly activity in professional cases.

Dr. Piper failed to properly interpret and apply the relevant criteria in accordance with article 4.03. She failed to apply the definition of “scholarly activity” appropriate for a professional case. Her reason for not recommending Dr. Rucker’s promotion was not tenable. I find that on the evidence Dr. Piper’s decision was unreasonable.

In reaching my conclusion I have had regard to the following two decisions and the parties’ submissions concerning their relevance: **Dr. Ralph R. Rothstein and President George K. Pedersen** Unreported, June, 1984 (Hickling); **Dr. Garry David Grams and The President of the University of BC** Unreported, December, 1992 (Blom). However, as University counsel pointed out, the definition of “scholarly activity” has changed since the **Rothstein** case when the language was as follows: “Scholarly activity means research of an original character or, in appropriate disciplines, creative or professional work of distinction”. It is unclear whether that definition still applied at the time the **Grams** decision was rendered. In the final analysis I have based my conclusion on the pertinent language in the Agreement before this board.

III The Arbitration Board’s Powers

Article 13.07(c) provides that “the Board shall reverse the decision if it finds that on the evidence the decision is unreasonable”.

(i) Article 13.07(c): What does it mean to “reverse the decision”?

The University agreed that if this board decided that the President’s decision to deny promotion was unreasonable, article 13.07(c) permits this board to reverse the decision. But the University argued that a reversal of the decision is not the same as a substitution. This board could not compel Dr. Piper to recommend Dr. Rucker be promoted. What the board could do is declare that the decision was wrong and direct the matter back to the appropriate level. This board could instruct Dr. Piper to apply what the board determined was the appropriate standard. But this board could not say that Dr. Piper recommends the promotion of Dr. Rucker. Nor could this board recommend Dr. Rucker’s promotion. So the argument goes.

I have considered the University's submission concerning the meaning of the phrase "shall reverse the decision". For the following reasons, however, I respectfully disagree with the University's interpretation of that phrase.

I begin my analysis by recognizing the role of the University's Board of Governors. The powers of the Board of Governors are set out in section 27(2) of Part 6 of the *University Act*, R.S.B.C. 1996, c. 468. The provision relevant to this case is section 27(2)(g):

Powers of board

27 ...

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

(g) **subject to section 28, to appoint** the president of the university, deans of all faculties, the librarian, the registrar, the bursar, **the professors**, associate professors, assistant professors, lecturers, instructors and other members of the teaching staff of the university, and the officers and employees the board considers necessary for the purpose of the university, and to set their salaries or remuneration, and to define their duties and their tenure of office or employment;

(emphasis added)

Section 27(2)(g) is subject to section 28 which is headed: **Tenure, appointment and removal of teaching staff and others**. The issue of promotion is addressed in section 28(3):

(3) A member of the teaching staff of the university or of any faculty of the university must not be promoted or removed except on the recommendation of the president.

I turn next to the President's authority with respect to promotions which is found in section 59(2)(a):

President and powers

...

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

(a) to recommend appointments, promotions and removal of members of the teaching and administrative staffs and the officers and employees of the university;

What is evident from these sections is that it is the Board of Governors that has the ultimate power with respect to whether Dr. Rucker can be promoted to Professor. But the Board of Governors cannot exercise that power unless the President - in this case Dr. Piper - has recommended Dr. Rucker's promotion.

Article 13 of the Agreement deals with the appeal of promotion decisions (as well as with reappointment and tenure appeals). The Interpretation section is article 13.01 and states:

13.01 Interpretation

For the purpose of this Section:

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

Dr. Piper did not recommend Dr. Rucker’s promotion. Her determination in that regard was a “decision” as defined in article 13.01 of the Agreement.

This leads to article 13.07(c). That article allows an arbitration board to *reverse* a decision. The use of the term “reverse” is key. The arbitration board is not limited to quashing the decision. The board has been given the power to “reverse” the decision.

If a “decision” made by the President - a determination *not* to recommend promotion - is reversed, it becomes a determination by the President that does recommend promotion. That is the only logical interpretation of article 13.07(c) when coupled with the agreed upon definition of “decision” found in article 13.01.

ii) Article 13.07(d)

Article 13.07(d) provides that in a case where both procedural error and unreasonableness are grounds a board “may exercise any of the powers conferred by (b) and (c) above”.

It was conceded that there was a procedural error that “may have resulted in a wrong decision”. Accordingly it is only article 13.07(b)(ii) that is applicable. Under that section there are two options that the board may exercise: reconsideration at the level where the error occurred or deciding the appeal on the substantive merits if it would not be possible for the matter to be fairly dealt with on a reconsideration.

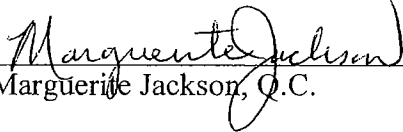
I have determined that Dr. Piper’s decision was unreasonable. These parties have agreed in article 13.07(c) that where a decision is found to be unreasonable it *shall* be reversed by the arbitration board. Although article 13.07(d) appears to provide that this board could exercise one

of the options set out in article 13.07(b) since a procedural error has also occurred, in my view it would be inappropriate to do so in this case. In light of my finding that on the evidence the decision of Dr. Piper was unreasonable, that decision is reversed and becomes a determination that recommends Dr. Rucker's promotion. It follows that it is unnecessary to deal with the procedural error.

IV

I have concluded that on the evidence Dr. Piper's decision not to recommend Dr. Rucker for promotion to Professor was unreasonable. That decision is reversed in accordance with the authority granted to this board under article 13.07(c) of the Agreement.

DATED at the City of Enderby, in the Province of British Columbia, this 15th day of April, 2004.



Marguerite Jackson, Q.C.