Case Name:

University of British Columbia v. University of British Columbia Faculty Assn.

Between
University of British Columbia, Appellant (Petitioner), and
University of British Columbia Faculty Association and the Labour Relations Board, Respondents (Respondents)

[2007] B.C.J. No. 667

2007 BCCA 201

278 D.L.R. (4th) 445

239 B.C.A.C. 181

67 B.C.L.R. (4th) 242

59 Admin. L.R. (4th) 245

59 C.C.E.L. (3d) 163

[2008] CLLC para. 220-006

156 A.C.W.S. (3d) 1081

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British Columbia Court of Appeal
Vancouver, British Columbia

Rowles, Ryan and Lowry JJ.A.

Heard: November 16, 2006.
Judgment: April 3, 2007.

(120 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Correctness -- Appeal by University from dismissal of judicial review application -- University had sought review of Labour Relations Board decision reversing University president's decision to not promote professor -- Appeal allowed, and matter remitted to Board for reconsideration -- Board upheld arbitrator's decision to substitute for the President's decision a recommendation that the professor be promoted -- Chambers judge ought to have applied correctness as the standard of review rather than patent unreasonableness -- Chambers judge erred in failing to find conflict between University Act and arbitrator's interpretation of collective agreement -- Obvious arbitral remedy was to revoke President's decision and remit matter of professor's promotion to President for reconsideration.

Labour law -- Collective agreements -- Provisions -- Interpretation -- Particular words -- Appeal by University from dismissal of judicial review application -- University had sought review of Labour Relations Board decision reversing University president's decision to not promote professor -- Appeal allowed, and matter remitted to Board for reconsideration -- Board upheld arbitrator's decision to substitute for the President's decision a recommendation that the professor be promoted -- Chambers judge ought to have applied correctness as the standard of review rather than patent unreasonableness -- Chambers judge erred in failing to find conflict between University Act and arbitrator's interpretation of collective agreement -- Obvious arbitral remedy was to revoke President's decision and remit matter of professor's promotion to President for reconsideration.

Labour law -- Labour relations boards -- Powers -- Appeal by University from dismissal of judicial review application -- University had sought review of Labour Relations Board decision reversing University president's decision to not promote professor -- Appeal allowed, and matter remitted to Board for reconsideration -- Board upheld arbitrator's decision to substitute for the President's decision a recommendation that the professor be promoted -- Chambers judge ought to have applied correctness as the standard of review rather than patent unreasonableness -- Chambers judge erred in failing to find conflict between University Act and arbitrator's interpretation of collective agreement -- Obvious arbitral remedy was to revoke President's decision and remit matter of professor's promotion to President for reconsideration.

Appeal by the University of British Columbia from the dismissal of its application for judicial review of a Labour Relations Board's decision reversing the University president's decision to not promote a professor. The Faculty Association brought a grievance on behalf of the professor. The matter went to arbitration, and the arbitrator decided that the decision of the President not to recommend the professor's promotion was unreasonable because the President had limited her consideration of the quality of the professor's scholarly work to the number of publications he had in peer review journals and had not taken into account the quality of his innovative professional work and how that work was regarded by his peers. By way of remedy, the arbitrator substituted for the President's decision a recommendation that the professor be promoted. The arbitrator chose to interpret the word "reverse" in the collective agreement to mean that a decision to recommend the promotion had to be substituted for the President's decision not to recommend the promotion. The University unsuccessfully appealed to the Labour Relations Board. The University then applied for judicial review of the Board's decision. The chambers judge held that the applicable standard of review was patent unreasonableness. The chambers judge did not accept the University's interpretation of the

University Act. On appeal, the University argued that the chambers judge erred in finding that the standard of review applicable to the Board's decisions was patent unreasonableness, and in his interpretation of the University Act, thereby failing to find a conflict between the University Act and the arbitrator's interpretation of the collective agreement.

HELD: Appeal allowed and matter remitted to the Board for reconsideration. The chambers judge ought to have applied correctness as the standard of review, rather than patent unreasonableness. Furthermore, the chambers judge erred in failing to find a conflict between the University Act and the arbitrator's interpretation of the collective agreement. The interpretation to be placed on the word "reverse" in Article 13.07(c) of the collective agreement had to be consistent with University Act, and the interpretation of the external statute and the determination and resolution of any operational conflict between the collective agreement and the University Act had to be correct. The chambers judge erred in his interpretation of the University Act when he concluded that the parties could agree, and had agreed, to fetter the President's statutory authority. The arbitrator's interpretation of the remedial authority granted in Article 13.07 of the collective agreement interfered with the interaction between the President's grant of authority and the powers of the Board contemplated by the scheme of the legislation. The collective agreement provided that where an arbitration board decided that there was a procedural error and an unreasonable decision, the arbitrator could exercise any of the remedies set out in Article 13.07 (b) and (c) of the collective agreement. The obvious arbitral remedy which did not entail any conflict with the provisions of the University Act was to revoke the President's decision and remit the matter of promotion to the President for reconsideration.

Statutes, Regulations and Rules Cited:

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 1, s. 43, s. 43(1), s. 44, s. 45(1), s. 58, s. 58(1), s. 58(2), s. 58(2) (a), s. 58(2)(c), s. 59

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2(b)

Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 9(1)(a)

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 99, s. 115.1, s. 138, s. 141

University Act, R.S.B.C. 1996, c. 468, s. 1, s. 27, s. 27(g), s. 28, s. 28(2), s. 28(3), s. 59, s. 59(2), s. 59(2)(a), s. 60(1), s. 60(2), s. 60(3)

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A.E. Black, Q.C. and M.G. Underhill: Counsel for the Respondent, University of British Columbia Faculty Association.

D.W. Garner: Counsel for the Respondent, Labour Relations Board.

Reasons for judgment were delivered by Rowles J.A., concurred in by Ryan J.A.. Separate dissenting reasons were delivered by Lowry J.A. (para. 95).

ROWLES J.A.:--

I. Overview

1 The first issue on this appeal is whether, on judicial review of the Labour Relations Board's Original Decision and its subsequent Leave and Reconsideration Decision of an arbitral award, the Board's interpretation of an external statute, the ***University Act***, R.S.B.C. 1996, c. 468, attracts a patently unreasonable standard under s. 58(2)(a) of the ***Administrative Tribunals Act***, S.B.C. 2004, c. 45 (the "***ATA***") or a correctness standard under s. 58(2)(c). The second issue is whether the Board's interpretation of a provision in the collective agreement between the appellant University of British Columbia (the "University") and the respondent union, the University of British Columbia Faculty Association (the "Association"), is in conflict with external statutes, specifically, the ***University Act*** and the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***").

2 The ***ATA*** governs the standard of review to be applied on judicial review of a decision of the Board by reason of the Board's enabling statute, the ***Labour Relations Code***, R.S.B.C. 1996, c. 244 (the "***Code***"). Section 115.1 of the ***Code*** provides that s. 58(1) and (2) of the ***ATA*** applies to the Board. The ***Code*** contains a privative clause. By s. 58(1) of the ***ATA*** the Board "must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction."

3 Section 58(2) of the ***ATA*** provides:

> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

4 The subject of the Board's decisions in this case was the remedy contained in an arbitral award. The University submits that while the award was made in the context of a grievance initiated under a collective agreement between the University and the Association, the arbitrator had to go outside the collective agreement to construe and apply the ***University Act***, a general public enactment of the provincial Legislature, in determining the remedy to be given in the award. Relying on ***McLeod v. Egan***, [1975] 1 S.C.R. 517 and ***Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324***, [2003] 2 S.C.R. 157, 2003 SCC 42, the University submits that when a tribunal must construe and apply an external statute, there can be no policy of curial deference to the tribunal's interpretation of that statute.

5 By way of background, the Association brought a grievance on behalf of a faculty member in respect of a decision made by the President of the University not to recommend the faculty member for promotion. The matter went to arbitration and the arbitrator decided the President's decision was unreasonable. It is the remedy given by the arbitrator in her award, not the finding that the President's decision was unreasonable, that has driven all the subsequent proceedings in this case.

6 The University is a corporation continued under the ***University Act***. The President is the chief executive officer of the University and is responsible for the supervision and direction of the academic work of the University. Under s. 59 of the ***University Act***, a university president has the power, among others, to recommend promotions of the teaching staff. The powers of the board of governors of a university are set out in sections 27 and 28 of the ***Act***. Those powers include the power to appoint, promote and remove teaching staff but that power is subject to s. 28(3) of the ***University Act*** which provides that a member of the teaching staff "must not be promoted or removed except on the recommendation of the president."

7 Article 13.07(c) of the collective agreement provides:

> (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.

8 Before the arbitrator the University argued that to accord with the ***University Act***, the word "reverse" in Article 13.07(c) should be interpreted as "revoke" or "annul", thus permitting the matter of the faculty member's promotion to be remitted to the President for reconsideration. However, the arbitrator chose to interpret the word reverse to mean that a decision to recommend the promotion had to be substituted for the President's decision not to recommend the promotion.

9 The University brought an application under s. 99 of the ***Code*** to review the arbitrator's decision. On both its initial application and on its subsequent leave and reconsideration application, brought under s. 141 of the ***Code***, the University argued that the interpretation the arbitrator had put on the word "reverse" in the collective agreement was in conflict with provisions in two external statutes, that is, the ***University Act*** and s. 2(b) of the ***Charter***, and that the arbitrator exceeded her jurisdiction in granting the remedy she did. The Board did not accede to the University's arguments. The Board's Original Decision may be found at [2004] B.C.L.R.B.D. No. 331, 2004 CanLII 34718 (BC L.R.B.) and its Leave and Reconsideration Decision at [2005] B.C.L.R.B.D. No. 86, 2005 CanLII 10028 (BC L.R.B.).

10 The judicial review proceedings subsequently brought by the University were dismissed. The chambers judge held that the applicable standard of review on issues other than the ***Charter*** was patent unreasonableness. The judge did not accept the University's interpretation of the ***University Act*** and concluded that s. 2(b) of the ***Charter*** was not engaged by the remedy granted by the arbitrator. The reasons of the chambers judge are found at 2006 BCSC 406.

11 On its appeal from the order dismissing its judicial review petition, the University argues that, with respect to the question of remedy, the chambers judge erred:

> (i) . . . in finding that the standard of review applicable to the Board's decisions is patent unreasonableness.
> (ii) . . . in his interpretation of the *University Act* thereby failing to find a conflict between the *University Act* and the Arbitrator's interpretation of the collective agreement.
> (iii) . . . in finding that the remedy of reversal imposed by the arbitrator did not constitute a breach of the President's section 2(b) guarantee of freedom of expression pursuant to the *Charter*.

12 Mr. Justice Lowry, whose reasons I have read in draft, would uphold the decision of the chambers judge without reference to how the standard of review is to be determined under the ***ATA***. With deference, I am unable to agree with my colleague's reasoning or result.

13 On review of the remedial portion of the arbitrator's award, the Board had to consider the interpretation the arbitrator had placed on provisions in the ***University Act***, an external statute. I am of the opinion that on judicial review of the Board's decisions in this case, on which the matter in issue was the proper interpretation of an external statute, s. 58(2)(c) of the ***ATA*** governs the standard of review to be applied. It is therefore my respectful view that the chambers judge ought to have applied correctness as the standard of review rather than patent unreasonableness. It is also my view that there is a conflict between the ***University Act*** and the interpretation placed by the Board on Article 13.07(c) of the collective agreement in relation to the remedy that could be granted.

14 For reasons more fully explained below, I would allow the appeal and remit the matter to the Board to be dealt with in accordance with these reasons.

II. The relevant statutory provisions

(a) The *Labour Relations Code*

15 The section under which the University brought its application to review the decision of the arbitrator is s. 99 of the ***Code***, which provides:

> 99(1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
>
> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

16 The University's application for reconsideration of the Board's Original Decision was brought pursuant to s. 141 which reads, in part:

> 141(1) On application by any party affected by a decision of the board, the board may grant leave to that party to apply for reconsideration of the decision.

17 The ***Code*** contains the following privative clause:

> 138 A decision or order of the board under this Code, a collective agreement or the regulations on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.

18 Section 115.1 of the ***Code*** provides that certain sections of the ***ATA*** apply to the Board:

> 115.1 Sections 1 to 10, 43, 46, 47(1)(c), 48, 49, 56, 57, 58(1) and (2) and 61 of the *Administrative Tribunals Act* apply to the board.

(b) The *Administrative Tribunals Act*

19 Section 1 of the ***ATA*** contains the following definitions:

> 1 In this Act
>
> * * *
>
> **"tribunal"** means a tribunal to which some or all of the provisions of this Act are made applicable under the tribunal's enabling Act;
>
> **"tribunal's enabling Act"** means the Act under which the tribunal is established or continued.

20 Through reference in their enabling statutes to provisions in the ***ATA***, a few tribunals, including the Board, have been given jurisdiction to decide constitutional questions. Section 43(1) of the ***ATA***, which applies to the Board by reason of s. 115.1 of the ***Code***, provides that "[t]he tribunal has jurisdiction to determine all questions of fact, law or discretion that arise in any matter before it, including constitutional questions."

21 When s. 44 of the ***ATA*** applies to a tribunal by reason of its enabling act, that tribunal does not have jurisdiction to decide constitutional questions. A tribunal to which s. 45(1) applies by reason of its enabling act "does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*."

22 Section 43 provides a procedure for questions of law to be referred to the court. That section reads, in part:

> (2) If a question of law, including a constitutional question, is raised by a party in a tribunal proceeding, on the request of a party or on its own initiative, at any stage of an application the tribunal may refer that question to the court in the form of a stated case.
>
> (3) If a constitutional question is raised by a party in an application, on the request of the Attorney General, the tribunal must refer that question to the court in the form of a stated case.

23 The standard of review applicable to decisions of tribunals with a privative clause is governed by s. 58 of the ***ATA***. If the tribunal's enabling act has no privative clause, s. 59 of the ***ATA*** applies. Section 59 provides that "in a judicial review proceeding, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise

of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness".

24 Subsections 58(1) and (2) of the ***ATA***, which apply with respect to judicial review of decisions of the Board by reason of s. 115.1 of the ***Code***, provide:

> 58(1) If the tribunal's enabling Act contains a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
>
> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
>
> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

(c) The *University Act*

25 Section 1 of the ***University Act*** defines "board" as "the board of governors of a university".

26 Part 11 of the ***University Act*** provides for the position and sets out the powers of a president of a university:

> 59(1) There must be a president of the university, who is to be the chief executive officer and must generally supervise and direct the academic work of the university.
>
> (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;
> (b) to summon meetings of a faculty when the president considers it necessary or advisable to do so, and at his or her discretion to convene joint meetings of all or any of the faculties;
> (c) to authorize lectures and instruction in any faculty to be given by persons other than the appointed members of the teaching staff;
> (d) to establish the committees the president may consider necessary or advisable.

27 Other powers of a president include the power to suspend any member of the teaching and administrative staffs and any officer or employee of the university (s. 60(1)). If that power is exercised, the president must promptly report the action to the board with a statement of his or her reasons (s. 60(2)). A person who is suspended under s. 60 has a right of appeal to the board (s. 60(3)).

28 Section 27 of the ***University Act*** provides:

> 27(1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.
>
> (2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers: . . .
>
> (g) subject to section 28, to appoint the president of the university, dean 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.]

29 Section 28 provides:

> 28(1) Unless otherwise provided, the tenure of persons appointed under section 27(2)(g) is during the pleasure of the board.
>
> (2) A person must not be appointed a member of the teaching staff of the university or of any faculty of the university unless the person is first nominated for the position by the president.
>
> (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.

[Emphasis added.]

(d) Section 2(b) of the *Charter*

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

III. Background

31 Dr. Rucker, an associate professor in the Department of Oral Health Sciences, Faculty of Dentistry, was eligible in the summer of 2001 to be considered for promotion to professor. The process for consideration for such a promotion proceeds through various levels, as set out in Article 5 of the collective agreement and culminates in the decision of the President to make or refuse to make a recommendation for promotion.

32 The President recommended against the promotion of Dr. Rucker. Under the collective agreement entered into between the Board of Governors of the University and the Association, the President's decision not to recommend promotion went to arbitration. Article 13.07 of the collective agreement sets out the jurisdiction of an arbitration board. Article 13.07(a) provides that a decision "may be appealed on the ground that it was arrived at through procedural error or on the ground that it was unreasonable." In this case, the grievance was advanced on both grounds.

33 The University conceded that there had been a procedural error at the departmental level of the appointments process and that the error had not been remedied. The Departmental Standing Committee had voted against promotion and the Head of the Department of Oral Health Sciences initially had supported that decision. However, the Department Head subsequently altered her decision after considering a submission from Dr. Rucker and she recommended his promotion.

34 The Dean of the Faculty of Dentistry also recommended the promotion after a review of the case by the Senior Faculty Committee for Promotion of which he was the chair. The vote of that Committee had been evenly split, two in favour and two against, with the Dean casting the deciding vote. The sixteen-member Senior Appointments Committee unanimously recommended Dr. Rucker's promotion. The President of the University at the time, Dr. Martha Piper, disagreed with the recommendation and so advised Dr. Rucker in her letter to him of 4 July 2002, which reads, in part:

> 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.

35 Under Article 13.07(b) of the collective agreement, if an arbitration board decides there was a procedural error, the 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.

36 The acknowledged procedural error in this case was that when it became apparent that members of the Departmental Standing Committee had serious concerns about Dr. Rucker's candidacy for promotion, Dr. Rucker ought to have been but was not provided with an opportunity to respond to those concerns before that Committee voted on his application. The University was prepared to have the grievance granted and to have Dr. Rucker's dossier submitted to the Departmental Standing Committee for reconsideration. However, the Association took the position that the defect could not be cured and that it was not appropriate to remit the matter for reconsideration. The Association argued that the arbitrator ought to decide the appeal on its "substantive merits" as permitted under Article 13.07(b)(ii)(b).

37 The arbitrator, having concluded that the appeal could be decided on its merits, rejected the University's submission that she should remit the matter to the Departmental Standing Committee for reconsideration.

38 The arbitrator decided that the decision of the President not to recommend Dr. Rucker's promotion was unreasonable because the President had limited her consideration of the quality of Dr. Rucker's scholarly work to the number of publications he had in peer review journals and had not taken into account the quality of his innovative professional work and how that work was regarded by his peers. By way of remedy, the arbitrator substituted for the President's decision a recommendation that Dr. Rucker be promoted.

39 The University subsequently applied to the Board under s. 99 of the ***Code*** to review the arbitrator's decision, not with respect to her conclusion that the President's decision was unreasonable, but with respect to the remedy provided in the award. Before the Board, the University argued, among other things, that the arbitrator's interpretation of the collective agreement, to permit the remedy of reversal of the President's decision, is inconsistent with the ***University Act*** and with freedom of expression guaranteed in s. 2(b) of the ***Charter***.

40 The Original Panel considered the University's argument that the arbitrator had interpreted her remedial authority in a manner that directly conflicted with an express grant of power to the President in the ***University Act***. The University's position was that the effect of the arbitrator's remedial order was to direct the President to exercise her discretion in a particular manner. In rejecting that submission, the Original Panel said:

> [23] I do not agree with the University that the effect of the Arbitrator's remedial order is to direct the President to exercise her discretion in a particular manner. The Arbitrator did not direct the President to do anything. The effect of the Award is only that the President's unreasonable decision to *not* recommend a promotion is *deemed* to be the recommendation of that promotion.

[Emphasis in original.]

41 The Original Panel dismissed the University's argument that the arbitrator exceeded her jurisdiction by failing to interpret the collective agreement in a manner consistent with the ***Charter*** on the same basis that it dismissed the argument that the exercise of remedial authority conflicted with the grant of authority to the President under the ***University Act***. The Original Panel held that the arbitrator's reversal of the President's decision does not direct or require the President to do anything which is inconsistent with the President's freedom of expression under s. 2(b) of the ***Charter*** because the effect of the award is only that the President's decision is *deemed* to be a decision to recommend the promotion.

42 The Original Panel also held that the ***University Act*** must be read in such a way as to harmonize it with the provisions of the collective agreement and found that, since the agreement still leaves the President's statutory power to recommend promotion intact when the President exercises her discretion in a reasonable way, the ***University Act*** can be harmonized with the agreement.

43 The University sought leave for reconsideration of the Original Decision pursuant to s. 141 of the ***Code*** on the basis that the Original Decision was inconsistent with principles expressed or implied in the ***Code*** in that it upheld the award, which conflicted with the ***University Act*** and with the guarantee of freedom of expression in s. 2(b) of the ***Charter***. The Reconsideration Panel held that the essential determination in the Award engaged the essential tasks of an arbitrator and that an arbitrator's findings of fact and interpretation of the collective agreement were entitled to deference from the Board. The Reconsideration Panel said:

> [10] These findings of fact, interpretation of the collective agreement, and the logical consequence flowing from them in the remedy do not raise a *Charter* issue, nor do they raise a concern in respect to the interpretation and application of other statutes.

44 The University then brought a petition for judicial review of the Board's decisions. Before the chambers judge, the parties were in agreement that, with respect to whether the ***Charter*** applied and whether the President's rights pursuant to the ***Charter*** had been breached, the applicable standard of review was correctness, but they disagreed with respect to the standard of review to be applied to the Board's interpretation of the ***University Act***. The chambers judge held that the standard of review on issues other than the ***Charter*** was patent unreasonableness. The parties also disagreed on whether the arbitral remedy was in conflict with the ***University Act*** and the ***Charter***.

45 The chambers judge did not accept the University's interpretation of the ***University Act***. As to the interpretation of Article 13.07 of the collective agreement and the arbitral remedy granted, the chambers judge said:

> [62] The University further argues, however, that in light of s. 28(3) that the arbitrator had not correctly interpreted the remedies available in the collective agreement at 13.07 and the meaning of the word "reversed". The term "reversed"

has more than one meaning. The Concise Oxford Dictionary Tenth Edition, p. 1225 defines "reverse" as follows:

> 1. Move or cause to move backwards. ? (of an engine) work in a contrary direction. 2. turn the other way round or up or inside out. 3. make the opposite of what it was. ?swap (positions or functions). 4. Law revoke or annul (a judgment by a lower court or authority).

[63] I agree with the University that it was possible for the arbitrator to interpret the word "reverse" to include the power to revoke or annul rather than to turn the recommendation not to promote into a recommendation to promote. However that decision involved an interpretation of the collective agreement itself and a selection of the appropriate remedy pursuant to that agreement and the facts of the case. The discretion to choose the remedy is a matter clearly within the exclusive jurisdiction of the arbitrator protected by the privative clause and the standard review of such a decision would be patent unreasonableness. The Board's decision under s. 99 was to consider whether the decision was consistent with the principles of the *Code*. Their decision that it was, is not patently unreasonable.

[64] The University is correct that one of the arbitrator's selection of remedies could have included remitting the matter to the president with directions for reconsideration. It is reasonable to presume that the president would then exercise her discretion properly considering the facts and circumstances of the case. (*Zundel v. Citron*, [2000] 4 F.C. 225.) There were no issues of credibility or findings that the associate professor in this case, Dr. Rucker, had been denied a fair hearing by the president, or that the president was no longer able to hear the evidence objectively. However the selection of remedy was something within the exclusive authority for jurisdiction of the arbitrator. The Board has concluded that the arbitrator did not exercise that authority improperly nor did the decision conflict with the *University Act*. The Board's decision was not patently unreasonable.

46 With respect to the University's argument that the remedy of reversal of the President's decision constituted a breach of the President's s. 2(b) ***Charter*** guarantee of freedom of speech, the chambers judge agreed that the ***Charter*** applied to the decision of an arbitrator under the ***Code*** but he disagreed with the University's argument that the arbitrator's decision puts words in the mouth of the President. Instead, the chambers judge decided that the arbitrator's decision "did not require the President to do anything". The chambers judge also held that any restriction on the President's freedom of expression as a result of the arbitrator's decision was justified under s. 1 of the ***Charter***.

IV. Did the chambers judge err in the standard of review he applied on the judicial review of the Board's decisions?

47 It is the University's position that the interpretation of a statute external to the Board's constituent statute is a question of law which is not within the Board's exclusive jurisdiction and, as a result, correctness is the appropriate standard of review to be applied to the Board's decision on that question under s. 58(2)(c) of the ***ATA.*** The University submits that the case authorities support the proposition that when a tribunal must construe and apply an external statute in interpreting a collective agreement, there can be no policy of curial deference to the tribunal's interpretation of that statute.

48 The Board submits that under s. 99 of the ***Code***, the Board's review of an arbitration award for consistency with the principles of the ***Code*** is a matter within the Board's exclusive jurisdiction and is protected by a privative clause. In support of its position that the Board's decisions cannot be overturned unless patently unreasonable, the Board argues that subsection s. 58(2)(a) reflects what the courts have consistently held: that with respect to the Board's s. 99 decisions the standard of review is patent unreasonableness. In the Board's submission, the structure and wording of s. 58(2)(a) of the ***ATA*** also supports its position.

49 As may be seen from the positions they have taken, one of the main points of contention between the University and the Board is whether, in the context of review of an arbitration Board's award under s. 99 of the ***Code***, the interpretation of an external statute may be reviewable under the ***ATA*** on a different standard than the rest of the decision.

50 The Board argues that one of the objectives of the legislature in enacting the ***ATA*** was to simplify the assignment of the standard of review, and to eliminate the need for the pragmatic and functional analysis for matters within a tribunal's jurisdiction. The Board argues that under sections 58 and 59 of the ***ATA*** on questions of law on a matter within jurisdiction, the standard of review is patent unreasonableness, where the tribunal is protected by a privative clause and correctness where it is not.

51 A summary of the Board's core argument appears in the opening statement in its factum:

> The *reasons why* a party argues an arbitration award is inconsistent with the principles expressed or implied in the *Code* do not change the fact that this determination remains a matter within the Board's exclusive jurisdiction, protected by a privative clause. Therefore the standard of review remains patent unreasonableness.

[Emphasis in original.]

52 The Board argues that if the ***ATA*** requires that the standard of review be determined, not in relation to the award being reviewed under s. 99 of the ***Code***, but on each argument made to the tribunal, such as the one the University advanced in relation to the remedy granted by the arbitrator in this case, it would necessitate a return to a pragmatic and functional analysis of each such argument. In particular, the Board argues, it would require an examination in each case of the nature of the issue, its relationship to the question within the tribunal's mandate, the relative expertise of the court and the tribunal: in essence, a full pragmatic and functional analysis of each issue decided. In the

Board's submission, that would defeat one of the objects of the ***ATA*** which was to replace the need for the pragmatic and functional analysis of decisions made by some administrative tribunals.

53 In response, the University submits that the effect of the Board's argument is that it makes all questions of statutory interpretation that are raised in conjunction with the interpretation of provisions of a collective agreement questions of law in respect of matters over which the Board has exclusive jurisdiction. If that were so, the University argues, s. 58(2)(c) of the ***ATA*** would be rendered nugatory. I agree with that argument.

54 I also agree with the University's submission that the Board's argument is inconsistent with the Supreme Court of Canada's recognition that separate findings made by a tribunal in the course of a decision may be subject to different standards of review: ***Toronto (City) v. C.U.P.E., Local 79***, [2003] 3 S.C.R. 77, 2003 SCC 63, at para. 14; ***Voice Construction Ltd. v. Construction and General Workers' Union, Local 92***, [2004] 1 S.C.R. 609, 2004 SCC 23 at para 19; ***Alberta Union of Provincial Employees v. Lethbridge Community College***, [2004] 1 S.C.R. 727, 2004 SCC 28 at para. 15; and ***Lévis (City) v. Fraternité des policiers de Lévis Inc.***, 2007 SCC 14 at para. 19.

55 One of the objectives of the legislature in enacting the ***ATA*** was to simplify the analysis required to determine the standard of review applicable on judicial review of decisions of various administrative provincial tribunals. In that regard, it is permissible to refer to what was said by the then Attorney-General, Geoff Plant, when the ***ATA***was in second reading, about the purposes of the ***ATA***: ***R. v. Gladue***, [1999] 1 S.C.R. 688 at para. 45; ***Global Securities Corp. v. British Columbia (Securities Commission)***, [2000] 1 S.C.R. 494, 2000 SCC 21 at para. 25; ***Reference re Firearms Act (Can.)***, [2000] 1 S.C.R. 783, 2000 SCC 31 at para. 17. During the Attorney General's speech, found at British Columbia, Legislative Assembly, ***Debates of the Legislative Assembly (Hansard)***, Volume 25, Number 15, (18 May 2004) at 11193, he said, in part:

> The question of what the standard of review should be on a case-by-case basis is often interpreted by the courts as a search for legislative intent. The words "legislative intent" are, in fact, the words that you see in the judicial decisions. What the courts are trying to do is find out what the intention of the Legislature was around the role of the courts in supervising decisions of administrative tribunals. Frankly, the Legislature does not always do as good a job as it should in making its intent clear. Accordingly, searching for that intent tends to be a time-consuming, expensive and sometimes disruptive exercise.
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> * * *
>
> Absent express legislation - that is, in cases where there is not a clear statement of the legislative intent in this area - what the courts have done is develop standards of review on a case-by-case basis within the factual context of individual decisions and according to some basic principles of approach. But the result is that there are a number of different standards, and the standards are sometimes confusing. The variety of standards in itself is a source of confusion. Sometimes the standards conflict with each other, and they are often difficult to apply when questions are raised in other contexts and circumstances.
>
> * * *

> In the bill before us today, this government is for the first time taking up the challenge of defining legislative intent by simplifying and codifying the standards of review that we want courts to apply in their review of tribunal decisions. For tribunals with specialized expertise, like the Farm Industry Review Board and the Employment Standards Tribunal, this bill generally provides that a court must defer to a tribunal's decision unless the decision is patently unreasonable or the tribunal has acted unfairly. For other tribunals - including, for example, the mental health review panels - the bill provides that with limited exceptions, a court must adopt a standard of correctness in reviewing the tribunal's decisions.
>
> [...] The provisions in this bill that codify the standards of review will shift the focus from what has been largely a scholarly debate about fine points of law to matters of greater immediate concern to the parties in tribunal proceedings. I believe these provisions offer the promise of greater certainty and finality to those British Columbians who want tribunals to help them on the matters that concern their health, their jobs and their futures.

56 Before the ***ATA*** was enacted, the standard of review that applied to judicial review of all decisions of administrative tribunals in this province was determined through the pragmatic and functional analysis developed by the Supreme Court of Canada beginning with ***U.E.S., Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048. In ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 2003 SCC 19, McLachlin C.J.C., for the Court, reviewed that approach and outlined its four factors, beginning at para. 26:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors - the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question - law, fact, or mixed law and fact. The factors may overlap. The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law. ... I must emphasize that consideration of the four factors should enable the reviewing judge to address the core issues in determining the degree of deference. It should not be viewed as an empty ritual, or applied mechanically. The virtue of the pragmatic and functional approach lies in its capacity to draw out the information that may be relevant to the issue of curial deference.

57 In my opinion, the Board's approach to the interpretation of sections 58(1) and (2) does not take into account the extent to which sections 58 and 59 of the ***ATA***, taken together with the enabling statutes of various tribunals, are designed to incorporate into the legislative scheme the elements of the pragmatic and functional analysis. The standard of review applicable to decisions of tribunals with a privative clause in their enabling legislation is governed by s. 58 of the ***ATA*** whereas s. 59 of the ***ATA*** applies where the enabling act contains no privative clause. Under s. 59, the standard of review to be applied to a decision of the tribunal is correctness for all questions except those respecting the exercise of discretion, findings of fact and the application of the common law rules of natural justice and procedural fairness.

58 The Board contends that the structure and language of s. 58(2)(a) supports its position that the patently unreasonable standard is the appropriate standard of review to apply. I will repeat that subsection for convenience of reference:

> a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,

59 The Board argues that "the matter" before the Board was the review of the arbitral award for consistency with ***Code*** principles under s. 99 of the ***Code***, not the University's "argument" concerning the ***University Act***. Thus, the standard of review set out in subsection 58(2)(a) must apply. That argument assumes that the interpretation of the ***University Act*** was intended to be within the exclusive province of the Board in its review of the arbitral award.

60 When the enabling legislation contains a privative clause, s. 58(1) of the ***ATA*** provides that "relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction." Section 58(2)(a) directs that "a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable." Subsection 58(2)(c) provides that "for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness."

61 By the inclusion of s. 58(2)(c) of the ***ATA***, it seems to me that the legislature must have intended that the standard of review to be applied in respect of those matters over which a expert tribunal does not have exclusive jurisdiction is correctness.

62 By s. 115.1 of the ***Code***, s. 58(1) and (2) of the ***ATA*** applies to the Board. In support of its position that the correctness standard under s. 58(2)(c) of the ***ATA*** ought to have been applied by the chambers judge in this case, the University submits that the central issue raised in its petition for judicial review of the Board's decisions turned on a pure question of law over which the Board does not have exclusive jurisdiction. The foundation for the University's submission that the interpretation of a statute external to the Board's constituting statute is a matter of law to which a correctness standard must be applied begins with the decision of the Supreme Court of Canada in ***McLeod v. Egan***. In that case, the collective agreement provided for a standard working week of 40 hours with provision for the rates payable for overtime. An employee, who had already worked 48 hours in a particular week, refused to work more and was disciplined by the company for his refusal. The arbitrator was called upon to interpret the language of a provincial employment standard statute to resolve the grievance that resulted from the company's demand that the employee work more than forty-eight hours. The legislation provided that "the working hours of an employee shall not exceed eight in a day and forty-eight in a week." The arbitrator dismissed the grievance but his decision was overturned on judicial review, the judge being of the opinion that while overtime could be demanded as a management right, the right had been limited by the employment standards legislation. The provincial court of appeal restored the decision of the arbitrator, having concluded that the arbitrator's construction of the collective agreement and the legislation, which provided that a permit for overtime could be obtained, was one which could reasonably be reached and accordingly could not be impeached. The Supreme Court of Canada allowed the appeal and restored the decision of the judge on the judicial review. Laskin C.J.C., in concurring reasons, stated at 518:

> . . . Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator, chosen by the parties or in accordance with their prescriptions, who interprets a document which is in language to which they have subscribed as a domestic charter to govern their relationship.

63 In ***Parry Sound***, the Supreme Court of Canada again considered the issue of the interpretation of external statutes. In that case, the Ontario ***Human Rights Code***, R.S.O. 1990, c. H. 19 and the ***Employment Standards Act***, R.S.O. 1990, c. E. 14. ***Parry Sound*** affirmed the principle that an external statute must be interpreted by an arbitration board on a standard of correctness. The reasons of Iacobucci J., for the majority, amplify the rationalization for adherence to the correctness standard, at para. 30:

> In some sense, *McLeod* is inconsistent with the traditional view that a collective agreement is a private contract between equal parties, and that the parties to the agreement are free to determine what does or does not constitute an arbitrable difference. But this willingness to consider factors other than the parties' expressed intention is consistent with the fact that collective bargaining and grievance arbitration has both a private and public function. The collective agreement is a private contract, but a contract that serves a public function: the peaceful resolution of labour disputes. See for example Professor P. Weiler, "The Remedial Authority of the Labour Arbitrator: Revised Judicial Version" (1974), 52 Can. Bar Rev. 29, at p. 31. This dual purpose is reflected in the fact that the content of a collective agreement is, in part, fixed by external statutes.

[Emphasis added.]

64 The proposition, which has been drawn from the concurring reasons of Laskin C.J.C. in ***McLeod v. Egan***, that the standard of review of the interpretation by a tribunal of an external statute is one of correctness was referred to in ***Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*** [1995] 1 S.C.R. 157. In that case, Iacobucci J., observed, at paras. 48-49:

> As a general rule, I accept the proposition that curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate. However, this does not mean that every time an administrative tribunal encounters an external statute in the course of its determination, the decision as a whole becomes open to review on a standard of correctness. If that were the case, it would

> substantially expand the scope of reviewability of administrative decisions, and unjustifiably so.
>
> While the Board may have to be correct in an isolated interpretation of external legislation, the standard of review of the decision as a whole, if that decision is otherwise within its jurisdiction, will be one of patent unreasonableness. Of course, the correctness of the interpretation of the external statute may affect the overall reasonableness of the decision. Whether this is the case will depend on the impact of the statutory provision on the outcome of the decision as a whole.

65 The observations of Iacobucci J. instruct us that while a tribunal may have to be correct in its interpretation of an external statute, the fact that the tribunal has had to interpret an external statute in the course of its determination does not mean that the decision as a whole must be reviewed on a standard of correctness, assuming the decision is otherwise within the tribunal's jurisdiction.

66 In ***Lévis (City) v. Fraternité des policiers de Lévis Inc.*** the Supreme Court of Canada again considered the question of whether two standards of review should be adopted where there are questions that engage different concerns under the pragmatic and functional approach. As noted by Bastarache J. under the heading, "Multiple Standards of Review", at para. 19:

> It is clear that the pragmatic and functional approach may lead to different standards of review for separate findings made by an arbitrator in the course of his or her decision [cases and citations omitted]. This will most frequently be the case when an arbitrator is called upon to construe legislation. The arbitrator's interpretation of the legislation - a question of law - *may* be reviewable on a different standard than the rest of the decision: see e.g. *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 49 ("*CBC*"); *Newfoundland Association of Public Employees v. Newfoundland (Green Bay Health Care Centre)*, [1996] 2 S.C.R. 3, at para. 14. While interpretations of general public statutes or statutes external to an administrative decision maker's constituting legislation will often be reviewed on a standard of correctness, this will not always be so: *CBC*, at para. 48. The answer in each case will depend on the proper application of the pragmatic and functional approach, which requires various factors be taken into account such as the presence or absence of a privative clause, the expertise of the decision maker, the purpose of the governing legislation and the nature of the question under review (*Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 29-38). Since the presence or absence of a privative clause will likely be the same for all aspects of an administrative decision, whether there is a possibility of more than a single standard of review under the pragmatic and functional approach will largely depend on whether there exist questions of different natures and whether those questions engage the decision maker's expertise and the legislative objective in different ways. Of course it may not always be easy or necessary to separate individual questions from the decision taken as a whole. The possibility of multiple standards should not be taken as a licence to parse an administrative decision into myriad parts in order to subject it to heightened scrutiny. However, reviewing courts must be careful not to subsume distinct questions into one broad

> standard of review. Multiple standards of review should be adopted when there are clearly defined questions that engage different concerns under the pragmatic and functional approach.

[Emphasis in original.]

67 It is true that one of the objects of the ***Code*** is to secure the prompt, final and binding settlement of disputes arising out of the interpretation or application of collective agreements and that a review by the Board of an arbitral award under s. 99 of the ***Code*** is protected from judicial review by a privative clause. However, the fact that the review is brought under s. 99 does not bring the interpretation of external legislation relevant to a distinct question arising out of the arbitral award within the Board's exclusive jurisdiction. Moreover, the interpretation of the external legislation in this case is not linked to the Board's special knowledge of labour or employment law which, at least under a pragmatic and functional analysis, might attract a degree of deference.

68 In summary, the provisions of s. 58(2) of the ***ATA*** guide the determination of the standard of review to apply. What the arguments of the Board and the Association overlook is that the Board's "finding ... of law" in this case was not "in respect of a matter over which it has exclusive jurisdiction under a privative clause." Instead, the Board was called upon to interpret a statute external to its constituting statute when determining whether, under Article 13.07(c) of the collective agreement, it was open to the arbitrator to substitute a recommendation for promotion rather than referring the matter back to the President for reconsideration. The standard of review to be applied to the Board's decisions thus fell under s. 58(2)(c) rather than s. 58(2)(a) of the ***ATA***.

V. Is the Board's interpretation of Article 13.07(c) of the collective agreement in conflict with the *University Act*?

69 The second issue on this appeal is whether the Board's interpretation of Article 13.07(c) of the collective agreement is in conflict with the ***University Act***.

70 Although the chambers judge recognized that the interpretation the University placed on the word "reverse" in Article 13.07(c) was one that was open to the arbitrator, he concluded that the selection of the arbitral remedy, based on an interpretation of the collective agreement and the facts of the case, was within the arbitrator's exclusive jurisdiction and was not patently unreasonable.

71 There is no dispute that the interpretation to be given to language in a collective agreement providing for an arbitral remedy is normally within an arbitrator's exclusive jurisdiction and attracts a high degree of deference on review. To determine whether the arbitral remedy given in this case is one that is available, it is necessary to look beyond the terms of the collective agreement and to construe and apply an external statute which, in the words of ***McLeod v. Egan***, "was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature" (at 518).

72 The University argues, correctly in my view, that the interpretation to be placed on the word "reverse" in Article 13.07(c) of the collective agreement had to be consistent with ***University Act*** and, further, that the interpretation of the external statute and the determination and resolution of any operational conflict between the collective agreement and the ***University Act*** had to be correct.

73 The University further contends that the interpretation given by the arbitrator to the scope of her remedial authority and her decision to reverse the President's decision created an inconsistency between the collective agreement and the powers granted to the President and the Board of Governors pursuant to the ***University Act***.

74 What meaning is to be given to the word "reverse" in Article 13.07(c) of the collective agreement must be considered in the context of the provisions in the ***University Act*** concerning the powers of the President and the Board of Governors to appoint, promote and remove a member of the teaching staff. Under s. 59(2) of the ***University Act***, the power to recommend appointments, promotion and removal of the teaching staff is vested in the office of the President. The power to recommend is an express grant of power to the office of the President, the exercise of which is an integral part of the scheme of appointments, promotions and removal of staff under the legislation. By s. 28(2) of the ***University Act***, the President's recommendation is a necessary condition to the Board of Governor's exercise of its statutory authority to make appointments pursuant to s. 27(g). Similarly, by s. 28(3), the President's recommendation is a necessary condition to the Board of Governor's exercise of its statutory authority to promote or remove a member of the teaching staff. The language used in both subsections 28(2) and (3) is mandatory.

75 The respondent Association argued before the chambers judge that, where a statute grants the employer a discretion, as it does in s. 59 of the ***University Act***, and the employer subsequently agrees to language in a collective agreement which limits that discretion, the legislation must be read so as to harmonize it with the language of the collective agreement. The chambers judge agreed with this analysis and found that, notwithstanding sections 27 and 28 of the ***University Act***, the President's discretion in s. 59 could be fettered by the terms of the collective agreement.

76 In my respectful view, the chambers judge erred in his interpretation of the ***University Act*** when he concluded that the parties could agree, and had agreed, to fetter the President's statutory authority. While the chambers judge was correct in observing that the President's authority to make a recommendation is not altered or modified by s. 28(3) of the ***University Act***, the arbitrator's interpretation of the remedial authority granted in Article 13.07 of the collective agreement interferes with the interaction between the President's grant of authority and the powers of the Board contemplated by the scheme of the legislation.

77 The Original Panel declined to interfere with the arbitrator's award on the ground that the arbitral award simply "deemed" the President's decision not to recommend promotion to be a decision to recommend. However, the Original Panel acknowledged that, in those circumstances, the deemed decision to recommend is not the President's decision.

78 In its Original Decision, the Board also held that the ***University Act*** could be read so as to harmonize it with the provisions of the collective agreement. The Original Panel held that, since the collective agreement would still leave s. 59(2)(a) of the ***University Act*** operative when the President exercises her discretion in a reasonable way, the ***University Act*** could be harmonized with the agreement.

79 The principles of law regarding operational conflict applicable to this case are those set out in ***B.C.G.E.U. v. British Columbia (Government Personnel Services Division)*** (1987), 12 B.C.L.R. (2d) 97 (C.A.) in which this Court applied the approach adopted by the Supreme Court of Canada in ***Durham Regional Police Assn. v. Durham (Region) Police Commissioners***, [1982] 2 S.C.R. 709. In ***Durham***, the Supreme Court considered whether an unfettered discretion found in an empowering provision in a statute precluded the operation of a collective agreement provision which interfered with the statutory discretion. In both ***B.C.G.E.U.*** and ***Durham***, the courts found that the existing legislation could be read in such a way as to harmonize it with the collective agreement. In ***Durham***, Laskin C.J.C. stated, at 714:

> . . . The supersession of s. 24(6) by a post-enacted provision for collective bargaining still leaves s. 24(6) operative in respect of members of the police force who are not under a collective bargaining relation with the Board of Commissioners of Police. In the circumstances, there is no incompatibility or inconsistency in this case between s. 24(6) and s. 29(2); each has is own area of operation. The latter may itself be superseded by the Lieutenant Governor in Council if it chooses to act under a Regulation; it has not chosen to do so in this case.

80 In the Original Decision in this case, the Board harmonized the statutory grant of power to the President with the arbitrator's interpretation of the remedial authority in the collective agreement to allow for reversal of the President's decision by concluding that the agreement still leaves s. 59(2)(a) of the ***University Act*** operative when the President exercises her discretion in a reasonable way. In arriving at that conclusion, however, the Board failed to take into account the nature of the grant of authority to the President and the relationship between the President's authority and the other provisions of the ***University Act***. Unlike the discretionary grant of authority reviewed in ***Durham***, the language of s. 28(3) of the ***University Act*** bespeaks a mandatory direction from the Legislature. It is not discretionary. In this case, it is not possible to say, as the courts did in ***B.C.G.E.U.*** and ***Durham***, that there is no incompatibility or inconsistency between the statutory empowerment and the collective agreement provisions as interpreted by the arbitrator. In those cases it was possible to carve out separate spheres of operation in part because there were circumstances in which the statutory power would simply not operate. In that way the statute and the collective agreement could be harmonized.

81 In the present case, the basic incompatibility between the mandatory statutory directives that the President recommend for promotion and that members of faculty must not be promoted except on the recommendation of the President and the arbitrator's interpretation of the remedial authority in the agreement so as to allow for a President's recommendation to be reversed cannot be resolved by asserting that the President's grant of authority remains operative when she acts reasonably. The statute prescribes a mechanism for appointments and promotion which involves a grant of personal authority to the President to recommend and an absolute restriction on the powers of the Board of Governors limiting its ability to appoint or recommend except on the recommendation of the President. Those types of restrictions did not exist in the ***Durham*** case.

82 The Association argues that the parties to the collective agreement were entitled to agree that the remedial provisions in the agreement would operate in the manner interpreted by the arbitrator so as to grant an arbitrator the authority either to direct the President to exercise the statutory grant of power set out in the ***University Act*** in a particular way or to bypass the grant of authority to the President by having the recommendation to the Board of Governors proceed as a "deemed"

recommendation of the President (the process that the Original Panel described as not requiring the President to do anything).

83 I would not give effect to that submission. The parties to the collective agreement could not agree to restrict or fetter in scope the President's exercise of statutory authority by making any such exercise of that statutory power to recommend subject to reversal by an arbitrator. Any interpretation of the arbitrator's remedial authority pursuant to the collective agreement that allowed the arbitrator to reverse the President's decision on matters governed by the President's statutory grant of authority would constitute a direct interference with that statutory grant of power and would be incompatible and inconsistent with the statutory scheme.

84 It is only in unusual cases that a statutory decision maker (such as the President in this case) is not given the opportunity to reconsider a decision once directions as to the proper criteria to be applied to the decision have been given. The presumption of regularity or impartiality holds that it must be presumed in the absence of any evidence to the contrary that public officers will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of the case. It is on the basis of that principle that a matter to be reconsidered is generally remitted to the original decision maker unless there is evidence to rebut the presumption of regularity: ***Zundel v. Citron*** (2000), 189 D.L.R. (4th) 131 (F.C.A.) leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 322.

85 Courts have held that there must be evidence to support an allegation that the matter will not receive a fair hearing if remitted; neither a bare allegation nor suspicion alone will operate to rebut the presumption of regularity: ***Adams v. British Columbia (Workers' Compensation Board)*** (1989), 42 B.C.L.R. (2d) 228 (C.A.).

86 In the case at bar, the collective agreement provided that where an arbitration board decided that there was a procedural error and an unreasonable decision, the arbitrator could exercise any of the remedies set out in Article 13.07(b) and (c) of the collective agreement. The obvious arbitral remedy which did not entail any conflict with the provisions of the ***University Act*** was to revoke the President's decision and remit the matter of Dr. Rucker's promotion to the President for reconsideration.

87 Nothing in the record suggests that remitting the matter for reconsideration would be inappropriate. The issue before the arbitrator was whether the President applied the wrong criteria to Dr. Rucker's application for promotion. There are no issues of credibility to revisit, no findings that the candidate had been denied a fair hearing, and no allegations of bias.

88 Where there has been no express finding that it would not be possible for the matter to be fairly dealt with on reconsideration, the presumption of regularity governs and the matter ought to have been remitted to the President for reconsideration. In this case, there was no evidence that the President, properly directed as to the criteria to be applied, would not or could not fairly reconsider the matter of Dr. Rucker's promotion and render a decision.

89 In summary, I agree with the University's submission that the interpretation of the arbitrator's remedial authority to revoke and remit for reconsideration, an interpretation which was available to the arbitrator on the language of Article 13.07(c) of the collective agreement, is the only interpretation that is both consistent with the presumption of regularity and avoids any conflict with the President's exercise of her statutory authority. In short, it is the only interpretation which avoids an operational conflict between the collective agreement and the ***University Act***.

VI. Did the chambers judge err in finding that the remedy of reversal imposed by the arbitrator did not constitute a breach of the President's section 2(b) guarantee of freedom of expression?

90 In view of my conclusion on the first two issues, it is unnecessary to consider the University's argument that the remedy which was upheld by the chambers judge would infringe the President's s. 2(b) ***Charter*** right to freedom of expression.

VII. Summary and conclusion

91 For the reasons given, I am of the view that the chambers judge erred in concluding that patent unreasonableness was the standard of review to be applied in respect of the two Board decisions that were under judicial review in this case. Instead, s. 58(2)(c) of the ***ATA*** applied and correctness was the applicable standard.

92 It is also my opinion, for the reasons I have stated, that the chambers judge erred in failing to find a conflict between the ***University Act*** and the arbitrator's interpretation of the collective agreement.

93 Accordingly, I would allow the appeal and set aside the order of the chambers judge dismissing the University's petition.

94 Under s. 9(1)(a) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, the court may "make or give any order that could have been made or given by the court or tribunal appealed from". In place of the order made by the chambers judge, I would substitute an order that the case be remitted to the Board to be dealt with in accordance with these reasons, that is, that the matter of Dr. Rucker's promotion be remitted to the President of the University for reconsideration.

ROWLES J.A.

RYAN J.A.:-- I agree.

The following is the judgment of

95 LOWRY J.A. (dissenting):-- This appeal is concerned with the interpretation of the provisions of a collective agreement. It is taken from an order of Mr. Justice Powers dismissing an application for judicial review. The questions raised concern the resolution of what is contended to be an ambiguity in the provisions of the agreement.

96 Lance Rucker is an associate professor with tenure in the Department of Oral Sciences, Faculty of Dentistry, at the University of British Columbia, and as such he is a member of the University of British Columbia Faculty Association, a trade union. He became eligible and applied to be considered for promotion to Professor. He did so five years ago. Although he had the support of the head of his department, the dean of his faculty and the President's standing advisory committee, the

President of the University declined to recommend to the Board of Governors that he be promoted. By statute, the board of governors of a university is precluded from promoting a member of the teaching staff without the president's recommendation.

97 The President's decision became the subject of a grievance submitted to arbitration by the Association pursuant to the provisions of the collective agreement between the Board of Governors of the University of British Columbia and the Association. The arbitrator found the decision to be unreasonable because the only reason the President gave for declining to recommend Dr. Rucker's promotion was his limited number of publications in peer-reviewed journals, which the President wrongly considered to be the only measure of his "scholarly activity". A "sustained and productive scholarly activity" is one of the criteria for the rank of Professor under the collective agreement. Having concluded that the President's decision was unreasonable, the arbitrator "reversed" it in accordance with her authority to do so under the provisions of the collective agreement. However, in reversing the decision, the arbitrator, in her award dated 15 April 2004, expressed the following opinion as to the effect of the reversal:

> 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.

98 The University took issue with the arbitrator's opinion. Its position was and remains that to "reverse" the President's decision must mean to set it aside and remit the matter to her for reconsideration.

99 The remedy imposed, and that alone, gave rise to an application for review by the Labour Relations Board and a further application to that board for reconsideration of its decision. Application was then made to the Supreme Court for judicial review of the Labour Relations Board's decisions. The Association was successful at each stage of the administrative and court proceedings, but Dr. Rucker now finds his application for promotion to be before this Court where he is caught in what has become a continuing contest over process, specifically the effect of the remedy invoked by the arbitrator under the collective agreement. The University seeks to have the order appealed from set aside and the matter remitted back to the Labour Relations Board.

100 The narrow question then that has, for the most part, fuelled this protracted litigation beyond the arbitrator is the meaning to be given to the word "reverse" as employed in the remedial provisions of the collective agreement. The Labour Relations Board held (BCLRB No. B330/2004, [2004] B.C.L.R.B.D. No. 331, leave for reconsideration denied, BCLRB No. B88/2005) that the collective agreement did provide for the remedy the arbitrator imposed, and the judge declined to interfere with its decisions (139 C.R.R. (2d) 346, 2006 BCSC 406). I am similarly of the view that the reversal of the President's unreasonable decision not to recommend Dr. Rucker for promotion has the effect of substituting a recommendation that he be promoted. For the reasons that follow, I would dismiss the appeal.

The Collective Agreement

101 The jurisdiction given to the arbitrator under the collective agreement to entertain the grievance submitted by the Association is found under Article 13. We are told it has stood for more than ten years. It provides, in material respects, as follows:

Article 13. Appeal of Decisions on Reappointment, Tenure and Promotion

* * *

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 [an Arbitration] Board decides that there was a procedural error, a Board may:

    i) dismiss the appeal if it is satisfied the error has not resulted in a wrong decision;
    ii) if the error may have resulted in a wrong decision:

        a) direct that the matter in question be reconsidered commencing at the level of consideration at which the error occurred. In so ordering the Board shall specifically identify the error, shall give specific directions as to what is to be done on the reconsideration, and shall adjourn the hearing until reconsideration has taken place; or
        b) if it decides that the error was of such a nature that it would not be possible for the matter to be fairly dealt with on a reconsideration, decide the appeal on the substantive merits.

c) When unreasonableness is a ground of the appeal the Board shall reverse the decision if it finds that on the evidence the decision is unreasonable; otherwise it shall dismiss the appeal.
d) When procedural error and reasonableness are grounds of appeal a Board may exercise any of the powers conferred by (b) and (c) above.

102 "Decision" is defined under Article 13.01 as "a determination made by the President not to recommend reappointment, tenure, or promotion after periodic review."

103 It will be seen that there are two grounds upon which a decision may be appealed and that different remedies are prescribed. Where a wrong decision has been reached through a procedural error, an arbitrator may direct that the matter in question be reconsidered, or decide the appeal on its merits if, by virtue of the nature of the error, the matter could not be fairly dealt with on a reconsideration. Where a decision is found to have been unreasonable, the agreement provides that it shall be reversed. Where both grounds are evident, an arbitrator may direct that the matter be reconsidered, or reverse it.

104 The President's decision not to recommend Dr. Rucker's promotion was not only found by the arbitrator to have been unreasonable, it was common ground that it had been reached through a procedural error. A departmental committee, which is the first in the line of consideration to be given to an application for promotion under the collective agreement, had refused to recommend Dr. Rucker's promotion. He was not given the opportunity to respond to which he was entitled. It was the University's position before the arbitrator that the committee should reconsider the matter

with directions as contemplated by the agreement. But the Association opposed that course and the arbitrator chose to decide the appeal on its merits and then to reverse the President's decision.

105 It may be it was not necessary for the arbitrator to express an opinion on the effect of her reversing the President's decision. She might have simply determined the decision was unreasonable and reversed it, as provided by the collective agreement. It may have been better for her to have left to the Board of Governors a determination of the effect of her decision. But no point has been taken in this regard in the proceedings that have followed and it is desirable that the question of the effect of the President's decision being reversed be resolved.

106 Reduced to perhaps its simplest terms, the question is whether the word "reversed", as employed in Article 13.07(c) of the collective agreement, means rescind and substitute, or rescind and remit for reconsideration.

Discussion

107 The University advances two grounds in support of the interpretation for which it contends, maintaining the standard of review of the Labour Relations Board's decisions is one of correctness. It first says where, as here, there are two possible meanings to be given to the provisions of a collective agreement, one that conflicts with a statute and one that does not, an arbitrator must presume the parties intended their agreement to conform to law. An interpretation that avoids conflict is to be preferred. An arbitrator is then required to attempt to reconcile any conflict between the language of the agreement and that of the statute by adopting an interpretation that harmonizes the two. The University says to interpret the word "reverse" as the arbitrator did is to put the remedial provisions of the agreement in conflict with the provisions of the ***University Act***, R.S.B.C. 1996, c. 468, governing the powers of the President in respect of promotions.

108 The following provision enables the president of a university to recommend promotions of members of the teaching staff:

> **59(1)** There must be a president of the university, who is to be the chief executive officer and must generally supervise and direct the academic work of the university.
> (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; ...

109 The powers of a board of governors of a university to appoint the teaching staff are as follows:

> **27(1)** The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.
> (2) Without limiting subsection (1) or the general powers conferred on the board by this Act, 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;

* * *

28(1) Unless otherwise provided, the tenure of persons appointed under section 27(2)(g) is during the pleasure of the board.

(2) A person must not be appointed a member of the teaching staff of the university or of any faculty of the university unless the person is first nominated for the position by the president.

(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.

110 The University says that when s. 59(2)(a) is read with s. 28(3) it gives a president a power over the promotion of members of the teaching staff that, as a matter of law, cannot be bargained away because a president's recommendation is a mandatory requirement for a promotion. It is not open to the parties to a collective agreement to compromise that power. The University says that, unlike permissive statutory powers, those powers, which are by statute mandatory, must be exercised as prescribed. It says the principles which govern this case are to be drawn from ***Durham Regional Police Assn. v. Durham (Region) Police Commissioners***, [1982] 2 S.C.R. 709, and ***B.C.G.E.U. v. British Columbia (Government Personnel Services Division)*** (1987), 12 B.C.L.R. (2d) 97 (C.A.).

111 Given that a promotion cannot be made without the recommendation of a president, the University maintains it cannot be made unless the recommendation is actually made by a president and that cannot occur where a president's decision is rescinded and another substituted by an arbitrator. The University contends that interpreting the word "reverse" as meaning rescind and substitute, renders the remedy to which the Association and the Board of Governors agreed invalid. But the University has not sought, and does not now seek, to have the remedial provision determined to be invalid. Rather, it urges an interpretation that would preserve the remedy for unreasonable decisions but restrict it to remitting such decisions back to the President for reconsideration. Thus, while the University maintains that the power given to a president under the Act with respect to promotion of members of a teaching staff cannot be compromised in the bargaining process - a recommendation cannot be made by other than a president - it accepts that the exercise of a president's decision may be limited to the extent that such a decision must be reasonable.

112 The second ground raised by the University for the interpretation it seeks is that the remedial provisions of the collective agreement must be interpreted in accordance with the democratic value of freedom of expression enshrined in s. 2(b) of the ***Canadian Charter of Rights and Freedoms*** and cannot permit the arbitrator's award to effectively attribute to the President a recommendation she was not prepared to make. At least in this Court, the University seeks no ***Charter*** reme-

dy, but raises s. 2(b) only to support the meaning it says is to be given to the remedy the arbitrator imposed.

113 The University contends that because the word "reverse" is capable of more than one meaning, it is to be given a meaning that would have the effect of providing only one remedy under the collective agreement regardless of the ground of appeal: reconsideration. I do not, however, accept there are two meanings that can be given to the word "reverse" as employed in the remedial provisions. When Article 13.07 is read as a whole there can be no ambiguity. "Reverse" can only mean rescind and substitute. The parties provided a different and distinct remedy for each of the two grounds of appeal that can be raised in respect of a decision made by the President not to recommend promotion. The first is reconsideration where a wrong decision was made because of a procedural error; the second is reversal where a decision is unreasonable. "Reverse" cannot mean remit for reconsideration because the two remedies would be essentially the same. As the Association says, where the parties intended a decision be reconsidered they so stipulated in clear words. They cannot have intended there be a reconsideration where they employed the word "reverse".

114 It is not the function of the court or of a tribunal to search for ambiguity in the face of the plain language employed by two parties to an agreement in order to work a result that may appear desirable. As Lord Hope of Craighead stated in ***Melanesian Mission Trust Board v. Australian Mutual Provident Society***, 1996 UKPC 53, [1996] J.C.J. No. 63:

> [9] The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail.

115 The ordinary meaning of the word "reverse" as employed in the remedial provisions of the collective agreement is clear and unambiguous. The University's contention does not get past the "starting point". We have been referred to dictionary definitions of the word "reverse" that define its meaning as "turn completely about in position or direction", i.e., "... opposite ..." (*Webster's*), and "turn the other way round or up or inside out" and "make the opposite of what it was" (*Concise Oxford*). We have been referred to no definition of the word that would suggest it could mean remit for reconsideration.

116 Where, as here, the decision in question is a choice between only two possibilities - to recommend or not to recommend promotion - I do not consider reversing the decision can mean other than imposing the opposite of what was decided. On the plain meaning of the word "reverse" read in the context of Article 13.07, that is the only effect of the remedy the parties to the collective agreement could have intended.

117 Where an arbitrator determines that a decision of the President not to recommend the promotion of a member of the teaching staff was unreasonable, the arbitrator must reverse the decision (save where there is also a procedural error giving rise to a choice of remedy under Article 13.07(d)). Where a decision of the President is reversed, the parties can only have intended that, for the purposes of s. 28(3) of the Act, a recommendation for promotion - accepted by the Board of Governors and the Association as having been made by the President - stand in the place of, or be substituted for, the decision the President actually made. I agree with the arbitrator:

> 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.

118 Given that the interpretation of the remedy for which the University contends is, on the language the parties to the collective agreement saw fit to employ, not feasible, and the University has not in these proceedings sought to have Article 13.07(c) determined to be invalid, no purpose is to be served now in considering the question of whether the remedy to be imposed where the President has made an unreasonable decision is in conflict with the Act or may indeed be invalid. No purpose is to be served in considering whether the remedy is inconsistent with the freedom enshrined in s. 2(b) of the ***Charter***, although I must say I do not see how the reversal of a decision by an appellant tribunal could ever be said to affect the freedom of expression of the person who made the decision.

Conclusion

119 I conclude then that the judge reached the correct result in dismissing the application for judicial review. I would only say further that I have difficulty seeing any utility in the proceedings the University has pursued in order to have the matter remitted to the President for reconsideration. Both initially, when she informed Dr. Rucker she declined to recommend his promotion, and in the whole of the testimony she gave before the arbitrator, the President identified only one ground for declining her recommendation when she had every opportunity to raise any other grounds of which she was aware. The arbitrator concluded the ground on which the President declined her recommendation was not supportable and her decision was accordingly unreasonable. I do not see how, on any proper reconsideration of her decision, the President could decide other than to recommend Dr. Rucker's promotion. Remitting the matter to her would not appear to serve any practical purpose.

Disposition

120 It is for these reasons I would dismiss the appeal.

LOWRY J.A.