

Case Name:
**University of British Columbia v. University
of British Columbia Faculty Assn.**

Between
University of British Columbia, petitioner, and
University of British Columbia Faculty Association
and The Labour Relations Board, respondents

[2006] B.C.J. No. 545

2006 BCSC 406

59 Admin. L.R. (4th) 280

139 C.R.R. (2d) 346

2006 CarswellBC 577

Vancouver Registry No. L051398

British Columbia Supreme Court
Vancouver, British Columbia

Powers J.

Heard: February 6 - 8, 2006.

Judgment: March 13, 2006.

(78 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Patent unreasonableness -- Application by University of British Columbia for judicial review of Labour Relations Board reversing decision of University's president not to promote a professor dismissed -- Board had exclusive jurisdiction to review arbitrator's decisions and standard of review in respect of interpretation of University Act was patent unreasonableness.

Constitutional law -- Canadian Charter of Rights and Freedoms -- Scope of application -- Entities subject to Charter -- Fundamental freedoms -- Freedom of expression -- Application by University of British Columbia for judicial review of Labour Relations Board reversing decision of University's president not to promote a professor dismissed -- Arbitrator was statutory creature subject to

Charter, as arbitrator's powers derived from collective agreement and Labour Relations Code -- Arbitrator's conclusion reversing president's decision did not breach president's freedom of expression by putting words in president's mouth, as arbitrator simply interpreted collective agreement and concluded that president's decision was unreasonable.

Labour law -- Collective agreements -- Provisions -- Interpretation -- Application by University of British Columbia for judicial review of Labour Relations Board reversing decision of University's president not to promote a professor dismissed -- Collective agreement entered into by University limited powers conferred to University under legislation.

Labour law -- Labour relations boards -- Powers -- Application by University of British Columbia for judicial review of Labour Relations Board reversing decision of University's president not to promote a professor dismissed -- Discretion to chose remedy and reverse decision was clearly within arbitrator's exclusive jurisdiction -- Board's conclusion that arbitrator's decision consistent with principles of Labour Relations Code was not patently unreasonable.

Application by University of British Columbia for judicial review of Labour Relations Board reversing decision of University's president not to promote a professor -- Professor sought to be promoted -- Departmental Committee and Dean recommended promotion -- University president refused promotion on grounds that professor did not have a sufficient number of publications -- Case went before arbitrator, who reversed President's decision on basis that there was procedural error and President's decision was unreasonable -- University dissatisfied with decision and unsuccessfully appealed to Labour Relations Board -- University claimed Board erred in law and exceeded its jurisdiction in finding that arbitrator's award did not raise Charter issue because it infringed on President's freedom of speech -- University claimed award conflicted with statutory authority under University Act -- University and Association parties to collective bargaining agreement that permitted Board to reverse unreasonable decision -- HELD: Application dismissed -- Standard of review on Charter issue was correctness -- Board had exclusive jurisdiction to review arbitrator's decisions and standard of review in respect of interpretation of University Act was patent unreasonableness -- While statute granted discretion to University, University agreed to collective bargaining agreement, which limited University's discretion -- University Act to be read in harmony with collective agreement -- Discretion to chose remedy and reverse decision was clearly within arbitrator's exclusive jurisdiction -- Board's conclusion that arbitrator's decision consistent with principles of Labour Relations Code was not patently unreasonable -- Arbitrator was statutory creature subject to Charter, as arbitrator's powers derived from collective agreement and Labour Relations Code -- Arbitrator's decision did not breach president's freedom of expression by putting words in president's mouth -- Arbitrator interpreted collective agreement and concluded that president's decision was unreasonable -- Arbitrator correctly exercised her discretion and it was within her power to reverse president's decision -- Any restriction on president's freedom of expression justified under Charter, as it was justified by collective agreement and purposes of Code.

Statutes, Regulations and Rules Cited:

Administrative Tribunals Act, S.B.C. 2004, c. 45, s. 58, s. 58(2), s. 58(2)(a), s. 58(3)

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

Judicial Review Procedure Act, R.S.B.C. 1996, c. 242,

Labour Relations Code, R.S.B.C. 1996, c. 244, s. 2, s. 82, s. 99, s. 100, s. 101, s. 136(1), s. 136(2)(a), s. 137(1), s. 138, s. 139, s. 141

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

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POWERS J.:--

INTRODUCTION

1 A dispute between the University of British Columbia (the "University") and the University of British Columbia Faculty Association (the "Association") over the president's recommendation against the promotion of an associate professor went to arbitration pursuant to the collective agreement between the Association and the University. The University was dissatisfied with the arbitrator's decision regarding the remedy, and took the matter before the Labour Relations Board (the "Board"). The University was unsuccessful before the Board (the "original decision") and sought leave to have the matter reconsidered. Leave was not granted (the "reconsideration")

2 The University brings these proceedings pursuant to the Judicial Review Procedure Act, R.S.B.C. 1996, c. 242 and the Labour Relations Code, R.S.B.C. 1996, c. 244 (the "Code") to set aside the decisions of the Board both on the original decision, which considered the arbitrator's decision, and on the application for reconsideration.

ISSUES

3 The University states the issues as follows:

- 1) that the Board erred in law and exceeded its jurisdiction in finding that the award did not raise a Charter issue, nor did it raise a concern with respect to the interpretation and application of other statutes;
- 2) that the Board erred in law and exceeded its jurisdiction in upholding the award on the basis that the award did not conflict with the statutory grant of authority to the president in the University Act, R.S.B.C. 1996, c. 468 and/or the guarantee of freedom and expression in s. 2(b) of the Charter.

4 The Association states the issues as follows:

- 1) whether the Board erred in law in rejecting the University's argument that the term "reverse" in Article 13.07(c) of the Collective Agreement should be interpreted to mean no more than "revoking" or "annulling" and ordering reconsideration, so as to render it consistent with the powers of the president under the University Act;

- 2) whether the Board erred in law in rejecting the University's argument that this interpretation of "reverse" should also be adopted because it is consistent with the Charter.

5 The Association also points out a third issue, and perhaps an issue that should be dealt with first, that is the standard of review to be applied.

6 The Association also argued that the University should be precluded from raising the grounds set out in the petition because it did not raise those grounds before the original arbitrator, and that the arguments do not arise from the arbitrator's reasons in an unanticipated way. However, the Board in its original decision, did allow the University to raise those arguments and dealt with them. Therefore, it is appropriate to deal with the arguments raised by the University on this application for judicial review.

THE FACTS

7 The following facts are taken from the submissions of the University and the Association:

1. The Petitioner, the University of British Columbia ("University"), is a corporation continued pursuant to the University Act, RSBC 1996, c. 468. The University is composed of a chancellor, a convocation, a board, a senate and faculties. The President is the chief executive officer of the University responsible for the supervision and direction of the academic work of the University. The President is a member of the Board of Governors.
2. The Respondent, the University of British Columbia Faculty Association ("Association") is a trade union pursuant to the Labour Relations Code, R.S.B.C. 1996, c. 244 as amended ("Code") and is the voluntarily-recognized bargaining agent for Association employed by the University.
3. The University and the Association are parties to a collective agreement which provides terms and conditions governing the employment of the faculty by the University ("Agreement"). The Agreement provides, inter alia, terms and conditions governing the appointment, re-appointment, tenure and promotion of faculty. Decisions with respect to appointment, re-appointment, tenure and promotion of faculty are subject to grievance and arbitration pursuant to the Agreement.
4. Dr. Lance Rucker is an Associate Professor in the University's Department of Oral Sciences, Association of Dentistry. In the summer of 2001 Dr. Rucker was eligible to be considered for promotion to the rank of Professor.
5. Dr. Rucker's application for promotion was considered pursuant to Article 5 of the Agreement. The faculty member's dossier is initially considered by the Departmental Committee. The recommendations of the Committee and of the Department Head are forwarded along with the faculty member's dossier to the Dean. The Dean, after considering the advice of his or her Advisory Committee, makes a recommendation to the President.
6. Recommendations to the President are reviewed by the Senior Appointments Committee ("SAC") a standing senior advisory committee that

makes recommendations to the President. The final decision on whether or not a recommendation is to be forwarded to the Board of Governors is made by the President pursuant to the Agreement and the President's statutory authority pursuant to section 59(2) of the University Act.

7. Pursuant to the University Act, appointments are made by the Board of Governors upon the recommendation of the President.
8. After considering Dr. Rucker's dossier the Departmental Standing Committee voted against promotion. The Head of the Department recommended Dr. Rucker for promotion. The vote of the Dean's Advisory Committee was split and the Dean recommended in favour of promotion.
9. Although SAC unanimously recommended Dr. Rucker's promotion, the University President, Dr. Martha Piper, disagreed with their recommendation. She advised Dr. Rucker of her decision against recommending him for promotion by letter dated July 7, 2002.
10. In her letter, Dr. Piper advised Dr. Rucker that the reason for her negative decision was the "small number of publications in peer-reviewed journals".
11. The Association filed a grievance on behalf of Dr. Rucker alleging that the President's decision was wrong as a result of procedural error and that it was unreasonable.
12. The University agreed that there had been a procedural error at the Departmental level that had not been remedied at subsequent levels in the process and that may have resulted in a wrong decision (i.e., that Dr. Rucker was not given an opportunity to respond to serious concerns raised by the Departmental Standing Committee). The University offered to remit Dr. Rucker's dossier to the Departmental Standing Committee for reconsideration.
13. The Association took the position that the procedural defect could not be cured and that remitting the matter to the Departmental Standing Committee was not appropriate. The matter was referred to arbitration.
14. The matter was heard by arbitrator Marguerite Jackson Q.C. ("Arbitrator") who rendered a decision on April 15, 2004 ("Award"). The Arbitrator upholding the grievance on the basis that there was a procedural error and on the basis that the President's decision was unreasonable. By way of remedy the Arbitrator reversed the President's decision pursuant to Article 13.07(c) of the Agreement.

8 Article 13.07 of the Collective Agreement between the University and the Association pertains to the remedial authority of an arbitrator on an appeal of a recommendation by the president that a faculty member not be promoted. It provides:

...

- b) When ... a Board decides that there was a procedural error, a Board may:

...

- 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. ...; 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 re-consideration, decide the appeal on the substantive merits.
- c) When reasonableness is a ground on 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.

(In Article 13.07 the Board refers to arbitrator).

9 The University argued before the arbitrator that the arbitrator should interpret the word "reverse" in such a manner that would allow the matter to be remitted to the president for reconsideration.

10 I refer to the submissions of the Association and the University, to the Board, in my following comments. The University sought review of the award pursuant to s. 99 of the Code on the basis that the award was contrary to principles expressed or implied in the Code. In particular the University alleged that the arbitrator exceeded her jurisdiction by failing to interpret the agreement in a manner consistent with the University Act; and that the Arbitrator exceeded her jurisdiction by failing to interpret the agreement in a manner consistent with the Charter of Rights and Freedoms (the "Charter").

11 The University's application was dismissed by the Board on the basis that the University had failed to demonstrate that the arbitrator committed any reviewable errors.

12 In the s. 99 review the University argued that the arbitrator had interpreted her remedial authority in a manner that directly conflicts with an express grant of power 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 and to make a recommendation contrary to the recommendation she made in good faith pursuant to her statutory authority. The original panel of the Board stated:

"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 or require 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 added]

13 The Board also held that the University Act must be read in such a way as to harmonize it with the provisions of the agreement. The Board found that, since the agreement still leaves section 59(2)(a) of the University Act operative when the president exercises her discretion in a reasonable way, then the University Act can be harmonized with the agreement.

14 The original panel's finding was as follows:

"The Government has not excluded Section 59(2)(a) of the University Act from the collective bargaining process. The Agreement provides that decisions of the President about the promotion of members of the faculty Association are subject to review by an arbitrator, and reversal if they are found to be unreasonable. I find that the Agreement still leaves Section 59(2)(a) operative when the President exercises her discretion in a reasonable way. Accordingly, I find that Section 59(2)(a) of the University Act can be harmonized with the Agreement.

Original Decision at para. 26

15 The Board dismissed the University's argument that the arbitrator exceeded her jurisdiction by failing to interpret the agreement in a manner consistent with the Charter on the same basis as it dismissed the argument that the exercise of remedial authority conflicted with the University Act's grant of authority to the president. The Board 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. (Original decision at paragraph 28).

16 The original panel stated:

... Having found that the President's decision not to recommend Dr. Rucker's promotion was unreasonable, the Arbitrator reversed that decision. She did not direct or require the President to do anything. The effect of the Award is only that the President's decision is deemed to be a decision to recommend Dr. Rucker's promotion. The President remains free to hold and express any opinion she wishes on the matter.

Original Decision at para. 28 (emphasis in the original).

17 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 was in violation of s. 2(b) of the Charter and conflicted with the University Act.

18 In the reconsideration decision, the Board denied leave and the application for reconsideration was dismissed.

19 In denying leave for reconsideration the Board determined 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.

20 The reconsideration panel described the essence of the arbitration award to be that the president had only one reason for recommending that Dr. Rucker not be promoted, and that reason was invalid.

21 The reconsideration panel said in its reasons:

That left only the possibility of the president recommending the promotion of the grievor.

(Reconsideration Decision at paragraph 7).

These findings of fact, interpretation of the collective agreement, and the logical consequences 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.

(Reconsideration Decision at paragraph 10).

22 The Board, in its original decision and the reconsideration decision, reviewed the arbitrator's award. The University seeks judicial review of the original decision and the reconsideration decision.

THE STANDARD OF REVIEW

23 The University agrees that the Board's decisions are protected by an interlocking web of privative clauses. The appropriate standard of review is determined by s. 58 of the Administrative Tribunals Act, S.B.C. 2004, c. 45 ("ATA"). Section 58 of the ATA provides:

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.

(3) For the purposes of subsection (2)(a), a discretionary decision is patently unreasonable if the discretion

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

24 The parties all agree that with respect to whether or not the Charter applies, and whether the president's rights pursuant to s. 2(b) of the Charter have been breached, is a matter on which the standard of review is correctness.

25 The University argues that the arbitrator was obliged to interpret the collective agreement in a manner consistent with the statutory law, being the University Act, and required to exercise its remedial authority in a manner consistent with the Charter. The University argues the arbitrator, and subsequently the Board, were required to interpret the agreement between the parties (a matter wholly within their jurisdiction), but also ultimately to interpret the provisions of the University Act and s. 2(b) of the Charter, matters not within the Board's exclusive jurisdiction. Therefore, the University argues that the standard of review is correctness. The University argues that in neither of these matters does the Board have exclusive jurisdiction.

26 The Association adopts the arguments of the Board, and argues that the standard to be applied is patent unreasonableness pursuant to s. 58(2) of the ATA. The Board argues that the standard is not altered simply because of consideration of the provisions concerning promotion in the University Act.

27 The University argues that the University Act is an external statute, not within the exclusive jurisdiction of the Board, and therefore the interpretation of that statute is a matter of law in which the University must be correct. The University argues that the arbitrator, and subsequently the Board on its review, erred when it found there was no operational conflict between the arbitrator's decision for remedy by reversing the president's decision under the collective agreement and the University Act. The University argues that this was an error in law in an interpretation or application of an external statute, and therefore the standard of review is correctness. In any event, the University argues that the Board's conclusions with regard to the applicability and interpretation of the University Act and the Charter to the arbitrator's exercise of remedial authority and the Board's decision with regard to the resolution of the operational conflict are patently unreasonable.

28 The Board points out in its argument that it is not the arbitrator's decision which is under review here, but the decision of the Board. The Board's decision under s. 99 deals with whether the arbitrator's decision is consistent with the principles expressed or implied in the Code. The mandate of the arbitration board is set out in s. 82 of the Code:

- 82(1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
- (2) An arbitration board, to further the purpose expressed in subsection (1), must have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and must apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

29 The arbitrator and the Board are directed to perform their duties in a manner that achieves the objects of the Code, including s. 2 of the Code:

2. The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that
 - (a) recognizes the rights and obligations of employees, employers and trade unions under this Code,
 - (b) fosters the employment of workers in economically viable businesses,
 - (c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,
 - (d) encourages cooperative participation between employers and trade unions in resolving workplace issues, adapting to changes in the economy, developing workforce skills and developing a workforce and a workplace that promotes productivity,
 - (e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
 - (f) minimizes the effects of labour disputes on persons who are not involved in those disputes,
 - (g) ensures that the public interest is protected during labour disputes, and
 - (h) encourages the use of mediation as a dispute resolution mechanism.

30 Except in a case where the basis of an arbitrator's decision or award is a matter or issue of general law not included in s. 99(1) of the Code (in which case the Court of Appeal may review a decision), the Board has exclusive jurisdiction to review an arbitrator's decision.

31 Section 99 to 101 reads as follows:

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.

(2) An application to the board under subsection (1) must be made in accordance with the regulations.

100. On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis

of the decision or award is a matter or issue of the general law not included in section 99(1).

101. Except as provided in this Part, the decision or award of an arbitration board under this Code is final and conclusive and is not open to question or review in a court on any grounds whatsoever, and proceedings by or before an arbitration board must not be restrained by injunction, prohibition or other process or proceeding in a court and are not removable by certiorari or otherwise into a court.

32 Section 101 is a privative clause dealing with arbitrators' decisions.

33 Sections 136 to 139 of the Code deal with the Board's jurisdiction as follows:

136(1) Except as provided in this Code, the board has and must exercise exclusive jurisdiction to hear and determine an application or complaint under this Code and to make an order permitted to be made.

(2) Without limiting subsection (1), the board has and must exercise exclusive jurisdiction in respect of

(a) a matter in respect of which the board has jurisdiction under this Code or regulations, and

...

137.(1) Except as provided in this section, a court does not have and must not exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 133 or a matter referred to in section 136, and, without limitation, a court must not make an order enjoining or prohibiting an act or thing in respect of them.

...

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.

139. The board has exclusive jurisdiction to decide a question arising under this Code ...

34 Section 99 of the Code gives the Board exclusive jurisdiction to review an arbitrator's decision unless it is a matter of general law referred to in s. 100. Section 136 gives the Board exclusive jurisdiction in matters in which the Board has jurisdiction under the Code; this includes s. 99. Section 137 is a privative clause and states that the court must not exercise jurisdiction in respect of a matter under s. 136, which includes review of an arbitrator's decision under s. 99. Section 138 is a further privative clause and deals specifically with the Board's decisions under the Code, a collec-

tive agreement, or the regulations, on a matter in respect of which the Board has jurisdiction by stating that their decision is final and conclusive, and not open to question or review in a court on any grounds.

35 The University argues that the arbitrator exercised her remedial authority in a way that conflicted with the University Act, in particular s. 28(3), and that the Board in its original decision, erred in finding that the arbitrator's decision harmonized the provisions of the collective agreement with the University Act, or harmonized the University Act with the collective agreement. The University argues that this interpretation of an application of an external statute was in error, and that the appropriate test in interpreting external statutes is correctness. The University refers to the decision *McLeod v. Egan*, [1975] 1 S.C.R. 517. In that case, there was a difference between the terms of a collective agreement and the Provincial Employment Standards Act, R.S.B.C. 1996, c. 113 dealing with overtime. Dealing with a grievance, the arbitrator interpreted the language of the provincial statute. Chief Justice Laskin said in the first paragraph of his decision:

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.

36 In other words, the test for review of an arbitrator's decision dealing with the interpretation of an external statute is correctness.

37 The University also refers to the *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, [2005] B.C.J. No. 289, 2005 BCCA 92. This case really deals with the question of jurisdiction. An arbitrator decided that he or she did not have jurisdiction to deal with a grievance over class size. Class size had originally been a part of the parties' collective agreement, but by an act of the Legislature had been removed from the bargaining process and incorporated into the School Act. The arbitrator was of the opinion that an arbitrator did not have jurisdiction to deal with a dispute regarding class size. The Court of Appeal held that despite the fact the class size had been incorporated into a statute, being the School Act, that it was still a term or condition of employment. If there was a dispute about the class size and whether the statute had been violated, it may raise issues with regard to the collective agreement as well. The arbitrator, therefore, did have jurisdiction to determine whether there was a violation of the School Act. This case does not support the University's argument that the test for interpretation of external statutes is correctness. This case deals with the issues of jurisdiction of an arbitrator, not standard of review. The case does refer to *McLeod*, and does so for the purposes of when an arbitrator has jurisdiction to deal with or apply a statute outside the collective agreement itself.

38 The Board points out that the *British Columbia Teachers' Federation* decision involved a direct appeal to the Court of Appeal pursuant to s. 100 of the Code. The Board also points out that there was no privative clause to be considered, and that was similar in the *McLeod* decision.

39 The Board argues that before the ATA, the Board's decision under s. 99 was reviewed based on the standard of patent unreasonableness. (See *Sunshine Coast School District No. 46 v. Sunshine*

Coast Teachers Association, [1997] B.C.J. No. 1488 (C.A.); Kelowna (City) v. Canadian Union of Public Employees, Local 338, [1999] B.C.J. No. 945; Graphic Communications International Union, Local 25-C v. Pacific Press, a Division of Southam Inc., [2002] B.C.J. No. 1044, 2002 BCCA 302).

40 The Board also points out that it is not the arbitrator's award which is under review here, but the Board's decision that the arbitrator's remedial decision was consistent with the principles expressed or implied in the Code. The Board argues that harmonizing of the collective agreement with the University Act or vice versa is only one aspect of that decision and it is the overall decision that has to be considered. The Board referred to the decision HEABC v. Nurses' Bargaining Assn., [2004] B.C.J. No. 1395, 2004 BCSC 911 in which there was a disagreement about the use of the arbitrator's extrinsic evidence. In that case, the petitioner, on an application for judicial review, argued that the Board does not have greater expertise than the court with regard to the issue of the use of extrinsic evidence, and that therefore the standard of review in that case should be reasonableness. The court said at [paragraph] 33:

However, the issue before me is not the Arbitrator's decision regarding the use of extrinsic evidence. It is the Reconsideration Panel's decision which dealt with the Board's role in reviewing an arbitration award involving the interpretation and application of the collective agreement.

41 The Board did refer to a decision that pre-dated the ATA dealing with a decision of the Canada Labour Relations Board. That decision is Canadian Broadcasting Corp. v. Canada Labour Relations Board, [1995] 1 S.C.R. 157. The Board cites this as an example of the proper way to review a decision of the Board where it may interpret an external statute. The Supreme Court of Canada said:

[paragraph] 49 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.

42 The Board argues that in this case the application of the University Act does not require an isolated interpretation of that act. The Board argues that the issue really is the scope of operation of the collective agreement, and a remedy awarded under the agreement in light of the statutory powers concerning promotion. The Board argues that the s. 99 review of the arbitrator's decision did not involve statutory interpretation of an external statute in a general sense, but involved reconciliation of the provisions of the collective agreement with the statute. In particular, the reconciliation involved promotion of a unionized employee and, therefore, a provision in relation to labour relations.

43 The Board argues that this case deals with the unionized employees of the university. The dispute required a reconciliation of two statutory regimes, the University Act and the Code. It also required interpretation and application of the collective agreement. The Board argues that these matters are within the Board's area of expertise. The Board argues that it is required to consider employment relations in a wide variety of context, including various public sector context with signif-

icant statutory duties, statutory provisions affecting employment, unique and special public mandates which in this case include the University Act.

44 The Board also argues that under the ATA the resolution of this dispute involves a finding of fact or law, or an exercise of discretion by the tribunal in respect of a matter which it has exclusive jurisdiction under a privative clause. The Board argues that this is a finding of law "in respect of a matter over which the tribunal has exclusive jurisdiction". The matter before the Board was whether the arbitrator's award was inconsistent with the principles expressed or implied by the Code, and within the Board's exclusive jurisdiction pursuant to ss. 99, 136, 137 and 139 of the Code. The Board argues that the University Act was simply one of the factors that the Board had to consider in deciding the matter before it. It was merely one of the legal arguments raised by the University in the same way extrinsic evidence was raised in the HEABC case.

45 The Board argues that the ATA was enacted specifically to simplify the issue of standard of review and cites *McIntyre v. British Columbia (Employment and Assistance Appeals Tribunal)*, [2005] B.C.J. No. 1808, 2005 BCSC 1179. The Board argues that it is the matter which determines the standard of review, not simply an issue raised such as the interpretation of the University Act. The Board argues that part of the arbitrator's duties under the Code included a determination of the proper interaction between the collective agreement and the provisions concerning promotion under the University Act and fulfilling its duties under the Code. The Board, on the review of the arbitrator's decision, was required to determine whether the award was consistent with the principles expressed or implied in the Code.

46 I agree with the Board's argument that the interpretation of the University Act in this case, and its reconciliation with the collective agreement, are findings of law or an exercise of discretion by the arbitrator in respect of a matter over which it has exclusive jurisdiction under a privative clause, and that the standard of review is patently unreasonable. I also find that the Board's s. 99 jurisdiction to review that decision is a matter exclusively within their jurisdiction and protected by a privative clause, and the standard of review again is patent unreasonableness.

47 The meaning of patent unreasonableness is discussed in the case *Aujla v. British Columbia Labour Relations Board*, [2000] B.C.J. No. 2731; 2000 BCSC 1896; *affd.* [2001] B.C.J. No. 2187; 2001 BCCA 611. The Court of Appeal cited the decision *Canada (Attorney General) v. Public Service Alliance of Canada* (1993) 101 D.L.R. (4th) 673 (S.C.C.) and stated at [paragraph] 12:

... the court provided the following definition of the standard of review applicable to administrative bodies like the board:

Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision of the board reached, acting within its jurisdiction, is not clearly irrational, that is evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction. This is clearly a very strict test. pp. 690-691

48 The court also referred to *C.A.I.M.A.W., Local 14 v. Paccar of Canada Ltd.* (1989), 62 D.L.R. (4th) 437 (S.C.C.) in [paragraph] 13:

The tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally

supported by the relevant legislation and demands intervention by the courts upon review.

The test for review is a severe test. Mere disagreement with the result arrived at by the tribunal does not make the decision patently unreasonable. Courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal and not on their agreement with it. The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result.

49 The Board argues that its decision on the s. 99 review was rational since there was a rational basis for the decision, and that it could be rationally supported whether the court agreed with it or not.

50 I do note, however, that s. 58(3) of the ATA does define what is patently unreasonable for the purposes of s. 58(2)(a). The definition may not be exhaustive and the existing caselaw may be of assistance. It is interesting to note that a decision may be patently unreasonable pursuant to s. 58(3) if the decision (d) fails to take statutory requirements into account. It is certainly possible and consistent with the Canadian Broadcasting Corp. decision referred to at [paragraph]40 that incorrectly interpreting the statutory requirement could amount to a failure to take that requirement into account.

51 The University argues that the Board erred in law when it concluded the arbitrator's decision was correct, and that the remedy selected being a reversal of the president's decision, rather than remitting back to the president, was consistent with the University Act or not in conflict with it.

52 The University and the Association agree that the arbitrator is required to interpret statutes and collective agreements in such a way as to harmonize them. They both agree that if there are two possible meanings to a provision in the collective agreement, one which conflicts with the statute and one which does not then the arbitrator may presume the parties intended to act in a manner which was not contrary to the law. The Association however argues that the collective agreement in particular 13.07(c) is unambiguous and therefore it is not necessary to consider whether one interpretation or another is consistent with the statute being the University Act.

53 In s. 1 of the University Act, definition of the "board" means the board of governors of a university.

54 The relevant provisions of the University Act are s. 27 which deals with the powers of the board and among other things 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; ...
- s) to enter into agreements on behalf of the university; ...

55 Section 28 deals with the Board's powers respecting ten year appointment and removal of teaching staff and others and 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.

56 These sections make it clear that the board of governors has the power to appoint professors including promotions but that power must not be exercised "except on the recommendation of the president".

57 Section 59 of the University Act deals with the position and powers of the president and includes:

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; ...

58 The University agrees that s. 59(2) is what has been described as an enabling section. The discretion in those sections can be fettered by a collective agreement. This is what occurred in the decision *Durham Regional and Police Association v. Durham (Region) Police Commissioners*, [1982] 2 S.C.R. 709. The statute creating the Police Act granted municipal counsel's discretion to pay or not pay damages and costs to a member of the police force incurred in a civil or criminal proceeding arising out of their employment. However, a collective agreement which was negotiated with the Police Association provided that the police officer's legal fees would be reimbursed on his acquittal of a criminal or statutory offence arising from his police duties. The court held that the unfettered discretion found in the Police Act was an empowering provision and did preclude the establishment of the collective bargaining agreement. The statute still applied to police officers who were not members of the union. The Association cites this decision and the decision *BCGEU v. British Columbia (Government) Personnel Services Division*, (1987), 12 B.C.L.R. (2d) 97, [1987] B.C.J. No. 391 the proposition that quotes:

... the existing legislation must be read in such a way as to harmonize with the collective agreement unless the operation of the latter is clearly excluded ...

59 The University in its argument used the phrase that the collective agreement must be read to harmonize with the statute rather than the other way around. However, I do not think anything turns on this. The collective agreement and the statute are to be harmonized with each other. However, I agree with the Association that where the statute grants the employer a discretion, as it does in s. 59 of the University Act, and the employer subsequently agrees to collective agreement language which limits that discretion, which has occurred, that the legislation must be read in a way that it harmonizes with the collective agreement language.

60 The thrust of the University's argument is that although s. 59 is a general enabling agreement including a discretion which can be fettered, the impact of s. 28(3) changes that. They argue that in some fashion s. 28(3) gives a special power to the president that cannot be delegated. Therefore, the arbitrator's decision and the Board's award which reversed the president's decision were inconsistent with s. 28(3) of the University Act and are in error.

61 The University presented a very persuasive argument however I do not accept the University's interpretation of the University Act. Sections 27 and 28 deal with the powers of the Board of Governors not powers of the president. Section 28(3) limits the power the Board of Governors to promote. The Board cannot act without a recommendation from the president. The president's authority to make a recommendation comes from s. 59 and is not altered or modified in any way by s. 28(3). The president's discretion in s. 59, an enabling section, can be fettered subject to review by the terms of the collective agreement that the University and the Association have entered into.

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 judgement 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.

CHARTER OF RIGHTS AND FREEDOMS

65 The University argues that because the Board determined that the arbitrator's decision to reverse the president's recommendation against promotion is deemed to be a recommendation for promotion, that the president's rights under the Charter s. 2(b) right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; has been breached". The University argues that the Board's decision in deeming the reversal to be a recommendation by the president, requires the president to put forward a recommendation to the Board of Governors pursuant to a statutory authority, in circumstances in which it is not a true exercise of her authority under the University Act. The Board in the original decision concluded that there was no infringement of the Charter because the arbitrator's decision did not direct or require the president to do anything inconsistent with the president's freedom of expression, the award was only deemed to be a decision to recommend the promotion.

66 The University argues and the Association and the Board agree that the standard to review for a decision and whether the Charter applies and whether it has been breached is correctness.

67 The University referred to *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 in which an adjudicator ordered an employer to provide a letter of recommendation with specific content and limited what the employer could say if potential employers inquired about this employee. The court found that this was a prima facie violation of the freedom of expression as is required an affirmation of facts which the person did not believe. The majority of the court found that these orders did infringe the Charter but were justifiable under s. 1 of the Charter. The court also found that the Charter did apply to the adjudicator who was a creature of statute. The statute conferred power upon the adjudicator and the statute must be interpreted in a manner consistent with the Charter.

68 The University also referred to the decision *Lavigne v. Ontario Public Service Employees' Union*, [1991] 2 S.C.R. 211 in which Madam Justice Wilson talked about a violation of the freedom

of expression and found that it occurs if the effect and order is to put "a particular message into the mouth of [a person]" in such a way that they are publicly identified with the statements. This was adopted by the Ontario Superior Court of Justice in *Ontario Hotel and Motel Association v. Toronto (City)*, [2004] O.J. No. 190. This dealt with the posting of health inspection notices by restaurant owners. In the Ontario case, the court found that this was not a breach of freedom of expression because it did not effectively associate the restaurant owners with the message which they disagreed with.

69 The Association argues that the Charter does not apply to the collective agreement or the arbitrator appointed under the collective agreement. The Association referred to the decision *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 which dealt with compulsorily retirement. That case has authority for the proposition that the University is a private actor to which the Charter does not apply and as well as the Association is a private actor.

70 The Association also referred to the decision *Re Bhindi and British Columbia Projectionists Local 348 (1986)*, 29 D.L.R. (4th) 47 (B.C.C.A.) which considered a Charter challenge to a closed-shop provision in a collective agreement. The Court of Appeal held that the Charter did not apply to the private contract between the parties, this was a commercial contract without a government actor. The Association also relied on the *Lavigne* decision for the proposition that a government actor was required before the Charter was engaged. In the *Lavigne* case, the court found that the counsel of regions who were responsible for the management of the community colleges were a government agent. The court also found that the employees were crown employees therefore the Charter applied. The Association refers to the fact that the *Bhindi* case was cited in *Lavigne* and refers to [paragraph] 31 to 35 of Justice Wilson's decision. However, the opening sentence in [paragraph] 35 is:

In my view, neither *Re Bhindi* nor *Re Baldwin*, 28 D.L.R. (4th) 301, adequately addresses the issue of the Charter's application to collective agreements and union security provisions in particular.

The last sentence in [paragraph]35 is:

Fortunately, this Court has recently had several opportunities to consider the scope and meaning of s. 32(1) of the Charter and these decisions provide helpful guidance for determining this difficult issue.

71 Madam Justice Wilson then goes on in [paragraph]38 to refer to the *Slaight* decision and does not agree with Lamer J.'s statement in *Slaight* that:

The fact of the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute.

[Emphasis in original.]

72 The arbitrator's powers come from collective agreement and the Code. In that sense the arbitrator is a statutory creature and subject to the Charter. The Board itself is entirely a creation of the

statute and clearly subject to the Charter. Therefore, I find that the Charter does apply to the decision of an arbitrator under the Code.

73 However, I disagree with the University that the arbitrator's decision puts words in the mouth of the president. The arbitrator has simply interpreted the collective agreement, and found the president's decision not to recommend a promotion is unreasonable. The arbitrator then exercised her discretion to determine the remedy. It was arguable that the arbitrator could have remitted the matter to the president for reconsideration, but it was within the arbitrator's power to simply reverse the decision as allowed under 13.07(c) of the collective agreement. It was also within the arbitrator's power or discretion to determine that the reversal of the decision not to recommend should be treated as a recommendation. I agree with the Board's interpretation that the arbitrator's decision did not require the president to do anything.

74 The Association argues that in fact the president would be free as a member of the Board of Governors to advise the Board of Governors that the arbitrator's decision was contrary to her personal views and to argue against the promotion at the board meeting. The University argues that may well be in contempt of an arbitrator's decision. The arbitrator's decision could be filed for enforcement as an order of the court and the president expressing her views before the Board of Governors could amount to contempt of court. I agree with the University that the president may well be restrained in arguing before the Board of Governors that the arbitrator's decision did not amount to her recommendation as required under the University Act, because of the limits that the collective agreement have imposed on the president's power under s. 59, a recommendation of the president although it is not her personal opinion. However it will also be clear that the decision is not the president's but is only deemed to be the president's as a result of the arbitration.

75 However, I do not find it necessary to refer the matter back to the arbitrator for consideration of whether or not such an infringement or limit on the president's expression is justified under s. 1. Any limit on the president's freedom of expression arises from the president's official role and the manner in which the University has agreed her powers under s. 59 are to be exercised. It is certainly justified in terms of the collective agreement and the purposes of the Code as was the limitation in Slight Communications.

76 I find that the University has failed to establish that the Board's decision under ss. 99 and 141 are patently unreasonable. I also find that the University has failed to establish that the Board was in error in its interpretation and in its conclusion that the arbitrator's remedy did not conflict with the University Act.

77 I also find that any restriction on the president's freedom of expression as a result of the arbitrator's decision is justified under s. 1 of the Charter.

78 The petition is dismissed with costs to the Association. The Board did not seek costs. Therefore they will bear their own costs.

POWERS J.