IN THE MATTER OF AN ARBITRATION

BETWEEN

THE UNIVERSITY OF BRITISH COLUMBIA

(the “University”)

-and-

THE UNIVERSITY OF BRITISH COLUMBIA FACULTY ASSOCIATION

(the “Faculty Association”)

( Dr. Laurence Preston )

ARBITRATOR: Robert Pekeles

COUNSEL: Donald Jordan, Q.C.,
for the University
Allan Black, Q.C.,
for the Faculty Association

DATE OF DECISION: January 30, 2004
INTRODUCTION

The Faculty Association grieves the denial of tenure and the denial of promotion to the rank of Associate Professor to Dr. Laurence Preston. Dr. Preston is currently an Assistant Professor in the Department of Asian Studies. I earlier wrote to the parties setting out my decision in this matter in part as follows:

Having carefully reviewed the evidence, the argument and the case law presented, I am now in a position to advise you of my conclusion in this matter.

The Senior Appointments Committee (the “SAC”) sent Dr. Preston’s file back for reconsideration by the Department and the Faculty in light of the new information submitted by Dr. Preston about the completion and acceptance of his new book for publication. In those circumstances, I conclude that letters of appraisal from external referees that included an appraisal of the quality and significance of that book must have been obtained: see Article 5.05(a) of the Agreement on Conditions of Appointment for Faculty (the “Agreement”). Such letters of appraisal from external referees were not obtained. I conclude that that was a procedural error. I further conclude that that procedural error may have resulted in a wrong decision.

I direct that letters of appraisal from external referees that include an appraisal of the quality and significance of Dr. Preston’s new book be obtained. I leave it to the parties to work out the details in this connection. If there are any issues in dispute, I retain jurisdiction to resolve them. Following receipt of the letters of appraisal, the issues of Dr. Preston’s tenure and promotion shall be reconsidered commencing at the Department level and continuing with the subsequent steps in the Agreement.

I retain jurisdiction to address any issues that may arise from this decision. The hearing is adjourned until reconsideration has taken place.

The Faculty Association subsequently requested the reasons for my decision. What follows are those reasons.
FACTS

Dr. Preston is currently an Assistant Professor in the Department of Asian Studies in the Faculty of Arts. He joined the University in that capacity in July 1994.

By email dated September 8, 1999, Dr. Joshua Mostow, the Acting Head of the Department of Asian Studies, wrote to Dr. Preston with respect to a meeting they had that day regarding promotion and tenure, in part as follows:

2) I reminded you that you will be able to add material to your dossier at any point in the review process, even after your case has left the department’s hands.

3) I suggested that your first priority at this point should be the completion of the book-length manuscript you have underway ("Toward the Mutiny"). I said that ideally you would have a book contract in hand when you came up for tenure, but that even a completed manuscript would be significant, and would be sent out to external reviewers along with the rest of your materials.

At that time, Dr. Preston was working on a new book. He was on sabbatical in the 2000-2001 academic year. He went to India in the first week of December 2000. In an email dated November 29, 2000 to Dr. Mostow, Dr. Preston wrote in part that:

I am sitting on a manuscript of 105,000 ‘good’ words (all inclusive, i.e. about 200+ printed pages). There is, however, a ‘hole’ in the middle, of about 25-30,000 words. Abstracts do however exist for this part, which requires in part reading (and understanding) a type of Marathi poetry that is quite difficult and will require some work.

Dr. Preston agreed in cross-examination that the need for a substantial monograph by the time he came up for appointment without term, which is another term for tenure, had been stressed to him by Dr. Mostow. He further agreed that the manuscript was not in a state where he felt it worthy to send to a publisher. He testified that he thought it complete enough to go to external review, but not complete enough to go to a publisher.
Dr. Mostow replied to Dr. Preston indicating that:

We will be sending your dossier to externals on Monday, Dec. 8. Whatever you want in that file should be to us by then. It sounds like you will not be including this new monograph -- is that correct? Do remember that you could add it later, esp. if you have a press’s agreement to publish it.

I pause here to quote Article 5.05(a) of the parties’ Agreement on Conditions of Appointment for Faculty (the “Agreement”):

5.05 Departmental Consultation: Letters of Reference

(a) Letters of appraisal from external referees on the quality and significance of the scholarly (including professional, and/or creative) achievements of the candidate shall be obtained when consideration is being given to:

(i) initial appointment at, or promotion to, the rank of Associate Professor or Professor

(ii) tenure; or

(iii) reappointment, when the departmental standing committee considers that it, or the Head considers that he or she, may recommend denial of reappointment, and a deficiency in scholarly work is a reason.

The Department of Asian Studies sought and obtained letters of appraisal from external referees. It did not send Dr. Preston’s incomplete manuscript to them. Four external referees wrote to Dr. Mostow. The first one wrote in part:

In making an overall assessment I find it helpful to think in terms, first, of the quantity and quality of what has been done so far, and, secondly, the trajectory one can discern from that record leading into the future. In terms of the scholarship in hand there is certainly what one normally requires: a good monograph, demonstrating a capacity to sustain an argument over a large topic with empirical research in archives, and a number of other, shorter works demonstrating a certain intellectual variety and complexity. That clearly exists here. Moreover, the record of teaching (including the heavy lifting involved in teaching Asian Studies 100 to 260 students) and service seem more than adequate.
What needs some thinking about is the fact that the bulk of the scholarly publications came out rather quickly after the Ph.D. and that the pace has since slowed. Preston seems to have spent ten years in the lower ranks at UBC and Red Deer College before getting on the tenure track at UBC in 1994. The fact that he arrived with his book and several important articles in hand – i.e. the bulk of what would be needed to make the case for tenure – are to his credit. It would scarcely be fair to call in question his having earned tenure because he has not maintained that quick pace of publication in the following years.

Nevertheless, one wants some second point, some second big project on the near horizon, by which to plot the trajectory of the future and feel confident that it is rising. Looking at the “Work in progress” section of his CV it seems that there are two book projects actually underway. The first is a sourcebook for premodern Asia, which I take to be a textbook for a course on premodern Asia in general (Asia 100?). This is certainly useful and germane to the case for tenure. But for the scholarly record one looks to the second book project, “Families in place and time: the first generations of the conquest in Kolhapur, 1820-1860”. He states that archival research is complete. One could wish to see something of the project, but there is every indication from the first book that he has the tools to bring this project to a successful conclusion, and that it will be a good one addressing again the question of the actual effects, both revolutionary and conservative, of early colonial British rule in western India.

Overall, then, I would say that the materials in hand are certainly strong enough and sufficient in number to make the case for tenure. Although one could have hoped for more publications since Preston became assistant professor at UBC there is, from the record so far, every reason to take him at his word in his statement about work in progress, and to draw from it the conclusion that he will continue to be a productive, publishing scholar of South Asian history, and, so far as I can infer from the CV, a willing teacher and a good citizen of the Department.

The second external referee wrote in part as follows:

In my judgment the quantity and quality of Prof. Preston’s work is more than adequate to justify tenure and promotion at a major university. Prof. Preston is a scholar whose work represents an important contribution to the field of modern South Asian history.

***
Preston’s published output since the publication of his book in 1988 is relatively limited, but his work is of high quality and his vita suggests that he has important works in progress. Given his past research and interests, I look forward with considerable anticipation to his “Families in Place and Time: The First Generations of the Conquest in Kolhapur, 1820-1860,” which may well represent a broader effort to deal with the role of lineage and family in the early British period. Given his overall production – and particularly given the quality and importance of his book – his contributions certainly warrant, at least in my judgment, recognition as a full-fledged member of the community of scholars that tenure at a major university represents.

The third external referee wrote in part as follows:

(b) Scholars of Maharashtra tend to produce one book and then disappear. I can think of three without effort at memory. Part of the difficulty is language (Marathi is endlessly complex), part due to the necessity of obtaining funds for further research, part due to the fact that our teaching of South Asian and Asian history is so broad that it does not reinforce research interests. So Preston is more productive than a good many of his generation. I hope his promotion will stimulate his participation in future International Maharashtrian Studies conferences (he has been very active in local conferences) and in further research time in Maharashtra.

***

(e) I heartily support the raising of Preston’s rank to Associate Professor.

The fourth external referee did not make a specific recommendation regarding tenure and promotion, but the appraisal letter can fairly be described as being positive.

Dr. Preston testified that the external referees are the essence of collegial government; they are the foundation of the system. The appraisals are done anonymously and at arm’s length. In his view, only the external referees are in a position to make decisions regarding scholarship.
I pause here to note that it is not the external referees who ultimately decide tenure and promotion. It is the University, and more particularly, the President of the University who ultimately makes a recommendation regarding those matters to the University’s Board of Governors.

By email dated February 15, 2001 Dr. Mostow wrote to Dr. Preston advising in part:

According to Section 4.03 of the Agreement, “Evidence of scholarly activity varies among the disciplines. Published work is, where appropriate, the primary evidence.” In your case, this evidence since your coming to UBC would include: 2 short (1-2 pp) encyclopedia entries; one refereed article (in press); and one invited book chapter (in press). You also submitted a book manuscript with six of eight chapters completed. Since this book manuscript was not complete, and had not been submitted to any press or publisher, Associate Dean Evan Kreider determined that it would be inappropriate for it to be sent out to outside referees. The Department thus has no outside assessment of this work.

Under these circumstances, concerns have arisen as to whether your work published since coming to UBC provides evidence of “sustained and productive scholarly activity” (Agreement 3.06(a)), or of you having “maintained a high standard of performance in meeting the criteria set forth . . . and show[ing] promise of continuing to do so (4.01(a)). These concerns arise despite the unanimous praise given your research by all four external referees.

By email dated February 26, 2001, Dr. Preston replied in part as follows:

I am pleased to report that the manuscript of my second monograph has been submitted to Cambridge University Press. . . . At this point in time, I can do little more than wait, except that I have taken the liberty of sending you a copy of the manuscript as submitted to CUP. I do hope that you and the department find some utility in examining this manuscript.

Dr. Preston sent a copy of the completed manuscript to Dr. Mostow in late February 2001.
By letter dated April 12, 2001, Dr. Mostow wrote to the Dean of Arts in which he advised that three of the Departmental Tenure Committee voted for tenure, three voted against, there was one abstention and the Acting Head of the Department recommended against tenure. Dr. Mostow wrote in part as follows:

As noted above, the practice in this department has been to require a publisher’s contract and the publisher’s readers’ reports. In Dr. Preston’s case, we have neither. While one very much hopes that the new monograph is of the same high-calibre as Dr. Preston’s previous work, the committee has no independent and external assessment of it on which to base its decision. Certainly all of the committee, and the Acting Head, very much hope that such assessments will become available and will inform the decisions of subsequent committees at the deaconal or Senior Appointments level. But as the record stands at present, we must judge Dr. Preston’s research on the basis of what is in print and in press. On that basis we cannot conclude that he has maintained the level of scholarly output necessary for appointment without term.

I pause to note that the terms “referees”, “reviewers” and “assessors”, and the terms “appraisals”, “reviews” and “assessments”, were used interchangeably in the oral and written evidence before me.

The Dean’s Advisory Committee voted 4 to 1 in favour of granting Dr. Preston tenure. The Dean of the Faculty of Arts recommended against granting tenure to him.

Dr. Preston’s book was ultimately accepted for publication by Manohar Publishers (“Manohar”), a publishing company in India. Dr. Preston wrote to the President of the University, Dr. Martha Piper, by letter dated June 14, 2001 in which he advised her that his book had been accepted for publication. The Senior Appointments Committee (the “SAC”) is a standing advisory committee that makes recommendations to the President. By email dated July 19, 2001, the Secretary to the SAC, Maureen Douglas, wrote to the Dean of Arts in part as follows:

According to the Agreement, (5.03), “the candidate...has the right, up to the stage of the President’s decision, to supplement the file by the
addition of new, unsolicited information (such as... the publication of an additional book or article...)."

In the case of Dr. Laurence Preston, the candidate, as you know, has submitted new information about the completion and acceptance of his book, and SAC is therefore sending the file back for reconsideration by the Department and the Faculty in the light of this new evidence.

Associate Dean Evan Kreider of the Faculty of Arts is the Secretary and a non-voting member of the Dean’s Advisory Committee. By email dated July 24, 2001, Associate Dean Kreider wrote to Dr. Mostow in part as follows:

S.A.C’s Jonathan Wisenthal has asked that the Preston dossier go back to the Departmental and Deaconal committees for another vote (and possibly revised letters of recommendation from you and the Dean, if required). S.A.C. feels that the acceptance of Preston’s book is sufficiently significant to warrant this unusual step. If the publisher’s readers’ evaluations are available, it would be ideal if they could be consulted, but only Preston will likely know whether they are available. We do not have time to send the book manuscript out to his assessors, since Jonathan wishes to have S.A.C. consider the dossier in late September.

By email dated September 17, 2001, Associate Dean Kreider wrote to Dr. Jonathan Wisenthal, the Chair of the SAC, in part as follows:

He (Joshua Mostow) has made copies of the book manuscript available for people to peruse, but I do not see how we can make the S.A.C. Oct. 12th deadline. We are also concerned that this important decision not be perceived as being rushed in any unseemly fashion.

Dr. Wisenthal replied in part as follows:

I totally agree with your thought that this important decision not be perceived as being rushed in any unseemly fashion, and from SAC’s point of view there is no reason why it could not be dealt with when the next cycle begins in November.
By email dated October 11, 2001, Dr. Preston sent to Dr. Mostow Manohar’s “second” reader’s report on his manuscript. The “first” reader’s report was delivered orally to Manohar.

By letter dated March 6, 2002 Dr. Mostow wrote to Dr. Anne Martin-Matthews, then the Dean pro tem of the Faculty of Arts, that the Departmental Tenure Committee voted 8-3 in favour of tenure and 7-3 (with one abstention) in favour of promotion to the rank of Associate Professor. Dr. Mostow concurred with the majority on both issues. He wrote in part as follows:

5. Scholarly Activity

At the time of his initial appointment, Dr. Preston already had to his credit a book published by Cambridge University Press, as well as a refereed article and a co-edited book. His recent CV (15 February 2002, attached) lists among refereed publications one book chapter (1980, 26 pp.), one article in the journal Modern Asian Studies (1987, 16 pp.), one article in press at the Journal of Historical Geography (13 pp.), and two short encyclopedia entries (1998, 4 pp. Total). In Non-Referred Publications he lists one book chapter (1988, 20 pp.) and, since his appointment in 1994, one chapter to appear in a Festschrift ("Sivaji’s Coronation," 21 pp. in manuscript), and five book reviews. In addition, Dr. Preston has just completed a book-length monograph (398 pp. in manuscript), which has been accepted for publication. Since 1994 Dr. Preston has read three papers at scholarly conferences. The committee was divided on whether this record was sufficient for appointment without term.

The majority’s views were set out in part as follows:

Since coming to UBC, while making many other important contributions to the department, both the quantity and especially the quality of Dr. Preston’s scholarly activity (published work) and his commitment to his field have been evident. In this time, he has published four (4) articles and had a book manuscript accepted for publication by Manohar Publisher, a respectable Indian press with an excellent publishing record. About 70 English titles of this publisher are available in UBC library. Several of them have been authored by well-established European and Indian scholars. The pace and the quality of his publications are, therefore, in keeping with the Agreement criteria for Associate
Professor, departmental norms and Faculty of Arts' guidelines (see “Arts 2000 and Beyond,” page 28).

***

Comments on scholarly activity:

The Acting Head advised us both that Dr. Preston’s case will probably hinge on judgements of his scholarly activity, and that the Dean of Arts rejected a request that his incomplete book manuscript be sent out to the external reviewers. Thus, we have been told that we--his Departmental colleagues--must decide on the quality of Dr. Preston’s forthcoming book. All of this has been troubling to some of us, but we have taken this responsibility very seriously.

One of the rules followed in the Promotion and Tenure Committee of the Faculty of Arts has been that the views of the referees chosen for a candidate are not set aside unless there is a compelling reason for suspecting a less than objective or careful assessment on the part of the referees. We have no reason, let alone a compelling reason, to contradict or second-guess the referees in Dr. Preston’s case.

This view was recently reaffirmed publicly by UBC President Martha Piper at the October 17, 2001 meeting of the Senate (See Senate of the University of British Columbia, Minutes of October 17, 2001, pp. 12785-12786). “Peer review is the best system we know of to ensure that a scholar’s work is evaluated by the dispassionate judgement and knowledge of experts, rather than by the court of public opinion or political policy” (or, one might add in this case, departmental colleagues who, however “respected,” are not scholars in Dr. Preston’s field of study -- do not have the linguistic competence, have not examined the documents used in the preparation of Dr. Preston’s forthcoming book, and so on). We who are all in this last category have, however, been asked to evaluate his forthcoming book without the guidance of external referees.

All four external referees attest to the high quality of Dr. Preston’s published work and their significant impact on his field.

***

Thus, Dr. Preston has received strong and unequivocal letters of support from four specialists. Three of the four referees offer unqualified recommendations for tenure or tenure and promotion. At least one of them has expressed confidence that the second book will be original and competently executed, even without seeing the text of the book.
Everyone on the departmental committee would qualify as a non-specialist in the above sense. Only one of us is a native speaker of the language used in Preston’s forthcoming book.

All of us have read the manuscript of Dr. Preston’s forthcoming book, some of us read it twice. We read it in conjunction with the Critique written by one member of the committee, passed on to Dr. Preston on October 25, 2001, and supported by two others in our November 22 meeting. Although we had varying reactions to Dr. Preston’s “Response to a Critique of Families in Place and Time; the first generation of the conquest in Kolhapur,” we all agree that he has more than adequately answered the concrete criticisms levelled in the Critique.

We agree that Dr. Preston has accomplished much in his forthcoming book, and we think his real peers -- our four external referees -- would have guided us toward such an evaluation had they been given the chance to review the manuscript.

In any case, through our reading of both the manuscript and Dr. Preston’s Response to the Critique, we conclude that this forthcoming book, especially when combined with Dr. Preston’s other published work, more than qualifies him for tenure and promotion to the rank of Associate.

In conclusion, we submit that Dr. Lawrence Preston has more than satisfied all of the UBC criteria -- in terms of quantity and quality of teaching, scholarly activity, and service -- for tenure and promotion to the rank of Associate Professor.

Certainly, a negative view -- the Critique -- expressed of one research work not seen by President Piper’s “respected scholars in the field, i.e. [Dr. Preston’s true] peers” because the university did not send that work to them, cannot be a good enough reason to set aside the views of the external referees.

The minority of the Committee’s views were expressed in part as follows:
2. Dr Preston has recently finished a book monograph that has been accepted for publication by Manohar Publications of New Delhi, India. Serious concerns have arisen about the quality and impact of this monograph...

3. Since the book manuscript was only recently finished, all of the external referees have based their comments on Dr Preston’s earlier work done over a decade ago...

4. Outside the book ms, since coming to UBC in 1994, Dr Preston has only one major refereed article that has been accepted for publication but is still not in print. The other two pieces listed under refereed publications are two entries of 4 pages total for multi-author encyclopaedias. Thus in terms of what has been published in a period of 7 years under the category of refereed articles by Dr Preston is only 4 pages.

***

The Acting Head of the Department expressed his views in part as follows:

Dr. Preston’s case is a difficult one. Due to the way and rate he has produced his research, the Departmental Committee has been given few of the usual aids in assessing him. Nonetheless, based on the assessment of the Departmental Committee members, I am recommending for tenure and promotion.

Dr. Preston’s major research activity appears to have gone into his recently completed book-length manuscript, Families in Place and Time. Unfortunately, this manuscript was not complete at the time materials were sent to outside referees, and thus the Committee has not had the benefit of it being vetted by scholars known to us.

***

It seems to me the most useful assessment of the outside referees was that written by , because he specifically addresses the issue of “overall trajectory.” He notes that Dr. Preston’s “pace has...slowed,” since his 1989 book publication. He admits that “one could have hope(d) for more publications since Preston became assistant professor at UBC,” but suggests that “there is, from the record so far, every reason to take him at his word in his statement about work in progress, and to draw from it the conclusion that he will continue to be a productive, publishing scholar of South Asian history....” While there was debate in the Committee about whether or not Dr. Preston has
achieved a level that can be described as one of “excellence” --and we were without the full degree of external expert opinion on which we usually most depend--almost all members of the Committee are agreed that, without any doubt, Dr. Preston has shown solid competence in teaching and sustained productivity in research. On this basis, I concur with the Majority’s recommendation for Appointment without Term, and promotion to Associate Professor.

In a letter to Dr. Wisenthal of March 22, 2002, Dean pro tem Martin-Matthews wrote in part as follows:

…in response to our query whether we should postpone consideration of the case until publisher’s reports could be obtained, Maureen Douglas wrote [20 July 2001]: “Dr. Kreider and Dr. Wisenthal have been in touch about this case. If it could be done in September it would be good, but if not, so be it, proper reconsideration is more important.”

***

On March 12, 2002, the Faculty of Arts P&T Committee once again reviewed the file pertaining to Prof. Preston’s case for promotion and tenure. Our committee debated whether the file actually did contain ‘additional new information’ of the import which prompted your July 19, 2001 directive to us. No additional external assessments of the case had been made; department members, while making assessments of the manuscript being written by Prof. Preston, questioned their own ability to adequately assess the merits of the piece, in the absence of external assessment. In this context, our (sic) the Faculty of Arts Advisory Committee questioned the magnitude of new information actually available to it.

Dean pro tem Martin-Matthews agreed in cross-examination that the Departmental Tenure Committee members were taking the place of the external referees and were questioning their ability to do so.

By letter dated May 1, 2002 Dean pro tem Martin-Matthews wrote to Dr. Piper. The Dean’s Advisory Committee voted against granting tenure to Dr. Preston and against promoting him to Associate Professor. Dean pro tem Martin-Matthews concurred with those recommendations.
In that letter, Dean pro tem Martin-Matthews advised that the Dean’s Advisory Committee decided to think of Dr. Preston’s book as being accepted for publication. Dean pro tem Martin-Matthews wrote in part as follows:

While we lack evaluations of this book manuscript by external assessors, our Committee noted that historians are invariably expected to read papers at prestigious international conferences and to publish articles which share ideas with experts in the discipline so that suggestions and criticisms can be provided for the author’s future work. This year’s Advisory Committee concluded that even with the book manuscript being accepted for publication, there is not enough evidence to suggest that Dr. Preston is truly engaged as a scholar in the discipline.

***

We have now reconsidered this dossier in light of ‘new information’ about the book being completed and accepted for publication. In our opinion, and in spite of the evidence of an accepted book manuscript, we have concluded that Dr. Preston has not exhibited sustained academic productivity since arriving at UBC as an experienced teacher in 1994. Instead, we find that he does not belong to any scholarly society (which might account for his not attending important North American meetings of scholarly societies), he has not read any papers at conferences since 1996 (other than at colloquia at UBC), he has had one 13-page article accepted for publication in a refereed journal and two 2-page contributions have appeared in encyclopedias. I therefore concur with the recommendation of my predecessor: I recommend that Dr. Preston not be promoted to Associate Professor, and that he not be granted tenure.

By letter dated May 31, 2002 Dr. Preston wrote to Dr. Piper in part as follows:

I write in response to the acting Dean of Arts’ recommendation not to grant me tenure and promotion conveyed first in a brief letter of 3 May 2002 and supplemented on 16 May with a copy of the acting Dean’s recommendation to the President of 1 May 2002. I ask that the acting Dean’s recommendation not be accepted and that instead the positive recommendation of the acting Head of the Department of Asian Studies, following upon a positive vote of the department’s Tenure and Promotion committee, be instead affirmed.

I make this plea because I believe that the most fundamental principle of collegial governance has been violated in the proceedings of my case.
That is, external peer review has not been obtained for a book accepted for publication by a respectable academic publisher. Only the Department of Asian Studies, in the face of unexplained restrictions placed upon its ability to consider my second book in the usual manner (i.e., seeking expert opinion from external referees), has been able to judge fully the merits of my case.

I find myself in a perplexing situation. The acting Dean of Arts argues that I have not been productive, too slow in getting out my publications, and not being engaged in my discipline. However, the very means needed to counter such a view of my scholarly activity—external peer review—has not been allowed. The “Agreement on Conditions of Appointment for Faculty” (4.03) clearly states that “published work is… the primary evidence [of scholarly activity].” Evaluation of this “primary evidence” by external peer review has not taken place.

***

I do not know what authority is needed to initiate an external peer review of a book manuscript accepted for publication. However, I do know that the Agreement (5.05) states that in departmental consultations “letters of appraisal from external referees on the quality and significance of the scholarly achievements of the candidate shall be obtained” for consideration of tenure and promotion. A newly accepted book, the very reason for the second year of these proceedings, is surely a “scholarly achievement”.

***

While I have a number of concerns about other procedural irregularities in my case, the omission of an external review of my second book materially affects the substance of my case for tenure and promotion.

(emphasis in original)

Dr. Preston was asked in cross-examination how external peer review would have an impact regarding his productivity. Dr. Preston testified that productivity is more than quantity. There is also quality. The two are linked. He referred to the positive assessments of the external referees in the first instance. He was further asked to assume that productivity includes quality and that the external referees would issue glowing reports. He was asked how would that affect the fact that his pace of getting out his publications was too slow. He replied that the external referees are entitled to make
comments on the pace of his production. It was put to him that their opinions are not
determinative. He replied that their opinions are an important part of the process.

Dean pro tem Martin-Matthews testified in cross-examination that the external referees
are important. She further testified that they are important at the Department level. She
agreed that in the normal course, external referees should not be colleagues of the
candidate. She further agreed that while published work is the primary evidence of
scholarly activity under Article 4.03 of the Agreement, it is not the only evidence. There
are other examples of scholarly activity.

By email dated June 12, 2002, Associate Dean Kreider wrote to Dean pro tem Martin-
Matthews in part about his concerns regarding Manohar and the rapidity with which Dr.
Preston completed the missing 25-30,000 words, and then concluded in the following
terms:

Anne, I doubt that it is worth spending much time on these issues. I
anticipate an appeal will succeed, that the book will need to be sent to
external assessors--as we had originally hoped. This is truly a sad case.

Dean pro tem Martin-Matthews testified that that was Associate Dean Kreider’s opinion.
She testified that she did not discuss with him that an appeal would succeed.

Informal notes of the SAC’s deliberation dated June 23, 2002 were introduced in
evidence. They state in part as follows:

There was no doubt about the adequacy of Dr. Preston’s teaching and
service contributions; he has clearly met the Agreement’s standards in
both of these areas. The problem had to do with whether he had
satisfied the expectation of “sustained and productive scholarly activity,”
and what follows here reflects the view of the majority of SAC members
that Dr. Preston has met this standard sufficiently at this point to justify
the granting of tenure.
In 1990 Dr. Preston had a book, based on his Ph.D. thesis, published by Cambridge University Press. During SAC’s discussion of the case, the point was made that if this book, brought out by one of the world’s most distinguished academic presses, had been published more recently, during the candidate’s pre-tenure period at UBC, then the case might well have been a clearly positive one. But in fact this publication occurred before his appointment as Assistant Professor at UBC.

During his pre-tenure period at UBC, Dr. Preston has been working on a second book (or actually third book, because there was a co-edited volume in 1984). It is the circumstances of this new book’s publication that have been the main source of difficulty in Dr. Preston’s promotion/tenure case. The full story is in the dossier, but I will mention here only the central point: he sent the book manuscript to Manohar Press in New Delhi, which has accepted it and is apparently about to publish it. There has been a considerable amount of discussion at all levels about the stature of this press, but it is an undisputed element in the case that the book has now been accepted for publication.

One of the major problems in this case is the fact that Manohar does not seem to follow the norms of academic presses in North America and the U.K. in its consideration of manuscripts. Our assumption on SAC a year ago was that Dr. Preston would promptly provide the readers’ reports from Manohar, but it turns out that one reader’s report was just some kind of oral communication, while the other does not include the kind of detailed evaluation that promotion and tenure committees expect from such documents. (This second reader’s report is on the very back page of the dossier.)

Nor is there any evaluation of the new book manuscript from the external referees, because the Faculty of Arts’ policy is that only completed manuscripts, which have been accepted for publication, should be sent out to referees, and until fairly recently it was not clear that Dr. Preston’s manuscript met these conditions. This means that the only evaluations (apart from the second Manohar reader’s report) have come from colleagues in the Department.

An important piece of positive evidence in the case is the fact that all of the external referees’ letters are favourable.
One SAC member made the point that while Dr. Preston may not have been especially prudent in investing all his scholarly energies into his second monograph during his pre-tenure period, this is a pretty standard, traditional model for scholars in the humanities.

In the end a minority of SAC members were not convinced that the Agreement’s criterion of sustained and productive scholarly activity had been met. I think the majority, on the other hand, took the view that Dr. Preston has an acceptable record in teaching and service, that he has a book published by Cambridge University Press and a second monograph forthcoming, and that he is favourably regarded as a scholar by all four of the external reviewers. On the basis of this evidence one might predict that he would perform well if his career at UBC continues into the future.

The SAC vote was 3-10 against recommending promotion to Associate Professor, and 8-5 in favour of recommending the granting of tenure.

By letter dated September 23, 2002, Dr. Piper wrote to Dr. Preston in the following terms:

I am writing to inform you that I am recommending that you not be awarded tenure or be promoted to Associate Professor. As you know, your Department and Department Head were in favour of your tenure and promotion, but the Faculty Committee and Dean were not in favour of tenure and promotion. The Senior Appointments Committee has recommended tenure, but not promotion.

I note that you have a satisfactory teaching record. Your service contributions to your Department and University are also satisfactory. The decision reflects my view that your research productivity is low and that you do not meet the test of "sustained and productive scholarly activity" nor is there evidence that there is potential to meet this goal.

As a consequence of not being granted tenure, you will receive a one-year terminal appointment. Your final year of appointment will therefore be from October 1, 2002 to September 30, 2003.
I draw your attention to the provisions on appeal (including time limits) that are to be found in section 13 of the Agreement, published in the *Guide for UBC Faculty, Librarians and Program Directors*.

July 2000 – July 2001 was Dr. Preston’s seventh year of service. Under the terms of the Agreement, that is the year in which a recommendation either to grant a tenured appointment or not to renew the appointment must be made: see Article 2.03(f)(2). It is common ground between the parties that it is common for the time lines in the Agreement to be extended. However, in Dean *pro tem* Martin- Matthews’ view, once the candidate’s dossier is sent to the Department, that is the dossier that the various levels of the University work with. The candidate has the option of bringing new material forward, but that does not mean that the process is started over.

She testified that what was unusual in this case was that the Department and Faculty were asked to reconsider Dr. Preston’s case. In her view, they were under no obligation to restart the process. The candidate would expect a reply to his tenure application in the seventh year. Here, the Department and Faculty were considering Dr. Preston’s case well into the eighth year. Dean *pro tem* Martin-Matthews agreed that the Agreement’s deadline had already been exceeded.

I refer to certain additional provisions of the Agreement:

1. Interpretation

1.01 For the purpose of this Agreement:

* * *

“Scholarly activity” means research of quality and significance, or, in appropriate fields, distinguished, creative or professional work of a scholarly nature; and the dissemination of the results of that scholarly activity;
2.03 Term Appointments with Review

***

(f) In the case of an Assistant Professor

***

(2) if an appointee is not granted a tenured appointment pursuant to (1) above, then in the seventh year of service a recommendation either to grant a tenured appointment at the rank of Assistant Professor or otherwise, or not to renew the appointment, must be made.

3.06 Associate Professor

(a) Appointment at or promotion to the rank of Associate Professor normally requires evidence of successful teaching and of scholarly activity beyond that expected of an Assistant Professor. The candidate for appointment or promotion will be judged on teaching as defined in Section 4.02, on sustained and productive scholarly activity, on ability to direct graduate students, and on willingness to participate and participation in the affairs of the Department and the University. Promotion to this rank is not automatic or based on years of service and it is expected that some persons who may be granted tenured appointments will not attain this rank...

4.01

(a) Candidates for appointment, reappointment, tenure or promotion, other than those dealt with in paragraph (b), are judged principally on performance in both teaching and in scholarly activity. Service to the academic profession, to the University, and to the community will be taken into account but, while service to the University and the community is important, it cannot compensate for deficiencies in teaching and in scholarly activity. Competence is required both in teaching and in scholarly activity, provided that a candidate who does not meet the criterion of scholarly activity but who is judged to be an excellent teacher may be given a tenured appointment as Senior Instructor when, in the view of the University, its needs will be best served by that appointment. Appointments without term are granted to individuals who have maintained a high standard of performance in meeting the criteria set forth below and show promise of continuing to do so.
4.03 Scholarly Activity

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

5.03 Recommendations: Supplementing Files

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

5.16 Arbitration

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

13.01 Interpretation

For the purpose of this Section:

***

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

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

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

In proceedings before the Board, the burden of proof shall be on the appellant.

13.07 Jurisdiction

(a) A decision may be appealed on the ground that it was arrived at through procedural error or on the ground that it was unreasonable.

(b) When procedural error is a ground of appeal and a Board decides that there was a procedural error, a Board may:

(i) dismiss the appeal if it is satisfied the error has not resulted in a wrong decision;

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

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

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

THE UNIVERSITY’S ARGUMENT

In view of my conclusion in this matter, I will only set out the University’s argument. The University begins by noting the basis of the President’s decision, namely that “The decision reflects my view that your research productivity is low and that you do not meet the test of ‘sustained and productive scholarly activity’ nor is there evidence that there is potential to meet this goal.” That basis, it argues, is key.

The University notes that Article 5.05(a) refers to “scholarly achievements”, which it submits is different than “scholarly activity”. It submits that the external referees are not
asked to measure “scholarly activity”. More particularly, the University does not cede to the external referees, judgment about the candidate’s productivity. Mr. Jordan, on behalf of the University, correctly acknowledges that the external referees could have helped the University with a portion of the definition of scholarly activity, namely with respect to the “quality and significance” of the research; but not with respect to productivity. The University further submits that the opinions of the external referees are not binding on the University.

The University submits that the only material to be sent out is published material. The University argues that the Agreement requires some form of dissemination of the results of the scholarly activity. It notes that under Article 5.03, the candidate can supplement the file with new information such as “the publication of an additional book or article”.

It is common ground between the parties that it is common for the time lines in the Agreement to be extended. The University submits, however, that supplemental material does not get sent to external referees.

ANALYSIS AND DECISION

I begin by noting that the Faculty Association raised seven arguments in support of its case. Mr. Black noted in argument that if any one of his arguments succeeds, then the Faculty Association would succeed. I have not set out the facts relating to a number of those arguments. I need only address, and have only set out the facts related to, the University’s failure to have Dr. Preston’s new book appraised by external referees.

The SAC sent Dr. Preston’s file back for reconsideration by the Department and the Faculty in light of the new evidence submitted by Dr. Preston about the completion and the acceptance of his new book for publication. For ease of reference, I again quote the relevant portion of Article 5.05 (a) of the Agreement:
5.05 Departmental Consultation: Letters of Reference

(a) Letters of appraisal from external referees on the quality and significance of the scholarly (including professional, and/or creative) achievements of the candidate shall be obtained when consideration is being given to:

(i) initial appointment at, or promotion to, the rank of Associate Professor or Professor

(ii) tenure;

I note first that the provision uses the word “shall” not “may”. Second, while there is no express definition of “scholarly...achievement” in the Agreement, a completed book accepted for publication falls easily within that language. The SAC sent the file back to the Department and the Faculty precisely because of the new evidence about the completion and acceptance of Dr. Preston’s book. I note that Article 4.03 of the Agreement states in part that: “Evidence of scholarly activity varies among the disciplines. Published work is, where appropriate, the primary evidence” (my emphasis). It does not say that is the only evidence. I need not address whether an incomplete or completed book, not yet accepted for publication, fit within the meaning of scholarly achievement. I do conclude that a completed book accepted for publication clearly falls within the meaning of “scholarly...achievement”. Given that Dr. Preston’s book accepted for publication was a scholarly achievement, under Article 5.05(a) of the Agreement it had to be sent to external referees for appraisal once his file was sent back to the Department.

I note further the SAC’s statement in its informal notes on its deliberation that “it is an undisputed element in the case that the book has now been accepted for publication.” The Dean’s Advisory Committee also decided to think of the book as being accepted for publication. The SAC did not in any way suggest that because the book was not physically published, it did not amount to “scholarly activity”. On the basis of the definition of scholarly activity and Article 4.03, I agree with the SAC’s view, implicit in its sending the file back to the Department, and in the statement which I have just quoted,
that a book need not have already been physically published in order to meet the definition of “scholarly activity”. Dr. Preston’s book had been accepted for publication, and would thereafter be published and disseminated to all those who purchase it. I ask parenthetically: if physical publication of the book were necessary to meet the definition of “scholarly activity”, then why would the SAC have sent Dr. Preston’s file back for reconsideration by the Department and the Faculty? In my view, the SAC was correct not to have felt constrained by the fact that the book had not physically been published just yet. Article 5.03 refers to the publication of an additional book as an example of what can supplement the file. It does not exclude a book accepted for publication. Nor, as suggested above, does Article 4.03 exclude a book accepted for publication. To read the definition of scholarly activity as absolutely requiring the past (as opposed to the impending) dissemination of the results of the scholarly activity, would leave candidates to potentially succeed or fail on the vagaries of a particular publisher’s publishing schedule. I note the following comments by the UBC Appeal Board in Beaudoin, January 10, 1990, at page 4, which while stated in a somewhat different context, offer some guidance in the present circumstances:

...On the other hand, some matters, such as publication, may be delayed by third parties through no fault of the faculty member, and it may seem unfair to ignore them completely when hindsight is more accurate than foresight. (emphasis added)

I conclude that Dr. Preston’s book accepted for publication, assuming it to be of quality and significance, would fit within the definition of “scholarly activity”.

It is common ground between the parties that it is common for the time lines in the Agreement to be extended. The University submits, however, that supplemental material does not get sent to external referees.

In the unusual circumstances of this case, I do not agree with that submission. What was unusual about this case was the fact that the SAC sent the file back for reconsideration by the Department and the Faculty. Having done so, the file was back at the Department
level. At that level, Article 5.05(a) of the Agreement mandates that letters of appraisal from external referees on the quality and significance of the scholarly achievement be obtained.

The University argues that the external referees do not play any role in the judgment of scholarly activity. I note that it correctly acknowledges, however, that appraisals of the external referees could have helped with a portion of the definition of scholarly activity, namely with respect to the quality and significance of the research. The University argues, however, that the external referees cannot help at all with respect to the issue of Dr. Preston’s productivity.

I agree fully that the University has not ceded the judgment of scholarly activity to the external referees. The appraisals of the external referees are one component of the tenure and promotion process. Their judgment is not binding on the University: see Eni, UBC Appeal Board, March 14, 1994, at page 14; and Wade, UBC Appeal Board, November 4, 1993, at page 14.

I do not agree, however, that the external referees have no role to play in the judgment of scholarly activity. As mentioned above, they appraise the quality and significance of the scholarly achievement i.e., the research in question. The importance of the role that the external referees play is well supported by the evidence in the present case. First, I note the views of the majority of the Departmental Tenure Committee as set out in Acting Head Mostow’s recommendation to Dean pro tem Martin-Matthews dated March 6, 2002: “One of the rules followed in the Promotion and Tenure Committee of the Faculty of Arts has been that the views of the referees chosen for a candidate are not set aside unless there is a compelling reason for suspecting a less than objective or careful assessment on the part of the referees”. I also note, parenthetically, its quote from President Piper set out in that report. The majority refers to the external referees as Dr. Preston’s “real peers”. They go on to state: “Certainly, a negative view – the Critique-expressed of one research work not seen by President Piper’s ‘respected scholars in the
field i.e. [Dr. Preston’s true] peers’ because the university did not send that work to them, cannot be a good enough reason to set aside the views of the external referees.”

I note that the minority’s views as set out in that same letter express serious concerns about the quality and impact of Dr. Preston’s new book. Of course, the quality and significance of that book is the very issue that the external referees would have addressed had they been given an opportunity to do so. Dr. Mostow states that “we were without the full degree of external expert opinion on which we usually most depend”.

In Dean pro tem Martin-Matthews’ March 22, 2002 letter to Dr. Wisenthal, she wrote in part that the “department members, while making assessments of the manuscript being written by Prof. Preston, questioned their own ability to adequately assess the merits of the piece, in the absence of external assessment.” Dean pro tem Martin-Matthews testified that the external referees are important. She further testified that they are important at the Department level.

The importance of the external referees’ appraisals is again reflected in the informal notes of the SAC’s deliberation. The SAC specifically notes that “An important piece of positive evidence in the case is the fact that all of the external referees’ letters are favourable.” I note that those referees’ letters are the initial ones that did not appraise Dr. Preston’s new book.

Finally, I note the Wade decision, supra, in which the Appeal Board held:

Counsel for the University pointed out that there is no requirement for referees at all in the Agreement. That said, it is clear that they are used in all tenure cases of which we are aware; and this Department did have a written policy regulating the procedure for obtaining them. It is also clear that they are important; this Board has on a number of occasions required reconsideration on the basis of problems with the letters (e.g. Tomlinson, 1987). However, it is also clear that they are for the information of each level in coming to the decision at that level; while a failure to consider them would be a serious flaw, a failure to agree with them is neither “wrong” nor unreasonable -- whether they are in favour of the candidate, or against. (page 14; emphasis added)
Of course, under Article 5.05(a) of the present Agreement, there is a requirement to obtain the appraisals of external referees.

As set out above, the appraisals of the external referees are an important component of the tenure and promotion process. The very definition of “scholarly activity” requires research of quality and significance. At the Department level, the quality and significance of the scholarly achievement i.e., the research in question must be appraised: Article 5.05(a). The external referees perform that function under that Article.

I agree with Dr. Preston’s testimony that the issues of quality and quantity are linked. Suppose, for example, that a candidate had produced a number of books of very modest quality and significance. In my view, that candidate would not necessarily be a superior candidate to one who produced just one book that was appraised as having immense quality and significance in his or her field. The judgment as to whether Dr. Preston should be granted tenure or promotion, of course, is one for each level at the University, and ultimately for the President, to make. However, in the particular circumstances of this case, each level should have had the benefit of the external referees’ appraisals of Dr. Preston’s new book when making that judgment.

In summary to this point, external referees’ appraisals of research or scholarly achievement is important. In the particular circumstances of this case, the failure to obtain them with respect to Dr. Preston’s new book was a procedural error within the meaning of the Agreement. More particularly, in the particular circumstances of the present case, the University failed to follow the required procedure set out in Article 5.05(a) of the Agreement. Those circumstances are that 1) the SAC sent Dr. Preston’s file back for reconsideration by the Department in light of the new evidence submitted by Dr. Preston about the completion and the acceptance of his new book for publication and 2) the University then failed to obtain letters of appraisal from external referees that included appraisals of the quality and significance of Dr. Preston’s new book.
The conclusion that, in the particular circumstances of this case, there was a procedural error does not end the matter. The next issue is the one identified in Article 13.07(b) namely whether (i) I am satisfied the error has not resulted in a wrong decision or whether (ii) the error may have resulted in a wrong decision. The same language of Article 13.07(b) was considered in *UBC v. UBC FA (Dodek)* (Award No. A-48/97, February 4, 1997, Kelleher, Q.C.). Arbitrator Kelleher (as he then was) addressed the language of Article 13.07(b) in the following terms: "We are directed to dismiss the appeal only if we are satisfied that the error has not resulted in a wrong decision. The significance of this change is this: we must be able to make a positive finding that the error made no difference to the decision." (p. 8, Quicklaw version).

The University argues in the present case that President Piper’s recommendation was essentially that Dr. Preston’s productivity was low and that the external referees do not have a role to play regarding that issue. Accordingly, regardless of their views on the quality and significance of his new book, that would have had no impact on the President’s decision.

I do not agree. The error in the particular circumstances of the present case was that the University did not obtain letters of appraisal from external referees that included appraisals of the quality and significance of Dr. Preston’s new book. That error, given the importance of external referees’ appraisals, potentially affected every level of consideration by the University. As I have concluded above, the issues of quality and quantity are linked.

Concern was raised about the absence of external referees’ appraisals at the Department level. The SAC also noted that there were no evaluations of the new book from the external referees. Depending on the nature of the external referees’ appraisals of Dr. Preston’s new book, the views of the Department and its Head, the Faculty of Arts and its Dean, and the SAC may have been affected, which in turn may have affected the President’s ultimate decision. Suppose for the purpose of discussion that the external referees’ appraisals of Dr. Preston’s new book are positive. That may change the views
and/or the strength of support expressed by each of the levels below the President. Faced with that, the President's view of the matter may change. In the absence of external referees' letters of appraisal that include appraisals of the quality and significance of Dr. Preston's new book, I cannot be satisfied that the procedural error has not resulted in a wrong decision. The procedural error may have resulted in a wrong decision. More particularly, it may have resulted in a wrong decision on the tenure and promotion criterion of scholarly activity. I note parenthetically, to use Arbitrator Kelleher's test, that I certainly cannot make a positive finding that the error made no difference to the decision.

For these reasons, I reached the conclusion set out at the outset of this decision. The Faculty Association expressly did not ask me to "decide the appeal on the substantive merits" (Article 13.07 (b)(ii)(B). The remedy that I issued follows the terms of Article 13.07 (b)(ii)(A).

Dated at the City of Vancouver in the Province of British Columbia, this 30th day of January, 2004.

[Signature]

Robert Pekeles