IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

("University")

AND:

FACULTY ASSOCIATION OF THE
UNIVERSITY OF BRITISH COLUMBIA

("Faculty Association")

RE:

SENIOR INSTRUCTORS' TENURE
POLICY GRIEVANCE

COUNSEL:

FOR THE FACULTY ASSOCIATION: Allan E. Black, Q.C.
and Michelle Blendell

FOR THE UNIVERSITY: Thomas A. Roper, Q.C.

DATES OF HEARING: May 27, 28, 31, 2007
and June 5, 13, 2007
Vancouver, BC

COLIN TAYLOR, Q.C.
Arbitrator

File: CT2780
I

[1] This arbitration arises out of a grievance filed by the Faculty Association claiming that the University has failed to correctly apply certain provisions of the collective agreement relating to tenure.

[2] The specific issue before me is whether a Senior Instructor who is promoted to the rank of Assistant Professor has tenure at that rank, as the Faculty Association contends, or whether a Senior Instructor so promoted must achieve tenure at the rank of Assistant Professor, as the University contends.

[3] The Faculty Association submits that Senior Instructors hold a tenured position and carry tenure with them if they are promoted to the rank of Assistant Professor: "tenure is tenure is tenure" asserts the Faculty Association. It is undisputed that the rank of Senior Instructor is a tenured appointment. The Faculty Association argues that there is only one type of tenure and having achieved tenure the Senior Instructor may advance in rank to Assistant Professor without serving a second pre-tenure period at that rank.

[4] In contrast, the University submits that a tenured Senior Instructor does not carry over tenure into the position of Assistant Professor. It contends that tenure must be obtained in the rank of Assistant
Professor while tenure as a Senior Instructor would be retained.

[5] It is the University's position that there are two distinct streams (Instruction and Professorial) and that tenure in one does not constitute tenure in the other. It argues that the tenured position in the instructor stream is Senior Instructor while tenure in the professorial stream is achieved within the probationary rank of Assistant Professor or if granted tenure at the Associate or Professor ranks.

[6] The Faculty Association submits that while there are two tracks to obtaining a tenured appointment, there is only one type of tenured appointment. It argues that there are not different types of tenured appointments for faculty members in the instructor ranks and those in the professorial ranks. It follows, asserts the Faculty Association, that Senior Instructors promoted to the rank of Assistant Professor continue to hold full tenured appointments and are not required to serve a second pre-tenure period at the rank of Assistant Professor.

II

[7] What is tenure? This question has been addressed by a number of respected authorities. In American
Association of University Professors, Bloomfield College Chapter v. Bloomfield College (1974), 332 A.R. 2d 846 (Superior Court of New Jersey, Chan. Div), the Court said this at pages 853-854:

Although the concept of academic tenure does not lend itself to perfect legal classification, its functional meaning within the present context is sufficiently clear for purposes of application. It is based upon principles identical to those recited in the historic 1940 “Statement of Principles” promulgated by the American Association of University Professors and endorsed at various times by 85 colleges and professional associations through the year 1973 ...

As recited in the Bloomfield College “Policies” and in the 1940 “Statement of Principles”, “Tenure is a means to certain ends: specifically (1) Freedom of teaching and research and of extra mural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability.” Practice undoubtedly varies from one institution to another, but under the “Statement of Principles” and the “Policies”, tenure does not “automatically” arise. It is conferred after the faculty member has passed through a probationary period during which his qualifications are examined by his peers and the administration. Thus, it is only after a demonstration of professional competence that the faculty member arrives at a status where he will be free of outside pressures and influences that might interfere with the conduct of his research, his interpretations and his investigations, or lead him to compromise the search for truth in his discipline and in transmitting it to his students. Although academic tenure does not constitute a guarantee of life employment, i.e. tenured teachers may be released for “cause” or for reasons of the kind here involved, it denotes clearly defined limitations upon the institution’s power to terminate the teacher’s services.

... the concept [of tenure] is the product of historical experience and long debate. Its adoption is not merely a reflection of solicitude for the staffs of academic institutions, but of concern for the general welfare by providing for the benefits of uninhibited scholarship and its free dissemination. The security provided therefore by the consensus of learned authority should
not be indifferently regarded. It should be vigilantly protected by a court of equity except where, under agreed standards stringent to the point suggested by phrases such as "financial exigency," "drastic retrenchment," and "demonstrable bona fide," the survival of the college is imperiled.

[8] The Ontario High Court of Justice, Divisional Court, had occasion to consider the concept of tenure in Association of Professors of the University of Ottawa v. University of Ottawa et al, (1978), 84 D.L.R. (3d) 576, involving a denial of tenure. The Court said:

In deciding in favour of granting tenure the university makes a significant commitment to the individual faculty member. It is in the nature of a university appointment that a faculty member is virtually free from supervision. This is in part due to the impossibility of constantly monitoring and assessing the work of an academic and, in larger part, due to the notion of academic freedom. For these reasons the granting of tenure represents a high degree of trust in the faculty member and it is only upon being satisfied that this trust is warranted that the university will grant tenure. It is no doubt precisely because the granting of tenure entails a long term commitment without close supervision and review that such a long probationary appointment (as compared to the length of probationary appointments in industry) is required. (page 6, QL)

[9] The Supreme Court of Canada also considered tenure in its decision with respect to mandatory retirement in McKinney v. University of Guelph, [1990] 3 SCR 229:

... By and large, members of a faculty begin their careers in university in their late 20's to mid-30's and with retirement age of 65 this means that they continue on staff for some thirty to thirty-five years. During this period, they must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmarks of a university. Tenure
provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. Rigorous initial assessment is necessary as are further assessments in relation to merit increases, promotion and the like. But apart from this, and excepting cases of flagrant misconduct, incompetence or lack of performance, strict performance appraisals are non-existent and, indeed, in many areas assessment is extremely difficult. In a tenured system, then, there is always the possibility of dismissal for cause but the level of interference with or evaluation of faculty members’ performance is quite low. The desire to avoid such evaluation does not, as I see it, relate solely or even principally to administrative convenience. Rather, the desire is to maximize academic freedom by minimizing interference and evaluation ...

The general situation is well stated by the Court of Appeal, at p.54:

The policy of tenure in university faculties is fundamental to the preservation of academic freedom. It involves a rigorous assessment by one’s peers of academic performance after a probationary period of up to five years. Once tenure is granted, it provides a truly free and innovative learning and research environment. Faculty members can take unpopular positions without fear of loss of employment. It provides stability of employment, because once an academic is found worthy of tenure by his or her peers, he or she can be assured of keeping that position until death, or the normal age of retirement, unless there is termination for cause following a properly conducted hearing before one’s peers. This is based usually on gross misconduct, incompetence, or persistent failure to discharge academic responsibilities. Collegial governance is also a safeguard of academic freedom ...(para.62)

[10] Finally, the hearing panel in University of St. Michael’s College v. Richardson, 1994, unreported, described tenure as follows:
A professor with tenure may be dismissed prior to reaching the age of retirement only for serious misconduct, incompetence or incapacity, and only after a hearing has been held. The justification for tenure is to free professors from the fear that they may be dismissed or otherwise disciplined by their employer for vigorously pursuing ideas in their research and teaching that may be regarded as dangerous, misguided, or irrelevant to the perceived needs of society. Without this protection, it is believed, universities would be unable to discharge their essential functions: challenging conventional wisdom with new knowledge and insights, and enhancing students’ understanding and their capacity for independent and critical thought. (para. 21)

[11] While the question of tenure has never been free of healthy controversy, the merits of that debate do not inform this dispute. There is no disagreement between the parties with respect to the concept and importance of tenure. The University takes no issue with the Faculty Association’s strong and defensible position on the importance of tenure: security of employment and freedom to pursue scholarly activity and research notwithstanding that such pursuits might stir controversy or be offensive to some.

[12] Tenure is a matter of contract. How a member of the faculty gets tenure and to what extent it guarantees security of employment is a matter of negotiated agreement between the parties. Practice undoubtedly varies from one institution to another but it is important to emphasize that while the importance and concept of tenure underscores the significance of the case, this dispute, in the legal sense, is not about the importance and concept of tenure. The
University takes no issue with the Faculty Association's vigorous emphasis on the importance of tenure to professional excellence and the quest for truth. This dispute is governed by contract - the collective agreement between the parties with a term of July 1, 2006 to June 30, 2010. I turn next to review the relevant provisions of that agreement.

III

[13] The Agreement on Conditions of Appointment for Faculty (hereafter referred to as the "Agreement") is contained within the collective agreement referred to in paragraph 12 hereof. For the purposes of this dispute, the relevant provisions of the Agreement are Articles 2, 3, 4, 5 and 9. A copy of those provisions are attached as Schedule "A" to this Award.

[14] Article 2 of the Agreement deals with "Types of Appointments"; Article 3 deals with "Titles and Ranks". Article 4 sets out "Criteria for Appointment, Reappointment, Tenure and Promotion" while Article 5 deals with "Procedures" for such appointments. Article 9 covers "Periodic Review for Promotion".

[15] Article 2 identifies "Types of Appointments". There are three:
2.02 - Term Appointments without Review
2.03 - Term Appointments with Review
2.04 - Tenured Appointments.

[16] Article 2.01 makes clear that they are the only types of appointment a faculty member may hold at the University and that every appointment must specify the nature of its term. While it is the case that ranks in the professorial stream can have different terms of appointment (tenure or not), that is not the case for the instructor stream. Instructor I is not a tenurable rank. Senior Instructor is, by definition, the tenured rank in this stream.

[17] Tenured appointments are defined as:

... full-time appointments except when the University and a faculty member have agreed to change a full-time tenured appointment to a part-time tenured appointment. They cannot be terminated before normal retirement age except in accordance with Article 10 below or for financial exigency or redundancy. Termination for financial exigency or redundancy shall be in accordance with any applicable criteria and procedures established under Article 12 below.

[18] The teaching ranks begin with Instructor I (Article 3.02) which can lead to the tenured position, Senior Instructor. The professorial ranks begin with Assistant Professor (Article 3.05), followed by Associate Professor (Article 3.06) and, finally, Full Professor (Article 3.07).
[19] An Instructor II is a temporary tenure track position in the professorial stream which a faculty member can hold before moving to a professorial rank (Article 3.03). In practice, this move is to the rank of Assistant Professor (tenure track).

[20] An Instructor I (Article 3.02) is appointed because of his or her teaching ability and is "not expected to qualify in due course for promotion to a professorial rank." In the fifth year of appointment as an Instructor I, the incumbent must be considered for tenure which, if awarded, results in an appointment as Senior Instructor. An Instructor I may be reviewed for tenure earlier than the fifth year.

[21] Senior Instructor is the "tenured appointment" which is "not expected to proceed through the professorial ranks". Article 3.04:

Senior Instructor

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

[22] If an Instructor I is appointed to the professorial rank in the pre-tenure period leading to Senior Instructor, the pre-tenure period for the professorial rank commences with appointment to that rank (Article 3.02).
[23] Article 4.01(b) provides that appointment as an Instructor I is based principally on teaching performance and secondarily on service. Scholarly activity is not a consideration. Instructors I who are candidates for a tenured appointment, i.e. Senior Instructor, "are judged on the ground of excellence in teaching". Article 5.05(a) provides that external referees are not required on a tenure decision for Senior Instructor since it is teaching which is being assessed.

IV

[24] The criteria for appointment to Assistant Professor are completion of academic qualifications and evidence of ability in teaching and scholarly activity (Article 3.05(a)). For appointment at or promotion to this rank, "it is sufficient to show potential to meet these criteria". It follows that Senior Instructors may be appointed to this rank if they show potential to meet the scholarly activity criteria. Teaching is not an issue because to achieve tenure as Senior Instructor, they must be excellent teachers.

[25] The threshold test for promotion to the rank of Assistant Professor from Senior Instructor was considered by Arbitrator Gordon in University of British
Columbia v. Faculty Association of the University of British Columbia (Chiu-Duke grievance), [2005] B.C.C.A.A.A. No. 66. At para. 89, the arbitrator held that it was sufficient to show:

"... a minimal level of participation in, or quantity of, scholarly activity ... I find the parties intended the level of participation in, or quantity of, scholarly activity for promotion to Assistant Professor to be relatively low or small..."

Arbitrator Gordon went on to conclude "that the parties' agreement to the words 'involved in scholarly activity' in section 3.05 expresses an intention to require a low level of participation in, or small quantity of, scholarly activity..." (para. 90)

[26] Appointment as an Instructor II also requires evidence of "potential ability in teaching and research" (Article 3.03). This rank accommodates individuals who have yet to complete academic qualification, sometimes referred to as "ABD" (All But Dissertation) meaning that they have completed doctoral studies save for their dissertation.

[27] The Instructor II appointment is a temporary position leading to an appointment in the professorial ranks. Unlike the Instructor I appointment, if the Instructor II is appointed to a professorial rank, the pre-tenure period in that rank begins at the start of the appointment as Instructor II (Article 3.03).
V

[28] An Assistant Professor can achieve tenure in one of two ways under Article 2.03(f)(i) and (ii) of the Agreement:

(i) if the Assistant Professor is promoted to Associate Professor at any time before or in the seventh year

(ii) if a recommendation is made in the seventh year "to grant a tenured appointment at the rank of Assistant Professor."

[29] Article 3.05(c) provides that an award of a tenured appointment at the rank of Assistant Professor will be made in accordance with Article 2.03. The award of a tenured Senior Instructor appointment is made pursuant to Article 3.04.

[30] While appointment at, or promotion to, the rank of Assistant Professor requires the potential to meet the teaching and scholarly activity criteria (Article 3.05(a)), tenure at this rank requires demonstrated competence in both teaching and scholarly activity (Article 4.01(a)), and demonstration that the candidate has "maintained a high standard of performance in meeting the criteria set forth below ..." [Teaching, Scholarly Activity and Service]. Tenure in the
professorial ranks is a much higher standard than the standard for promotion to Assistant Professor: *University of British Columbia v. Faculty Association of the University of British Columbia (Chiu-Duke grievance)*, supra.

[31] A further demonstration of this difference is found in Articles 3.05(c) and 4.01(a) which deal expressly with Assistant Professors and provide that where a candidate for tenure as an Assistant Professor does not meet the criterion of scholarly activity but is an excellent teacher, the candidate may be given a tenured appointment as Senior Instructor.

[32] The process for considering tenure and the criteria for granting tenure, as a Senior Instructor, are governed by Article 2.03 except (f), Articles 3.02, 3.04 and 4.01(b). The process and criteria for an Assistant Professor are governed by Articles 2.03(f), 3.05 and 4.01(a).

[33] The Agreement provides for appointment to the rank of Associate Professor or full Professor with tenure: Articles 3.06(b) and 3.07(c). There is no similar provision for appointment to the rank of Assistant Professor with tenure. Tenure for an Assistant Professor is governed by Article 2.03(f) i.e. promotion to the rank of Associate Professor, or by meeting the criteria set out in Article 4.01(a).
[34] The criteria for promotion to Associate Professor are equivalent to or beyond the criteria for tenure. Article 3.06(a) provides that promotion:

... 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 Article 4.02, on sustained and productive scholarly activity, on ability to direct graduate students, and on willingness to participate in and participation in the affairs of the Department and the University.

[35] Promotion to the rank of Associate Professor is therefore with tenure. This is the effect of Article 2.03(f) which demonstrates that the standard for tenure in the professorial ranks is lower than the standard for promotion to Associate Professor and Article 3.06 which shows that the criteria for promotion are sufficient for tenure.

[36] Article 3.04 provides for the promotion of a Senior Instructor to a professorial rank. Promotion to the rank of Assistant Professor requires only that potential be shown to meet the criterion of scholarly activity. But tenure at the rank of Assistant Professor requires demonstrated competence in both teaching and scholarly activity and maintenance of a "high standard of performance in meeting the criteria ..." of Teaching, Scholarly Activity and Service: Article 4.01(a). Scholarly activity is assessed on the basis of "quality and significance of an individual's contribution": Article 4.03.
VI

[37] My task is to ascertain what the parties meant by the words they have used; to discover the meaning of what is written in the Agreement so as to give effect to the intention as expressed by the language chosen by the parties to reflect their bargain.

[38] Both parties adopted the principles for the interpretation of a collective agreement enunciated by Arbitrator Germaine in British Columbia and BCGEU, (2003), 122 L.A.C. (4th) 201 at para.23:

... Very briefly, the essential objective of any interpretation is to ascertain the intention of the author of the document. In the case of a collective agreement, that entails the search for the intention of the parties who made the agreement. The primary source of this information is the language used by the parties to express their bargain. For the most part, the words of the agreement are to be given their plain and ordinary meaning having regard to the context in which they are found and the reasonableness of the meaning in light of the practical consequences. A secondary meaning may be preferred if such an interpretation is dictated by the context or the necessity to avoid an absurdity. The Employer relies on the general proposition that “[w]hen faced with a choice between two linguistically permissible interpretations ... arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility and which interpretation would give rise to anomalies” (Brown and Beatty, supra). I accept that proposition as a summary of, or consistent with, the general principles to which I have referred.

[39] Adopting those principles of interpretation, the Faculty Association submits that the plain and ordinary meaning of Articles 2, 3 and 4 of the Agreement
provides that while there are two tracks to obtaining a tenured appointment there is only one type of tenured appointment. There is not, it is argued, one type of tenured appointment for faculty members employed in the instructor ranks and another type of tenured appointment for those in the professorial ranks. It follows, says the Faculty Association, that Senior Instructors promoted to the rank of Assistant Professor carry over the tenure awarded as Senior Instructors and continue to hold full tenured appointments as Assistant Professors. If that is a correct interpretation of the Agreement, then Senior Instructors promoted to Assistant Professor are not required to meet the tenure requirements provided for Assistant Professors by Articles 2.03(f), 3.05 and 4.01.

[40] The Faculty Association submits that Article 2 describes only one type of tenure. It does not establish a type of tenure for the instructor ranks and a second, or different type of tenure, for the professorial ranks. The Faculty Association goes on to emphasize the importance of tenure which once awarded applies equally to all faculty members who obtain it. The evidence is that there is no difference between the characteristics of tenure (security of employment and academic freedom) awarded to a Senior Instructor and that awarded to a member of the professoriate.

[41] Articles 2, 3, 4 and 5, argues the Faculty Association, create a clear distinction between a
faculty member's type of appointment and his or her rank and, given that distinction, there is only one type of tenured appointment. The existence of tenure as a separate concept from rank means, it is argued, that there is no such thing as tenure at a specific rank and there can not be tenure in the instructional ranks and tenure in the professorial ranks: tenure exists separate from rank. It must follow, says the Faculty Association, that a tenured appointment stays with a faculty member as he or she moves through the ranks regardless of whether the change in rank causes the faculty member to remain in either the instructor ranks or the professorial ranks, or whether it causes the member to cross from one type of rank to the other.

[42] The Faculty Association buttresses that argument by pointing to Article 2 which provides for the only types of appointment a faculty member may hold whereas the ranks to which a faculty member may be appointed are contained in a different provision: Article 3. The Faculty Association asserts that the language of Articles 2, 3, 4 and 5 evidence a clear distinction between appointment type and rank leading to the conclusion that the Agreement contemplates only one type of tenure as opposed to instructor rank tenure and professorial rank tenure.

[43] The Faculty Association emphasizes that there is no language in the Agreement providing for review of a tenured appointment. Article 3.04 provides that Senior
Instructors may be promoted to professorial rank. It does not say that such persons are subject to a second review for tenure. The distinction between type of appointment and rank is consistent, argues the Faculty Association, with the concept of tenure: once awarded it can not be taken away.

[44] The "clear distinction between appointment type and rank" submission advanced by the Faculty Association is flawed in this respect: the distinction does not hold in the instructor stream. One cannot be an Instructor I with tenure or a Senior Instructor without tenure. There is no separation between rank and nature of appointment for a Senior Instructor since it is, by definition, a tenured rank.

[45] As to Article 9 and the argument that there is no provision for review of a tenured appointment, the University does not contend that the Agreement provides for a second tenure review of a Senior Instructor. Nor could there be. A Senior Instructor is a self-defined tenured appointment. The University says that the Senior Instructor does not have tenure in the professorial stream and upon promotion to Assistant Professor must qualify for promotion in that stream.

[46] The real point of departure between the parties rests on the University's contention that the Agreement identifies two distinct appointment streams: the teaching ranks and the professorial ranks. It submits
that the Instructor I and Senior Instructor are in the teaching ranks: the Assistant Professor is a professorial rank and Instructor II is a temporary position in the professorial stream. The University says the Faculty Association's submission amounts to a blending of the two streams and avoids the question of how one gets tenure in each of the streams. Thus, upon promotion to Assistant Professor, a Senior Instructor, it is argued, must follow the agreed requirements of the professoriate stream and qualify for tenure in that stream. This, says the University, does not mean that the Senior Instructor loses tenure. He or she retains tenure but in the instructional stream - not in the professorial stream. The Faculty Association says there is only one type of tenure and the Agreement does not require a tenured faculty member to serve a second pre-tenure period and be reviewed for tenure a second time. The University does not agree with that interpretation of the Agreement.

[47] The Faculty Association submits that the Agreement provides for the only circumstances in which a faculty member must serve a pre-tenure period and this holds regardless of a change in rank causing the faculty member to cross from one track to the other.

[48] The Faculty Association asserts that Articles 3.02 (Instructor I); 3.03 (Instructor II); 3.05 (Assistant Professor); 3.06 (Associate Professor) and 3.07 (Professor) all specify the circumstances in which
faculty members at those ranks have to serve a pre-tenure period. The Faculty Association contrasts those provisions with Article 3.04 which makes no mention of a Senior Instructor being required to qualify for tenure upon promotion to Assistant Professor:

3.04 Senior Instructor

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

[49] That Article, says the Faculty Association, simply states that Senior Instructors may be promoted to professorial rank and in contrast to the provisions respecting promotion of Instructors I and Instructors II there is no reference to a pre-tenure period following promotion to the professoriate. It must follow, it is argued, that the parties agreed that a Senior Instructor promoted to the professoriate would not have to serve a pre-tenure period following promotion: his or her tenure would continue as before.

[50] The University responds by pointing out that Article 3.04 is silent as to whether a Senior Instructor ports tenure upon promotion to Assistant Professor and goes on to argue that tenure can not be carried over in these circumstances because there is nothing in the Agreement which authorizes or supports appointment to the rank of Assistant Professor with
tenure. There is such language for Associate Professor (Article 3.06) and Professor (Article 3.07). Moreover, contends the University, Article 2.03(f) expressly provides the only two ways for a faculty member to attain tenure at the rank of Assistant Professor. It does not provide for tenure as an Assistant Professor by reason of being in-bound from a Senior Instructor appointment. The University asserts that the parties have agreed on the only methods by which tenure may be awarded at the rank of Assistant Professor.

[51] As to Article 3.04 and the absence of express language requiring a Senior Instructor to serve a pre-tenure period upon promotion to the professoriate, the University says that in the presence of the express provisions in Article 2.03(f) as to how one attains tenure in the Assistant Professor rank, there is no need for such language in Article 3.04.

[52] The University's reliance on Article 2.03(f) is met by the Faculty Association's rejoinder that Article 2.03 addresses "Term Appointments with Review". The Faculty Association says that a Senior Instructor is a tenured appointment and, as such, Article 2.03(f) can have no application. Article 2.03(d) provides:

Subject to Article 2.03(f), any person holding a term appointment with review is eligible for consideration for a tenured appointment.
[53] Since a tenured faculty member does not hold a term appointment with review, the Faculty Association submits that such persons are not eligible for consideration for (borrowing from the University's submissions) a tenured professorial appointment.

[54] The Faculty Association argues that Article 2.03(e) makes clear that the review for tenure occurs in respect of a person holding a term appointment with review, not in respect of a person already holding a tenured appointment, even if the tenured appointment, according to the University's argument, is an "instructor rank tenured appointment". Article 2.03(f) is the exception to Article 2.03(e) in terms of the timing of the review for tenure of a faculty member holding a term appointment with review:

(f) In the case of an Assistant Professor

(i) if at any time before, or if in, the seventh year of service an Assistant Professor is promoted to the rank of Associate Professor, a tenured appointment will also be granted.

(ii) If an appointee is not granted a tenured appointment pursuant to (i) 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.

[55] The Faculty Association submits that language can not apply to an Assistant Professor who is promoted to that rank from the rank of Senior Instructor and who,
in the University's view, continues to hold an instructor rank tenured appointment. The words "or not to renew the appointment" in the last line of Article 2.03(f)(ii) make it clear, says the Faculty Association, that the person being reviewed has a term appointment with review, not a tenured appointment. Moreover, it is argued, an Assistant Professor who was previously a Senior Instructor would have more than seven years of service at the time of promotion to Assistant Professor such that even if Article 2.03(f) applied to him or her, promotion could not occur before or in the seventh year of service since it takes a minimum of five years to become a Senior Instructor (Article 3.02) and usually takes at least a further five years to be promoted from that rank to Assistant Professor (Articles 9.02 and 9.03).

[56] In further support of its submission, the Faculty Association points to Article 2.03(g), (h) and (i), all of which reference term appointments with review and argues that no part of Article 2.03 applies to an Assistant Professor who was formerly a Senior Instructor because that Article applies only to term appointments with review and such a faculty member would not have a term appointment with review. He or she would, asserts the Faculty Association, to use the words of the University, hold an "instructor rank tenured appointment." "The provisions in Article 2.03(f) for review for promotion to Associate Professor
and for review for tenure just would not apply”, argues the Faculty Association.

[57] The Faculty Association submits that the Agreement sets out the only circumstances in which a faculty member is required to serve a pre-tenure period and there are no provisions requiring a Senior Instructor to serve a second pre-tenure period following promotion to Assistant Professor. It follows, argues the Faculty Association, that the absence of provisions requiring a former Senior Instructor to serve a second pre-tenure period must mean that there is only one type of tenure under the Agreement.

[58] The University does not take the position that it can review a Senior Instructor for tenure. The Senior Instructor is a tenured position. The University asks: when the promotion occurs is it to anything other than a tenure track Assistant Professor? The University contends that, unlike Associate or Full Professors, there is no provision in the Agreement which authorizes or provides for appointment to Assistant Professor with tenure. The evidence is that of the 2,627 Assistant Professors hired since 1972, only one, Dr. Ross King, was appointed to the Assistant Professor rank with tenure. The documentation shows that his case was extraordinary and to that extent was anomalous.

[59] The University submits that a Senior Instructor is promoted to Assistant Professor with review. Senior
Instructors have tenure. On promotion to Assistant Professor, the University argues they go to a different stream - one which calls for an appointment with review; the Agreement, it is urged, does not provide for appointment to Assistant Professor with tenure. It does for Associate Professor and Professor. It follows, says the University, that promotion is to a tenure track Assistant Professor.

[60] The Faculty Association suggests that the University's position "leads to an absurdity" since the Agreement does not provide for review of a tenured faculty member for tenure. This assertion takes the argument back to its real point of departure. The University does not say that a Senior Instructor is reviewable for tenure. It says a Senior Instructor has tenure at the Senior Instructor rank. Upon promotion to Assistant Professor, the University asserts that the Senior Instructor leaves that stream and enters the professorial stream and is subject to the provisions which govern all appointments to Assistant Professor: Articles 2.03(f), 3.05 and 4.01.

[61] The Faculty Association submits that Article 3.05(b) refers to a faculty member's initial appointment to the University at the rank of Assistant Professor:

3.05 Assistant Professor
b) Initial appointments at this rank are normally for a term of three years, but in exceptional circumstances may be for a lesser period. Renewal of an individual's appointment is for a term of three years. If an additional renewal is granted, it is for two years.

It is argued that this could not apply to Assistant Professors who previously held the rank of Senior Instructor because their initial appointment at the University was not at the rank of Assistant Professor and the former Senior Instructor would not hold a term appointment with review.

[62] The difficulty with that argument is that Article 3.05 is concerned with Assistant Professors and (b) says "initial appointments at this rank" are normally for three years. The University relies upon this together with Article 2.03(f) to support its position that appointment or promotion to Assistant Professor is a tenure track appointment.

[63] The Faculty Association accepts that Article 4.01(a) and (b) set out different criteria by which faculty members in the professoriate and faculty members in the instructor ranks may obtain tenure. Thus, there are two paths to tenure. This, however, does not, in the Faculty Association's view, mean that there are two types of tenured appointments.

[64] Article 4.01(a) sets out criteria for an award of tenure to a faculty member in the professoriate and (b)
sets out separate criteria for an award of tenure to a faculty member holding the rank of Instructor I. This, submits the Faculty Association, must be read in the context of the whole of the Agreement and does not lead to the conclusion that the parties have agreed on two types of tenured appointments. It reiterates its reliance on Article 2 which specifies only one type of tenured appointment; the distinction between appointment type and rank and the express requirements for serving a pre-tenure period which do not include persons already holding a tenured appointment. Moreover, it is argued, there are no provisions for review of a faculty member with a tenured Senior Instructor rank who is promoted to Assistant Professor.

[65] The University relies on what it submits is the clear language of Article 4.01(a) and (b) which it asserts provides two paths to tenure - one in the professorial stream and one in the instructor stream. It is argued that Article 4.01 is the clearest evidence that the parties' Agreement provides for two distinct appointment streams and that tenure for one is not tenure for both. The University says that Article 4.01 answers the question "tenure as what?" Tenure in the instructional ranks or tenure in the professorial ranks. The University does not suggest that the concept and importance of tenure is different between the two streams; it says the process for considering tenure and the criteria for granting tenure is different as between the two streams.
The Faculty Association asserts that the very nature of tenure is such that clear language is necessary before limits can be placed on its application to a faculty member. It submits that it would require specific language in order to interpret the Agreement as providing that when tenure is granted to a faculty member of instructor rank, the tenure is of a limited nature and the faculty member must serve a second pre-tenure period and qualify for a different type of tenure following promotion to the rank of Assistant Professor. The Faculty Association submits that such an interpretation would require language in the Agreement expressly creating two types of tenure in Article 2.04; words in Article 2.04 providing for review of the record of a faculty member with instructor rank tenure for a grant of professorial rank tenure similar to those contained in Article 2.03(f) in respect of an Assistant Professor with a term appointment with review; words in Article 2.04 specifying that if the Assistant Professor with instructor rank tenure is unsuccessful in achieving "professorial rank tenure", he or she will revert back to the rank of Senior Instructor. The Faculty Association suggests it would be an absurd result if a Senior Instructor who achieves promotion to Assistant Professor retains "instructor rank tenure" and then has to serve another pre-tenure period and apply for "professorial rank tenure" which provides no different or better benefits than "instructor rank tenure" in
terms of academic freedom and job security. The Faculty Association also says the University's position is absurd in that if the Assistant Professor does not achieve "professorial rank tenure", he or she also loses the rank of Assistant Professor for which he or she has already qualified.

[67] The University does not take the position that a Senior Instructor has tenure of a "limited nature" and must serve a second pre-tenure period and qualify for a "different type of tenure" following promotion to the rank of Assistant Professor. The University does not differentiate between the concept and characteristics of tenure — security of employment and academic freedom — in the instructor ranks and the professoriate. Nor does the University say that a Senior Instructor must serve a second pre-tenure period. What the University does say is that tenure attained as a Senior Instructor is obtained on the basis of a process and criteria which is different from the process and criteria for obtaining tenure at the rank of Assistant Professor. The University does say that because of this difference a Senior Instructor promoted to Assistant Professor does not port tenure. He or she must obtain tenure according to the process and criteria dictated for the rank of Assistant Professor. The University does not say there are two types of tenure. It says there is a process and criteria for obtaining tenure in the instructor ranks and a different process and criteria for obtaining tenure in the professoriate and because
of this difference, the Senior Instructor does not port tenure when promoted to the rank of Assistant Professor. The University submits that Article 4.01 confirms that tenure for one stream is not tenure for both streams because of the different standards.

[68] The University does not say that a Senior Instructor loses tenure following promotion to Assistant Professor. The University submits that tenure is retained in the instructional stream but that the Agreement requires the Senior Instructor promoted to Assistant Professor to qualify for tenure at the rank of Assistant Professor. The University emphasizes that promotion to the rank of Assistant Professor requires only the potential to meet the teaching and scholarly activity criteria whereas tenure at this rank requires demonstrated competence in both teaching and scholarly activity and demonstration that the candidate has maintained a high standard of performance in meeting the stipulated criteria. Tenure in the professorial ranks is a much higher standard than the standard for promotion to Assistant Professor: University of British Columbia v. Faculty Association of the University of British Columbia (Chiu-Duke grievance), supra.

[69] It follows, argues the University, that a Senior Instructor promoted to Assistant Professor by demonstrating potential to meet the teaching and scholarly activity criteria must then, over the next 5 to 7 years, demonstrate that he or she has met the
qualifications for tenure at the rank of Assistant Professor. If tenure is not attained, the candidate continues to have tenure as a Senior Instructor. That, argues the University, does not amount to an absurdity. It simply means the candidate failed and reverts to his or her former position. It might, however, be argued contends the University, that an anomaly results from someone who gets to the rank of Assistant Professor on potential and has tenure without demonstrating the standard of scholarly activity which the Agreement says is required for tenure at the rank of Assistant Professor.

VII

[70] Both parties rely upon what they consider to be the clear and unambiguous language of the Agreement. Nonetheless, the Faculty Association adduced evidence of bargaining history and past practice which it submits is consistent with the plain meaning of the Agreement that there is only one type of tenure and that a Senior Instructor promoted to the rank of Assistant Professor is not subject to review for "professorial rank tenure" as contended by the University.

[71] The starting point with respect to the admission of extrinsic evidence is University of British Columbia and
Canadian Union of Public Employees, Local 116, (1977), 1 Can. L.R.B.R. 13 (Weiler) in which the Board directs arbitrators to read disputed language together with any extrinsic evidence which is presented to persuade the arbitrator of the proper interpretation of the written contract.

[72] The Board in UBC described the task of the arbitrator as being to:

... decipher the actual intent of the parties lurking behind the language which they used: and not rely on the assumption that the parties intended the 'natural' or 'plain' meaning of their language considered from an external point of view.” (p.16)

[73] Extrinsic evidence may not be used to defeat language where the intention of the parties is made clear. This point was reaffirmed by the British Columbia Labour Relations Board in Nanaimo Times Ltd. and Graphic Communications International Union, Local 525-M, BCLRB No. B40/96:

If the arbitrator decides, after considering both the collective agreement language and the extrinsic evidence, that there is no doubt about the proper meaning of the clause in question, the arbitrator then reaches an interpretive judgment without regard to the extrinsic evidence. See Pacific Press Ltd., BCLRB No. B97/94 (upheld on reconsideration BCLRB No. B427/94) where the Board concluded that after considering the extrinsic evidence and finding the language of the collective agreement to be clear, the arbitrator did not need to (and would not be entitled to) resort to extrinsic evidence as an aid to interpretation. This amounts to the arbitrator effectively concluding: “I have considered all of the evidence, both the collective agreement and that which is extrinsic to the
agreement, and conclude that what the language means is what it appears to mean to me on the first reading."

On the other hand, if an arbitrator concludes that when the language of the collective agreement is considered with the extrinsic evidence, there is some doubt about the meaning of the provision in dispute, the arbitrator is entitled to use extrinsic evidence to resolve the ambiguity or doubt, even in the face of collective agreement language that appeared clear when read in isolation: Finlay Forest Industries Ltd., BCLR No. B137/94. However, even in these circumstances, an arbitrator is not bound to base his or her decision on the extrinsic evidence simply because the language is somewhat equivocal. The arbitrator is trying to decipher the meaning which the parties mutually intended for the disputed contract language, and should not forget the actual language in concentrating on a mass of extrinsic evidence: U.B.C. (pp.8-9)

[74] Arbitrator Hope, in Re Board of School Trustees of School District No.43 (Coquitlam) and Canadian Union of Public Employees, Local 561, (1988), 1 L.A.C. (4th) 301, expressed his understanding of the interpretive principles enunciated in UBC this way:

... while an arbitrator should receive and consider extrinsic evidence in the initial examination of the language, the language remains the primary interpretive resource and extrinsic evidence will not be permitted to overcome language that is clear in its meaning. (p.313)

[75] The Faculty Association introduced evidence of bargaining history intended to show that its reliance on the separation between rank and appointment type has existed in every collective agreement negotiated by the parties and may be found as early as the 1967 Faculty Handbook. The Faculty Association led evidence arising from statements in previous Faculty Handbooks and
collective agreements intended to demonstrate that a Senior Instructor promoted to Assistant Professor retains tenure and that faculty members have been required to serve only one pre-tenure period. The Faculty Association submits that the evidence of bargaining history does not raise an ambiguity as to the correct interpretation of the Agreement.

[76] Likewise, the Faculty Association submits that the evidence of past practice does not raise an ambiguity in the sense discussed in Nanaimo Times, supra.

[77] The past practice evidence is that in the past 30 years, six faculty members were promoted from Senior Instructor to Assistant Professor. The parties disagree as to whether those persons were reviewed for tenure at the rank of Assistant Professor. The Faculty Association says there was no pre-tenure review. The University says those cases are ambiguous as to the basis upon which the promotion decisions were made because of the involvement of the Senior Appointments Committee which is intended to review only appointments at or promotion to the ranks of Associate Professor and Professor and tenure decisions.

[78] The University also takes the position that the past practice of the parties is not a "practice" within the meaning of the case authorities and, even if it was, it was terminated by proper notice given by the
University at the commencement of the last round of collective bargaining.

[79] I do not find it necessary to resolve the legal issues arising out of the introduction of extrinsic evidence.

[80] The extrinsic evidence does not provide any basis for concluding that the language of the Agreement should be given any meaning other than its plain and ordinary meaning. Extrinsic evidence must be applied for the purpose of resolving a doubt and not to create a doubt when the language of the Agreement presents no real difficulty.

VIII

[81] The Agreement is clear that the process for considering tenure and the criteria for granting tenure, as a Senior Instructor, are different than the process and criteria for an Assistant Professor. Instructors are governed by Articles 2.03 except (f), 3.02, 3.04 and 4.01(b). Assistant Professors are governed by Articles 2.03(f), 3.05 and 4.01(a).

[82] To give effect to the Faculty Association's submission would mean that notwithstanding the fact that the parties have reached an Agreement providing
for two distinct appointment streams and notwithstanding the different process and criteria, tenure granted in the instructor stream would carry over to tenure in the professorial stream. Yet, an Instructor I achieves the tenured position of Senior Instructor on an entirely different basis than tenure may be achieved in a professorial rank.

[83] The award of a tenured Senior Instructor appointment is made pursuant to Article 3.04. It is for those individuals "not expected to proceed through the professorial ranks." It is "judged on the ground of excellence in teaching". External referees are not required on a tenure decision for Senior Instructor because only teaching is being assessed: Article 5.05(a).

[84] In contrast, tenure at the rank of Assistant Professor requires demonstrated competence in both teaching and scholarly activity (Article 4.01(a)), and demonstration that the candidate has "maintained a high standard of performance in meeting the criteria set forth below..." [Teaching, Scholarly Activity and Service]: Article 4.01(a). Unlike Senior Instructors, external referees are consulted on tenure decisions for professorial ranks because the quality and significance of scholarly activity is being assessed (Article 4.03).

[85] In Bloomfield College, supra, the Court said:
... [tenure] is conferred after a faculty member has passed through a probationary period during which his qualifications are examined by his peers and the administration. Thus, it is only after a demonstration of professional competence that the faculty member arrives at a status where he will be free of outside pressures and influences that might interfere with the conduct of his research, his interpretations and his investigations ... 

[86] The Supreme Court of Canada in McKinney v. University of Guelph, supra, spoke of the "rigorous initial assessment" which precedes the awarding of tenure. The Ontario Court of Appeal in the same case said:

[Tenure] involves a rigorous assessment by one's peers of academic performance ... 

[87] The rigorous assessment for tenure at the Senior Instructor rank is on teaching. If the Faculty Association is correct, there is no rigorous assessment of the different criteria, i.e. scholarly activity upon promotion of a Senior Instructor to Assistant Professor. Indeed, there is no probation. If that is what the parties agreed, it is not reflected in the language they chose to express their bargain. This case is not about taking tenure away from the Senior Instructor. It cannot be taken away. The issue is whether the parties have agreed that tenure in one stream is transferable to the other stream.
[88] Both parties adopted the approach to collective agreement interpretation put forward by Arbitrator Germaine in *British Columbia and BCGEU, supra*:

... the words of the agreement are to be given their plain and ordinary meaning having regard to the context in which they are found and the reasonableness of the meaning in light of the practical consequences ... and which interpretation would give rise to anomalies...

[89] The plain and ordinary meaning of the Agreement is that there are two distinct appointment streams. The practical consequences of the Faculty Association's interpretation is that a faculty member who is an excellent teacher and has attained tenure on that basis as a Senior Instructor may be promoted to the rank of Assistant Professor without probation and without demonstrating competence in scholarly activity and without demonstrating maintenance of a high standard of performance in meeting the criteria demanded for tenure at that rank. The anomaly would be that someone who has not demonstrated scholarly activity is promoted to the rank of Assistant Professor on the basis of potential but has tenure without demonstrating in a probationary way the required capability. Is that a reasonable interpretation of the Agreement in light of the practical consequences?

[90] Under this Agreement, an Assistant Professor can achieve tenure in only one of two ways (Article 2.03(f)(i) and (ii)):
(i) If the Assistant Professor is promoted to Associate Professor at any time before or in the seventh year

(ii) If a recommendation is made in the seventh year to grant a tenured appointment at the rank of Assistant Professor.

[91] The Agreement makes no provision for a tenured appointment at the rank of Assistant Professor by reason of a Senior Instructor having been promoted to that rank. Article 3.05(c) provides that an award of a tenured appointment at the rank of Assistant Professor will be made in accordance with Article 2.03. The award of a tenured Senior Instructor appointment is made pursuant to Article 3.04. These provisions demonstrate that the tenure process and tenure considerations are different as between Senior Instructor and Assistant Professor.

[92] It is true that Dr. Ross King was appointed to the rank of Assistant Professor with tenure, the evidence being that he is the only one of 2,627 Assistant Professors hired since 1972 with tenure. This single exception out of 2,627 appointments may be said to be the exception which proves the rule that tenure at the rank of Assistant Professor is governed by Article 2.03(f). The documentation reveals the appointment of Dr. King to have been an extraordinary case but in any event the express provisions of Article 2.03(f) do not
provide for appointment to the rank of Assistant Professor with tenure.

[93] The Agreement does provide for appointment to the rank of Associate Professor and Professor with tenure: Articles 3.06(b) and 3.07(c). There is no similar provision for appointment to the rank of Assistant Professor with tenure.

[94] It is true that Article 3.04 is silent with respect to the porting of tenure by a Senior Instructor upon promotion to Assistant Professor. But there is nothing in the Agreement which authorizes or supports appointment to that rank with tenure. In contrast, there is such language for Associate Professors and Professors. Moreover, there is language which requires a tenure review for the rank of Assistant Professor. It provides for a different tenure period and different qualifications for Assistant Professor than for Senior Instructor.

[95] Article 2.03(f) is compelling language. It provides the two ways by which an Assistant Professor may attain tenure. It does not provide an exception for Senior Instructors. While it may be argued that Article 3.04 does not contain language for a pre-tenure period, the fact is that it does not need to do so because Article 2.03(f) does provide such language.
[96] The Faculty Association advanced a vigorous argument based upon the fact that Article 2.03 speaks to term appointments with review. Given the finding that the Agreement provides for two tenure tracks, one for the teaching stream and one for the professorial stream, with distinct and different process and criteria and in the context of the Agreement as a whole, the conclusion must be that the promotion to Assistant Professor can only be a tenure track appointment.

[97] Consideration of Article 4.01 provides compelling support for the University's position. It clearly provides for two paths to tenure. Article 4.01(a) addresses the professorial stream and (b) the instructor stream. This Article answers the question: "tenure as what?"

- candidates for tenure other than those dealt with in (b) are judged principally on both teaching and scholarly activity;

- competence is required in both teaching and scholarly activity but a candidate who does not meet the criterion of scholarly activity but is judged to be an excellent teacher may be given a tenured appointment as Senior Instructor;
• (b) provides that Instructors I who are candidates for a tenured appointment are judged on excellence in teaching.

Thus, if a candidate is unable to demonstrate the necessary qualifications for tenure at the rank of Assistant Professor, he or she may be awarded tenure at the rank of Senior Instructor. Tenure as an Assistant Professor or tenure as a Senior Instructor. Different process, different criteria.

[98] It is instructive to bear in mind the difference between promotion to the rank of Assistant Professor and tenure at that rank. Promotion may be attained by merely demonstrating potential to meet the teaching and scholarly activity criteria (Article 3.05(a)) whereas the standard for tenure is much higher. If a Senior Instructor is promoted to the rank of Assistant Professor, he or she has 5 to 7 years to demonstrate the required standard for tenure. If he or she fails, the candidate still has tenure as a Senior Instructor. In the context of the whole of the Agreement and the finding of two distinct appointment streams with clearly different process and criteria, I respectfully reject the Faculty Association's contention that this constitutes an "absurdity".
[99] The Agreement provides for two tenure tracks, one for the teaching stream and one for the professorial stream:

Instructor I → Senior Instructor
Assistant Professor → Associate Professor → Full Professor

[100] An Instructor I is appointed because of his or her teaching ability and is "not expected to qualify in due course for promotion to a professorial rank."

[101] If an Instructor I is appointed to a professorial rank in the pre-tenure period leading to Senior Instructor, the pre-tenure period for the professorial rank commences with appointment to that rank (Article 3.02). This recognizes that Instructor I’s are on a different tenure track than appointees to a professorial rank. They are on a teaching tenure track leading to the tenured position of Senior Instructor. They are not on a professorial tenure track that leads to tenure as an Assistant or Associate Professor. The pre-tenure period is not transferable upon appointment to a professorial rank. An Instructor I shall be considered for tenure in the fifth year of appointment and if awarded tenure is given an appointment as a Senior Instructor. But if at, say, 4 years, an Instructor I is appointed to a professorial rank that pre-tenure period is not transferable. This
implies that tenure at the Senior Instructor rank does not carry over to the professorial ranks. If the pre-tenure period is not transferable, there is no basis to conclude that tenure would transfer.

[102] The two tracks have different appointment criteria: Instructor \(\rightarrow\) Senior Instructor are evaluated on teaching (Article 4.01(b); Instructor II \(\rightarrow\) Assistant Professor must demonstrate potential ability in both teaching and research (Article 3.03).

[103] The tenure track timelines are different: 5 years for Instructor I (Article 3.02) and 7 years for Assistant Professors (Article 2.03(f)).

[104] The tenure considerations are different. Tenure in the professorial stream is based on competence in both teaching and scholarly activity and demonstrated maintenance of a high standard of performance in meeting those criteria: Article 4.01(a). Tenure as a Senior Instructor is based only on excellence in teaching: (Article 4.01(b)).

[105] Scholarship is assessed by external referees in the case of tenure in the professorial ranks, whereas internal letters of appraisal are appropriate for Senior Instructors who are assessed on teaching excellence: Article 5.05.
[106] Where tenure is not awarded to an Assistant Professor, he or she may be given a tenured appointment at the rank of Senior Instructor (Article 3.05(c)) where a candidate "does not meet the criterion of scholarly activity but who is judged to be an excellent teacher" (Article 4.01(a)).

[107] The inevitable conclusion is that the Agreement provides for two tenure streams: one for instructors and one for the professorate. They are different streams with different qualifications and different considerations for tenure. The Faculty Association's interpretation would result in two different tenure standards for Assistant Professors: one standard for those hired in the position of Assistant Professor and another for those promoted to the position of Assistant Professor from Senior Instructor. The Faculty Association's position is not consistent with the language of the Agreement. There are no provisions for a Senior Instructor to be promoted to the rank of Assistant Professor with tenure at that rank - tenure obtained on the basis of teaching excellence only.

[108] In the result, the terms of the Agreement provide that when a Senior Instructor is promoted to the rank of Assistant Professor, that promotion is to a tenure track position. Tenure at the rank of Assistant Professor is then achieved in accordance with the provisions of Article 2.03(f). Senior Instructors promoted to a professorial rank do not port tenure with
them. They retain tenure as a Senior Instructor but do not automatically have tenure as an Assistant Professor. Tenure must be granted at the rank of Assistant Professor (or above) pursuant to the terms of the Agreement. If the candidate does not achieve tenure in the professoriate rank, he or she returns to the rank of Senior Instructor, not through a demotion, but because the application for promotion was unsuccessful and he or she continues in the tenured Senior Instructor position.

[109] The necessary arbitral declarations are hereby made to give effect to this Award.

DATED at Vancouver, British Columbia, this 20th day of August, 2007.

Colin Taylor, Q.C.
AGREEMENT ON CONDITIONS OF APPOINTMENT FOR FACULTY

The University of British Columbia and the Faculty Association of The University of British Columbia have agreed on the following conditions of appointment for faculty members at The University of British Columbia.

Article 2. Types of Appointments

2.01 Every appointment shall be one of the following types. The term of every appointment, and the termination date, shall be clearly stated on the appointment notice received by the appointee.

2.02 Term Appointments without Review

a) Appointments without review are full-time or part-time appointments for a specified limited term. There is no implication that the appointee will be considered for any further appointment of this or any other kind on the expiration of the specified term.

b) Term appointments without review are governed by regulations of the Board of Governors set forth in UBC Policy Number 42.

2.03 Term Appointments with Review

a) Term appointments with review are full-time appointments for a specified term of at least twelve (12) months other than term appointments without review.

b) For the purpose of calculating years of service, all appointments shall be deemed to have commenced on July 1 of the calendar year in which the appointment began.
c) These appointments carry no implication of automatic renewal but imply that the appointee will be considered for further appointment. They are to be reviewed before expiration of the specified term in accordance with the criteria and procedures prescribed below.

d) Subject to Article 2.03(f), any person holding a term appointment with review is eligible for consideration for a tenured appointment.

e) By the end of an appointee's fifth year of continuous service in a term appointment with review, a recommendation must be made to the President either to grant a tenured appointment or not to renew the appointment, except as provided in Article 2.03(f). In exceptional cases a recommendation may be made before the end of the fifth year, or in the case of an Associate Professor or Professor, before the time when it would normally be made; in particular an early recommendation to grant a tenured appointment may be made when a candidate has had academic, professional, or other comparable experience before being appointed by the University.

f) In the case of an Assistant Professor

i) if at any time before, or if in, the seventh year of service an Assistant Professor is promoted to the rank of Associate Professor, a tenured appointment will also be granted;

ii) if an appointee is not granted a tenured appointment pursuant to (i) 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;

iii) during the pre-tenure period an Assistant Professor who has been reviewed for but denied promotion to the rank of Associate Professor has the right of appeal which would normally arise from a decision following a periodic review.
g) A decision not to grant a tenured appointment on the expiry of the maximum period for a term appointment with review will normally be followed by a one-year terminal appointment. If the decision not to grant a tenured appointment is received after December 1 of the academic year following the review year, the period of notice of termination will include one complete academic year in addition to any months remaining in the academic year in which the notice of termination is received. If, however, the current term appointment with review has one year or longer to run at the date of the decision not to grant a tenured appointment, notice of intention not to renew the appointment shall be given at least twelve (12) months prior to termination date of the current appointment and this notice shall be sufficient to comply with Article 7.01 below.

h) The maximum period of a term appointment with review is:

i) in cases of Assistant Professor eight (8) years; and

ii) in cases other than Assistant Professor six (6) years;

The sixth or eighth year, in appropriate cases, shall be the terminal year.

i) No person will acquire a tenured appointment by reason only of holding a term appointment with review that extends beyond the maximum period of such appointments.

2.04 Tenured Appointments

Tenured appointments are full-time appointments except when the University and a faculty member have agreed to change a full-time tenured appointment to a part-time tenured appointment. They cannot be terminated before normal retirement age except in accordance with Article 10 below or for financial exigency or redundancy. Termination for financial exigency or redundancy shall be in accordance with any applicable
criteria and procedures established under Article 12 below.

Article 3. Titles and Ranks

3.01 Every faculty member is either a Lecturer or holds one of the following ranks.

3.02 Instructor I

Appointment to this rank may be made in the case of individuals who are not expected to qualify in due course for promotion to a professorial rank. Appointments and reappointments are normally made for two years but in exceptional circumstances may be made for a lesser period. An Instructor I who is in the fifth year of appointment shall be considered for tenure in that year and if awarded tenure shall be given an appointment as a Senior Instructor.

If a person holding an appointment as an Instructor I is appointed to a professorial rank, service in the pre-tenure appointment in the professorial rank shall be deemed to commence at the date of the appointment to that rank.

3.03 Instructor II

Appointment to this rank requires the completion, or promise of early completion, of academic qualifications and evidence of potential ability in teaching and research. Appointment is for a term of two years. A person will not normally be reappointed as an Instructor II. At the end of the second year of appointment, an appointment may be offered at the rank which would be an appropriate rank or the appointment may not be renewed. The pre-tenure period begins at the start of the appointment as Instructor II.

3.04 Senior Instructor

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

3.05 Assistant Professor

a) Appointment at or promotion to the rank of Assistant Professor normally requires completion of academic qualifications, and evidence of ability in teaching and scholarly activity. Evidence will ordinarily be required to demonstrate that the candidate for an appointment or promotion is involved in scholarly activity, is a successful teacher, and is capable of providing instruction at the various levels in his or her discipline, but it is sufficient to show potential to meet these criteria. The evidence may include the opinion of scholars familiar with the candidate’s work and capability.

b) Initial appointments at this rank are normally for a term of three years, but in exceptional circumstances may be for a lesser period. Renewal of an individual’s appointment is for a term of three years. If an additional renewal is granted, it is for two years.

c) Decisions on the award of tenured appointments are made in accordance with the provisions of Article 2.03. In special cases an Assistant Professor may be given the rank of Senior Instructor and a tenured appointment.

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 Article 4.02, on sustained and productive scholarly activity, on ability to direct graduate students, and on willingness to participate and participation in the affairs of the Department and the University. Promotion to this rank is not automatic or based on years of service and it is expected that some
persons who may be granted tenured appointments will not attain this rank. In exceptional circumstances, initial appointment at this rank may be based upon evidence of the candidate’s potential to meet these criteria, including the opinion of scholars or other qualified persons familiar with the candidate’s work and capability.

b) Initial appointments at this rank are normally for a term of three years, with review, but in exceptional circumstances may be for a lesser period or tenured. Renewal of these appointments that have been made for a term of three years will normally be tenured but if the initial term was made for less than three years, a tenure decision will not usually be made until the appointee is in the third year of service at the rank of Associate Professor.

3.07 Professor

a) Appointment at or promotion to the rank of Professor is reserved for those whose contributions (judged by the criteria as set out in Article 4) are considered outstanding.

b) These persons will have met appropriate standards of excellence and have wide recognition in the field of their interest. They must have shown high quality in teaching and sustained and productive scholarly activity, have attained distinction in their discipline, and have participated significantly in academic and professional affairs. Promotion to this rank is not automatic nor based on years of service and it is expected that some persons will not attain this rank.

c) Initial appointments at this rank may be term appointments or tenured appointments. Renewal of term appointments will normally be made without term.
ARTICLE 4. Criteria for Appointment, Reappointment, Tenure and Promotion

4.01

a) Candidates for appointment, reappointment, tenure or promotion, other than those dealt with in paragraph (b), are judged principally on performance in both teaching and in scholarly activity. Service to the academic profession, to the University, and to the community will be taken into account but, while service to the University and the community is important, it cannot compensate for deficiencies in teaching and in scholarly activity. Competence is required both in teaching and in scholarly activity, provided that a candidate who does not meet the criterion of scholarly activity but who is judged to be an excellent teacher may be given a tenured appointment as 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.

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

c) Judgements of an individual should be made objectively.

d) The decision to grant a tenured appointment shall take into account the interests of the Department and the University in maintaining academic strength and balance but no person holding a term appointment with review shall be denied reappointment or a tenured appointment on the ground that the University has established quotas
in a Department or Faculty for those holding a tenured appointment.

e) A person holding a term appointment with review may be denied reappointment or a tenured appointment on the grounds of financial exigency or redundancy. This shall be done in accordance with any applicable criteria and procedures established under Article 12 below.

4.02 Teaching

Teaching includes all presentation whether through lectures, seminars and tutorials, individual and group discussion supervision of individual students' work, or other means by which students, whether in degree or non-degree programs sponsored by the University, derive educational benefit. An individual's entire teaching contribution shall be assessed. Evaluation of teaching shall be based on the effectiveness rather than the popularity of the instructor, as indicated by command over subject matter, familiarity with recent developments in the field, preparedness, presentation, accessibility to students and influence on the intellectual and scholarly development of students. The methods of teaching evaluation may vary; they may include student opinion, assessment by colleagues of performance in university lectures, outside references concerning teaching at other institutions, course material and examinations, the caliber of supervised essays and theses, and other relevant considerations. When the opinions of students or of colleagues are sought, this shall be done through formal procedures. Consideration shall be given to the ability and willingness of the candidate to teach a range of subject matter and at various levels of instruction.

4.03 Scholarly Activity

Judgement of scholarly activity is based mainly on the quality and significance of an individual's contribution.

Evidence of scholarly activity varies among the disciplines. Published work is, where appropriate, the primary evidence. Such evidence as distinguished architectural, artistic or engineering design,
distinguished performance in the arts or professional fields, shall be considered in appropriate cases.

a) For the scholarship of teaching, scholarly activity may be evidenced by originality or innovation, demonstrable impact in a particular field or discipline, peer reviews, dissemination in the public domain, or substantial and sustained use by others. For example, textbooks and curriculum reform that changed academic understanding or made a significant contribution to the way in which a discipline or field is taught might constitute useful evidence of the scholarship of teaching whereas textbooks or curriculum revision of a routine nature would not.

b) In professional or clinical studies scholarly activity may be evidenced by research on or the creation of:

i) significant applications of fundamental theory or

ii) significant forms and applications of professional or clinical practice.

Work with professional, technical, scholarly or other organizations or with scholarly publications which falls within the definition of scholarly activity may also be considered.

4.04 Service to the University and the Community

This includes service performed for the benefit of Departments, Faculties, Continuing Studies, or other parts of the University (including the Faculty Association), and for professional organizations and the community at large. Such service might include administrative or supervisory work, service on committees and university bodies, all continuing education activity in the community including professional education, special work with professional, technical, scholarly or other organizations or with scholarly publications not falling within the definition of scholarly activity, membership on or service to governmental or public
councils and boards, and other forms of academic, professional, and public service.

Article 5. Procedures for Appointment, Reappointment, Tenure and Promotion

5.01 General Provisions

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

b) The procedures in this section govern initial appointments at the ranks of Instructor I, Instructor II, Senior Instructor, Assistant Professor, Associate professor and Professor; renewal or non-renewal of term appointments with review; recommendations for or against the award of tenure; and promotions.

c) Where there is a joint appointment, procedures and criteria for tenure and promotion evaluation will be clearly laid out at the time of appointment.

d) It is expected that confidentiality will be respected by all those participating in consultations.

5.02 Meetings with the Head

a) At the beginning of the academic year preceding the year in which a faculty member may be considered for promotion under Article 9 below, or will be considered for reappointment, or for tenure, the Head shall meet with the faculty member. The purpose of the meeting is to identify any potential difficulties with the candidature and to assist the candidate with any concerns.

b) When a faculty member is to be considered for promotion under Article 9 below, or for reappointment, or for tenure, the Head shall meet with the candidate before the submission by the candidate of information to be supplied by the candidate. The purpose of this meeting is:
i) to advise the candidate that it is the responsibility of the faculty member to provide an up-to-date curriculum vitae and other relevant information to the Head, prior to a date set by the Head, provided that this date is no earlier than September 1; and

ii) to identify any potential difficulties with the candidature and to assist the candidate with any concerns.

c) The faculty member may bring a colleague to each of the above meetings.

d) At the conclusion of each of these meetings the matters discussed should be recorded in an agreed memorandum. Any concerns or opinions of the Head are his or her own views.

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.

5.04 Departmental Consultation: Committees

a) The Department Head shall consult formally at meetings convened for that purpose with eligible members of the Department in order to ascertain their views and to obtain their recommendation concerning appointment, reappointment, tenure and promotion.

b) Faculty members eligible to be consulted are:
i) In the case of initial appointments, those of a rank equal to or higher than the rank at which the appointment is to be made.

ii) In the case of reappointments and promotions, those higher in rank than the candidate, except that in the case of reappointment of a Professor those holding the rank of Professor are eligible to be consulted.

iii) In the tenure cases, those who are tenured and of equal or higher rank.

c) Consultation shall be achieved through standing committees. These committees shall be composed of all the eligible members of the Department, or of eligible members elected by the eligible members of the Department. Members of faculty from outside the Department may be added to the standing committee when the number of eligible members (not including the Head) is less than three (3). These additional members shall be chosen by the eligible members of the Department and approved by the Dean.

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.
For purposes of clarification, in the case of promotion to Senior Instructor, letters of appraisal do not need to be from external referees.

b) The Head shall solicit letters of appraisal from four referees, of whom at least two shall be taken from a list of names supplied by the candidate. If additional referees are required at any time, the number selected from the list supplied by the candidate shall never be less than the number otherwise selected. If additional referees are required the candidate shall, if need be, provide additional names so that there shall always be one more referee on the candidate's list than the number of referees to be selected from the list.

c) Before selecting prospective referees for consideration the Head shall consult with the departmental standing committee about these referees.

5.06 Departmental Committee: Meetings

a) Consultation shall be conducted according to procedures agreed upon between the Head and the eligible members of the Department and approved by the Dean. The Head shall ensure that each faculty member in the Department is informed of the agreed procedures. The Dean shall collect and maintain an open file of all such procedures.

b) Consultation shall include consideration of all relevant information, including any information submitted by the candidate as provided for in 5.02(b)(i) or 5.03 above, at formal meetings.

c) Members of the departmental standing committee who cannot participate in the consultations may submit opinions in writing to the committee.

d) The Head shall chair the departmental standing committee but shall not vote.

e) Normally, the only material which will be considered is material that has been obtained
following required or other recognized procedures. Material which will not normally be considered includes material solicited by the candidate and unsolicited material such as letters from third parties, faculty members who are not official appraisers, or students. If any material that would normally not be taken into account is considered and it is not supportive of the candidate, the contents of the material shall be revealed to the candidate. The candidate shall be given a reasonable opportunity to rebut or explain the contents, and this rebuttal or explanation shall be added to the file.

f) When serious concerns about the candidacy arises in the departmental standing committee, the Head shall inform the candidate of that fact and the reasons therefore with sufficient particularity to enable the candidate to have a meaningful opportunity to respond either orally or in writing at the option of the committee and to introduce further relevant evidence. The candidate shall be provided with a summary of the referees' opinions, the summary to be prepared by a member of the departmental committee selected by the committee. The summary shall be prepared in such a way that the identities of the referees are not disclosed.

g) The recommendation of the departmental standing committee shall be that of a majority.

5.07 Head and the Department Recommendations

a) When a Department has considered a reappointment, a tenure decision, or a promotion resulting from a periodic review under Article 9 below, the Head shall forward the following to the Dean:

i) the Head's recommendation with the basis for it;

ii) the recommendation, a record of the vote and the full report of the departmental committee;

iii) letters of appraisal from external referees;
iv) unsolicited information from faculty members or students that qualifies for consideration under Article 5.06(e); and

v) information submitted by the candidate pursuant to Article 5.02(b)(i) or 5.03.

b) The Head shall prepare the report of the departmental committee. The report shall contain a full statement of the reasons of the committee including a full statement of the majority and any minority opinions. Before sending the report to the Dean the Head shall circulate a draft to the committee and shall invite comments on the draft.

5.08 Notification of Departmental Recommendations to Candidate

a) In all cases other than an initial appointment, the Head shall, at the time the recommendations are forwarded to the Dean, inform the candidate in writing of the recommendations being forwarded.

b) If the recommendation of either the Head or the standing committee is negative, the Head shall provide detailed and specific reasons in writing for any negative recommendation including respects in which the candidate is deemed to have failed to satisfy the applicable criteria. Where the Head’s recommendation is negative but that of the standing committee is positive the Head shall also provide detailed and specific reasons for the positive recommendation.

c) The Head may provide detailed and specific reasons by giving to the candidate a copy of the recommendation being forwarded to the Dean but if that is done the recommendations shall be modified to the extent necessary to protect the confidentiality required under Article 5.01(d) and to protect the identity of referees.
d) The candidate shall be invited to make a timely response, which shall be added to the file pursuant to Article 5.03.

5.09 Procedures for Institutes, Schools and Faculties without Formal Departments

a) Institutes and similar Academic Units shall follow the procedures consistent with those for Departments.

b) Schools and similar Academic Units shall follow the procedures consistent with those for Departments or Faculties, depending on what is appropriate in the circumstance.

c) In a Faculty not having formal departmental organization, the Dean shall ensure that recommendations for appointments, reappointments, tenure decisions, and promotions are arrived at by procedures and arrangements consistent with those for Departments and Faculties.

5.10 Review by the Dean

The Dean shall review the recommendations received from the Head to ensure that proper procedures have been followed, that all relevant material has been considered, and that recommendations are made consistent with the evidence presented.

In the case of recommendations concerning tenure, promotion or reappointment (when the Dean is considering not recommending in favour of reappointment) the Dean shall consult with an advisory committee. In the case of other recommendations the Dean may consult with an advisory committee.

The advisory committee shall be composed of tenured full professors, one-half of whom shall be elected by the faculty, and one-half of whom shall be selected by the Dean. Heads who are tenured full professors shall be eligible for selection by the Dean. In selecting members of the committee the Dean, having regard to the members who have been elected, shall take into account the need for representation of disciplines within the Faculty, including emerging disciplines and
multi-disciplinary activities, and the need to maintain gender balance.

a) The Dean may request further information from the Head and the departmental standing committee, and may also obtain such further information as is deemed appropriate.

b) The Dean, after considering the advice of the advisory committee, (i) may refer the case back to the Head and the departmental standing committee for reconsideration; or (ii) make a recommendation to the President pursuant to 5.11.

5.11 Dean: Recommendation to the President

a) The Dean shall, except when his or her decision concerning an initial appointment or a promotion not arising out of a periodic review under Article 9 below is negative, forward his or her recommendation to the President together with the recommendations received from the Department.

b) If the Dean’s recommendation is different from either that of the Head or that of the departmental standing committee, the Dean shall inform the President of the reasons for this.

5.12 Dean: Informing the Candidate

a) In all cases other than initial appointments, the Dean shall, at the time the recommendations are being forwarded to the President, inform the candidate in writing of his or her recommendation.

b) If the recommendation of the Dean is negative, in opposition to the recommendation of the Head or the departmental standing committee, or for reasons not raised by the Head or the departmental standing committee, the Dean shall provide detailed and specific reasons in writing to the candidate including the respect in which he or she is deemed to have failed to satisfy the applicable criteria.
c) The Dean may provide detailed and specific reasons by giving the candidate a copy of the Dean's recommendation to the President but if that is done the recommendation shall be modified to the extent necessary to protect the confidentiality under Article 5.01(d) and to protect the identity of referees.

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

5.13 Dean: Informing the Head and Department

If the Dean's recommendation is not in accord with the recommendation of either the Head or the departmental standing committee, the Dean shall inform the Head of this fact and the reasons for it and the Head shall inform the members of the departmental standing committee.

5.14 Review by President

a) All recommendations to the President concerning initial appointments at or promotions to the rank of Associate Professor or Professor, or concerning tenure decisions, shall be reviewed by the Senior Appointments Committee, which is a standing advisory committee established by and making recommendations to the President. The Faculty Association shall nominate a member of the Committee. A Dean whose recommendations are being considered by the committee may participate in the deliberations of the committee but shall not vote on the recommendations.

b) The President may request a further review of a case by the Dean.

c) If the President's decision respecting a candidate is not in accord with the recommendation of a departmental standing committee or the Senior Appointments Committee, the appropriate committee shall be informed of this fact and the reasons for it.
5.15 President: Informing the Candidate

a) Except in the case of initial appointments, the President shall, at the time a decision is made on whether or not a recommendation is to be forwarded to the Board of Governors respecting a candidate, inform the candidate in writing of that decision with a copy to the Faculty Association.

b) If the recommendation of the President is negative, the President shall provide detailed and specific reasons in writing to the candidate including the respects in which he or she is deemed to have failed to satisfy the applicable criteria and send a copy to the Association.

5.16 Arbitration

a) The President’s decision to deny reappointment, tenure, or promotion may be subject to arbitration following the procedures as provided in Article 13 of this Agreement.

b) Upon notice of appeal of a decision by the President to deny reappointment, tenure or promotion, the University will provide a copy to the Faculty Association of the candidate’s file reviewed by the President. The file shall be modified to the extent necessary to protect the confidentiality required under Article 5.01(d) and to protect the identity of referees.

Article 9. Periodic Review for Promotion

9.01

a) A review of the record of each Associate Professor shall be conducted during the fifth year after appointment at or promotion to that rank, and every third year thereafter.

b) A review of the record of each Assistant Professor shall be conducted during the fifth year after appointment at or promotion to that rank, and every second year thereafter.
c) When a review is due under paragraph (a) or (b), the University shall, subject to 9.03 below, refrain from conducting that periodic review if requested to do so in writing by the faculty member concerned.

d) When a faculty member has requested under paragraph (c) that a review not be conducted, the University shall conduct a periodic review in a subsequent year, before the next review is due under paragraph (a) or (b), if requested to do so in writing by the faculty member concerned. Such request shall be made to the Department Head no later than May 15 of the academic year preceding that in which the review is to be undertaken.

e) When a review, undertaken at the request of the faculty member in accordance with paragraph (d), does not result in a promotion, the faculty member concerned shall not be entitled to a further periodic review until the third year (in the case of an Associate Professor) or the second year (in the case of an Assistant Professor) after the year in which the review was conducted.

9.02 A review of the record of a Senior Instructor shall be conducted at his or her request, during the fifth year after appointment at or promotion to that rank, or in subsequent years, provided that such reviews shall not be conducted more frequently than every three years.

9.03 The provisions of this section do not preclude the University from conducting reviews or making recommendations for promotion at any time.