

IN THE MATTER OF AN ARBITRATION

BETWEEN:

LAURENTIAN UNIVERSITY

("the University")

AND:

LAURENTIAN UNIVERSITY FACULTY ASSOCIATION

("the Union")

IN THE MATTER OF:

ALLEGED VIOLATION OF ARTICLE 2.25.1 SELECTION OF PRESIDENT

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE UNIVERSITY:

Michael Kennedy - Counsel

APPEARANCES FOR THE UNION:

David Wright - Counsel

AWARD

The Union grieves in this matter that the University breached article 2.25.1 when it failed to consult with respect to the process to be followed in selecting a new president and in appointing an acting president for a two-year fixed term and in delaying the start of the selection process for a permanent replacement president until July 1, 2018. The past president resigned April 27, 2017. There is no dispute with respect to my authority to hear and determine this matter.

Article 2.25.1 of the collective agreement, which applies to the selection of a president, stipulates as follows:

While retaining the right to appoint Senior Academic Administrators, including the President, the Employer recognises the usefulness and desirability of consultation with Members, Units and Divisions in their selection, and shall follow the selection and appointment procedures that have been approved by the Board of Governors and the Senate. In instances where an outside applicant is being considered for a senior academic appointment, the applicant will normally be offered an appointment according to their qualifications at a rank consistent with the criteria listed under Article 5.20 – Appointment and Renewal.

The procedure for the evaluation and selection of senior academic administrators, as approved by the Board of Governors and as incorporated by reference into the collective agreement under article 2.25.1 reads as follows:

PRESIDENT AND VICE-CHANCELLOR

1. RENEWAL OF APPOINTMENT

At least 18 months prior to the expiry of the term of the incumbent, the Chair of the Board shall determine if the incumbent intends to seek a renewal of the appointment. If the response is positive, the Executive Committee of the Board (including the Senate representatives) shall act as an Evaluation Committee.

a. The Evaluation Committee shall determine within a 3-month period whether or not to recommend renewal. In carrying out its deliberation the committee shall consider the criteria employed by the Presidential Search Committee in its search for the individual, the goals established by the Board and the President during the President's current term and the broad objectives of the University for the next five years.

b. The Committee shall meet with the President at the beginning of the process to discuss the review and to provide an opportunity for the President to submit a self-evaluation.

c. In seeking informed opinion on the President's performance, the Committee shall consult widely with the internal University community and appropriate individuals and groups external to the University, allowing them at least 30 working days to provide their input. The Committee shall, in writing, solicit views from the internal community and meet in confidence with groups or individuals that wish to make a presentation. The Committee shall make available to the University community and appropriate individuals and groups external to the University a copy of the incumbent's self-evaluation. Only signed submissions shall be considered by the Committee. Surveys initiated by associations will be considered by the Committee as long as its results are shared only in confidence with the Committee and are not shared with the participants or with the public, as is the case for student teaching surveys used by university personnel committees.

d. A positive recommendation for renewal shall be presented to Senate for comment and to the Board of Governors for approval. Senate may choose to make its comment in the form of a vote.

e. If the Evaluation Committee recommends that the position be opened for competition, the Committee shall recommend to the Board of Governors that the Board institute a Presidential Search Committee. The incumbent shall be informed of such a recommendation before its presentation to the Board of Governors.

f. All deliberations of the Committee shall be confidential, including after the Committee has completed its work.

4. TERMS OF REFERENCE AND PROCEDURE

a) The Committee shall in consultation with members of the university community and major external constituencies, establish the specific qualities and strengths expected of the next President.

5. TERM OF APPOINTMENT

The normal term of the appointment of a President shall be five years. The Chair of the Board may, for operational reasons, and if he or she believes that it's in the best interest of the University, recommend to the Board of Governors to extend the terms of an incumbent by up to 18 months.

By memo to students, faculty, staff, governors, alumni, donors and external partners, dated April 26, 2017, the Chair of the Board of Governors announced that the Board of Governors had unanimously approved the appointment of Dr. Pierre Zundel as Interim President and Vice-Chancellor for the fixed term August 21, 2017 until June 30, 2019 and that the presidential search process would be delayed until the summer of 2018. There had been no consultation with "Members, Units and Divisions."

The reasons advanced by the Board of Governors for providing the interim president with a fixed 22-month term and for delaying the commencement of the search for the next president until July 1, 2018 are as follows:

- The 2018-2023 strategic plan had not yet been completed such that by delaying the search for a new president until July 2018, the 2018-2023 strategic plan would be in place before the search began which, in the view of the Board,

"would expand the pool of candidates," attracted by certainty with respect to the direction of the University.

- Because of the turnover within Ontario universities at the presidential level, the immediate competition for a replacement would be severe. There are some seven Ontario universities presently in the process of recruiting a new president.
- With Laurentian sitting in a disadvantaged position with respect to comparative executive compensation and with the province delaying any decision with respect to raising its executive compensation levels, the expectation is that Laurentian would be in a better position to offer a more competitive economic package if the search was to be delayed.

The essence of the Union position is that the University has constrained its authority to appoint its president under article 2.25.1 to the extent of requiring it to engage in consultation and by requiring it to follow the selection and appointment procedures that have been approved by the Board of Governors and the Senate. The Union contends that it is not open to the University to deviate from these procedures. This requirement is absolute, it is argued, such that the reasons advanced in support of any decision to deviate are irrelevant. The Union maintains that the procedures, when read in their entirety, allow the University to consider the renewal of an existing

president within a three-month window commencing 18 months prior to the expiry of his/her contract and to institute a presidential search committee upon recommending that the position be opened for competition. It follows, the Union reasons, that where an incumbent president resigns, as in this case, so that the position becomes open for competition, a presidential search committee must be instituted forthwith, not some 14 months after the fact. To the extent that the procedures do not speak to acting or interim appointments, the Union concedes that acting or interim appointments are necessary but that, given the uncertainty as to when a permanent appointment will be possible, the acting interim appointment cannot be for a fixed term. Alternatively, the Union argues that an acting or interim appointment for a fixed term is, in fact, a permanent appointment for the duration of the fixed term such that a fixed term of any period less than the five years required under the procedure is in breach of the procedure and hence in breach of article 2.25.1. I am reminded that under article 3.10.3, collegial governance is essential to the exercise of academic freedom and that collegial governance includes participation in decisions related to tenure, promotions and the appointment of senior academic officers.

The University cites 3716724 Canada Inc. v. Carleton Condominium Corp. No. 375 2016 ONCA 650 (Can Lit) in support of the proposition that a court will not second guess decisions made by a board of directors in the best interest of either for profit or not for profit corporations. It is submitted that this hands-off approach should be followed here, especially in circumstances where the Board of Governors was faced

with the loss of two members of its four-member management team and in circumstances where a number of factors supported a decision to delay an immediate search for a full-time replacement that in turn necessitated appointing an acting president for a 22-month period. It is argued that because the selection procedure is silent with respect to acting appointments, the University has a broad discretion in this regard, including the discretion to make an interim appointment for a fixed term – especially where, as here, there are compelling reasons for so doing. The University relies on City of Niagara Falls and CUPE, Local 133 (2010) 194 LAC (4th) 189 (Kaplan) in support of the proposition that absent a specific restriction in the collective agreement, employer actions should be assessed on a broad standard of reasonableness. Finally, the University cites Brant Haldimand Norfolk CDSP and OSSTF (2014) 245 LAC (4th) 307 (Hayes) in support of the proposition that an explicit contractual restriction must exist in order to inhibit what would otherwise be the unfettered discretion of the employer. While in that case there was an express requirement to post, it is emphasized that in this case there is no restriction upon acting appointments in either the collective agreement nor the presidential selection procedure that is incorporated by reference.

DECISION

Faculty collective agreements reflect a unique set of priorities, including collegial governance and academic freedom. Consistent with these priorities Article 2.25.1 of this collective agreement recognizes the value of consultation in the selection of senior academic administrators. The express reference to the "usefulness and desirability" of consultation must be read in the context of collegial governance as requiring that the University consult in regard to both the process and the actual selection of senior academic administrators, including the president. Apart altogether from any considering of the merits of the arguments advanced in support of the decision to delay the commencement of the selection process in this case and concomitantly the decision to appoint an acting president for a fixed twenty-two month term, there was no consultation. Rather, these decisions were made unilaterally by the Board of Governors and communicated to the University community as decisions already made.

The procedure to which the University is bound under article 2.25.1 requires that 18 months prior to the expiry of the term of the incumbent president, the selection process shall begin with an evaluation of the incumbent. The evaluation is to be completed within three months, with a decision made as to whether or not to renew. If the evaluation committee recommends that the position be opened for competition, that committee shall recommend that a presidential search committee be instituted. The clear expectation is that the search committee begin its work without delay and that,

barring unforeseen circumstances, the process be completed within 15 months. This is not to say, however, that the start date or the duration of the search process could not be altered through consultation. Absent consultation, it must be found that the decision in this case to delay the constitution of a search committee until July 2018 (when the position became open in late April 2017 with the resignation of the incumbent) was at variance with the presidential selection procedure to which the University bound itself under article 2.25.1 of the collective agreement.

This case, therefore, is distinguishable from *City of Niagara Falls (supra)* because, whereas there was no governing contractual language in that collective agreement, there is governing contractual language here. Indeed, this case satisfied the stipulation in *Brant Haldimand Norfolk (supra)* that there be contractual language that governs.

An acting or interim appointee is in the nature of a placeholder during the hiatus between the time that an incumbent departs and a replacement assumes office. The departure of an incumbent may occur when advised that he/she is not being renewed or it may occur with the expiry of his/her contract or, as in this case, an incumbent may resign midterm to pursue another opportunity. Because the expectation is that the selection process will normally require about 15 months after the position becomes open for competition, it is accepted by the Union that during this period, the position may be filled on an acting basis for an indeterminate period.

However, the Union argues that the effect of appointing an acting incumbent on a fixed term contract is to, in effect, make that person a permanent replacement. It is argued that because the selection procedure for a permanent replacement was not followed and because the twenty-two month fixed term contract given to the interim president is for a shorter period than is permitted under the procedure, i.e. five years, the mandated selection procedure has been violated. I do not understand how an acting or interim appointment for a fixed term makes the acting person a permanent replacement, thereby triggering the permanent replacement procedure, when it is understood by all concerned that the person is acting pending a permanent replacement. The difficulty in this case is not that the position is being filled on an acting basis for a fixed term but that the fixed term here (twenty-two months) ignores the requirement that a selection committee be struck without delay and that in the normal course the position be filled on a permanent basis within 15 months. It cannot be, without there being a consultative arrangement to the contrary, that the fixed term under which an acting appointment is made can be relied upon to either delay the commencement of the search or to extend the search and consequent appointment of a permanent replacement beyond the period contemplated under the procedure, i.e. 15 months.

It follows from all of the foregoing that the University has breached article 2.25.1 and the selection procedure incorporated by reference: firstly, by failing to consult regarding the presidential selection process; secondly, by delaying the commencement of the presidential selection process; and thirdly, by adopting a selection process that

ignores the contractual expectation of a 15-month selection period. The three breaches are interrelated.

This raises the question of remedy. In this regard, it is to be noted, firstly, that both parties share a common interest in attracting a field of qualified candidates and in recruiting the most highly qualified candidate and, thereby, in adopting a process that will best achieve this result. It is to be noted, secondly, that the reasons advanced by the Board of Governors for delaying the start of the selection process are in support of putting the University in a better position to attract the most qualified candidates and thereby to achieve the common objectives of the parties. The University reasoned that it was best to delay the process in order to await a government decision that would allow the University to raise compensation levels that are competitively low and thereby to allow the University to better compete for qualified candidates; to delay the process in order to complete the 2018-2023 strategic plan so as thereby to exhibit stability and a commitment to a chosen direction; and finally to delay the process in order to avoid having to compete with a number of other universities that are currently in the market for a president.

It would be open to the arbitrator, having found that the University breached article 2.25.1, to simply order compliance. However, the effect of doing so would be to disregard the requirement for consultation and the probable outcome of that consultation in the circumstances of this case. Meaningful consultation involves an open-minded sharing of ideas and harmonization of interests with the objective of

coming to a consensus. It is the view of this arbitrator that within the context within which this consultation would have taken place, these parties, in all probability, would have achieved a consensus.

Given the shared interest in attracting a field of qualified candidates and the shared objective of appointing the most qualified of these; given the factors advanced by the University that, in this arbitrator's view, mitigate in favour of a delay in commencing the selection process in order to better attract qualified candidates; and given the availability of a qualified and highly regarded interim President, it is more likely than not that had there been the required consultation, the parties would have achieved a consensus to modify the stated procedure by delaying the commencement of the search in order to enhance the prospect of attracting better qualified candidates.

It can reasonably be estimated that a meaningful consultation taken place the result would have been to delay the selection process for at least eight months.

Accordingly, in order to put the Union in the position that, more likely than not, it would have been in had there been the required consultation, I hereby direct that a selection committee be struck and that it commence its work no later than January 1, 2018.

Dated this 20th day of July 2017 in the City of Toronto.

Kevin Burkett

KEVIN BURKETT