

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**FACULTY ASSOCIATION OF THE UNIVERSITY
OF BRITISH COLUMBIA,**

the "Faculty Association"

AND:

**POINT GREY COMMERCE FACULTY ASSOCIATION,
SAUDER SCHOOL OF BUSINESS,**

the "Commerce Faculty"

MINORITY AWARD

of Brenda Peterson, Faculty Association Nominee

[1] The main issue before this Board is to determine the proper meaning of Article 16.2 of the Faculty Association's Constitution, which states as follows:

Minority Protection

16.2 Subsidiary Agreements

(a) Interpretation

In this section:

(i) "subsidiary agreement" means an agreement covering any matter which is or could be covered by the master agreement;

(ii) "Faculty or Department" means those members of the Association employed in a particular Faculty or Department, and shall include members of the Association employed in the University Library, the Centre for Continuing Education or a School;

(iii) "Request" means a request in writing specifying the matters to be covered by a proposed subsidiary agreement and approved by a majority of the Faculty or Department at a meeting called for the purpose. A majority in this context means a majority of those voting.

(b) Requests under this section may be made to the Executive at any time, provided that a Faculty or Department that has been refused the right to bargain for subsidiary agreement may not make a further request within six months.

- (c) (i) Upon receipt of a request the Executive may permit the Faculty or Department to bargain with the University for a subsidiary agreement. A request may be granted subject to conditions provided that no condition shall be imposed in derogation of the right established in paragraph (j) below.
- (ii) The Executive's decision shall be communicated to the Faculty or Department within 2 months of receipt of the request.
- (iii) The Executive's decision under this section may be appealed by the Faculty or Department concerned to an arbitration board. The intention to appeal must be communicated to the Executive within 7 days of receipt of the Executive's decision.
- (d) (i) An arbitration board under this section shall consist of one person nominated by the Executive, one nominated by the Faculty or Department concerned, and a chairman agreed on by the two nominees.
- (ii) Nominations to the arbitration board shall be made within 7 days of notice of appeal being received by the Executive, and the nominees shall select a chairman within a further 7 days.
- (iii) If the nominees are unable to agree on a chairman within the prescribed period, a chairman shall be chosen at random by the President of the Association from a panel previously established by the Executive.
- (iv) The panel referred to in (iii) above shall consist of 12 members of the Association and shall be drawn up by the Executive on an annual basis. No member of the Executive shall be eligible for the panel.
- (v) If a Faculty or Department fails to nominate a person to the arbitration board within the prescribed period, its request shall be deemed to have been withdrawn.
- (vi) If the Executive fails to nominate a person to the arbitration board within the prescribed period, the request shall be deemed to have been approved.
- (e) The Faculty or Department appealing and the Executive shall have the right to appear before the arbitration board.
- (f) The board shall, within 3 weeks of being consulted, decide whether the Faculty or Department is or is not entitled to bargain for a subsidiary agreement.
- (g) A Faculty or Department entitled to bargain for a subsidiary agreement may allow the Executive to negotiate on its behalf or may set up a separate bargaining committee which shall include at least one member nominated by the Executive.

- (h) Any subsidiary agreement shall be subject to ratification by the Faculty or Department concerned.
- (i) Except with the approval of the Executive, no subsidiary agreements shall be executed until the Master Agreement is executed.
- (j) Authority to bargain for a subsidiary agreement under this section shall continue until terminated in accordance with the following provisions. Where two successive Master Agreements have been executed without the Faculty or Department being able to conclude or maintain a subsidiary agreement the Executive may appeal that Faculty or Department's right to bargain for a subsidiary agreement to an arbitration board constituted and operating in accordance with paragraph's (d), (e) and (f) above.
- (k) Once a subsidiary agreement has been executed, the Executive shall not seek to remove that subsidiary agreement by subsequent negotiations in that or future years without the consent of the Faculty or Department concerned.

[2] The parties to the arbitration seek a definitive interpretation of the duration of permission granted or awarded under Article 16.2. Does it subsist until terminated in accordance with Article 16.2(j) or does it expire when a subsidiary agreement is achieved?

[3] The position of the Commerce Faculty is that it can bargain for a subsidiary agreement in 2004, because it retains the bargaining authority that it secured in 1981. Under Article 16.2(c)(iii), by a majority award dated November 13, 1981, an arbitration board awarded the Commerce Faculty the authority to bargain a subsidiary agreement. The position of the Commerce Faculty is that the authority so awarded continues in effect to the present day because the Faculty Association has never terminated it by an appeal to an arbitration board, pursuant to Article 16.2(j). The Faculty of Commerce further contends that under Article 16.2(j) the Faculty Association can only commence an appeal to revoke bargaining authority after two failed attempts by the faculty or department concerned. Thus, if a faculty or department tries and fails to reach a subsidiary agreement that failure counts as one instance of being unable to conclude or maintain a collective agreement, but if the faculty or department does not enter into a bargaining round, it does not count and preserves the authority to a future round, at the choice of the bargaining unit.

[4] The Faculty Association contends that the Commerce Faculty's bargaining authority, awarded in 1981, was spent when the Commerce Faculty achieved its first subsidiary agreement in 1984. The position of the Faculty Association is that, to obtain the authority to bargain another subsidiary agreement this year, the Commerce Faculty must request permission from the Executive of the Faculty Association under Article 16.2(c)(i). The Faculty Association argues that Article 16.2(j) has no application to the Faculty of Commerce, because it successfully reached a subsidiary agreement in 1984 and, as a consequence of so doing, its right to bargain expired. According to the Association's argument, Article 16.2(j) applies only to a faculty or department that has not yet achieved a subsidiary agreement, after receiving permission to try for one. Once a subsidiary agreement is reached permission to bargain lapses. The Faculty Association also disagrees with the argument that Article 16.2(j) permits a faculty or department to preserve its right to bargain by failing to exercise it.

[5] The majority decision of the Board reads:

[106] To summarize, this Award reaffirms the admissibility of the extrinsic evidence based on the contractual nature of the Faculty Association's constitution and the potential for the extrinsic evidence to assist the arbitration board to determine which of the two reasonable interpretations advanced by the parties is correct. This Award then concludes that:

1. in order to provide that assistance in relation to a foundational document such as a constitution, the extrinsic evidence must be capable of demonstrating an organizational commitment to one of the alternative interpretations;
2. on a careful analysis of the evidence of the history of the issue of the duration of authority to bargain a subsidiary agreement, the extrinsic evidence in this case does not assist with the interpretation of the disputed terms;
3. on a thorough examination of the ordinary meaning of the language of Article 16.2 of the Constitution, the Commerce Faculty's interpretation presents a cohesive and persuasive interpretation if it is modified to exclude the necessity for a failed attempt to bargain a subsidiary agreement from the pre-conditions to an appeal under Article 16.2(j);
4. as between the modified Commerce Faculty interpretation and the Faculty Association interpretation, the decisive factor is the absence of any express

- provision to support the latter's assertion that bargaining authority is spent when the faculty achieves a subsidiary agreement;
5. the correct interpretation is therefore that the minimum duration of the authority to bargain a subsidiary agreement is the period of time during which the faculty or department is successful in its bargaining for a subsidiary agreement plus the period defined in Article 16.2(j), which excludes any requirement for the faculty to attempt but fail to bargain a subsidiary agreement;
 6. since the Faculty Association must then appeal under Article 16.2(j), the duration may be longer if the appeal is not successful.

[6] I agree with point #2 of the majority decision that the extrinsic evidence presented to the Board does not assist with the interpretation of Article 16.2.

[7] I disagree with points ## 4-6 of the majority decision regarding the interpretation of the duration of permission granted or awarded under Article 16.2 and the reasons for it.

[8] As has been demonstrated in the arguments presented by both parties, the language in Article 16.2 is ambiguous.

[9] As stated in paragraph 61 of the Majority Board Report, "The ordinary grammatical sense of the words is presumed to express intended meaning, unless that construction gives rise to absurd or unreasonable consequences."

[10] In my respectful view, the interpretation of the duration of authority by the majority gives rise to absurd consequences to the Faculty Association. The majority's interpretation is neither logical nor reasonable. The drafters of the disputed provisions cannot have intended the resulting inconvenience and impracticality to the Faculty Association in its role as bargaining agent. The ambiguous language employed in Article 16.2 cannot reasonably lead one to the positions embraced by the majority.

[11] Article 2.2 of the Constitution states that the purposes of the Society are to "act as the bargaining agent of all faculty members employed by the University of British Columbia and to

regulate relations between the faculty members and the University through collective bargaining”.

[12] According to Article 16.2 (a) (iii), permission for authority to bargain a subsidiary agreement is based on **a specific application** to the Executive for permission to bargain on specified issues. Circumstances surrounding collective bargaining between the faculty and the university are always changing over time. Issues evolve, too. It is not logical that the Association would intend that approval of one application would provide *carte blanche* permission for all future attempts to bargain subsidiary agreements, on any issues that might arise in the future. Conditions submitted as evidence to the Executive in an application to gain permission to negotiate a subsidiary agreement do not exist in perpetuity. In thirty years’ experience of the Faculty Association’s practice under Article 16.2 there has been no case where a faculty has pursued bargaining for a subsidiary agreement in every round of bargaining on the basis of blanket permission to bargain without further approval for every contract.

[13] Thirty years ago, when Article 16.2 was drafted, the Faculty Association had only voluntary recognition as bargaining agent over a very limited scope of bargaining, and conducted bargaining outside the labour legislation of the day. Since 2001, the Faculty Association has become a union under the Labour Relations Code, with the broad scope of bargaining conferred by statute. In my view, Article 16.2 of the Constitution must be interpreted as argued by the Faculty Association out of due regard for this change in the status of Faculty Association.

[14] The Faculty Association’s constitution is a “living instrument” that must be interpreted so that its purposes as stated in the preamble can be accomplished in the current circumstances as they may exist from time to time. In my respectful view, for the purpose of effectiveness as bargaining agent for the faculty, the Faculty Association’s interpretation of Article 16.2 ought to prevail.

[15] As specified in Article 16.2 (b), requests for permission for authority to bargain a subsidiary agreement go to the Executive, thus acknowledging the discretionary and supervisory role of the Association.

[16] The majority's interpretation of Article 16.2 (j) determines that the permission granted to faculties and departments would continue until the Faculty Association successfully appeals to an arbitration board. The Association would be put in the position of making an appeal to an arbitration board to overturn its previous decisions to grant permissions to bargain. On what grounds would the Association make its case to a board? The Association would not have access to the detailed information required for arguments on whether or not conditions existed that would justify the faculty or department being granted authority to bargain a subsidiary agreement. How would the Association gain access to privileged information under stringent protection of privacy legislation regarding faculty hiring, retention, and recruitment in a particular faculty or department?

[17] If the majority's interpretation of Article 16.2 (j) was the intention of the drafters of this Article in the Constitution, one would expect, at the very least, to find some language that would require the faculties and departments to notify the Faculty Association of their intention to engage in bargaining for another subsidiary agreement with the University. Without notification, how would the Executive be aware of other units' bargaining? Such a result is incompatible with effective representation and sound bargaining.

[18] With all due respect to the majority's opinion, it is not a reasonable conclusion to hold that the Association has surrendered its supervisory, evaluative and quasi-judicial authority to grant or withhold permission, especially in the absence of any express provision in the Constitution directing me to such a conclusion. Here, not only is there no express provision stripping the Faculty Association and its Executive of these fundamental rights, essential to the proper discharge of the fiduciary responsibilities owed by the Association to its members, there is, as I have pointed out above, a strong indication of contrary intent. For these reasons, I cannot accept the conclusions of the majority members that these rights have been lost, or that the Association can be seen to have fettered its plenary discretionary powers.

[19] The interpretation adopted by the majority imposes an adversarial system upon the cooperative and collegial model of the Association. Pitting faculty against faculty and against

the central bargaining agent, the Association is contrary to the *raison d'être* espoused by the members throughout the Association's history.

[20] The Executive, stripped of its discretionary right to evaluate such departmental requests, would be loath to permit authority to bargain to any other faculties and departments. In addition, any attempts by the Association to appeal the right of a unit to bargain would logically be fought equally hard since they would know that the Association would be loath to grant such rights again.

[21] It does not seem reasonable that the Association would surrender its supervisory rights forever. This extreme loss of rights of the Association begs for a more sensible interpretation of the language in Article 16.2.

[22] The more reasonable and logical interpretation as suggested by the Faculty Association does not have such absurd consequences. The Minority Rights of faculties and departments remain protected. Faculties and departments maintain their right to seek authority to bargain a subsidiary agreement at any time and maintain their right to appeal if their application is refused. There would be no hardship to the faculties and departments, since the documentation required for the application for authority to bargain would be required in any case, for bargaining with the University.

[23] I do, however, agree with point #3 of the majority's interpretation of Article 16.2(j), that a faculty or department cannot extend or prolong its right to bargain by failing to exercise its rights in a particular round of bargaining.

[24] I would like to thank both counsels for their excellent presentations.

[25] Dated at Vancouver, British Columbia, on March ___, 2004.

Brenda Peterson,
Nominee of the Faculty Association