

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

("University" or "UBC")

AND:

FACULTY ASSOCIATION OF THE UNIVERSITY
OF BRITISH COLUMBIA

("Faculty Association" or "Association")

INTEREST ARBITRATION 2013

COUNSEL:

Allan E. Black, Q.C.
For Faculty Association

Thomas A. Roper, Q.C.
and Jennifer Russell
For University

DATES OF HEARING:

June 3, 4, 5, 2013
Vancouver, BC

COLIN TAYLOR, Q.C.
Arbitrator

I

[1] The purpose of this Award is to settle a dispute between the University of British Columbia (the "University" or "UBC") and its Faculty Association concerning a renewal collective agreement. The parties are agreed that the renewal collective agreement will be for a term of two years commencing July 1, 2012. The primary issue is the amount of any salary increase.

[2] The Faculty Association (or "Association") is a union under the *Labour Relations Code*, R.S.B.C. 1996, c.244, which represents approximately 3,500 faculty members, Librarians and Program Directors.

[3] This Award is governed by Article 11.02(e) of the *Framework Agreement* between the parties, which provides as follows:

In making its award, the Arbitration Board shall give first consideration to the University's ability to pay the cost of an award from its general purpose operating funds. In doing so, with due regard to the primacy of the University's academic purpose and the central role of Faculty Members, Librarians and Program Directors in achieving it, the Arbitration Board shall take account of the University's need to preserve a reasonable balance between the salary of members of the bargaining unit and other expenditures. If the Arbitration Board is satisfied that the University has the ability

to pay the cost of an award, it shall base its award on the following criteria:

- i. the need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians, and Program Directors of the highest caliber;
- ii. changes in the Vancouver and Canadian Consumer Price Indices;
- iii. changes in British Columbian and Canadian Average Salaries and Wages; and
- iv. salaries and benefits at other Canadian universities of comparable academic quality and size.

[4] The process under Article 11 contemplates a large amount of material being assessed and a decision being rendered in a relatively short period of time. Consistent with that process and previous awards, this Award will not reproduce the extensive material provided by the parties (which the parties already have), but will instead set out my reasons for decision (which the parties do not already have). The parties' extensive submissions will not be repeated. Both parties' submissions are, not surprisingly, thorough and excellent.

[5] My role in this proceeding is to interpret and apply the parties' agreement in Article 11.02(e). While the parties have advanced a wide range of arguments, the deciding factor is largely the mandate imposed by

Article 11.02(e). That, in turn, has been the subject of extensive consideration in prior awards between these parties. It is therefore critical to begin by ascertaining the mandate imposed by Article 11.02(e), and hence the nature of the task before me.

II

[6] The parties disagreed at the outset as to whether I should employ an "adjudicative" or "replication" approach (or a combination). The issue to which that distinction is most important is the fact that the University is subject to a province-wide mandate from the Public Sector Employers Council (PSEC), under which settlements of 2% and 2% over two years have been the consistent pattern throughout the Province, including the post-secondary sector, and including the University's settlements with other employee groups. The University submits that the "replication" approach would strongly support that result here.

[7] However, on considering the parties' submissions and the case law it is clear that Article 11.02(e) mandates an "adjudicative" model of interest arbitration. The difference between that and the "replication" model was explained by Arbitrator Munroe in a December 23, 1986 decision quoted in *Governing Council of the University of Toronto -and- The University of Toronto Faculty*

Association, unreported, June 18, 1993 (Munroe, Brown, Sack). In the 1993 award, the arbitration board noted that its 1986 award described the parties' shift from a "purely adjudicative model" to a "more replicative" model of interest arbitration. The quotation from the 1986 award sets out the "purely adjudicative" interest arbitration clause (which is materially similar in nature to Article 11.02(e) here), the subsequent "replication" clause, and describes the differences between the two approaches:

As we indicated at the outset, Article 6 has recently been amended. ... [I]n late 1981, the parties agreed to ... a process of binding arbitration based on the following criteria:

- Changes in the Consumer Price Index in Canada and in Toronto;
- salaries and benefits for faculty members and librarians at other universities and for other professions and groups in society;
- the need to attract faculty members and librarians of the highest quality;
- the overall compensation presently received by faculty members and librarians [at the university];
- total compensation adjustments made in recent public and private sector collective bargaining settlements;
- the need for the University to operate in a responsible manner.

Thus, the parties agreed that their arbitrator (if resort to adjudication proved necessary) would adopt and follow the "adjudicative model" of interest arbitration: where criteria are enumerated and expressed as objective yardsticks in the expectation that they will be interpreted and applied in a rights-like fashion to the proven facts and circumstances.

...

... [I]n December, 1984, the parties agreed to a substantial re-wording. Among other things, the criteria for decision were altered. Indeed, they were deleted. Now, the obligation on the part of the panel is to:

... attempt to reflect the agreement the parties would have reached if they had been able to agree (Article 6(16)) tak[ing] into account the direct or indirect cost or saving of any [agreed-upon change] to any salary or benefit (Article 6(19))...

By that formulation, the parties moved away from the adjudicative model of interest arbitration, agreeing instead to the adoption of the so-called "replication model": where the decision-maker is to try to replicate the agreement that the parties themselves would have reached if they had been left to the ordinary devices of collective bargaining - including economic sanctions. Put simply, at what point would the Association and its membership have settled rather than commence or continue a strike (if the strike option had been available)? At what point would the University have settled rather than commence or continue a lockout (if the lockout option had been available)? In theory, the answers to those two questions are the same. And, the

task of the decision-maker, upon a review of the evidence and the submissions of the parties, is to discern the likely point of common ground.

While that may be a difficult task, and one for which an objective measurement of success may be impossible to construct, the modern arbitral consensus is that the replication model does represent the ideal. That is because of any of the models for third-party intervention, it is the least inimical to the accepted norm of free collective bargaining. Accordingly, it helps to maintain the acceptability - to employers and employees alike - of interest arbitration as an alternative to strikes and lockouts in public or essential industries.

It is perhaps important to observe that the shift from the adjudicative model to the replication model does not mean that the process of decision-making has become undisciplined. What it does mean is that the role of the decision-maker is no longer simply to identify the criteria - either contractual or jurisprudential - around which to pivot a detached and dispassionate award. Rather, the essential function of the decision-maker becomes the identification of the factors which likely would have influenced the negotiating behaviour of the particular parties in the actual circumstances at hand. It is the dynamic mix of those factors which produces the end result.

(pp.4-5; emphasis in original)

[8] The adjudicative criteria of Article 11.02(e) set out two distinct stages of inquiry. The arbitrator must give "first consideration" to the threshold issue of

what can be described in shorthand as the University's "ability to pay". (As will be seen, the provision has not been interpreted as an unstructured assessment of that issue writ large. Rather, it is primarily a highly defined inquiry into a relatively narrow question structured by the parties.)

[9] If the "ability to pay" threshold is passed, the second half of Article 11.02(e) establishes the criteria upon which the arbitration board "shall base its award", providing an exhaustive list of four factors.

[10] In this regard, Article 11.02(e) is distinguishable from the mandate under the *Fire and Police Services Collective Bargaining Act*, R.S.B.C. 1996 c.42 which the University relies on to support the applicability of a "replication" model. The mandate in that case provides that an arbitrator must "have regard to" a non-exhaustive list of criteria, and "(g) any other factor that the arbitrator or arbitration board considers relevant" (*Nelson (City) -and- Nelson Professional Fire Fighters Assn. (Wage Grievance)*, [2010] B.C.C.A.A.A. No. 174, para.5). It is therefore open to the arbitrator to consider any factor that might have influenced the parties' ultimate hypothetical settlement in the particular circumstances (i.e., replication). Article 11.02(e), on the other hand, stipulates that the award must be based on the exhaustive list of enumerated factors. It is the

"purely adjudicative" model described by the Munroe board.

[11] This conclusion is supported by the prior arbitration awards interpreting Article 11.02(e), which do not employ a replication analysis, but rather apply the enumerated factors.

[12] The above distinction should not be overstated: a review of the enumerated factors indicates they are themselves essentially directed at replication. They are the type of criteria - the rate of inflation and general wage increases, comparability with similar institutions, and recruitment and retention - that are likely to influence the parties' views of an appropriate collective bargaining outcome.

[13] Where the distinction comes into sharp relief is where there are other factors that may influence a particular collective bargaining outcome, but are not part of what the parties have agreed should influence interest arbitration in Article 11.02(e).

[14] There is a tension in this regard between an adjudicative model of interest arbitration and interest arbitration's policy goal of supporting (and not supplanting) the parties' collective bargaining relationship. There is a fundamental concern of interest arbitration, which is thus universally described as an inherently "conservative" exercise.

What it endeavors to "conserve" is free collective bargaining, both directly (by not imposing terms except where necessary) and indirectly (by not providing an incentive to one party to prefer interest arbitration over collective bargaining). It is in this latter respect that the tension arises: if there is a factor that affects collective bargaining, but not interest arbitration, then it may be in one party's interest to prefer interest arbitration, which is undesirable from the perspective of fostering the parties' collective bargaining relationship.

[15] This tension will be revisited further on in more concrete terms. At this juncture it suffices to explain Arbitrator Munroe's opinion that the replication model is ideal from the perspective of being most supportive of collective bargaining.

[16] Why would the parties have agreed to an adjudicative model of interest arbitration? On its face, it may have advantages in terms of certainty, and in terms of the parties' self governance: they have agreed in advance the factors they have decided should guide an interest arbitration, rather than leaving those to be decided by an arbitrator on a case-by-case basis. It should also be noted that the parties' recent past indicates a commendable record of reaching collective agreements on their own through collective bargaining, without recourse to interest arbitration.

[17] Ultimately these are choices for the parties. The role of an arbitrator in my situation is to interpret and apply the clause the parties have chosen. The nature of that clause is clear. The purpose of the above discussion is to set the general backdrop for the interpretive discussion which follows, and to address a theme in the University's argument: that I should apply a replication analysis, because it best promotes the policy objective of collective bargaining. I agree with the general point that this policy objective is fundamental and must always be considered. However, that does not allow me to substitute a different approach from the one the parties have agreed to. Respecting collective bargaining includes, perhaps most fundamentally, respecting the parties' agreement.

III

[18] The next task is to consider how Article 11.02(e) (formerly Article 12.02(e)) has been interpreted. It has been the subject of four previous awards: *University of British Columbia and University of British Columbia Faculty Association*, April 17, 1989 (Getz, Kelleher, Ladner); *University of British Columbia and University of British Columbia Faculty Association (Salary Increases for 1989/90)*, September 26, 1989 (Getz, Kelleher, Ladner); *The University of British Columbia and Faculty Association of the University of British Columbia*, January 25, 1994 (Kelleher, Korbin, Larson); and *University of British Columbia and Faculty Association of the University of British*

Columbia, July 10, 1997 (Larson, Burke, Taylor). I will refer to these in shorthand form, as do the parties and the awards themselves, as for example the "1994 Kelleher" arbitration board and award.

[19] The focus of interpretation has been on the threshold "ability to pay" clause, as its wording is more susceptible to different interpretations than the relatively straightforward enumerated factors that follow on the merits. The nature and breadth of what is to be considered under that threshold is a recurring argument between the parties in this dispute.

[20] The prior interpretations of the "ability to pay" threshold in Article 11.02(e) build on each other, and it is necessary to consider their development in order to understand the end product. As this will require setting out fairly extensive excerpts from the awards, it is helpful to provide a brief overview at the outset.

[21] Article 11.02(e) requires that the "ability to pay" analysis "*take account of*" the need to preserve a reasonable balance between Faculty Association salaries and other expenditures from the University's general purpose operating funds. (I may refer to this in shorthand as the "reasonable balance".) This connection ("take account of") was susceptible to, broadly speaking, two different possible interpretations. One is that the assessment of ability to pay would be based

primarily on this balance. Another is that the balance would be merely one factor in what is otherwise a free-ranging inquiry into the subject of "ability to pay" in general.

[22] In its seminal April 1989 decision, the Getz arbitration board chose the former interpretation. Its reasons for doing so are animated by some of the policy objectives noted in the preceding section of this Award: certainty, self-governance, and respect for the collective bargaining process. It is fair to say that the general "ability to pay" analysis in the public sector is a notorious quagmire. The "reasonable balance" criterion was seen as the parties' effort to avoid (or at least limit) the various difficulties inherent in that exercise, by reliance instead on a relatively certain, narrow and objective criterion. In that way, such a limit protects both parties.

[23] The Getz board in fact adopted this ratio as essentially the only criterion, describing the analysis as "almost mechanical". Subsequently, the language was amended to change the word "ratio" to "balance". This amendment was held to make the calculation "less formulistic and more flexible". Arbitration boards also held that the "reasonable balance" remained the "primary", "central", and "most important", but not "exclusive" criterion (although it was the only one that was in fact applied). An important topic of dispute in this arbitration thus became whether and how

an arbitration board might apply considerations other than the "reasonable balance" test in determining whether the University has the "ability to pay".

[24] This requires an analysis of the interpretation of Article 11.02(e), and the development of that interpretation, in the prior arbitration awards.

[25] Article 11.02(e) (then 12.02(e)) was first interpreted in the April 1989 award of the Getz arbitration board. As noted, the Getz board found the threshold "ability to pay" test was based on the ratio calculated pursuant to that provision, rather than a wide-ranging inquiry into "ability to pay" in a general sense.

Arbitrators in interest disputes such as this have found "ability to pay" a troublesome concept. They have devoted a great many words to analyzing and expounding it, and drawing distinctions between its application in the context of employers, such as the University, funded out of public revenues and those who are not so funded.

A number of considerations, however, suggest that it is unnecessary for us to embark on an extended re-examination of the concept of "ability to pay" in general. For reasons that will become apparent we can content ourselves with a few general observations. (pp.11-12)

[26] After setting out the general observations in question, the Getz board continued:

These observations are relevant to the concept of ability to pay in what we have earlier described as a large and general sense - the same sense, that is, in which someone without current income, prospects of gainful employment or inheritance, or assets to sell or offer as collateral to a lender, does not have the ability to pay \$500,000 for a house (or, more likely, a modest cottage). In our view, however, they are substantially irrelevant to the concept of "ability to pay" that is embodied in the Framework Agreement.

... [T]he Agreement imposes an obligation on us, in giving first consideration to the University's ability to pay, to take account of its need to preserve a reasonable ratio between faculty salaries and other expenditures. The two concepts thus become inextricably interlinked. The parties have agreed that the University has the ability to pay an amount in respect of faculty salaries if doing so preserves a reasonable ratio between that amount and other expenditures. (pp.14-15; emphasis added)

[27] The Getz arbitration board concluded that the "reasonable ratio" to be "preserved" was the ratio that existed in the previous year, which was 42.1%. Although the arbitration board acknowledged that interpreting the "ability to pay" provision in that fashion was "almost mechanical" (p.19), it nonetheless made "industrial relations sense", because it was a fixed number, capable of ascertainment, which limited both parties in the "ability to pay" dispute, while promoting agreement as the best way for the parties to reach their objectives:

[O]n reflection, it is an analysis which does embody some industrial relations sense, for it leaves these issues to be resolved where properly they ought to be resolved - in free negotiations between the parties.

A departure from the determined reasonable ratio (42.1% on the present facts) between expenditures on salaries paid to members of the Faculty Association and other expenditures to the advantage of the faculty can effectively come about, on this analysis of section 12.02(f) of the Framework Agreement, only as the result of a "management" decision by the university administration to make such a departure; and a departure to the disadvantage of the members of the faculty can occur only as the result of a decision of the Faculty Association to temper its bargaining demands. What is sauce for the goose, it turns out, is sauce for the gander too. In either event, the Framework Agreement, at least in principle, establishes agreement between the parties, rather than arbitration, as the most fruitful method of reaching their objectives. It limits both parties. (p.19; emphasis added)

[28] The Getz arbitration board continued:

There is a second conclusion to which this analysis leads that is more important in the context of arbitrations pursuant to the provisions of the Framework Agreement generally and of this arbitration in particular. It seems to us that if the salary proposal that either side puts before an arbitration board results in a distortion of, of a departure from "a reasonable ratio" that the board is enjoined to preserve, the fact

that the Association can identify sources within the University's operating fund out of which its request can be financed, or the University can show that it has no "uncommitted" funds, is irrelevant. The reason that it is irrelevant is, quite simply, that the arbitration board is foreclosed by the terms of the Framework Agreement, and in particular by the special sense in which, on the view under consideration, "ability to pay" is used in that Agreement, from making an award that violates the requirement that a reasonable ratio be preserved, notwithstanding that there are or are not funds available out of which that "violation" can be funded.

In this arbitration, the Faculty Association devoted a great deal of time and attention to an attempt to show that, in the words of one of its representatives, Dr. J.G. Cragg, if the University were stood on its head, money would drop out of its jeans. The University on the other hand, devoted a good deal of its effort before us to show that its pockets were empty. On this view of the requirements of the Framework Agreement, that time and effort was wasted, for even if the sound of falling money had been deafening (and we should say in passing that it was not), that would have provided no basis for an award which did not preserve the required reasonable ratio. (p.20; emphasis in original)

[29] The Getz board continued to equate "ability to pay" precisely with the "reasonable ratio":

By contrast, even if the University's evidence had not been persuasive, on this view of the Agreement that would also have been irrelevant, for by definition it does

have the ability to pay any award that preserves the "reasonable ratio" referred to in section 12.02(f). Of course, the University may not incur a deficit in circumstances not permitted by sections 28 and 30 of the University Act. If, as a result of an award, it faces a deficit, that would mean not that it has no ability to pay within the meaning of the Framework Agreement, but rather that it must re-order its expenditure allocations so as to enable it to pay the cost of the award. (p.20; emphasis added)

[30] By the time of the 1994 Kelleher award, the parties had negotiated a small change to Article 11.02(e) (then still numbered 12.02(e)): "reasonable ratio" was changed to "reasonable balance". The language was otherwise unchanged. The Kelleher arbitration board noted that the University argued "that the amended language now permits us to take a broader view of the University's efforts to balance cost allocations" (p.6). The Association argued that the changes were "less fundamental" than argued by the University. The Kelleher board concluded:

We are in general agreement with the Association on this point. The central criterion in determining whether there is an ability to pay the cost of an Award is the relationship between bargaining unit salaries and other expenditures. The effect of the amendment to Section 12.02(e) is to render that comparison less formulistic and more flexible. (p.7)

[31] The final award considering Article 11.02(e) is that of the 1997 Larson arbitration board. The award begins by noting some of the difficulties associated with the "ability to pay" inquiry in the public sector. It then continues:

Although it is well to bear that historical background in mind, for reasons which we will discuss in a moment, one may contrast that approach with Article 12.02(e) of the Framework Agreement which not only requires that 'ability to pay' be given priority by an arbitration board in its deliberations on economic matters but it also provides certain criteria by which to objectively measure 'ability to pay', which is to say, that the arbitration board is mandated to:

'... take account of the University's need to preserve a reasonable balance between the salary of members of the bargaining unit and other expenditures.'

Two other criteria are also specified, which are more subjective in nature but which we take to bear equally on any determination of ability to pay, which is to say that an arbitration board is required to: (1) give due regard to the primacy of the University's academic purpose; and (2) the central role of faculty members in achieving it. There is no indication, on the face of Article 12.02(e) precisely how an arbitration board is to weight those factors in any particular case but we think it would not be inappropriate to observe, at this point, that a restricted ability to pay will not necessarily correlate positively with high academic standards, but what one can say, is that high academic standards cannot be achieved without highly

qualified faculty members. We do not think that proposition to be controversial. (pp.4-5; emphasis added)

[32] The Larson board reviewed the interpretive history of the provision, beginning with the decision of the Getz arbitration board, and continued:

Subsequently, as has already been noted, Article 12.02(e) was amended by changing the test to one of reasonable balance. The effect of that change was then considered by the Kelleher board (*supra*) which determined that the obvious intention of the parties was to 'render (the) comparison (between salaries and other expenses) less formulistic and more flexible[']. Without attempting to be exhaustive, we take that to mean that if one is put to determine whether a reasonable balance has been preserved it must involve some examination of the historical past, particularly agreements that were freely negotiated, and that it is not sufficient to merely look at the previous year. Secondly, the introduction of the word *balance* must be seen, in that context, to accord a certain degree of expansiveness or range to the decision of the arbitration board that was not possible under the *reasonable ratio* test. More importantly, we hold that the *reasonable balance* test is not an exclusive indicator of ability to pay and that, *inter alia*, other criteria may be taken into account which could include considerations of academic purpose and the central role of faculty at the University. (pp. 6-7; emphasis in original)

[33] Under the heading "Ability to Pay", the Larson board then reviewed the University's relatively dire financial circumstances at that time.

The evidence is that the financial situation of the University is critical. (p.7)

...

For the 1996-97 fiscal year provincial funding was reduced by \$500,000 as a result of the discontinuance of certain non-recurring funding and will be further reduced by 0.6% or \$1.67 million in fiscal 1997-98. At the same time the Provincial Government mandated that tuition fees be frozen at the 1995-6 level and required that enrolment be increased by 4% in 1996-97 and by a further 1% in 1997-98. The University argued that the enrolment increase should be seen to be equivalent to a funding cut because student tuition funds only a portion of the operating costs. In the result, it projected a deficit as at March 31, 1997 of \$6.4 million, not counting any amount which might accrue as a result of a salary increase. (p.8)

...

We think it is also important to note, at this point, that U.B.C. is one of the few universities in Canada that has eliminated academic programs in order to deal with past deficits and has severed the associated tenured faculty. The consequence of that, on continuing programs, is that since 1983-84 the student/faculty ratio has increased from just over 13 students per faculty member to about 16 students at the present time. (p.9)

[34] After noting the evidence of University witnesses, the Larson board stated:

We do not intend to review that evidence in detail in this award. Suffice it to say that we are persuaded that the financial state of affairs of the University is acute. Academic programs are being cut; faculty have been laid off; the physical plant is in a state of decay; and gross revenues are not keeping pace with expenses. Every year the situation becomes worse. ... (p.10)

[35] At p.11, the Larson board noted the University's argument as follows:

While the financial picture is incomplete, Mr. Roper argued that it is not material to the resolution of the central issue relating to ability to pay which, he says, must be measured against the statutory prohibition against incurring a deficit. He took the position that if a proposed salary increase might result in a deficit, prima facie, one must conclude that the University does not have an ability to pay. He argued that if the only way that the University might be able to pay the salary increase would be to make other expenditure decisions, then the arbitration board should defer to the Board of Governors unless there is a proper basis justifying interference with the decisions that have been made. Put in another way, he said that an arbitration board should defer to the expenditure allocations made by the Board of Governors unless it concludes that the University has created an inability to pay through budgetary contrivance or ultra-conservative budgeting: [citations omitted].

[36] The Larson board rejected that argument, by reference to the Getz award and its "reasonable ratio" (or reasonable balance):

The fact is that that issue was decided by the first Getz board, in 1989, which held at p.20 that such considerations are essentially irrelevant where the effect of an award is to preserve the proper balance:

"... even if the University's evidence had not been persuasive, on this view of the agreement that would also have been irrelevant, for by definition, it (has) the ability to pay any award that preserves the *reasonable ratio* referred to in section 12.02(e). Of course, the University may not incur a deficit in circumstances not permitted by ... the University Act. If, as a result of an award, it faces a deficit, that would mean not that it has no ability to pay within the meaning of the Framework Agreement, but rather that it must re-order its expenditure allocations so as to enable it to pay the cost of that award."

We do not consider that approach to be wrong. Since the University is required to operate within the mandate of the University Act, we do not think it to be unreasonable to presume that it will find cost areas that can be reduced or eliminated so as to not end up with a deficit. Indeed, the existence of the statutory obligation to balance the books precludes any presumption that a projected deficit is indicative of an inability to pay. In the end, the ability of the University to pay must be measured, not against forecasted revenues and expenses prior to the

implementation of expense management, but the ability of the University to absorb a salary increase after the books have been brought into balance based upon the criteria set out in Article 12.02(e) of the Framework Agreement. It is not enough to demonstrate that a salary increase will create or contribute to a deficit. (pp.11-12)

[37] Next, the Larson board considered a similar argument by the University that the test had been broadened as a result of the amendment from "reasonable ratio" to "reasonable balance":

Another related position taken by the University was that the effect of the change in Article 12.02(e) to *reasonable balance* must be taken to mean that the relationship between salaries and expenses is to be measured from a historical perspective which takes into account the increases which the faculty bargaining unit has enjoyed over time at a cost of significant retrenchment, a current assessment of faculty salaries in light of the overall financial situation and an appreciation of the consequences which a salary increase will have for the future. Mr. Roper said that, under that formula, the historical numeric ratio should not be taken to be determinative of what it must be in the future and that where the University is facing an increase in total expenditures for reasons largely beyond its control, it is antithetical to the requirement of ability to pay for an arbitration board to order that academic salaries be increased by the same proportion so as to maintain a reasonable balance and that, at some point, it is unreasonable to expect the University to cut deeper into other expenditures to satisfy salary increases. (pp.12-13)

[38] The Larson board found this argument to have "considerable logic", from both a normative and interpretive standpoint:

There is considerable logic in that position, in a normative sense, because actual revenue and expenses and the capacity to manage them are the best indicators of ability to pay. By contrast, the historical balance between academic salaries and other expenses may not be a good indicator since it presumes that just because the University had the ability to pay at a point in time when the balance was at a given level, then it must also have a current ability to pay if that balance is preserved. There is also an interpretive element which is that Article 12.02(e) only prescribes that an arbitration board *take account* of the balance. It is arguable, on that language, that there is no requirement to preserve the balance where it is clear to the arbitration board that the University is otherwise unable to pay the cost of an award. (p.13)

[39] However, the Larson board rejected the argument on the basis of precedent, holding it had already been settled by the Getz and Kelleher boards:

The problem is that, as we have already observed, the same issue was settled some considerable time ago and has been a central feature of salary arbitration since the time it was addressed directly by the first Getz board. After the language of Article 12.02(e) was amended, the significance of the

reasonable balance test in determining ability to pay was again considered by the Kelleher board. One can see at pp.6-7 of the award, that the same argument was made in that case, albeit in somewhat different terms, that the balance between salaries and other expenses should not be taken to be the primary indicator of ability to pay. However, upon analysis, the Board adopted the view of the Association... (pp.13-14)

[40] The Larson board then held that the "reasonable balance" was a "*central or primary* criterion" in determining "ability to pay" under Article 11.02(e) and, while not exclusive, was the "most important criterion".

We think that the correct view, as we stated at the beginning, is that the relationship between salaries and other expenditures is a *central or primary* criterion to be used in the determination of ability to pay but it is not an exclusive one. It follows that evidence of the difficulties had by the University in managing its revenues and expenses is relevant to the general issue of ability to pay, which may properly be taken into account by the arbitration board in reaching its decision but, in the end, the most important criterion is that of *reasonable balance*. (pp.14-15; emphasis in original)

[41] The "reasonable balance" criterion was also, in the case before it, the sole criterion the Larson board applied:

We are satisfied, on the evidence available to us, that the University is not able to increase its revenues as a means of dealing

with its financial problems. We would prefer it to be otherwise since that would obviously be the least complicated way out of the dilemma. The problem, however, is that while we were provided with evidence of financial distress, we do not know how the University proposes to manage the projected deficit or whether cuts in other areas would not be appropriate in order to accommodate a salary increase. We know that the University projected a deficit of \$6.4 million for the year ended March 31, 1997 but, in the absence of either a forecast or an expense management plan, we have no evidence that other expenditure allocations cannot reasonably be made. In the result, we are left to decide the issue of ability to pay in this case solely on the criterion of *reasonable balance* but predicated upon a balanced budget where expenditures do not exceed available revenues. (p.15; emphasis in original)

[42] Based on the reasonable balance analysis, the Larson board found there was an ability to pay a salary increase for the academic year July 1, 1996 to June 30, 1997.

[43] Accordingly, despite the Larson board's statement that the "reasonable balance" analysis is not the "exclusive" criterion, both the Larson board and the Kelleher board applied it as the exclusive criterion in reaching their result (as did both Getz boards). In my view, considering the whole of these awards and the history of the provision, what this means is that the "reasonable balance" criterion is not the only one available, and can be departed from if there are

compelling reasons to conclude that, in the particular circumstances, it would result in an unsound or unjust assessment of the University's actual ability to pay.

[44] The circumstances cited in the Larson award - which did not cause a shift from the "reasonable balance" criterion - indicate that such reasons would have to be compelling indeed.

[45] This is not surprising, given the purpose of the provision. There will never be any shortage of arguments concerning what the University's submission calls "macro considerations" - i.e., other factors, beyond the criterion of the "reasonable balance" between salaries and other expenditures in the University's general purpose operating funds. These "macro considerations" range from the various factors affecting the general financial situation of the University, both presently and in the long term, to arguments concerning its spending priorities: for example, the Association's argument that the University has prioritized spending on buildings over people. Nor will there be any shortage of arguments about these arguments: their relevance, the reliability of the information, countervailing information, and the weight that - in view of the various big-picture factual and jurisprudential forces, each of which are themselves subject to argument - each of these considerations should be given.

[46] Factoring in these considerations as a matter of course would defeat the purpose of the "reasonable balance" criterion, which is to provide a relatively certain, predictable and ascertainable measure upon which the parties can, with some degree of certainty, order their affairs. I conclude that is why the prior arbitration boards have not done so.

[47] Based on the foregoing review of the authorities, I conclude that the "reasonable balance" test has not devolved into merely a factor, even a very important one, that is to be routinely weighed along with other "macro considerations" in order to come up with a result that is some mixture of the two. It has never been employed in that fashion. Such an interpretation would be inconsistent with the original limiting purpose of the reasonable balance test, which has been substantially adhered to by subsequent arbitration boards. It would not fit with the "primary" and "central" function which the reasonable balance test has been assigned. Finally, it would be inconsistent with the reasoning of the prior arbitration decisions, which have rejected fairly compelling "macro" arguments and resorted instead to the "reasonable balance" test as the sole determinant of the result.

[48] Rather than interpreting Article 11.02(e) as a mixture or combination of the "reasonable balance" approach and a full-blown "ability to pay" debate (with all that that entails), in my view the prior

arbitration awards have treated the "reasonable balance" test as determinative, unless there are compelling reasons why doing so would result in an unsound or unjust assessment of ability to pay. That is the effect of the stipulation that the "reasonable balance" test is not the "exclusive" criterion that may be considered under Article 11.02(e).

[49] Further, a review of the Larson award indicates the circumstances that would warrant a departure from the "reasonable balance" test must be compelling indeed. The circumstances cited by the University in that case, which are more compelling than this one, were found to be insufficient.

[50] I have reviewed the various "macro considerations" cited by the parties in this case, and conclude that none rise to the level that would justify a departure from the "reasonable balance" criterion. There are many cogent arguments on both sides - the effect of which, in the end, would likely be to largely cancel each other out while broadening the inquiry and substantially attenuating its certainty.

[51] It is readily understandable that the University would wish an arbitrator assessing "ability to pay" to appreciate that its operating grant was not increased for 2012-2013 and that it anticipates 1% and 1.5% decreases in its base funding from government for 2013-2014 and 2014-2015, and that annual tuition increases

have been frozen at 2% since 2005. These factors are, as the University submits, relevant to "ability to pay" in the broad sense. However, that is not the inquiry in which I am engaged, and if it were, I would then be obliged to balance those factors against the Association's submissions concerning the University's other sources of revenue, and its allegations concerning the University's spending priorities.

[52] In its introductory submissions, the University observes that the "ability to pay" inquiry in the broad sense has not been a happy experience for public sector employers, and it submits, correctly, that the "reasonable balance" test insulates it from those effects by limiting the inquiry. However, the point here is that those limits similarly benefit the Association. This point was made in the seminal April 1989 decision of the Getz arbitration board, *inter alia* in its remarks as to what is sauce for whom. The limits of Article 11.02(e) benefit both parties. If an award would preserve a "reasonable balance" between faculty salary and other expenditures in the University's general purpose operating funds, then absent compelling reasons why that would result in an unsound or unjust assessment of the University's actual ability to pay, that is determinative. Like the prior arbitration boards, I have found no sufficient cause for departure in this case.

[53] One final topic deserves particular consideration under this heading: the PSEC bargaining mandate. The letter announcing the University's funding stipulates that it must adhere to PSEC bargaining directives. There has been no suggestion that the funding will be withdrawn if an interest arbitration award is made that is not within those bargaining directives; had that been the suggestion, that would undoubtedly have led to a number of arguments, including (but by no means limited to) the University's obligations under Article 10 to "use its best efforts to obtain the funds needed to meet its obligations incurred in accordance with this Agreement." The arguments did not proceed in that direction.

[54] The PSEC mandate does not have legislative force, and therefore does not override the parties' Agreement legislatively. The question that then remains is whether it fits within the concept of "ability to pay" in the parties' Agreement.

[55] I have concluded it does not. The meaning of that term in this agreement has been reviewed extensively above. It refers to a particular method of calculating whether there are the necessary funds available at this institution. While the particular method may be departed from in some circumstances, there is no basis in those prior awards to found a departure from the ultimate question: i.e., whether there are the

necessary funds at this institution. The Association's agreement is with the University.

[56] Moreover, those prior interpretations make it clear that if the "reasonable balance" criterion is met, but the result conflicts with the University's other obligations - including those with legislative force, such as the prohibition against incurring a deficit - then the consequence is that the University must re-order its expenditures to meet those other obligations. It is not that the "reasonable balance", and the obligation to the Association, gives way.

[57] I recognize the difficulty for the University that its bargaining mandate and government funding may not match its agreement. It would undoubtedly be more convenient for all concerned (with perhaps the notable exception of the Association and its members) if the bargaining mandate, the government funding and the "ability to pay" clause were all harmonious. The difficulty is they are not. The "ability to pay" clause in this agreement, by longstanding interpretation, simply does not mean "co-extensive with the government funding allocation", nor "co-extensive with the government province-wide bargaining mandate". (I note in passing that a PSEC mandate was also mentioned in the 1997 Larson award, but was not considered part of the "ability to pay": p.19.)

[58] Perhaps the clearest illustration of this point is language which I have not yet given any express consideration, though it is equally part of Article 11.02(e). The University's "ability to pay" must be considered "with due regard to the primacy of the University's academic purpose and the central role of Faculty Members, Librarians and Program Directors in achieving it".

[59] The PSEC bargaining mandate, being a general province-wide public sector bargaining mandate, clearly does not do that. Nor does the government funding stipulation that accords with that mandate. That is not a criticism of either, but simply a recognition that they represent a general province-wide public sector bargaining mandate. That mandate is not based on UBC's unique circumstances, while UBC's Agreement with the Association expressly is.

[60] My role is not to reconcile any such discrepancy, but rather simply to ascertain the meaning of the Agreement. That meaning, by longstanding interpretation, is clear on this point. That is the end of my role in that regard.

[61] Whether and how there should be any such reconciliation would involve considerations such as, on the one hand, the legitimate role of province-wide mandates and their importance in maintaining tight public finances, and on the other hand the central role

of UBC faculty in the University's success in competing on a global scale - and whether and to what extent one may affect the other.

[62] My role is to interpret the Agreement, and now having done so, to apply it. I will therefore go on to assess the "reasonable balance" between faculty salaries and other expenditures in the University's general purpose operating funds, which determines the University's "ability to pay" an award under this Agreement.

IV

[63] The first disagreement which must be resolved in calculating the "reasonable balance" is the applicability of what the parties have described as the "Mackie letter". The Association submits that the "reasonable balance" is derived from a comparison of bargaining unit salaries to GPOF expenses. In opposing that submission, the University adduced evidence from Dr. George Mackie who, at all relevant times, was the Associate Vice President - Academic Planning.

[64] On July 1, 2004, the parties entered into a Letter of Understanding by which they agreed to "engage in a process to clarify the appropriate sources of funding that should be examined in connection with the

Arbitration Board's determination of the University's ability to pay the cost of an award. ... The Joint Committee shall consider the provisions of Article 11.02(e) with a view to making recommendations to the Parties as to whether and how this clause should be clarified and/or amended."

[65] On February 28, 2006, the Association advanced a collective bargaining proposal which included a "new" provision to be added to the Agreement on the Framework for Collective Bargaining. That proposal read:

"General Purpose Operating Fund" for the purposes of this Agreement means the total revenues of the University of British Columbia.

[66] On March 9, 2006, Dr. Mackie tabled a letter headed "General Budget Definitions". Item 2 reads:

2 GPOF. The general purpose operating fund lies at the core of the University's budget. Its principal revenue sources include:

- The provincial grant based largely on student FTE
- Domestic tuition fees
- Federal funds for the indirect costs of research (restricted funds)
- Income from the central share of royalties and equities

- Overhead funds from the Canada Research Chairs program (restricted funds)
- Income on cash balances.

The first three items account for over 90% of the GPOF.

[67] At a meeting on March 13, 2006, Rosanne Hood of the Faculty Association thanked Dr. Mackie for the document he had prepared and said "... very helpful but want it on letterhead and signed." On that same day, Dr. Mackie did that and testified that "either settled [the issue] or it ceased to be a pressing concern."

[68] In cross-examination, Dr. Mackie agreed that the letter did not become a part of the collective agreement. It was put to Dr. Mackie that the parties "never agreed orally or in writing [to the Mackie letter]". He agreed with that proposition.

[69] I find that the evidence adduced by the University falls short of establishing that the parties agreed to the components of the GPOF described in the Mackie Letter.

[70] There remained a number of other disagreements between the parties as to how to calculate the "reasonable balance" between faculty salaries and other expenditures in the University's general purpose operating funds pursuant to Article 11.02. In particular, the parties disagreed as to what

constitutes "expenditures" pursuant to that provision. I considered expert evidence from Ms. Eleanor M. Joy of PricewaterhouseCoopers LLP, retained by the Association, and Mr. Paul McEwen of Ernst & Young LLP, retained by the University. I also heard evidence from Mr. Pierre Ouillet, the CFO of the University.

[71] The expert evidence of Ms. Joy was that in determining the reasonable balance it is necessary to consider the ratio of bargaining unit salaries to GPOF expenses. In fact, Article 11.02(e) speaks to "general purpose operating funds". It does not say "General Purpose Operating Fund" or "GPOF". The language in Article 11.02(e) is lower case and plural. Ms. Joy asserted an exercise in determining "salaries to expenses", as opposed to "salaries to revenues", which was the position taken by the University and Mr. McEwen.

[72] The evidence establishes that the general purpose operating funds have changed significantly since 2010. Utilities and Plant Operations were added in 2010; IT services in 2011. What used to be known as the GPOF is now one of three component funds of the Operating Fund. The other components are Fee for Service and Continuing Studies.

[73] The Operating Fund is used, *inter alia*, for Interfund Transfers and Invested in Capital. The former is obviously transfers between funds, some of which are

expended on building maintenance, library acquisitions, computers, furniture and equipment, research start-ups, grants, student awards and other outlays necessary for the operations of the University. Ms. Joy took issue with including Interfund Transfers in expenditures (for the purpose of Article 11.02(e)) but agreed that the University needs to spend resources on building maintenance, books, computers, furniture, equipment and the like. Ms. Joy insisted that Interfund Transfers were transfers: "No, it's a transfer, not an expense". She did agree that such transfers were reductions in the general purpose operating funds which were not coming back. This was buttressed by the evidence of Mr. Ouillet.

[74] Prior to 2006-2007, the Province directly funded the University's capital expenditures. Mr. Ouillet testified that with the end of capital funding, all operating revenues were brought together and since then the University has funded capital expenditures from what is now the Operating Fund. Mr. Ouillet testified that capital funding amounts to \$25 million to \$30 million per year (this is in addition to non-capital outlays, described in the preceding paragraph), and that "this money will never come back to the general purpose operating funds". Mr. Ouillet said that Ms. Joy's projection of a 3% expense growth for 2014 was too high. He suggested 1.3% to 1.5% and perhaps as high as 1.7%.

[75] It is appropriate to add a brief comment on "expenses" and "expenditures", about which there was considerable debate. In my view, in ordinary language, those two words may be used interchangeably. It may be that in accounting the two words represent different concepts. An expense may be an expenditure but an expenditure may not be an expense. It will depend upon the particular circumstances in which the words are used.

[76] Ms. Joy said Interfund Transfers were not expenses for the purpose of calculating the "reasonable balance". That proposition may have some validity in technical accounting constructs, but in this arbitration it should not be used as a distraction to divert from what is really at question. The evidence is that such transfers fund buildings, books, computers, furniture and equipment, vehicles, research start-ups, grants, student awards and the like. It is frail logic to maintain that such outlays are "transfers - not an expense". I prefer the plain, uncontradicted logic of Mr. Ouillet. The funds Ms. Joy calls "discretionary" and "transfers" and therefore not properly counted as expenses are used for the staples of the University: library books, research start-ups, student loans, computers, furniture, equipment and the like. Further, as Mr. Ouillet testified, the funds so expended "are not coming back". These resources are used up; they do not go back to their source. Those uses of University resources are, for the purposes of this arbitration,

expenditures. (Moreover, I observe from Exhibit 19 that Ms. Joy in a Schedule of Revenues and Expenditures for the year ended March 31, 1996 included, *inter alia*, Library acquisitions and furniture and equipment in Expenditures. The University's expert for that earlier arbitration, James Cosh, did the same thing (Exhibit 18).)

[77] Nor did I find the evidence of the University's expert to be entirely satisfactory. Errors came to light in cross-examination for which I have adjusted in considering Appendix B - Updated PwC Ratio Analysis for Fiscal 2006 to 2014 (hereafter called "App. B - Updated").

[78] Mr. McEwen agreed that \$11 million accounted for in general purpose expenses in 2013 were recorded as fee for service expenses in 2012. I have adjusted this by reducing the 2013 and 2014 "Salaries to Members" line in App. B - Updated, thereby reducing 2013 to \$331,144,000 and 2014 to \$356,478,000. As well, there is a Building Operations adjustment in 2009 of \$32,477,000.

[79] Ms. Joy said it was "not unreasonable" to adjust the International Student expenses for the years 2006-2009 and include external interest for the same years. I have accepted the evidence of Mr. McEwen, supported by Mr. Ouillet, with respect to the Fiscal year 2014 adjustment and the Fiscal 2014 adjustment - excess of

forecast revenues over expenditures. I have added "Interfund transfers" and "Invested in capital assets", for reasons previously discussed.

[80] On June 10, 2013, I asked the parties to prepare a revised App. B - Updated by making the described adjustments. I did that so as to avoid any arithmetical disputes. The revised App. B - Updated is attached as Schedule 1 to this Award. I wish to make clear that I did not seek comment or agreement of the parties to the adjustments I made to App. B - Updated and Ms. Joy made clear she did not agree with all of them. She did agree to the arithmetic in App. B - Updated, which is all that was asked. Submissions closed June 5, 2013 and nothing after that date has been considered.

[81] Following consideration of the expert evidence and that of Mr. Ouillet, I have determined that Schedule 1 App. B - Updated represents the most accurate ratio analysis and should be used for the purpose of determining the "reasonable balance" under Article 11.02(e) of the Framework Agreement.

[82] Accordingly, the ratios for the following fiscal years (ending March 31) are as follows: 2006 - 24.9%; 2007 - 27.2%; 2008 - 26.5%; 2009 - 28.1%; 2010 - 28.5%; 2011 - 28.7%; 2012 - 28.8%.

[83] The Association's proposal of general wage increases of 5% and 5% would result in the following

ratios for 2013 (adjusted) and 2014 (forecast): 2013 - 28.9%; 2014 - 31.1%.

[84] It is clear that for 2014, the Association's proposal is outside the "reasonable balance" and therefore beyond the University's "ability to pay" as that is defined in Article 11.02(e).

[85] That is not determinative of the result: this is not "final offer selection", like *Simon Fraser University and Simon Fraser University Faculty Association*, unreported, April 30, 2013 (Taylor), which involved a 2% and 2% settlement and is relied on by the University here. Under Article 11.02(e), the fact that the Association's proposal is unreasonable does not mean the University's proposal of 2% and 2% is awarded. The merits of the appropriate award (provided it is within the University's ability to pay) are determined on the four enumerated criteria in the second half of Article 11.02(e).

[86] I therefore turn to address the four enumerated criteria on the merits.

V

[87] Repeated for convenience, the four enumerated factors that determine the appropriate award (provided it is within the University's ability to pay) are:

- i. the need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians, and Program Directors of the highest caliber;
- ii. changes in the Vancouver and Canadian Consumer Price Indices;
- iii. changes in British Columbian and Canadian Average Salaries and Wages; and
- iv. salaries and benefits at other Canadian universities of comparable academic quality and size.

I will defer dealing with the first factor until after I have dealt with the fourth, which provides some context for it.

[88] With respect to the factors of CPI and general wage increases, the parties have submitted data for a range of periods, and have not argued there is a particular defined period to which consideration must be limited under the Agreement. In my view that is appropriate. A holistic and practical view is preferable to a false affectation of mathematical precision. Further, the numbers must be assessed in their relevant context.

[89] There is, however, a fundamental qualitative difference that emerges from the parties' submissions. The Association compares its wage increases in the last

ten years, and/or since the beginning of the last agreement (which was 0% and 0%) to the corresponding CPI and general wage increases for those periods. While I appreciate why the Association has done so, those collective agreements are past. This is not an exercise in redressing perceived inequities in past collective agreements. Those agreements were concluded at the time, and are not to be reargued now. The purpose of the criteria in Article 11.02 is to fix the terms of a new collective agreement, moving forward.

[90] Both the CPI and general wage increase criteria are prefaced with the phrase "changes in". They do not specify precisely since when - e.g., the term of the last collective agreement, or the time of the last round of bargaining, in which the parties last had an opportunity to revisit the matter. A purposive interpretation suggests a holistic and practical assessment directed at ascertaining general levels and trends that are relevant to the period of this collective agreement.

[91] The annual changes in the Vancouver CPI, on a month-to-month basis, proceed from 2.39% in January 2011 to hit almost 3% twice before declining to 1.56% in July 2011. They rise to above 2% for a few months, then below 2% for a few months, before declining to 1.45% in July 2012 (the first month of this Agreement). They then decline further, to 0.85% and 0.68% and finally 0.17% in November 2012, before rebounding to

0.51% for a period, then 1.18% in February and 0.76% in March 2013.

[92] The annual changes in the Canadian CPI, on a month-to-month basis, proceed from 2.33% and 2.24% in January and February 2011 to over 3% for most of the next several months, before declining to 2.28% in December 2011; there are then similar numbers for the next few months until a decline to 1.33% in May and 1.25% in July 2012 (the first month of this Agreement). There is then a further decline to a low of 0.49% in January 2013, before rising to 1.07% in February and March of 2013.

[93] Given the Association's submission that Bank of Canada monetary policy aims for a target of a 2% midpoint between 1% and 3% over the long term, one would not expect these downward trends to continue, although when a correction may occur is uncertain, and we are already partway through the term of this agreement.

[94] The next criterion is more favourable for the Association. For British Columbia, the annual per cent changes in average weekly wages were 1.8% for 2011, 2.0% for 2012, and 2.6% for January-April 2013. The corresponding numbers for Canada were 2.4% for 2011, 3.2% for 2012, and 2.4% for January-April 2013.

[95] I next turn to the fourth factor: "salaries and benefits at other Canadian universities of comparable academic quality and size".

[96] Like all of the factors, this must be assessed purposively and with a view to the likely intention of the parties. For example, particularly once one reaches a certain level of "size", that factor tends to cede importance to "quality"; this is reflected in the parties' submissions. Further, there is no other university that is precisely comparable, and therefore one must consider the University's place in a range.

[97] The Association relies on a compilation of seven rankings of comparator universities, placing particular reliance on two of them, which it notes that the University also cites on its website: the *Times* Higher Education 2012-2013 World Ranking, and the Academic Ranking of World Universities 2012, produced by Shanghai Jiao Tong University. The table provided by the Association lists nine comparator Canadian universities among the seven different overall rankings.

[98] These rankings vary - as the Association acknowledges, they are far from precise - and should only be assessed as a broad cross-section.

[99] What is clear from these rankings is that UBC is successfully competing on an international scale, at a

very high level. The picture that emerges from the rankings overall is that UBC is second in Canada only to the University of Toronto, with McGill in third. Those are the only three Canadian universities that consistently rank highly in the international rankings. There is a sharp drop-off after those three, with none of the other universities approaching UBC in any of the rankings. UBC is ranked higher than McGill in 5 of the 7 rankings, including the two noted earlier, in which UBC ranks close behind the University of Toronto.

[100] If it is possible to make an uncontroversial statement about university rankings, it is that they are imperfect. I am also not persuaded that they are the only measure of academic quality. I thus agree with the University that SFU and the University of Victoria should not be excluded entirely from the analysis, as the Association has done (even though the comparison is relatively attenuated, and this is reflected in the existing relative salaries). Further, it is difficult to translate rankings into an overall measure: one could not say that a university that ranks 60th as opposed to 40th thereby has only 2/3 the academic quality, for example.

[101] It is nonetheless clear that importance is placed on rankings, and the Association observes they have been relied on by the University in determining appropriate compensation for senior administrators. A

June 8, 2012 UBC Executive Compensation Report sent to PSEC states:

As one of the highest ranked universities in Canada, and one of the top 30 universities in the world, UBC seeks to retain and attract the best senior administrators it can by remaining competitive in its compensation practices with other large research-intensive universities represented by the U15 (i.e., leading research-intensive universities in Canada), and in particular the University of Toronto and the University of Alberta, and with the global market for senior administrator talent generally.

[102] I note however that the comparisons made were not just to the University of Toronto, but also the University of Alberta and the "U15" generally.

[103] In comparing UBC with its national comparators, I have accepted the University's submission that UBC Okanagan should be excluded from the analysis, given its unique circumstances (including its recent transition) and relatively small proportion. I have taken account of the Association's submission in response concerning the different campuses of the University of Toronto. However, in comparing the numbers provided by the University and the Association, it is clear that the inclusion of UBC Okanagan in the Association's numbers significantly distorts the comparison between UBC and its national comparators,

and to that extent does not present an accurate comparison in substantive terms.

[104] Nonetheless, the overall picture that emerges is that salaries at UBC have fallen somewhat behind its relative place in terms of academic quality (or, perhaps more accurately, UBC's academic quality has risen faster than its salaries). This factor tends to provide some support for an increase.

[105] That is not surprising, given the historical background cited by the Association - in particular, the last collective agreement of zero general wage increases over two years. At times in its submissions, the Association appears to advocate for a four-year collective agreement that includes that period - or at least, an increase that takes account of the absence of any increase during that two year period. In general terms, that is water under the bridge.

[106] A partial exception to that, however, may be the criterion at hand. Unlike the criteria for CPI and general wages, it is not based on the *changes* in salaries and benefits at comparative universities in this particular round, but rather on "wages and benefits" at those universities generally.

[107] The University submits that I should consider, under Article 11.02(e), not just its proposal of 2% and 2% general wage increase, but also its proposal to

maintain 1% lump sum and 2.5% for Progress Through the Ranks (PTR). (I note that I have accepted UBC's submission that it mistakenly failed to add the 1% to its numbers used for comparative purposes, though that does not make a difference to the ultimate Award.)

[108] I accept, however, the Association's point that both 2.5% PTR and the 1% lump sum represent the *status quo*, and the mere fact that they would be open to bargaining (as would any collective agreement provision) does not mean that the Association must start from ground zero in that regard. The University's proposal to maintain does not take the place of an increase.

[109] The University also relies on the following passage from the Larson award, which occurs in the context of a discussion of a proposal concerning PTR:

Notwithstanding the gaps in that system, it is obvious to us that the Career Advancement Plan has been adopted by the parties as the primary means of advancing the compensation levels of faculty under the collective agreement. Certainly in the immediate past general salary increases have not been an essential feature of the compensation structure. (p.27)

[110] This point would be more relevant if there were a debate as to how a justified increase under Article 11.02(e) should be fulfilled - i.e., whether by an

increase in PTR or general wage increase or both. That is not the debate at hand; the University is not proposing to increase PTR.

[111] I also accept the Association's submission that PTR rewards individuals' career advancement; it is not a substitute for a general wage increase to keep pace with inflation and the general state of salaries elsewhere. As noted by Arbitrator Burkett in *The University of Toronto and the University of Toronto Faculty Association*, unreported, June 3, 1982:

The P.T.R. increases received by a faculty member over time are given in recognition of his increasing contribution to the University. ... The purpose of the P.T.R. increase, therefore is not to advance the salary ranges but to recognize merit by moving individual faculty members through the salary ranges. Upward movement of the salary ranges is achieved by means of, and in the amount of, the annual economic increase. It follows that only the amount of economic increase should be included for purposes of determining how faculty salary ranges have fared over time. (para.27)

[112] In summary, the University's proposal to maintain 2.5% PTR is significant, and an important part of the context. However, a proposal to maintain the *status quo* is not an increase, and if an increase under Article 11.02 is justified, then a proposal to maintain the *status quo* does not fulfil it.

[113] I turn finally to the first-enumerated factor: "the need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians and Program Directors of the highest caliber". To some extent, this criterion overlaps with the one addressed above, and it is dealt with there. Having said that, I acknowledge the University's submission that there is much more to an individual's decision to come to (or remain at) U.B.C. than salaries and benefits.

[114] In addition, as noted by the Kelleher board, recruitment and retention is affected by expenditures on both sides of the "reasonable balance" ledger;

Moreover, as the University's counsel argues, attracting and retaining faculty is not simply a function of salaries. There are other expenditures which the University must make which have an impact on the ability of the university to attract and retain faculty: adequate support staff, up-to-date equipment and funding for research are examples. (p.12)

[115] The Association relies on survey evidence, and to some extent speculation as to the number of resignations based on the change in its membership, to argue the University has a retention problem. The survey is the University's November 2011 *Workplace Experiences Survey* conducted by Ipsos Reid. The Association submits that, for example, among the Vancouver

Professoriate (which it submits is by far the largest faculty group in the bargaining unit), 29% stated they were somewhat or very likely to leave UBC over the next three years, and 29% of those cited "to increase salary" as a reason.

[116] The University relies on the number of actual resignations, which is small, and the number of applicants for each position, which is large, and submits these demonstrate it does not have a recruitment and retention problem.

[117] I find the University's numbers of actual resignations to be the most reliable evidence, and I accept the University's submissions that it does not presently have a general recruitment and retention problem.

[118] I also accept the University's argument that general retention (relevant to a general wage increase) is different from specific, targeted retention issues that may arise at a university, and thus the fact that the University has engaged in targeted retention efforts, and earmarked a small proportion of its increase for that purpose, does not assist the Association's case. It is not surprising that there would be particular areas where retention would be a concern, it is the type of practice the University has engaged in for some time, and the fact that the University has earmarked 0.05% and 0.10% of its

proposed increase for such situations does not demonstrate that a larger general wage increase is necessary.

[119] Undoubtedly, recruitment and retention is an ongoing concern, and one the University must keep its eye on. The survey numbers indicate it is *possible* that a broader recruitment and retention problem may develop. On the other hand, as the Association submits, the market for faculty is international. It is not at all surprising that a significant proportion might consider going somewhere else, and that of those, a significant proportion may consider higher salary as a factor. That does not, alone, demonstrate that the University has a recruitment and retention problem that would justify a larger general salary award. It indicates that UBC is in a competitive and financially challenging market for faculty; but it does not indicate that UBC is failing to compete.

[120] At the same time, it cannot be said that UBC's salaries are beyond what is needed for recruitment and retention, so as to justify a lower general wage increase. On balance, once one takes account of the need for an increase noted earlier, this factor is essentially neutral.

[121] Weighing the four enumerated factors based on all the information provided, I conclude that the factor of CPI would tend to support an annual increase of 1.5%.

The second factor, general wage increases, would tend to support an annual increase of 2.5%. Taken together therefore, these two of the four factors would tend to support an annual increase of 2.0%.

[122] Taking into account the factors of "salaries and benefits at other Canadian universities of comparable academic quality and size" brings the appropriate annual increase to 2.5%.

[123] Once that is taken into account, I find the "need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians and Program Directors of the highest caliber" is otherwise a neutral factor at the present time.

[124] The appropriate Award under Article 11.02 is therefore annual increases of 2.5% and 2.5%.

[125] Based on the ratios in Schedule 1, I am satisfied this falls within the University's "ability to pay" as defined in that Article.

VI

[126] In addition to the general wage increase, the Association has sought to have awarded by interest arbitration a large number of other proposals. The

University objected to this, but submitted in the alternative (a submission which the Association did not seriously dispute, and with which in any event I agree), that if any such proposals were awarded there would have to be "trade-offs" awarded to the University in exchange. This led to back-and-forth submissions on the various proposals that could be described as bargaining through interest arbitration.

[127] As noted, the University's primary submission was that it fundamentally objected to this entire exercise. It argued that the appropriate forum for such trade-offs is collective bargaining between the parties, not interest arbitration.

[128] The University submits:

127. In *City of Richmond v. Richmond Fire Fighters Assn.*, [2009] B.C.C.A.A.A. No. 106, Arbitrator McPhillips discussed the reasons which make it difficult to adjudicate terms other than wages and term of the agreement:

74 With respect to the other issues in this dispute there are four general observations to be made. The first is whether this Award should address those matters at all. Generally, interest arbitration awards will deal with such issues only if there is a clear and compelling reason to do so: *Greater Victoria Labour Relations Association* [1993] B.C.C.A.A.A. No. 31, October 28, 1993 (Ready); *City of Vancouver, December 21, 1983 (McColl)*; *City of Campbell River, supra*; *City of Burnaby, supra*.

...

76 The third consideration is these are costs and language items which generally require trade-offs with other terms in the Agreement to be made by the parties themselves and it is difficult to do that in this setting.

77 The final point is that this Collective Agreement will expire in approximately three months and the parties will soon have another opportunity to address directly the matters of concern to them and the bargaining history is that is what they have done.

(emphasis added by the University)

[129] After citing further case authorities, the University submits:

132. It is the University's primary submission that the appropriate resolution to all non-salary proposals is to determine that none should form part of the award. All of the factors referred to by Arbitrator McPhillips in *City of Surrey, supra*, apply to these circumstances:

- a. There is no compelling need for the changes requested;
- b. The issues raised are complex, and there is insufficient information before this arbitration board for it to be satisfied that the changes should be made;
- c. It would be appropriate to make trade-offs for the changes requested; and

- d. The next round of bargaining is imminent.

133. In regard to the latter factor, the parties agree to a two year term for the current collective agreement. By the time this matter is resolved, the parties will be back at the bargaining table in six months time at most. None of the non-monetary proposals is so pressing that it cannot be left for bargaining in January of 2014 when the appropriate trade-offs can be freely negotiated by the parties.

134. Furthermore, many of the non-monetary proposals made by the parties involve extremely complex issues that are not readily analyzed and addressed by way of interest arbitration. They have potential consequences that are not always evident on the face of the proposals which require careful consideration and assessment. The non-monetary proposals are better suited to the give and take of collective bargaining where the parties will have time to fully consider and negotiate the various competing interests involved.

135. In particular, the Faculty Association is looking for significant breakthroughs in terms of language and practice in its proposals. For example, the Association seeks major changes to the terms and conditions of employment for Sessionals and Lecturers. They also seek to implement new and extensive procedures for conducting investigations at the University and create a new process for workload allocation. These significant and complex proposals (which are discussed in detail below) are not appropriate for interest arbitration. They represent the very sort of breakthroughs that neither party can expect from the

inherently "conservative exercise" of interest arbitration.

[130] I agree with and accept that submission, and find it applies to all of the proposals from both sides, beyond the award of general wage increase. (I add that all of the value to be derived from Article 11.02(e) is fully accounted for in that award.)

[131] The issue is not, as the Association submits, whether the issues are "that complicated" (though some of them are), nor whether the proposals are accurately characterized as "breakthroughs" (though some of them would be), nor whether this arbitration board could request and receive further information - rather, it is who is best situated to make the decisions and trade-offs in question: the arbitrator or the parties themselves.

[132] The University and the Association are sophisticated parties with a mature bargaining relationship and a long history of self-governance. They have a commendable record of resolving their issues and reaching agreement without the need for a third party to order their affairs.

[133] If it were otherwise, there might be a greater need for management by a third party. However, that is not the case. While the Association correctly observes that the parties have not been able to reach agreement

on such issues in this round of bargaining, that has not been the case in other rounds, and I am not persuaded that any of the issues raised are of sufficient urgency that the parties should not be given another chance to resolve the issues themselves. It is their Agreement, and they deserve that chance.

VII

[134] Having reached the necessary conclusions under Article 11.02(e), it is appropriate to revisit the University's objections concerning the preservation of the collective bargaining process, with the benefit of that concrete information.

[135] Those objections relate primarily to the fact that a pattern of settlement has been reached in the B.C. public sector, and the post-secondary sector, and with UBC's other employee groups, of 2% and 2% over two years. I have calculated the appropriate award under Article 11.02(e) as 2.5% and 2.5%. I have not awarded any other changes, and I am generally not aware of whether, and if so what, other changes were reached under the various other agreements.

[136] I reject the University's argument that the Association has used either the settlements with other groups, or the University's offer, as a "springboard".

As noted earlier, 11.02(e) is an "adjudicative" model, which is exhaustively based on the enumerated criteria - it is not based on other settlements or on either party's offer.

[137] The University's argument regarding fostering collective bargaining is more difficult. As noted earlier, interest arbitration seeks to encourage collective bargaining, and therefore endeavors not to provide an incentive to either party to go to interest arbitration. As the University observes, these principles are consistent with the duties in ss.2(c) and (e) of the *Labour Relations Code* to "encourage the practice and procedures of collective bargaining" and "promote conditions favourable to the orderly, constructive and expeditious settlement of disputes".

[138] It is difficult to say what would have occurred if the parties had proceeded to strike or lockout. A settlement according to the 2% and 2% mandate is one possibility. On the other hand, strikes or lockouts are what occur when each party finds the other's mandate unacceptable. There is also the further possibility that trade-offs would ultimately have been made involving language and rights without direct monetary consequences.

[139] In any event, as I have described earlier, the parties' agreement in Article 11.02(e) follows the adjudicative, not replication, model. It would

encourage neither collective bargaining, nor the orderly resolution of disputes, if parties could not rely on their freely negotiated agreements.

[140] The four criteria enumerated in Article 11.02(e) are essentially directed at replication of a situation governed by those four criteria. To the extent that surrounding circumstances differ, there is the potential for different results. There may be a tension between the independence of Article 11.02(e) and the surrounding coordinated public sector context from which the University derives much of its funds. That is a matter for the parties. The role of this Award is to interpret and apply their agreement in Article 11.02(e).

VIII

[141] In conclusion, I award that the current collective agreement be renewed for a term of July 1, 2012 to June 30, 2014.

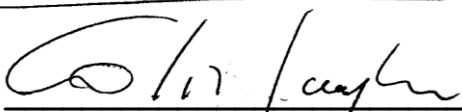
[142] The University's salary proposals are awarded, plus an additional .5% and .5% to general salary increases each year. For greater clarity, this means the University's proposals in "Attachment 2'" and "Attachment 3" are awarded, with the exception that in "Attachment 2", items 1(a) and 1(b), "1.95%" is changed

to "2.45%", and in items 2(a) and 2(b), "1.9%" is changed to "2.4%"; consequent amounts, including those in "Attachment 3", will increase accordingly.

[143] Agreed items are left to the parties to implement.

[144] All other items have been considered and are not awarded.

DATED at Vancouver, British Columbia, this 24th day of July 2013.



Colin Taylor, Q.C.

APP. B - UPDATED

SCHEDULE 1

Updated ratio analysis

\$000

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>
Per Joy reply report									
Adjusted total GPOF expenses	680,532	680,741	716,020	783,448	815,233	914,269	972,901	1,078,251	1,110,599
Salaries to members (GPOF)	202,289	219,263	233,447	249,477	272,275	284,533	301,677	342,144	367,478
Salaries to members as % of expenses	29.7%	32.2%	32.6%	31.8%	33.4%	31.1%	31.0%	31.7%	33.1%
Salaries to members as above	202,289	219,263	233,447	249,477	272,275	284,533	301,677	342,144	367,478
Deduct \$11m								(11,000)	(11,000)
Adjusted numerator	202,289	219,263	233,447	249,477	272,275	284,533	301,677	331,144	356,478
GPOF expenses as above	680,532	680,741	716,020	783,448	815,233	914,269	972,901	1,078,251	1,110,599
International student adjustment	24,519	28,310	33,263	37,361	44,164				
External Interest Inclusion	33,906	20,162	21,965	25,923	26,015				
Fiscal year 2014 adjustment									(18,514)
Building Operations				(32,477)					
Interfund transfers	41,196	46,345	77,278	40,481	34,815	31,696	29,799	14,669	
Invested in capital assets	30,834	31,790	32,483	33,502	35,727	46,911	45,058	51,493	
Fiscal 2014 adjustment - excess of forecast revenues over expenses									53,859
Adjusted denominator	810,987	807,348	881,009	888,238	955,954	992,876	1,047,758	1,144,413	1,145,944
Adjusted numerator/adjusted denominator	24.9%	27.2%	26.5%	28.1%	28.5%	28.7%	28.8%	28.9%	31.1%