BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE UNIVERSITY OF BRITISH COLUMBIA

(the "University")

-and-

UNIVERSITY OF BRITISH COLUMBIA FACULTY ASSOCIATION

(the "Association")

PANEL: G.J. Mullaly, Vice-Chair

APPEARANCES: Thomas A. Roper, Q.C., for the University
Allan E. Black, Q.C., and S. Michelle Blendell, for the Association

CASE NO.: 51071

DATES OF HEARING: June 6, 7 and 20, 2005

DATE OF DECISION: February 28, 2006
DECISION OF THE BOARD

I. INTRODUCTION

The University applies under Section 99 of the Labour Relations Code (the "Code") for review of an arbitration award (the "Award") by Arbitrator James E. Dorsey, Q.C. (the "Arbitrator") issued on February 18, 2004 (Ministry No. X-008/04). The Arbitrator dealt with two grievances the Association had filed. The first one (the "exclusive bargaining authority grievance") alleged that the University had violated Article 3 of the parties’ Agreement on the Framework for Collective Bargaining (the "Framework Agreement") by negotiating directly with faculty members. The second grievance (the "discrimination grievance") alleged that contrary to Article 4 of the Framework Agreement, the University had removed a faculty member (Dr. Mary Bryson) from work assigned to her because of her membership in, and activities on behalf of, the Association. The Arbitrator upheld both grievances.

The University maintains that the Award is patently unreasonable and inconsistent with the principles expressed or implied in the Code. It also maintains that the Arbitrator denied it a fair hearing by failing to consider relevant sections of the parties' collective agreement (the "Collective Agreement") and by failing to provide a reasoned analysis of the issues.

II. BACKGROUND

The University has voluntarily recognized the Association as the bargaining agent for a bargaining unit that includes more than 2,500 of the University’s full and part-time faculty members. The Collective Agreement consists of several documents, including the Framework Agreement.

The Preamble of the Framework Agreement provides, in part, that:

THE UNIVERSITY OF BRITISH COLUMBIA and the FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

***

RECOGNIZING that the University is a community of scholars whose essential functions are the pursuit and dissemination of knowledge and understanding through research and teaching and that academic freedom is essential to carry out these functions; and

BEING DETERMINED not to interfere with that academic freedom;

HAVE AGREED AS FOLLOWS:

(Award, p. 3. emphasis added)
Article 3 of the Framework Agreement provides, in part, that “[t]he University recognizes the Association as the sole collective bargaining agent for all members of the bargaining unit” (Award, p. 3). Article 4 of the Framework Agreement prohibits discrimination on, among other grounds, membership in, or activities on behalf of, the Association:

4. No Discrimination

The University, Faculty Members, Librarians and Program Directors are committed to fostering an environment of tolerance and mutual respect in which all members of the University Community - students, faculty, staff and visitors - are able to study and work free from harassment and discrimination. The University and the Association agree that there shall be no discrimination against any Faculty Member or member of the bargaining unit in relation to the matters covered by this Agreement because of race, colour, sex, sexual orientation, place of origin, creed, marital status, political or religious affiliation or belief, age (other than the normal provisions relating to retirement) or membership or non-membership in, or activities on behalf of, the Association. (Award, p. 3, emphasis added)

In 1993 the University issued “Policy #88: Patents and Licensing” (“Policy #88”). It provides, in part, that ownership of the intellectual property rights to “literary works” produced by those connected to the University are vested in the individuals involved (Award, p. 8). There is no dispute that for the purpose of Policy #88, “literary works” includes course material (Award, p. 85).

In 2000 the University and a university in Mexico (Tec de Monterrey) agreed to develop a joint, on-line, Masters degree program in Educational Technology (the “MET program”). The University asked Bryson, and another member of the Association, Dr. Dan Pratt, to develop a course (ETEC 512) for the MET program. Bryson agreed to do so without appreciating that the University wished her to sign a document (the “MET agreement”) that the University later described to her as “…a standard contract that lays out the responsibilities of the different members of the team and also clarifies issues of copyright and ownership of course materials” (Award, p. 56). The ‘clarification’ of the issues of copyright and ownership of course materials included drawing a distinction between “author materials” and “course materials” and stipulating that:

The University owns copyright in Course Materials. The University agrees that those elements of Course Materials that comprise “content” (including without limitation the syllabus, but excluding the “look and feel!”) may be used, in perpetuity, by an Author who contributed to the creation of those materials, for the purposes of teaching and/or publication. (Award, p. 50)

The MET agreement provided for more than a change in copyright ownership. The Arbitrator described what it also did in the following passage from the Award:
It created a limitation on academic freedom. It granted the employer a previously non-existing right under the collective agreement or prior Distance Education and Technology agreements to act "in its discretion" to "decide which of the materials contributed by the Author it will use." It created a new remuneration for teaching work by introducing potential future payments to be negotiated and other unspecified compensation (Section 7.2 and 11). It introduced methods of evaluation that might conflict with the evaluation processes [sic] and methods in the collective agreement. It introduced a dispute resolution process alien to the collective agreement and Labour Relations Code. (Award, p. 93)

The dispute resolution process provided for in the MET agreement was a mediation-based dispute resolution mechanism.

Bryson had concerns about signing the MET agreement and had dealings with Dr. Jim Gaskell, a member of the University's management, about her concerns. She eventually took her concerns to the Association and it advised her and its other members not to sign individual contracts with the University.

When Bryson and Pratt subsequently confirmed to the University that they would not sign the MET agreement, it took steps to have ETEC 512 developed by someone else. The Association then filed the exclusive bargaining authority and discrimination grievances. After a five day arbitration, the Arbitrator issued the Award, upholding both grievances.

III. POSITIONS OF THE PARTIES

The University relies on five grounds of appeal. While it does not take issue with the Arbitrator's finding that its negotiations with Bryson about "conditions other than copyright" were contrary to Article 3 of the Framework Agreement, it submits that the Arbitrator erred:

1. in defining the scope of a union's bargaining agency as including "any facet of the employment relationship" and in determining that intellectual property rights are matters within the Association's exclusive bargaining agency;

2. in determining that the University must negotiate to obtaining intellectual property rights from faculty, when such rights were established by the University by policy and the Association has not negotiated any provisions relating to intellectual property in the Collective Agreement;

3. by failing to consider section 15 of the Collective Agreement;

4. by making findings of fact without any evidence or contrary to the evidence and failing to provide a reasoned analysis for his conclusions; and
5. by imposing a remedy beyond his jurisdiction.

Given the conclusions I have reached I need not set out the Association's response to the University's positions.

IV. ANALYSIS AND DECISION

The Arbitrator made two findings of fact that were critical to his reasoning and significant for assessing the merits of the University's Section 99 application. First, he found that Bryson's dealings with Gaskell regarding the MET agreement had amounted to negotiations, not "consultation" as the University had contended (Award, pp. 92-93).

The second finding of fact that was critical to the Arbitrator's reasoning and significant for present purposes concerned the capacity in which the University was negotiating with Bryson. The Arbitrator recognized that the University (through UBC Press) is also a publisher and, in that capacity, sometimes deals with faculty members in their capacity as authors rather than employees (Award, p. 11). However, he found as a fact that when the University (through Gaskell) was negotiating with Bryson with regard to the MET agreement, it was doing so in its capacity as her employer, not her publisher, and she was negotiating in her capacity as an employee:

The negotiations were about more than copyright. They were about the conditions on which the faculty members would do their teaching. They were about these faculty members' conditions of employment on this assignment. They were negotiations between the employer and the employees in those capacities about the employees' performance of their teaching assignments. The circumstance was no different than an employer negotiating with employees covered by a collective agreement about the different conditions of employment under which they would perform their next project or work assignment. (Award, p. 93, emphasis added; see also pp. 86, 89, 90, 91)

As noted above, the University no longer disputes that it was negotiating with Bryson. Nor has it demonstrated that the Arbitrator committed a palpable and overriding error when he found that the University (through Gaskell) was negotiating with Bryson in its capacity as her employer, not her publisher and that Bryson was negotiating in her capacity as an employee. Instead, it maintains that it was entitled to negotiate with Bryson about some of the matters it negotiated with her about (i.e., matters pertaining to copyright) because those matters are beyond the Association's exclusive bargaining authority.

(I acknowledge that the University does dispute what it regards as the Arbitrator's determination that in other contexts when a faculty member deals directly with the University with respect to intellectual property rights (e.g., "when they publish in UBC Press"), the faculty member is not "performing work as an employee." However, such contexts were not the subject of the Association's grievance and even if, in those
contexts, faculty members are ‘performing work as employees’ as the University contends, it would not follow that the Arbitrator erred when he determined what capacities the University and Bryson were acting in when negotiating about the MET agreement.)

Because the parties argued this issue thoroughly I will address the University’s arguments that the Arbitrator erred in concluding that some matters pertaining to copyright were within the scope of the Association’s exclusive bargaining authority. However, before doing so, I note that since the University does not contest that the Arbitrator’s finding that its negotiations with Bryson also pertained to matters that were within the scope of the Association’s exclusive bargaining authority, whether the Arbitrator was wrong that some matters pertaining to copyright are also within the scope of the Association’s exclusive bargaining authority can have no bearing on whether the Association’s application is upheld. So long as the University negotiated with Bryson about any matters within the scope of the Association’s exclusive bargaining authority, the Arbitrator did not commit a reviewable error in upholding the exclusive bargaining authority grievance.

FIRST GROUND OF APPEAL

The University’s first ground of appeal is that the Arbitrator erred (i) when he concluded that the scope of the Association’s bargaining agency includes “any facet of the employment relationship” and (ii) when he determined that intellectual property rights are matters within the Association’s exclusive bargaining agency. This submission overstates the Arbitrator’s conclusions. He was clear about the limited scope of the issues raised by the exclusive bargaining authority grievance. He held that it did not raise intellectual property issues beyond copyright (Award, pp. 10, 85).

Moreover, although the Arbitrator stated (correctly in my view) that the Code (unlike section 27 of the School Act, RSBC 1996, c. 412) does not “exclude any facet of the employment relationship from being the subject of collective bargaining and a provision of a collective agreement” (Award, p. 84), he concluded that negotiations about the ownership of copyright in material authored by a faculty member in the development of a credit course are within the scope of the Association’s exclusive bargaining authority because he found such issues to be part of the conditions of employment of those faculty members producing such work:

For employees who, in the course of their employment, produce work that is subject to copyright, the identity of the work, the ownership of the copyright in the work, any exceptions to the works or ownership, compensation for transfer of copyright to the employer or others, participation in future revenue from the copyright, reassignment of the copyright, reversionary rights, dispute resolution processes with the employer and numerous other issues constitute part of the terms and conditions of employment of the employees…(Award, p. 87, emphasis added)
The University's first ground of appeal raises two questions. First, does the scope of the Association's bargaining agency include the conditions of employment of faculty members? Second, if it does, did the Arbitrator err when he concluded that in a university context, issues relating to the ownership of copyright in works produced by faculty members in the course of their employment are conditions of employment of those faculty members?

The answer to the first question is obviously "yes". Section 27(1)(a) of the Code provides that:

27. (1) If a trade union is certified as the bargaining agent for an appropriate bargaining unit,

(a) it has exclusive authority to bargain collectively for the unit and to bind it by a collective agreement until the certification is cancelled (emphasis added)

The Board had held that a voluntarily recognized trade union, such as the Association, has the same authority: Kathy Kim, BCLRB No. B450/99, 56 CLRBR (2d) 290.

The Code defines "collective bargaining" as "...negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision, or to the regulation of relations between an employer and employees" (Section 1, emphasis added). A collective agreement is defined in the Code as:

...a written agreement between an employer, or an employers' organization authorized by the employer, and a trade union, providing for rates of pay, hours of work or other conditions of employment, which may include compensation to a dependent contractor for furnishing his or her own tools, vehicles, equipment, machinery, material or any other thing (Section 1, emphasis added)

It follows from the foregoing that a certified or voluntarily recognized trade union is the exclusive bargaining agent with respect to the conditions of employment of the employees in any unit it is the exclusive bargaining agent for.

The second question raised by the University's first ground of appeal is whether the Arbitrator erred when he concluded that in a university context, faculty members' ownership of the copyright in works they produce in the course of their employment is a "condition of employment" of those faculty members within the meaning of the Code.

The University disputes this conclusion but most of its arguments do not directly address the issue of what counts as a condition of employment for the purposes of the Code. For example, the University argues that a number of the Board's Section 12 decisions establish that unions do not owe duty of fair representation with respect to matters that are "individual" or "purely personal" to employees and not related to any provisions in the collective agreement. Since, according to the University, a union's duty of fair representation is the other side of the coin of it exclusive bargaining authority, it
follows that matters that are "individual" or "purely personal" to employees and not related to any provisions in the collective agreement are beyond the scope of that bargaining authority.

None of the Section 12 decisions the University relies on dealt with the ownership of copyright in a university context (or indeed, in any context). Moreover, in my view, none of them stand for the proposition that unions do not owe a duty of fair representation with respect to matters that are "individual" or "purely personal" to employees in the way the University maintains copyright is "individual" or "purely personal" to Faculty members. Rather, most of the cases dealt with complaints about a union's representation (or lack of it) with respect to (i) challenges to decisions made by parties not bound by the union's collective agreement and/or (ii) disputes being adjudicated in forums in which employees are entitled to represent themselves: Tom Smith, BCLRNo. B15/2004 (Leave for Reconsideration of BCLRNo. B218/2003), 104 CLRBR (2d) 109 (a complaint about a union placing conditions on agreeing to represent a former employee in a civil proceeding); Gustav Gonske, BCLRNo. B249/93 (Leave for Reconsideration denied: BCLRNo. B330/93) (a complaint about a union failing to properly represent a member in processing his appeals before the Worker's Compensation Board); Helen L. Semancik, BCLRNo. B520/99 (a complainant about a union's ceasing to pay the legal fees of a lawyer who was attempting, through a civil action, to have an insurance company reinstate the complainant's LTD benefits); John Henry Stewart, BCLRNo. B170/2001 (Leave for Reconsideration of BCLRNo. B110/2001) (a union's handling of a complainant's WCB claim); Rachel Carey, BCLRNo. B101/2000 (a complaint about a union's handling of an appeal to the Public Service Appeal Board); Deborah Thompson, BCLRNo. B227/2003 (Leave for Reconsideration denied: BCLRNo. B287/2003) and Donna Page, BCLRNo. B237/2002 (Leave for Reconsideration denied BCLRNo. B266/2002) (complaints about representation before a professional association dealing with professional competence complaints); Richard Billinghamurst, BCLRNo. B404/99 (a complaint about a union's failure to assist a complainant in an appeal relating to employment insurance benefits); and Mike John Werhun, BCLRNo. B105/2001 (a complaint about a refusal to file a grievance alleging a violation of the group termination provisions of the Employment Standards Act, when, under the Act, such complaints could be made by "an employee, former employee or other person" and had to be made directly to the Director of Employment Standards).

The University also relies on Curtis D. Martin, BCLRNo. B490/94 (Leave for Reconsideration of BCLRNo. B229/93) ("Martin") to support its contention that a faculty member's ownership of copyright is not a condition of employment. It characterizes the decision as one of several in which the Board considered "matters which clearly fall within the employment relationship broadly described but do not fall within a union's exclusive bargaining agency: a complaint about an apprenticeship decision." I do not agree with this characterization of Martin. Indeed, I find that the reasoning in that case to be inconsistent with the position urged by the University in this case.

In Martin, a joint industry-union committee (the JTC) served as Martin's principal under the Apprenticeship Act, R.S.B.C. 1979, c. 17. When the JTC decided to terminate
Martin's apprenticeship, he asked his union (one of the two parties to the JTC) to represent him in his appeal to the JTC, of its decision. His union refused to do so and Martin complained that was a breach of what is now Section 12. The original panel of the Board dismissed Martin's complaint because it held that the union did not have exclusive authority to pursue or appeal matters before the JTC and because a decision by the JTC about apprenticeship status did not engage employment and was not properly captured by the words "representing any of the employees in a bargaining unit" found in what is now Section 12 of the Code.

Martin successfully sought reconsideration of the original decision. The reconsideration panel concluded that to determine whether a matter is within the scope of an union's exclusive bargaining authority, one has to determine whether the matter amounts to a "condition of employment" within the meaning of the Code—not whether it is "individual" or "purely personal" to employees:

What is the scope of a union's exclusive authority? Section 27(1)(a) of the Labour Relations Code states a certified trade union has exclusive authority to bargain collectively. Collective bargaining as defined in Section 1 is directed towards the conclusion of a collective agreement, or to the regulation of relations between an employer and employees. A collective agreement is defined as an agreement providing for rates of pay, hours of work or other conditions of employment. It is these matters which fall within the scope of the union's exclusive authority.

"Other conditions of employment" is a broad term. Matters which may fall within this broad scope may be superceded or effectively removed by legislation such as the Workers' Compensation Act: Lopez, supra; Gonske, BCLRB No. B330/93; Magnus E. Sieme, Letter Decision BCLRB No. B124/94: or may be impliedly limited by the scope of a statutory scheme: Craig Ryback, IRC No. C18/93 (Reconsideration of Letter Decision dated June 25, 1992). (pp. 9-10, emphasis added)

I will consider below whether the Copyright Act, R.S.C. 1985, c. C-42, includes any provision that precludes an employee's bargaining agent from bargaining on the employee's behalf with his or her employer about matters pertaining to the copyright in works produced by the employee in the course of employment.

Another decision the University also relies on to support its contention that a faculty member's ownership of copyright is not a condition of employment is Valdi Foods (1987) Inc. and U.F.C.W., Local 175 (1992), 26 LAC (4th) 279 ("Valdi Foods"). According to the University, Valdi Foods:

...dealt with an employer's right to require an employee to sign authorizations (i.e. enter into an individual agreement) allowing the employer to make deductions from her pay if the employee did not return her uniform. The Arbitrator rejected the union's claim that its
exclusive bargaining agency had been violated, holding that the rights were individual to the employee.

I do not agree with this characterization of the reasoning in Valdi Foods. In that case an article in the parties' collective agreement vested in management the "...right to establish and maintain reasonable rules and regulations covering the operation of the stores..." (p. 285). Acting pursuant to that provision, the employer instituted a rule that required all employees to sign a release form that authorized it to deduct a stipulated amount from the final pay cheque of any employee that failed to return their uniform when they ceased to be an employee. The employer claimed that the amount stipulated was compensatory. Ultimately the arbitrator declared the rule invalid as unreasonable after finding that the stipulated amount was not compensatory. However, before reaching that conclusion, the arbitrator dealt with an argument by the union that the employer had struck a bargain with employees which interfered with its exclusive bargaining rights. The arbitrator did not accept this argument—but not because any 'rights individual to employees' were involved. Instead the arbitrator held that:

...the fact that an employee has signed a release form authorizing a deduction from his pay would not, in my view, bar the arbitrator from reviewing the penalty since it has been unilaterally imposed and not agreed to by the union in the collective agreement.

It follows from the foregoing that the company's promulgation of a rule such as that in question here does not, in and of itself, constitute a violation of or an interference with the union's exclusive bargaining rights pursuant to the Labour Relations Act. Rather, the execution of the form does nothing to reduce the employee's right or the union's right on his or her behalf to challenge the company's action in imposing the penalty. (p. 295, emphasis added)

After finding that the rule promulgated by the employer was unreasonable (and hence invalid) the arbitrator recommended a course of action that is inconsistent with the suggestion that he saw the case as involving 'rights individual to employees':

...the suggestion that the employer and union might reach some mutually acceptable solution is not only viable but is a process I would recommend. Although it is still open to the employer to attempt unilaterally to set a reasonable level of monetary compensation, the risks inherent in that approach, absent the cooperation of the union are, I believe, made apparent in this award. (p. 298)

In its oral argument the University relied on the following passage from Valdi Foods:

In summary, the authorization pursuant to the Employment Standards Act regulation in this case must be by the employee and not by the union. Accordingly, since the legislation itself contemplates the execution of such an authorization by the
employee himself it cannot be said that the employer has interfered in the union’s rights to represent the employee with respect to the signing of the authorization form pursuant to this legislation. Similarly, as indicated later in this award I do not view the employer’s actions as being an unlawful interference with the union’s bargaining rights pursuant to the Labour Relations Act. However, that is not the end of the matter since it must be determined whether or not the form in this case is in compliance with the regulation. (p. 293)

The arbitrator in Valdi Foods concluded that the regulation required that only an employee could sign the sort of authorization at issue because, with respect to other sorts of authorizations, it permitted “the employee or his agent” to sign. The University says this reasoning is applicable in this case since Section 13(3) of the Copyright Act refers to agreements with authors. I will consider the University’s Copyright Act arguments in more detail below but for now it suffices to note that Section 13(3) of the Copyright Act differs from the legislation considered in Valdi Foods in at least one important respect—the Copyright Act does not provide that only authors can negotiate with respect to the assignment of their copyright. Section 13(4) of the Copyright Act provides that:

The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner’s duly authorized agent. (emphasis added)

The final decision the University relies on to support its contention that a faculty member’s ownership of copyright it not a condition of employment is Speckling v. British Columbia (Labour Relations Board), [2003] BCJ No. 909 (“Speckling”). The court dealt with an appeal of the dismissal of a judicial review of decisions of the Board. The Board had held that Speckling’s union had not breached its duty of fair representation when it did not grieve his employer’s failure to notify it that it was going to make an objection to a Workers Compensation claim he had made.

The University maintains that Speckling stands for the proposition that some matters a union can bargain about are nevertheless beyond the scope of its exclusive bargaining authority:

The BC Court of Appeal in Speckling v. British Columbia (Labour Relations Board) [2003] BCJ No 909 expressly confirmed (at para 27) that matters relating to worker’s compensation are not within the union’s exclusive bargaining agency and subject to the duty of fair representation. It is critical to note that the employee complained that the employer had failed to notify the employee of
an objection it had made to his WCB claim. That was clearly a matter that a union could bargain about. There would be nothing precluding a union and an employer from agreeing to such a notice requirement in the collective agreement. That notwithstanding, the Court acknowledged that such matters were beyond the union’s bargaining agency. It is not “any facet of the employment relationship” that falls within the union’s exclusive bargaining agency. If that was true, Speckling would have been successful in his section 12 complaint.

I do not agree with the University’s reading of Speckling. The Court upheld the Board’s dismissal of Speckling’s complaint because it held that the decision of the Board had been “plainly right” (para. 33). The Court quoted the Board’s reasons for dismissing Speckling’s complaint and they had nothing to do with scope of the union’s bargaining authority. The statements in paragraph 27 of the judgement that the University relies on are obiter and, on my reading, only pertain to claims under the Workers Compensation Act, R.S.B.C 1996 c. 492, against the Workers Compensation Board:

But what the collective bargaining process is generally not about is claims under the Workers Compensation Act. With those claims, under ordinary circumstances the Union has no collective bargaining responsibility. That is not to say that a Union may not take up the cause of an employee who has difficulty with the Workers Compensation Board but any such obligation on the part of a Union to a member can only arise under the constitution and bylaws or rules of the Union. (para. 27, emphasis added)

Before addressing the University’s next argument regarding the scope of the Association’s exclusive bargaining authority I note another difficulty with its contention that the scope of a union’s duty of fair representation has implications for whether any matters pertaining to copyright fall within the Association’s bargaining authority.

The University acknowledges that other Canadian universities and faculty associations have negotiated collective agreement provisions with respect to copyright. Although it maintains that those universities could not have been forced to do so (an issue that I do not have to decide for present purposes), it does not argue, nor could it plausibly maintain, that those faculty associations do not owe their members a duty of fair representation when bargaining and administering such collective agreement provisions. That being the case, it follows that the University is mistaken when it submits that it is something about the nature of copyright that puts it beyond the scope of a union’s exclusive bargaining authority, i.e., because it is ‘individual to the employees’ or ‘purely personal’. If, in any circumstances, a union owes a duty of fair representation with respect to matters pertaining to copyright, it cannot be the case that in those circumstances (if any) that a union does not owe such a duty, that is because of the personal nature of copyright. If the personal nature of copyright precluded a union from owing a duty of fair representation in any circumstances it would preclude a union from
owing such a duty in all circumstances; the fact that a university had agreed to collective agreement provisions regarding copyright, could not change the nature of copyright.

WORK INPUTS/OUTPUTS ARGUMENT

The University's first argument is that a union's exclusive bargaining authority covers "inputs to work" like wages, not the "outputs of work". It maintains that while it can be compelled to bargain about labour inputs, it cannot be compelled to bargain about labour outputs. This is significant it says, because a union's exclusive bargaining authority does not extend beyond those matters that an employer can be compelled to bargain about.

The University produced no authorities to support its contention that a distinction between work inputs and outputs is relevant to the issue of the scope of a union's exclusive bargaining authority. In my view a consideration of the Code's provisions must be the starting point for a determination of the Association's exclusive bargaining authority. The Sections quoted above establish that a certified or voluntarily recognized union has the exclusive authority to bargain with respect to the "conditions of employment" of members of the bargaining unit. The Code does not distinguish between conditions of employment that pertain to "work inputs" and conditions of employment that pertain to "work outputs". Even if it is possible to draw a meaningful distinction between "work inputs" and "work outputs", I find such a distinction is not relevant to the issue of the scope of a union's exclusive bargaining authority.

REDUCTIO AD ABSURDUM ARGUMENTS

The University relies on two reductio ad absurdum arguments to support its contention that "matters such as the individual faculty member's right to deal with their intellectual property rights relating to their scholarly output is not...within the Faculty Association's exclusive bargaining agency." According to the University:

The proof of that proposition can be tested by asking the simple question of whether a faculty member would have had any basis to complain against the Association pursuant to section 12 of the Labour Relations Code for the Association's failure to properly represent or advise faculty members in any of their dealings with the University when they executed agreements pertaining to intellectual property pursuant to Policy #88, the [Distance Education and Technology] program or when publishing their work through UBC Press. It is obvious that no such complaint could be made because intellectual property matters do not fall within the Association's exclusive bargaining agency. The fact that these agreements were not put in issue in this case, and were acknowledged by the Arbitrator as being valid agreements can only mean that intellectual property rights do not fall within the union's exclusive bargaining agency.
I am not persuaded by this argument for two reasons. First, the Award contains no finding that faculty members have ever executed agreements pertaining to copyright pursuant to Policy #88. On its face, the sort of agreements it appears to contemplate are agreements with respect to inventions and discoveries, not copyright.

Moreover, and in any event, the grievances did not concern a Distance Education and Technology ("DET") program agreement or an agreement with UBC Press and so there was no reason for the Association to put them "in issue" in this case. For his part, the Arbitrator expressly declined to decide whether negotiations in those contexts would involve a violation the Collective Agreement:

This grievance does not require a decision about whether there is any violation of the union's exclusive bargaining authority when a faculty member approaches UBC Press to publish a work or makes a proposal to Distance Education and Technology to develop a course online. (Award, p. 89)

The University's second reductio ad absurdum argument in support of its contention that "[m]atters such as the individual faculty member's right to deal with their intellectual property rights relating to their scholarly output is not...within the Faculty Association's exclusive bargaining agency" was expressed in the following way in its Section 99 application:

If intellectual property rights were within the Association's exclusive bargaining agency then the University could reach an agreement with the Association relating to any individual faculty member's intellectual property rights and bind the faculty member without that faculty member's consent. The reason why that self-evidently problematic conclusion does not result, is because the Labour Relations Code does not grant exclusive bargaining agency to a union over matters that are purely personal to the employee, on matters that are regulated by other legislation, like intellectual property rights.

I am not persuaded by this argument either. It appears the University made the same argument to the Arbitrator. He pointed out, correctly in my view, that it would be no less problematic, from a labour relations perspective, if employers were free to negotiate directly with individual employees with respect to the assignment of copyright to it:

In other employment contexts, a union clearly has the right to bargain that the employer agree to assign copyright ownership to individual authors or that the employee authors share in the benefits of the copyright their work has produced. At first blush, it may appear more problematic to conclude the union could negotiate away copyright ownership of individual bargaining unit members. However, it is equally problematic to consider that the employer could use its position to negotiate directly with individual employees to demand assignment to it of copyright in all or specific
works. The range of bargaining clout individual employees have varies widely from junior, un-established authors to those whose reputation gives them star or celebrity status in their field of work. (Award, p. 86)

I would also note that what the University maintains is a self-evidently problematic conclusion is even less self-evidently problematic when it is appreciated that the exclusive bargaining authority found by the Arbitrator does not extend beyond the Association's right to negotiate with the Employer in its capacity as employer (e.g., the Association is not entitled to be the agent of authors in their dealings with UBC Press) and, for that limited purpose, the Association owes a statutory obligation to the faculty members not to act in a manner that is arbitrary, discriminatory or in bad faith.

COPYRIGHT ACT ARGUMENTS

The University relies on the fact copyright is regulated by the Copyright Act to maintain that copyright is not a term or condition of employment. In its Section 99 application the University developed this argument in the following passages:

Intellectual property rights are not terms and conditions of employment: they are rights related to the product of one's work. Those rights are individual to the faculty member and are regulated by the Copyright Act, RSC, C-42. Those rights, although arising from and connected to employment, are not terms and conditions of employment, in the same way that rights under the Employment Standards Act, the Workers' Compensation Act, or apprenticeship training or professional registration are not terms and conditions of employment, even though they directly relate to employment.

***

If intellectual property rights fall within the Association's bargaining agency, there could be no resolution of disputes between the University and faculty about intellectual property rights other than by way of grievance arbitration under the Labour Relations Code: Weber v. Ontario Hydro, [1995] 1 SCR 929 (SCC). That dispute resolution process is inconsistent with the dispute resolution process and specific remedies mandated by the Copyright Act, RSC, chapter C-42. Moreover, how would an arbitrator resolve disputes over copyright ownership in a way that would bind Tec de Monterey? Again, this simply reinforces the conclusion that intellectual property rights are not a subject included within the exclusive bargaining agency granted to the Association under section 27 of the Labour Relations Code.

In making this argument the University relies, in particular, on the following provisions of the Copyright Act:

Ownership of copyright
13. (1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

***

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

(4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.

***

Moral rights

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

The University made the same argument to the Arbitrator:

The employer submits the personal nature of intellectual property rights, such as the inability to assign moral rights, precludes the union from collective bargaining about these rights. Copyright enforcement mechanisms under the Copyright Act are incompatible with grievance arbitration. Intellectual property rights are to be dealt with on an individual basis. "Intellectual property rights are not employment rights and are therefore beyond the scope of the union's bargaining agency." Because intellectual property rights over scholarship rests with faculty members, as an exception to the
general law of employment, the union cannot claim exclusive bargaining agency to deal with copyright as a condition of employment. (Award, p. 80)

The Arbitrator gave lengthy reasons not accepting the University’s Copyright Act arguments:

Collective agreements are written in response to varied working circumstances and employment relationships. They are negotiated in a working context against the background of practices and behaviour that shapes the understandings and expectations of the parties.

Intellectual property rights, and specifically copyright, is not an aspect of employment that attracts attention at the collective bargaining table in most employment contexts. The sole focus in this grievance is on copyright. It is not moral rights which can be bequeathed, but not contracted away, or other intellectual property.

The question whether the employer or employee owns the copyright for the creative work of the employee is a matter of employment context and contract. The legal context for negotiations about copyright is that Parliament has decided that authors, not publishers will be the first owners or [sic] their work. And employers of authors will be the first owners of the copyright in works made in the course of employment, “in the absence of any agreement to the contrary.”

Whether the employer or the employee owns copyright in works produced in the course of employment is not unique to universities. It is an important subject in several employment contexts - journalism, entertainment in its many facets, broadcasting, publishing, software development and other endeavours. As submitted by the employer and reviewed above, a unique aspect of employment in a university is that there is an implied term in each contract of employment that the employee, not the employer, owns the copyright in works produced in the course of employment. It is not necessary to explore here which employees or what works. This employer adopted a broad approach to recognizing employees as first owners of copyright in “literary works”, which includes course development, under its Policy #88.

An outgrowth of this uniqueness is that a union representing employees, who author literary works including course development, does not have to negotiate to have the employer agree to give first copyright ownership to the employees. The employer has to negotiate to obtain first copyright ownership. The employer has to negotiate to obtain that ownership both at law and under its Policy #88.
In other employment contexts, a union clearly has the right to bargain that the employer agree to assign copyright ownership to individual authors or that the employee authors share in the benefits of the copyright their work has produced. At first blush, it may appear more problematic to conclude the union could negotiate away copyright ownership of individual bargaining unit members. However, it is equally problematic to consider that the employer could use its position to negotiate directly with individual employees to demand assignment to it of copyright in all or specific works. The range of bargaining clout individual employees have varies widely from junior, un-established authors to those whose reputation gives them star or celebrity status in their field of work.

Whether the first copyright ownership of a work produced in the course of employment presumptively resides with individual employees or the employer is not determinative of whether it can be the subject of collective bargaining and provisions of a collective agreement. It is simply the starting point for discussion about how copyright ownership is to be dealt with in the employment relationship and a collective agreement.

A collective agreement regulates the relationship between the union and employer and the employees and the employer. It cannot address or remedy copyright infringement by third parties. By negotiating collective agreement provisions about copyright, as several faculty unions and employers have, access to civil or statutory remedies under the Copyright Act against third parties are not supplanted. The union does not become the exclusive bargaining agent for each employee on each copyright as it does not become the exclusive bargaining agent for each bargaining unit employee on each workers' compensation or employment insurance claim or right under the Employment Standards Act.

At the same time, the fact the union is not the exclusive bargaining agent, with a duty of fair representation to each bargaining unit employee, in work related dealings with persons and agencies other than the employer does not mean the union cannot negotiate with the employer with respect to those matters.

For example, unions representing pilots, or drivers or divers cannot negotiate about the conditions of personal licensing by external agencies, but they can and do negotiate with employers about many aspects of work that impact the licensing requirements and the use of the license. Unions cannot negotiate workers' compensation entitlement, but they can and do negotiate many matters related to the employer's timely participation in processing of workers' compensation claims, alternate insurance and benefit coverage and return to work. Unions may not be able to negotiate whether an employer can obtain a wage assignment as security against a uniform it supplies to an employee, but unions can and do negotiate many matters related to uniforms. Unions may not be
able to negotiate about various individual income tax forms with obligations unique to each employee that employees must sign, but they can and do negotiate about many related aspects of pay and pay statements.

Copyright is personal to the author of a work, but it is no more complex or different an employment related issue than the many talent, tax, benefit insurance and other issues in collective agreements in numerous work contexts. This, like so many other issues in work, can challenge unions and employers and the law to find the balance between collective and individual employment rights and processes for meeting the needs of both employers and creative employees. Characterizing the issue as one of "intellectual property" relating to the "ownership of the expression of ideas" clouds, rather than clarifies, the question. Similarly, the issue is not about output of work or work product.

For employees who, in the course of their employment, produce work that is subject to copyright, the identity of the work, the ownership of the copyright in the work, any exceptions to the works or ownership, compensation for transfer of copyright to the employer or others, participation in future revenue form the copyright, reassignment of the copyright, reversionary rights, dispute resolution processes with the employer and numerous other issues constitute part of the terms and conditions of employment of the employees. They do not supplant, but complement the Copyright Act and if a conflict arises between statutory and contractual rights or processes the conflict can be resolved as many routinely are.

The many issues related to copyright are all susceptible to collective bargaining and in some work contexts and for some employees - perhaps employees engaged exclusively in online course development - they can be central and significant terms and conditions of employment. This collective agreement is built on a determination "not to interfere with academic freedom." Academic freedom is essential "to instruction and the pursuit of knowledge." Questions of copyright are inimical to academic freedom and scholarly pursuits.

In the university employment context, because of the importance of the expression of ideas to academic freedom and the presumptive first ownership of copyright in faculty, issues related to copyright are part of the core of the relationship between employer and employee. They are part of the conditions of employment. (Award, pp. 84-88)

I agree with the Arbitrator's reasoning. It is consistent with what I regard as the correct approach to determining the scope of a union's exclusive bargaining authority. I would add the following points. For reasons that I will explain below, I agree with the
Arbitrator that faculty members are the first owners of the copyright in the material they author in the development of credit courses. That being the case, in my view the Board would fail in its Section 2 duty to encourage “the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees” were it to conclude that the University, in its capacity as the employer of the Association’s members, was free to negotiate directly with those employees about the assignment of the copyright in the material authored by them in the development of credit courses.

The provisions of the Copyright Act may be the source of a faculty members’ ownership in work produced in the course of their employment with the University. However, that Act does not expressly say, nor does it entail, that the Association is precluded from being the exclusive bargaining agent of faculty members in negotiations with the University, in its capacity as their employer, about ownership in copyright in course materials authored by the faculty members.

I note, parenthetically, that the University may not have needed to negotiate the assignment of copyright with anyone. At the hearing, the Association made it clear that it was not maintaining that the University was precluded from promulgating a policy that required faculty members to assign their copyright in material they author in the development of credit courses as a condition of participating in the MET program. Rather, its position was simply that unless such a requirement did not otherwise violate the Collective Agreement, the University could institute such a policy or rule. The Association brought the exclusive bargaining authority grievance because the University had not purported to do that; it had tried to negotiate an agreement directly with faculty members; an agreement that, among other things, assigned to the University, copyright in materials faculty members authored in the course of their employment.

The final argument the University makes to support its submission that intellectual property rights do not fall within the Association’s exclusive bargaining authority concerns the grievance arbitration process and third parties:

If intellectual property rights fall within the Association’s bargaining agency, there could be no resolution of disputes between the University and faculty about intellectual property rights other than by way of grievance arbitration under the Labour Relations Code: Weber v. Ontario Hydro, [1995] 1 SCR 929 ( SCC). That dispute resolution process is inconsistent with the dispute resolution process and specific remedies mandated by the Copyright Act, RSC, chapter C-42. Moreover, how would an arbitrator resolve disputes over copyright ownership in a way that would bind Tec de Monterrey? Again, this simply reinforces the conclusion that intellectual property rights are not a subject included within the exclusive bargaining agency granted to the Association under section 27 of the Labour Relations Code.

The University does not explain why the grievance arbitration process is inconsistent with the dispute resolution process and specific remedies mandated by the
Copyright Act. The Copyright Act does not state or imply that employers and employees may not agree to a dispute resolution mechanism for resolving disputes between themselves about matters pertaining to copyright, that differs from the dispute resolution mechanism provided for in the Act. Indeed, in this regard I note that the MET agreement itself provided for a dispute resolution mechanism not found in the Copyright Act. The MET agreement provided that:

Any dispute arising in connection with this paragraph 7 (Intellectual Property) must be referred for mediation, at the request of either an Author or the University, to:

- An agreed mediator; or
- If the Author and the University cannot agree on a mediator, a mediator appointed by the Vice President Academic and Provost.

The role of any mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding unless the Author and the University have so agreed in writing. The cost of any mediator engaged must be shared equally between the Author and the University. (Award, p. 50)

The fact that the grievance arbitration process cannot bind third parties is not an impediment to the University and the Association agreeing to have disputes between them about copyright dealt with by grievance arbitration; the rights of either the University or faculty members vis a vis third parties can be dealt with by the mechanisms provided for in the Copyright Act. In short, I agree with the Arbitrator that the dispute resolution process that the parties may agree to would “...not supplant, but complement the Copyright Act and if a conflict arises between statutory and contractual rights or processes the conflict can be resolved as many routinely are” (Award, pp. 87-88).

Absent an explanation why the grievance arbitration process is inconsistent with the dispute resolution process and specific remedies mandated by the Copyright Act, I am not prepared to accept the University's 'impracticality claim', particularly since it appears to be inconsistent with a fact acknowledged to be true by the University, i.e., that other Canadian universities and their Associations have negotiated collective agreements that contain provisions that deal with intellectual property.

The University also does not explain why it matters, for the purpose of determining the scope of the Association's authority to bargain with the University, whether the grievance arbitration process can resolve disputes over copyright ownership in a way that would bind third parties. I find that the reasoning in the following passage from the Award is a convincing answer to the University's claim:

A collective agreement regulates the relationship between the union and employer and the employees and the employer. It cannot address or remedy copyright infringement by third parties. By
negotiating collective agreement provisions about copyright, as several faculty unions and employers have, access to civil or statutory remedies under the Copyright Act against third parties are not supplanted. (Award, p. 86)

In summary with respect to the University's first ground of appeal, I find that although to uphold the exclusive bargaining authority grievance, the Arbitrator did not need to conclude that some matters pertaining to copyright are within the scope of the Association's exclusive bargaining authority, his conclusion was nevertheless correct.

SECOND GROUND OF APPEAL

The University's second ground of appeal is that the Arbitrator erred when he determined that "...UBC must negotiate a provision in the collective agreement to obtain intellectual property rights from faculty...". In particular, the University takes issue with the statement in the following passage from the Award:

An outgrowth of this uniqueness is that a union representing employees, who author literary works including course development, does not have to negotiate to have the employer agree to give first copyright ownership to the employees. The employer has to negotiate to obtain first copyright ownership. The employer has to negotiate to obtain that ownership both at law and under its Policy #88. (Award, p. 85)

The University argues that intellectual property rights "...were established by the University through Policy #88 and the Faculty Association has not negotiated any provisions relating to intellectual property in the collective agreement." It maintains that the Award, leaves it "frozen in its tracks" until it negotiates terms about intellectual property rights with the Association—something that turns the KVP doctrine on its head. According to the University, by virtue of the Award, the Association has achieved an absolute prohibition on the transfer of intellectual property rights without having done anything in the way of collective bargaining.

This argument presupposes that the Arbitrator concluded that negotiation was the University's only option for obtaining an assignment of the copyright ownership in any ETEC 512 course materials Bryson prepared. Put another way, the University reads the passage above as precluding the University from obtaining such an assignment by simply implementing a rule or policy that required faculty to assign their copyright in course materials in order to participate in the MET program.

I do not accept this interpretation of the Award. As the Employer acknowledges in its Section 99 application, at other points in the Award the Arbitrator stated:

Over the decades, an arbitral consensus has emerged that, in the absence of terms in the collective agreement to the contrary, the employer has reserved managerial rights to act unilaterally on matters related to the management of its enterprise. Provided there is nothing to the contrary in a collective agreement and within
accepted principles, the employer can promulgate rules as part of its managerial prerogative. In the administration of the collective agreement and directing daily work activities, the employer is expected to deal directly with individual employees on routine matters related to the administration of the collective agreement.

***

There are no provisions related to copyright in the current collective agreement... (Award, pp. 84, 89)

The requirement that awards be given a sympathetic reading entails that, if reasonably possible, they not be read as internally inconsistent. I read the Arbitrator's assertion that "[t]he employer has to negotiate to obtain that ownership both at law and under its Policy #88" (Award, p. 85) as simply a statement that if ownership of the copyright in course materials is to change hands by negotiation, the onus is on the University to negotiate since the starting point is that the faculty members own the copyright, not the University.

In my view, the Arbitrator did not rule out the possibility that, instead of negotiating, the University, (after dialogue and debate), could have unilaterally promulgated a rule or policy requiring the assignment of copyright as a pre-condition to participation in the MET program. The grievance was upheld because instead of doing that it had tried to obtain an assignment of the copyright through negotiations with faculty members:

The negotiations [that Gaskell had with faculty members in the summer of 2002] were to transfer to the employer copyright that was owned by individual faculty members as an incident of academic freedom, their employment and University policy. The goal was not a new rule or policy to be unilaterally promulgated by the University. It was a specific agreement attached to a specific teaching assignment. It was an encroachment on academic freedom and deviation from published policy without adherence to the established processes for dialogue and debate prior to adopting new policy. (Award, p. 93, emphasis added)

In short, I find that the Award does not turn the KVP doctrine on its head. It left the University free to implement rules or policies consistent with the KVP doctrine.

Even if I had found that the Arbitrator had mistakenly concluded that negotiation was the University's only option for obtaining an assignment of the copyright ownership in any ETEC 512 course materials Bryson prepared, that would not persuade me to allow the University's application. That is because the Arbitrator's reasons for allowing the exclusive bargaining authority grievance did not depend on the conclusion the University attributes to him. The Arbitrator allowed the exclusive bargaining authority grievance because he found as a fact that the University, in its capacity as employer, had negotiated directly with Bryson, in her capacity as an employee, about the conditions of her employment. Even if the Arbitrator did not appreciate that the
University had the option of obtaining the copyright in another way (e.g., by promulgating a policy that required the assignment of copyright as a precondition of participation in the MET program) that has no bearing on whether on his conclusion that the way it chose to proceed (i.e., negotiating with employees) amounted to a violation of the Association's exclusive bargaining authority.

The University supports its second ground of appeal with the assertion that "[i]t is well established in British Columbia that where a collective agreement does not address a particular matter, the employer is free to act pursuant to its residual management's rights, quite apart from its right to make rules or establish policies." The University submits that:

Consistent with this view of residual management's rights, [it] was entitled to implement terms relating to intellectual property rights pertaining to the MET program, in view of the fact that the subject of intellectual property is not addressed, at all, in the collective agreement.

The employer's residual authority extends to requiring individual agreements between the employer and the employee on matters not dealt with in the collective agreement. Policy #88 is an example of such a rule. The case law is replete with examples of employer initiated rules that require an employee to execute an individual agreement dealing with his/her individual rights. Although these cases were cited to Arbitrator Dorsey, he completely misunderstood the import of the cases. Award p. 82 para 1. While those cases clearly uphold unilaterally implemented rules, they are particularly important to this case because each of the rules in question required the employee to individually give up rights or sign agreements in favour of the employer. (emphasis in original)

The problem with this argument is that it rests on a characterization of what the University did (i.e., unilaterally implement a rule after consulting with faculty members) that the Arbitrator expressly rejected. As noted above, he found as a fact that the University had been negotiating with faculty members.

Had the University actually unilaterally implemented a rule requiring faculty members to assign rights to the University (rather than negotiating with faculty members for the assignment of rights), the grievance may not have been upheld.

The University's second ground of appeal also involves the contention that faculty members' ownership in their course material was established by the University through Policy #88 or, if not, has been "overtaken" by that Policy. Even if the University is correct in this regard, that would not assist it in demonstrating that the Arbitrator made a reviewable error when he concluded that the University's negotiations with individual faculty members regarding the transfer of their copyright was a violation of the Association's exclusive bargaining authority. The scope of that authority is not dependant on the source of faculty members' ownership of copyright in the course material they author.
Of course, if the University is correct that the source of faculty members' ownership of copyright in the course material they author is now only Policy #88, it would have been open to it to simply change that Policy. However, it did not purport to do that. It negotiated with Bryson with Policy #88 still in effect.

In any event, I agree with the Arbitrator that Policy #88 is not the only source of faculty members' ownership of copyright in the course material they author (Award, p. 93). In the Award he explained that another source of faculty members' ownership of that copyright is the "academic exception" to the presumption of first ownership of copyright in the University as the employer of the faculty members:

Faculty members are expected to engage in scholarly activity and to produce and disseminate their scholarly work. Because of this expectation and to protect the unfettered pursuit of knowledge that is necessary for scholarship, it is accepted, in the context of employment at a university, that academic authors have copyright ownership of their writings, unless they agree to assign the copyright to the university, a publisher or someone else. This can be characterized as the academic or teacher exception to the presumption of first ownership of copyright in the employer or it may be treated as an implied agreement to the contrary based on custom, tradition, practice or a common and shared understanding. Whether grounded in an exception or implied agreement, academic authors are the first owners of the copyright of their work. (See the review and analysis in Dolmage v. Erskine [2003] O.J. No. 161 (Ontario Superior Court of Justice - Small Claims Court) ["Dolmage"]). (Award, pp. 6-7)

The judgement in Dolmage contains a lengthier explanation of the "academic exception":

The plaintiff's position is that when he wrote the case he was a Professor in a contract for services with Western and not a contract of service. He also pleads an agreement to the contrary, known as an academic exception or teacher exception. The Court will consider the existence of the exception first.

Section 13 of the Act reads:

13(1) Subject to this Act, the author of a work shall be the first owner of the copyright therein.

13(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright...
The plaintiff asserts that if subsection 3 applies he is nevertheless the beneficiary of an “agreement to the contrary.”

It is well established that implied agreements are effective. In discussing the educational sector at pp. 86 and 87 of Copyright Law Professor Vaver says:

Unwritten or implied agreements and customs can also be effective. For example, all persons in an institution may understand -- without the need for a written policy -- that they have no legal interest in such things as committee reports and minutes; the copyright in these items will therefore belong to the institution. Such an understanding, once proved, can amount to an implied agreement that is as effective as a signed written contract.

***

At p. 88 of Copyright Law Professor Vaver seems to be of the opinion that whether a professor authors scholarly articles, treatises and art work arising from work done at the University or writes fiction or newspaper articles on the side “[t]he copyright in this work evolves to the professor, not his institution, unless the parties have agreed differently.”

The plaintiff puts forth the case of Abernethy v. Hutchinson (1825), 3 L.J. 209 (Ch.) and in particular a passage found at p. 215. The Court there was faced with a request by a professor to restrain a journal from publishing his lectures which had been delivered orally to medical students and others. At p. 215 the Chancellor noted that a professor is appointed to impart information “but I have never yet heard that any body could publish his lectures.”

It is apparent from the Lord Chancellor’s words near the end of the second to last paragraph on p. 215 that the defendants had argued the professor’s “employer” as employer owned the copyright. The Chancellor explicitly did not decide that issue and the order made was consistent only with ownership of copyright in the professor.

The United States case of Williams v. Weisser (1969) 163 U.S.P.Q. 42 was an appeal to the California District Court of Appeal. A professor of anthropology at a major California University obtained a trial judgment for misappropriation of literary property. As in Abernethy the defendant published the plaintiff’s lectures which had been delivered orally for the most part. Although the university was not a party to the proceeding the defendant, a pirate publisher, argued the university, not the professor, owned the copyright and the lecture notes by reason of being the professor’s employer.
The California Appeal Court reviewed the English, Scottish and American legal history of the question starting with the Abernethy case. It came to the conclusion that professors owned the copyright in their lecture notes. The Court concluded that in the absence of an agreement to the contrary it is the professor, not the university, which owns the common law copyright and the lecture notes. It should be noted that in Canada the Act has replaced common law copyright. (paras. 103-106, 109-113)

It was because of the Arbitrator’s acceptance of the statement of the law in Dolmage that he concluded that the faculty members’ ownership of copyright in the course materials they authored did not depend exclusively on Policy #88:

The negotiations were to transfer to the employer copyright that was owned by individual faculty members as an incident of academic freedom, their employment and University policy... (Award, p. 93, emphasis added)

In the Arbitrator’s view, Policy #88 merely confirms what was already the case. The issue of whether Policy #88 has overtaken the academic exception would only have arisen if, contrary to fact, it had purported to do otherwise.

THIRD GROUND OF APPEAL

The University’s third ground of appeal is that the Arbitrator failed to provide a reasoned analysis, and denied the University a fair hearing, by failing to have regard to Section 15 of the Framework Agreement. Section 15 provides:

Subject to this Agreement or any amendments thereto or to any Collective Agreement the University agrees not to change rights of or practices relating to Faculty Members or members of the bargaining unit that traditionally have been the subject of consultation and discussion without appropriate consultation and discussion at the Departmental, Faculty or University level.

According to the University:

Section 15 is an express acknowledgement by the parties that certain rights or practices relating to faculty members fall outside of the collective agreement and may be modified unilaterally by the University. Where such rights or practices have previously been the subject of consultation and discussion (rather than negotiation) then the University can change those rights following appropriate consultation...

The Arbitrator’s conclusion that the University must negotiate rights pertaining to intellectual property is directly inconsistent with Section 15 of the collective agreement which acknowledges that the University may change rights or practices without negotiation.
In Castlegar and District Hospital, BCLR No. B380/99, 54 CLRBR (2d) 87 ("Castlegar") the Board explained the approach it takes when a party alleges that an arbitrator denied it a fair hearing by failing to consider one of its arguments:

In accordance with the requirement to give an arbitration award a sympathetic reading, the Board will not assume that an arbitrator failed to consider an argument, a piece of evidence or an authority merely because it is not set out in the award: Lomex Mining Corp. and U.S.W.A., Local 7619, [1977] 1 Can LRBR 377 (BCLR No. 96/76). An award must, however, provide a reasoned analysis of the issues before the arbitrator: Drifter Motor Hotel (Rupert Management Ltd.), B.C.L.R.B. (No. 29/78). A failure to address a significant issue upon which a party's case is founded may well indicate that the arbitrator has not provided a reasoned analysis: Port Moody (City), B.C.L.R.B. (No. B119/98).

Section 82(2) of the Code requires an arbitrator to have regard to "the real substance of the matters in dispute and the respective merits of the positions of the parties to it under the terms of the collective agreement" and not to be "bound by a strict legal interpretation of the issue in dispute". It is not unusual for parties to proffer complex legal arguments that sometimes have limited relevance to what the arbitrator can plainly see is the nub or "real substance" of the dispute. In such circumstances, arbitrators often feel obliged to set out in the award a dutiful recitation of every aspect of the parties' arguments, in order to avoid the very accusation that is being levelled in the present case (that the arbitrator failed to consider an argument).

In our opinion, it is inconsistent with both ss. 82(2) and 2(1)(d) of the Code to encourage this approach to labour relations dispute resolution. While an arbitrator must have regard to the respective merits of the positions of the parties, this does not, in our view, require an arbitrator to expressly address in the award every twist and turn of a party's argument. It is sufficient that the award clearly reflects an understanding and appreciation of the essential elements of each party's position on the significant issue or issues in order to fulfill the requirements of s. 82(2). This may mean, for example, that a party's argument on a significant issue is implicitly rather than expressly addressed or negated by the findings of fact or the reasoning of the arbitrator. (paras. 18-20, emphasis in original)

As noted above, the Arbitrator found that the University's dealings with Bryson regarding copyright in ETEC 512 course materials did not amount to the unilateral modification of rights of or practices relating to faculty members or members of the bargaining unit that traditionally have been the subject of consultation and discussion. Instead, he found that the University had been negotiating with Bryson:
The negotiations were to transfer to the employer copyright that was owned by individual faculty members as an incident of academic freedom, their employment and University policy. The goal was not a new rule or policy to be unilaterally promulgated by the University. It was a specific agreement attached to a specific teaching assignment... (Award, p. 93)

Given this finding of fact the Arbitrator had no need to decide whether the University would have breached the Association’s exclusive bargaining authority had it done what the University says Section 15 of the Framework Agreement permits it to do, i.e., unilaterally modify rights or practices relating to faculty members that traditionally have been the subject of consultation and discussion. In other words, I find that the University’s Section 15 argument was implicitly addressed or negated by the Arbitrator’s finding of fact that in its dealings with Bryson the University was negotiating, not unilaterally modifying rights or practices relating to faculty members. Accordingly I find that the University has not established that the Arbitrator failed to provide a reasoned analysis or denied the University a fair hearing.

FOURTH GROUND OF APPEAL

The University’s fourth ground of appeal relates to the upholding of the discrimination grievance. It submits that in doing so the Arbitrator made findings that were unsupported by any evidence and inconsistent with other findings he made. The findings the University challenges are (i) that Gaskell “effectively fired Bryson from the assignment” (Award, p. 95) and (ii) that her removal was “punishment for her refusal to agree to work under terms different than those in the collective agreement” (Award, p. 96). The University submits that these findings are inconsistent with the Arbitrator’s findings that:

When Dr. Gaskell pressed his position with the authority to cut the funding to Dr. Bryson’s department, his focus was on accomplishing the goal of development and delivery of the program. He had no motivation to discriminate against Dr. Bryson because she was asserting collective agreement rights that he did not believe applied. Nor was he seeking to interfere or retaliate against Dr. Bryson for having consulted the Faculty Association...(Award, p. 95)

It is helpful to distinguish the claims that the University is making. I see no inconsistency between the Arbitrator’s finding that the University “effectively fired Bryson from the assignment” (Award, p. 95, emphasis added) and his findings that, in doing what he did (on behalf of the University), Gaskell was focused on accomplishing the goal of development and delivery of the program, was not motivated to discriminate against Bryson and was not seeking to interfere or retaliate against Bryson.

However, the Arbitrator’s finding that the University’s decision to remove Bryson from the ETEC 512 assignment was “punishment for her refusal to agree to work under terms different than those in the collective agreement” (Award, p. 96), if read in
isolation, might seem problematic. Stating, without qualification, that “A” punished “B” would ordinarily be understood to mean that “A” intended to. However, giving the Award a sympathetic reading, I conclude that the Arbitrator was not making a finding that the University ever intended to punish Bryson. I am led to this conclusion by the context of the impugned statement. The narrow context was as follows:

In the end, Dr. Gaskell on behalf of the University effectively fired Dr. Bryson from the assignment and she had to go back to her department head to find a substitute assignment.

There was an adverse effect on Dr. Bryson who was excluded from a program in her area of expertise, in which she had taken an interest and for which she had once sat on the advisory committee. The basis for her exclusion was because she refused to sign an agreement covering part of her regular teaching load that was negotiated contrary to, and that conflicted with, the collective agreement.

When Dr. Bryson was removed by Dr. Gaskell in November 2002 from the assignment given to her by her department head Dr. Perry in May 2002, it was because she was insisting on doing this portion of her assigned teaching, like the rest of her regular teaching load, in accordance with the terms of the collective agreement. The decision to remove her was punishment for her refusal to agree to work under terms different than those in the collective agreement.

(Award, pp. 95-96, emphasis added)

In my view, it is clear from this passage, and particularly the Arbitrator’s use of the expression “adverse effect”, he was interpreting Article 4 of the Framework Agreement in the same manner that courts and tribunals have interpreted anti-discrimination provisions in human rights legislation, i.e., that no intent to discriminate is necessary to violate a prohibition on discrimination.

The wider context of the impugned statement includes an argument the Association made, and the authorities it relied on, at the arbitration. The Arbitrator noted the argument the Association had made with respect to the test for deciding whether the University had discriminated against Bryson:

The union...submits that the test is no longer action based solely on anti-union motivation as in Wire Rope Industries Ltd. (1983), 13 LAC (3d) 261 (Hope). The union submits that the human rights law on which the analysis in Wire Rope Industries Ltd. was based has evolved so that “... if discrimination forms any part of an employer's reasoning for its actions, the courts will find that the employer has discriminated against the employee. Arbitral jurisprudence must now recognize that shift.” (Award, p. 76)

The Arbitrator then noted that the Association had relied on an Alberta arbitration Award, Alberta Hospital Ponoka and A.U.P.E., Loc. 42 (1994), 46 LAC (4th) 231
("Alberta Hospital") to support its submission the University had discriminated against Bryson:

In support of this proposition, the union relies on Alberta Hospital Ponoka (1994), 46 LAC (4th) 231 (McFetridge). The arbitration board decided:

We are of the view that the tests for discrimination which have been developed by the courts in human rights cases are useful to arbitrators when they are interpreting anti-discrimination provisions in collective agreements. Much the same way as human rights legislation declares public policy regarding fundamental principles of free and democratic societies, the anti-discrimination provisions of a collective agreement are fundamental to the principles of free collective bargaining and should not be subject to a restrictive interpretation. ...

...We note that both the Alberta Labour Relations Code, S.A. 1988, c. L-12 (s. 147), and the Public Service Employee Relations Act, R.S.A. 1980, c. P-33 (70(3)), contain provisions which prohibit discrimination on the basis of union membership. These legislative provisions suggest to us that where a collective agreement includes similar anti-discrimination objectives, they too should be interpreted liberally. In our view, arbitration boards should not take a narrow view of anti-discrimination provisions or search for ways to minimize their impact. Subject always to the specific language of the collective agreement, the principles established by the courts in interpreting human rights legislation should be considered by arbitrators when interpreting anti-discrimination provisions in collective agreements so that the objects of these provisions can be attained. (pp. 244-5)


I note parenthetically that I do not accept—nor is there reason to think the Arbitrator accepted—the Association's characterization of how human rights law has evolved with respect to the test for discrimination. There is no requirement in that context that discrimination have formed at least some part of an employer's reasoning
for its actions. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 321, the Supreme Court of Canada stated that for the purposes of deciding whether a human rights code’s prohibition against discrimination has been violated, no intent to discriminate is required:

It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory. (p. 329)

Moreover, *Alberta Hospital* does not stand for the proposition that some intent to discriminate is necessary to breach a ‘no discrimination’ provision in a collective agreement. Rather, Arbitrator McFetridge found that no intention to discriminate is necessary for adverse effect discrimination:

It would be easy to infer that there was an intention to discriminate from the fact that the employer took union activity into consideration in deciding which positions should be eliminated. Even if it was not deliberate, however, it had a discriminatory effect. We are inclined to believe that it was not intentional but we do not consider it necessary to make a finding on this point. We cannot avoid the conclusion that it had a discriminatory effect and must be characterized as adverse effect discrimination as defined by the Supreme Court of Canada in *Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 321 at p. 332, [1985] 2 S.C.R. 536, 86 C.L.L.C. 17,002... (p. 241, emphasis added)

The employer in *Alberta Hospital* sought judicial review of the award on the basis that by importing principles of interpretation applicable to human rights legislation when interpreting a ‘no discrimination’ provision in a collective agreement, the Board had committed a jurisdictional error. The Alberta Court of Queen’s Bench rejected this contention:

In my view the Board reached the right conclusion, supported by the right view that adverse effect discrimination can be sufficient to justify a grievance based on the no-discrimination clause in the Collective Agreement. Being correct, it was *a fortiori* not patently unreasonable, the latter being the test applicable to judicial review of a decision which was within the jurisdiction of the Board. The Board had the jurisdiction to decide whether or not there had been discrimination. It was within the Board’s jurisdiction to decide that discrimination may exist within the meaning of the no-discrimination clause even when the discrimination is “adverse effect discrimination”. The decision did not become unreasonable, or erroneous in any degree, by virtue of the Board’s taking inspiration from judicial decisions based upon human rights legislation. (*Alberta Hospital Ponoka v. Alberta Union of Provincial Employees, Local 42* (1995), 95 CLLC para. 210-044 at p. 141,337)
The employer’s further appeal to the Alberta Court of Appeal was dismissed:

The appellant argues that the Board erred by incorporating principles from human rights legislation into the interpretation of the collective Agreement. In so doing, they say that the Board exceeded its jurisdiction by amending, adding to, or altering the Collective Agreement, contrary to its provisions.

We are of the view that the Board’s decision, based on its findings of fact which were supported by evidence, was not patently unreasonable, and it did not commit jurisdictional error. Its duty was to decide whether the action of the hospital breached Article 12.01. That is precisely what the Board did. In doing so, it looked at human rights jurisprudence to aid in its determination of the meaning of the word discrimination and committed no error in doing so. (Alberta Hospital Ponoka v. Alberta Union of Provincial Employees, Local 42 (1997), 97 CLLC para. 220-052 at p. 143, 569)

Returning to the facts of this case, in my view, when the Arbitrator’s statement that Bryson’s removal was “punishment for her refusal to agree to work under terms different than those in the collective agreement” is read in its narrow and wider context, he was simply finding that Bryson had been effectively punished. Read in this way the statement is not inconsistent with the Arbitrator’s other findings that the University relies on.

Moreover, and in any event, the Arbitrator’s reason for upholding the discrimination grievance does not depend on his characterization of the University’s actions as ‘firing’ or ‘punishing’ Bryson. As I will explain below, the Arbitrator upheld the discrimination grievance because he found that Bryson had suffered an adverse effect (removal from the ETEC 512 assignment) because of her membership in and activity on behalf of the Association, contrary to Article 4 of the Framework Agreement.

The University submits that finding the University’s response to Bryson’s refusal to agree to work under terms different than those in the collective agreement to be “punishment” is fundamentally at odds with the ‘work now grieve later’ doctrine since it implies that she was entitled to refuse to do so. The ‘work now grieve later’ doctrine is explained in Brown & Beatty, Canadian Labour Arbitration, 3rd Edition (Canada Law Book Inc., Aurora, Ontario):

One of the most basic and long-standing rules of arbitration law is that employees who dispute the propriety of their employers’ orders must, subject to the considerations that follow, comply with those orders and only subsequently, through the grievance procedure, challenge their validity... (¶7:3610, emphasis added)

The learned authors later state that in the standard case where an employee is disciplined for refusing to do what he or she has been told to do, arbitrators have
required that the first thing an employer must prove is “that an order was in fact given” (¶7:3612).

In this case, no order was ever given. Instead, the Arbiter found the University had, through negotiations, tried to obtain Bryson’s agreement to certain conditions of employment it was proposing. The Arbiter also found that she was removed from work she had been assigned because she refused to agree to the conditions of employment the University wished her to agree to (Award, 96). In short this case was about a refusal to make an agreement, not a refusal to comply with an order, and therefore the Arbiter’s conclusions were not at odds with the ‘work now grieve later’ doctrine.

The University argues, in the alternative, that if there is no requirement of an intent to discriminate, there was no discrimination in any event. I do not agree, given the Arbiter’s findings of fact and his interpretation of Article 4 of the Framework Agreement. The Arbiter’s conclusion that the University discriminated against Bryson rests on a finding of fact and an interpretation of Article 4 of the Framework Agreement. The finding of fact was that Bryson suffered an adverse effect (removal from the ETEC 512 assignment) as a result of her refusal to make a private agreement to conditions of employment that differed from the conditions of employment provided for in the Collective Agreement. (The University does not dispute the Arbiter’s finding that, in addition to changing copyright ownership, the MET agreement created a limitation on academic freedom; granted the University a previously non-existing right under the Collective Agreement to act “in its discretion” to “decide which of the materials contributed by the Author it will use”; created a new remuneration for teaching work; introduced methods of evaluation that might conflict with the evaluation process and methods in the Collective Agreement; and introduced a dispute resolution process alien to the Collective Agreement (Award, p. 93).)

The interpretation of Article 4 of the Framework Agreement that the Arbiter’s finding of discrimination rests on is that Bryson’s refusal was an ‘activity on behalf of the Faculty Association’ within the meaning of Article 4:

I find that Dr. Bryson was removed from work assigned to her as part of her regularly [sic] teaching load her because of her membership in and activities on behalf of the Faculty Association contrary to Article 4 of the Framework Agreement for Collective Bargaining. There is no need to make any finding with respect to Article 12... (Award, 96, emphasis added)

The activity that the Arbiter found (i) to have resulted in the adverse effect and (ii) to have been an ‘activity’ within the meaning of Article 4 of the Framework Agreement was Bryson’s vigilance in ensuring the terms of the collective agreement were abided by and her refusal to make private agreements regarding conditions of employment that differed from the conditions of employment provided for in the Collective Agreement:
Membership in the Faculty Association includes accepting and insisting on adherence to the collective agreement. Every bargaining unit member has a right, and perhaps a responsibility, to ensure the University complies with the terms of the collective agreement. This is an activity each bargaining unit member performs on behalf of the bargaining agent. *Vigilance in ensuring the terms of the collective agreement are abided by and refusing to make private agreements to different conditions of employment are activities on behalf of the bargaining agent.* (Award, p. 96, emphasis added)

The University has not shown that the Arbitrator's finding of fact and his interpretation of Article 4 of the Framework Agreement involve any reviewable errors. In summary, when the Award is given a charitable interpretation I find that the University has not established that the Arbitrator made findings that were unsupported by any evidence and inconsistent with other findings he made.

FIFTH GROUND OF APPEAL

The University's final ground of appeal pertains to the remedy the Arbitrator ordered, i.e., that Bryson be assigned the development and teaching of another MET program course (ETEC 531) as part of her regular teaching load without being required to execute an intellectual property agreement.

According to the University, arbitrators have no jurisdiction to order an employer to remedy a breach of the collective agreement by doing something the employer is under no obligation to do. It maintains that it was not open to the Arbitrator to order it to assign a faculty member to develop a MET course "when there is no obligation in the collective agreement on the University to do so."

Moreover, the University contends that:

...the Arbitrator's order would put the University in direct conflict with its agreement with Tec de Monterrey. The University would expend resources in developing a course for the Program with no right to the ownership of the course and no ability therefore to jointly own the courses with Tec de Monterrey or enforce meet its legal obligations to Tec de Monterrey.

The Arbitrator's reasons for ordering the remedy he did are found in the following passage from the Award:

Dr. Bryson lost the opportunity to develop and teach a course in the Master of Educational Technology program. She is qualified and was recommended to co-develop and teach ETEC 531 with Dr. Petrina. That course has not been developed for the MET program. To remedy the lost opportunity suffered by Dr. Bryson by taking away her assignment, I order the University to assign to Dr. Bryson, as part of her regular teaching load, development and teaching
ETEC 531 with Dr. Petrina as recommended by Dr. Gaskell in April 2002. (Award, pp. 96-97)

Section 89 of the Code provides that:

For the purposes set out in section 82, an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement...

The University acknowledges that the Arbitrator had the jurisdiction “to put the employee in the position she would have been in but for the employer’s breach.” However, it submits that “[i]n this case, even if no breach had occurred, Bryson could not claim an entitlement to work on any particular course.” In my view that fact is not significant for present purposes. Even if the University was not obliged to assign ETEC 512 to Bryson in the first place; having done so, it was not free to deprive her of the assignment in violation of Article 4 of the Framework Agreement. Had ETEC 512 not already been developed by the time the Arbitrator issued the Award, putting Bryson in the position she would have been in but for the University’s breach of the Collective Agreement would have involved ordering the University to re-assign ETEC 512 to her despite the fact it had not initially been under any obligation to assign the course to. That being the case, the question that has to be answered is whether the Arbitrator’s remedial authority was somehow diminished by the fact that ETEC 512 had already been developed by the time the Arbitrator issued the Award.

The remedial authority of arbitrators was discussed by the Board in The Board of School Trustees of School District No. 23 (Central Okanagan), BCLR No. B406/94:

The remedial authority of an arbitrator is set out in Section 89 of the Code. Pursuant to this provision, an arbitrator is accorded a broad jurisdiction to “provide a final and conclusive settlement of a dispute arising under a collective agreement...”

Moreover, within the legislative framework created by Part 8 of the Code, an arbitrator is required to go beyond the strict legal interpretation of the issues, including the issue of remedy, and “have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties”: Section 82(2). The Board has recognized that without such broad remedial authority an arbitrator is severely hampered in his or her ability to ensure arbitration operates as an effective means of resolving mid-term disputes without stoppages of work: Section 84(2)...

In practice, a decision as to the appropriate remedy is one of judgment; a judgment which is based upon the arbitrator’s view of the evidence and the circumstances before them. These elements of the case are in turn coloured by the arbitrator’s background and expertise in labour relations. It is for these reasons that the Board has been reluctant to interfere with the judgment of an arbitrator concerning the appropriate remedy.
An arbitrator's remedial authority is not, however, absolute. Remedies must not be issued in a vacuum; they must respond to the specific circumstances presented by the dispute: Sandbar Construction Ltd., IRC No. C9/89. As described by Mr. Justice Chouinard in National Bank of Canada and Retail Clerks International Union [1984] 1 SCR 269:

"...In my view, it is essential for there to be a relation between the unfair practice, its consequences and the remedy. (p. 288)"

In addition, a remedy must be supported by the evidence and reasonable inferences drawn from the evidence. A remedy that lacks an evidentiary foundation violates the principles of natural justice. Similarly, a remedy unsupported by the evidence is inconsistent with the fundamental values enshrined in the Charter of Rights and Freedoms: Retail, Wholesale and Department Store Union, Local 580 et al. v Dolphin Delivery Ltd. et al., [1986] 2 SCR 573 at p. 603; Doman Forest Products Limited, New Westminster Division, IRC No. C76/91; Re Doman Forest Products Ltd. (1990), 13 L.A.C. (4th) 275 (Vickers). Finally, the relief fashioned by an arbitrator should not be punitive: White Spot, IRC No. C57/89 (Reconsideration of C7/89); Canadian Imperial Bank of Commerce (1986), 10 CLRBR 186. (pp. 7, 8)

In a more recent case, Westfair Foods Ltd., BCLR No. B268/2003 (Leave for Reconsideration of BCLR No. B124/2002), the Board stated:

Sections 82(2) and 89 of the Code provide a broad discretionary remedial power to arbitrators to provide appropriate, even innovative, remedies designed to suit the circumstances of each case: The Board of School Trustees of School District No. 23 (Central Okanagan), BCLR No. B406/94. The Board gives arbitrators considerable deference in exercising their remedial authority. The Board's supervisory role is to ensure the manner in which an arbitrator exercises that authority is consistent with the Code: Okanagan University College, BCLR No. B43/98. There must be a rational connection between the remedy and the breach of a collective agreement in the context of all the circumstances of the case. (para. 13)

I find that in this case a rational connection exists between the breach found by the Arbitrator and the remedy he ordered. The Arbitrator was merely trying, to the greatest extent it was then possible, to put Bryson in the position she would have been in had the Collective Agreement not been breached. Had the University not breached Article 4 of the Framework Agreement, Bryson would have developed and taught a MET course. Since by the time the Arbitrator issued the Award it was no longer possible to have Bryson develop ETEC 512, he merely ordered the University to allow Bryson to develop a MET course (ETEC 531) that she was qualified to develop and which it had initially planned that she would co-develop (Award, p. 41).
In this respect the Award is distinguishable from the authority the University relies on to support its contention that the Arbitrator did not have the jurisdiction to order the remedy he ordered: *Riverside Forest Products Ltd. and IWA, Local 1-423* (Hall, October 25, 2001, unreported) ("Riverside"). In that case Arbitrator Hall found that the employer had violated a letter of agreement by contracting out log sorting work that had previously been done by employees at its Lumby log yard. The union asked Arbitrator Hall to direct that the employer rectify the breach by ordering it to re-instate the work to the Lumby log yard. It relied on cases in which arbitrators had made compliance orders. Although Arbitrator Hall accepted that he had the jurisdiction to issue a compliance order, he distinguished the cases relied on by the union:

There is a notable difference between this case and the authorities cited by the Union. In none of those cases is there any suggestion that the employer had more than one means of complying with the collective agreement. The Employer could obviously rectify its contravention by returning the Union’s work to the Lumby site. It might also transfer the work to one of its other operations in the Okanagan... *(Riverside*, p. 8, emphasis added)

Ultimately, however, Arbitrator Hall’s reason for not issuing the compliance order sought by the union was based on his interpretation of the letter of agreement. He concluded that even if he could specify the manner of compliance when there was an alternative means of rectifying a breach, he was not prepared to do so in that case since “[s]pecifying the manner in which the Employer must operate its business would go beyond the protection negotiated by the Union under the Letter of Agreement” *(Riverside*, p. 9).

In this case, in contrast, there is no basis for concluding that, having assigned ETEC 512 to Bryson, there was any other way of complying with Article 4 of the Framework Agreement than by allowing Bryson to develop and teach the course. Moreover, there is no reason to conclude that the Arbitrator was of the view (or had any reason to be of the view) that the remedy he ordered was beyond the protection negotiated by the Union under Article 4 of the Framework Agreement.

Finally, in this regard, the University has provided no authority to support its submission that the fact (if it is a fact) that the Arbitrator’s order puts it “in direct conflict with its agreement with Tec de Monterrey”, is relevant to the issue of his *jurisdiction* to make the order. In my view, an agreement an employer may have with a third party cannot deprive an arbitrator of the jurisdiction to order a remedy for the violation of a collective agreement if the arbitrator would have had the jurisdiction to order the remedy in the absence of such an agreement.

V. CONCLUSION

In summary, the Arbitrator found (i) that in a university setting, many issues related to copyright are “conditions of employment” of faculty members; (ii) that the University, in its capacity as Bryson’s employer, negotiated with her, in her capacity as
its employee, about conditions of her employment (including, but not limited to, copyright) that differed from the conditions of employment in the Collective Agreement; (iii) that because she did not agree with the position the University took in those negotiations, it did not permit her to do work it had previously assigned to her as part of her regular teaching load; (iv) that her refusal to agree with the position taken by the University constituted an 'activity on behalf of the Association' within the meaning of Article 4 of the Framework Agreement; and (v) that when an action of the University results in a faculty member suffering an adverse effect because he or she was engaged in activity on behalf of the Association, the University violates Article 4 of the Framework Agreement. For the reasons given above, I find that the University has not demonstrated that the Arbitrator committed any reviewable errors in making any of these findings or in issuing the remedy he did. Accordingly, the University's Section 99 application is dismissed.

LABOUR RELATIONS BOARD

[Signature]

G.J. MULLALY
VICE-CHAIR