IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE UNIVERSITY OF BRITISH COLUMBIA
(the "University")

AND:

THE FACULTY ASSOCIATION OF THE UNIVERSITY
OF BRITISH COLUMBIA
(the "Faculty Association")

(Policy Grievance re: Teaching Evaluation)

PRELIMINARY AWARD

ARBITRATOR: David C. McPhillips

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

COUNSEL FOR THE FACULTY ASSOCIATION: Allan E. Black, Q.C. and Pamela Constanzo

DATE AND PLACE OF HEARING: January 18, 2008
Vancouver, B.C.

DATE OF AWARD: March 12, 2008
This dispute centers around the introduction of a Policy on Student Evaluation of Teaching (the "Policy") which was approved by the Vancouver Senate of the University of British Columbia ("U.B.C.") on May 16, 2007. That Policy addresses the creation, implementation and application of student evaluations of teaching in all academic programs at the University’s Vancouver campus. The Faculty Association of the University of British Columbia (the "Faculty Association") filed a grievance on September 20, 2007 asserting that the Policy was "in violation of the collective agreement and raises serious concerns about member rights and the integrity of teaching". The University takes issue on the merits with both of those assertions. However, the University has also raised a preliminary objection that this Policy of the University Senate is not arbitrable pursuant to the terms of the Collective Agreement between the University of British Columbia and the Faculty Association. The University asserts that an arbitrator appointed under the Collective Agreement does not have jurisdiction to address a grievance with respect to this Policy of the University Senate which, it is agreed, will effect members of the bargaining unit. It is that matter of jurisdiction which is the subject of this Preliminary Award.

BACKGROUND

In British Columbia, the University Act, [RSBC] 1996, Chapter 468 is the statute under which universities in the province are created. The University Act lists "the corporations which continue to be universities in British Columbia" (Sec. 3(1)) and the University of British Columbia is on that list. Section (3) (2.1) states that "the University of British Columbia is composed of a chancellor, a convocation, a board, an Okanagan senate, a Vancouver senate, a council, and faculties". Section 46.1 of the University Act indicates that "(s)ubject to this Act and for the purposes of exercising its powers and carrying out its duties and functions under this University Act, a university has the power and capacity of a natural person of full capacity". Section 47 sets out the functions and duties of a university and these include establishing colleges, school, facilities, departments, chairs and courses of instruction, providing
instruction, establishing research facilities, providing scholarships, fellowships and prizes and providing a program of continuing education.

The structure of U.B.C., as with other universities in Canada, has often been described as being bicameral. Under the University Act, U.B.C. has a Board of Governors which is responsible for the management, administration and control of the property, revenue, business and affairs of the University which includes the appointment of senior officials and faculty on the recommendation of the President. The twenty-one (21) member Board of Governors is composed of the Chancellor of the University, the President, three faculty members, three students, two employees of the University and eleven persons nominated by the Lieutenant Governor (Section 19). The powers of the Board of Governors are set out in Section 27 of the University Act.

XXVIII. Powers of board

27 (1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.

(2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:

(a) to make rules for the meetings of the board and its transactions;

(b) to elect from among its members a chair, and, when necessary, an acting chair;

(c) to appoint a secretary and committees it considers necessary to carry out the board's functions, including joint committees with the senate, and to confer on the committees power and authority to act for the board;

(d) in consultation with the senate, to maintain and keep in proper order and condition the real property of the university, to erect and maintain the buildings and structures on it that in the opinion of the board are necessary and advisable, and to make rules respecting the management, government and control of the real property, buildings and structures;

(e) in consultation with the senate, to provide for conservation of the heritage sites of the university, including any heritage buildings, structures and land of the university;

(f) with the approval of the senate, to establish procedures for the recommendation and selection of candidates for president, deans, librarians, registrar and other senior academic administrators as the board may designate;

(g) subject to section 28, to appoint the president of the university, deans of all faculties, the librarian, the registrar, the bursar, the professors, associate professors, assistant professors, lecturers, instructors and other members of the teaching staff of the university, and the officers and employees the board considers necessary for the purpose of the university, and to set their salaries or remuneration, and to define their duties and their tenure of office or employment;

(h) if the president is absent or unable to act, or if there is a vacancy in that office, to appoint an acting president;

(i) to consider recommendations from the senate for the establishment of faculties and departments with suitable teaching staff and courses of instruction;
(j) subject to section 29 and with the approval of the senate, to provide for the establishment of faculties and departments the board considers necessary;

(k) to provide for chairs, institutes, fellowships, scholarships, exhibitions, bursaries and prizes the board and the senate consider advisable;

(l) to receive from the president and analyze and adopt with or without modifications the budgets for operating and capital expenditure for the university;

(m) to set, determine and collect the fees

(i) to be paid for instruction, research and all other activities in the university,

(ii) for extramural instruction,

(iii) for public lecturing, library fees, and laboratory fees,

(iv) for examinations, degrees and certificates,

(v) for the use of any student or alumni organization in charge of student or alumni activities, and

(vi) for the building and operation of a gymnasium or other athletic facilities;

(o) to pay over

(i) the fees collected for a student or alumni organization that the organization may request, and

(ii) in accordance with section 27.1, the fees collected for a student society or a provincial or national student organization;

(p) to administer funds, grants, fees, endowments and other assets;

(q) to select a seal and arms for the university and have sole custody and use of the seal;

(r) to provide for student loans;

(s) with the approval of the senate, to determine the number of students that may in the opinion of the board, having regard to the resources available, be accommodated in the university or in any faculty of it, and to make rules considered advisable for limiting the admission or accommodation of students to the number so determined;

(t) to enter into agreements on behalf of the university;

(u) to control agreements and pedestrian traffic on the university campus;

(v) to acquire and deal with

(i) an invention or any interest in it, or a licence to make, use or sell the product of an invention, and

(ii) a patent, copyright, trade mark, trade name or other proprietary right or any interest in it;

(w) to require, as a term of employment or assistance, that a person assign to the board an interest in an invention or an interest in a patent, copyright, trade mark, trade name or other proprietary right resulting from an invention;

(x) to pay to a municipality incorporated under an Act a grant in a year;

(y) to make rules consistent with the powers conferred on the board by this Act;

(z) to do and perform all other matters and things that may be necessary or advisable for carrying out and advancing the purposes of the university and the performance of any duty by the board or its officers prescribed by this Act.
(3) A person appointed under subsection (2) (b) has, during the period for which he or she is appointed, all the powers, rights and privileges of the president.

Subsections 4, 5, 6 and 7 of Section 27 address the right of the Board of Governors to collect personal information from students.

Section 28 of the University Act deals with the authority of persons appointed by the Board of Government pursuant to Section 27 (2)(g). Section 28 states:

XXX. Tenure, appointment and removal of teaching staff and others

28 (1) Unless otherwise provided, the tenure of persons appointed under section 27 (2) (g) is during the pleasure of the board.

(3) A person must not be appointed a member of the teaching staff of the university or of any faculty of the university unless the person is first nominated for the position by the president.

(3) A member of the teaching staff of the university or of any faculty of the university must not be promoted or removed except on the recommendation of the president.

Section 35.1 establishes that there will be two Senates at U.B.C., one a Vancouver Senate and one an Okanagan Senate. Section 35.1(2) mandates that the Vancouver Senate will be composed of the (a) Chancellor, (b) the President (who is the Senate’s chair), (c) the Academic Vice President, (d) the Deans of the Faculties, (e) the Chief Librarian, (f) the Director of Continuing Education, (g) a number of faculty members equal to twice the number of Senate members in subsections (a)-(f), (h) a number of students equal to the number of Senate members in subsections (a)-(f), (i) four persons elected by convocation, (j) one member elected by the governing body of each affiliated college and (k) “additional members, determined by the senate, without altering the rates set out in paragraphs (g) and (h)”. Section 36 of the University Act deals with the term of office of members of the Senate.

Section 37 states the “academic governance of the university is vested in the senate” and then sets out specific powers of the Senate:

XL. Powers of senate

37 (1) The academic governance of the university is vested in the senate and it has the following powers:

(a) to regulate the conduct of its meetings and proceedings, including the determination of the quorum necessary for the transaction of its business, and the election of a vice chair at least annually, who is to chair meetings in the absence of the president;

(b) to establish committees it considers necessary and, by 2/3 vote of its members present, to delegate to one or more committees those of its powers as it may determine;
(c) to determine all questions relating to the academic and other qualifications required of applicants for
admission as students to the university or to any faculty, and to determine in which faculty the students
pursuing a course of study must register;

(d) to determine the conditions under which candidates must be received for examination, to appoint
examiners and to determine the conduct and results of all examinations;

(e) to establish a standing committee to meet with the present and assist the president in preparing the
university budget;

(f) to consider, approve and recommend to the board the revision of courses of study, instruction and
education in all faculties and departments of the university;

(g) to provide for courses of study in any place in British Columbia and to encourage and develop
extension and correspondence programs;

(h) to provide for and to grant degrees, including honorary degrees, diplomas and certificates of
proficiency, except in theology;

(i) to recommend to the board the establishment or discontinuance of any faculty, department, course of
instruction, chair, fellowship, scholarship, exhibition, bursary or prize;

(j) to award fellowships, scholarships, exhibitions, bursaries and prizes;

(k) to determine the members of the teaching and administrative staff who are to be members of each
faculty;

(l) to make rules for the management and conduct of the library;

(m) to establish policies regarding the conservation of heritage objects and collections that are owned by
or in the possession of the university or any of its faculties, divisions, departments or other agencies;

(n) to provide for the preparation and publication of a university calendar;

(o) to make recommendations to the board considered advisable for promoting the interests of the
university or for carrying out the objects and provisions of this Act;

(p) to deal with all matters reported by the faculties, affecting their respective departments or divisions;

(q) to establish a standing committee to consider and take action on behalf of the senate on all matters
that may be referred to the senate by the board;

(r) subject to the approval of the board, to enter into agreements with any corporation or society in
British Columbia entitled under any Act to establish examinations for admission to the corporation or
society, for the purpose of conducting examinations and reporting results, and those corporations or
societies have power to enter into the agreements;

(s) to make rules respecting the conduct and financing of examinations referred to in paragraph (r) and
other examinations conducted by the senate under any other Act;

(t) to make rules respecting the reporting of results of examinations referred to in paragraphs (r) and (s);

(u) to set the terms of affiliation with other universities, colleges or other institutions of learning, and to
modify or terminate the affiliation;

(v) to establish a standing committee of final appeal for students in matters of academic discipline;

(w) to establish a standing committee on relations with other post secondary institutions in British
Columbia;

(x) to require any faculty to establish an advisory committee consisting of students of the faculty and
members of the community at large.

This Arbitration Board was also referred to Sections 40 and 41 of the University Act which
address the powers and duties of the faculty:
Powers and duties of faculty

40 A faculty has the following powers and duties:

(a) to make rules governing its proceedings, including the determining of the quorum necessary for the transaction of business;

(b) to provide for student representation in the meetings and proceedings of the faculty;

(c) subject to this Act and to the approval of the senate, to make rules for the government, direction and management of the faculty and its affairs and business;

(d) to determine, subject to the approval of the senate, the course of instruction in the faculty;

(e) subject to an order of the president to the contrary, to prohibit lecturing and teaching in the faculty by persons other than appointed members of the teaching staff of the faculty and persons authorized by the faculty, and to prevent lecturing or teaching so prohibited;

(f) subject to the approval of the senate, to appoint for the examinations in each faculty examiners, who, subject to an appeal to the senate, must conduct examinations and determine the results;

(g) to deal with and, subject to an appeal to the senate, to decide on all applications and memorials by students and others in connection with their respective faculties;

(h) generally, to deal with all matters assigned to it by the board or the senate.

Approval of rules

41 A general rule made by a faculty is not effective or enforceable until a copy has been sent to the senate and the senate has given its approval.

The University of British Columbia’s web site contains a description of the interrelationships of the Board of Governors, the Senate and the President (the “Administration”):

• • • Institutional Business and Academic Freedom

Another important distinction from many other organizations is the division of governance roles and responsibilities in a university. The traditional bicameral system of both a Board and Senate is refined in our modern universities under legislative roles which separate the business from the academic integrity of the institution.

Essentially the Board is responsible for the "business" of the University – its administration, finances, operations, and assets, and place in the community, and the integrity of such.

The Senate is a more focused responsibility for the academic integrity of the University, subject to the Board’s involvement where the academic matters interface with matters of “business” and the larger community.

The University Act provides for Board interaction with the University’s Senate in a number of areas including the consideration of recommendations from Senate for the establishment of faculties and departments and the provision of chairs, institutes, fellowships, scholarships, exhibitions, bursaries and prizes.

Both the Board and the Senate are governing bodies of the University. This means that their role is that of strategic oversight:

• to set the vision and strategic direction, and;
• then to periodically assess operational status relative to that direction.

The latter aspect, of oversight, is just that – to be informed about, but not supervise, nor direct, the day to day activities, risks and successes of the organization.
University Executive

The third component of the governance framework is sometimes known as the Administration. This is the University Executive offices and management, including the President, senior administrative officers and associated systems, for the general supervision and direction of the business and academic work of the University, in accordance with, and to effectively implement, the strategic framework and oversight directions of the Board and Senate.

The parties also placed into evidence a May, 2005 Report of the Senate Ad Hoc Committee for the Review of Senate which had been mandated to review all aspects of the Senate, including its organization, functioning and deliberations and to make recommendations relating to the activities and responsibilities of Senate. The Report of the Committee contains some comments which are of relevance to the present dispute:

A. Major Concerns

1. Loss of Policy-Making Role

   The *University Act* states (Section 37(0)) “the academic governance of the university is vested in the senate...” This statement, along with other parts of the Act, suggest or presume a primary role for Senate with respect to academic policy at the University. However, there was a general consensus that Senate has largely lost its role as the primary body for academic governance. Senate was viewed as being “reactive” rather than “proactive” in academic policy, and as having become marginalized in some areas.

   Policies were viewed as deriving largely from the senior administration, with the vice-presidents, especially the Vice-President, Academic and Provost, and the Associate Vice-Presidents reporting to the Provost having taken on an increasingly enlarged role in academic policy. In addition, Senate was viewed as having, on a de facto basis, delegated much of its authority to deans of Faculties. These reductions in the influence of Senate represent, in part, a replacement of “part-time” or “amateur” Senators with full-time professional staff in the central administration and, to a lesser extent, in specific Faculties. (p.9)

   Other aspects of the academic environment also affect the role of Senate. One aspect of the environment not emphasized in input received by the committee but worthy of note is the “labour relations” or “human resource” environment. While the University has sought to keep academic governance and labour relations separate and distinct, there are emerging areas of overlap. For example, issues such as mandatory retirement, integration of UBC Vancouver with UBC Okanagan, handling of intellectual property rights, and performance evaluation of academic units are potentially of interest to both the Senate and the Faculty Association. The relatively recent certification of the Faculty Association under the Labour Code of BC, the structure of recent collective agreements, and various arbitration and other legal decisions constrain or otherwise affect academic governance to some extent.

   The de facto loss of Senate’s traditional policy authority is generally reflected in what many people perceive as a “rubber stamp” role for Senate. Several people made the point that by the time issues come to Senate they are already a fait accompli and that, while some members of Senate might have serious objections, anything other than approval seems obstructionist. (p.10)

2. Lack of Emphasis on Major Issues

   A second near-consensus concern that came up in questionnaires and in interviews is that Senate seems to spend too little time dealing with “big picture” issues. This is related to the concern about the reduction of Senate’s policy-making role, but it is conceptually distinct. It would be possible, for example, for Senate to discuss some major issues of academic policy even if Senate did not have a major policy formulation role in all areas. Senate could still discuss these and develop a position that would at least serve as input to decisions taken by others.

   Virtually every person or group we spoke to was able to identify major issues that Senate ought to discuss but has not. The previous Provost suggested that Senate should proactively consider innovations in teaching methods. The current Provost suggested that Senate should, in a world where "accountability" to "stakeholders" is increasingly important, consider methods of performance evaluation of individuals and of academic units. Two other important issues raised for Senate attention, among a fairly long list, are mandatory retirement and the relationship of UBC Vancouver and UBC Okanagan.
Apparently, the Senate took some of these concerns and criticisms to heart and, in May, 2007, promulgated a Policy on Student Evaluation of Teaching. That Policy states:

**A POLICY ON STUDENT EVALUATION OF TEACHING**

Approved by Senate on May 16, 2007 upon recommendation of the Teaching and Learning Committee. This policy is meant to replace all earlier Senate Policies on Student Evaluation.

**BACKGROUND**

In May 2006, as part of a larger strategy to support and foster quality teaching and learning at UBC, Senate approved in principle recommendations related to student evaluations of teaching. These recommendations focused on supporting a modular evaluation process that enables the key stakeholders who influence the quality of the learning environment at UBC to ask relevant questions of students at appropriate times (concurrent and end of term, as appropriate) and then readily collect, analyze and interpret and share those data.

Guiding principles embedded in the recommendations were that evaluation of teaching should be student-focused, and that the products of evaluations be used to inform teachers on how they can continuously improve their practice and to support the university efforts to monitor and nurture its teaching and learning environments. The Senate charged the Senate Teaching and Learning Committee and the Office of the Provost with developing an implementation strategy for the recommendations. A joint committee (SEOT) was struck to address this charge.

The SEOT committee has reviewed recommendations, guidelines, and policies established by Senate over the past few decades on student evaluation of teaching at the University, and is of the opinion that a new policy on student evaluation of teaching would be of benefit. It should be noted that this proposed policy does not specify the means of data collection and should be applied to all current and future means of obtaining student evaluations of teaching evaluation. However, the SEOT Committee is of the view that a centrally supported, yet locally managed web-based system for student evaluations of teaching would greatly facilitate the uniform application of this policy. Evaluation of a potential system continues. This policy is meant to replace all earlier Senate Policies on Student Evaluation.

**INTRODUCTION, APPLICATION, AND GOALS**

This policy derives from recommendations approved by Senate in 1978, 1991, 1996, 1999, 2000, and 2006, and is in alignment with the conditions for appointment for faculty, sessional, and part-time faculty members. The policy also applies to teaching assistants when they take on substantial responsibility for student learning experience in a course. It applies to all undergraduate, graduate and continuing studies courses offered at UBC.

**Student evaluation of teaching has four major goals:**

1) To provide data that will be used to continuously improve the student's learning experience.

2) To provide students, departments, faculties and the University with a source of data about the overall quality of teaching.

3) To provide teachers with information on their teaching performance and to assist with the further development of their teaching.

4) To provide the University with data on the quality of teaching to be used for operational purposes, including but not limited to assessment of faculty for merit and/or performance adjustment salary awards, promotion, tenure and institutional recognition.

**GUIDING PRINCIPLES FOR STUDENT EVALUATION OF TEACHING**

1) Student evaluations should be considered as part of an overall teaching evaluation system that includes regular peer review, faculty self-assessment, and other forms of assessment, as appropriate.
2) Educational programs and incentives should be developed to ensure a high rate of participation in the evaluation of teaching.

3) Evaluations of teaching shall ensure students’ confidentiality, e.g., the students will not be required to provide their name and/or student number.

4) Student evaluation of teaching should be student-centred (i.e., ultimately improving the learning experience) and it must provide a mechanism for receiving reliable and valid data from students on a range of topics related to their learning experiences.

5) Student Evaluations of Teaching should be administered in every course section at UBC every time it is offered including those offered to undergraduate, graduate and continuing studies students. Exceptions to this requirement are courses of an individual/independent nature (e.g., independent study courses, special research projects, thesis, music studios, etc.) or sections with very small enrollments as defined by each faculty, where other means of obtaining student feedback may be more appropriate.

6) A rating scale (when used) of 1-5 should be adopted for all evaluation questions, with 5 being the most positive response.

7) In addition to the formal summative evaluations by students, faculty members are strongly encouraged to seek formative feedback during the course, using methods of their own choice.

8) Carefully planned dissemination, feedback, and response strategies are needed, so that the data can be used to improve the learning environment.

9) Different stakeholder constituencies of the University requirement different information in order to assess the quality of teaching and provide appropriate support structures that encourage teaching excellence.

IMPLEMENTATION

1) A modular, multi-perspective design endorsed in principle by the Senate at its May 2006 meeting shall be adopted to take into account the multiple stakeholders in need of Student Evaluations of Teaching data (students, teachers, departments, faculties, and the University).

2) Data can be collected through mechanisms as diverse as traditional paper forms and a centrally administered web-based evaluation platform. Regardless of delivery mechanism, Faculties are responsible for providing certain data to the University on a timely basis for reporting.

3) In addition to modules contributed by departments, Faculties and the Provost Office, individual teachers may elect to include a personal module for which the data collected will be confidential to that teacher.

4) The instruments used to obtain student evaluations shall carry a copy of this statement:

   The University recognizes the importance of high quality teaching for the academic preparation of its students and accordingly requires that teachers be annually evaluated by procedures which include provision for assessments by students. Students are advised that submissions containing malicious or otherwise inappropriate comments will be discarded.

   Except for confidential questions used solely for the benefit of an individual teacher, the University will use data from student evaluations of teaching to improve the learning environment of the University. In addition the University will use this data for operational purposes, including but not limited to assessment of faculty for promotion, tenure and institutional recognition.

5) Paper forms shall carry an additional statement that:

   Students may wish to print their comments to avoid recognition of their handwriting.

ACCESS TO RESULTS OF STUDENT EVALUATIONS OF TEACHING

The Modular approach is intended to provide a means for collecting data in alignment with the needs of stakeholder constituencies. Table 1 depicts who will have access to the data in each module. Note that the teacher of a course will have access to all of the data collected related to his or her teaching during the evaluation whereas the University designee will have direct access only to the University Module results. If there is more than one instructor teaching a course, that individual will have access to his or her own results, but not necessarily those of co-teachers.
Table 1. Representation of who has access to which modules, where the X indicates access to the results of a particular module. See footnotes for details.

<table>
<thead>
<tr>
<th>Stakeholder Representative</th>
<th>Individual Teacher</th>
<th>Department Head or Designate</th>
<th>Dean/Head of School or Designate</th>
<th>University Designate</th>
<th>Students/AMS</th>
</tr>
</thead>
<tbody>
<tr>
<td>University Module</td>
<td>X</td>
<td>X</td>
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<tr>
<td>Faculty/School Module</td>
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<tr>
<td>Department Module</td>
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<tr>
<td>Confidential Teacher Module</td>
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1. In compliance with the privacy laws, results for individual instructors will be released only with their consent.

**DISSEMINATION OF STUDENT EVALUATIONS OF TEACHING**

Student evaluations of teaching shall be disseminated according to the following guidelines:

1. Faculties shall make the University module data available to the Provost Office on an annual basis.

2. Deans, Heads or Directors or their equivalents will have access to all information contained in student evaluations of teaching except for the confidential questions collected at the specific request of individual teachers.

3. Individual teachers participating in a course taught by more than one individual will receive 1) a summary of the course evaluations, 2) numerical rating(s) of their own teaching performance together with any written comments and 3) the average numerical rating of the teaching performance of all other contributors to the course (given for the benefit of peer comparison).¹

4. Teaching assistants will receive: a) numerical rating(s) of their own teaching performance together with any written comments and b) the average numerical rating of the teaching performance of all other contributors to the course (given for the benefit of peer comparison).

5. Results will not be given to instructors until after they have submitted final marks for the course or courses in which they are being evaluated.

6. Results of the University Module will be made available to students (AMS). Release of results in any public format must comply with privacy regulations stipulated by the Office of University Counsel. Accordingly, no results that can be attributed to an individual teacher will be released without the consent of that instructor.

7. Each Faculty/School will annually provide students with a summary report of the general quality of teaching in their programs.

8. In special circumstances, the University's designee in consultation with the Dean of the relevant Faculty, may choose not to release part or all of the summary data from teaching evaluations to the AMS or other authorized student organization. Examples of what might be withheld include evaluation summaries for:
   A. faculty in their first year of teaching
   B. classes with very small numbers of students
   C. evaluations with very low response rates
   D. first-time courses given on an experimental basis

¹ In case of sections of courses taught by a large number of instructors, alternative modes of assessment may be used to gather the data, as appropriate.
Note: In the case of B above, alternate methods of involving students in the evaluation of teaching will have to be used.

ASSIGNMENT OF RESPONSIBILITIES

Student's Responsibilities
The University has repeatedly affirmed the importance of and necessity for students to be able to provide confidential and timely feedback to faculty members regarding their teaching. This feedback comprises part of the information which is used to assess faculty performance, and is considered in reappointment, promotion and tenure decisions. As such, UBC believes that participating in teaching evaluation is a student responsibility which should be approached with due seriousness.

University Administration Responsibilities
The Vice President Academic and Provost shall report annually to Senate on teaching quality, effectiveness, and evaluation, and on the extent to which the university is reaching its learning goals.

The University will support a central repository of information about student evaluation of teaching that contains such things as policy, historical information, best practice guidelines, etc., to facilitate professional development, information gathering, and scholarly discourse as well as avoid duplication of effort.

Faculty & Department/Unit Shared Responsibilities
Deans, Directors and Department Heads will ensure that the Student Evaluations of Teaching and administered according to this policy.

Deans, Directors, Department Heads and members of relevant committees shall review the procedures and instruments for the evaluation of teaching in their units and ensure that they are consistent with the statements made in this policy document.

Each Faculty and Department shall establish clear, written criteria which will be used to assess unsatisfactory teaching performance. These criteria shall be made known to anyone who is working in a teaching capacity (including Teaching Assistants).

Deans, Directors and Department Heads shall take action in response to results which show less than satisfactory teaching performance, and a report of such action shall be submitted annually to the Vice President Academic and Provost in the case of Deans and to the Dean in the case of Directors and Heads.

All units shall give serious consideration to establishing a committee whose function is to monitor the processes whereby teaching is evaluated and whose membership includes student representation.

Faculty Level Responsibilities
Each Faculty shall ensure that there is a level of uniformity in the evaluation questionnaires used by individual teaching units to allow the Faculty to make available statistical summary data on overall teaching effectiveness in individual courses.

Each Faculty shall develop policies and procedures that ensure access for their Professors, Instructors and Teaching Assistants to peer-based teaching development programs.

Department Head's or Director's Responsibilities
Heads or Directors of teaching units, or their delegates, shall use the results of teaching evaluations as one component in assessing teaching performance when recommending annual merit/performance salary adjustment increases for faculty, and for the purposes of recommendations concerning tenure and/or promotion.

Heads or Directors of teaching units, or their delegates, shall ensure that all faculty whose teaching is being assessed by students are given the opportunity to provide or withhold consent to their Student Evaluations of Teaching data being released to the students, as stipulated by this policy. However, these data will be used by UBC employees designated with the authority for the assessment of faculty for merit and/or performance adjustment salary awards, promotion, tenure and institutional recognition.

Each unit head must be responsible for ensuring that the criteria are set high enough to motivate teachers to improve the effectiveness of their teaching.

Faculty Member's Responsibilities
Anyone teaching a course at UBC is responsible for familiarizing themselves with the policies and expectations related to student evaluation of teaching.
Anyone teaching a course at UBC is strongly urged to avail themselves of services offered through UBC teaching and scholarly service units (e.g., TAC, Institute for the Scholarship of Teaching and Learning) in order to understand how they can use student evaluations of teaching to inform and improve their teaching practice.

The Faculty Association of the University of British Columbia, which is a product of voluntary recognition, and the University of British Columbia have an existing Collective Agreement with a term running from July 1, 2006 until June 30, 2010. The Collective Agreement actually consists of a compendium of separate agreements: The Framework for Collective Bargaining ("Framework Agreement"); Agreement on Salaries and Economic Benefits ("Salary Agreement"); Leaves of Absence; Agreement on Conditions of Appointment for Faculty ("Agreement on Faculty Appointments"); Agreement on Conditions of Appointment for Librarians; Agreement on Conditions of Appointment for Program Directors in Continuing Studies; Agreement on Conditions of Appointment for Sessional and Part-time Faculty Members ("Sessional Agreement"); Agreement on Reduced Appointments; and finally, Agreement on the Termination or Non-Renewal of Faculty Appointments for Financial Exigencies ("Financial Exigencies Agreement").

The Collective Agreement with the Faculty Association is entered into by the University under the authority of the Board of Governors pursuant to Section 27 of the University Act. The Board of Governors has the power to enter into agreements (Section 27 (2) (s)) and can expressly do so with respect to employment matters (Section 27 (2) (g)). The President of the University is the signatory to the Collective Agreement “for the University of British Columbia” and the Agreement is ratified by the Board of Governors.

The Collective Agreement contains numerous provisions dealing with teaching responsibilities, which is not particularly surprising given that teaching is one of the fundamental activities of the faculty members at U.B.C. The preamble of the Framework Agreement expressly recognizes “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 carrying out these functions.”

In a number of the component agreements making up the Collective Agreement, there is specific reference to teaching. For example, there is acknowledgement that teaching is one of the critical criteria for assessing faculty merit awards (Salary Agreement – Section 2.04 (b)), performance salary adjustments (Salary Agreement – Article 2.05 (b)), and appointment, reappointment, promotion and tenure (Agreement on Faculty Appointments – Articles 4.01 and 4.02).

By way of example only for the purposes of this preliminary matter, the Faculty Association points to Article 4.02 of the Agreement on Faculty Appointments as a potential source of conflict with the Senate Policy on Student Evaluation of Teaching:

4.02 Teaching

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

By way of further example, similar references to the use of teaching evaluations are also contained in Article 8 of the Sessional Agreement and Article 4 of the Financial Exigencies Agreement.

The Faculty Association filed this grievance with respect to the Senate Policy on September 20, 2007 pursuant to the terms of the Framework Agreement. The grievance letter sent from Dr. Kenny Kwok, Chair, Personnel Services Committee of the Faculty Association to Dr. David Farrar, Vice President Academic & Provost of the University states:

Re: Teaching Evaluations, Policy Grievance

The Faculty Association hereby initiates a grievance (Article 20.04, Framework Agreement) in the matter of the University’s policy on student evaluation of teaching, as approved by the UBC Vancouver Senate at its May 2007 meeting. Although the Faculty Association acknowledges and embraces the role (sic) of evaluations, this policy is in violation of the collective agreement and raises serious concerns about member rights and the integrity of teaching.
The collective agreement (Article 4.02, Agreement on Conditions of Appointment for Faculty) notes that ‘(e)valuation of teaching shall be based on the effectiveness rather than the popularity of the instructor, as indicated by command over subject matter, familiarity with recent developments in the field, preparedness, presentation, accessibility to students and influence on the intellectual and scholarly development of students.’ From what we have seen of the intended questions on the University module, they do not appear to be in keeping with the collective agreement.

Secondly, the announced implementation of this evaluation process violates the collective agreement (Article 17, Agreement on the Framework for Collective Bargaining), which provides for consultation on all matters previously the subject of consultation.

Furthermore, your request that faculty sign the consent form creates a coercive situation wherein consent cannot be freely given; faculty would reasonably expect that by not giving consent they could be making a decision that would have a negative impact on their careers.

Finally, anonymous comments from students are potentially defamatory, and as such the University has an obligation to not disseminate such comments. It is not clear to us how the University intends to collect this information or to whom it might be made available.

The Faculty Association is seeking that the University place an immediate moratorium on the implementation of this plan until full consultation with faculty has taken place and any teaching evaluation protocols are consistent with the collective agreement and faculty rights more generally.

The University replied to the Faculty Association by letter from Dr. Farrar to Dr. Kwok on October 26, 2007. That response stated:

Re: Teaching Evaluations, Policy Grievance

I am writing in response to the policy grievance filed by the Faculty Association (dated September 20, 2007), grieving a policy of the UBC Vancouver Senate passed in May 2007. As you know, I wrote earlier this month to the Faculty Association providing an update on recent developments with the evaluation process.

Let me say at the outset of my response to the policy grievance, that the University questions whether Senate policies can be the subject of a grievance, and the University will argue that Senate policies are not arbitrable.

With respect to the specific concerns identified in the grievance, I can respond as follows:

First, you advise that the questions in the University module “do not appear to be in keeping with the collective agreement”. Art. 4.02 of the Agreement on Conditions of Appointment for Faculty require the University to evaluate the “effectiveness” of the instructor. The six questions in the University’s module all evaluate aspects of effective instruction (that is, the clarity of the instructor’s expectations of learning; the instructor’s ability to communicate the course content effectively; the instructor’s ability to inspire interest in the subject; the fairness of the instructor’s assessment of learning; the instructor’s concern for students’ learning; and the overall quality of the instructor’s teaching). Accordingly, the questions meet the requirements of the Collective Agreement.

Second, you say that appropriate consultation has not taken place, in contravention of Article 17 of the Agreement on the Framework for Collective Bargaining which calls for consultation “at the Departmental, Faculty or University levels.” The University has historically not consulted with the Faculty Association on student evaluations of teaching; accordingly there has been no breach of Article 17. However, it is clear that the Faculty Association has concerns about this matter and we will continue to meet with you to hear those concerns.

Third, you allege that asking faculty to sign a consent form allowing the results to be posted online is coercive because consent cannot be freely given. We are confident that faculty members will not find the language in the consent form coercive in any way. The language clearly provides the choice of agreeing to release the results or not. At most, faculty members are encouraged to consent. There are no consequences for those faculty members who elect not to consent to the release of the numeric results.

Fourth, you express concern about potential defamation if anonymous comments are disseminated. The University module does not provide for collection of comments and the University will not disseminate comments obtained through other modules to the community. Any such comments will continue to be disseminated in accordance with the departmental or faculty procedures already in place.
Finally, you request that the University "place an immediate moratorium on the implementation" of "this plan". The University does not intend to place a moratorium on the implementation of the student evaluation plan. However, as I confirmed in my earlier memo to you, the results of the implementation this Fall will be carefully studied, and that discussion which will involve members of the University community will inform changes to the student evaluation questions and process.

The University's position is that the teaching evaluation protocols are consistent with the Collective Agreement and the rights of faculty generally.

That exchange of letters sets out in brief the substantive bases of the Faculty Association's challenge to the Senate Policy as well as the response of the University with regard to those matters. The University has acknowledged that it intends to use the teaching evaluation data collected pursuant to the Senate Policy of May, 2007 "for employment purposes within certain parameters". The letter from Dr. Farrar also informed the Faculty Association that the University was raising a preliminary objection to the Faculty Association's grievance, specifically whether the matter is arbitrable under the terms of the Collective Agreement between the University and the Faculty Association. It is that issue which this Preliminary Award addresses.

POSITIONS OF THE PARTIES

1. The University's Submissions

The University takes the position that this matter is not arbitrable on two separate grounds. The first argument is that an arbitrator under the Collective Agreement has no jurisdiction to consider a challenge to Senate policies or decisions nor has any jurisdiction to impose a remedy that would infringe upon a Senate policy or decision. It is asserted that U.B.C. is a statutory corporation under the University Act with a bicameral governance model, which clearly demarcates the division of powers between the Board of Governors (s.27) and the Senate (s.37). The legislation also expressly indicates wherever there is an overlap of jurisdiction between the two bodies and specifically identifies those instances where one body must either consult or seek approval from the other. It is asserted that the Senate Policy in question in this dispute does not come within one of these areas of combined responsibility as the Policy relates to a matter of academic governance which is within the sole purview
of Senate. It is submitted that Senate has the sole statutory responsibility for, and authority over, the quality of academic performance of the University. It governs the quality and integrity of the academic mission of the University and has the jurisdiction to set academic standards and to ensure those standards are met; the Senate Policy establishing University standards for evaluating teaching is integral to that jurisdiction.

It is also asserted that Senate, itself, has no jurisdiction to enter into collective agreements, except for the express grant of authority contained in Section 37 (1)(r). Further, the University maintains that the Board of Governors has no authority to enter into agreements with respect to subjects which are within the Senate’s exclusive jurisdiction. The Board of Governors may enter into an agreement relating to terms and conditions of employment that address a Senate standard or policy, but can make no agreement with respect to the standard itself.

The Board of Governors has entered into a collective agreement with the Faculty Association that addresses the terms and conditions of employment for faculty and it has the authority to do so: Regina v. B.C. Labour Relations Board, ex parte Simon Fraser University, (1966) 58 D.L.R. (2d) 571 (B.C.S.C.). That right is consistent with Section 27 (2)(g) and (s) and Section 28 of the University Act. The Collective Agreement provides that the evaluation of teaching will be a component of employment decisions (i.e. appointment, promotion or tenure) for individual faculty. The application of those standards to the employment of a particular faculty member is certainly a matter within the Board of Governor’s jurisdiction. It is over the terms of those agreements entered into by the Board of Governors that arbitrators have jurisdiction but there is no such jurisdiction for arbitrators over matters of exclusive Senate jurisdiction.

Moreover, it is asserted that the Board of Governors has no jurisdiction to modify academic standards set by the Senate and, by extension, has no authority to enter into agreements which would have that effect. It is asserted by the University that the Senate Policy at issue here, being an act within the exercise of Senate authority, is not a matter over which the Board of Governors has jurisdiction nor
can Senate’s statutory authority be limited or restricted by agreement. Neither the Collective Agreement, or the jurisdiction of an arbitrator thereunder, can infringe on the statutory powers set out in the University Act: University of British Columbia v. University of British Columbia Faculty Association, (“Rucker” Grievance), 2007 B.C.C.A. 201; Leave to Appeal to the Supreme Court of Canada denied, [2007] SCCA No. 275.

The University notes that the Senate is a broadly representative statutory body and that faculty members of the University are significantly represented in the make-up of the Senate. However, the Senate also contains representatives from many other constituencies (e.g. students) within and from outside the university community. It is asserted that the Faculty Association, which represents only one of the constituencies represented on Senate, cannot attack the Senate Policy by way of a grievance pursuant to the Collective Agreement with the Board of Governors.

The Senate is a statutory body with the authority to govern academic matters in the University and must also be distinguished from the University Administration. The Administration implements Senate policy but it has no jurisdiction to establish or modify such policies through an agreement with a bargaining agent.

The University acknowledges that arbitrators have jurisdiction to “interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement” (Labour Relations Code of British Columbia, Section 89 (g)). However, the University submits that the University Act is not such a statute: Kinsmen Retirement Center Association v. Hospital Employees Union, Local 180, [1985] B.C.J. No. 2299, 63 B.C.C.R. 292; University of British Columbia v. University of British Columbia Faculty Association, supra.

It is also submitted by the University that because Senate is a statutory body any challenge to a decision of the Senate would be to the courts by way of judicial review: Cynthia Maughan v. University of British Columbia et al, B.C.S.C., January 16, 2007. It is further submitted that the courts will not
permit collateral attacks against a statutory decision where judicial review is otherwise available to a party: grenier v. canada, 2005 F.C.A. 348; schenkman v. canada, 2007 F.C. 603.

The second and alternative position taken by the University is that, as a matter of general law, an arbitrator has no jurisdiction over a policy that does not form part of the collective agreement: brewers' distributor ltd., [2004] B.C.C.A.A.A. No. 54, March 8, 2004 (Moore); brown & Beatty, canadian labour arbitration, Fourth Edition, canada law book, para. 4:1230. It is asserted that the Senate Policy in question has not been incorporated into the Collective Agreement between U.B.C. and the Faculty Association and, therefore, is not subject to the arbitration provisions thereunder.

It is asserted the Senate Policy in question is an ancillary document which does not form part of the Collective Agreement between U.B.C. and the Faculty Association and, as a result, disputes over that Policy are inarbitrable. On the same basis, an arbitrator has no jurisdiction over statutes, or statutory pronouncements, unless they have been incorporated into the collective agreement. In other words, if the basis of a union's grievance lies outside the collective agreement, then the matter is not arbitrable:


It is submitted by the University that the Faculty Association may file a grievance once the Senate Policy has been applied and has had employment implications for one or more of the faculty members, for example, the imposition of discipline, the denial of a pay increase or the denial of promotion or tenure. However, the University also maintains that if there are any provisions of the Collective Agreement which conflict with the Senate Policy, or encroach on the jurisdiction of Senate, then those contract provisions will be found to be ultra vires the Board of Governors. As a result, the arbitrator would be bound to apply the Senate Policy to the issue which had arisen. The parties cannot contract out of a statute, or, in this case, contract in derogation of the rights of Senate: University of British Columbia v. University of British Columbia Faculty Association, supra.
In summary, the University argues that the jurisdictions of Senate and the Board of Governors are, in a sense, complementary. Academic governance is the role of Senate; operational management, including employment, is the role of the Board of Governors. The jurisdiction over employment, which is within the scope of the Board of Governors’ authority, provides the basis for the Collective Agreement and the jurisdiction of an arbitrator. However, the jurisdiction of the arbitrator is no broader than the jurisdiction of the Board of Governors and that jurisdiction does not extend to the jurisdictional realm of the Senate. The Collective Agreement between the Board of Governors and the Faculty Association cannot modify the statutory authority or the exercise of that statutory authority by the Senate. As a result, an arbitrator under the Collective Agreement has no basis or jurisdiction on which to issue a decision that would affect the Senate Policy.

2. The Faculty Association’s Submissions

The position of the Faculty Association is that this grievance falls within the jurisdiction of an arbitrator under the Collective Agreement between U.B.C. and the U.B.C. Faculty Association. The Faculty Association agrees that U.B.C., as a university, is a statutorily created body but it submits that it is U.B.C., and not the Board of Governors or the Senate, which is the employer of the members of the Faculty Association. It is conceded that various bodies have been given statutory powers and duties under the University Act, but those bodies perform acts on behalf of U.B.C., as part of U.B.C.:


Here, the Faculty Association has entered into its Collective Agreement with U.B.C. and not with a single governing body or component of U.B.C. As a result, governing bodies within the U.B.C. community are bound by the Collective Agreement as the Agreement is relevant to all working conditions of the bargaining unit members, regardless of which body of U.B.C. is statutorily empowered to affect those conditions. It is asserted that U.B.C. is not a body separate from Senate but is a legal entity which acts through its governing body and executive. The University Act states that U.B.C. is “composed” of certain bodies, including the Board of Governors and the Senate, which means U.B.C. is
a body made up of constituent elements or parts: Black's Law Dictionary, Eighth Edition, Thomson-West. Therefore, the term “university” cannot be limited in such a way as to refer only to the Board of Governors: Brendon v. Board of Governors, University of Western Ontario, [1977] O.J. No. 2455 (H.C.J.).

As well, the Framework Agreement (Article 1.01) defines “University” as the “University of British Columbia” but the term as it is used throughout the Collective Agreement refers to different entities, including individuals with specific duties, departments, deans, the Board of Governors, the President and the Senate. The President, the Senate and the Board of Governors are each fulfilling roles on behalf of U.B.C. ‘but none of them, individually, is U.B.C’. It is submitted that the Board of Governors and the Senate are governing bodies of U.B.C. and although each has different, statutorily delegated roles, both bodies are part of the legal entity that forms the corporation of U.B.C. and it is U.B.C. which is the employer party to the Collective Agreement.

The British Columbia Labour Relations Code (the “Code”) defines an “employer” as one “who employs one or more employees” (Sec. 1) and a collective agreement as “a written agreement between an employer... and a trade-union...” (Sec. 1). Section 48 (a) of the Code binds the trade-union and employees to the terms of the collective agreement and thus, employees within the Faculty Association bargaining unit are bound by the Collective Agreement by virtue of their employment with U.B.C.

At U.B.C., several different bodies, including the Board of Governors, the President, the Senate, Deans and Department Heads, on behalf of the University exercise control and direction over the workplace and the employees of U.B.C. St. Peter's Hospital, (2002) 109 L.A.C. (4th) 89 (Brown). However, only the Board of Governors has the power to enter into a collective agreement and it has done so, on behalf of U.B.C., with the Faculty Association. The Faculty Association also notes that although the Board of Governors must ratify the collective agreement, it is the University President who actually executes the Agreement on behalf of the University and the agreement is not effective until it is executed or signed by the President.
As well, the Faculty Association submits that the powers of the Board of Governors and the Senate are not completely discreet. There are several areas of overlapping jurisdiction identified in the University Act and there are some areas where Senate actions must be approved by the Board of Governors. The Faculty Association argues that the Senate Policy in dispute here falls within one of those overlapping areas as the Policy is concerned with teaching evaluation, an area of Senate responsibility, but also with the evaluation of teaching for employment-related purposes which comes within the Board of Governor’s jurisdiction to determine matters related to employment of faculty members. The bicameral nature of the University frequently creates such overlapping jurisdictions: Kulchyski v. Trent University, [2001] O.J. No. 3237 (Ont. C.A.). It is submitted that neither the Board of Governors nor the Senate has primacy; both are governing bodies which act on behalf of the University. As well, both bodies cannot act completely independently as decisions of one will often have consequences for the other.

The Faculty Association acknowledges that teaching is a core function of U.B.C. and is ‘firmly but not exclusively within the purview of Senate, in its role as the academic governor of U.B.C.’. However, it is submitted that teaching is relevant to many of the administrative functions at the University, including labour relations which deals with issues of employment. Academic governance and labour relations with the professorate are not easily separable as the faculty members are directly responsible for the teaching and learning that take place at U.B.C. Although those activities relate clearly to academic governance those areas are not within the sole domain of the Senate but rather are shared with the Board of Governors and, indeed, the President and administration. It is submitted that because of that reality, the Senate power related to academic governance is not unfettered: University of British Columbia v. University of British Columbia Faculty Association (Rucker Grievance), supra; British Columbia Teachers’ Federation v. British Columbia Public Schools Employers’ Association, [2005] B.C.J. No. 289, 2005 B.C.C.A. 92.
By way of example, there are a number of provisions in the Collective Agreement between the Faculty Association and U.B.C. which address teaching and the assessment thereof. The Faculty Association asserts there is no obligation under the Collective Agreement to evaluate teaching performance through student evaluations or, where those evaluations are done, to use them as part of an assessment for various purposes such as tenure, promotion, salary, or merit decisions. The Faculty Association asserts, however, that the new Senate Policy would make the performance of evaluations and their utilization mandatory. As well, the dissemination of information is largely mandatory under the Policy. Moreover, there are responsibilities assigned to U.B.C. employees under the Senate Policy and they are also mandatory; many of those assignments will require faculty, who are members of the bargaining unit, to administer the Senate Policy.

The Framework Agreement also contains the following provisions:

**Article 16. Preservation of the Traditional Role of the Association**

16.01 Nothing in this Agreement shall be interpreted as restricting the role of the Association in representing the interests of its members at the University. The University recognizes that this role traditionally has extended, and will continue to extend, beyond the matters to which the Agreement relates.

...*

**Article 17. Preservation of Past Rights and Practices**

Subject to this Agreement or any amendments thereto or to any Collective Agreement, the University agrees not to change rights 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.

The Faculty Association argues that U.B.C. has the right to introduce employment policies, including those which affect teaching, but the Association has a right to represent its members in that regard and those University rules and policies must be consistent with the Collective Agreement: 

*KVP Co. Ltd.* (1965) 16 L.A.C. 73 (Robinson); Brown and Beatty, *supra*, paras. 4:1510 and 4:1552.

The Faculty Association notes that the disputed Senate Policy states in its Introduction that the Policy “is in alignment with the conditions for appointment for faculty, sessional, and part-time faculty members”. It is submitted that that statement in the Policy is an acknowledgement by the Senate itself that the Policy has to be consistent with the Framework Agreement.
It is submitted that U.B.C. is the Employer party to this Collective Agreement with the Faculty Association and that U.B.C. includes the Senate. The Faculty Association takes issue with the arguments that the Board of Governors and the Senate are fully independent governing bodies of the University and that the Board of Governors is the sole party to the Collective Agreement. Rather, it argues that the University is one body with many component parts and that, as a result, the Senate is bound by the terms of the Collective Agreement negotiated by the Board of Governors on behalf of U.B.C. Given that conclusion, the policies of the Senate are subject to an arbitrator’s review pursuant to the grievance procedures in the Framework Agreement, as well as Section 84 (2) of the Labour Relations Code.

The Faculty Association also submits that, if this type of grievance was found to be inarbitrable, U.B.C. could direct “many self-defined academic policies to Senate for approval, including those that are actually labour relations policies, and thereby short circuit the right of the Association to consultation or grievance on behalf of its members”. If that were the result, then the Association would have to proceed in each case by way of judicial review, which would not only be costly but also ineffective, as the courts have historically been reluctant to interfere in academic matters: Kuchyvski v. Trent University, supra; Mohl v. University of British Columbia, [2000] B.C.J. No. 2572 (B.C.S.C.); Dawson v. University of Toronto, [2007] O.J. No. 591 (S.C.).

In conclusion, the Faculty Association submits that this Senate Policy is a policy of the Employer, the University of British Columbia, and, therefore, is subject to arbitral review for reasonableness and consistency with the Collective Agreement.

DECISION

There is little doubt, after considering these submissions of the parties and analyzing the various court decisions on this topic, that the issue of university governance in Canada is a complex and problematic one. Beyond its theoretical interest, however, there are significant practical implications in determining how universities operate.
For example, both parties in this dispute have expressed legitimate concerns about the potential practical ramifications of the outcome of this dispute concerning the U.B.C. Senate Policy on Student Evaluation of Teaching. The Faculty Association is rightfully concerned that the Senate of the University, under its jurisdiction of academic governance, could seriously impact the contractual rights of the bargaining unit employees, whose main function, after all, is to provide the academic work of the institution. It is not difficult to imagine other Senate academic policies which might have significant impact on the provisions of the Collective Agreement between the Faculty Association and the University.

Just as legitimately, the University has significant concerns that terms of the Collective Agreement, which affect only one of the constituent elements of the University, i.e. the faculty, could seriously limit the Senate's ability to establish academic policy for the benefit of the university community as a whole.

In the opinion of this Arbitration Board, this preliminary objection concerning the jurisdiction of an arbitrator under the Collective Agreement to review the Policy lies to be determined by conclusions about the nature of the university and the legislation framework within which it operates. The real issue in this case is whether, if an inconsistency were to be found between a Senate policy and the terms of the Collective Agreement, an arbitrator would have jurisdiction to find that the Collective Agreement would govern on the grounds that the Senate policy could not conflict with the terms of that Agreement.

This is not a case of first impression as this matter of university governance has been extensively reviewed by the courts in Canada. The first point that the courts have determined is that universities are statutory bodies. In McKinney v. University of Guelph, supra, the Supreme Court of Canada dealt with the issue of mandatory retirement within the university setting. In that decision the majority held that because a university performs a public service it is not part of government in the sense that it follows the dictates of government. Of relevance for our purposes is that the Supreme Court described the university as a "creature of statute" or "a statutory body".
Moreover, the courts have determined that the separate governing bodies within the university structure are also independent quasi-judicial bodies and in fulfilling their duties they are exercising statutory powers. In Mohl v. University of British Columbia, supra, an education student filed a petition for judicial review challenging a decision of the Senate Committee on Appeals on Academic Standing which had dismissed Mr. Mohl’s appeal of a failing grade in the practicum section of his teacher training program. The British Columbia Supreme Court dismissed Mr. Mohl’s petition and stated that it was affording a high level to the expertise of the Senate and the faculty in matters related to academic study.

Of importance to the dispute at hand, the B.C. Supreme Court noted, at para. 12:

Second, the University Act gives the senate comprehensive powers in relation to academic governance. For example, these powers include responsibility for admission standards into the university and any faculty within the university (s. 37 (e)); determining the conduct and results of examinations (s. 37 (d)); and granting degrees (s. 37 (h)). The foregoing are simply illustrative of the reach of governance affecting students. By delegating the responsibility for such matters to the senate, the legislature necessarily recognized the special expertise of the senate and the faculties operating under its control.

In Dawson v. University of Toronto, supra, the Ontario Superior Court of Justice dealt with a suit by a student against the university based on the denial of her application for reinstatement to the Ph.D. program in Dentistry. In denying the student’s claim, the Court stated, at paras. 18 and 19:


I appreciate that not all conduct by a university is of an academic nature. The example of non-academic conduct, which I posed during argument, was a university that failed to maintain its premises and to perform its obligations as an occupier. If a person were injured, the university would be subject to a tort claim and perhaps a breach of contract claim. However, I have no doubt that Ms. Dawson’s complaints are about academic matters. Her essential complaints are that her thesis work was insufficiently assisted and unfairly and incorrectly evaluated and that the procedure adopted by the university to determine whether she should have an opportunity to defend her thesis and complete her doctorate was contrary to the principles of natural justice. Her dispute is a disagreement
about academic matters associated with the completion of her doctoral program and according to the authorities, these matters of university affairs are not the subject matter of breach of contract or tort claims.

In Cynthia Maughan, supra, the British Columbia Supreme Court dealt with an application from a graduate student in the English Department at U.B.C. claiming that a faculty member gave her an unjustifiably low grade and had acted contrary to section 1 of the Civil Rights Protection Act. Ms. Maughan claimed that her appeal had been inappropriately dismissed by both the Senate Appeals Committee and the Senate itself. In dismissing Ms. Maughan’s appeal, the B.C. Supreme Court observed, at para. 20, that the “Senate Committee on Appeals on Academic Standing exercises powers conferred on it by statute” and, then at para. 22, that the Committee was conducting a quasi-judicial function which “appears to flow from the statutory duties and authorities conferred on it.” That decision also cited with approval the decision of the Ontario High Court of Justice in Re Polton and Governing Council of the University of Toronto, (1976) 8 O.R. (2d) 749, wherein that Court stated, at p.17, that “the determination of such an appeal is a judicial act made in the exercise of a statutory power and as such is subject to judicial review.”

Similarly, in Harelkin v. University of Regina, [1979] S.C.J. 59, Mr. Justice Beetz of the Supreme Court of Canada observed that the University’s “governing bodies function as domestic tribunals when they act in a quasi-judicial capacity.” (p.24).

In Brendon v. University of Western Ontario, supra, the Ontario Court of Justice dealt with an application for judicial review of a decision by the University of Western Ontario to deny tenure to a member of faculty. One of the issues in the case was the meaning of the term “University” in the documents and whether that term was synonymous with the “Board of Governors”. The Court concluded that “the meaning to be attributed to the University in various sections of the agreement depends on the context in which it is read” (para. 41). In arriving at that conclusion, the Court made, at para. 31-40, the following observations about the nature of a university:
31. It is difficult to see how the term "University", as used here, can be read to mean only the board of governors in the personal or individual sense that Mr. Chemnack contends for. Western was established and continued by a special Act of the Legislature of Ontario. That is, the University of Western Ontario Act, 1974 (Ont.), c. 163. That Act makes it clear that the responsibility for operating the university is shared among a number of groups and persons. The two major groups are the board of governors and the senate. These groups are separate and distinct from each other. The board is responsible for a number of things "on its own", as it were, such as the appointment of non-academic staff, the fixing of tuition fees, the maintenance of buildings (the Act, s. 21). It is responsible for other things that may be done only on the recommendation of others. One of these is the appointment of academic staff. That may be done only "on the recommendation of the President" and "in accordance with the policies and procedures established by the Senate" (the Act, s. 21(b)). Similarly, the board may "fix and provide for the remuneration, tenure of office or employment, retirement and superannuation, or other conditions of employment" of academic staff, but the "policies and procedures followed in respect of" academic staff "shall be adopted" only "after consultation with the Senate" (the Act, s. 21(d)).

32. Similarly, some responsibilities are given to the senate exclusively and some are given to be shared with the board. The Senate is responsible for the academic policy of the University..." (the Act, s. 31). It is the exclusive responsibility of the senate to "determine all courses of study, including standards for admission into the University and qualifications for degrees" (the Act, s. 31(b)).

33. There is nothing in the Act giving the board any powers or responsibilities in relation to courses of study.

34. Any doubt on this point is removed by the closing words of s. 22(a) of the Act. That is one of the sections describing the board's powers and responsibilities. The words are, "...but the Senate shall determine the curricula of all programs of instruction".

35. The exclusion of the board from matters relating to curricula of instruction is crystal clear and complete. The term "the University" in para. 16 cannot be read to refer only to the board. "When the University agrees" means, in reality, "when the Senate agrees". The term "the University" must, therefore, be taken to bear a wider connotation than merely "the Board".

36. The board could not on its own comply with para. 16 of the agreement. It could do no more than request the senate to comply. It is not possible to accept the contention that the term "University" must be read throughout the agreement to mean only the board of governors.

37. The same may be said of paras. 14 and 15. The "approval" of the senate referred to in para. 14(ii) cannot mean simply approval. It was the senate's exclusive responsibility to establish the courses referred to, not merely approve them. No term of the agreement could expand the powers of the board nor diminish those of the senate. In that respect, the agreement must be read subject to the realities of the Act.

38. There are other instances in the agreement that, as well, prove to my satisfaction that the term "University" as used therein, should not necessarily be confined to mean "the Board". In some contexts that meaning makes sense. In others, it is obviously intended to bear a wider meaning, i.e., the university as a whole. Another instance is s. 12. There the phrase "Senate of the University" is senseless if "the University" means the board.
39. Paragraph 7 provides: "The University shall in accord with University policies institute academic and administrative structure, rules and procedures appropriate to the Faculty." If "University" must be read to mean "Board" alone the paragraph is senseless for the board has no power to fulfil these obligations. While the board may "establish or terminate academic units, departments, chairs and programs of instruction in the University or elsewhere..." (the Act, 2. 22(a)), this may be done only on the recommendation of the senate (ibid.). The board has no power to compel a recommendation to be made. The board could not institute the proposed "structure" on its own.

40. Furthermore, it is an exclusive function of the senate to "create faculty councils or committees" (the Act, s. 31(a)). It is difficult to see in the light of these provisions (and of the "Conditions of Appointment" I deal with later), how the proposed faculty of education could function without the appropriate "faculty councils and committees" as part of the required "academic and administrative structure". The board has, again, no part to play in the matter. How then, can "University" be read to mean only "the Board"? It makes more sense to me at this point to read it to mean "the Senate", or again, comprehensively, to mean the university as a whole.

Finally, in Regina v. B.C. Labour Relations Board, Ex parte Simon Fraser University, supra, the British Columbia Supreme Court dealt with an application by way of certiorari to quash orders of the British Columbia Labour Relations Board in 1966 certifying twelve different unions for employees at Simon Fraser University. The Court stated the following with respect to the Universities Act, (1963), C. 52, which was in effect at the time:

* * *

It is clear, however, from s. 46(m) and (n) that the university board has the power to enter into any agreements. This section reads as follows:

46. The management, administration, and control of the property, revenue, business, and affairs of the University are vested in the Board. Without thereby limiting the general powers conferred upon or vested in the Board by this Act, the Board has power

(m) to enter into any agreements or covenants on behalf of the University; and

(n) to do and perform all other matters and things which may be necessary for the well-ordering and advancement of the University.

* * *

If, on the negotiations, the board of governors take the position that they are at liberty not to negotiate any type of collective agreement or only in respect of certain matters, then it is my opinion that they will be wrong in taking this position.

* * *

It is my opinion that the board of governors of Simon Fraser University are in the same position as any other employer (apart from the Crown) and their powers are subject to the Labour Relations Act, and they should accordingly make every reasonable effort to conclude collective agreements with the respective unions, without restrictions.

(p.3)

(p.4)
Therefore, it is very difficult to reconcile the position taken by the Courts in these cases with the Faculty Association’s principal submission in this dispute that ‘the university is the university is the university’. The Senate, when it exercises its statutory authority and passes academic policy, is not acting as an “employer” but rather as a quasi-statutory body. The Faculty Association acknowledged that the key to its position in this case is that U.B.C. must be regarded as a single entity and that its component parts must act in unison. However, that is not how the courts in the above noted decisions have characterized the governance structure of universities in Canada. Even the dissenting opinion in U.B.C. v. U.B.C. Faculty Association, supra, which will be discussed at length below, does not adopt that position. The Courts have made it abundantly clear that the components parts of a university have independent statutory authority.

For this reason, this Arbitration Board concludes that the well known labour relations approach known as the KVP analysis which holds that all policies promulgated by an employer must conform to the terms of any collective agreements entered into by that company is not applicable in these circumstances.

The next matter is the scope of the Senate’s authority over academic governance and whether there is a shared responsibility for the matter in dispute here. It is clear that management, administration and control of the business affairs of the University are vested in the Board of Governors and the academic governance of the University is vested in the Senate. The Senate’s jurisdiction over academic governance is clearly set out in Section 37 of the University Act wherein it states that the “academic governance of the university is vested in the Senate”. The question is how does that authority interact with the responsibilities of the Board of Governors enumerated in Section 27 of the University Act?

When one reviews Sections 27 and 37 of the University Act, it is apparent that the legislature did contemplate some overlapping jurisdiction. As a result, the University Act expressly points to areas where consultation or joint approval is required and they are as follows (with emphasis added):
XXVIII. Powers of board

27 (1) The management, administration and control of the property, revenue, business and affairs of the university are vested in the board.

(2) Without limiting subsection (1) or the general powers conferred on the board by this Act, the board has the following powers:

   (c) to appoint a secretary and committees it considers necessary to carry out the board's functions, including joint committees with the senate, and to confer on the committees power and authority to act for the board;

   (d) in consultation with the senate, to maintain and keep in proper order and condition the real property of the university, to erect and maintain the buildings and structures on it that in the opinion of the board are necessary and advisable, and to make rules respecting the management, government and control of the real property, buildings and structures;

   (e) in consultation with the senate, to provide for conservation of the heritage sites of the university, including any heritage buildings, structures and land of the university;

   (f) with the approval of the senate, to establish procedures for the recommendation and selection of candidates for president, deans, librarians, registrar and other senior academic administrators as the board may designate;

   (g) to consider recommendations from the senate for the establishment of faculties and departments with suitable teaching staff and courses of instruction;

   (h) subject to section 29 and with the approval of the senate, to provide for the establishment of faculties and departments the board considers necessary;

   (i) with the approval of the senate, to determine the number of students that may in the opinion of the board, having regard to the resources available, be accommodated in the university or in any faculty of it, and to make rules considered advisable for limiting the admission or accommodation of students to the number so determined;

XL. Powers of senate

37 (1) The academic governance of the university is vested in the senate and it has the following powers:

   (c) to consider, approve and recommend to the board the revision of courses of study, instruction and education in all faculties and departments of the university;

   (d) to recommend to the board the establishment or discontinuance of any faculty, department, course of instruction, chair, fellowship, scholarship, exhibition, bursary or prize;

   (e) to make recommendations to the board considered advisable for promoting the interests of the university or for carrying out the objects and provisions of this Act;

   (f) to establish a standing committee to consider and take action on behalf of the senate on all matters that may be referred to the senate by the board;

   (g) subject to the approval of the board, to enter into agreements with any corporation or society in British Columbia entitled under any Act to establish examinations for admission to the corporation or society, for the purpose of conducting examinations and reporting results, and those corporations or societies have power to enter into the agreements;

When one views the specific powers of the Board of Governors with respect to its overlapping jurisdiction with the Senate, there is nothing in Section 27(2) subsections (c), (d), (e), (f), (i), (j) or (r) which could apply to the evaluation of teaching. Similarly, there is nothing in Section 37(1) dealing with
the overlapping areas where the Senate must consult or gain approval of the Board of Governors, specifically subsections (f), (i), (o), (q) or (r), that refers to matters which would apply to teaching policy or the evaluation thereof. There is certainly a functional overlap as most decisions of the Senate or the Board of Governors will have direct or indirect effect on matters within the jurisdiction of the other and the matter of teaching evaluation would certainly be one of those. However, this is not a functional analysis – it is a jurisdictional one – and the legislature has not specifically identified matters of teaching evaluation policies as being part of the overlapping jurisdiction.

There are two judicial authorities that directly address the issue of the powers of the governing bodies with respect to these types of academic matters.

In Kulchyski v. Trent University, supra (“Kulchyski”), the Ontario Court of Appeal heard an appeal from a Divisional Court decision in which that Court had dismissed a judicial review application from two professors who had protested the decision of the University to consolidate all its operations on one campus for reasons of financial exigency. The Board of Governors of Trent University had approved the consolidation but the Senate of the University had refused to support that decision. The Majority of the Appeal Court dismissed the appeal on the basis of jurisdiction (as well as determining that the professors had not had standing to seek judicial review in any event). The Divisional Court and the Appeal Court each discussed the nature of the University’s decision making processes.

At para. 19 of the Appeal Court decision, a section of the decision of the Divisional Court is reproduced:

We are of the view that while s. 4 of the Trent Act permits Senate to determine “what faculties, schools, institutes, departments, chairs and courses are necessary”, the same section specifically provides that Senate’s authority is limited in this regard by the Board’s authority “with respect to finances and facilities.” Senate’s jurisdiction in respect to matters pertaining to education is also limited by the specific grants of authority to the Board such as the authority over the hiring of Faculty.

We are of the view that a review of the specified powers allocated to Senate under the various subsections of s. 12 of the [Trent Act] demonstrate that each power is intimately linked to the delivery of the academic programme. These powers are clearly distinct from both the general governance power granted to the Board and the Board’s specific
authority over property and expenditures. In both such areas, the Board's authority is paramount.

We are of the view that the Board's specific and residuary powers grant it exclusive jurisdiction over the management and control of the University's property, revenues and expenditures including financial responsibility for provision of facilities.

The Court of Appeal, in the Majority decision written by Mr. Justice Finlayson (Osborne A.C.J.O., concurring), added its own comments on this issue:

8. It appears from the material filed by the respondent University that the relationship between the academic side of the University (the Senate) and those responsible for the financing and maintenance of the facilities (the Board) has historically been far from harmonious. Over time, the University's bicameral governance system, which appears to have worked satisfactorily in other universities, created fractiousness in the Trent University community and led to numerous internal conflicts. The deterioration of the governance system was one of the matters addressed by an external review of the University's administration conducted in 1997 by H.W. Arthurs and Joyce Lorimer.

27. On the face of it, this restructuring program appears to be fully within the jurisdiction of the Board, which is charged under s. 10 of the Trent Act with the "government, conduct, management and control of the University and of its property, revenues, expenditures, business and affairs". One would have thought that the academic side of the University, as represented by the Senate, would have welcomed a necessary cost-cutting move that would upgrade the facilities of the two colleges without any loss of faculty or staff and that would re-locate the two colleges a few kilometers away in new facilities on the main campus. However, as is often the case when a segment of an institution becomes isolated from its center core, even to a small degree, it appears to take on an identity of its own.

31. In my view, all these opinions about the value of the present isolation of the two colleges and its effect on the delivery of the academic curriculum are of little assistance in determining the central issue under appeal which is whether the Board possesses the jurisdiction and authority to pass the resolution at issue without the concurrence of the Senate. Similarly, the extensive evidence about how unpopular the Board's decision is in some quarters is equally irrelevant. This is particularly true in the light of the appellants' oft-repeated assurance that the court should not be concerned about the merits of the Board's resolution.

32. I support the conclusion of the Divisional Court that "the Board's specific and residuary powers grant it exclusive jurisdiction over the management and control of the University's property, revenues and expenditures including financial responsibility for provision of facilities". It follows, in my view that under the Trent Act the Board is the keeper of the University purse and has no obligation to indefinitely provide financial support to any policy, educational or otherwise that is draining the coffers of the University, even if that policy originally was agreed upon by both the Board and the Senate. In saying this, I do not accept that on the record before us, the decision to open the University in downtown Peterborough was ever a considered change in educational policy from that envisioned by the founders of Trent University. It was a pragmatic decision that was not beyond the reach of the Board had it sought to act alone. However, even if it was a decision involving educational policy, and even if it can be said that the Board acted under s. 12 of the Trent Act and approved the "expenditure of funds and the establishment of facilities" to implement such policy, it cannot be argued that by so
doing, the Board divested itself of its powers and obligations under s. 10 covering "the government, conduct, management and control of the University and its property, revenues, expenditures, business and affairs".

33. The language of s. 12 giving limited power to the Senate to initiate and control educational policy is always subject to the overriding provision that the Senate requires the approval of the Board "in so far as the expenditure of moneys is concerned". There is no language in the Trent Act to support the contention that once financial approval is given by the Board to a particular policy, such support can never be withdrawn by the Board no matter how deleterious the policy venture is to the financial well being of the University as a whole.

34. Section 4 of the Trent Act gives the University the power to establish and maintain such faculties and departments "as the Senate deems necessary and a shall be approved with respect to finances and facilities by the Board". However, once again I suggest that the legislature could never have intended that the University's bicameral governance system would be so inflexible that once a decision was jointly made, it could never be revoked or modified except by the joint agreement of both deliberative bodies. In this instance, the Board cannot be forced to continue to support the existence of the downtown colleges in the face of economic loss, financial necessities and concerns for the future of the entire University.

36. As submitted by the respondent University, the implementation of the Capital Development Strategy and the Board's resolution will not affect (a) the subject matter or organization of any of the academic courses or programs taught at the University (b) the availability of any academic courses or programs to any of the University's students (c) the role of faculty in developing or teaching academic courses (d) the number of faculty employed at the University (e) the role of research and scholarship in the University (f) the University's admission or academic standards (g) the importance of interdisciplinary study at the University (h) the University's commitment to small teaching groups in appropriate fields or (i) the continued role of the residential college system at the University.

Mr. Justice Sharpe dissented from this decision of his colleagues and determined that because the closure of the downtown campus at Trent had significant implications for the academic policy of the University, the approval of the Senate was also required. He made a number of comments about the situation at Trent which apply as well to the nature of the university system in Canada:

58. The allocation of powers as between the Board and the Senate represents an attempt to reflect and accommodate the interests and concerns that have to be taken into account in the governance of a modern university. Decisions relating to educational policy are assigned to the Senate, a body comprised primarily of members of the University's academic community. Decisions relating to management and finances are assigned to the Board, a body comprised primarily of lay members, who reflect the broader community interest in the sound and prudent management of an important publicly funded institution. The bicameral scheme of governance is designed to provide an institutional framework that will allow the University to identify and achieve its academic and educational goals in a manner consonant with the interests of the community and public at large.
59. As I read the Trent Act, the powers of the Board and the Senate are both exclusive and overlapping. They are exclusive in the sense that where a matter is specifically assigned to one body, the other body lacks authority over that matter. For example, the Board has no authority to determine educational policy for the University. Similarly, the Senate has no authority to manage or control the property, revenues, and expenditures of the University. However, not all issues fall neatly into the categories of the matters assigned to the Board and the Senate respectively. As many issues confronting the University present more than one aspect, to that extent, the powers of the Board and Senate overlap. From one aspect, the issue will fall within a power assigned to the Board, while from another aspect, the same issue will fall within a power assigned to the Senate.

60. The overlapping nature of the respective powers of the Board and the Senate where educational policy intersects with financial matters is evident from the terms of the Trent Act. Section 4 of the Trent Act provides as follows:

   The University has power to establish and maintain such faculties, schools, institutes, departments, chairs and courses as the Senate deems necessary and as shall be approved with respect to finances and facilities by the Board.

   [emphasis added]

61. Similarly, s. 12 of the Trent Act provides that “[t]he Senate is responsible for the educational policy of the University”, and that it may create such faculties, departments, schools, institutes or chairs as it determines “with the approval of the Board in so far as the expenditure of funds and the establishment of faculties are concerned” (emphasis added).

62. These provisions plainly envisage a power-sharing relationship between Senate and the Board. Decisions falling within these provisions give rise to issues of both financial management and educational policy and hence require the concurrence of both bodies. As the President of the University, Bonnie Patterson, conceded on cross-examination, where a matter has both educational policy and financial implications, the approval of both Senate and the Board is necessary.

63. Quite apart from these specific provisions, it seems to me that a power-sharing relationship between the Board and the Senate is implicit in the bicameral scheme of governance created by the Trent Act. Where an issue gives rise to aspects falling within the powers of both the Board and the Senate, bicameralism requires the concurrence of both bodies. While each body has exclusive authority to decide that aspect of the decision that falls within its powers, neither body has exclusive or paramount authority over the entire question.

64. Bicameralism was first introduced in Ontario following the Report of the Royal Commission on the University of Toronto (Toronto: Queen’s Printer, 1906). The Royal Commission concluded at p. xxi that the history of the University of Toronto had “demonstrated the disadvantage of direct political control.” It sought to establish a scheme that would provide the university with independent governance, reflecting both the public interest in sound management and respect for academic judgment on academic issues. The Royal Commission’s plan aimed “at dividing the administration of the University between the Governors, who will possess the general oversight and financial control now vested in the State, and the Senate, with the Faculty Councils, which will direct the academic work and policy.” (Ibid.)
65. Bicameralism has both advantages and disadvantages. On the positive side, it provides a system of governance that distinguishes management issues from issues of educational policy and allocates responsibility for each to specialized governing bodies capable of reflecting the interests and concerns bearing upon the matters assigned. On the negative side, by dividing governing authority, bicameralism may complicate decision-making and, as the experience at Trent sadly shows, result in deadlock. Bicameralism was abandoned by the University of Toronto thirty years ago in favour of a unicameral Governing Council in which all estates are represented. Some other universities have retained the bicameral structure but have altered its operation by affording significant academic and student participation at the Board level. One could only gain an accurate appreciation of how bicameralism actually works at a particular university by careful study of that institution’s arrangements, practices, and traditions.

66. I see nothing in the Trent Act that accords priority, paramountcy or “overriding jurisdiction” to the decision of the Board in the event of conflict between the Board and the Senate on an issue requiring the concurrence of both bodies. The Trent Act specifically excepts from the Board’s powers “such matters specifically assigned by this Trent Act to the Senate or the councils of the faculties...”. These words qualify all of the Board’s powers, including its general governance power and its specific authority over property and expenditures. I agree with the appellants’ submission that by enacting these words, the legislature provided its own solution to potential conflicts between the Board and the Senate. The legislature subtracted authority over educational policy from the Board’s powers and protected Senate’s power over educational policy from encroachment by any power of the Board. Neither the Board’s power of general governance nor its power of the purse allow it to usurp the role of the Senate to control, regulate, and determine the educational policy of the University. The Trent Act makes no provision for a “tie-break” mechanism to resolve a conflict between the Board and the Senate. The way out of deadlock is not unilateral action by the Board but debate, discussion, negotiation, and compromise, or all else failing, legislation.

67. There are two governing bodies, each with its own area of expertise and concern to be brought to bear upon the educational issues confronting the University. The Board cannot decide where to spend the University’s resources without the Senate’s determination of educational policy. Similarly, the Senate cannot implement an educational policy without the Board’s determination to make available the required resources.

68. The Board could, of course, require the University to change and curtail its academic program for valid financial reasons, but the role of the Senate, the body responsible for the University’s educational policy, in identifying the activities or programs to be eliminated or curtailed would have to be respected. The power of the Board to determine the resources available for the University’s program cannot be doubted, but neither should the Senate’s power to define and shape the institution’s educational policy with the resources that are available.

(emphasis added in original)

It should be noted that in this dissent which concluded that there was overlapping jurisdiction between the Board of Governors and the Senate, there was no solution provided as to how to resolve potential disagreements between those statutory bodies. It is also interesting to observe that in this
dissenting opinion in *Kulchyski*, Mr. Justice Sharpe felt that the closure of a campus affected both the financial control and the academic program. However, Mr. Justice Sharpe also opined that “the Board has no authority to determine educational policy for the University” (para. 59).

In its decision, the Majority of the Ontario Court of Appeal determined that the Board of Governors had the paramount jurisdiction to determine financial issues which affect the university and therefore, had exclusive authority over decisions that fall within that area. This was so despite the fact that the decision taken by the Board of Governors would have some impact on the academic experience at Trent University; it was, nevertheless, where the legislation has granted specific statutory authority that the ultimate right to act resided. There are clearly practical difficulties inherent in this approach – as the dissent clearly notes and the majority decision implies – but the Ontario Court of Appeal felt bound by legislative intent.

The more critical authority for our purposes is the very recent decision (April 3, 2007) of the British Columbia Court of Appeal in *University of British Columbia v. University of British Columbia Faculty Association (Rucker Grievance)*, supra (“Rucker”). Despite the fact that this was a split decision by the B.C. Court of Appeal, leave to appeal to the Supreme Court of Canada was denied without reasons: [2007] B.C.C.A. No. 275, October 25, 2007. As a result, the B.C. Court of Appeal decision constitutes the final opinion with respect to that dispute.

In that case the U.B.C. Faculty Association filed a grievance on behalf of Dr. Lance Rucker of the Faculty of Dentistry with respect to a decision of the President of the University, Dr. Martha Piper, not to recommend Dr. Rucker for promotion to the rank of Professor based on “the small number of publications in peer-reviewed journals”. The grievance proceeded to arbitration under the Collective Agreement and Arbitrator Marguerite Jackson determined that the President’s decision had been unreasonable because, in the Arbitrator’s view, the President had limited her consideration of the quality of Dr. Rucker’s scholarly work to the number of publications he had in peer review journals and had not
taken into account the quality of his innovative professional work and how that work was regarded by his peers.

That determination by Arbitrator Jackson was accepted by the parties but the University did file an appeal challenging the remedy which had been imposed. Arbitrator Jackson had ordered that Professor Rucker be promoted to Professor based on the language of Article 13.07 (c) of the Collective Agreement which states that “when unreasonableness is a ground of the appeal, the Board shall reverse the decision if it finds that on the evidence the decision is unreasonable: otherwise it shall dismiss the appeal”.

The University filed its appeal with the British Columbia Labour Relations Board and submitted that the arbitrator did not have the authority to substitute a recommendation for promotion. The University argued the word “reverse” in Article 13.07 (c) of the Agreement must be given a meaning which accords with both the Charter of Rights and Freedoms and the University Act, specifically Section 28(3) which states that “a member of the teaching staff of the University or of any faculty of the university must not be promoted or renewed except on the recommendation of the president”. The University maintained that on that basis, the word “reverse” must be interpreted to mean “revoke” or “annul”, and thus required the matter of the promotion of Dr. Rucker to be remitted back to the President for reconsideration. The Labour Relations Board denied the University’s appeal, both at first instance, [2004] B.C.L.R.B.D. No. 331, and then on reconsideration, [2005] B.C.L.R.B.D. No. 86.

The University then proceeded by way of judicial review to the courts but its application was, at first instance, dismissed by Mr. Justice Powers in Chambers in the British Columbia Supreme Court, 2006 B.C.S.C. 406. In determining that the Labour Relations Board’s decision was not patently unreasonable, the Court stated, at paras. 62-64:

[62] The University further argues, however, that in light of s. 28(3) that the arbitrator had not correctly interpreted the remedies available in the collective agreement at 13.07 and the meaning of the word “reversed”. The term “reversed” has more than one meaning. The Concise Oxford Dictionary Tenth Edition, p.1225 defines “reverse” as follows:
1. Move or cause to move backwards. > (of an engine) work in a contrary direction. 2. turn the other way round or up or inside out. 3. make the opposite of what it was. >swap (positions or functions). 4. Law revoke or annul (a judgment by a lower court or authority).

[63] I agree with the University that it was possible for the arbitrator to interpret the word “reverse” to include the power to revoke or annul rather than to turn the recommendation not to promote into a recommendation to promote. However that decision involved an interpretation of the collective agreement itself and a selection of the appropriate remedy pursuant to that agreement and the facts of the case. The discretion to choose the remedy is a matter clearly within the exclusive jurisdiction of the arbitrator protected by the privative clause and the standard review of such a decision would be patent unreasonableness. The Board’s decision under s. 99 was to consider whether the decision was consistent with the principles of the Code. Their decision that it was, is not patently unreasonable.

[64] The University is correct that one of the arbitrator’s selection of remedies could have included remitting the matter to the president with directions for reconsideration. It is reasonable to presume that the president would then exercise her discretion properly considering the facts and circumstances of the case. (Zundel v. Citron, [2000] 4 F.C. 225.) There were no issues of credibility or findings that the associate professor in this case, Dr. Rucker, had been denied a fair hearing by the president, or that the president was no longer able to hear the evidence objectively. However the selection of remedy was something within the exclusive authority for jurisdiction of the arbitrator. The Board has concluded that the arbitrator did not exercise that authority improperly nor did the decision conflict with the University Act. The Board’s decision was not patently unreasonable.

This decision of Mr. Justice Powers was then appealed by the University to the British Columbia Court of Appeal. Madam Justice Rowles, writing for the Majority (Ryan J.A., concurring and Lowry J.A. dissenting), concluded that the University’s appeal should be upheld. The Court of Appeal applied the “correctness” test as the appropriate standard of review as the matter involved an interpretation of external statutes and in the course of its decision concerning whether the arbitration board’s interpretation of the collective agreement was in conflict with the University Act, the Majority made the following observations:

6. The University is a corporation continued under the University Act. The President is the chief executive officer of the University and is responsible for the supervision and direction of the academic work of the University. Under s. 59 of the University Act, a university president has the power, among others, to recommend promotions of the teaching staff. The powers of the board of governors of a university are set out in sections 27 and 28 of the Act. Those powers include the power to appoint, promote and remove teaching staff but that power is subject to s. 28(3) of the University Act which provides that a member of the teaching staff “must not be promoted or removed except on the recommendation of the president.”
72. The University argues, correctly in my view, that the interpretation to be placed on the word "reverse" in Article 13.07(c) of the collective agreement had to be consistent with University Act and, further, that the interpretation of the external statute and the determination and resolution of any operational conflict between the collective agreement and the University Act had to be correct.

73. The University further contends that the interpretation given by the arbitrator to the scope of her remedial authority and her decision to reverse the President's decision created an inconsistency between the collective agreement and the powers granted to the President and the Board of Governors pursuant to the University Act.

74. What meaning is to be given to the word "reverse" in Article 13.07(c) of the collective agreement must be considered in the context of the provisions in the University Act concerning the powers of the President and the Board of Governors to appoint, promote and remove a member of the teaching staff. Under s. 59(2) of the University Act, the power to recommend appointments, promotion and removal of the teaching staff is vested in the office of the President. The power to recommend is an express grant of power to the office of the President, the exercise of which is an integral part of the scheme of appointments, promotions and removal of staff under the legislation. By s. 28(2) of the University Act, the President's recommendation is a necessary condition to the Board of Governor's exercise of its statutory authority to make appointments pursuant to s. 27(g). Similarly, by s. 28(3), the President's recommendation is a necessary condition to the Board of Governor's exercise of its statutory authority to promote or remove a member of the teaching staff. The language used in both subsections 28(2) and (3) is mandatory.

75. The respondent Association argued before the chambers judge that, where a statute grants the employer a discretion, as it does in s. 59 of the University Act, and the employer subsequently agrees to language in a collective agreement which limits that discretion, the legislation must be read so as to harmonize it with the language of the collective agreement. The chambers judge agreed with this analysis and found that, notwithstanding section 27 and 28 of the University Act, the President's discretion in s. 59 could be fettered by the terms of the collective agreement.

76. In my respectful view, the chambers judge erred in his interpretation of the University Act when he concluded that the parties could agree, and had agreed, to fetter the President's statutory authority. While the chambers judge was correct in observing that the President's authority to make a recommendation is not altered or modified by s. 28(3) of the University Act, the arbitrator's interpretation of the remedial authority granted in Article 13.07 of the collective agreement interferes with the interaction between the President's grant of authority and the powers of the Board contemplated by the scheme of the legislation.

80. In the Original Decision in this case, the Board harmonized the statutory grant of power to the President with the arbitrator's interpretation of the remedial authority in the collective agreement to allow for reversal of the President's decision by concluding that the agreement still leaves s. 59(2)(a) of the University Act operative when the President exercises her discretion in a reasonable way. In arriving at that conclusion, however, the Board failed to take into account the nature of the grant of authority to the President and the relationship between the President's authority and the other provisions of the University Act. Unlike the discretionary grant of authority reviewed in Durham, the language of s. 28(3) of the University Act bespeaks a mandatory direction from the Legislature. It is not discretionary. In this case, it is not possible to say, as the courts did
in B.C.G.E.U. and Durham, that there is no incompatibility or inconsistency between the
statutory empowerment and the collective agreement provisions as interpreted by the
arbiter. In those cases it was possible to carve out separate spheres of operation in part
because there were circumstances in which the statutory power would simply not operate.
In that way the statute and the collective agreement could be harmonized.

81. In the present case, the basic incompatibility between the mandatory statutory directives
that the President recommend for promotion and that members of faculty must not be
promoted except on the recommendation of the President and the arbiter’s
interpretation of the remedial authority in the agreement so as to allow for a President’s
recommendation to be reversed cannot be resolved by asserting that the President’s grant
of authority remains operative when she acts reasonably. The statute prescribes a
mechanism for appointments and promotion which involves a grant of personal authority
to the President to recommend and an absolute restriction on the powers of the Board of
Governors limiting its ability to appoint or recommend except on the recommendation of
the President. Those types of restrictions did not exist in the Durham case.

82. The Association argues that the parties to the collective agreement were entitled to agree
that the remedial provisions in the agreement would operate in the manner interpreted by
the arbiter so as to grant an arbiter the authority either to direct the President to
exercise the statutory grant of power set out in the University Act in a particular way or
to bypass the grant of authority to the President by having the recommendation to the
Board of Governors proceed as a “desmod” recommendation of the President (the
process that the Original Panel described as not requiring the President to do anything).

83. I would not give effect to that submission. The parties to the collective agreement could
not agree to restrict or fetter in scope the President’s exercise of statutory authority by
making any such exercise of that statutory power to recommend subject to reversal by an
arbiter. Any interpretation of the arbiter’s remedial authority pursuant to the
collective agreement that allowed the arbiter to reverse the President’s decision on
matters governed by the President’s statutory grant of authority would constitute a direct
interference with that statutory grant of power and would be incompatible and
inconsistent with the statutory scheme. • • •

The Majority of the Court also concluded that there was no basis to conclude that the matter, if
remitted, would not receive a fair hearing as there was no evidence to rebut the presumption of
regularity. Madam Justice Rowles concluded, at para. 89, that “I agree with the University’s submission
that the interpretation of the arbiter’s remedial authority to revoke and remit for reconsideration, an
interpretation which was available to the arbiter on the language of Article 13.07(c) of the collective
agreement, is the only interpretation that is both consistent with the presumption of regularity and avoids
any conflict with the President’s exercise of her statutory authority. In short, it is the only interpretation
which avoids an operational conflict between the collective agreement and the University Act.”
The Dissenting Opinion of Mr. Justice Lowry is also apposite. He observed, at para. 111 of the
decision, that “while the University maintains that the power given to a president under the University
Act with respect to promotion of members of a teaching staff cannot be compromised in the bargaining
process—a recommendation cannot be made by other than a president—it accepts that the exercise of a
president’s decision may be limited to the extent that such a decision must be reasonable.” Mr. Justice
Lowry went on to state that the term “reverse” in Article 13.07 of the Collective Agreement is clear and
unambiguous and can have only one meaning, specifically to “rescind and substitute”. He then stated, at
para. 117:

Where an arbitrator determines that a decision of the President not to recommend the
promotion of a member of the teaching staff was unreasonable, the arbitrator must
reverse the decision (save where there is also a procedural error giving rise to a choice of
remedy under Article 13.07(d)). Where a decision of the President is reversed, the
parties can only have intended that, for the purposes of s. 28(d) of the Act, a
recommendation for promotion—accepted by the Board of Governors and the
Association as having been made by the President—stand in the place of, or be
substituted for, the decision the President actually made. • • •

Finally, Mr. Justice Lowry concluded that he saw little practical purpose in remitting the matter back to
President Piper as her decision had been found to be unsupportable and he stated, at para. 119 that “I do
not see how, on any proper reconsideration of her decision, the President could decide other than to
recommend Dr. Rucker’s promotion.”

Therefore, in that case, the British Columbia Court of Appeal concluded that the statutory
authority given to the President was set out in Section 28 of the University Act and that the Collective
Agreement between the University and the Faculty Association could not fetter those powers. The
Majority concluded that the terms of the Collective Agreement which gave the arbitration board certain
remedial powers with respect to unreasonable decisions by the President could not derogate from the
express statutory authority given to the President in the legislation. In the case of an operational conflict
or inconsistency between the University Act and the Collective Agreement, the University Act will
govern. In other words, any interpretation of a Collective Agreement that interferes with the statutory
grant of power to one of the component bodies (whether it be the President, the Board of Governors or the Senate) would be ultra vires.

That conclusion of the B.C. Court of Appeal binds this Arbitration Board in dealing with the Senate Policy on Student Evaluation of Teaching. There is no doubt that the overriding element of the U.B.C. Senate's Policy on Student Evaluations of Teaching, approved on May 16, 2007, is fundamentally one of academic governance and that power has been legislatively conferred on the Senate of the University. The Senate, on which the faculty has significant representation, has the jurisdiction to set academic standards and issues pertaining to teaching evaluation certainly are integral to that jurisdiction. The Board of Governors has no jurisdiction under the University Act to modify academic standards set by the Senate and, by extension, has no authority to enter into agreements that would limit or restrict the Senate's statutory authority. Indeed, the Association's main argument in this case is that terms in the Collective Agreement would override any Senate policy (i.e. a Senate policy must be consistent with the terms of the Collective Agreement). As such, the Association is really maintaining that the contractual authority of the Board of Governors under Section 27 has paramountcy over the Senate, even on a matter which falls clearly within the scope of academic governance. In the view of this Arbitration Board, that runs contrary to the judicial authorities canvassed above.

Within the university setting most decisions of either the Board of Governors or the Senate will, either directly or indirectly, affect areas over which the other has jurisdiction. However, the legislation has identified those areas where there was jurisdictional overlap and either consultation or approval was required. Where that has not been expressly identified, paramountcy of authority is the key. In the situation at U.B.C., the issue of teaching evaluation is clearly an academic governance matter and there are no direct implications for the financial management or economic well being of the university such that the Board of Governor's jurisdiction would be invoked.

When the Senate is dealing with matters of academic governance, its policies will bind the other component parts of the University, which would include the President, the Board of Governors and the
Faculty Association. Obviously, academic governance decisions will have an impact on the faculty members at the University of British Columbia. From the perspective of labour relations and general arbitral principles, the Collective Agreement is the document from which an arbitrator’s jurisdiction is drawn and it governs the terms of the employment relationship. Under that model, various labour relations principles, such as the KVP, supra, tests, apply.

However, the decisions of the various courts discussed above make it clear that the University Act is the ultimate authority on where the jurisdiction to act lies. Madam Justice Rowles in Rucker, supra, captured the essence of the matter in her comments at para. 83, wherein she stated that “any interpretation of the arbitrator’s remedial authority pursuant to the collective agreement that allowed the arbitrator to reverse the President’s decision on matters governed by the President’s statutory grant of authority would constitute a direct interference with that statutory grant of power and would be incompatible and inconsistent with the statutory scheme.”

Therefore, the terms of the Collective Agreement between the Board of Governors and the U.B.C. Faculty Association cannot fetter the Senate’s paramount authority over academic matters, and to the extent that the terms of the Agreement were to do so, those terms would be ultra vires the Board of Governors.

The University has acknowledged that arbitrators will certainly have jurisdiction to apply Senate policies when they have impact on the employment of members of the bargaining unit. That was the case in British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association, supra, (“B.C.T.F.”), in which the British Columbia Court of Appeal dealt with the issue of an arbitrator’s jurisdiction to deal with a grievance concerning class sizes. The Court held that although the government had passed legislation in the School Act imposing class size limits, the subject of class sizes was nevertheless a term or condition of employment contained in the collective agreement. As a result, the arbitrator under that collective agreement had the jurisdiction to determine whether the terms of the School Act had been violated. In the same way, if the U.B.C. Senate Policy on Student Evaluation...
of Teaching comes before an arbitration board as a result of its impact on a faculty member under the conditions and terms of the Collective Agreement, then the Senate’s policy would have to be applied by that arbitration board. In other words, it is within the jurisdiction of an arbitration board to apply the Senate policy but the arbitration board does not have authority to sit in judgment of it.

The Faculty Association also referred this Board to a statement in the Introduction to Senate Policy on Student Evaluation of Teaching which indicates that the Policy is consistent with the Collective Agreement. In my opinion, that is only a statement that the Senate is of the view that there is no conflict with the terms of the Collective Agreement but it does not necessarily imply that the Senate is of the view that it could not establish a policy that would be contrary to the Agreement.

There is no doubt that this bicameral model of university governance causes practical problems and potentially place various components of the university structure at odds: Kulchyski v. Trent University, supra; U.B.C. v. U.B.C. Faculty Association (Rucker), supra. The dissenting opinions in the Kulchyski and Rucker decision quite clearly point to the practical difficulties which can result from this organizational structure. Those difficulties were well summarized by Mr. Justice Sharpe of the Ontario Court of Appeal in his dissent in Kulchyski, supra, at para. 65:

65. Bicameralism has both advantages and disadvantages. On the positive side, it provides a system of governance that distinguishes management issues from issues of educational policy and allocates responsibility for each to specialized governing bodies capable of reflecting the interests and concerns bearing upon the matters assigned. On the negative side, by dividing governing authority, bicameralism may complicate decision-making and, as the experience at Trent sadly shows, result in deadlock. Bicameralism was abandoned by the University of Toronto thirty years ago in favour of a unicameral Governing Council in which all estates are represented. Some other universities have retained the bicameral structure but have altered its operation by affording significant academic and student participation at the Board level. One could only gain an accurate appreciation of how bicameralism actually works at a particular university by careful study of that institution’s arrangements, practices, and traditions.

Additionally, in Rucker, the referral of the matter back to President Piper when it has been found that her previous decision was unreasonable may be somewhat problematic; as Mr. Justice Lowry indicated in his dissent, that there was little practical purpose in remitting the matter back as he could not
see how the President could decide other than to recommend promotion. However, the B.C. Court of Appeal has made it clear that is what the University Act requires.

In summary, the Senate is an administrative decision-maker and is exercising statutory authority when dealing with matters of academic governance; therefore, appeals to its policies in that area are by way of judicial review to the courts: Grenier v. Canada, supra; Schenkm an v. Canada, supra. That result derives from the organizational structure of the University in the legislation and it is the University Act passed by the British Columbia legislature which is the principal source of difficulty for the U.B.C. Faculty Association in this case.

AWARD

For all of the above reasons, the preliminary objection of the University is upheld and this Arbitration Board concludes it does not have jurisdiction over the content of the U.B.C. Senate’s Policy on Student Evaluations of Teaching.

Dated this 12th day of March, 2008.

[Signature]

David C. McPhillips
Arbitrator