IN THE MATTER OF AN ARBITRATION PURSUANT TO THE
COLLECTIVE AGREEMENT BETWEEN THE UNIVERSITY OF BRITISH COLUMBIA AND
FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

(the "University" or "UBC")

AND:

FACULTY ASSOCIATION OF THE UNIVERSITY OF BRITISH COLUMBIA

(the "Association")

SUBMISSION OF THE UNIVERSITY OF BRITISH COLUMBIA

I. INTRODUCTION

1. This arbitration is being conducted pursuant to Article 11, Arbitration (Interest), of the Agreement on the Framework for Collective Bargaining (the "Framework Agreement") (University's Book of Documents Tab 1).

2. The Faculty Association is a union under the Labour Relations Code representing a bargaining unit of approximately 3500 members appointed on a full-time or part-time basis as a Faculty Member, Librarian, or Program Director. Attached as Tab 2 of the University's Book of Documents is a profile of the Faculty Association bargaining unit.

3. Article 11 provides for arbitration to resolve the terms of a renewal collective agreement where negotiations between the parties have not resulted in an agreement.

4. This set of negotiations pertains to the renewal of the collective agreement having a term July 1, 2010 to June 30, 2012. The parties have agreed that the renewal agreement should have a term of two years. Unfortunately that is one of the only agreements the parties were able to reach during 21 days of negotiations.

1 "Faculty Member" means a person holding a Board of Governors appointment as Sessional Lecturer, Lecturer, Instructor, Instructor I, Instructor II, Senior Instructor, Professor of Teaching, Assistant Professor, Associate Professor, or Professor.
5. Article 11.02(e) sets out the terms that guide an arbitration board in reaching its award:

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

      i) the need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians, and Program Directors of the highest caliber;

      ii) changes in the Vancouver and Canadian Consumer Price Indices;

      iii) changes in British Columbian and Canadian Average Salaries and Wages; and

      iv) salaries and benefits at other Canadian universities of comparable academic quality and size.

6. Article 9.05 is significant in stressing the importance of the Government's operating grant to the conclusion of a collective agreement:

   9.05

   a) The negotiations under this Article shall not be concluded until the University has been officially notified of the operating grant allocated to it by the Province of British Columbia.

   b) If agreement has not been reached on the Collective Agreement within six (6) weeks of the receipt by the University of official notification of the operating grant allocated to it, or another date agreed to by the Parties, the matters in dispute shall be submitted to arbitration in accordance with Article 11.

7. Articles 11.02(e) and 9.05, read together, show that the determination of faculty salaries and the University's ability to pay, must be based on the University's general purpose operating funds, the most significant component of which by far is the provincial government grant.

8. Section 29 of the University Act, RSBC [1996] c. 468 precludes the University from incurring a deficit. This means that the University cannot incur more expenses in a fiscal year than the revenue it receives in that fiscal year:

   Limit on expenditures

   9. 29 (1) In this section:

      "expenditure" includes amortization, allowances for doubtful accounts and non-cash expenses;

      "revenue of the university from other sources" does not include

      (a) unrealized gains or losses on investments, or

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2 In this case the parties have agreed to arbitration by a single arbitrator.
(b) endowments received by the university.

(1.1) The board must not incur any liability or make any expenditure in a fiscal year beyond the amount unexpended of the grant made to the university and the estimated revenue of the university from other sources up to the end of and including that fiscal year, unless an estimate of the increased liability or over-expenditure has been first approved by the minister and Minister of Finance.

10. As the funding letters issued by the provincial government for 2011-2012 and 2012-2013 show (University's Book of Documents Tab 3), there was no increase in the operating grant for 2012-2013 for existing operations. The grant was increased only for new targeted FTE students. In real terms, the government grant decreased as a result of inflation.

11. By letter dated April 12, 2012, the Government advised of its intention to reduce base budgets in 2013-2014 and 2014-2015 by $20 million and $30 million respectively (University's Book of Documents Tab 4). This represents a 1% and a 1.5% reduction in base funding to UBC over those two years. The anticipated 1% cut was reduced to 0.27% for 2013-14 ($1.5 million), but this is a timing change only – the total reduction is expected over the three years.

12. Tuition fee annual increases have been frozen at 2% since 2005 (University's Book of Documents Tab 5).

13. It is a condition of the funding, as expressed in the 2012-2013 funding letter, that the University comply with the PSEC Cooperative Gains Mandate and obtain the approval of Government for any changes to compensation. Any increases in compensation must be met from savings generated elsewhere, without any increased funding from the Government, reductions in service or passing the cost of existing services on to the public.

14. A key issue in this proceeding will be the wage demands made by the Association. To put these demands in context it is important to appreciate that the current annual cost of faculty bargaining unit salaries alone is approximately $350 million. Every percentage increase in bargaining unit compensation therefore has a cost of approximately $3.5 million at a minimum in salary (resulting pension and benefits increases would be additional to that).

15. As will be discussed in further detail below, the compensation demands that the Association brings to this arbitration are beyond the University's ability to pay and are not reasonable bearing in mind the settlement pattern in the post-secondary education sector specifically and the public sector more broadly. Those settlements, including agreements concluded by the University with its other employee groups, provide for general increases of 2% for 2012 and 2013. (University's Book of Documents Tabs 6 & 6(a)). These agreements cover approximately 212,000 employees.

16. The Faculty Association seeks a 5% general wage increase in each of two years of an agreement covering 2012 and 2013 (as well as other demands which have a significant

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3 Approximately $300 million cost to the Operating fund.

4 The Association's proposed general salary increase of 5% in each year would be in addition to 2.5% for Career Progress Increments, Merit and Performance Salary Adjustments and 1% lump sum payment (as set out in the Agreement on Salaries and Economic Benefits).
financial cost). The Faculty Association's proposals are at University's Book of Documents Tab 7. Such an increase is well beyond negotiated settlements in the post-secondary education sector in B.C., let alone the public sector.

17. The University's proposals are at Tab 8. The University has proposed a 2% wage increase for each of 2012-13 and 2013-14. These general wage increases would be in addition to the Career Progress Increments, Merit Awards and Performance Salary Adjustments that the University would maintain at 2.5% of total salaries of continuing members of the bargaining unit. These components of salary are set out in the Agreement on Salaries and Economic Benefits (University's Book of Documents Tab 9) and are generally referred to "Progress through the Ranks" or "PTR". The University's proposed general wage increase is also in addition to a 1% lump sum payment in each of the two years of the agreement.

18. This proposal recognizes that the salary progression structure that is for PTR is the primary mechanism that the parties have negotiated to provide wage increases for the bargaining unit.

19. This was acknowledged by Arbitrators Dalton Larson, Emily Burke and Colin Taylor in their award between these parties dated July 10, 1997 (University of British Columbia v. Faculty Association of the University of British Columbia (University's Brief of Authorities Tab 6):

Notwithstanding the gaps in that system, it is obvious to us that the Career Advancement Plan has been adopted by the parties as the primary means of advancing the compensation levels of faculty under the collective agreement. Certainly in the immediate past general salary increases have not been an essential feature of the compensation structure. Under those circumstances, it is our view that the Career Advancement Plan should be continued at the same levels as existed in the last collective agreement, which is to say, career progress increments should continue to be funded at 1.5% rather than the 0.77% proposed by the University; but nothing should be allocated for merit awards or performance salary adjustments. The advantage for the University, which takes into account its dire financial circumstances, is that because there is no general salary increase, the salary cost base will not increase proportionately to the 1.5% allocation in relation to the 1995-96 academic year and, in addition, it is still entitled under that formula to realize its projected turnover savings. For the Faculty Association the same compensation structure as existed in the immediate past is preserved.

(At page 27, emphasis added).

20. The Faculty Association's salary proposal seeks to lock into the Collective Agreement the value of this component of salary increases for the future. This is a clear confirmation of the Association's understanding that historically these elements of total compensation are negotiable in each round of bargaining. They form part of the negotiated salary increase. The Association's proposal is to enshrine them into the Collective Agreement. (see pages 3 and 4 of Tab 7).

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5The total general salary increase is 2% consisting of a 1.95% increase to base academic salaries effective July 1, 2012 together with a $200,000 retention fund to be distributed to faculty in accordance with Article 6 of the Agreement on Salaries and Academic Benefits, and a 1.90% increase to base academic salaries effective July 1, 2013 with a $400,000 retention fund for faculty.

6 The 2.5% for the Career Advancement Plan is composed of 1.25% for Career Progress Increments, .75% for Merit Awards and .50% for Performance Salary Adjustments.
21. The proposal of the University to maintain PTR represents a 2.5% increase in compensation to the bargaining unit in each year of the Agreement. This together with the proposal of a general increase of 2% in addition to a 1% payment in each of the two years of the new agreement is reasonable in all of the circumstances and is at the limit of its ability to pay as defined in the Framework Agreement.

22. As discussed further below, the University's proposal is also consistent with the terms of reference for arbitration. These terms of reference are, however, subject to the University's ability to pay.

II PRINCIPLES OF INTEREST ARBITRATION

23. There has been much written on interest arbitration. It is been heavily criticized because of its “narcotic effect” on negotiations, and the fact that unions typically see interest arbitration as a vehicle to necessarily get more, not less, than what they could achieve during the negotiations phase of the process. There is very little incentive on a union to settle in negotiations – the narcotic effect – when there is an expectation that they will do no worse than they would do if they accepted the employer's last offer in bargaining; and indeed expect to get something through arbitration that the employer was not willing to give.

24. Arbitration under this Collective Agreement involves a combination of the replication and adjudicative models of interest arbitration. The parties have spelled out the terms of reference for the arbitration, upon which the arbitration award is to be based. On the basis of those terms of reference the arbitration award is an attempt to replicate what the parties would likely have achieved had they engaged in a strike/lockout under the Labour Relations Code.

25. This is the first interest arbitration between these parties where both monetary and non-monetary issues are before the arbitrator. There have been prior arbitration awards that dealt only with salaries and economic benefits. Those awards are important, and will be discussed below, in interpreting and applying the ability to pay language in Article 11.02(e).

26. Before turning to those cases, we set out the most recent statements of interest arbitrators in this province on the general issue of replication and the approach to be taken in determining whether to award a proposed language change advanced by either party. These most recent arbitral decisions arise out of the firefighter and police arbitrations conducted under the Fire and Police Services Collective Bargaining Act [RSBC 1996], c. 142. That legislation similarly sets out factors that an arbitrator is to take into account in reaching a decision.

27. Arbitrator McPhillips summarized certain principles that have application to this case in City of Nelson v. Nelson Professional Firefighters Association [2010] B.C.C.A.A.A. No. 174 (McPhillips) (University's Brief of Authorities Tab 1) as follows:

6 ... First, replication is the desired outcome and that refers to the notion that an interest arbitration board should attempt to duplicate what the parties themselves would have arrived at if they had reached an agreement on their own. In City of Vancouver and Vancouver Fire Fighters, Local 16, [2001] B.C.C.A.A.A. No. 48, Arbitrator Korbin determined that “the guiding arbitral principle in interest arbitration is the replication theory—an award should replicate what the parties would have concluded themselves, had they successfully settled their collective bargaining dispute. This is a principle which arbitrators have long accepted.” Similarly, in Board of School Trustees, School District
No. 1 (Fernie) and Fernie District Teachers Association, 8 L.A.C. (3d) 157, Arbitrator Dorsey stated, at p. 159 that "...the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed to by the parties in a free collective bargaining environment where there may be the threat and the resort to a work stoppage in an effort to obtain demands ... and arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities". That principle has been adopted in numerous other awards: Vancouver Police Board and Vancouver Police Association [1997] B.C.C.A.A.A. No. 621 (Lanyon); City of Burnaby and Burnaby Fire Fighters Union, Local 23 [2008] B.C.C.A.A.A No. 220 (Gordon); Beacon Hill Lodges of Canada, 19 L.A.C. (3d) 288 (Hope); Corporation of City of Calgary and IAFF, Local 255, December 22, 1999 (Tetensor); City of Regina and Fire Fighters Association, Local 181, September 21, 2005 (Paus-Jenssen); City of Richmond and Richmond Fire Fighters Association, [2009] B.C.C.A.A.A No. 106 (McPhillips); City of Vancouver and Vancouver Fire Fighters Union, Local 18, [2008] B.C.C.A.A.A No. 182 (Korbin).

A second principle is the requirement to be "fair and reasonable" in the sense that the award must fall within a "reasonable range of comparators" even if one party could have imposed more extreme terms. City of Vancouver and Vancouver Fire Fighters (2001), supra; Yarrow Lodge Ltd., (1993) 21 C.L.R.B. (2d) 1 (B.C.L.R.B.); Vancouver Police Board (1997), supra; City of Richmond and Richmond Fire Fighters Association, supra; City of Campbell River and Campbell River Fire Fighters Association (I.A.F.F., Local 1668), October 19, 2005 (Gordon); City of Burnaby and Burnaby Fire Fighters (2008), supra; City of Regina and Regina Professional Fire Fighters' Association, Local 181 (IAFF), (2005), supra; City of Moose Jaw and Moose Jaw Fire Fighters' Association, IAFF Local 553, August 30, 2007 (Paus-Jenssen); McMaster University and McMaster University Faculty Association, 13 LAC (4th) 199 (Shime); Temiskaming Lodge and Canadian Union of Public Employees, September 11, 2007 (Shime); Governing Council of the University of Toronto and the University of Toronto Faculty Association, March 27, 2008 (Mr. Justice Winkler); City of Vancouver and Vancouver Fire Fighters' Union, Local 18, (2008) supra; City of Vancouver and Vancouver Fire Fighters' Union Local 18, (2001) supra.

Third, the exercise of interest arbitration has been described as a "conservative process" and that it "ought to supplement and assist the parties' collective bargaining relationship and not unravel or depart from it": City of Campbell River and Campbell River Fire Fighters Association, supra, at pa. 18, see also: Vancouver Police Board and Vancouver Police Union, (1997), supra; City of Vernon and Vernon Fire Fighters Association, Local 1517, [1995] B.C.C.A.A.A. No. 432, December 28, 1995 (Hope); Okanagan Mainline Municipal Labour Relations Association and International Association of Fire Fighters, Locals 953, 1339 and 1746, 6 L.A.C. (4th) 323 (Hope); City of Vancouver and Vancouver Fire Fighters Union, Local 18 (2001), supra; City of Burnaby and Burnaby Fire Fighters Union, Local 323 (2008), supra; City of Vernon and Vernon Fire Fighters Association, IAFF Local 1517, [1999] B.C.C.A.A.A. No. 182 (Hope). In his 1996 decision in City of Vernon and Vernon Fire Fighters, Local 1517, supra, Arbitrator Hope stated, at paragraph 76, that "interest arbitration is not an appropriate medium for the imposition of fundamental changes in collective agreement relationships ...." Similarly, in Okanagan Mainline Municipal Labour Relations Association and IAFF Locals 953, 1399 and 1746, (1997) supra, Arbitrator Hope stated, at page 43, that "it is trite for me to observe that interest arbitration holds little potential for innovation. Interest arbitrators are enjoined to replicate the collective bargaining process. Thus, it is predictable, and perhaps inevitable, that they will follow bargaining trends, not set them". (underlined emphasis added)

28. Arbitrator McPhillips further condensed these principles in his recent award in City of Surrey v. Surrey Fire Fighters' Assn. [2011] B.C.C.A.A.A. No. 50 (University's Brief of Authorities Tab 3):
An analysis of these decisions indicates that a number of principles have been developed and regularly applied in setting the terms of fire fighter agreements.

1. Replication is the desired outcome and interest arbitration boards should attempt to duplicate what the parties themselves would have arrived at if they had reached an agreement on their own;

2. The decision should fall within a "reasonable range of comparators" and be considered a "fair and equitable" result.

3. The exercise of interest arbitration is a "conservative process" and it "ought to supplement and assist the parties' collective bargaining relationship and not unravel or depart from it." As a result, historical patterns of negotiated settlements between the parties should carry significant weight; and

4. Finally, there is no weight assigned by the legislature to the factors set out in Section 4(6) of the Act and, therefore, it cannot be concluded that any one of the factors take precedence over any others.

29. Arbitrator McPhillips continued in City of Surrey holding that although the legislation specified the factors that must be considered, the weight to be given to any particular factor was a matter for the arbitrator to determine on the facts of a particular case. The arbitrator's personal sense of social justice or fairness was not relevant:

13 That final point above is at the root of many of the disputes in this industry as the parties wish to emphasize different criteria to the exclusion of others. However, in City of Campbell River and Campbell River Fire Fighters Association, supra, Arbitrator Gordon stated, at p. 18 that "(t)he thread running through the awards is that all of the criteria are to be considered and the weight attached to the criteria will depend on the economic and collective bargaining circumstances of the particular dispute at the time of the award."

14 In the same vein in City of Burnaby and Burnaby Fire Fighters Award (2008), supra, Arbitrator Gordon indicated, at p. 6, that "...there is no statutory direction given as to how much weight each of the enumerated factors in Section 4(6) ought to be given. The Section is framed in mandatory language and an arbitrator "must" consider all the enumerated factors." Similar views were expressed in Vancouver Police Board and Vancouver Police Union [2000], supra, wherein Arbitrator Munroe stated, at p. 12, that "(A)s many arbitrators have observed, the Act does not assign the weight to be given to any of the guiding criteria—i.e., in relation to each other. And indeed, the relative weighting can change from one dispute to the next, as the circumstances may vary". This weighting of the listed factors is what Arbitrator Gordon described in her 2008 Burnaby firefighter award as "the discretionary element of the board’s authority."

15 Finally, it has been often stated in the arbitral jurisprudence that there is no place for the imposition of the arbitrator's personal sense of social justice or fairness: Board of School Trustees, School District No. 1 (Femie), 8 L.A.C. (3d) 157 (Dorsey); Beacon Hill Lodges of Canada, 19 L.A.C. (3d) 288 (Hope).

30. Arbitrator Lanyon said this about the conservative nature of interest arbitration in a later case, Vancouver Police Board v. Vancouver Police Officers Association [2011] B.C.C.A.A.A. No. 146 (University's Brief of Authorities Tab 4):

13 Third, an interest arbitration is essentially a conservative undertaking. The primary role of an arbitrator/arbitration board is to follow established bargaining outcomes; as a result, any
innovative initiatives are reserved to the parties themselves. These arbitral principles are fully canvassed in *Yarrow Lodge Limited*, (1993) 21 C.L.R.B.R. 2d pagel.

III. UBC INTEREST ARBITRATION AWARDS AND ABILITY TO PAY

31. One of the key issues dealt with in earlier decisions of arbitration boards under the Framework Agreement was “ability to pay”.

32. Ability to pay arguments in the public sector have been largely rejected on the basis that a public sector employer, so it is said, always has the ability to pay because the funding agent, i.e. the government, can generate more revenue through taxation.

33. While that view represents a simplified and, in our respectful submission, unrealistic view of government’s taxation ability particularly in periods where it is attempting to stimulate economic growth, we need not get into that debate in this case. That is because the parties have agreed that ability to pay is the “first consideration” to be made by the arbitration board, and have gone on to specifically define what “ability to pay” means in the context of this Collective Agreement. It is only after ability to pay is determined, that the other factors set out in the Agreement come into play.

34. The University’s ability to pay is informed by having “due regard to the University’s academic purpose and the central role of Faculty Members...in achieving it” and instructs the arbitration board to “take account of the University’s need to preserve a reasonable balance between the salary of members of the bargaining unit and other expenditures.”

35. This last point is important because it addresses the argument that might be otherwise made; that is, the University can always create the ability to pay by re-allocating its expenditures to satisfy any particular salary increase. The Framework Agreement provides that the University can assert an inability to pay where it can show that its expenditures on faculty salaries are in “reasonable balance” with its other expenditures; or stated differently that the Association’s salary proposal would disrupt the reasonable balance.

36. In other words, where the University can show that its allocation of funds, from its general purpose operating funds, preserves a reasonable balance of expenditures, then it has no ability to pay more, as doing so would force a re-allocation of expenditures.

37. Where the Faculty Association can show that the funds allocated to faculty salaries do not preserve a reasonable balance, then the University has the ability to pay more. Where the converse is the case and a reasonable balance is preserved, then by definition there is no ability to pay more as the reasonable balance would be altered in doing so.

38. These points are drawn from previous arbitration awards that have considered this very language in the Agreement.

39. The Agreement previously referred to the need to preserve a “reasonable ratio” of bargaining unit salaries to other expenditures. The assessment of what ratio was “reasonable” was first made in *University of British Columbia v. Faculty Association of the University of British Columbia* (unreported, April 17, 1989, Getz, Kelleher, Ladner) (University’s Brief of Authorities Tab 5). In that case, the Board held that while ability to pay
was a concept that was the subject of much arbitral debate, that debate was unnecessary here because of the requirements of the University Act and the provisions of the Framework Agreement pertaining to the Government grant and the method by which ability to pay was to be determined:

Section 12.02(f) of the Framework Agreement requires us to give "first consideration to the University's ability to pay the cost of an award from its general purpose operating fund." It seems appropriate, in the circumstances, to do precisely that.

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

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

First, section 28(1) of the University Act, which applies to the University of British Columbia, provides that:

The Board shall not incur any liability or make any expenditure in a fiscal year beyond the amount unexpended of the grant made to the University and the estimated revenue of the University from other sources up to the end of and including that fiscal year, unless an estimate of the increased liability or over-expenditure has been first approved by the minister and Minister of Finance.

This provision is substantially self-explanatory. While section 30 of the University Act does permit the University to make interim borrowings pending the availability of "the revenues of the current year", it requires that these borrowings be repaid out of those current revenues.

Secondly, in recognition of the fact that the Provincial Government is by a country mile the principal supplier of the University's funds, the Framework Agreement provides that negotiations concerning matters of faculty salaries and economic benefits may not be concluded "until the University has been officially notified of the operating grant allocated to it by the Universities Council of British Columbia". By the time that the parties are free to conclude their negotiations, therefore, the overwhelmingly significant element in the University's general operating budget is more or less definitively established.

The combination of these two considerations substantially determines the outer limits of the University's ability to pay in a large and general sense. No doubt the University has some other sources of revenue, such as tuition fees, gifts, earned income and the like, and no doubt to some extent these other revenues might be enlarged through the University's own efforts. But the extent to which they can be so enlarged is relatively limited. It is no doubt also true that, like Oliver Twist, the University may return to those principally responsible for its health and well-being, and ask whether it can have "some more". It has no obligation to do any of these things, however, and there is no guarantee in any event that such efforts would be attended by any degree of success.

Moreover, the University is a continuously operating enterprise which cannot simply close down its operations pending advice from the Universities Council as to the size of its operating budget allocation. There are teachers to be paid, services and supplies to be bought and paid for, students to be accommodated, and all of the myriad of other activities associated with its operations to be planned and, to some extent, paid or provided for. There is a compelling practical necessity, therefore, for the University to embark upon its negotiations with the Faculty Association on the basis of an at least minimally educated guess, no doubt based on prior experience and general
intelligence, as to what funds it is likely to have available to it in a given fiscal year. The complexities of its conjectures in this respect are to a degree compounded by the disparity between its fiscal year and the academic year. The former ends on March 31. The latter, which determines the University's contractual commitments to the members of the Faculty Association, ends on June 30.

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

Section 12.02(f) begins with the words "In making its award, the Arbitration Board shall give first consideration to the University's ability to pay", and continues, "In doing so ... the Arbitration Board shall take account of the University's need to preserve a reasonable ratio between the salary of members of the bargaining unit and other expenditures." It is not clear whether the "so" in the phrase "in doing so" refers back to the making of the award, or to the consideration of the University's ability to pay, but the latter seems more probable. So the Agreement imposes an obligation upon us, in giving first consideration to the University's ability to pay, to take account of its need to preserve a reasonable ratio between faculty salaries and other expenditures. The two concepts thus become inextricably interlinked. The parties have agreed that the University has the ability to pay an amount in respect of faculty salaries if doing so preserves a reasonable ratio between that amount and other expenditures.

Before exploring some of the implications of this linkage, we should examine the question of how the ratio in question is to be determined.

(pages 11-14, underlined emphasis added)

40. The Board, then determined that the "reasonable ratio" was to be determined on the basis of what the parties themselves had previously determined to be reasonable; i.e. the ratio of faculty salaries to overall general operating expenses produced by the last collective agreement:

Against this background, we return to what we see as the central issue: how to give meaning to the concept of "a reasonable ratio".

We have agitated a great deal over this issue. "Ratio" is an objective mathematical concept which expresses a relationship between two amounts. That relationship is inherently neither reasonable or unreasonable. It simply exists. To invest it with the quality of reasonableness is to impose a judgment upon it, and thereby to change it from being merely a relationship into something that somehow gives, or is deemed to give, a sense of satisfaction - whether for moral, aesthetic, economic, or other reasons. But these reasons exist outside the ratio itself. In principle, the possibilities are almost cosmic.

Our range of choice in identifying the criteria for determining the reasonableness of the ratio that must be preserved has been limited, to some extent at least, by the fact that it appeared to be common ground between the parties that we are restricted to a consideration of matters existing, or perhaps which historically have existed, at UBC only. It is not the world, or even the academic world, that is our oyster. We must concentrate our gaze on Point Grey. Specifically, the criteria referred to at the conclusion of section 12.02(f) - the ability to attract faculty of the highest calibre, changes in consumer price indices, and salaries and benefits at other Canadian universities of comparable academic quality and size - are irrelevant to this branch of our enquiry.
This common ground, while imposing a welcome limitation upon the scope of our consideration, unfortunately does not resolve all our difficulties. Consider for a moment the phrase "preserve a reasonable ratio". It can plausibly be argued, it seems to us, that there is no distortion of the meaning of words to conclude that this directs us to maintain or continue something that already exists. If it does not, the use of the word "preserve", seems inappropriate. The only ratio that exists presently is the ratio reflected in the arrangements for the allocation of the operating fund as between faculty salaries and other expenditures in the 1987-88 fiscal year. Any other ratio would have to be invented or resurrected. The present ratio, as we have indicated above, is 42.1%, so that on this view, it must be deemed to be reasonable, and would be more or less determinative of the issue before us. We would be limited to the performance of the relatively simple and almost mechanical task of calculating the amount which is 42.1% of forecast expenditures.

At first blush, that might seem a perverse conclusion. Why invoke the elaborate and costly mechanism of arbitration by three arbitiators, when the question could be resolved in half an hour by someone familiar with the principles governing the computation of total expenditures, equipped with a sharp pencil and a calculator.

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

A departure from the determined reasonable ratio (42.1% on the present facts) between expenditures on salaries paid to members of the Faculty Association and other expenditures to the advantage of the faculty can effectively come about, on this analysis of section 1202(f) of the Framework Agreement, only as the result of a "management" decision by the university administration to make such a departure; and a departure to the disadvantage of the members of the faculty can occur only as the result of a decision of the Faculty Association to temper its bargaining demands. What is sauce for the goose, it turns out, is sauce for the gander too. In either event, the Framework Agreement, at least in principle, establishes agreement between the parties, rather than arbitration, as the most fruitful method of reaching their objectives. It limits both parties.

There is a second conclusion to which this analysis leads that is more important in the context of arbitrations pursuant to the provisions of the Framework Agreement generally and of this arbitration in particular. It seems to us that if the salary proposal that either side puts before an arbitration board results in a distortion of, or a departure from "a reasonable ratio" that the board is enjoined to preserve, the fact that the Association can identify sources within the University's operating fund out of which its request can be financed, or the University can show that it has no "uncommitted" funds, is irrelevant. The reason that it is irrelevant is, quite simply, that the arbitration board is foreclosed by the terms of the Framework Agreement, and in particular by the special sense in which, on the view under consideration, "ability to pay" is used in that Agreement, from making an award that violates the requirement that a reasonable ratio be preserved, notwithstanding that there are or are not funds available out of which that "violation" can be funded.

41. The Board rejected the argument that preserving a "reasonable" ratio required an assessment of reasonableness in a broader context and held that this would be problematic because the ratio could vary significantly over time, and the ratio may trend one way or the other. The Board settled on the view that the ratio produced by the parties

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7 Since the late 1980s the accounting presentation of certain cost contributions has changed such that they are report as a component of revenues rather than as an offset to expenditures. The effect of this is
in the last round of bargaining was the best indicator of reasonableness:

42.1% was the ratio produced by free collective bargaining for 1987 - 1988 academic salaries. This seems, on the evidence, the most reliable index of reasonableness in the circumstances. The Faculty Association suggested that it had tempered its demands for 1987-68 in the light of certain statements of aspiration by the President of the University concerning future faculty salary levels. Those statements, however, have nothing to do with the issue of reasonable ratios.

(At page 22)

42. In the arbitration hearing to determine salary increases for the following year, the Faculty Association argued that the “reasonable ratio” produced by the previous agreement was not appropriate because that agreement was negotiated in the context of legislated pay restraint. The Board, in University of British Columbia v. Faculty Association of the University of British Columbia (unreported, September 26, 1989, Getz, Kelleher, Ladner) (University's Brief of Authorities Tab 6), rejected that submission and held that the parties' last collective agreement established the ratio that would define the University's ability to pay. In doing so, the Board commented on its previous award:

We next considered the matter of how a judgment might be made as to the reasonableness of a given ratio, and concluded that we could only give effect to the requirement of the Framework Agreement that our Award should "preserve" a reasonable ratio by giving effect to the existing ratio reflected in the 1987-88 fiscal year. "Any other ratio," we said, "would have to be invented or resurrected". The particular ratio established in 1987-88, according to the method of calculation that we considered proper, was 42.1%.

We also considered what we described as "an alternate view of the phrase "preserve a reasonable ratio", under which an assessment "based upon such considerations of reasonableness - unidentified in the Agreement - as the arbitration board considers it appropriate to take into account" would be called for. We concluded that on the assumption that the alternate view was the correct one, the 1987-88 ratio, having been the product of what we described as "free collective bargaining", was "the most reliable index of reasonable in the circumstances," and hence the applicable ratio.

In the present arbitration the Faculty Association, while accepting the general approach that we had; outlined and adopted in the 1989 Award, disagreed with the conclusion that we had reached, that 42.1% was the appropriate ratio. The Association described this as based on a "significant error of fact" in the 1989 Award. The error in question, it was suggested, in our conclusion that 1987-88 salaries were the outcome of free collective bargaining. The Association did not dispute that if the 1987-88 settlement had been the product of free collective bargaining, it might, on the alternate view of "reasonable ratio", be an appropriate index. But, said the Faculty Association, that settlement was reached in an environment of legislated pay restraint, and so "in no sense was this unconstrained, free bargaining." The Faculty Association accordingly contended that, that error having been made, the question of which ratio to use was res nova, once again properly before us, and we were at large to look for an alternate "reasonable ratio."

The University took issue with the suggestion by the Faculty Association that it is open to us now to adopt as reasonable a different ratio than the 42.1% that we adopted in the 1989 Award. The University objected that (1) our earlier interpretation of the Framework Agreement and adoption of 42.1% as the appropriate ratio to be preserved, are both res judicata (2) alternatively, we did not make the error attributed to us by the Faculty Association; (3) in the further alternative, our reliance upon the 1987-88 ratio was, in itself, an alternative and subsidiary basis for our conclusion.

that, all else being constant, the ratio declines owing to the larger denominator (revenue as a proxy for expenditures).
In any event, the University says, the circumstances surrounding the 1980-81 salary settlement upon which the Faculty Association relies, suggest that it is not a persuasive guide in the present arbitration.

The Faculty Association's assertion of error is predicated upon the hypothesis that had there not been an "atmosphere" of legislated pay restraint surrounding the negotiations leading up to the 1987-88 agreement, some other settlement would have been arrived at than the particular settlement that was reached. The problem with an hypothesis of this sort is that it can neither be proved nor disproved. At an intuitive level, perhaps, it seems plausible. But, as the University pointed out, at least two agreements - those in 1983-84 and in 1984-85 - negotiated during the period of legislated pay restraint provided for salary levels below what would have been permitted under the applicable legislation. Who is to say that the same might not have occurred in 1987-88? The simple point, as it seems to us, is that the Faculty Association's attribution of error is based upon a mere speculation. If there was an error, it was an error of characterization. We are not persuaded that it was an error of substance. The Faculty Association's speculation seems to us to provide us with nothing better.

Since the essential foundation for the Faculty Association's contention that we are entitled to revisit the matter of whether 42.1% is the proper "reasonable ratio" is, in our view, unsound, it is not necessary for us to consider the other arguments raised by the University in this connection, and we confirm our view that given the reasoning in the 1989 Award, the appropriate ratio for 1989-1990 is 42.1%.

43. The most recent award is University of British Columbia v. Faculty Association of the University of British Columbia (unreported, July 10, 1997, Larson, Burke, Taylor) (University's Brief of Authorities Tab 7). That award discusses the concept of "reasonable balance" as against the previous language in the Agreement that referred to a "reasonable ratio". While the concept of "reasonable balance" is less formulistic it is nonetheless a central or primary determinant of ability to pay, with the ability of the Board to consider more generally the difficulties faced by the University in managing its revenues and expenditures:

After the language of Article 12.02(e) was amended, the significance of the reasonable balance test in determining ability to pay was again considered by the Kelleher board. One can see at pp. 6-7 of the award, that the same argument was made in that case, albeit in somewhat different terms, that the balance between salaries and other expenses should not be taken to be the primary indicator of ability to pay. However, upon analysis, the board adopted the view advocated by the Association:

"Counsel for the University asserts that the amended language now permits us to take a broader view of the University's efforts to balance cost allocations. Rather than applying a narrow mathematical analysis of comparative ratios, this board's task is to

.....consider whether the University has maintained an expenditure balance which is reasonable in light of the primary academic purpose and without compromising the role that faculty members must play in achieving that purpose.

The Association's position is that the changes to Section 12.02(e) are less fundamental than that. Counsel agreed that we as a board are no longer confined to the fixed numerical relationship between bargaining unit salaries and other expenditures. She put it this way:

The commitment now is to weigh the relative value of the competing costs as well as the budgeting and spending history of the Employer to determine whether the Employer has preserved a reasonable balance or equilibrium between the cost of bargaining unit salaries and
other operating fund costs. Where that balance or equilibrium is preserved, the ability to pay is established.

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

It is true that at p. 10 of the award, the board restated the issue and then concluded that, if the balance is preserved by the Association's salary proposal, the University is deemed by section 12.02(e) to have the ability to pay it, but that did not comprise part of its interpretive analysis. We think that the correct view, as we stated at the beginning, is that the relationship between salaries and other expenditures is a central or primary criterion to be used in the determination of ability to pay but it is not an exclusive one. It follows that evidence of the difficulties had by the University in managing its revenues and expenses is relevant to the general issue of ability to pay, which may properly be taken into account by the arbitration board in reaching its decision but, in the end, the most important criterion is that of reasonable balance.

(pages 14-16, underlined emphasis added)

44. Accordingly, there are two levels to the “ability to pay” consideration: a more macro consideration of the difficulties faced by the University in managing its revenues and expenditures to avoid a deficit position; and a more micro assessment of the criterion of “reasonable balance”.

Ability to Pay – Macro Consideration

45. The University is a highly complex, multi-faceted, enterprise. While the delivery of academic programs and research are at its core, it maintains a vast infrastructure of buildings, laboratories, student housing and many ancillary services in carrying out its mission. While money or “surpluses” might be identified in any given year, the issue when considering salary increases is whether there is an ability to pay additional recurring expenses.

46. As Arbitrator McColl held in an early decision relating to whether an ancillary agreement for the Faculty of Commerce (as it then was) would be appropriate (University of British Columbia v. Faculty Members of the Faculty of Commerce and Business Administration, October 26, 1984) (University's Brief of Authorities Tab 8):

Having regard to the fact that by statute the University is required to operate without a deficit, the existence of surplus funds is a necessity in order for the University to comply with the statute. (page 27)

47. Similarly, the University does not budget its resources on the basis of line by line projections of expenditures in the Operating fund. It funds faculties and other operating units who are then responsible for managing their activities within these resources.

48. In this case the University will present the evidence of Pierre Ouillet, the University’s Chief Financial Officer (Vice President Finance, Resources and Operations). His evidence (University’s Book of Documents Tab 10) will explain the financial challenges of the University given fiscal restraints facing the provincial government, which flow through to the University by way of the Government grant. The University would have to forgo
necessary expenditures such as deferred maintenance and refurbishing teaching labs, which will impact faculty members and their work, in order to fund the salary increases that the Faculty Association proposes in this arbitration.

49. The University’s expenditure allocations have been made in the context of frozen government funding and caps on tuition fees, to ensure that the maximum possible support can be given to faculty salaries and the salaries and benefits of other employees on campus while enabling the University to meet its other financial obligations.

50. Both the University’s salary proposal and the Association’s salary proposal have been costed (University’s Book of Documents Tab 11). We have also presented the costing for the other proposals made by the Faculty Association. The cost is significant, and well beyond the University’s ability to pay as defined in the Framework Agreement. The increase sought by the Association is also well beyond any settlements for the same period negotiated in the public sector.

51. The mandate imposed on the University by government is an important consideration in assessing the University’s ability to pay as defined above. PSEC is part of the legislative scheme designed to coordinate and regulate wages and benefits in the public sector through the Public Sector Employers Act, RSBC 1996, c. 384. The mandate is derived from PSEC’s statutory authority and thus must be given considerable weight in assessing the University’s ability to pay.8

52. As noted earlier, compliance with the government’s Cooperative Gains Mandate is an express requirement of the Government grant that has been made to the University.

53. The mandate requiring the University to support any wage or benefit increase to faculty (and other employee groups) through demonstrated offsetting cost reductions in operating expenditures is, itself, a measure of “reasonable balance”. The mandate requires the University to find room for any wage increases through a reduction in other costs; to reallocate expenditures where possible. As Mr. Ouillet’s evidence will demonstrate, the University has developed strategies that will allow it to provide general salary increases to faculty of 2% in each of the two years of the proposed new Agreement, in addition to funding the Career Advancement Plan at 2.5% and funding a 1% payment each year. These strategies are the extent to which the University believes that it can retrench other expenditures, to create an ability to pay the offered salary increases to faculty.

54. The Association might contend that the University has strategies to generate funds for an overall 2% increase to all employee groups and that more should be allocated to faculty salaries. There are a number of responses to any such assertion.

55. First, any assessment of reasonable balance at this level, must take into account what other employee bargaining agents have considered reasonable in terms of negotiated wage increases for their members. It is unlikely they would view a reallocation of funds available for increases to faculty salaries as being reasonable.

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8 We enclose at Tab 13 a paper presented by Donald R. Munroe, Q.C. to the CBA 2010 National Administrative Law, Labour and Employment Law and Privacy and Access Law Conference, in which Mr. Munroe presents a strong argument as to why government mandates must be given serious consideration by arbitrators if interest arbitration is to have any future role in the resolution of public sector bargaining disputes.
56. Second, over time faculty salaries have increased at a greater rate than the salaries of other employee groups. The graph (at University's Book of Documents Tab 12) demonstrates this phenomenon over the past 5 years.

57. To summarize on the first approach in assessing the ability to pay – the challenges facing the University to manage its expenditures to avoid an operating deficit – the University's has no ability to pay faculty salary increases beyond what it has proposed in this arbitration.

Ability to Pay – "Reasonable Balance" Consideration

58. We turn then to address the "most important criterion" of ability to pay; the preservation of a reasonable balance between faculty salary costs and other expenditures from the University's general purpose operating funds: Article 11.02(e).

59. Prior arbitration boards have held that a "reasonable balance" is the balance derived from the previous negotiated collective agreement. In other words, the product of the parties' own negotiated agreement is the best evidence of the reasonable balance.

60. Prior arbitration awards have also adopted a methodology of determining total expenditures from the general purpose operating fund (the denominator in the "reasonable balance") that avoids any debates over fund transfers or year end surpluses in operating expenditures. The methodology assumes that the University will spend all of its revenues; or that it could spend all of its revenues (i.e. operating surpluses could be spent) but could not incur a deficit. Total operating fund revenues then equate to total expenditures, and the expenditure on faculty bargaining unit salaries can be assessed against the total amount available to be spent (total revenue) to see if a "reasonable balance" is being preserved.

61. This methodology avoids any need to assess fund allocations, transfers of funds from general purpose operating funds to other funds, surpluses, or any other assessment of expense allocation. It assumes that the University has all of its operating revenue available for expenditure and then assesses the proportion of that amount that is allocated to faculty bargaining unit salaries.

62. The methodology also avoids any consideration of budgets. The University does not budget its resources on a line by line projection of operating fund expenditures. It manages its finances with a model that allocates funding to faculties and other University operating units, which they must use to manage and meet their financial obligations.

63. Previous arbitration boards dealing with ability to pay between these parities have recognized that University budgets are a management tool and not a forecast of revenues and expenditures. In University of British Columbia v. Faculty Association of the University of British Columbia (unreported, January 25, 1994, Kelleher, Korbin, Larson) (University's Brief of Authorities Tab 9) the Board held, at page 8:

The position of the Association is that we should have regard to the original 1993-94 Budget prepared by the University. Counsel [for the Faculty Association] argued that it is to be preferred to the Forecast of Revenue and Expenses prepared by Mr. Cosh [the University's external accounting expert]; first, in that it was not prepared in contemplation of litigation. Second, she argued, the budget is prepared yearly as part of a regular process known to the parties.
That argument has an initial attraction. The budget should be a reliable and objective estimate of what will actually occur in the 1993-94 fiscal year. On the evidence, however, that is not a conclusion we can reach. The budget at the University is not designed to be a prediction of actual line-by-line expenditures.

Rather, the Budget reflects ongoing salary commitments in each faculty. It does not purport to reflect the actual salaries to be paid in a given year. For example, if a member of Faculty is absent on leave in a particular year, his or her salary will be included in the budget even though it will not be paid. Similarly, if there is a vacant position in a Faculty, the Budget will include an amount for a salary for that position.

Because the Budget is designed in this way, there are faculty salary funds which are in the Budget which will not be expended on Faculty salaries. These funds can then be used for other purposes within the Faculty, paying for sessional lecturers, teaching assistants, supplies, equipment and the like.

For that reason, it is not surprising that the budgeted amounts for academic salaries are routinely under-expended. At the same time, of course, budgets for supplies, expenses and non-academic staff are consistently over-expended.

To the outsider this may seem to be an unusual manner in which to use the Budget. It is clearly, however, the manner in which the University has carried on its business for a substantial period of time. It obviously suits the needs of the University.

For those reasons we find that the Forecast prepared by Mr. Cosh, rather than the University’s budget, to be a more useful predictor of expenditures in the current fiscal year.

(at pages 8-10)

64. The methodology confirmed by Mr. Cosh has been consistently accepted and applied by arbitration boards under the Framework Agreement. That same methodology has been applied by the University in the following analysis.

65. In the 2006 round of bargaining the parties agreed on the make-up of the “general purpose operating fund” (GPOF). That understanding is set out in a letter from the then Associate VP, Academic Planning, George Mackie dated March 13, 2006 (Tab 14, the “Mackie Letter”). The components of the GPOF are:

- The provincial grant
- Domestic Tuition Fees
- Federal funds for the indirect costs of research
- Income from the central share of royalties and equities
- Overhead funds from the Canada Research Chairs program
- Income on cash balances

66. The analysis presented at Tab 15 (in the University’s Book of Documents) is the “Cosh approach” that has been adopted by all prior arbitration boards who have dealt with “reasonable ratio” and “reasonable balance” in determining ability to pay. The analysis is based on two alternate definitions of “general purpose operating funds” in Article 11.02(e) of the Framework Agreement. The first is based on the description of the GPOF in the Mackie Letter. The second approach uses the Operating fund as reported in the financial statements. Again, both approaches use revenue in the GPOF as described in the Mackie
Letter or revenue in the current Operating fund as a proxy for total expenditures (the denominator in the "reasonable balance" ratio).

67. With respect to the current Operating fund, the University's latest financial statements are at Tab 16 (in the University's Book of Documents). Schedule 1 to the financial statements, the Consolidated Schedule of Operations and Changes in Net Assets for 2005 through 2012, are at Tab 17 (in the University's Book of Documents). The revenues in the Operating fund are listed in Schedule 1 and are accounted for as General Purpose, Fee for Service and Continuing studies.

68. Under either approach, the University's salary proposal is at the limit of its ability to pay (indeed beyond the limit). The Faculty Association's position on salary increases, not to mention its other proposals that have monetary implications, is well beyond the University's ability to pay.

GPOF (Mackie Letter) "Reasonable Balance"

69. The analysis using the GPOF revenues identified in the Mackie Letter is at Tab 15 page 4. The reasonable balance produced by the last collective agreement is 30.8%. The 2006-2010 collective agreement produced a "reasonable balance" in the 30 to 31% range.

Forecast of Bargaining Unit Salaries - GPOF (Mackie Letter)

70. Using the GPOF as defined in the Mackie Letter the University's proposal will produce a reasonable balance of 33.6% for 2012-13 and 35.3% for 2013-14 (Tab 15 pages 5 and 6). This includes both the proposed general wage increase, and funding Progress through the Ranks offset by turnover savings and new faculty positions. This analysis demonstrates that the University's proposal is at the limit of its ability to pay.

71. The final page of Tab 15 graphs these results, and adds in the skewing of the balance if the Faculty Association proposal was accepted. Stated differently, the funds that would have to be allocated from GPOF revenues, to satisfy the Faculty Associations proposal are not within the University's ability to pay; defined as preserving a "reasonable balance" of bargaining unit salaries to other expenditures: Article 11.02(e).

Operating fund "Reasonable Balance"

72. The analysis at Tab 15 (page 1) shows the last negotiated collective agreement produced a balance between faculty salary expenditures and total expenditures of 24.9% for 2011-12 (or 25.1% adjusted for the lump sum payment). The previous collective agreement (2006-2010) produced a "reasonable balance" in the 23%-24% range.

Forecast of Bargaining Unit Salaries - Operating Fund

73. The analysis at Tab 14 (pages 2 and 3) then determines the reasonable balance that will be produced by the University's proposal in the first year and forecasts the reasonable balance for the second year. Again, this includes both the proposed general wage increase, and funding Progress through the Ranks offset by turnover savings and new

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9 Growth in faculty positions was factored into the Cosh methodology, and is included in the total bargaining unit expenditure for all years.
faculty positions (footnote 9). The result is 25.7% for 2012-13 and 26.5% for 2013-14. These percentages are consistent with the “balance” produced by the previous collective agreements. In other words, the University’s proposal is at (if not beyond) the limit of its ability to pay.

74. Again, the final page of Tab 15 graphs these results, and adds in the skewing of the balance if the Faculty Association proposal was accepted. Stated differently, the funds that would have to be allocated from Operating fund revenues to satisfy the Faculty Associations proposal are not within the University’s ability to pay, defined as preserving a “reasonable balance” of bargaining unit salaries to other expenditures: Article 11.02(e).

75. Assessing faculty salary expenditures against the Operating fund is more favourable to the Faculty Association than the Mackie Letter approach, as it brings into consideration all unrestricted revenue, not just revenue from the sources listed in the Mackie Letter. Even on this analysis, any monetary increase beyond the University’s proposal would exceed the University’s ability to pay.

76. The University has provided the expert report of Ernst & Young (Mr. Paul McEwen) attesting to the validity of the analysis presented above (University Book of Documents Tab 18).

IV. LABOUR RELATIONS CODE PRINCIPLES

77. While the analysis of ability to pay in the previous section should, as we later discuss, determine the salary award to be made in this case, the arbitrator should be mindful of Labour Relations Code principles in making an award.

78. One of the concerns we expressed above is that interest arbitration would be destructive of collective bargaining if it could be used to one-up settlements reached with other employee groups, or if the position of the parties in negotiations was simply the “floor” from which the arbitrator would base his decision.

79. In Vancouver Police Board v. Vancouver Police Officers Association [2011] B.C.C.A.A.A. No. 146 (University’s Brief of Authorities Tab 4) , Arbitrator Lanyon rejected the VPOA’s attempt to obtain higher increases than had been negotiated by the VPU:

No bargaining unit can be permitted to employ interest arbitration by using the settlements of other bargaining units as a floor or a springboard to greater wages and benefits. This would have the adverse effect of undermining freely negotiated collective agreements. It would also undermine the very rationale of comparability under the Act.

80. Section 2 of the Labour Relations Code provides:

s. 2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a manner that:

***

(c) encourages the practice and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees,

***
(e) promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes.

81. One of the fundamental underpinnings of the Code is the concept of labour relations stability. Much has been written on the destabilizing effect of leapfrogging and whipsawing on collective bargaining. The Board has expressly addressed this concern in its seminal decision on the establishment of bargaining units. In Island Medical Laboratories Ltd. (1993) 19 CLRBR (2d) 161 ("IML") at p. 8, the Board held that it was axiomatic that multiple bargaining units lead to the potential for industrial instability through whipsawing and leapfrogging:

It is axiomatic in labour relations that a proliferation of bargaining units increases the potential for industrial instability. Multiple bargaining units per se, raise a serious concern about industrial stability. Instead of one strike, there may be several strikes. Each union may potentially whipsaw the employer by trying to leapfrog the last set of negotiations. Therefore, in regard to applications for certification in relation to employers who have existing collective bargaining regimes, the ICBC factor of industrial stability must be given the greatest weight in the determination of what constitutes an appropriate bargaining unit.

82. There are multiple bargaining units at the University. Virtually all of the employee groups, save for the Faculty Association, have agreed to 2% general increases for 2012 and 2013 (in some cases after strike action):

a. CUPE Local 116 (2000 trades, food and custodial workers, parking attendants, engineering techs, research assistance, campus security patrol and some clerical – 2% April 1, 2012 and 2013.

b. CUPE Local 2950 (1700 clerical and secretarial workers and library assistants, and Chan Centre front of house staff) - 2% April 1, 2012 and 2013

c. CUPE Local 2278 (2900 TAs and 60 non-credit instructors in the English Language Institute) – 1% on each of September 1 and December 1, 2012; 2% September 1, 2013

d. BCGEU (Okanagan) (255 clerical, secretarial, maintenance workers and research assistants) – 2% July 1, 2012 and 2013

e. Association of Administrative and Professional Staff - AAPS (3100 management and professional staff at both the Vancouver and Okanagan campuses) – 2% July 1, 2012 and 2013

In total, excluding faculty, approximately 97% of the remaining employees of the University have settled on the basis of a 2% general increase in 2012-13 and 2013-14.

83. Code principles are not enhanced where collective bargaining is perceived as establishing the floor from which the parties' position in interest arbitration will be adjudicated. This point will be expanded below, as the University comes into this arbitration with a position that it advanced, on a without prejudice basis, to see if an agreement could be achieved prior to arbitration. That position was made public by the Association, leaving the University with no option but to maintain that position in arbitration.
84. Meaningful collective bargaining can only occur if there is a disincentive in proceeding to arbitration. There is no disincentive on a union where it can take the employer's final and best offer and establish it as a floor for arbitration.

V. SALARY

85. Again, based on the analysis of ability to pay set out earlier, there is no need to bring into play any other considerations in determining the appropriate salary award in this case. Any monetary award beyond the University's proposal is beyond the University's ability to pay. However, the University also wishes to explain the basis upon which it brings this proposal to arbitration in light of the concerns set out in the previous section relating to the efficacy of collective bargaining and the effect that interest arbitration can have on that process.

86. The University tabled a proposal in bargaining for a salary increase of 1.5% over a two year collective agreement. This proposal, together with the University's preparedness to continue the Career Advancement Plan at 2.5% would provide salary increases to the bargaining unit consistent with the criteria set out in the Collective Agreement and in many cases better than settlements elsewhere in the public sector. The Association rejected that proposal.

87. In an effort to achieve a Collective Agreement in bargaining prior to interest arbitration, the University proposed another session of bargaining in December 2012 to present a final "without prejudice" offer of 2% in each year of a two year agreement. In making this offer, the University had an understanding about the meaning of without prejudice and the very limited nature of any communication arising from the discussions. This would ensure that the proposal would not be a springboard to arbitration, but rather the basis for a possible settlement.

88. It became clear that the Faculty Association had a different understanding of the basis of the discussions when it published the University's offer in a blog on the Association's general website.

89. Whether the Faculty Association's publication of the University's offer was appropriate or not need not be decided, because either way it has left the University with no other option but to come into this arbitration with its last position as its proposal for a salary award. The publication of its without prejudice position has set an expectation among the bargaining unit membership that precludes the University from coming into this arbitration with any other position. It means that the University is presenting a position in arbitration that gives it absolutely no room to accommodate higher increases, well aware of the predilection of interest arbitrators to want to split the difference in making a salary award.

90. One of the problems with the traditional approach of interest arbitration (other than final offer selection) is that it encourages the parties to hold back from presenting a final proposal in bargaining, to leave room for an interest arbitrator to find the middle ground. Effective collective bargaining is undermined by the union's belief that it can only do better in arbitration than the employer's last offer in bargaining.

91. The University sought to guard against this belief by making a final offer, on a without prejudice basis. However the publication of that offer, setting an expectation among faculty members, has left the University potentially vulnerable to a higher award at arbitration; a
result that would eliminate any incentive on the University to put its best position forward in collective bargaining in the future.

92. This said, the University firmly believes that an application of the criteria set out in the Framework Agreement, and the principles of the Labour Relations Code should lead the arbitrator to accept that the University's proposal is a principled position, at the limit of its ability to pay, and fully consistent with the criteria for interest arbitration set out in the Agreement.

93. The University's proposal is also consistent with the settlements reached with its other employee groups. While this is not an express criterion of the Collective Agreement, it is an important factor in assessing the "reasonable balance" of University expenditures; a balance that would be tipped by reallocating resources to fund higher salary increases for one employee group over another. It is also an important consideration in applying the duties on arbitrators set out in section 2 of the Code, to preclude interest arbitration from being used as a mechanism to leapfrog or whipsaw settlements with other University employee groups.

94. With those background comments in mind, we return to the language of Article 11.02(e) of the Framework Agreement.

95. As the documents at Tabs 11 and 16 demonstrate, the University's salary proposal is at the limit of its ability to pay; whether considered at the more general level of the University having to cut costs in other areas to avoid a deficit while at the same time implementing the proposed salary increase, or at the more micro level of "reasonable balance" - preserving the same percentage of its total expenditures for faculty salaries that the parties negotiated in the previous rounds of bargaining.

96. Once the University demonstrates that its salary proposal exhausts its "ability to pay" that is the end of the inquiry. It is only "if the Arbitration Board is satisfied that the University has the ability to pay the cost of an award" that the other criteria in Article 11.02(e) come into play.

97. In this case the evidence demonstrates that the University's proposal is at the limit of its ability to pay, as defined in the Framework Agreement. It does not have the ability to pay more.

98. However, even if the Arbitrator were persuaded by the Association that the University could pay salary increases higher than the University has proposed, the other criteria would not support a higher award in any event. For ease of reference, those criteria are:

i) the need for the University to maintain its academic quality by retaining and attracting Faculty Members, Librarians, and Program Directors of the highest caliber;

ii) changes in the Vancouver and Canadian Consumer Price Indices;

iii) changes in British Columbian and Canadian Average Salaries and Wages; and
iv) salaries and benefits at other Canadian universities of comparable academic quality and size.

99. The document at Tab 19 of the University's Book of Documents demonstrates that the University has no difficulty in attracting and retaining top level faculty. It receives an average of 58 applicants for each nationally advertised position and there have been 42 resignations in the past year. This is comparable to the number of resignations in the previous 3 years, which is minimal (0.01%) when considering a complement of approximately 3500 faculty.

100. The documents at Tabs 20 and 21 (in the University's Book of Documents) show that the University's salary proposal significantly exceeds changes in the Vancouver and Canadian CPI and the changes in B.C. and Canadian Average Salaries and Wages.

101. Both the Vancouver and Canadian CPI have remained virtually unchanged over the past year, with the rate of change declining. The graphs at Tab 20 show the change in CPI for each month when compared with the same month in the previous year. The rate of change has been below 1.5% since the middle of last year.

102. The Canadian CPI rose 1% in the 12 months to March 2013. The change in inflation for British Columbia was the lowest in the country at 0.5% for March 2013. The Vancouver CPI average change for 2012 was 1.3% (Tab 20).

103. The graphs at Tab 21 show that change in Average Weekly Wage Rates for each month when compared with the same month in the previous year. For BC, the rate of change has been below 1.5% since the middle of last year with the exception of October 2012 and February 2013 which were less than 2.5%. As at March 2013, British Columbia's average wages were 5th highest in the country.

104. The document at Tab 22 of the University's Book of Documents shows that faculty salaries at UBC are at the upper end of the scale of Canadian Universities of comparable quality and size. The document shows this comparison for UBC Vancouver and UBC Okanagan. It is relevant to make this distinction, as UBC Okanagan is transitioning from a college where the salaries are not comparable. This analysis includes a 1% payment that has formed part of the Collective Agreement for the last 8 years. The comparator salaries do not include the annual lump sum payments. However, given that the 1% has been a feature of UBC faculty salaries, the adjustment is appropriate.

105. In the July, 1997 Arbitration Award between these parties, the relative position of UBC was noted as follows:

In terms of the average salaries of all professorial ranks, however, UBC pays higher than most other universities except Simon Fraser, McMaster, the University of Toronto and Waterloo (at page 22).

106. That same general comparison is true today.

10 The comparison is with the "U15" universities in Canada: large universities which are research intensive.
107. Even if a broader group of Canadian universities is considered, UBC Vancouver and UBC Okanagan on average rank near the top of the list (Tab 19).

108. This same document shows that faculty salaries at UBC are well ahead of salaries at both SFU and the University of Victoria at a time when all three universities are operating in an environment of significant fiscal restraint.

109. Simon Fraser University and the SFU Faculty Association have now resolved a renewal of their agreement for 2012-2014 through final offer selection arbitration (University's Book of Documents Tab 23). The renewal agreement provides for a general increase of 2% in each year (1.95% in the second year plus a 0.05% for a psychological services benefit). The university's proposal, which was awarded by the arbitrator, to add four steps to the Senior Lecturer scale and four steps to the Professor scale would be offset in large part by a reduction in cost of retention payments for members of these groups. The settlement therefore was a net 2% in each of the two years of the agreement.

110. That is the same proposal the University is making in this case, including a continuation of PTR at 2.5%.

111. While not an express criterion under the Agreement, the University's proposed 2% general salary increase in each year of the two year agreement compares favourably to the general salary increases negotiated at other Universities (University's Book of Documents Tab 24).

VI. OTHER PROPOSALS WITH MONETARY IMPLICATIONS

112. In addition to its salary proposal, the Association has made a number of proposals with monetary implications. All of these proposals have been costed at Tab 11 of the University's Book of Documents.

113. All of these proposals are beyond the University's ability to pay, as discussed above if they were to be awarded in addition to the University's salary proposal. With respect to the Association's proposal for Vision Care for example, if that proposal was to be awarded, then the University's salary proposal would have to be reduced by the equivalent cost.

Proposals re: Sessionals

114. The Association's proposal for full pension and benefits coverage for all Sessionals (regardless of level of appointment) has a significant cost. Moreover, it is premised on the idea that Sessionals are long term appointments; a proposition that the University does not accept. As we point out below, there is a fundamental disagreement between the University and the Association on the role that Sessionals play in supporting teaching at the University. The Association's proposal for pension benefits, quite apart from the cost issue, reflects and highlights this disagreement.

115. The Association has also proposed a minimum salary scale for Sessionals replacing the scale at page 45 of the current Agreement on Salaries and Economic Benefits. The University is opposed to this proposal, again because of its significant cost, and because it would completely revamp assumptions as to what constitutes a full time course load in different faculties and departments.
116. A “full” teaching course load for faculty members varies from unit to unit ranging from 6 to 15 credits of teaching per term.

117. The grid at page 45 was negotiated in many years ago when the University and Association agreed to a standard annual salary for full time sessionals. From there, the parties determined what a full-time teaching load was in each faculty and divided the salary figure accordingly. The calculations in the grid were designed to create a consistent full time salary for Sessional instruction. This flat rate mirrors the manner in which tenure-track faculty teaching loads are calculated.

118. The Association has proposed a standard full time load for Sessional faculty members of nine (9) credits per term. This is based on the full time course load in the Faculty of Arts. The Association has also proposed that the per-credit rate be increased significantly.

119. This proposal is both financially and operationally unworkable. The University estimates that this proposal would cost approximately $1.8 million to implement (Tab 11) in the University’s Book of Documents). Moreover, certain faculties such as the Faculty of Education (whose full time load is 15 credits) will be unduly impacted financially as they would effectively be required to almost halve the amount of work currently expected of a Sessional for the amount they are paid; or stated differently, double their salary for full time work.

120. The Association’s proposal is also fundamentally at odds with the language of the Agreement on Conditions of Appointment for Sessional Faculty Members which provides in Article 1.4 that “Full-time” will be defined Faculty by Faculty, as it is given by the current pattern in different types of academic activities...”.

Proposal re: Librarians

121. The parties agreed to strike a side table composed of representatives from the University, the UBC Librarians’ Association and the Faculty Association to address potential amendments to the Agreement on Conditions of Appointment for Librarians. With the authorization of the parties, the side table had several meetings and developed a number of explicit and well thought out recommendations regarding almost all proposals raised.

122. The library side table was able to agree on all proposals discussed except the Faculty Association’s proposal regarding granting administrative leave to head librarians. The Association suggested that librarians appointed to the role of Head Librarian should be entitled to administrative leaves equivalent to the entitlement of unit heads in the professoriate at the conclusion of their term.

123. There are significant costs associated with this proposal and, if it was to be awarded, the University’s salary proposal would have to be reduced by the equivalent cost. Nor does the University agree that the Faculty Association has demonstrated a need for administrative leaves for head librarians.

124. During their administrative appointments, members of the professoriate reduce their teaching and research endeavours to fulfill their administrative obligations. Administrative leaves are intended to provide a reasonable period of time for administrators who are
returning to the academic ranks to focus on their scholarly and professional activities and to re-integrate with their disciplines before they resume their regular duties as faculty members.

125. The rationale for granting members of the professoriate administrative leaves at the conclusion of their administrative appointments is not applicable to librarians. Unlike administrative appointments in the professoriate, Head Librarian appointments can be renewed indefinitely. Indeed, some head librarians will be reappointed throughout their careers. Their duties are also different. During their appointments, they continue to perform work of the same nature as they performed before their appointments. Nor are they required to teach and therefore do not require the leave time in order to prepare for that role. Librarians are entitled to study leave (see Article 7.02 of the Agreement on Conditions of Appointment for Librarians) should they require an opportunity to focus on academic initiatives.

VII. NON-MONETARY PROPOSALS

126. We have referred to recent arbitration decisions under the Fire and Police Services Collective Bargaining Act in regard to the principles of interest arbitration where all terms of a collective agreement, both monetary and non-monetary, are resolved by arbitration if the parties fail to reach agreement. These recent arbitration awards have established principles to be applied in considering non-salary proposals. We anticipate that the Association will argue that if it does not get a salary increase of more than 2%, then it should realize significant changes in the language of the Agreement, to compensate for a lower-than-proposed salary increase.

127. In City of Richmond v. Richmond Fire Fighters' Assn., [2009] B.C.C.A.A.A. No. 106 (University's Brief of Authorities Tab 2), Arbitrator McPhillips discussed the reasons which make it difficult to adjudicate terms other than wages and term of the agreement:

74 With respect to the other issues in this dispute there are four general observations to be made. The first is whether this Award should address those matters at all. Generally, interest arbitration awards will deal with such issues only if there is a clear and compelling reason to do so: Greater Victoria Labour Relations Association [1993] B.C.C.A.A.A. No. 321, October 28, 1993 (Ready); City of Vancouver, December 21, 1983 (McColl); City of Campbell River, supra; City of Burnaby, supra.

75 The second consideration is that in the evidence at the hearing the parties primarily focused on wages and term of the Agreement and very little attention was placed on these other matters with the result that there is little in the way of background or analysis that has been provided for consideration.

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

77 The final point is that this Collective Agreement will expire in approximately three months and the parties will soon have another opportunity to address directly the matters of concern to them and the bargaining history is that is what they have done.
As a result of these considerations, it will be appropriate to include these items in the new Agreement only if there is a very obvious reason to do so.

128. Arbitrators are reluctant to award proposals that have the effect of infringing management rights or otherwise deal with "operational" issues. In City of Surrey, supra, Arbitrator McPhillips denied the union's proposal to introduce a new category of officer into the parties' collective agreement, reasoning as follows:

107  It is my opinion this proposal from the Association with respect to changing the corporate structure and creating a new classification presents two major difficulties. First, it is one which would require far more information than is available in this arbitration process. There have been assertions made with respect to "span of control" and administrative responsibilities but there is no proof that any difficulties are actually being experienced with the existing structure. Moreover, besides that information being required, more detail with respect to the actual suggested solutions would have to be thoroughly analyzed. This is far too complicated an issue to be addressed on the limited evidence available at this hearing.

108  The second problem is that, as the City points out, the structure of an operation is a basic management right and should not be arbitrarily amended. Matters of this nature should be only addressed by an interest arbitrator in the most fundamental and obviously dysfunctional of situations where other solutions have failed. Moreover, these types of changes may involve considering whether it is appropriate to create "exempt" staff and that is a matter better left to the parties themselves or to the British Columbia Labour Relations Board. (emphasis added)

129. As stated by Arbitrator Lanyon in Construction Labour Relations Assn. of British Columbia, supra at paragraph 8:

...interest arbitration is a conservative exercise. As a general rule, neither party should look for a major breakthrough from a third party neutral; that is reserved for negotiations.

130. In Participating Hospitals v. Service Employees International Union (Renewal Collective Agreement Grievance, [2010] O.L.A.A. No. 629, the arbitration board addressed similar circumstances to these, where the employer's bargaining ability was limited by government action. In the result, the union came in to interest arbitration with the expectation that they would make significant gains in their non-monetary agenda to compensate for the lack of economic gain. The board refused to accede to this tactic, and determined that given that the parties would be returning to the bargaining table in less than one year, the appropriate course of action was to refer most of the non-monetary proposals back to the parties to make the appropriate trade-offs in bargaining:

15  As we noted, the bargaining became "frozen" following the passage of Bill 16 and the related government pronouncements. The Union, in turn, decided to proceed to arbitration with its full non-monetary bargaining agenda in place — no doubt in the belief that if an arbitrator was to accept the Participating Hospitals' economic position, there would be an enhanced likelihood of succeeding with respect to its non-monetary agenda. In the result, we have before us an inordinate number of "breakout" items. We refer to:

- Standardized Language
- Job Posting
- Use of Part-Time Employees
• Contracting Out
• Work of the Bargaining Unit
• Contract Terms for RPNs
• Pay Equity
• Workload/Professional Responsibility

16 While these demands reflect legitimate Union objectives, the reality of free collective bargaining is that bargaining objectives are achieved over time and that, in any given set of negotiations, the union prioritizes its objectives as the bargaining progresses. Tradeoffs and compromises are made with the result that the parties are able to reach a voluntary two-party agreement, as these parties have done over the previous three rounds, or if the dispute goes to interest arbitration, the union priorities are clear. This has not happened here. As we have noted, we have before us a raft of Union "breakout" demands. If awarded, these demands would provide superior coverage to that enjoyed by other unionized hospital workers (contracting out, work of the bargaining unit, use of employment agencies, use of volunteers, utilization of part-time employees, professional responsibility and RPN provisions) or are problematic within the context of this central process (pay equity and standardized language). This is not to say that breakout demands can never be realized. However, interest arbitrators have long required a party seeking to achieve breakout language to establish a "demonstrated need" for it. It follows that breakout language will be awarded where it is identified as a union priority and where a compelling case for its inclusion in the collective agreement is made. An interest board cannot be expected to simply choose from a laundry list of such demands. To repeat, it is incumbent upon the party seeking this type of change to prioritize its demands and to then establish the required demonstrated need. Neither has occurred here in respect of the Union's breakout demands. In circumstances where the bargaining in this round became frozen as a result of the government intervention, where the parties had voluntarily agreed to the language at issue in the preceding three rounds, where to award any of these Union demands would put the Union in an advantaged position relative to its hospital comparators and where the parties will be returning to the bargaining table in less than one year, we have decided that the best course would be to remit these matters (including the Participating Hospitals' demands regarding staff planning and notice of layoff) back to the parties for consideration in the next round. (emphasis added)

131. The University submits that the same result is appropriate in these circumstances.

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

a. There is no compelling need for the changes requested;

b. The issues raised are complex, and there is insufficient information before this arbitration board for it to be satisfied that the changes should be made;

c. It would be appropriate to make trade-offs for the changes requested; and

d. The next round of bargaining is imminent.

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

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

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

136. In the alternative, in the event that any of the Faculty Association's non-monetary proposals are to be awarded (in whole or in part) the University advances a number of its own proposals which may be used to replicate the "trade-offs" that would have been made in free collective bargaining. Those proposals are described in paragraphs 196 - 276 below. The University has also provided a brief description of its position with respect to the Faculty Association's non-monetary proposals, and with respect to the tripartite issue of Sessionals/PhD students/Lecturers.

**The Association’s Non-Monetary Proposals**

137. The Faculty Association has made a number of proposals, none of which should be awarded at interest arbitration pursuant to the tests set out in the *City of Richmond* and *City of Surrey* decisions, supra. There is no clear and compelling reason for the proposed amendments: the potential impact of the amendments is significant and complex; they should be the subject of collective bargaining so that the appropriate trade-offs can be negotiated; and none of them is so compelling that the parties cannot wait another year to address them in bargaining.

138. The following constitutes a brief summary of the University’s position with respect to the Faculty Association’s outstanding bargaining proposals. The Faculty Association’s April 4, 2013 statement of position, which contains the Association’s proposed language, is at Tab 7 of the University’s Book of Documents.

A. **Investigations**

**New Article for Framework for Collective Bargaining**

139. The Association has proposed the addition of a new article to the *Framework Agreement* establishing mandatory procedures for investigations conducted by the University.

140. The Association’s proposal includes extensive language regarding various matters including the following:
a. A broad definition of "investigation" which includes anything that "may reasonably be expected to result in discipline";

b. That a faculty member would receive prompt notice of any complaint upon "acceptance" of the same;

c. That the University would at the same time advise members of their right to advice and/or representation by the Faculty Association;

d. That the University would be obligated to provide the respondent and the Faculty Association "within a reasonable period of time" a copy of the complaint and the name of the investigator;

e. Specific content requirements for any terms of reference produced;

f. A requirement that all evidence be disclosed to a respondent before s/he is required to respond to any allegations;

g. Specific requirements regarding the manner in which a respondent would be entitled to provide evidence;

h. Limitations on the investigator's powers, including a prohibition on the investigator being empowered to make recommendations with regard to disciplinary action;

i. An obligation that a meeting be convened following the production of the investigator's report and before any discipline is imposed;

j. A requirement that any investigation launched be limited to the specific allegations in the "complaint";

k. An obligation on the University to take steps to maintain the privacy of the investigation and inform participants of the "confidential" nature of any investigation;

l. An obligation that the University provide a copy of any investigation report produced to both the respondent(s) and the Faculty Association;

m. That the disciplinary process be entirely distinct from academic (tenure/promotion/merit) assessment processes and discretionary salary adjustments.

141. The University is not prepared to add any of this language to the collective agreement. Nor should it be awarded at arbitration. It is unnecessary, unworkable, and there is no clear and compelling reason for an arbitral determination of this issue.

142. On any given day there are numerous investigations being conducted across the University. As written, the Faculty Association's proposal could cover virtually any investigation involving a faculty member and inappropriately overtake various procedures and processes that have been carefully developed and implemented at the University to suit the applicable circumstances.
143. Investigations conducted by Heads or Deans are currently governed by Policy 95 which sets out comprehensive guidelines for investigative procedures at the University. Policy 95 ensures that natural justice is respected by the University in any investigations conducted into the conduct of faculty members. In the University's submission, Policy 95 addresses all of the underlying issues covered by this proposed language. A copy of Policy 95 and the "guidelines" adopted by the University are at Tab 25 of the University's Book of Documents.

144. Other policies provide for investigations under specific circumstances. For example, Policy 3 - Discrimination and Harassment establishes detailed procedures for investigations of allegations of harassment and discrimination. Equity-related investigations are managed by the University's Equity Office which has specialized expertise in addressing the particular issues governed by the Policy. The procedures established by Policy 3 are comprehensive and uphold the principles of fairness and natural justice. A copy of Policy 3 is at Tab 26 of the University's Book of Documents.

145. Policy 85, a copy of which is at Tab 27 of the University's Book of Documents, provides for investigations into issues of scholarly integrity. Again, these procedures are comprehensive and uphold the principles of procedural fairness and natural justice and are specifically tailored to investigating issues of scholarly misconduct.

146. The Office of Internal Audit which is governed by Policy 111, a copy of which is at Tab 28 of the University's Book of Documents, is responsible for ensuring transparency and accountability when it comes to the large volumes of funds for research, teaching and other University purposes that are administered by the University. That body also conducts its own investigations and reports directly to the Board of Governors.

147. The above examples do not constitute an exhaustive list of the various types of investigations being carried on at the University at any given time. The point is that it would be inappropriate to specify only one type of investigation in the collective agreement in the case of conduct that might result in discipline.

148. The University strives to uphold the principles of procedural fairness and natural justice in its investigations, but submits that the specific procedural requirements necessary to satisfy those obligations differ depending on the particular circumstances. There is an extensive body of arbitral jurisprudence regarding the requirements of a fair and lawful investigation. This body of law is nuanced and situation-specific. The University's reaction to any given complaint must be equally nuanced. These requirements cannot be effectively summarized in a few short paragraphs for inclusion in the Agreement without creating an unduly cumbersome and rigid scheme.

149. The language proposed by the Association mandates a level of formality to every investigation that is both unworkable and unnecessary. In fact, in some circumstances, the level of formality required would be detrimental to resolving a dispute in an appropriate manner.

150. The University's goal is generally to resolve disputes and issues of concern as efficiently and informally as the particular circumstances allow respecting procedural fairness as appropriate in the circumstances. In many cases administrators and faculty members would rather not have an overly formal process in place. The University's administrators have an obligation to follow up on all questions and issues raised to ensure a safe, healthy
and productive work environment, and they estimate that in the overwhelming majority of cases, they manage to resolve issues through consultation and discussion without spending unnecessary time and effort, or causing undue embarrassment to the faculty members involved.

151. A one-size-fits-all approach to investigations is not feasible in the University environment. UBC is a complex institution with complex issues. The University requires the flexibility currently provided for in its policies to address different kinds of issues, keeping in mind the principles of natural justice and procedural fairness, and understanding that the University must defend its process before an arbitrator, human rights tribunal or court, if challenged by the Association or the individual faculty member. By incorporating a series of rigid procedural requirements in any case that may be “expected to result in discipline” - an extremely broad category of cases - into the collective agreement, this flexibility will be lost. This would result in increased costs and delays in the resolution of cases.

152. Furthermore, in certain circumstances the University may be unable to uphold the proposed obligations for disclosure and confidentiality given the requirements of provincial privacy legislation (i.e. Freedom of Information and Protection of Privacy Act).

153. The University submits that the Faculty Association has failed to provide a compelling rationale for the implementation of these investigation procedures or demonstrate that they are necessary to rectify a problem with the University’s current procedures.

154. This new article would constitute the sort of significant breakthrough gain for the Faculty Association that is inappropriate to award via the conservative process of interest arbitration; it should be implemented only through the process of give-and-take bargaining.

B. Equity, Diversity and Anti-Discrimination

Article 4 of Framework for Collective Bargaining

155. The Faculty Association has proposed extensive equity-related modifications to Article 4.01 and 4.02 of the Framework for Collective Bargaining. It has also proposed to modify Article 4.03 of the Agreement on Conditions of Appointment for Faculty to explicitly recognize all non-traditional methods of scholarship in its assessment of scholarly activity for purposes of appointment, reappointment, tenure and promotion.

Article 4.01 and 4.02 - Discrimination

156. The University fully supports the Faculty Association's proposal to amend the collective agreement to add "gender identity" to the prohibited grounds of discrimination listed in Article 4 of the Framework Agreement as illustrated at Tab 29 of the University's Book of Documents.

157. Otherwise, it is the University's position that the equity language currently found in the Agreement is broad and inclusive. The remaining revisions proposed by the Faculty Association are unnecessarily and, indeed, may be counterproductive.

158. There is no need for, or benefit to, the addition of the extensive language proposed by the Faculty Association. Most of the additional wording does not make any substantive change to the protections contained in the collective agreement and will only obfuscate rather than clarify the University's obligations in this regard. The proposed language lacks
precision and lends itself to multiple interpretations which will only lead to further disputes down the road.

159. Simply adding more equity-related statements to an Agreement does little, if anything, to ensure that all members of the university community are treated equally. The University is bound by law to comply with the B.C. Human Rights Code regardless of the language contained in the collective agreement. It is committed to removing barriers to greater diversity within the University, including those faced by historically disadvantaged groups. This commitment is stated clearly in Place and Promise: The UBC Plan (at Tab 30 of the University's Book of Documents) and is evident from the many equity-related projects and initiatives currently underway on campus. No language of the nature proposed by the Association will strengthen this commitment.

160. Rather than adding confusing and repetitive language to an otherwise strong statement of the University's commitment to equity, UBC would prefer to focus on the concrete initiatives currently underway on campus such as various initiatives aimed at engaging Aboriginal people and integrating understandings of Indigenous cultures and histories into its curriculum and operations (see: Place and Promise, page 16) including the appointment of a Senior Advisor to the President on Aboriginal Affairs. The University also appointed a Director, Intercultural Understanding Strategy Development whose purpose is to research and implement intercultural programs and provide resources for students, clubs and faculty members to empower others to promote intercultural understanding through their unique cultures and approaches. The University also appointed a Senior Advisor to the Provost on Women Faculty.

161. A Provost's Advisory Committee on Equity and Diversity was established to provide the University with advice and direction to meet that commitment and to create and maintain an inclusive work and study environment for students, faculty and staff. Moreover, the University recently concluded a joint project with the Faculty Association on gender equity salary adjustment and best practices in employment equity.

162. Individual faculties are also making efforts to ensure equity. For example, the Faculty of Science appointed an Associate Dean, Faculty Affairs and Strategic Initiatives who is responsible for ensuring equity and diversity within faculty recruitment, retention, mentoring, career evolution, policies and procedures.

163. The University has also enacted Policy 3: Harassment and Discrimination which is at Tab 26 of the University's Book of Documents. This is UBC's equity statement. It was carefully drafted, and was recently revised and updated under the supervision of Mr. Tom Patch as the University's then Vice President Equity. Mr. Patch is a former B.C. Human Rights Tribunal member and expert in issues of equity and human rights. There is no need to include language in the collective agreement that is already contained in policy. Policy 3 is actively enforced across the University.

164. The University submits that the Faculty Association has not demonstrated that there is any problem with the current equity language on campus; the University is unaware of any equity-related disputes that have arisen due to inadequate language. Nor has the Association provided any other demonstrated need for the complex, repetitive and oblique language they have proposed to add to the clear, broad statement of equity already contained in the collective agreement.
Article 4.03 - Criteria for Appointment, Reappointment, Tenure and Promotion

165. The Association has also proposed language which explicitly requires the University to give recognition to "diverse substantive contributions to knowledge" when assessing scholarly activity for purposes of appointment, tenure and promotion. It seeks an acknowledgement that "diversity demands representation of difference in terms of vision, values, cultural mores, methodologies and epistemologies in critical analysis." Again, it is the University's position that this language lacks clarity and is unnecessary. The rationale for this proposal is already addressed by the existing language of the Agreement.

166. The University is alive to the challenges associated with applying "normal expectations" and traditional evaluative measures regarding scholarly output to scholars who approach research from different perspectives and/or use innovative, non-traditional methods. For instance, rather than producing traditional peer-reviewed written publications, some professors focus on university-community research activities, and certain aboriginal scholars perform work focused primarily on oral dissemination of information. The University is aware of these challenges and is working to apply traditional scholarly metrics in a manner that ensures that these "non-traditional" contributions are fairly assessed.

167. The University agrees that valuable scholarly activity may include diverse approaches or contributions that demonstrate academic and scholarly excellence. But, any language that is added to the collective agreement to this end must be carefully considered and reflect those standards of excellence that the University strives to uphold. Non-traditional research must be subject to the same criteria for assessment of quality as traditional research, i.e., peer-review and evidence of impact and evidence of broad recognition. In other words, quality has to be confirmed by arms-length reviewers or referees; no one can independently claim that their scholarly work is of high quality. The University cannot agree to the language proposed by the Faculty Association because in its view, it does not clearly reflect the expectations of the University.

168. Nor should language be imposed via interest arbitration given the limited evidence that is before the arbitrator on this topic; there is simply insufficient information available to ensure that this matter is given due consideration.

169. Regardless of the above, the University submits that it is also unnecessary to add further language to the collective agreement in this regard. In the last round of bargaining, the parties addressed this very issue by agreeing that the President must consider "all relevant and contextual factors" in assessing a faculty member's scholarly contributions in any promotion and tenure decision: see article 5.14(e) of the current Agreement which is reproduced at Tab 31 of the University's Book of Documents.

170. This new language has been in place for less than two years and the parties need to give it time to operate before making further substantive changes in this regard. Until the parties have had sufficient time to evaluate the effect of the new language, there is no basis upon which the arbitrator should find that further language is necessary. The Faculty Association has failed to demonstrate that this new language is necessary, especially given the recent revisions to article 5.14.

171. Research is at the very heart of a University. The academic assessment of scholarly output is a highly specialized function that is best left to the community of scholars that makes up a University. It is that community - which includes faculty members, the
University's President, its Deans, and its Heads - that has the requisite knowledge and expertise to set appropriate standards for the assessment of scholarly output.

172. With respect, it is the University's position that language establishing standards for academic assessment should not be imposed by an interest arbitrator. Canadian courts have long shown great deference to the academic decisions of a University, and arbitrators should be similarly reluctant to intervene in university affairs: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 594-95 (University's Brief of Authorities Tab 10); *Paine v. University of Toronto et al.* (1982), 34 O.R. (2d) 770 (Ont. C.A.) at page 6 (University's Brief of Authorities Tab 11). This principle of deference applies equally in these circumstances, and innovative collective agreement language regarding non-traditional research should only be developed with great care and, if necessary, implemented through free collective bargaining.

B. Workload

Article 13 of Framework for Collective Bargaining

173. The Association has proposed the addition of new language in Article 13 of the Framework Agreement establishing extensive new procedures and standards for assigning workloads for faculty members.

174. The University is not prepared to add any of the proposed language to the collective agreement. Nor should it be awarded at arbitration. Many elements of the proposal are simply unworkable, and there is no clear and compelling reason for an arbitral determination of this issue. It is unnecessary at this time given that the new language added the last round of collective bargaining has yet to settle.

175. The University agreed to extensive workload-related language in the 2010/12 round of bargaining. That new language is found at Tab 32 of the University's Book of Documents. UBC's general position with regard to the Association's proposed workload language is that the parties need time to work with the new language before it is changed again. The parties have only had just over one year with the new language. The parties have insufficient experience with this new language to properly evaluate its impact. Until that impact can be accurately gauged, there is no basis upon which to assert that further revised language is necessary and there is therefore no clear and compelling reason for adjudicating this issue at this time.

176. It is impossible to say that the existing language has not been effective until its mandate has been fully implemented. Furthermore, there is an active grievance at UBC's Okanagan campus under the 2010/12 workload language that has yet to be resolved or heard by an arbitrator. It remains to be determined how that language will be interpreted.

177. In fact, to the University's knowledge, the vast majority of workload-related concerns to date have emerged from UBCO, rather than from the Vancouver campus. This is not surprising given that UBCO is an institution in transition from its college background. UBCO's faculty only constitutes approximately 10% of the full complement of faculty members at UBC (approximately 350 to UBCV's 3500 faculty members and are a mix of newly hired faculty and faculty who transitioned from the workload expectations of the college system. Workload is not a university-wide issue; issues are predominantly a reflection of transition on the UBC Okanagan campus. UBC Okanagan is a young campus established in 2005 where units and Faculties continue to be in a process of significant
change and reorganization while being led by Heads with limited experience in their roles at UBC. This means that many units have not yet reached the state of stability and experience consistent with effective collegial workload guidelines and practices. Education and coaching is ongoing.

178. To date, the Faculty Association has not provided any explanation or rationale as to why it is unwilling to give the existing language time to see how it works in practice.

179. The determination of workload is a fundamental aspect of management rights. The University is unwilling to fetter these rights to a greater degree than already exists under the Agreement. The University respectfully submits that an interest arbitrator should not interfere with those rights in these circumstances. Any new workload language should be the subject of negotiations between the parties in the next round of bargaining.

180. The Faculty Association has expressed a view that without further language on workload, faculty members are unable to successfully do the work necessary to achieve promotion and tenure. In other words, they suggest that a workload policy generated by a committee would better enable faculty members to reach the goal of promotion and tenure.

181. The University does not understand the argument that workload language is necessary to help faculty members achieve promotion and tenure. On the contrary, under the current collective agreement, the University's record of granting its faculty members promotions and tenure is very high. Approximately 96% of candidates are successful.

182. The University is absolutely committed to helping its faculty members succeed and it was in this spirit that the University committed to the workload language negotiated in the last round of bargaining. In the University's view, the current language establishes a consultative process that is in keeping with the principles of collegial governance.

183. The language proposed by the Faculty Association would only serve to reduce flexibility and collegiality and instead create prescriptive rules that are more in keeping with an industrial model of workload management than a research-intensive university. There are far more factors that go into a fair and equitable workload than the assigned number of teaching credits. Workload generally involves a combination of research, teaching and service.

184. This new language could also impact the University's ability to ensure excellence in the educational experience being provided to students. UBC wants to ensure that the best teaching happens in the courses it offers. In some units that necessitates being flexible in terms of utilizing faculty members' skills and strengths. Article 13 provides the necessary balance between allowing the University flexibility, and ensuring that faculty members are assigned reasonable and equitable workloads.

185. The Faculty Association's focus appears to be on the imposition of prescriptive and fixed teaching loads, which are in contradiction to the flexibility reflected by the current language that allows the relative balance of activity in teaching/research/service to be adjusted in discussion between individual faculty members and their Head.

186. In developing its proposed language, the Faculty Association appears to have cherry-picked certain components of the workload language in place at the University of Toronto. Notably, they have eliminated the broad discretion of the Dean to refuse to accept a
proposed workload policy developed by a departmental committee for any reason so long as s/he does not act in a manner that is irrational, arbitrary or in bad faith (see: Article 2.8). A copy of the University of Toronto's workload policy is at Tab 33 of the University's Book of Documents.

187. In the University's view, the current language in UBC's collective agreement is preferable to the University of Toronto's language; it allows for a more collegial, flexible and equitable distribution of workload. The language proposed by the Faculty Association reduces this flexibility and suggests a more prescriptive, rule-based approach to workload that does not reflect the realities of a university work environment. The proposed language limits the Head's role in assigning workload based on multiple factors related to unit operations and individual circumstances and it ignores the role of the Dean in ensuring fairness as well as operational and fiscal integrity across the Faculty.

188. In the end, given the administrative structure at UBC, the responsibility for assigning workload is appropriately within the mandate of unit Heads. Workload allocation is a fundamental management right. The current language provides for collegial consultation in the development of workload policies and assignments, and further limitations on the head's discretion of the nature proposed by the Faculty Association are unworkable.

189. The Head's role in the allocation of workload in no way detracts from the principle of collegial governance. Collegial governance requires checks and balances from all of the various constituents of the University community, not the collective determination by faculty members of their own workload expectations. Moreover, Heads are members of the bargaining unit. A Head is simply one amongst many "colleagues" who has temporarily assumed various administrative duties. This role is enshrined in the collective agreement.

190. Article 1.1 of the Agreement on Conditions of Appointment for Faculty explicitly acknowledges that Heads "...provide intellectual and administrative leadership for the unit, and are accountable for the operation of the unit, including the budget..."

191. A Head has a broad responsibility for acting in the best interests of not only faculty, but the unit as a whole. This perspective is necessary for the proper administration of workload. The assignment of workload and the finalization of workload policies must fall to unit Heads given the significant administrative, operational and budgetary impacts of such decisions.

192. It is impossible to agree that no faculty member will be required to teach in the summer term. UBC has existing programs in Education, Medicine and Dentistry that require teaching in the summer. Across North America, universities are moving to trimester systems in which a university's enormous assets can be put to full use during the summer term. This reflects changing student expectations and financial realities. UBC cannot agree to language at this time that would interfere with existing programs and preclude it from making the most effective use of its resources.

193. The Faculty Association's proposal that there be no significant discrepancies between workloads at the UBCO and UBCV campuses is similarly unworkable given the different nature and evolution of the two institutions. Again, UBCO has only been established for 8 years; it is an institution in transition (towards the research intensiveness of the Vancouver campus) and at this time, there are significant differences between the extent of the research performed on the two campuses. Workload allocations must reflect the different
stage of development and maturity on each campus.

194. Not only is there no clear and compelling reason for changing workload language that has only recently been implemented, there is also insufficient background information available to allow for the fulsome analysis of the complex issues in play that would be necessary for an interest arbitrator to impose new language in this regard.

195. In the University's submission, no further language regarding workload should form part of the award.

**The University's Non-Monetary Proposals**

196. As stated above, it is the University's position that no non-monetary proposals should be awarded at arbitration. Rather, the award should be limited to resolving the financial dispute between the parties and any non-monetary proposals should be referred back to the parties for resolution by way of the give-and-take of collective bargaining which will likely begin in January of 2014.

197. In the alternative, should this Board see fit to award any of the Faculty Association's proposals, then the University submits that in order to ensure that the award replicates the likely results of free collective bargaining, it would be necessary to also award one or more of the University's outstanding non-monetary proposals. The University would not have agreed to any of the Faculty Association's non-monetary proposals in bargaining without a reciprocal agreement from the Association on one or more of the University's proposals.

198. Thus, for the purpose of providing this arbitration board with the requisite "trade-offs" in the event that it chooses to award any one (or part of) the Faculty Association's non-monetary proposals, the University's final proposals - in rough order of importance - are described below.

199. These proposals were developed and proposed at the bargaining table consistent with the University's guiding *Principles and Values for Collective Bargaining*, a copy of which is at Tab 34 of the University's Book of Documents. These proposals support the University's overall objective of encouraging, inspiring and valuing the highest standards for the University in keeping with the spirit and intent of *Place and Promise: The UBC Plan*, a copy of which is also at Tab 30 of the University's Book of Documents.

200. The University's primary goal in this round of bargaining was to achieve an approach to faculty employment that better rewards merit and upholds the standards of excellence necessary for the University to compete on the highly competitive global stage. This goal of ensuring and rewarding excellence at the University underlies not only the University's own proposals, but also its concerns about some of the Faculty Association's proposals.

201. A University is only as good as its faculty members; they are essential to its success. UBC values the excellent relationship it currently enjoys with its faculty members which is managed pursuant to the core principles of collegiality, shared governance, and flexibility. These principles reflect the traditional nature of a University as an independent community of scholars dedicated to excellent teaching and the pursuit of knowledge. The University must be mindful that these core principles, which are essential to the success of the institution, are not undermined - deliberately or inadvertently - by its negotiated agreement.
202. In the following sections, all references to the "University's List of Proposals" or the "Attachments" refer to the University's list of outstanding issues and final position on the same, delivered April 4, 2013.

A. Proposal 7: Tenure and Promotion (Attachment 6)

Ending the Practice of Tenure at the Assistant Professor Rank

203. The language in Attachment 6 of the University's List of Proposals proposes the revision of the existing tenure and promotion process to allow for tenure only in conjunction with a promotion to the rank of Associate Professor. Currently, faculty members may be granted tenure as Assistant Professors. This is not in line with the University's mandate of excellence. It is also inconsistent with ranking and tenure systems at comparable universities.

204. None of the universities in Canada with which UBC competes (i.e. the tier one research institutions) including McGill University, the University of Toronto, the University of Alberta, Queen's University or the University of Western Ontario allow for tenured Assistant Professors. Rather, tenure is awarded only in conjunction with or following an appointment to the rank of Associate Professor. UBC seeks to implement equivalent standards for its professoriate.

205. In fact, contrary to UBC's current system, many universities that have uncoupled tenure and promotion decisions, such as several of the Ivy League schools in the United States, have done so in the opposite manner: a candidate may receive a promotion to Associate Professor, but still be denied tenure.

206. Tenure and promotion are linked, but tenure is the key decision when it comes to a faculty member's career and the University's interests as an institution.

207. An Assistant Professor can currently achieve tenure in one of two ways under Article 2.03(f)(i) and (ii) of the Agreement on Conditions of Appointment for Faculty:

   a. if the Assistant Professor is promoted to Associate Professor at any time before or in the seventh year, in which case the promotion comes with tenure; or

   b. if a recommendation is made in the seventh year the faculty member may be granted "a tenured appointment at the rank of Assistant Professor" (that is, without promotion to Associate Professor).

208. A tenured appointment is essentially a lifetime appointment. The language of Article 3.08 of the Agreement on Conditions of Appointment for Faculty establishes the standards required to achieve an appointment as an Assistant Professor as follows:

   ...(completion of academic qualifications, and evidence of ability in teaching and scholarly activity. Evidence will ordinarily be required to demonstrate that the candidate for an appointment or promotion is involved in scholarly activity, is a successful teacher, and is capable of providing instruction at the various levels in his
40

or her discipline, **but it is sufficient to show potential to meet these criteria.** (emphasis added)

209. The threshold test for promotion to the rank of Assistant Professor from Senior Instructor was considered by Arbitrator Gordon in *University of British Columbia v. Faculty Association of the University of British Columbia (Chiu-Duke grievance),* [2005] B.C.C.A.A.A. No. 66 (University’s Brief of Authorities Tab 12). At paragraph 89, the arbitrator held that to obtain an appointment as an Assistant Professor it was sufficient to show:

\[\text{... a minimal level of participation in, or quantity of, scholarly activity ... I find the parties intended the level of participation in, or quantity of, scholarly activity for promotion to Assistant Professor to be relatively low or small ...}\]

210. This language – and the language of the Assistant Professor which is an entry level position - does not support a lifetime appointment. It describes an individual who has the **potential** to be, for instance, a successful teacher and a successful scholar. Tenure should be based on proven performance at the required standard. In other words, a lifetime appointment should at least reflect the standards required to obtain a promotion to the rank of Associate Professor which are stated as follows in Article 3.07:

\[\text{...evidence of successful teaching and of scholarly activity beyond that expected of an Assistant Professor. The candidate for appointment or promotion will be judged on teaching... on sustained and productive scholarly activity, on ability to direct graduate students, and on willingness to participate and participation in the affairs of the Department and the University.}\]

211. In *University of British Columbia v. Faculty Assn. of the University of British Columbia (Tenure Policy Grievance),* [2007] B.C.C.A.A.A. No. 175 (University’s Brief of Authorities Tab 13), Arbitrator Taylor discussed the nature of “tenure” at a university and reviewed a number of respected authorities on the subject. Those authorities included the Supreme Court of Canada’s decision in *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229, in which the Court spoke of the “rigorous initial assessment” which should precede the awarding of tenure and stated as follows:

\[\text{... By and large, members of a faculty begin their careers in university in their late 20's to mid-30's and with retirement age of 65 this means that they continue on staff for some thirty to thirty-five years. During this period, they must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmarks of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. Rigorous initial assessment is necessary as are further assessments in relation to merit increases, promotion and the like. But apart from this, and excepting cases of flagrant misconduct, incompetence or lack of performance, strict performance appraisals are non-existent and, indeed, in many areas assessment is extremely difficult. In a tenured system, then, there is always the possibility of dismissal for cause but the level of interference with or evaluation of faculty members' performance is quite low... The general situation is well stated by the Court of Appeal, at p.54:}\]

The policy of tenure in university faculties is fundamental to the preservation of
academic freedom. It involves a vigorous assessment by one's peers of academic performance after a probationary period of up to five years. Once tenure is granted, it provides a truly free and innovative learning and research environment. Faculty members can take unpopular positions without fear of loss of employment. It provides stability of employment, because once an academic is found worthy of tenure by his or her peers, he or she can be assured of keeping that position until death, or the normal age of retirement, unless there is termination for cause following a properly conducted hearing before one’s peers. This is based usually on gross misconduct, incompetence, or persistent failure to discharge academic responsibilities. ... (para.62)

(emphasis added)

212. Arbitrator Taylor also relied at paragraph 8 on the *University of Ottawa* decision *supra*, a case involving a denial of tenure. The Court said:

In deciding in favour of granting tenure the university makes a significant commitment to the individual faculty member. It is in the nature of a university appointment that a faculty member is virtually free from supervision. This is in part due to the impossibility of constantly monitoring and accessing the work of an academic and, in larger part, due to the notion of academic freedom. For these reasons the granting of tenure represents a high degree of trust in the faculty member and it is only upon being satisfied that this trust is warranted that the university will grant tenure. It is no doubt precisely because the granting of tenure entails a long term commitment without close supervision and review that such a long probationary appointment (as compared to the length of probationary appointments in industry) is required.

(emphasis added)

213. It is precisely this degree of trust required of a tenured faculty member and the significant benefits afforded to the same that demonstrates why a faculty member who has not achieved the performance standards required of an Associate Professor should not be granted tenure.

214. The University's goal is to ensure excellence amongst its professoriate. Allowing Assistant Professors who may not - or ultimately do not - achieve an Associate Professor ranking and the increased performance expectations of that rank, does not promote this mandate of excellence. Rather, it allows Assistant Professors to “plateau” in their performance (which was deemed insufficient for promotion) and nonetheless remain at the University indefinitely.

215. The *quid pro quo* of the protection of tenure is high performance expectations. The University invests considerable financial resources in its professoriate and the job market is highly competitive. The University estimates that the average cost for a tenured Assistant Professor over a lifetime appointment is approximately $3 million of public funding. This is a considerable sum to devote to an individual who has failed to demonstrate sustained and productive scholarly activity, an ability to direct graduate students, a willingness to participate in the affairs of the Department and the University and a record of successful teaching at the level expected of an Associate Professor. Nor is it commensurate with the University's commitment to excellence.

216. The argument often made in support of granting Assistant Professors tenure even though they may not meet the standards required to achieve a promotion to Associate Professor is
that these individuals have potential but simply need a bit of “extra time” to achieve the standards required for promotion. Awarding those individuals tenure without the promotion provides them with an opportunity to succeed.

217. In the University's view, this language allows faculties to be less rigorous in their selection of candidates for tenure than they should be. By granting tenure to an individual who has not demonstrated the ability to perform at the level required for promotion during the seven years they are given to do so, but who may have the potential to make up for their performance deficiencies over time is a significant risk to take with millions of dollars of public money.

218. While certain individuals may indeed benefit from an arrangement which allows them time to make up for performance deficiencies, it is also the case that numerous Assistant Professors over the years have simply “plateaued” and have not (and likely never will) achieve a promotion. At Tab 35 of the University's Book of Documents is a spreadsheet prepared by UBC Faculty Relations which describes the 19 Assistant Professors granted tenure without promotion to Associate Professor since 2004/2005 who have since failed to achieve that promotion. Only six individuals made this transition following their appointment to a tenured Assistant Professorship. That said, overall, this proposal would not affect a particularly large number of individuals at the University. The University proposes that this change be implemented effective July 1, 2014 to give incumbent tenure track Assistant Professors notice of the change.

219. The proposed language would also bring the tenure process for the professoriate in line with that in place for UBC's revised teaching stream positions. Faculty members appointed to the rank of Instructor are considered for both tenure and promotion to the rank of Senior Instructor at the same time. Tenure cannot be granted without the promotion to Senior Instructor. It is inconsistent that the University's professoriate may be eligible for tenure without promotion when the teaching stream must meet the criteria for both promotion and tenure.

220. Moreover, in the University's experience, a decision to award tenure without promotion is not well-received by affected faculty members. It sends an incoherent message to a candidate in that they are being promised a job for life, but told that they are not good enough to obtain a promotion. This has proven to be de-motivating to faculty members rather than encouraging. What should have been a moment of career triumph is instead viewed as a rejection. Many faculty members grieve these decisions, despite being awarded tenure.

Criteria for Promotion in the Professoriate Ranks

221. The University has also proposed revised language with respect to the criteria for promotion to the ranks of the professoriate. All of the proposals discussed in this section refer to the Agreement on Conditions of Appointment for Faculty.

222. The University's proposals relating to the criteria for appointment, reappointment, promotion and tenure are not intended to “raise the bar”. Rather, they are designed to ensure that the language of the Agreement reflects what the University is expecting from its faculty members in practice. In other words, the proposed language would create consistency between the Agreement and what is happening on the ground. The key changes are as follows.
223. In regard to the Assistant Professor rank (Article 3.06), the University proposes revised language requiring "compelling evidence" of scholarly activity rather than simply an "involvement" in scholarly activity, and proposes that it would only be in exceptional circumstances that potential to meet the criteria for appointment would be sufficient.

224. The University also proposes to remove the words "promotion to" from Article 3.06 because as a result of the last round of collective bargaining, there is no longer any avenue for "promotion" to the rank of Assistant Professor. The collective agreement now recognizes two separate teaching streams, and faculty members are no longer permitted to cross from the instructor ranks to the professorate. In the University's view, this is more along the lines of a "housekeeping" item than a substantive proposal.

225. In regard to the Associate Professor rank (Article 3.07), the University proposes that candidates for promotion be required to show "demonstrated" ability to direct graduate students and "meaningful and collegial" participation in the affairs of the department and the University.

226. Furthermore, it is no longer accurate to state that individuals appointed to the rank of Associate Professor should not necessarily expect to be promoted to full Professor in the future. The University has proposed the removal of language to that effect. On the contrary, UBC is a top 40 global university and those individuals who achieve promotion to the Associate Professor ranks are of the highest caliber. They are celebrated by the University, which as an institution wants those individuals to achieve the rank of full professor and expects that they will do so. The Agreement should reflect this reality.

227. With regard to Professors (Article 3.08), the University has proposed that candidates be required to show high quality in graduate student supervision which is an expectation that has always existed (as per article 4) but was not reflected in the language of Article 3.08. The University seeks to clarify the language to reflect the expectation that has always existed.

228. The University further proposes to change the language of that article to more clearly reflect an expectation of "high standards of performance" as appropriate to the rank in question in regard to teaching and scholarly activity.

229. In regard to the evaluation of teaching under Article 4.02, the University has proposed language which ensures that teaching performance is no longer evaluated pursuant to an outdated set of basic criteria, but rather in accordance with the most current research on effective pedagogy. Knowledge of what makes for effective teaching evolves over time, and the University's evaluations of the teaching of its faculty members should reflect the most current scholarship in this area. The current language focuses on such basic criteria as "command over subject area" and "accessibility to students" which are entry-level expectations of a competent teacher rather than what the current research suggests is effective and indeed excellent teaching.

230. All of these proposals are designed to reflect the high standards of performance that UBC expects of its faculty members as a leading global university. In the last round of collective bargaining, the parties agreed to add article 5.14(e) to the language of the Agreement on Conditions of Appointment for Faculty. It reads as follows:
Given that the University strives to foster excellence in teaching, scholarly activity and service, the mandate of all involved in a reappointment, tenure and/or promotion review is to make recommendations which ultimately advise the President on individual cases, in accordance with...

iii. consideration of appropriate standards of excellence across and within faculties and disciplines.

231. Given this language, the University submits that there is no basis for objecting to language that brings the criteria for appointment or promotion to the professorial ranks into line with that statement.

Termination of Appointment where Tenure Denied

232. The University advises that it has provided the Faculty Association with notice that effective the end of the current Agreement, it is ending its practice of allowing faculty members to stay on at the University and retain their appointments following tenure-denial decisions while they await the outcome of the appeal process. That is, the University will terminate the individual’s employment within the collective agreement timelines provided for in Article 2.03(g) (i.e. a one year terminal appointment).

233. The University’s estoppel notice is contained at Tab 36 of the University’s Book of Documents.

B. Proposal 6: Eligible Voting Members and Selection Procedures for Appointment Reappointment, Tenure and Promotion Decisions (Attachment 5)

Article 5.04(b)(i) - Agreement on Conditions of Appointment for Faculty

Eligibility to Vote on Appointment, Promotion and Tenure Decisions

234. The University has proposed language to clarify what constitutes a “faculty member eligible to be consulted” on appointment, reappointment, tenure and promotion decisions as per Article 5.04(b)(i) of the Agreement on Conditions of Appointment for Faculty. The University proposes three charts which would clearly set out who would be eligible to vote in particular circumstances given the creation of the Professor of Teaching stream in the last round of collective bargaining. This proposal seeks to fill a gap in the collective agreement that was created by the Professor of Teaching stream. The relative “rankings” between the two streams need to be clarified in order to reflect the new reality.

235. In the University’s view, this is not a proposal that, if implemented, would constitute a “win” for the University. Rather, it is just a necessary addition to the Agreement.

236. The current Agreement contains prescriptive language regarding who is entitled to participate in a Departmental Standing Committee and vote on an appointment, reappointment or tenure. The basic principle of this language is that those of equal or superior rank are eligible to vote on a particular tenure, promotion, appointment or reappointment decision in their department. This language was negotiated prior to the
change in the last agreement that put the new rank of Professor of Teaching in place, and
refined the expectations of the other ranks in the teaching stream.

237. The University's proposed language is designed to accomplish the task of realigning the
relative "rankings" between the traditional stream and the Professor of Teaching stream.

238. The current language in the Agreement defines the teaching stream appointments (i.e.
Instructors, Senior Instructors) as inferior to the traditional stream. This does not reflect
present circumstances in which neither stream is considered "superior" to the other,
particularly given the difficulties involved with trying to compare ranks in the two streams of
the tenured faculty. The University therefore proposes to move away from the language of
lesser and superior rankings to language regarding who is "eligible" to vote in a particular
circumstance. The University wants to provide a simple and easily understood approach
to which rank votes on which decision.

239. The primary amendments proposed by the University with respect to appointment
decisions are reflected in Chart 1 (Attachment 5) and are designed to clarify that:

a. As the highest rank in the teaching stream, a Professor of Teaching may vote on all
appointment, reappointment and tenure decisions, including regarding an
appointment or promotion to full Professor in the traditional stream;

b. An Assistant Professor (which is an entry level position) will no longer vote regarding
the promotion of Instructors to Senior Instructor rank (which is a tenured position);

and

c. An Associate Professor will not vote regarding a Professor of Teaching appointment.

240. The second chart in the University's proposal relates to reappointments and seeks to
clarify that an Assistant Professor will not vote on a reappointment decision given that
there is no longer any potential for "promotion" to Assistant Professor under the Collective
Agreement. Assistant Professor is an entry-level position.

241. The third chart proposed by the University addresses tenure and promotion decisions and
provides that Assistant Professors will not vote on the potential tenure and promotion of an
Instructor to the rank of Senior Instructor.

Broader Representation on Departmental Standing Committees

242. The University also proposes that the language of Article 5.04 of the Agreement on
Conditions of Appointment for Faculty be revised so as to allow greater representation on
departmental consultation committees for initial appointments including anyone agreed
upon by the Head and eligible members of the department and approved by the Dean.

243. The University's proposed language is intended to reflect what is happening in many
departments at the University, especially in smaller departments where there are very few
members. When building a department, "fit" is an important consideration and it is often
desirable for a department or faculty to be able to have more - or even all - faculty
members, such as Instructors and Assistant Professors participate in the departmental
consultation process for initial appointments, regardless of rank.
244. Moreover, many departments are expanding the nature of the individuals who participate in Departmental Standing Committees. For instance, certain departments have invited First Nations elders to participate where appropriate. At times even students at the graduate and undergraduate level are invited to provide their input during committee meetings. However, the collective agreement does not permit such individuals to vote in determining the Committee's recommendation on tenure or promotion.

245. The goal of this proposal is to ensure that the department as a whole can participate in the decision to appoint a new faculty member by allowing the eligible members to decide to include on the Standing Committee individuals other than those explicitly "eligible" to vote under the collective agreement.

246. For example, where a particular candidate is also (or will also be) an associate member of another department, it would make sense to be able to bring that other department into the decision-making process.

247. The Faculty Association opposes this proposal and suggests that rather than modify the provisions on who participates in Departmental Standing Committees, departments should constitute selection committees which can seek the input of a wide variety of individuals of varying backgrounds. While some departments at UBC are big enough to constitute a selection committee that is distinct from a Departmental Standing Committee, in other smaller departments that proposal is not practically feasible as the majority of the members of the two committees would necessarily be the same.

248. The new language proposed by the University would ensure greater compliance with the requirements of the Agreement and the ability of departments to obtain the input and opinions of those individuals who are qualified and necessary to make what are amongst the decisions most vital to the success of a department: the appointment and promotion of excellent faculty members. There is therefore a clear and compelling reason for implementing this proposal.

C. Proposal 4: CPI, Merit Awards and Performance Salary Adjustments
   (Attachment 3)

   Article 3 - Agreement on Salaries and Economic Benefits

249. The University has proposed to revise the dates on which career progress increments ("CPI"), merit pay and performance salary adjustments ("PSA") will be awarded to reflect the term of the new collective agreement.

250. In addition, the University has proposed that each Faculty be permitted to set its own "year" for the purposes of reviewing the performance of its faculty members for merit and PSA awards. Currently, pursuant to Article 2.03 of the Agreement on Salaries and Economic Benefits, merit pay must be assessed in accordance with the University's fiscal year which runs from April 1 to March 31.

251. The fiscal year generally has no relationship with the academic calendar or most faculty members' teaching term and research cycles. In order to comply with the fiscal year requirement, Faculties are pushed to provide their recommendations on merit and PSA by
March of each given year. However, the Spring Term does not end until April 30. Thus, teaching evaluations for the Spring Term are not received until May, so there are no evaluations available for faculty members teaching in that term when evaluations must be performed.

252. Faculties must therefore base their awards on their faculty members' "projected" scholarly productivity and performance during the final months of the fiscal year. For many faculties this is a workable model. However, other faculties prefer to use the calendar year because they feel that it allows for performance to be based on actual performance rather than expected performance.

253. By way of example, in the Faculty of Science, faculty members typically publish scholarly papers rather than books and it is often difficult to determine (absent significant, time consuming research on the part of a Head) more than the year of publication of a particular piece of work. Thus, by using the fiscal year there is an increased risk of counting particular publications in more than one year or missing scholarly publications entirely in assessing performance for purposes of merit and PSA. For the Faculty of Science, basing PSA and merit evaluations (even if performed in March) on the previous calendar year would be more efficient, ensure that decisions can be made based on current and complete teaching evaluation information available and help avoid the risk of double counting or missing scholarly publications in reaching decisions.

254. The practice of setting the "year" for review faculty by faculty has worked without objection for many years – this change would simply bring the language of the Agreement into line with the practice of certain faculties.

D. Proposal 11: Salaries for Faculty Members Seconded to Faculty Association (Attachment 10)

Article 16 - Framework Agreement

255. The University does not take issue with the secondment of faculty members from their responsibilities to provide service to the Faculty Association. Rather, it is concerned about the financial costs associated with seconded faculty which it believes should be borne by the Faculty Association. It is also concerned with the potential impact that such secondments can have on a department.

256. Although not provided for in the current Agreement, the practice is that the Faculty Association may also request the secondment of additional faculty members from their teaching responsibilities. The University's proposal codifies this practice with the caveat that the University would be required to make reasonable efforts to accommodate those requests. This would allow the University the flexibility to refuse a particular secondment where such request would have an undue impact on a department. For instance, should three faculty members from a small department request simultaneous secondments, this may be unworkable from a practical perspective and the University needs the ability to refuse those secondments. From a practical perspective, the University envisions this happening rarely.

257. The Association would also be responsible for paying the seconded faculty members' units $10,000 (indexed annually to general faculty salary increases) for each three credits of teaching release to cover salary, benefits and pension that would be paid to the faculty
member's replacement. The departments are currently reimbursed for a secondment on the basis of the Sessional Lecturer rate of pay (plus an amount for benefits) which comes nowhere close to reimbursing the department for the loss of the faculty member's teaching.

258. The proposed amount does not compensate the University for the cost associated with granting teaching releases to these seconded faculty members; however, it would constitute a more equitable reimbursement amount than is currently in place.

E. Proposal 5: Maternity/Parental/Adoptive Leave during Pre-Tenure Period (Attachment 5)

Article 1 - Agreement on Leaves of Absence

259. The maternity/parental/adoptive leave provisions in Article 1 of the current Leaves of Absence Agreement provide that a tenure-track faculty member may elect to extend his/her “tenure clock” by a full year where the member has taken any period of maternity, parental or adoptive leave. The University has proposed language which would create a rational and fair connection between the leave time taken by a particular faculty member and the length of the tenure clock extension granted to them as a result.

260. A standard pre-tenure period (normally 7 years at UBC for an individual initially appointed as an Assistant Professor) serves several important purposes, all of which are enhanced by the University's proposal. Among other things, the pre-tenure period serves as a probationary period in which the faculty member has time to establish a high standard of performance for securing a permanent faculty position, with the expectation that excellence is a function both of the quality and the rate of scholarly productivity. The "probationary" nature of a pre-tenure appointment was accepted by the Ontario High Court of Justice in Association of Professors of the University of Ottawa v. University of Ottawa et al, (1978), 84 D.L.R. (3d) 576 ("University of Ottawa") (University's Brief of Authorities Tab 14) and discussed by Arbitrator Germaine at paragraph 56 of University of British Columbia v. Faculty Association of the University of British Columbia (Lang Grievance), unreported, February 25, 2008 (Germaine) (University's Brief of Authorities Tab 15).

261. A relatively inflexible pre-tenure period is further designed to ensure that competitive conditions are similar amongst faculty: one person should not receive a significantly longer period of active service than another to produce a body of work that demonstrates the candidate has met the standard for tenure. This latter point of fairness was recognized by Arbitrator Gordon in University of British Columbia v. University of British Columbia Faculty Assn. (Dr. Carl Johnson Arbitration), [2003] B.C.C.A.A.A. No. 286 ("Johnson Decision") (University’s Brief of Authorities Tab 16), when she held that the candidate must be held to the body of work that was submitted to the President for consideration for tenure, when his case was being sent back for reconsideration.

262. Arbitrator Gordon accepted in the Johnson Decision that equality of treatment for all candidates for promotion and tenure is a “fundamental concept underlying the review process provided by the Agreement”. She stated as follows at paragraph 24:

I am satisfied that the review process contemplated in the Agreement is intended to ensure equality of treatment by providing candidates with the same period of time in which to develop their records in an effort to satisfy the prescribed standard of achievement. In Dr. Johnson's case, that period of time is his seven year "pre-tenure
period": see Article 2.03, and in particular 2.03(f)(1), (2) and (3), Article 3.05(b) and Article 9.01(b). The eighth year for Dr. Johnson is a one year terminal appointment; see Article 2.03(g) and (h).

263. Arbitrator Gordon further stated at paragraph 34 that based on this principle of equal treatment, appeal boards have declined to exercise their remedial jurisdiction in a manner that would create inequality of treatment, or an unfair advantage, for a particular candidate. They have further refused to direct remedies on reconsideration which would effectively "extend the pre-tenure period", thereby giving one candidate more time, or "a second chance", to meet the required standard of achievement.

264. Given the importance of both maintaining the rigour of the pre-tenure process and treating all candidates as equally as possible, the University proposes that a leave of a minimum of 10 weeks "normally" be required in order to obtain a full year extension to the length of the pre-tenure appointment period. The language proposed by the University allows for flexibility in exceptional circumstances.

265. At Tab 37 of the University's Book of Documents is a spreadsheet prepared by UBC Faculty Relations indicating the number of faculty members who have taken maternity or parental leaves of less than 10 weeks since January of 2008. Faculty Relations records indicate that there were 212 leaves taken by 190 faculty members during that period. The average leave was just over 20 weeks. However, during that time, 14 tenure track faculty members (all male) took parental leaves of less than 10 weeks. Each of those individuals was provided with a tenure clock extension of one year. All of these individuals were Assistant Professors (with only one exception). As indicated in the attached spreadsheet, some of the leaves in question were for as little as two or three weeks.

266. During the same period, there were 33 other faculty members who took maternity/parental/adoptive leaves that were of only 10 or 11 weeks duration. They also received a full year's extension of their tenure clock.

267. The University fully supports its faculty members in their personal goals and commitment to family and encourages them to take the time they want or need to take to care for young families. However, faculty members taking leaves of two or three weeks and obtaining full year extensions to their tenure clocks creates an obvious and perceived unfairness to other candidates. As described above, there is a clear and compelling reason to adjudicate this issue and implement the language propose by the University.

F. Proposal 8: Review by President - without prejudice (Attachment 7)

268. The University further proposes to amend the language of article 5.14 of the Agreement on Conditions of Appointment for Faculty to state that all recommendations to the President concerning appointments, promotions or tenure decisions may be reviewed by the Provost or Deputy Vice-Chancellor. This proposal reflects current practice at the University and makes it clear to faculty members that this is a step in the review process.
This proposal was made on a without prejudice basis to the University's position that the longstanding practice without challenge by the Association supports this review and there is no language in the collective agreement that precludes it.


Article 17 - Framework Agreement

In order to encourage a more fulsome discussion of practices and new initiatives, the University proposes to suspend the operation of Article 17 of the Framework Agreement which provides that the University will not change rights or practices that have "traditionally been the subject of consultation and discussion without appropriate consultation and discussion at the Departmental, Faculty or University level" for the length of the collective agreement.

The meaning and purpose of the language in Article 17 is unclear. Its only potential effect is to inhibit communication between the parties. To the University's knowledge, Article 17 has never been raised or actively relied on by either party in the past. Given the lack of clarity regarding its purpose and meaning, the University submits that it should be suspended and in so doing remove an obstacle to open communication.

H. Proposal 10: Roster of Mediators/Facilitators (Attachment 9)

The University proposes an initiative to address inter-faculty disputes which would involve a jointly funded peer mediation/facilitation program using experienced, respected senior faculty members. The initiative would include training for mediators through bodies such as the law school mediation program or the Justice Institute of British Columbia. The parties would mutually agree to terms of reference.

The purpose of this proposal is the timely and efficient resolution of inter-faculty disputes in an efficient and timely manner. It is not a complete dispute-resolution regime but rather a proposal to develop a peer-intervention option for faculty members.

I. Proposal 13: Housekeeping (Attachment 12)

The parties' agreement with respect to various "housekeeping" matters is reflected in the memorandum at Tab 38 of the University's Book of Documents.

The only housekeeping item proposed by the University that remains outstanding is that the word "promotion" be deleted from the Assistant Professor language of Article 3.06 of the Agreement on Conditions of Appointment for Faculty. This language is inconsistent with the rest of the Agreement as there is no longer any such thing as a "promotion" to the rank of Assistant Professor. It is an entry-level position. The language is therefore unnecessary; there is a clear and compelling reason for its removal; the effects to the parties are minimal given that it does not change substantive rights, and is the sort of non-salary amendment an interest arbitrator is well-positioned to make to the Agreement.
Sessionals, PhD Students and 12 Month Lecturers

276. Both the University and the Faculty Association have identified issues relating to the terms and conditions of appointment of sessionals, lecturers, and PhD students (who are currently appointed as sessionals). The proposals made by the parties are inextricably intertwined with each other, and cannot be awarded or considered in isolation.

277. As is described in detail below, the issues involved are incredibly complex. There is no question that they require resolution, but the University submits that interest arbitration is not the appropriate forum for that to take place. Rather, it must be left to the parties to negotiate a mutually acceptable solution to the various issues caused by the current Collective Agreement. The University is committed to this endeavour.

278. In the result, the University's primary submission is that none of the University's or the Faculty Association's proposals ought to form part of the award, either in whole or in part.

279. In the alternative, should the arbitrator wish to make an award in this regard, it should be limited to ordering that the parties form a joint committee to consider issues relating to sessionals and lecturers and develop a comprehensive solution. This joint committee could be assisted by a neutral third party facilitator/mediator if necessary, but the final decision must be left to the parties. For the reasons that follow, the University submits that issues are simply too complex to be determined by adjudication.

Sessional Course Entitlement

280. The Association has proposed language regarding rights for non-continuing sessional bargaining unit members to course assignments.

281. The Association seeks to modify Article 6.1 to include a right of first refusal for non-Continuing Sessionals to any course for which they are qualified based on length of service up to a full time appointment. In other words, once a non-continuing sessional is hired to teach a single course, the University would be obligated to assign any other available courses to that individual, up to a full time load, so long as they were qualified to teach the same (and had the greatest seniority amongst qualified sessionals), rather than selecting any non-bargaining unit candidate such as an adjunct, visiting professor, or PhD student. All of these other ranks serve to bring a diverse and rich teaching experience to students and to the Faculty. Restricting the ranks only deprives the community of the richness available to it, on both a disciplinary basis and a pedagogical basis.

282. The Association's proposal runs contrary to the University's expectations of excellence. This proposal would prevent the University from appointing the best candidate for any given teaching assignment.

283. The implications of the Faculty Association's proposals are significant. By way of example, if non-Continuing Sessional Lecturers have a priority right to be considered for course assignments up to a full time load in priority over non-bargaining unit faculty, such as seconded public school teachers (Adjuncts), or over new Sessional Lecturers, the teaching education program in the Faculty of Education, as it currently exists, will be jeopardized. Over time, available courses would be taught by a continually expanding group of Sessionals, squeezing out available courses for adjuncts, visiting professors, and other
non-bargaining unit faculty who bring academic vitality and renewal to the University's programs.

284. Furthermore, if Non-Continuing Sessional Lecturers have a right to course assignments in priority over others, then PhD candidates would be unlikely to obtain Sessional appointments as they would not be more qualified than an existing Sessional Lecturer to teach a course. Moreover, PhD candidates already appointed as Sessional Lecturers would have a priority right to future work. The opportunity to provide new PhD candidates with teaching experience would be lost. The University would not make a Sessional Lecturer appointment where there was an expectation that the individual would make such an appointment a career path to full-time teaching at UBC.

285. By nature, Sessional Lecturers appointments are intended to be “fill-in” appointments to deal with the changing teaching needs within the Departments. They are intended to cover gaps in the University’s professoriate ranks due to absences such as maternity and sick leaves, sabbaticals, unexpected growth, and emerging areas of study.

286. The Faculty Association is effectively attempting to create a career path for Non-Continuing Sessionals where one does not exist. Moreover, it does not make sense for the University to implement such a career path. Sessional lecturers are valued members of the University community, but their role is one of supplementing the University's teaching streams or “filling in the gaps”. They help the University maintain its flexibility to offer a diverse course load, and also ensure its research faculty have the opportunity to excel in their endeavours through teaching releases, leaves of absence, and sabbaticals. The University will be unable to maintain this necessary flexibility if it is required to offer up-to-full-time course loads to any Sessional entitled to reappointment after he or she is hired to “fill in a gap” in the teaching schedule.

287. The appointment of a Sessional Lecturer to teach a course is not intended to be an appointment for a generation. If the Faculty Association's proposal were implemented, the effective result of hiring a Sessional to teach a course could be a permanent full time employee within a few years. However, the assessment process for a sessional appointment is far less rigorous than that required for the appointment of a regular faculty member.

288. Finally, the matter of the Sessional agreement raises numerous highly complex issues with significant consequences. The degree of analysis necessary to ensure a workable and fair resolution to sessional issues simply does not lend itself to interest arbitration. The University submits that these issues should be left to the parties to resolve in future collective bargaining.

289. The Association has also proposed that Sessionals have the right to first consideration for any Lecturer position that becomes available at the University.

290. This proposal would significantly limit the University's recruitment ability. It would be unable to conduct open searches and appoint the best possible candidate in favour of existing “qualified” sessionals. This runs contrary to the University's mandate of excellence.

291. As stated above, these issues are not ones that can or should be resolved in this forum. The issues involved are extremely complex and no changes should be made to the
collective agreement that have not been carefully analyzed and negotiated. There is insufficient evidence and information available in this arbitration to ensure that these issues are properly analyzed and all potential consequences considered.

**12 Month Lecturers**

292. The Association has also proposed language related to 12 Month Lecturers that cannot be readily addressed in isolation from the terms and conditions of employment for Sessional Lecturers.

293. The Faculty Association has proposed that Lecturers have a right of renewal of appointment subject to teaching performance and lack of available courses. This language effectively mirrors the rights provided to Continuing Sessionals under Article 5 of the Agreement on Conditions of Appointment for Sessional and Part-Time Faculty Members.

294. While most Lecturers are appointed as "12 Month Lecturers", there is no specified limit to the amount of time for which a lecturer can be appointed in the collective agreement. That being said, the majority of Lecturers are appointed to 12 month terms, year after year, on a long-term basis.

295. The Association also proposes that the University be required to provide written reasons if a Lecturer is not reappointed.

296. Currently, 12 Month Lecturers are appointed on an annual contractual basis with no right of renewal. They are the only bargaining unit appointment open to the University that does not carry with it renewal rights. They are therefore critical to the University's ability to respond to temporary and unexpected circumstances without creating an ongoing relationship with the faculty member in question.

297. The University has two streams of faculty members at the University: 1) the career stream and 2) the temporary teaching stream. The latter consists of short term appointments that are intended to "fill the gap" in the teaching roster. They often address such issues as maternity leaves, growth, sick leave, emerging areas of study and appointments without renewal rights are necessary to the University's ability to respond to these issues.

298. Thus, as long as Sessional Lecturers have a right of renewal, the University cannot grant a similar right of renewal to 12 Month Lecturers.

299. Should the arbitrator determine that it would be appropriate to award a right of renewal to Lecturers, then the University submits that the Sessional Agreement must be modified to remove any right of reappointment for Sessionals to ensure that the University retains the flexibility it requires. It is untenable for both 12 month Lecturers and Sessionals to have reappointment rights.

**Post-Candidacy Students (or equivalent) with Teaching Appointments**

300. PhD candidates who have advanced to candidacy (that is, have finished their coursework and comprehensive exams and defended a dissertation proposal, but have yet to complete their dissertation) currently can be appointed to teach courses as Sessional Lecturers.

301. The University proposes to allow Doctoral Candidate students (or the equivalent) to hold
an appointment to teach a course or courses for which a Board of Governors appointment is required. Those assignments would be made in accordance with Policy 75 (a copy of which is attached at Tab 39 of the University's Book of Documents), except that the student would not be appointed as a Sessional Lecturer and would not be included in the faculty bargaining unit.

302. Policy 75 sets a nine credit cap on the amount of teaching a PhD candidate can do in a year.

303. The University's proposal will allow PhD candidates access to the teaching opportunities that they require in order to be competitive in the university job market without requiring an appointment as a Sessional Lecturer with its attendant right of reappointment. It also provides them access to teaching opportunities without the need to compete with Sessional Lecturers who have teaching experience.

304. It is vitally important to PhD candidates that they obtain teaching experience in the university setting so that they are able to obtain academic positions elsewhere. Most academic positions require teaching experience at a university. UBC generally looks for such experience in candidates for faculty appointments. The intention of the University is not that these PhD candidates will establish a long term relationship with UBC, but rather is to support them in their studies and prepare them for their future careers.

305. Currently, in order to give PhD candidates teaching opportunities, departments have two options. First, they can appoint PhD candidates as Teaching Assistants under the supervision of a faculty member (which does not allow for the degree of autonomy and responsibility that is required to provide the type of experience required). The other option is to appoint candidates as Sessional Lecturers which also has significant drawbacks, including a right of reappointment which could lead to a permanent employment relationship. PhD candidates also have difficulty competing for general courses because they don't have teaching experience and therefore the opportunities are given to Sessional Lecturers. In some cases, all they can teach is an upper level course based on their specific area of study – and cannot access general teaching opportunities.

306. In providing PhD candidates with teaching experience, the University is not looking to create ongoing employment relationships, which is the effective result of a Sessional appointment given the right of reappointment under the collective agreement.

307. Given these consequences, there has been some reluctance on the part of departments to appoint PhD candidates as sessionals, and PhD candidates are therefore suffering from a lack of teaching opportunity. Teaching Assistant experience, which is often limited to marking and lab supervision duties, does not provide the meaningful experience necessary for these candidates to compete in a tight academic job market.

308. There is precedent for this arrangement in that this is how the University generally addresses the appointment of Post-Doctoral candidates to teaching assignments.

309. As stated above, this proposal is directly related to the Faculty Association's proposals regarding increasing the reappointment rights of Sessionals. Increased rights for sessionals would have a direct negative impact on the University's ability to provide PhD candidates with necessary teaching opportunities absent these proposed amendments.
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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