

ARBITRATION

BETWEEN:

**UNIVERSITY OF BRITISH COLUMBIA**

- and -

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

Concerning grievances over the Challenge to the Appointment of Associate Deans to Various  
Committees

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**AWARD**

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***BEFORE:***

Andrew C.L. Sims, Q.C. .... Arbitrator

***REPRESENTATIVE OF UBC***

Jennifer Russell ..... Counsel  
Meaghan McWhinnie ..... Co-Counsel  
Julia Bell

***REPRESENTATIVE FOR FACULTY ASSOCIATION OF UBC***

Jessica Burke ..... Counsel  
Stephanie Mayor ..... Co-Counsel

***HEARD following mediation, based on agreed facts and written arguments***

***AWARD ISSUED on October 7, 2021***

*Our file: 7877*

## AWARD

The University of British Columbia and the Faculty Association of the University of British Columbia disagree on the roles that can be assigned to or undertaken by Associate Deans. Both parties accept their 2010 agreement to list Associate Deans as persons specifically excluded from the scope of the bargaining unit. They have sought to narrow the issues between them which are the subject of the two grievances described below.

University academic staff are what can be described as dual-status employees. The status of faculty member in a University goes back into the mists of time. It connotes membership in the University as well as a more universal membership in “academia”. The introduction of collective bargaining into the academic world is more recent. Now, in British Columbia and elsewhere, statutes provide that University faculty members (more or less precisely defined) can be represented by a bargaining agent and bargain collectively with their University employer towards a collective agreement binding on the University, the Faculty Association and faculty members (again more or less loosely defined). Such bargaining, here and elsewhere, is most frequently through a Faculty Association.

The superimposition of a collective bargaining regime on the traditional University structure with Boards of Governors, Presidents, Faculties, Departments, and so on, can leave areas of uncertainty about just what can be bargained for, and just which persons fall within the scope of the bargaining agent’s [which, from now on, I will simply refer to as the Faculty Association’s] exclusive bargaining authority. It is not always clear, when the term “faculty member” is used, with or without capitals, whether the more traditional meaning of a member of the University’s Academic Staff is intended, without any labour relations connotation, or the labour relations definition in the sense of a person (or perhaps an “employee”) represented by the Faculty Association, to the exclusion of those not so represented. This is true in written documents and even more so in notes of discussions.

The grievances here are now about whether a member of the academic community, who is excluded from the Faculty Association’s bargaining unit, can be appointed to or participate in the committees mandated to review and advise on questions related to appointment, reappointment, promotion and tenure (“ARPT”). Such committees are provided for in the collective agreement but analogous committees exist in unorganized Universities without collective agreements. They existed at UBC before certification. It is through such committees that some of the important function of peer review is carried out. These facts are sufficiently well-known that I am prepared to take arbitral notice of them. They are supported by the following extract:

Unionisation undoubtedly shifted power and authority relationships within universities (Zudivor 1999). Many areas of university policy that had one been left in the hands of university administration or university governing bodies became subject to collective bargaining, including faculty salaries, procedures for appointment, tenure and promotion, and job security. Even in universities where there is no faculty union, it is not uncommon to find policies and procedures in areas related to faculty work that closely parallel those that have emerged through collective bargaining in unionized environments (Anderson & Jones 1998; Ponak & Thompson 1984).

*University Governance in Canadian Higher Education* (June, Shanahan and Goyan)

See also:

Michiel Horn, *Academic Freedom in Canada*, University of Toronto Press, 1998 Chapter 11

Much of the question here is whether such committee processes have now become a creation of the collective agreement and whether membership is a collective agreement benefit, only available to those in the bargaining unit to the exclusion of administrative office holders who are Faculty Members in the *University Act* sense but who are excluded from the bargaining unit.

The analysis of these issues requires a review of the status of bargaining unit members and of members of the academic faculty as defined by the *University Act*. It also requires an assessment of the role such committee's play in the University. Are they a mechanism of the University as a "community of scholars", are they a product of collective bargaining where roles are assigned to managers on the one hand and employees on the other, or are they some amalgam of the two?

### ***Process Issues***

These matters were originally scheduled to be heard between May and July of 2018. Certain events, including renewed efforts towards settlement, resulted in an adjournment. That lasted until December 14, 2018, when the Association sought to have the matter rescheduled. In the interim, issues of disclosure, particulars, and the admissibility of proposed documents, expert and opinion evidence and so on arose, few of which could be resolved in advance. The matter came on for hearing on October 7-9, 2019.

With the party's agreement, further efforts were then made to mediate a resolution. It became clear at that time, without going into the exchanges in mediation themselves, that the parties each had strong views on the "collegial model" versus the "labour relations model". Some of the

differences were policy based or positional; yet others involved misconceptions of what the existing law provides.

There were differences:

- In what labour relations law allows or prohibits;
- In what labour law presumes, both in the grant of bargaining rights and in the negotiation of collective agreement terms;
- In what they have in fact agreed upon and its meaning.

Unfortunately these various differences were interlaced, each with the other.

The proceedings adjourned *sine die* in the hope of resolution. That did not prove possible and instead, the parties asked that a decision be rendered based on what had been heard and said up to that point, and on evidence and argument all as outlined in a letter of November 25, 2019.

We also write to confirm that the parties agree to the following list of documents upon which you may rely in rendering your decision in this matter:

1. Books of Documents:

- a. The University's Book of Documents (Volume I and II), excluding the historical documents at Tabs 11-24 of Volume I;
- b. The Faculty Association's Book of Documents (Volume 1, 2 and 3), excluding the historical documents at Tabs 74-84 and 86 in Volume 3;
- c. The Faculty Association takes the position that Tab 9 of Volume I of the University's Book of Documents and pp. 3-4 of Tab 85 of Volume 3 of the Faculty Association's Book of Documents are part and parcel of the historical documents the University agreed not to rely on. These 1972/1973 documents are likely provided for precisely the same reasons as other historical documents and raise the same issues of relevance and reliability. Accordingly, the Faculty Association submits they ought to also be excluded. The University has taken the position it did not agree to forgo relying on these documents and that they are of a different nature than the other historical documents.

As it is not clear at this stage whether the University will, in fact, rely on these documents in its response, no ruling is currently needed on their admissibility. However, if the University does rely on such documents, this issue may need to be determined at that point.

2. Exhibits Entered into Evidence: Any document entered into evidence at the arbitration, but not already contained within the Books of Documents.

3. Disclosure Documents: Any document previously disclosed by the parties in this grievance, excluding the historical documents referenced above. Any disclosed document that a party wishes to rely on, that is not already entered into evidence, will be attached to the party's submission. To that end, please find three such documents provided with this letter.

The parties exchanged written arguments and authorities in due course. The Faculty Association's argument was dated November 25<sup>th</sup>, 2019, and the University's on December 20<sup>th</sup>, 2019. The Faculty Association's written reply is dated January 27<sup>th</sup>, 2020. On February 18<sup>th</sup>, 2020 the University objected that significant portions of the Faculty Association's reply was improper because it included new issues or expanded arguments. It also objected that certain facts that were characterized as undisputed when in fact they remained in issue because of the University's general denial.

***The Two Grievances and the Issues they now raise***

This formal dispute began many years ago with two grievances. The first, filed on June 28, 2012, read:

Re: Decanal Appointees to Departmental Search & Hiring Committees

It has recently come to our attention that the Dean of Arts appointed two Associate Deans to serve as non-voting members on two different hiring committees in the Faculty of Arts during the 2011-2012 academic year. As a result, the Faculty Association is initiating a grievance pursuant to Article 21 of the *Framework for Collective Bargaining* in the matter of the Dean of Arts appointing Associate Deans to serve on departmental hiring committees in violation of Article 5.04.

The University is well aware of the Faculty Association's position in this matter. We first raised our concerns to the University about these appointments in a Joint Consultation Committee meeting held on November 21, 2011. Article 5.04 has also been a topic of much discussion at the bargaining table. We have never agreed to allow Deans to appoint members of the hiring committees and such appointments are contrary to the plain language of the Collective Agreement.

The remedy sought in this matter is that the University promptly advises all Deans in writing, with a copy to the Faculty Association, that they are not to appoint individuals to or otherwise interfere in departmental standing committees.

On July 19, 2019 the parties advised, in respect of this first grievance, that:

1. The issue of Deans appointing Associate Deans to search/hiring/selection committee that was the subject of the grievance filed on June 28, 2012 will be severed from the current arbitration process and as such that particular issue is no longer before the arbitrator. However, this is without prejudice to the Faculty Association's position that Deans are not permitted under the Collective Agreement to appoint Associate Deans as set out above, or any other individual, and we will be filing another grievance and/or proceeding with a separate arbitration on that issue if needed.

The second, July 24, 2013, grievance originally read:

Re: Decanal Appointments of Associate Deans to the Dean's Advisory Committee

The Faculty Association hereby initiates a grievance, pursuant to Article 21 of the *Framework for Collective Bargaining*, in the matter of the appointment of an Associate Dean to the Dean's Advisory Committee on promotion and tenure in the Faculty of Applied Science.

While reviewing a member's dossier as part of an appeal of a promotion denial, the Faculty Association learned that an Associate Dean had been appointed as a non-voting member of the Dean's advisory committee in Applied Science. The composition of the Dean's Advisory Committee is clearly outlined in Article 5.10 of *Conditions of Appointment for Faculty* and does not include members who have been excluded from the bargaining unit under Article 2 and Appendix A of the *Framework for Collective Bargaining*. This is a clear violation of these provisions. Other articles may also have been violated.

This adds to the grievance filed by the Faculty Association on 28 June 2012 regarding decanal appointees to Search and Hiring Committees as both concern a violation of Article 5 of *Conditions of Appointment for Faculty*. We have also sent a letter, dated 5 October 2012, to the University outlining our view of Associate Deans serving on Departmental Standing Committees. Many of the same concerns arise with their participation on Dean's Advisory Committees, particularly as a member of the Dean's office they represent the interests of the Dean.

The remedy in this matter includes an acknowledgement by the University that it has violated the Collective Agreement and that the University advise all Deans in writing that they are not to appoint Associate Deans to committees convened pursuant to the Collective Agreement, with a copy to the Faculty Association.

The same July 19, 2019 letter narrowed the 2013 issues:

2. The Parties have settled part of the issue that gave rise to the July 24, 2013 grievance regarding the appointment of Associate Deans to Dean's Advisory Committees. In this matter, the Faculty Association and the University have agreed that Associate Deans, acting as support to the Dean's Advisory Committee in faculties with formal departments, will only provide advice and support on technical or procedural matters as appropriate and will not influence the substantive, academic decision or influence the discussions on the academic merits of the file. For further clarification, it is understood that Associate Deans will not be appointed to Dean's Advisory Committees as members of those Committees, but they are entitled to provide support for the Dean as noted above.

A clearer view of the issues still in dispute can be gleaned from the parties' very extensive briefs. According to the University, the issues that remain before me are:

A. Does the Collective Agreement prohibit or limit Associate Deans from serving as faculty members in:

- i. their Home Departments on DSCS convened pursuant to Article 5.04 of Part 4 of the Agreement; or
- ii. the ARPT processes developed pursuant to Article 5.09 of Part 4 in Non-Departmentalized Faculties ("NDFs")?

B. In respect of processes developed pursuant to Article 5.09 of Part 4, does the Collective Agreement prohibit or limit Associate Deans in NDFs from performing the duties that a Head normally performs in Departmentalized Faculties?

In this,

**ARPT** refers to “Appointment, Reappointment, Promotion and Tenure” and is used in respect of the procedures and committees that deal with these subjects for faculty members.

**DSCS** refers to Departmental Consultation Standing Committees.

**NDF’s** refers to Non-departmentalized Faculties. Some Faculties (as institutional structures) are divided into Departments (for example the Department of History in the Faculty of Arts), smaller Faculties (for example Law) are not.

The University’s written argument asserts that Associate Deans participated as faculty members in the ARPT procedures in their home Departments or Faculties before the 2010 exclusion agreement. Similarly they acted as Heads. The University says the record shows no mutual agreement to exclude Associate Deans from acting as before in ARPT procedures. Absent any clear mutual understanding, the University says the question is whether the collective agreement, properly interpreted, allows Associate Deans of suitable rank to participate on the ARPT committees in their home departments. The University thus relies on past practice, while the Faculty Association relies on the presumption that collective agreement benefits are presumed to be for bargaining unit members alone.

The question of whether Associate Deans (or other excluded ranks) can similarly participate in Non-Departmentalized Faculties (performing the duties otherwise performed by Heads) the University says this practice is consistent with the requirements of Article 5.09 which requires that they be “consistent with those from Departments and Faculties.”

The collective agreement provisions referred to above are discussed in greater detail below. For now it is suffice to explain that they are within Part 4 of the collective agreement which is headed: “Conditions for the Appointment of Faculty.”

1.01 For the purpose of Part 4: *Conditions of Appointment for Faculty*:

“Faculty Member” means all persons appointed by the Board of Governors of the University of British Columbia on a full or part time basis as Instructor, Senior Instructor, Professor of Teaching, Lecturer, Acting Assistant Professor, Assistant Professor, Associate Professor, Professor or equivalent position.

5.04 Departmental Consultation: Committees

- a) The Department Head shall consult formally at meetings convened for that purpose with eligible members of the Department in order to ascertain their views and to obtain their recommendation concerning appointment, reappointment, tenure and promotion.
- b) Faculty members eligible to be consulted are:
  - i. In the case of initial appointments, all tenured and tenure-track members of the department.
  - ii. In the case of reappointments and promotions, those higher in rank than the candidate, except that in the case of reappointment of a Professor those holding the rank of Professor are eligible to be consulted.
  - iii. In the tenure cases, those who are tenured and of equal or higher rank.

*\*5.04 is temporarily amended for the term of the agreement as explained below.*

#### 5.09 Procedures for Institutes, Schools and Faculties without Formal Departments

*The section then speaks to how this Article is to be modified in academic units other than Faculties.*

The Association introduced its arguments as follows:

1. The main issue to be determined in this arbitration is whether Associate Deans, whom the parties have agreed are excluded from the bargaining unit, can access bargaining unit rights or participate in bargaining unit processes under the Collective Agreement, beyond where roles have been expressly negotiated for excluded academic administrators.
2. The Faculty Association takes the position that under the Collective Agreement only members of the bargaining unit are entitled to serve as members of departmental standing committees (or their equivalent in non-departmentalized faculties) or Dean's advisory committees in non-departmentalized faculties. It is further our position that Associate Deans cannot assume the role of bargaining unit members in these Collective Agreement processes, such as that of a Head.
3. Participation in these processes is a bargaining unit right. The presumption is that persons outside the bargaining unit (ie., management) cannot access that right unless an exception to do so is clearly specified in the Collective Agreement – which it is not.

It provided a fuller description of the issues, as it views them, at paras. 202 to 206 of its brief which read:

202. The question to be dealt with in this arbitration is:

Can Associate Deans, whom the parties have agreed are excluded from the bargaining unit, access bargaining unit rights or participate in bargaining unit processes under the Collective Agreement, beyond where roles have been expressly negotiated for excluded academic administrators, related to appointment, reappointment, promotion and tenure set out under Part 4, Article 5 of the Collective Agreement?

203. Specifically, can Associate Deans, given their excluded status:



- a. Be substantive voting members of Departmental Standing Committees (“DSCs”) in their “home department” (ie., the department they were initially hired into) (as the University concedes that it cannot send them out as administrators to participate in DSCs in other departments);
- b. Be substantive voting members of any consultation committees (ie., equivalent to Departmental Standing Committees and Dean’s Advisory Committees) providing recommendations on appointment, reappointment, promotion and tenure (“ARPT”) decisions in non-departmentalized faculties (“NDFs”); and
- c. Act as Head (or the equivalent to a Head) in Part 4, Article 5 processes including Article 5.02 meetings and Article 5.04 consultation committees providing recommendations on ARPT decisions in NDFs (as the University has effectively acknowledged that Associate Deans should not act as Heads in departmentalized faculties).

204. Although there are various inconsistencies with the procedures and practices of NDFs, the Faculty Association has agreed on a without prejudice basis that the only issues before the Arbitrator concerning NDFs are (b) and (c) above. The Faculty Association reserves the right to grieve other concerns at a later date.

205. The Faculty Association’s position is simply that as excluded members, Associate Deans, like Deans or other excluded positions, cannot access bargaining unit rights and benefits such as the consultation rights outlined in Part 4, Article 5 unless explicitly provided for in the Collective Agreement. Since Part 4, Article 5 is completely silent as to the role of Associate Deans in ARPT processes under the Collective Agreement, the answer to all of the above questions is no: they cannot participate in and be voting members in DSCs in departmentalized faculties, they cannot be substantive voting members in any consultation committees in NDFs, and they cannot act as Heads or equivalent in NDFs.

The parties addressed these issues on the basis of contractual interpretation plus historical and institutional context. They advanced extrinsic evidence of bargaining history, past practice, and negotiated intent. The relevant principles of interpretation and admissibility of extrinsic evidence are reviewed below.

Despite the apparent narrowing of the issues, the parties’ positions, arguments, and particularly their extensive briefs are heavily interlaced with assertions that each involve some underlying major premise, about some of which the parties have disagreed for over a decade. Deciding the specific and narrow questions above requires some untangling the knots created by such assumptions.

The parties remain separated by fundamentally different perspectives to which they return, as if tied by bungee cords, when a related issue arises. The Faculty Association’s position gives paramountcy to what it calls fundamental labour relations principles and applies what they view as those principles to issues in a fairly rigid manner. The University most frequently relies on what it views as a collegial perspective to University governance to which it mostly argues the

rules for industrial labour relations needs to be adapted. That said, the University still advocates for its ability to “manage” in particular circumstances, falling back on dual aspect approaches when it suits that managerial interest.

This all requires an examination of the history of this bargaining relationship and its consequent collective agreement, as well as the basic building blocks upon the relationship depends. The result, in deference to the scope of the parties’ written arguments, is a much broader set of reasons than might otherwise have been necessary.

### ***Employment rights for Faculty Members excluded from the Bargaining Unit***

The fundamental problem has been this. The *University Act* contemplates persons becoming members of the University’s faculty. That is an important status with important rights. The Faculty Association acknowledges this, if in no other way, by saying that, if and when the person’s administrative position ends, they return automatically to the bargaining unit, essentially without loss of rank or status. The *Labour Relations Code* in British Columbia was amended to allow Faculty Associations, as Trade Unions, to certify a bargaining unit, but neither the *Labour Relations Code* nor the *University Act* gives guidance as to how the managerial exclusions in the *Labour Relations Code* are to be dealt with.

Faculty members, in the *University Act* sense, who are excluded from the bargaining unit, still have terms and conditions of employment. It is generally accepted that their employment while excluded is governed by common law contracts, that they cannot use the collective agreement’s grievance procedure, and cannot look to the Faculty Association for representation. However, such “managerial” faculty members often continue to teach, hold and progress through their academic ranks and so on. What processes govern this dual-aspect employment? Is it

- specific and individual contracts with the University
- University policies which apply except to bargaining unit faculty members to the extent the collective agreement provides otherwise, or
- can some or all of their terms and conditions of employment be drawn from the collective agreement even though they are excluded from the bargaining unit?

In some jurisdictions legislation solves the problem or the parties devise ways to navigate these difficult waters. Doing so requires plain language. Hitherto these parties have been content to perpetuate sometimes ambiguous uses of terms like “faculty member” and “bargaining unit

member". The same is true of the term "managerial" and "managerial work". Often each side's use of a term is implicitly but not expressly qualified by their conviction that "collegial" or alternatively "labour law" principles and presumptions will result in their own interpretation prevailing.

### ***Differing Perspectives***

I have referred to the collegial versus the labour relations perspectives. Collegial decision making has a long tradition, and continues to play a major role in University life. However, a few preliminary points need to be made.

First, in most cases, the influence of the collegium in the ARPT area in Universities has been advisory, with ultimate decisions being made by a President, Board of Governors, or some other clearly managerial authority, often finally, but at times subject to arbitral or appellate review. This is not to suggest the importance of the advisory role is other than robust, only that it is usually not decisive.

Second, decisions on hiring, tenure, promotion and so on are primarily important because they influence the individual's academic place within the institution. Beyond that, such decisions reflect upon and influence the individual's admission to and standing within the global academic community. This is a major reason why a decision of one's peers carries such importance. However, it is equally true that each Faculty, and each University, develops its wider reputation by the cumulative quality of its academic choices.

The University refers to the following extract to underscore the fundamental importance of tenure processes:

80 Tenure decisions are among the most important decisions for both the faculty member and the institution. In this regard, the words of Arbitrator Etherington are apt:

The large body of case law undoubtedly reflects the great importance of tenure decisions to both the professor and the institution. There is likely no more important decision made by academic institutions and their collegial decision-making processes for both the long-term health and reputation of the institution. This is undoubtedly the reason why university professors have one of the longest periods of probation in the world of employment. This in turn highlights its importance to their economic wellbeing, academic freedom and academic career aspirations.

81 For these reasons, the central feature of the tenure decision process in this collective agreement, as in all other university collective agreements, is that the decision is a collegial one. Recommendations regarding tenure, either to grant or deny, are made by the applicant's

colleagues in the faculty (TPF) and the University (TPU and URAC) with the initial recommendation made by the Dean and the final decision made by the President.

*Nipissing University and Nipissing University Faculty Association [2017] O.L.A.A. 204 (Steinberg)*

Third, the exclusion of an academic from aspects of collegial decision making, (or failing to include them in, depending on one's point of view) is of particular interest to those excluded individuals. The University's interest is less direct; it has an interest in not having administrative appointments seem undesirable because of such exclusions. It has its reputational interest. However, the University's major interest in these type of collegial decisions is maintained by its more direct influence on the final decisions, usually reserved to the Governance Board, a President or some similar entity. Any discussion of the importance or paramountcy of collegial governance has to recognize this. The Faculty Association's view is that any loss of influence at the consultation phase by administrators is compensated by increased influence, as part of the "Dean's office" or the "President's office" at the next stage of the various processes.

The conflict of interests (or rights) is between academic staff who want decisions made excluding the influence of management through administrators, and those administrators who feel they continue as academics themselves, who may well return to a purely academic role, to have a right to participate in such decisions. For example, in bargaining in 2010, Vice Provost and Associate Vice President Academic Anna Kindler expressed the view that her rights and opinions as a faculty member had been stripped from her. Dr. Peacock, the Dean of Science, expressed a similar view and bemoaned the development of a "them versus us" approach. The University's brief lists what it views as the interests of Associate Deans and Deans.

Associate Deans have advised the University that:

- They identify primarily with their role as faculty members as opposed to as "managers" or administrators.
- When involved in DSCs:
  - Associate Deans participate in DSC processes wearing their "faculty member hats" as opposed to their "administrative hats".
  - Associate Deans do not participate as representatives of the Dean's office. They do not report to the Dean on what transpired at the DSC and do not assist the Dean with his/her recommendation.
  - Associate Deans would not participate or vote on a candidate for ARPT if there was a conflict for any reason, including based on dealings while in Associate Dean role (both true of when the individual in the Associate Dean role and upon conclusion of the appointment and return to the Bargaining Unit). This is the same way conflicts are addressed for a faculty members appointed to the Head role; on a case by case basis.

- It is important to Associate Deans to have a say in who gets appointed, promoted or tenured in their Home Departments as they expect to work alongside those individuals for many years. These decisions are important as they shape the future of the Department.
- Some Associate Deans advised that they would not have accepted or would have seriously reconsidered taking an appointment as Associate Dean if it meant being deprived of the ability to vote in ARPT procedures in their Home Departments.

Deans have advised the University that:

- It is difficult to find faculty members to fill the Associate Dean role. Not being able to participate in ARPT would made [sic] the job less attractive and more difficult to fill.
- The Associate Dean role is highly demanding, and not rewarded at the level of effort.
- Associate Deans step into the role because they care about their Departments. They are “good citizens”, well-respected, highly involved faculty members that are committed to the institution and their colleagues. It would not serve the Faculty well to have a weak Associate Dean.
- It would also not serve the University for Faculties to have to hire faculty members (or non-faculty members) externally to fill the Associate Dean roles but that may be necessary if current faculty members are not prepared to apply for the roles due to being denied the ability to participate in ARPT in their Home Departments.
- Associate Deans do not report to them in respect of their involvement in DSCs.

What it does not list are the expressed interests of the University in having these positions able to participate in ARPT process still carrying their management perspectives. Some discussions during and after bargaining illustrate this aspiration.

The Faculty Association, in its initial bargaining proposals on February 1, 2010, proposed terms to deal with some of the problems with exclusions generally and with the problems created concerning terms and conditions if excluded.

The Faculty Association’s proposal on this read:

Heads, Directors, Associate Deans

7. The Association proposes a new Article in the Agreement on Conditions of Appointment for Faculty and a new Article in the Agreement on Conditions of Appointment for Librarians providing the terms and conditions of employment for members with specific administrative responsibilities (Heads, Directors, Associate Deans, Supervising Librarians, and similar positions) including job description, selection, recognition for service, a clear mechanism for access to the career advancement plan and to ensure that they have the training, time, and support they require to be effective.

The University’s initial response to this proposal, on March 1, 2010, said simply:

This issue is a non-starter for UBC. We acknowledge that heads are in the bargaining unit qua faculty. In capacity as heads, act for and on behalf of mgt. Sometimes their membership in BU can put them in conflict, but not prepared to bargain their roles in these positions as management in the university. (emphasis added)

This “in the bargaining unit qua faculty” approach was repeated several times. The University’s position reflected the view that included employees like Heads still managed and that excluded employees still had the rights to participate in the ARPT procedures in the collective agreement.

### ***History of the bargaining relationship***

The University of British Columbia has had academic faculty, and an academic hierarchy, since its creation in 1908. It has had governing legislation throughout its existence. Early on, faculty formed the Faculty Association of the University of British Columbia. Over time the Association increasingly represented faculty in respect to salaries, academic freedom, tenure, promotion and similar issues, but all on a voluntary basis. Some of the history of the relationship, up to 2004 is described in a decision between these same parties.

*University of British Columbia v. University of British Columbia Faculty Association* [2004] 125 L.A.C. (4<sup>th</sup>) 1 (Dorsey)

A fuller and very helpful history which shows how UBC developments often mirrored developments from elsewhere, particularly the University of Toronto, is contained in an extract from the following text referred to by the Faculty Association.

Michiel Horn, *Academic Freedom in Canada*, University of Toronto Press, 1998, Chapter 11

The relationship took on greater statutory formality in 1999-2000. The Canadian Union of Public Employees applied to the British Columbia Labour Relations Board to certify the sessional instructors at UBC. The Faculty Association opposed this move arguing that it already bargained for them on a voluntary recognition basis. The Labour Board, in a preliminary decision, said “... instead of pursuing voluntary recognition status, the Faculty Association might seek certification”. The Labour Board later described what happened next.

6. Shortly after our Interim Decision, the University and the Faculty Association agreed to amend their Agreement on the Framework for Collective Bargaining (the "Framework Agreement"). The second paragraph in the preamble of this document previously recorded the resolve of the parties "to enter into collective bargaining outside of the Labour Code of British Columbia". Under Section 3, the University recognized the Faculty Association "as the sole collective bargaining agent for all members of the bargaining unit on the matters specified in Section 8 below". The latter section

established the scope of bargaining and listed items that could be "the subject of negotiation" between the parties.

7. The proposed amendments to the Framework Agreement were intended to "formalize" the parties' relationship under the *Labour Relations Code* and were subject to ratification. Appendix "A" to a letter dated November 10, 1999 from the University's Vice-President Academic and Provost to the Faculty Association's President listed six amendments to the Framework Agreement.

*UBC v. CUPE Local 2278 (infra)* (Hall – Vice-Chair)

The same decision noted that:

- A "Framework Agreement" had existed since 1979 and was amended several times, including 1993 and 1999 (para. 14-15);
- Annual collective agreements had been negotiated with disputes resolved through arbitration (para. 16);

The Board dismissed CUPE's certification because it found the Faculty Association's voluntary recognition agreement with the University, by then expressly contemplated to be under the *Labour Relations Code*, for a bargaining unit of sessionals and faculty, was valid.

*University of British Columbia v. Canadian Union of Public Employees Local 2278* (BCLRB No. B220/2000 Vice-Chair Hall), [2000] CanLii 27787 reconsideration denied BCLRB No. B446/99 and B220/2000, [2000] CanLii 27376

The University thus voluntarily and briefly recognized the Faculty Association under the Code in November 1999. The Labour Relations Board granted certification in January 2000.

In 2005, the University absorbed what was once Okanagan University College, and took on about half its staff. Now, one collective agreement covers both the Vancouver main campus and the smaller Okanagan campus. Because of its size and limited number of full professors the parties agreed to some modified ARPT provisions. The Okanagan campus has given rise to some of the questions in issue here because it has, despite these modifications, not always fit into the normal faculty model.

The issues now in dispute originate primarily from the 2010 round of collective bargaining. A key issue was which positions fell within the scope of the certification and which did not. More will be said of this later. Suffice for now to say that the parties came to a resolution over excluded positions, but they never genuinely agreed on what exclusion from the bargaining unit meant in practice. What was agreed requires reference to the "Framework for Collective Bargaining" and

more particularly Appendix A which specifically lists the agreed upon exclusions. Some of the discussion on the point then and after is recorded later.

The Collective Agreement is divided into nine parts plus an index. Most significant for this decision are:

- Part 1: Framework for Collective Bargaining, and
- Part 4: Conditions of Appointment for Faculty.

Following a brief introduction, it spells out “Framework for Collective Bargaining”, followed by definitions, addressed separately below. The preface, signed by the University’s President and by the Faculty Association President, includes:

The Collective Agreement defines rights of members and is essential reading for members of the Faculty Association and administrators alike in such critical activities as consideration for promotion and tenure, collective bargaining between the Association and the University, and the proper conduct of grievances.

The Collective Agreement should be read in conjunction with other documents including:

1. The UBC Policy Handbook, available online at [www.universitycounsel.ubc.ca/policies/index.html](http://www.universitycounsel.ubc.ca/policies/index.html), and
2. Publications from Human Resources that provide details about benefits, available online at [www.hr.ubc.ca](http://www.hr.ubc.ca)

This is followed by:

**PART 1: FRAMEWORK FOR COLLECTIVE BARGAINING**

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

**DESIRING** to promote fair and proper economic conditions and terms of appointment for Faculty Members, Librarians, and Program Directors at The University of British Columbia;

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

**BEING DETERMINED** not to interfere with that academic freedom;

**CONFIRM THAT** the members of the University enjoy certain rights and privileges essential to the fulfillment of its primary functions: instruction and the pursuit of knowledge. Central among these rights is the freedom, within the law, to pursue what seems to them as fruitful avenues of inquiry, to teach and to learn unhindered by external or non-academic constraints, to engage in full and



unrestricted consideration of any opinion. This freedom extends not only to the regular members of the University but to all who are invited to participate in its forum.

Since before the 2010 round of bargaining, the parties included a “scope clause” within their agreement. The current version reads:

Article 2. Bargaining Unit

2.01 a) The bargaining unit shall consist of all persons appointed on a full-time or part-time basis as a Faculty Member, Librarian, Program Director in Continuing Studies, or equivalent position.

b) A person shall not cease to be a member of the bargaining unit if his/her employment by the University is changed from full-time (tenured or confirmed appointment) to part-time (tenured or confirmed appointment).

2.02 The Parties may from time to time agree to include additional persons in, or exclude persons from, the bargaining unit (see List of Exclusions in Appendix A). (emphasis added)

The parties initially took differing views of whether, after certification, this implicitly excluded non-employees under the *Labour Relations Code*, or whether any such exclusions had to be explicit following bargaining on the question. In my view the scope of the Faculty Association’s right to exclusively represent faculty members, from the time of the voluntary recognition under the *Labour Relations Code* in 1999 implicitly excluded persons who, in fact, fell within the managerial definition. There could be disagreements about any particular person’s status, a topic on which the parties might agree, seek an arbitrator’s ruling, or a Labour Board determination. However, there is no presumption that someone clearly managerial is within the unit unless and until it is ruled otherwise.

In the 2010 negotiations, after much debate, the parties amended Appendix A to add “Associate Deans, Assistant Principals and equivalent positions” to the list of exclusions. Ever since, the parties have been at odds over how, if at all, this agreed upon exclusion affects the ability of the persons now excluded to sit on committees involved in ARPT processes.

Appendix A, in its current form, reads:

**APPENDIX A\***

**Exclusions from the Bargaining Unit**

The President of the University  
 The Vice Presidents of the University  
 The Deputy Vice Chancellor and Principal  
 The Provosts

Associate Vice Presidents of the University  
 Senior Advisors to the President  
 Deans and Principals of Faculties or equivalent units  
 Vice Dean of the Faculty of Medicine and equivalent positions  
 Associate Deans, Associate Principals and equivalent positions  
 The University Librarian  
 Deputy University Librarian  
 Associate University Librarians  
 Faculty members holding visiting appointments

Faculty members, including Deputy University Librarians and Associate University Librarians, excluded from the bargaining unit to serve as academic administrators shall enter or re-enter the bargaining unit as full-time members at the end of their administrative term. They will not lose any previously accrued rights and privileges and their employment in the bargaining unit is deemed to be continuous. An academic administrator appointed to the University's negotiating committee for collective bargaining whose administrative appointment terminates during a round of bargaining, may, if the University desires, remain on the University's bargaining team, and thus on Appendix A, until the end of round of bargaining. (*emphasis added*)

\* See also Letter of Understanding 1:Re: Exclusion of New Position(s) from Faculty Bargaining Unit

Letter of Understanding 1 provides:

Re: Exclusion of New Position(s) from Faculty Bargaining Unit

Pursuant to Article 2 of Part 1: *Framework for Collective Bargaining*, the Parties agree the Office of Faculty Relations of the University will endeavour to provide the Faculty Association with timely notice where the University intends to create a new position that it proposes will be excluded from the Bargaining Unit represented by the Faculty Association. As part of this notification, the Office of Faculty Relations will provide the job description for the position and, if applicable, the name of the faculty member who will fill the position. The Faculty Association will provide a timely response to the University regarding the proposed exclusion. The Parties will meet to discuss the proposed exclusion at the request of either Party.

After reaching agreement about a proposed new excluded position, the Parties will add that position to Appendix A of Part 1: *Framework for Collective Bargaining*. In the event there is no agreement on the exclusion, the University reserves its right to exclude the position and the Parties are at liberty to seek resolution using the appropriate legal channels.

This letter leaves unexpressed just what the parties' view as the "appropriate legal channels"; whether Labour Board, arbitration, or something else.

As the parties agreed that Associate Deans are excluded and that Heads are in the unit, I need not review the following cases.

*Workers' Compensation Board and B.C. and Compensation Employees' Union*, B.C.L.R.B. No. B364/2001 (Saunders)

*British Columbia Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.* [2013] B.C.J. No. 2509

On June 29, 2011, the parties came to a “Supplemental Memorandum of Agreement” regarding the Interpretation and Clarification of the November 19, 2010 Memorandum of Settlement, which addresses specifically the position of Assistant Deans. It reads, in material part:

... the purpose of the following Supplemental Memorandum of Agreement (“Supplemental MOA”) is not to change or alter the November 19, 2010 Memorandum of Settlement ... but rather to clarify and implement the terms of that agreement. If there is any discrepancy between the Supplemental MOA and the Memorandum of Settlement, the parties agree that the terms of the Memorandum of Settlement will govern.

...

Appendix A

3. Associate Deans and Associate Principals are excluded from the bargaining unit, effective January 16, 2011.

4. Associate Deans and Associate Principals are entitled to any salary increases to which they were entitled to as members of the bargaining unit as of July 1, 2010.

5. A member’s entitlement to Career Progress Increments and study leave will be frozen as of the date of appointment as Associate Dean, Associate Principal or an equivalent position and their entitlement to the same will continue uninterrupted upon re-entry to the bargaining unit.

6. Associate Deans continue to be eligible for tenure and promotion reviews, as are other excluded positions. As excluded faculty members, Associate Deans do not have the right of representation by the Faculty Association. In the case of a tenure or promotion which is denied, the Associate Dean shall be responsible for obtaining his or her own legal representation if he or she wishes to dispute the decision on a contractual basis or otherwise. (*emphasis added*)

7. An Assistant Dean position is not an “equivalent position” that is excluded from the bargaining unit unless the Faculty Association and the University agree to the exclusion pursuant to Article 2.02 of the *Agreement on the Framework for Collective Bargaining* and the July 6, 2010 Letter of Understanding Re: Exclusion of New Position(s) from Faculty Bargaining Unit.

As noted above in the 2010 round of bargaining, the Faculty Association took the position that *prima facie* the unit for which it was certified included everyone with a Board of Governor’s appointment under the *University Act*. “Administrative positions” or “managerial positions” could only be excluded with the Faculty Association’s agreement. The University, in contrast, took the position that the unit description in the certification and the scope clause in the collective agreement could only include persons who were “employees” within the *Labour Relations Code* definition. They debated at the time the specific positions of Associate Dean and Head. For further disputes as to how exclusion issues should be resolved, they came to two agreements:

- (a) that they would use the process set out in the letter;
- (b) that they would amend Appendix A to exclude Associate Deans and, implicitly, not exclude Heads;

Those basic decisions are no longer up for debate, but the parties still disagree on what this means in practice.

At this point I note that there are other academic and quasi academic employees who are clearly and well understood to be outside the bargaining unit, in most cases because they are also outside the definition of Faculty Member in the *University Act* sense. These include Honorary Professors, Adjunct Professors, Partner Appointments, Visiting Professors and so on. While both parties referred to them, their existence makes no difference to the issues at hand.

### ***Basic Definitions***

The University of British Columbia owes its legal status, powers and responsibilities to the *University Act*, RSBC 1996, c. 468 (as amended). What was said in *Harelkin (infra)* is equally true for the University of British Columbia.

The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy.

*Harelkin v. University of Regina* [1979] 2 S.C.R. 561

In B.C. Universities and Faculty Associations had no access to the Labour Code until about 1996. It now allows trade unions to obtain bargaining rights for the employees of an employer; the University is such an employer, and the Faculty Association is one such trade union. Bargaining rights can be obtained by voluntary recognition or by a process of certification. Section 27 provides:

Effect of certification

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

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

Both the *University Act* and the *Labour Relations Code* contain definitions:

The *University Act* provides:

1. In this Act,

...

“faculty member” means a person employed by a university as an instructor, lecturer, assistant professor, associate professor, professor, or in an equivalent position designated by the senate;

This definition makes no mention of the fact that such listed persons may also take on senior administrative roles.

The B.C. *Labour Relations Code* extends the right to choose collective representation and bargaining to “employees” which it defines as follows:

“employee” means a person employed by an employer, ... but does not include a person who, in the board's opinion,

(a) performs the functions of a manager or superintendent, or

(b) is employed in a confidential capacity in matters relating to labour relations or personnel;

While the confidential labour relations capacity has some relevance, I will simply use the term “managerial exclusion”. Several other definitions and processes in the *Labour Relations Code* draw on the “employee” definition. In particular a unit is “an employee or group of employees ...”

The party's collective agreement includes its own definitions, initially in Part 1:

1.01

“**Collective Agreement**” means Part 1: Framework for Collective Bargaining; Part 2: Salaries and Economic Benefits; Part 3: Leaves of Absence; Part 4: Conditions of Appointment for Faculty; Part 5: Conditions of Appointment for Librarians; Part 6: Conditions of Appointment for Program Directors in Continuing Studies; Part 7: Conditions of Appointment for Sessional Lecturers; Part 8: Reduced Appointments; and Part 9: Termination or Non-Renewal of Faculty Appointments for Financial Exigency.

“**Academic unit**” means a Faculty, a Department, the Library, Continuing Studies, a School or equivalent body;

“**Association**” means the Faculty Association of The University of British Columbia;

“**Faculty Member**” means any person having an appointment from the Board of Governors of The University of British Columbia as Sessional Lecturer, Lecturer, Instructor, Senior Instructor, Professor of Teaching, Acting Assistant Professor, Assistant Professor, Associate Professor, or Professor;

**“Head”** means the head or director of an academic unit or the equivalent position in Institutes and Schools;

**“Member”** means member of the Faculty Association bargaining unit;

**“Salary”** means compensation which is received by members of the bargaining unit and which is subject to negotiations between the Parties and/or arbitration;

It is significant that “Faculty Member” and “Member” are separately, and differently, defined. Part 4 of that agreement, however, also contains its own definition “For the purpose of Part 4”:

**“Faculty Member”** mean all persons appointed by the Board of Governors of the University of British Columbia on a full or part-time basis as instructor, Senior Instructor, Professor of Teaching, Lecturer, Acting Assistant Professor, Assistant Professor, Associate Professor, Professor or equivalent position.

The University’s written submission describes the difference between Departmentalized Faculties and non-Departmentalized Faculties.

#### **B. Departmentalized Faculties**

Departmentalized Faculties are faculties that are divided into specific departments or programs (“Department”). For example, the Faculty of Science has 12 Departments (e.g., Botany, Chemistry, Computer Science). Each Department has a Department Head appointed from the Bargaining Unit.

Faculty members in a Departmentalized Faculty have a home department (“Home Department”). For example, Dr. Simon Peacock is a Professor in the Department of Earth, Ocean and Atmospheric Sciences (his Home Department) in the Faculty of Science.

#### **C. Non-Departmentalized Faculties**

A number of faculties at the University, namely, the Allard School of Law, Pharmaceutical Sciences, Sauder School of Business, Land and Food Systems and the Faculty of Management at UBC-Okanagan do not have formal Departments. These are referred to as Non-Departmentalized Faculties (“NDFs”). NDFs differ significantly from Departments but also from one another.

Some NDFs have natural divisions, somewhat akin to, though significantly smaller and generally more diverse than, programs or Departments in Departmentalized Faculties. For example, Land and Food Systems (“LFS”) has 4 streams: Applied Biology; Food, Nutrition and Health; Global Resources Systems; and Food and Resource Economics. However, LFS has a total of approximately 40 faculty members so each stream [sic stream] is small, highly diversified and has few full professors. Sauder is loosely organized into divisions corresponding to particular business disciplines (e.g. real estate and accounting). These divisions are smaller and less autonomous than Departments. The divisions do not manage the strategic direction of the unit nor are they fully accountable for budgetary or operational issues. They do not hire faculty, set salaries, and do not set the academic direction of the unit.

Others NDFs, such as Law and Pharmaceutical Sciences, are flat with no natural divisions. In these faculties, the faculty members effectively act as one large Department. There are no DSCs or Heads in NDFs because there are no Departments.

In the abstract, just who, from time to time, is “a manager”, and thus not an “employee” in the collegial and hierarchical structure of a University, is not easy to either define or to discern. It is not assisted by asking are they doing “managerial work” at a given time since the collective agreement, despite arguments to the contrary, contains no direct definition of “managerial” or “bargaining unit” work. It is made more difficult by the tendency to appoint administrators from the (broadly defined) faculty and very often see them continue to teach or research and then return to the faculty (in the labour relations sense) once their administrative term and responsibilities end. Such issues bring to mind the nursery rhyme about the Grand Old Duke of York’s 10,000 men.

When they were up they were up  
 When they were down they were down  
 And when they were only half way up they were neither up nor down

### ***Labour Relations in the University Setting***

Much has been written about the difficulties of adapting labour relations principles, drawn largely from industrial circumstances, to a University setting. The Faculty Association suggests this is adding a false complexity to a simple question, as suggested in the first three paragraphs of its Reply Brief:

1. The University’s 93-page response (the “University’s Response”) boils down to a convoluted argument that labour relations law and principles, including the “normal assumption” that persons excluded from the bargaining unit are excluded from collective agreement rights and processes (as characterized by the University at para. 9), do not apply – and are not mutually presumed to apply – in the university setting. The University effectively argues that the Faculty Association’s position is too logical and straight-forward and that the admittedly more complicated argument of the University ought to be followed instead. The Faculty Association could not disagree more. In most cases, as is here, the simplest answer is the correct one.

2. In general, we say that all labour relations law and principles apply, even if they have to be modified to fit within a non-traditional workplace. With respect to the specific presumptions at issue here, however, there is no reason why they cannot be simply applied. When a person is excluded from the bargaining unit, as in the case of Associate Deans, they cannot legally access the collective agreement unless explicitly permitted to do so. There is nothing about the university context that changes this, even if a determination of who is management and who is an employee is a complicated question. The question is not whether or not Associate Deans are management, the question concerns the effect of their exclusion. At minimum, the parties are presumed to know the applicable labour relations law and principles, especially the “normal assumptions” such as the presumption on exclusions and the inherent conflict posed by management. Thus, in the 2010

round of bargaining when Associate Deans were excluded, like any other senior administrator, both parties must be presumed to have known they could not access any bargaining unit terms, conditions, roles and processes.

3. The issues in this case are straightforward and can be answered by reference to, not avoidance of, longstanding arbitral and labour law. If not, this will be a precedent-setting case. Although this arbitration was only originally intended to address the exclusion of Associate Deans, it is clear from the University's submissions that this issue involves the role of all senior excluded administrators in ARPT under the Collective Agreement. If the University is correct, then all senior excluded administrators will suddenly have access to various aspects of the Collective Agreement, without remittance of any union dues or fidelity to the bargaining unit, and despite involvement in various managerial discussions and bargaining matters. Such a result would be manifestly unfair and irreparably damage the integrity of the bargaining unit.

Notwithstanding these views, the following extracts are worthy of consideration. Both parties agree that the interpretative task needs to be contextual, particularly given the specialized nature of a University as a place of academic employment. It is now well accepted that collective agreements are not negotiated in a vacuum. The words used can draw meaning from their context; from the agreement as a whole, and from the judicial and jurisprudential history that sets the parties' expectations and understandings.

Arbitrator Dorsey has said:

48 ... A workplace environment of collegial decision-making may produce agreement on structures and processes that soften the clear lines between employer, union and employee authority and roles commonly found in collective agreements operating in typical industrial workplaces ...

*British Columbia Institute of Technology v. BCIT Faculty and Staff Association* [1997] B.C.C.A.A. 575 (Dorsey)

It is also useful to reflect on the words of former B.C. Labour Relations Board Chair, the late Paul Weiler.

The distinction between the manager and the employee is fundamental to our collective bargaining law. That legislation was developed and designed with the traditional industrial model in mind. There, authority is given to a few persons at the top of the hierarchy to direct the activities of large numbers of employees at the bottom. The point of trade-union representation is to give these latter "employees greater equality of bargaining power in dealing with those higher up ... That model is strained considerably when it is stretched to apply to the organization of white collar employees ... However, when applied to institutions of higher education, that model reaches the breaking point.

Why is that so? Because, as was graphically illustrated by the evidence in this case, the ideal mode of educational decision-making is believed to be shared, collegial authority. That ideal stems from the nature of college education. Members of these faculties normally undergo years of training in an intellectual discipline, obtaining M.A.'s, Ph.D's, and even doing post-doctoral study. They then go into the classroom alone to try to impart that knowledge to their students. There are no supervisors present telling them how to teach. Not only would that be ineffective, it would also



produce the immediate reaction of a breach of academic freedom. Each instructor claims the right to teach the subject as he or she feels best: to decide what is to be discussed in the classroom, what reading materials are to be used, how the ideas may best be conveyed, and finally, how to judge whether the students have learned it. These claims of academic freedom extend beyond the classroom and the individual course to the design of the over-all program of which it is a part. Faculty members participate jointly in deciding what will be included in the curriculum, what are the prerequisites for students being admitted to the course, and what will be the qualifications for a degree. The ultimate implication of this notion of professional competence in the discipline extends to the question of who should be part of this intellectual community which enjoys these freedoms and makes these decisions. That is why faculties historically have claimed the right to judge who should be hired, who should get tenure, who should be promoted, and who should be dismissed. Each of these judgments depends on an evaluation of a person's professional qualifications and performance. The notion is that they should be made only by those who have themselves passed the test and become members of the faculty.

The thread which runs through this whole structure is the view that academic decisions of this kind should be arrived at by free discussions among professional colleagues, not imposed from above by someone with a position of authority. Clearly, some people will have much greater influence than others on the decision, but that should be due to their formal role in the institution. Certainly, this is an idealized picture of how academic decisions are reached in universities and colleges. As counsel for the employer put it in this case, academics should not deceive themselves into believing that in the real world such decisions are based purely on a consensus of objective scholarly judgments. Still, there is a visible contrast in the style of government in an academic community and the way production in a mill or a factory is directed by management. (*emphasis added*)

*Faculty Association of Vancouver City College (Laugan) and Vancouver City College, BCLRB 60/74 (P. Weiler – Chair)*

See also:

*Okanagan College Board v. Okanagan College Faculty Association* [1982] BCCAAA No. 250 (Bluman) at para. 40-41

*Nicola Valley Institute of Technology v. Nicola Valley Institute of Technology Employees' Assn.* (2006) 84 C.L.A.S. 141 (Ready)

*British Columbia Public School Employers' Assn. v. B.C. Teachers Federation* (2010) 101 C.L.A.S. 343 (Brown)

Chair Weiler's comments remain significant today, although the introduction of management concepts to universities combined with a greater emphasis of budgets and fundraising (sometimes adding "public relations" pressures) have made the challenges even more difficult in today's environment.

Arbitrator Luborsky described a few of the features of academic life that are important in University - Faculty Association labour relations.

40 The foregoing provisions of the collective agreement must be read in the context of the workplace. Unlike the traditional perception of the “shop floor” with its rigid separation of management and labour, the line between analogous administrative and faculty positions in the collaborative environment of a university is much less defined. As illustrated by the facts of the present case and the express provisions of the parties’ collective agreement, there is significant overlap of managerial or administrative functions with clear bargaining unit work in roles that are nevertheless recognized as bargaining unit positions. Moreover, in order to foster the collaborative environment of the workplace, it is apparent that the parties have contemplated in their collective agreement a high degree of mobility by employees who may regularly transfer from the predominate bargaining unit position as a faculty member, to mixed duties for teaching (or research activities) with added administrative responsibilities along a continuum of progressive increments in managerial authority, the latter being compensated separately as a stipend on the base salary negotiated for faculty members. In such an environment, the separation of management from labour becomes blurred.

*Ryerson University v. Ryerson Faculty Assn. (Norrie Grievance)* [2012] OLA 608 (Luborsky)

As in *Ryerson (supra)*, at UBC there are certain characteristics that distinguish it from the industrial workplace with clear lines between managers and workers.

- It is commonplace for bargaining unit members of faculty to take administrative appointments, often for a fixed term, with the expectation of returning back to their regular faculty duties alone (in the unit) once their term is over.
- Academics who take on administrative positions in a University often continue to teach classes or undertake research and writing, albeit as a reduced portion of their overall activities.
- Excluded persons continue to be eligible for tenure and promotion reviews (see Appendix A Supplemental Memorandum of Agreement).
- Persons who take on administrative positions in a University must frequently do so following an academic career having achieved professional standing, most often with a PhD in their chosen field.
- As academics, whether in administration or not, there is a core belief in the value of academic freedom and the virtues of peer review, both for assessing research and for academic advancement.

It is such factors that reinforce the “I’m a faculty member in the *University Act* sense” notion and tends to blur the “industrial divide” between labour and management.

I note again the trend in Universities to hire what can loosely be called managers, particularly for the financial, human resources or public relations/fundraising portfolios and to provide them with titles that imply an academic background they may not possess. It is a factor that tends to heighten the perception of a management versus labour dynamic in University labour relations.

### ***University Management***

The University says express limitations are necessary to limit its management rights, although perhaps it is more properly expressed as the rights to manage as granted to the Board of Governors by Section 27 of the *Universities Act*.

#### **Powers of board**

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

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

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

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

#### **Tenure, appointment and removal of teaching staff and others**

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

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

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

The University supports this assertion by reference to a 2004 case between these same parties. Neither party, then or now, disputed that a collective agreement can, and this agreement does, bind the University. Section 49(1) of the current *Labour Relations Code* puts that beyond doubt.

The grievance involved the University's insisting on a copyright agreement from an instructor in the bargaining unit without going through the Association. The copyright dispute related to the faculty member's development of on-line courses. Arbitrator Dorsey began his analysis with

important points about the Association's exclusive bargaining agency and the terms of the collective agreement:

223 The Faculty Association is the exclusive bargaining agent for its members. It has entered into a collective agreement with the University. A collective agreement is a written and binding agreement about some, but not all, of the terms and conditions of employment of the employees covered and bound by the agreement.

224 The *Labour Relations Code* under which this collective agreement was negotiated does not limit the scope of permissible collective bargaining. Unlike section 27 of the *School Act* RSBC 1996, c.12, it does not exclude any facet of the employment relationship from being the subject of collective bargaining and a provision of a collective agreement. And, with exceptions to advance the public policy of industrial stability, the *Labour Relations Code* does not direct what employers and unions must include in their collective agreements.

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

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

*University of British Columbia and University of British Columbia Faculty Association* [2004] BCCAAA 39 (Dorsey)

This passage reinforces the point that the University has the right to manage the operation, subject to restrictions negotiated by the parties that restrict those rights. It also puts emphasis on the point made elsewhere that what the parties negotiate is a question of interpreting their agreement in each situation; agreements can cover more or less of the terms and conditions of employment. Arbitrator Dorsey concluded that the University had improperly negotiated the copyright issue with the grievor without going through her bargaining agent. The University challenged this ruling before the British Columbia Labour Relations Board:

*Re: University of British Columbia* [2006] B.C.G.R.B. No. 56 (Mullaby, Vice-Chair)

The Board rejected the University's arguments and, at para. 22-25, reinforced the proposition that the Faculty Association, as a certified or voluntary recognized trade union,

... is the exclusive bargaining agent with respect to the conditions of employment of the employees in any unit ... (*emphasis added*)

The BCLRB made a further important point concerning the University's right to manage, the Association's exclusive bargaining agency, and the ability of the University to make policies touching on employment. It recognized the right to make policies but pointed out that, in doing so; (a) it cannot negotiate directly with employees and (b) that any such policies must still comport to the *KVP* rules, the first three elements of which are as follows:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.

See:

*Re UBC (supra)* at para. 70

The BCLRB said:

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

This limitation on the University's right to manage would not, without clear language, apply to excluded employees (see below) during the term of their inclusion. Arguably however, this agreement contains such language on some important points.

Most Universities use a wide range of policies to govern their affairs and it is a thriving source of arbitral activity to sort out how such policies mesh with faculty negotiated collective agreements, and to whom and to what extent these policies apply. The parties placed several such policies into evidence, notable among them AP4 – Faculty Term Appointments Policy, UBC – Human Resources – Administrative Appointments, and Policy 22 – Heads of Academic Units, and SC3 Conflict of Interest and Conflict of Commitment. The University frequently refers to such policies in its offer letters, and thus common law contracts with excluded persons, and also in letters appointing an initially included persons to an administrative position.

The University's management's rights, whether from Section 27 and 28 of the *University Act* or specific recognition within the collective agreement must also be interpreted, as in the Dorsey

decision referred to above, in light of the Faculty Association's exclusive bargaining agency, which itself is acknowledged in this agreement in Article 3.

Article 3. Bargaining Agent

3.01 The University recognizes the Association as the sole collective bargaining agent for all members of the bargaining unit. Further, it is recognized by the Parties that the ratification of the document (letter dated November 10, 1999, from Vice President Academic and Provost to the President of the Association) by the Parties had the effect of voluntarily recognizing the Faculty Association under the Labour Relations Code.

The Faculty Association, in its reply, referred to a decision addressing, in a nuanced way, how management's rights may be constrained by the terms of a collective agreement. Arbitrator Knopf said:

28 The parties do not disagree about the general principles governing this grievance. They have been ably and fairly summarized in the *Long Manufacturing* case (pages 43 and following) and therefore shall not be repeated here. An individual's control over his/her terms or conditions of employment is determined by the collective agreement. Basically, the only ability of an individual to bargain or alter terms or conditions of employment is what, if anything, is allowed specifically in a collective agreement. Further, an employer cannot unilaterally change terms and conditions of employment or act contrary to the collective agreement. However, residual management rights do allow employers to act unilaterally on matters that are not covered by a collective agreement. See *Long Manufacturing*, and *Consumers Glass*, *supra*,

29 The application of these principles is a little more problematic. The question then becomes one of definition and focus. Does the Policy cover or deal with matters that fall within the collective agreement or not? Put alternatively, does the collective agreement "occupy the field" of the treatment of accrued vacation entitlement? If it does, then the payment could be held to violate the collective agreement and/or the Union's exclusive authority to represent the employees.

*Canadian Broadcasting Corp. v. C.E.P.* (2002) 112 L.A.C. (4<sup>th</sup>) 353 (Knopf)

Part 1 includes two other Articles which may be significant for this decision:

Article 16. Preservation of the Traditional Role of the Association

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

Article 17. Preservation of Past Rights and Practices

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

Neither party addressed in any detail what other representational activities the Association might be engage in or what rights and past practices were intended to be preserved by these two sections. It is significant that Article 17.01 refers to the broader term “Faculty Members” as well as the more limited term “members of the bargaining unit”.

### ***From Voluntary Recognition to Certification***

The parties’ arguments reveal several conceptual differences over what the 2010 certification entailed. Basically the University views it as but one point on a continuous relationship from voluntary recognition outside the *Labour Relations Code*, over decades, and probably over an increasingly wide range of topics, through brief voluntary recognition under the *Labour Relations Code*, to the 2010 certification.

In contrast, the Faculty Association sees certification as something of a “reboot”, with a series of new assumptions over the scope of the unit and to whom its collective agreement applies and can benefit. Much of this difference played out in respect to the rights of or restrictions on “administrative” Board of Governors appointees after 2010 most particularly the Associate Deans and Heads.

The Faculty Association, in its reply brief, argues that pre-certification concepts of management’s rights change fundamentally. It argues:

... prior to the advent of unions and collective agreements there was just management’s rights. When those rights were enshrined in a collective agreement, however, they no longer belonged to the employer but the employee (and by extension the bargaining unit). This fundamental concept has been well understood from at least the 1950s where arbitrators held that, “[t]he introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. (*emphasis added*)

To say collective agreements only enshrine employees and bargaining unit rights is an overstatement. The Association refers to a very early case where then arbitrator Bora Laskin said:

The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist.

The Faculty Association's assertion on this point is too black and white. It postulates that collective bargaining totally alters management's rights; it does, but largely only to the extent the collective agreement (properly interpreted) alters those rights. See for example, *CBC (supra)* In some cases agreements actually solidify or add to management's rights.

The Association's position also gives too little credit to the fact that this Faculty Association and others achieved many of the restraints on unilateral University action, and many of the procedural protections related to promotion and tenure, well before changes to labour legislation contemplated certification. Under voluntary recognition outside labour status such bargaining was not restricted by any statutory managerial exclusion. The Faculty Association's argument that protections and processes can only have been intended for Faculty Association members under the *Labour Relations Code* regime ignores this historical reality. Article 17 may simply be one reflection of that pre-certification history.

The analysis that follows distinguishes between some "generic" *Labour Relations Code* issues and then some rules and presumptions more specifically directed at collective agreement interpretation. It does so because, on each point, in addressing these issues, the parties have differed in some significant way in their dealings or in their submissions.

The "generic issues" are:

- Labour Boards certify employees not work;
- Differing notions of "dual status";
- Scope clause flexibility;
- Flexibility in negotiations;

The interpretation issues are:

- General Rules of Contract interpretation and the role of contextual evidence
- Presumptions against agreement rights for non-members
- Presumptions about management's rights
- Presumption about consultation rights



***The Labour Relations Board certifies “employees” not “work”***

The Labour Relations Board certifies trade unions as the exclusive bargaining agent for employees which means persons who meet that definition under the *Labour Relations Code*. This definition includes the managerial employees exclusion. Contrary to arguments advanced by the Faculty Association during the 2010 bargaining, it must be presumed that the scope of the certificate excludes managerial employees. The same is presumptively true if the parties adopt the wording from that certification into their collective agreement’s “scope clause”.

Employees are in or out of the unit because of the work they do in a broad, not a “snapshot”, sense. Absent contract language (which may include detailed job descriptions) the Union has no independent right to claim those it represents are exclusively entitled to perform certain work. Many parties negotiate contract language to achieve that result, but it does not presumptively follow certification. Particularly in industrial situations, is not uncommon to find a collective agreement clause of this sort.

Bargaining Unit Work: No non-bargaining unit employees will be used to perform work normally performed by members of the bargaining unit.

Whether in this case there are less direct references that have the same effect is the subject of argument.

The *Labour Relations Code* defines who is an “employee” and who is excluded from that definition because they “perform the function of a manager or superintendent”. It does not define what is “managerial work” or “bargaining unit work”. The Labour Relations Board, in a multitude of cases, has described which factors in a person’s job duties it finds indicative of managerial status, but that is quite a different concept than granting bargaining rights over the work itself. This point is made in the following extract:

61 I pause here to summarize the principles set out in the cases, and in particular those involving a dispute between two unions. First, a union’s certification only grants it the exclusive right to represent or bargain on behalf of employees in the bargaining unit, but does not establish any exclusive jurisdiction over the work performed by those employees. Second, in the absence of job descriptions (which may by implication restrict an employer’s right to assign certain duties to non-bargaining unit employees) a scope clause does not in itself grant the union exclusive jurisdiction over the work of those employees. Third, there is an implied term in collective agreements that bargaining unit work will not be assigned to non-bargaining unit employees to such an extent as to bring those employees within the bargaining unit. However, in order for that reasoning to apply, it must first be established that the subject work is bargaining unit work in the sense of being work that is performed exclusively by the bargaining unit. In other words, work that is performed by both bargaining unit and non-bargaining unit employees will defeat a claim that the work is bargaining unit work, because it is not exclusively performed by the bargaining unit. (*emphasis added*)

*Re Donohue Forest Products Inc. and CEP Local 402* [BCLRB] B 287/2001

See also:

Brown and Beatty, *Canadian Labour Arbitration*, 5<sup>th</sup> edition, 5:1200

The tests used to determine if a person is a managerial employee are well known and depend on a weighing of a variety of indicia of managerial status. The test is flexible, depending on the nature of the workplace. A person is not excluded simply by identifying their involvement in some duties capable of being one of those indicia. The texts and the case law are replete with descriptions of the wide variety of tasks and levels of responsibility that provide such indicia.

Employees of an employer are either included within the bargaining unit description, or excluded. I agree with the Faculty Association's proposition that people do not step in or out of a unit depending on the task or time of day. An early BCLRB case describes the principle.

... it is apparent that the IUOE, supported by the IWA, seeks a bargaining unit structured around job functions rather than employees. If the Board were to accede to this application, the practical result would be that an individual employee could be both within and without the bargaining unit on a number of occasions in the course of a single day, depending upon the nature of the work performed at any given time. For example, the operator of a crawler tractor working in the bush in the morning would not be a member of the bargaining unit but the same employee working on the same equipment on a road construction project in the afternoon would then become a member of the bargaining unit. The unworkability of such a situation, in a labour relations sense, is plain to see.

Contrary to the IWA's submissions, the foundation of a union's bargaining agency is not the right to bargain on behalf of job functions but, rather, the right to bargain on behalf of employees in a bargaining unit. A bargaining unit may be defined by reference to the work performed by the employees but the Board has held in previous decisions that it is inappropriate to structure units around job functions alone. (*emphasis added*)

*Re: A.S. King Ltd.* [1979] BCLRB 14

The same principle was reasserted in *Lifestyle Retirement (infra)*:

38 A trade union is certified to represent employees and not merely the work which they perform. For example, jurisdiction over work (e.g. assignments between job classifications, contracting out and so on) *is properly the subject of collective bargaining.* In contrast, while the scope of representational rights may be discussed, the issue cannot be taken to impasse in the event the parties disagree. (*emphasis added*)

*Re Lifestyle Retirement Communities Ltd.* [1997] BCLRBD Nov. 452 at para. 38

See also:

*Elty Publications Ltd. and CPU Local 226* [1994] Carswell B.C. 3911 (Bruce)

This arbitrator had to address the same question in a nursing case where a nurse was purportedly employed in two positions, one managerial and one treated as within the bargaining unit. The issues were described at page 738.

We now turn to the key question, which we could address in various ways:

- Can an individual have two statuses with the same employer at the same time?
- What job duties should the Board consider when determining whether to exclude a person as managerial?
- How does a person's status under the Code change if they perform two sets of job functions concurrently, sequentially or perhaps on an alternating basis?

*United Nurses of Alberta, Local 1 and Calgary General Hospital* [1992] ALRBR 731

In deciding that the individual was an excluded managerial employee the Board considered the nurse's duties in their entirety. It relied upon the discussions of the purpose behind managerial exclusions as described in the leading B.C. Board case:

*The Corporation of the District of Burnaby v. CUPE Local 23* [1974] 1 CLRBR 1

See also:

Adams, *Canadian Labour Law*, (2<sup>nd</sup> edition), Canada Law Book, Chapter 6, at 6.170

The exclusion is rooted in notions of a labour relations conflict of interest. The Board recognized that, in the hospital industry, there is no clear divide between managerial duties and bargaining unit duties and no-prohibition on manager's doing "hands on" work. The same is true in a University.

The Canada Labour Relations Board specifically addressed the labour relations conflict of interest that underlies the managerial exclusion.

The basis of the exclusion of certain "management" persons from the coverage of collective bargaining is the avoidance of conflicts of interest for those persons between loyalties with the employer and the union. This avoidance of conflicts protects both the interests of the employer and the union. The conflict is pronounced when one person has authority over the employment

conditions of fellow employees. It is most pronounced when the authority extends to the continuance of the employment relationship and related matters (e.g., the authority to dismiss or discipline fellow employees). It is for this reason that certain persons are denied collective bargaining rights granted to other employees. The Code is clear that the mere supervision of fellow employees does not satisfy the rationale for exclusion from employee status under Part V (see s. 124(4)).

*Bank of Nova Scotia*, 77 C.L.L.C. 16,090 at p. 536, upheld on judicial review [1978] 2 F.C. 807 (Fed C.A.)

See also:

*Fort S. James Operation Services LP* (2017) 5 C.L.R.B.R. (3d) 239 (Miller, Vice-Chair, BCLRB) at 30

*Vancouver General Hospital* (1993) 18 C.L.R.B.R. (2d) 161

Some of the discussions about the managerial exclusion in this case turned on the question of conflicts of interest. The Faculty Association spoke on several occasions about the difficult position Heads would be in if they were required to be involved in disciplinary or similar matters against a colleague. The University replied, at times, that conflicts of interest would not be an issue since the University has a robust policy on conflicts which applies to all employees. People simply recuse themselves where conflicts exist. The University's policy indeed covers a wide range of potential conflicts. However, conflicts in the sense of the topics addressed in the policy are quite different than the labour relations concept of a conflict of interest that is used to justify the employee versus management divide. The policy is important, but does nothing to negate the basic labour relations approach to managerial exclusion.

The tests the B.C. Labour Relations Board has developed for ruling on managerial exclusions, based on then s. 1(1) but in modified terms, was described by Board Chair Weiler in *Vancouver City College (supra)*. I find the case particularly helpful since it is from an analogous sector with similar functions for instructors and administrators. The issue in the case was whether four persons employed as Division Chairpersons were excluded from the College's academic bargaining unit. His description of the difficulties in applying the *Labour Relations Code* to a College are set out above. That cautionary description of the collegial approach to decision making was followed by the following comments on the managerial tasks that can or must co-exist along with collegial decision making:

Yet to end the description at that point would convey quite a one-sided picture of the status of faculty members in a college. The reason is that there is another feature of college operations – the need for efficient administration of the academic enterprise. Someone has to allocate courses to instructors, prepare class time-tables and exam schedules, see that course materials are

available. Someone has to see that committees are struck, job applications are processed, and interviews are held. Perhaps most important, someone must see that budgets are prepared, funds are obtained, and then that they are properly distributed. These tasks are performed in universities in accordance with the traditional bureaucratic model. Someone is given the authority to see that someone else does something at the proper time and gets a certain reward for doing it. In that relationship, the individual faculty members are like any other employees. They feel the need for joint efforts to achieve better wages and fringe benefits from the college administration (and, more and more, from the governments in the background who actually provide the budgets). They also feel the need to provide a secure foundation for preserving faculty control over key academic decisions from the encroachment of administration. That, I believe, is the explanation for the recent trend to faculty unionization and collective bargaining. However, it also leaves an uneasy relationship between these two systems of authority in the university – the collegial and the bureaucratic.

*Vancouver City College (supra)*

In the next part of the *Vancouver College* award the majority set out the duties of Division Chairmen in that institution. They were drawn from faculty, to serve for a limited term, assuming they would return to the faculty ranks once their term was over. They continued to teach but also took care of administrative details, including coordinating the work of faculty members. The conclusion is set out in the following passage:

From the picture that emerged at the hearing, these functions appeared to be the major thrust of the Division Chairman position. That function does not appear to be management – the exercise of authority over a group of people. Instead, it appears to be coordination of the instructional efforts of the many people in the division. The key indicia of managerial authority – the power to hire and fire, to evaluate and promote – are not features of this position. I do not mean to say that the Division Chairmen have no part to play in these decisions because they are made somewhere higher up. As a practical matter (subject to formal approval by the Principal), these are group decisions. The Division Chairman participates in the group and has substantial influence. However, so do ordinary faculty members who, as individuals, are clearly “employees” under the Code. Division Chairmen have no authority to impose discipline, except perhaps by way of verbal reprimands. They do prepare budget recommendations, but that task appears to be largely one of compiling figures with the real judgments about where to cut or where to expand being made elsewhere, again by a group. Finally, there are some functions for the Division Chairmen under the current agreement which appear to be managerial, e.g. the grievance procedure and on the evaluation committee. However, I am inclined to give these little weight. Not one of the Division Chairmen has yet had occasion to exercise any such authority and in any event the agreement was negotiated on the tacit assumption that the Labour Board would be deciding the true status of the persons in question, and that these functions would be deleted if we found them to be “employees”. In terms of the criteria relied on in the Corporation of Burnaby decision, there is very little here to suggest that the Division Chairmen are truly managerial personnel.

Of course, one cannot apply the language of that decision unthinkingly to new cases. The Board in that case simply began the development of guidelines for dealing with this kind of problem; it certainly did not finish the task. These guidelines will have to be worked out with reference to the types of enterprises in which employees are working and persons are exercising managerial authority. The kind of academic enterprise with which we are now concerned is very different from the operations with which the Board dealt in the Corporation of Burnaby decision. However, these special features of higher education point to a wider definition of “employee” under the Code, not a

narrower one. I imply no downgrading of the real importance and authority inherent in a position such as Division Chairman here. These people do exercise leadership and have substantial influence; they are not pure coordinators of the efforts of others. However, they don't "exercise management functions over other employees". (In fact, they found it distasteful, in giving their evidence, even to speak of managing or supervising other faculty members). They do use their greater experience, understanding, and time for reflection to play a major role in the groups which make the key decisions as to the direction in which the educational enterprise is to be taken. However, given the type of collegial responsibility for these decisions which exists at Vancouver City College, this important role for the Division Chairmen still does not mean that they are "employed for the primary purpose of exercising management functions over other employees".

*Vancouver City College (supra)*

See also:

*Re: Carleton University* [1975] O.L.R.B. Rep. 500

*Red Deer College and A.U.P.E.* [2017] CLRBR (2d) 100 (Alberta L.R.B.)

Such rulings provide support for the choice these parties eventually made to treat Heads as included in the UBC Faculty Unit as well as the simultaneous decision to exclude Associate Deans. That point is, by agreement, no longer an issue. What is significant is there was no suggestion, in these analogous academic situations, of Division Chairmen or like positions being in for some functions and out for others.

### ***Differing notions of Dual-Status Employees***

At the outset I referred to the persons who hold an academic position in a University and who are bound by a collective agreement negotiated by a bargaining agent on their behalf as "Dual Status Employees". Caution is needed since the term is occasionally used in two different circumstances. I use the term only to refer to employees that have their terms and conditions of employment partially established by a statute and partially through collective bargaining processes.

Examples of dual-status employees in this sense include police officers, public employees covered by a certification and a *Public Service Act*, teachers covered by a *School Act* and so on. Many cases have had to address issues that arise due to legislative schemes that exist parallel to collective bargaining rights for those same persons. In the unionized public service area see:

*Government of Alberta and AUPE (Guay)* [2013] CanLii 29734 (Sims)

There is little uniformity to these dual status cases since the various governing legislative schemes have to be assessed against the particular statute governing the bargaining relationship and then against the specific agreement terms the parties have chosen within that framework.

The second use of the term dual status employee, is rarely *apropos* but raised in the underlying arguments in this case. That is where an employee is described, at the same time, as both managerial (and thus excluded) and an employee (and thus included). Sitting on such a jurisdictional fence is rarely provided for and normally quite uncomfortable. Arguments that the same person can, at one and the same time, be an excluded manager and a bargaining unit member are normally based on confusion caused by the assumption that Labour Boards certify work not persons, as discussed above. It, as here, is an inappropriate effort to reconcile the fact that some excluded managers do what the certified bargaining agent views as “its work” and that bargaining unit members can perform some functions indicative of managerial status but in insufficient ways to exclude them from the unit.

In this case the parties chose to define the “managerial line” based essentially on the job titles “Associate Deans” and “Heads”. Some of the Associate Deans have portfolios that involve little of the Dean’s “hands on managerial” tasks. Some Heads have more indicia of managerial activity than others. Such diversity is inevitable given the variations in size between academic units. However, as described in the next section, the parties were and remain free to agree upon inclusions and exclusions on a more granular and specific basis. Having made the choice to base the managerial line on these two levels in the hierarchy, arguments that purport to iron out these differences by an artificial notion of dual status are no longer open to them; the remedy is to agree on a more refined set of exclusions.

For these reasons I have difficulty, in the face of the party’s agreement, in giving any effect to the University’s submission, at paragraph 85 of its brief:

[85] In the end, Heads are more “managerial” than most Associate Deans in that their roles require more of the duties that are the indicia of management in the Labour Board’s case law in that regard.

Heads, when included in the unit, are the academic equivalent of industrial lead hands, in scope foremen, quality control supervisors, and so on. They have some duties capable of being seen as managerial, and are subject to managerial direction in that respect, but those duties do not put them over the “managerial line” in terms of the scope clause or *Labour Relations Code* definitions. The Faculty Association can bargain over the extent of these duties and the

University can resist such negotiated constraints. But the question is what the parties in fact have agreed to in terms of such duties, not a question of the capacity to negotiate, or of presumptions. This was the Faculty Association's position from the outset and confirmed expressly during the June 15, 2010 bargaining session. They justified that position by reference to the role of Heads in analogous Universities across Canada. These differing views on "dual status" are reflected in the to and fro of bargaining May 27, 2010 and June 24 as described below.

The University at pages 55-58 of its brief, list a series of events or exchanges that arise from these broad disagreements. Some matters remain outstanding but not before me, otherwise involved without prejudice agreements. What this list supports is the fact that the "Associate Deans out – Heads in" agreement may be too crude an arrangement and special unit by unit conclusions may have served the parties better. However, such questions are things the parties, but not an arbitrator, can resolve on an ad hoc basis.

### ***Scope Clause Flexibility***

The last point reflects the flexibility left with parties to agree over the scope of their bargaining unit following certification. The approach of the B.C. Labour Relations Board is usefully described in the following extract:

Once the parties receive the certification with this general unit description, they ordinarily will take one of two courses of action: either they apply to the Board under Section 34 of the Code for a decision about the status of individual employees whose positions are on the periphery of the unit; or alternatively, they may decide to negotiate and to agree about that issue by themselves, in particular in the scope clause which they write into their collective agreement.

The issue of principle that is raised by this case is what attitude the Board should take to such agreed-to arrangements if a party later brings the matter back to the Board pursuant to a Section 34 application. Our judgment is that the Board should respect these arrangements. We add at the outset two caveats to that principle: first of all, that the inclusions and exclusions which have been agreed upon by the parties fit reasonably within the flexible policies which the Board follows in defining an appropriate unit; secondly, that the union, in negotiating a specific boundary to the bargaining unit, has not violated its duty of fair representation to certain employees by arbitrarily or discriminatorily excluding them from the benefits of collective bargaining. Clearly, each of these conditions was satisfied upon the facts of this case. Within these premises the parties would be entitled to come together by way of voluntary recognition to establish a collective bargaining relationship. So also should they be entitled to agree voluntarily to modify the scope of that relationship either by way of expansion or contraction. (We would refer here to the remarks of Chief Justice Laskin in the Supreme Court of Canada decision in *Terra Nova Motor Inn (1975) 50 DLR (3d) 253.*)

Once the parties have agreed to define the precise scope of the unit which the union will represent, there are good industrial relations reasons why the Board should respect that bargain.



*Automatic Electric (Canada) Ltd. (Re)*, [1976] B.C.L.R.B.D. No. 26

This approach was confirmed by the B.C. Board in 1999. See:

*North Shore Neighborhood House Society* [1999] B.C.L.R.B.D. No. 361

See also:

*Vancouver Museum and Planetarium Assn.* [1990] B.C.L.R.B.D. No. 191

While jobs do change over time, Labour Boards generally take a cautionary approach to making exclusion decisions that alter the status quo. See Adams, *Canadian Labour Law*, 2<sup>nd</sup> edition at 6.2(ii). There are suggestions in the arguments and evidence that only the Labour Relations Board can adjudicate whether a person is excluded from a unit. While it can, parties can also and frequently do agree upon or arbitrate such issues.

### ***Flexibility in Negotiations***

The Faculty Association's position suggests that, absent clear language, benefits in a collective agreement are restricted to bargaining unit employees and unavailable to others. The University argues against this general proposition but also cites what it views as clear language that supports its own position. Before addressing this argument (see below), it is useful to note the flexibility of Canadian collective bargaining law on this point.

In Canada, and in some ways unlike the U.S., labour boards, arbitrators and courts have avoided the rigid view that a Union can (and can only) negotiate terms and conditions of employment for employees. The cases are replete with examples of Unions being able to negotiate benefits for what can be viewed as non-employees, or provisions that touch on their terms of employment. Examples will suffice. The first is the improvement of pension benefits for retirees. The B.C. Labour Board addressed this issue as follows:

In this precedent-setting case in Canadian labour law, this Board has had to consider how the subject of pensions for retired workers fits into the bargaining regime under the Labour Code. We are conscious that our analysis of that question has been lengthy and detailed. But we believe that our conclusions can be distilled in these propositions.

- (i) It is perfectly compatible with the Labour Code that a trade-union, acting on behalf of the active employees, "bargains collectively" -- in the full-

blooded sense of that term under the statute--about the situation of individuals who may not come within the scope of its bargaining unit. Thus, even if it is true that retired workers are not "employees" in the legal sense--an issue which we do not propose to resolve here--the CPU is entitled to pursue the subject of their pension benefits in negotiations with the Bureau, and to use the normal routes available in the Labour Code to resolve any "dispute" which might arise regarding that issue.

- (ii) The legal duty to bargain imposed by the Labour Code is a single, global obligation to negotiate a settlement of an entire collective agreement. Section 6 does not create a set of separate duties to bargain, duties which are attachable to each of the items placed on the bargaining table by the other side. While making bona fide and reasonable efforts to settle a collective agreement with the CPU, the Bureau is legally entitled to refuse to discuss with the CPU the one issue of pension benefits for retired workers. That stance leaves it up to the union membership to decide whether retiree benefits are sufficiently vital to their conditions of employment that they should take strike action in order to change the Bureau's mind. (*emphasis added*)

*Pulp and Paper Industrial Relations Bureau v. Canadian Paper Workers' Union*, (1997) No. 62/77, (BCLRB)

An Ontario Court also dealt with the parties' ability to bargain for non-active persons, or persons not currently in the bargaining unit.

[54] If there is any consistent theme that can be gleaned from the above decisions, it would appear to me to be that, although non-active members are not members of the bargaining unit and the union is not authorized by statute to bargain on their behalf and that therefore an employer is entitled to refuse to negotiate with a union with respect to benefits to non-active members, unions may, and in fact do, with the participation of the employer, bargain for improved pension benefits on behalf of both active and non-active members. In the case at bar, this is clearly what happened during the relevant period and, although retirees may not be able to enforce their entitlement to improved benefits through grievance procedures, they would be entitled to enforce them through action in the courts. Although the authorities in this area do not deal with the issue, it appears to me that the employer negotiates with the union on behalf of retirees on the basis of the apparent or ostensible authority of the unions to bargain on their behalf. The evidence before the court is consistent that the Unions, in negotiations with Owens Corning, purported to negotiate improved pension benefits and amendments to the Plan on behalf of both active and non-active members. The affidavits of Mr. Mifsud filed with this Court clearly state that the unions have in negotiations since 1972 negotiated improvements to the Plan for all beneficiaries of the Pension Plan and the transcript of the cross-examination of Mr. Sullivan, a retired union representative who had been involved in such negotiations verifies that in negotiating pension matters with Owens Corning he was negotiating on behalf of "all pension plan members, not just current Owens Corning employees" and that he negotiated "numerous benefits for people who had long retired".

[55] In my view the evidence establishes that the Unions did purport to negotiate on behalf of both active and non-active members of the Plan and did in fact negotiate improved benefits for both categories of members. Owens Corning clearly participated in such negotiations relying on the apparent or ostensible authority of the Unions to negotiate on behalf of non-active members of the Plan. Accordingly, I am of the view that agreements entered into by the Union with respect to the

Plan are binding on non-active members and that actions, admissions, assertions or knowledge of the Unions relating to matters in issue in this Application can be imputed to non-active as well as active members of the Plan. (*emphasis added*)

*Misfud v. Owens Corning Canada Inc.*, 2004 CanLII 10923 (ON SC)

The hiring hall situation provides yet another example, best illustrated by the well-known *Blouin Drywall (infra)* decision. The Union had negotiated a provision protecting work to its members, yet the Employer hired non-members. Arguments were raised that the Union could not arbitrate over and not seek a remedy for its unemployed members who might otherwise have been employed. It was argued that the Ontario *Labour Relations Act* did not extend the binding effect of a collective agreement, or its access to arbitrate, beyond existing employees. The Court held:

While ss. 37(9) and 42 of the Labour Relations Act do not extend the binding effect of a collective agreement or arbitration award made pursuant thereto beyond “employees”, I do not regard these sections as prohibiting the negotiating parties from agreeing to confer rights or benefits on non-employee members of the union and that such rights and benefits may then be the subject of grievance procedure and within the jurisdiction of an arbitration board under the agreement.

and further held:

In my opinion, the grievance for the loss of the benefit in terms of the loss of wages, was maintainable either as a grievance by the non-employee members of the union or by the union on their behalf.

...

In my view, the non-union member has the status to claim by way of grievance but under the provisions of the collective agreement the grievance may be carried by the union. Alternatively, the union as a party to the agreement may claim on behalf of its members the loss of these benefits and this quite independently of the member’s right to grieve.

*Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975) 8 O.R. (2d) 103

In an interest arbitration, Arbitrator Ready considered the appropriateness of awarding a provision in a faculty collective agreement providing for the bargaining unit’s representation in the selection process for excluded managers. The Union proposed equal representation hiring committees for academic and non-academic managers to ensure the unique aboriginality of the *Nicola Valley Institute of Technology*. He noted, at paragraph 43:

43 I have reviewed the provisions in the collective agreements from comparable workplaces submitted by the Union. I agree with its observation that “Union participation in the selection of managers is by no means new at post-secondary institutions in British Columbia”. In most of the

provisions provided (certainly more than “four or five”), the Union does have the right to equal participation in appointments to the selection committee.

After weighing a series of arguments, including practices in other B.C. Institutions and Colleges, as well as arguments against incursions into management’s rights, he awarded the following provision:

With respect to selection committees for excluded managers, the Employer will continue its practice of inviting participation of a representative or representatives selected by the Union.

*Nicola Valley Institute of Technology v. Nicola Valley Institute of Technology Employees’ Assn.*  
[2006] B.C.C.A.A.A. 22 (Ready)

Yet other examples involve restrictions on the work that may be performed by persons not in the bargaining unit, which are commonplace, and provisions dealing with the preservation of seniority and the granting of rights to return to the unit for persons who temporarily accept managerial or out of scope provisions, about which more will be said later.

This flexibility in the subject matter of bargaining is important because the parties in their discussions and briefs have put forward the notion that the collective agreement cannot, or is presumed not, to provide for issues beyond “employees”. That is not so. It is still a matter of whether they have negotiated such matters in fact; but undistracted by arguments that they cannot do so.

For this case I find that the parties were free to negotiate ARPT procedures that could apply to all “Faculty Members” as defined in the agreement and not just bargaining unit members. The justification for this lies in the interest of both parties in a common system for assessing the ARPT issues of bargaining unit members as well as those who leave the bargaining unit with a predictable chance of returning to the unit. Similarly, I find the parties were free to negotiate whether persons excluded from the unit due to their administrative position shared in or did not share in the merit pool and how they would be evaluated in that respect.

Reference was made in the arguments to the *University of Saskatchewan* case (*infra*). Dealing with a tenure matter, this arbitrator observed that, historically and currently there was variety in how tenure matters can be addressed:

94 A review of the articles and cases on tenure reveal that:

- (a) its roots are ancient but it has taken on a more contemporary role;

(b) tenure is not essential to a University. Universities may operate without it and some historically did so, albeit at their peril in terms of their reputation and ability to recruit;

(c) tenure provisions, and more specifically the process by which tenure is achieved, are sometimes set unilaterally by Universities, sometimes negotiated as extra contractual policies (sometimes in the form described as “frozen policies”) and sometimes negotiated as part of a collective agreement;

(d) tenure is sometimes referred to expressly in the statute creating the particular University and sometimes not;

(e) tenure usually involves a formal approval or granting process beyond the simple judgment by one’s peers, but there is little uniformity as to whether this involves an official like the President or Governing Board, and little uniformity as to when appeals or arbitration is available, and if so, as to which point in the decision-making process any such appeal or right to arbitrate relates.

*University of Saskatchewan v. USFA (Iliopoulou) (supra)*

This case does not support the narrow assertion that tenure matters for excluded and non-excluded Faculty Members must be dealt with either by negotiations or by a unilateral policy. Rather, it illustrates the variety of ways such common interests can be resolved. The Faculty Association, too narrowly in my view, takes paragraph 94(c) for the proposition that here, the parties have negotiated all of the analogous ARPT processes, implicitly only for its members. It says at para. 187 of its reply that:

This is not a collective agreement that is silent on this matter at all but is one that is detailed and explicit. It occupies the field and leaves no room for management to unilaterally amend it.

Depending on the language of the collective agreement that may be the result, but it is not a simple choice between the University governing this area unilaterally or “everything must be and is presumed to be negotiated”.

Rather, it points to the variety of ways a Faculty Association can ensure a broadly fair process. It can ensure that administrators, with their continuing status as *University Act* “faculty members”, are governed by the same or analogous rules. Unilateral acceptance of University policies are usually an unacceptable option for a certified Faculty association. However, a policy agreed upon, combined with a commitment not to change that policy without further bargaining; “freezing” its terms, is sometimes adopted. Similarly, the parties may recognize the limits to whom the Faculty Association can bargain but still get a University’s commitment to use a “mirror” policy or process for dealing with the same issues for faculty members while excluded. Such arrangements, in between unilateral policies, and collective terms “occupying the field” explicitly covering *Labour Code* “employees”, are possible. The discussion above on flexibility in collective

bargaining gives this scope, particularly given the excluded person's ongoing teaching role and the Faculty Association's clear interest in their personal status (in terms of rank and so on) upon a predictable, although not certain, return to the unit.

Some support for this can also be found in the introduction to the "Framework for Collective Bargaining" and more particularly in Articles 16 and 17. Saying they could do such things is different however than saying they have done so, a question addressed below.

I now move to the principles and presumptions that apply to the collective agreement the parties negotiate. I address the submissions made on collective agreement interpretation generally, and then to what is one of the Faculty Association's principle arguments; that collective agreement terms, or benefits, are presumptively for the members of the bargaining unit not others. I then address what the University maintains is a presumption in favour of its management's rights and the Faculty Association presumption about consultation rights.

### ***Principles of Collective Agreement Interpretation***

Both parties made submissions on the principles of interpretation. There was a time when the plain words of the agreement was the paramount rule, and extrinsic evidence admissible only in the event of patent or latent ambiguity. This has given way to a more contextual look at the provisions in issue, and a relaxation of the ability to consider extrinsic evidence.

The University refers me to the opinion offered by Brown and Beatty, *Collective Bargaining in Canada*, 4:2300 – The Collective Agreement in Context, provides the following summary.

In construing collective agreements, arbitrators look to the purpose of the particular provision in the collective agreement as an aid to determining the meaning intended by the parties. In this regard, they have recognized that collective agreements are not negotiated in a vacuum, but rather are settled in the context of general industrial relations practices, within a specific negotiating context and against a vast history of judicial and arbitral jurisprudence which will affect the parties' expectations and understandings. In the result, arbitrators give effect to this general contextual climate by requiring clear statements to alter such general expectations.

That same text, under the heading 4:2250 Extrinsic Evidence, summarizes the approach to the role of extrinsic evidence from an arbitral perspective:

In some jurisdictions, an arbitrator is restricted in construing a collective agreement to the agreement itself, and cannot resort to extrinsic evidence to assist in this task unless the agreement is ambiguous. However, this general proposition must be qualified in two respects. First, where the context of the agreement or subject-matter referred to is sought to be established, extrinsic

evidence may be received for that purpose. In addition, where the word or phrase in issue is alleged to have been used in a trade sense or to have a special technical meaning, evidence of the trade, custom or special meaning may be adduced. More recently, whether an ambiguity in the collective agreement is required before an arbitrator can resort to extrinsic evidence to aid in the interpretation of that collective agreement has been called into question.

In grievance arbitration, the clearest and most commonly utilized examples of extrinsic evidence are past practice and negotiating history. As well, of course, related documents may be relevant in interpreting the collective agreement. For example, in determining the meaning of terms in the agreement relating to insurance benefits, arbitrators have considered the actual policy taken out by the employer.

The modern rules of interpretation, in the collective agreement context, are usefully reviewed in:

*Communications, Energy and Paperworkers Union of Canada, Local 777 and Imperial Oil Strathcona Refinery*, [2004] AGAA No. 44 (Elliott)

The following summary is also helpful.

**36** The issue in this case turns on the interpretation of the Collective Agreement. The arbitral task at hand is to ascertain what the parties mutually intended in terms of conferring the benefit in question. There are a number of principles that assist in carrying out this interpretative exercise. Some of them were set out in *Pacific Press, supra* (at para. 27):

The first major issue I address is one of interpretation. I reaffirm my adherence to the rules of interpretation which I set out in *White Spot*. I summarize as follows:

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be giving meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

**37** The search for the parties' mutual intention begins with the Collective Agreement itself. Its provisions must be considered with the context in which they were bargained and their purpose in mind. Generally, the articles of a collective agreement should be interpreted in a harmonious manner and absurdities or inconsistencies should be avoided. Thus, the specific language of Article 20.05 cannot be considered in isolation, but must be assessed in the context of the Collective Agreement as a whole.

*H.Y. Louie Co. and Teamsters Local 213 (Overtime)* [2014] BCCA 99 (Nichols)

See also:

*B.C. Hydro v. I.B.E.W. Local 258* [2018] B.C.C.A.A.A. 83 (McPhillips) at paras. 57-64

It is axiomatic that one's interpretation cannot add to or amend the collective agreement.

*Insurance Corp. of British Columbia v. Canadian Office of Professional Employees' Union Local 378* (2012) 223 L.A.C. 306 (Taylor)

Similar approaches are set out in earlier University cases:

An adjudicator does not restrict the interpretative task to the precise words which have led to the grievance. Account must be taken of other clauses that may, if the "plain meaning" at first instance is applied, be put in conflict with that "plain meaning" or even be rendered absurd. In the context of a potential absurdity or direct conflict, adjudicators must strive to give the applicable clauses a harmonious interpretation if this is possible. If two provisions are equally capable of being read as consistent or inconsistent with one another, they are to be given that interpretation which makes them consistent: see *Vancouver Community College v. College Institute Educators' Assn.* [2000] B.C.C.A.A.A. No. 64 (Blasina).

**115** Although the task of construing statutes, collective agreements or private contracts is much the same, there are differences in context that must be taken into account when seeking out the mutual intentions of the parties. Collective agreements are not normally drawn up in the quiet offices of a legislative draftsman or through exchanges between teams of lawyers using on-line data rooms. They are most frequently negotiated between persons on opposite sides of a table where understanding of the meaning of words has been achieved through long experience within an industry, representing unions or employers. Putting together the collective agreement is perhaps the most important thing these negotiators will do. What this means for arbitrators is that the search for the Holy Grail is the search for precisely what the two sides intended when they drafted and signed the Collective Agreement. As Professor Weiler put it in *University of British Columbia and CUPE, Local 116*, [1977] 1 Can LRBR 13 ("*University of British Columbia*"):

The parties do not draft their formal contract as a purely literary exercise. They use this instrument to express the real-life bargain arrived at in their negotiations. When a dispute arises later on, an arbitrator will reach the true substantive merits of the parties' positions under their agreement only if his interpretation is in accord with their expectations when they reached that agreement.

**116** This not only raises the bar for adjudicators but calls for them to engage in a searching inquiry into the meaning of the words or phrases about which the parties now disagree.

**117** The arbitrator is trying to decipher the proper meaning which the parties may reasonably be said to have intended for their contract language. In that quest, the arbitrator may draw inferences from other provisions of the agreement, feel constrained to follow the consensus in arbitration precedents, or be concerned about the industrial relations sense of alternative interpretations. (See *University of British Columbia*)

...



**119** This rule of construction points to an important enquiry for the adjudicator: at the time the specific words were adopted into the collective agreement, was there a well-understood meaning given to those words in the jurisprudence or perhaps in common usage? Arbitrator Steeves in *North West Community College* cited the decision of Arbitrator Christie in *Re Andres Wines (B.C.) Ltd. and United Brewery Workers, Local 300* (1981), 30 L.A.C. (2d) 259 for the following proposition:

... the parties must be assumed to have negotiated their collective agreement "conscious of the various mechanisms by which a long-term disability plan can be related to the collective agreement" ... Clearly, the same assumption is to be made with short-term disability plans. (at para. 12)

*Vancouver Island University v. Vancouver Island University Faculty Assn. (Thiessen Grievance)*, [2013] B.C.C.A.A. No. 93 (McConchie)

The approach to extrinsic evidence changed somewhat with the Supreme Court of Canada's decision in *Sattva Capital* which referred to the ability to consider "the surrounding circumstances" as a factor in determining the party's intentions.

*Sattva Capital Corp. v. Creston Moly Corp.* [2014] 2 S.C.R. 633

A subsequent decision summarized the approach to interpretation of non-standard form contracts generally:

### **Principles of Contractual Interpretation**

87 Courts must interpret contracts by reading the contract as a whole, giving the words their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract such that the interpretation gives effect to the objective intentions of the parties: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47, 55 [*Sattva*].

88 The surrounding circumstances or "factual matrix" consists of any "objective evidence of the background facts at the time of the execution of the contract... that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva* at para. 58.

89 The relevant contextual factors include "...the purpose of the agreement and the nature of the relationship created by the agreement": *Sattva* at para. 48. The Court's consideration of the factual matrix is intended to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" and cannot be relied on to support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement": *Sattva* at para. 57.

90 Where there is an ambiguity in the wording of a contract, the court must read the contract in a manner that "promotes a sensible commercial result": *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 at 901; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para. 56. Courts should favour an interpretation of an ambiguous term that is "consistent with the reasonable

expectations of the parties, as long as that interpretation is supported" by the language of the contract:

*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 50.

A recent Alberta Court of Appeal decision in the context of a labour arbitration expressed caution against taking *Sattva (supra)* too far.

32 It is possible to interpret *Sattva* as defining surrounding circumstances so broadly as to include *all* pre-contract negotiations, so long as evidence of subjective intentions is excluded. To do so would mean such evidence was admissible regardless of any ambiguity in the contract language. We choose not to interpret *Sattva* so broadly for four reasons. First, *Sattva* itself does not explicitly go so far: see para 61. Second, some members of the Supreme Court of Canada have said this remains to be addressed: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 (S.C.C.) at paras 99-100 of the dissenting reasons. Third, this Court has found that in the commercial context if the pre-contract negotiation evidence is not evidence of the surrounding circumstances, then its admission requires an ambiguity, *IFP* at paras 85-87. Fourth, some discipline is required when considering evidence extrinsic to a contract. Not only are courts concerned with such evidence 'overwhelming' the written words in a contract, but we are also concerned about overwhelming the hearing process with irrelevant extrinsic evidence.

*Alberta Union of Provincial Employees v. Alberta Health Services* [2020] 309 L.A.C. (4<sup>th</sup>) 149 (Alta. C.A.)

Lastly, the B.C. Labour Relations Board has said, in a University case:

... it is important in industrial relations that the arbitrator decipher the actual intent of the parties lurking behind the language which they used: and not rely on the assumption that the parties intended the "natural" or "plain" meaning of their language considered from an external point of view."

*UBC and CUPE* [1996] BCLRBD 42

### ***Presumptions against benefits for non-bargaining unit members***

The Association relies upon what it asserts is the presumption that persons excluded from a bargaining unit cannot benefit from the rights and benefits of the collective agreement covering the bargaining unit from which they are excluded. This presumption, it argues, applies unless there is clear and express language in the agreement to the contrary. The rationale for this is described by Arbitrator Shime:

Employees entitled to collective bargaining through union representation pay dues to their union and are entitled to participate in union affairs including the setting of demands for negotiation purposes. Some of the rights and benefits achieved under collective bargaining came about as a

result of strikes by employees. There is a price that is paid by bargaining unit employees for a collective agreement and it would require an overriding sense of altruism to pay the price that is required in order to achieve benefits and rights for non-bargaining unit personnel. It should require very specific language to find that bargaining unit employees negotiated rights for non-bargaining unit personnel that gave them priority over members of the bargaining unit and it is difficult to imagine that priority rights would be granted to those who had not paid union dues, participated in the union processes and to those who had not been prepared to withdraw their services to achieve gains in a collective agreement. [...]

*Re: Participating Hospitals and Ontario Nurses' Association (1984) 16 L.A.C. (3d) 348*

Arbitrator Shime's analysis in the immediately preceding paragraphs are instructive. He was dealing with the question of seniority rights, particularly of longer term employees who enter the bargaining unit, for example, returning from management. At paragraph 7 he referred to an extract from a decision of Arbitrator Weiler:

... as an implied restriction of all of the benefits of the agreement to those who are members of that unit. These are the people who support the union, they are the only ones whom the union is entitled to represent, and thus they alone should be able to enjoy the rights which are created through this collective bargaining. Persons on staff could not claim rights to pensions, sick pay, protection against discharge, and so on under the collective agreement. By the same token, they should not be able to claim seniority rights either. (*emphasis added*)

*Re Icn Strong Cobb Arner Ltd. and Machinists Lodge 877 (1973) 5 LAC (2d) 105 (Weiler) at pp. 106-7*

This led Arbitrator Shime in *Participating Hospitals (supra)* to say at paragraph 8:

8 After considering the decided cases and the collective agreement, it is our view that the latter theory should prevail. While we recognize the equities that have pushed arbitrators to extend seniority rights to non-bargaining unit personnel, it is difficult to escape the logic expressed in the *Federal Wire & Cable* case that seniority is a bargaining unit concept. Before collective bargaining employees do not have job security or seniority rights. Some employers may unilaterally grant priority to longer-service employees, but these priorities are privileges and not rights in an era of pre-collective bargaining. Once the right of collective bargaining is achieved, employees are entitled as of right, to the benefits of the collective agreement. These rights are achieved by bilateral negotiation and not unilaterally bestowed as a privilege. (*emphasis added*)

*Participating Hospitals (supra)*

Arbitrator Germaine followed *Participating Hospitals* and came to the following conclusions:

58 The inescapable implication of this recognition and bargaining authority of the Union is this: the Union bargains on behalf of employees in the bargaining unit, not employees outside of the bargaining unit. Thus, the basic dynamic of the collective bargaining relationship established by Article 2.02 is turned upside down by a literal construction of the words "date of hire" in Article 5.03. In the absence of some explicit language, there is no logic by which it is possible to reason that the

parties intended to extend collective agreement benefits, including the accumulation of seniority, to someone outside of the bargaining unit.

59 Nor can Article 5.03 be construed as bestowing credit for past years' employment when the employee enters the bargaining unit. Even more specific language would be required to conclude the parties intended to confer seniority rights retroactively, when a long-term employee joins the Union. The fundamental limitations imposed by the Union's bargaining authority cannot be finessed so easily.

*Fraser River Terminal Inc. v. Teamsters Local 31* (2010) 203 L.A.C. (4<sup>th</sup>) 42 (Germaine)

The Faculty Association refers me to B.C. cases arising from the school's context. In *B.C.P.E.A. (infra)* Arbitrator Kinzie considered the practice of granting teachers a leave of absence and then temporarily appointing them to vice-principal positions which, it was agreed, were outside of the teacher's bargaining unit. He said:

**42** Thus, once a teacher has been appointed to an administrative officer position, that individual is automatically excluded from the bargaining unit and the collective agreement no longer applies to her.

**43** As was the case in *Board of School Trustees of School District No. 84 (Vancouver Island West)*, *supra*, the language in these two collective agreements is generally worded with the result that, in my view, the rights encompassed by those agreements must be confined to "teachers". In my view, absent clear and express language to that effect, the Employers and the Unions cannot be presumed to have intended to confer rights on non-bargaining unit individuals. In these circumstances, I am of the view that she cannot be placed on a leave of absence under the terms of that agreement following a temporary, acting appointment to an administrative officer position. Instead, the terms and conditions of her employment are now governed by the contract she enters into with her employer school board as well as the provisions of Sections 20 and 21 of the School Act.

*British Columbia Public Employees' Association v. British Columbia Teachers' Federation (Positions Grievance)* [2015] B.C.C.A.A.A. 89 (Kinzie) upheld [2016] B.C.L.R.B.D. 45

The case relied on two earlier decisions:

*Board of School Trustees of School District No. 33 (Chilliwack)* (unreported decision, Hope, June 13, 1997)

*Board of School Trustees of School District No. 84 (Vancouver Island West)* (unreported decision, Munroe, Oct. 1, 1993)

In each of those cases, the decision turned in part of the interplay between the *School Act's* definition of a teacher and the fact that administrative officers (such as vice-principals) were excluded from the definition of teachers in both the *School Act* and the definition of "employee" under the *Industrial Relations Act*. As Arbitrator Kinzie noted at paragraphs 8-9:

The principal thrust of these changes was to extend collective bargaining rights to teachers thereby enabling them to negotiate collective agreements under the provisions of the Industrial Relations Act. However, one of the consequences of these changes was a further amendment that removed principals and vice-principals and directors of instruction from the definition of "teacher" in the *School Act* and the *Teaching Profession Act*. Instead, they became collectively known as administrative officers and they were expressly excluded from the definition of "employee" under the Industrial Relations Act. Thus, they could not be included in any bargaining unit for which a trade union was certified under that Act.

9 With these changes, movement from a teaching position to an administrative position such as that of a principal or vice-principal has the effect of changing the status of the individual concerned. Initially, the individual is a teacher, a member of the B.C. Teachers' Federation, a member of the bargaining unit in the school district for which the Federation is certified, and one whose terms and conditions of employment are governed by the collective agreement covering employees in that bargaining unit. On assuming an administrative officer position within that school district, that individual ceases to be a teacher, is no longer a member of the teachers' bargaining unit in that school district, and is no longer governed by the collective agreement in force in that district.

The comments relied upon by the Association at paragraph 43 above must be understood in this statutory context, as the reference in paragraph 42 makes clear. That context is analogous to the context here, except that the *Universities Act* does not exclude academic administrators from the definition of faculty member in s. 1 of the Act.

In support of this same presumption against conferring collective agreement rights on non-bargaining unit members, the Association refers to:

*OPSEU Pension Trust v. OPSEU Local 568 (Union Dues Grievance)* (2001) 101 L.A.C. (4<sup>th</sup>) 336 (Abramski)

The Union in that case grieved to compel the Employer to deduct and remit union dues on behalf of persons who were completing a temporary assignment in a managerial position outside the bargaining unit but who, under that agreement, had the right to return to their home position or equivalent. The Union argued that the employees taking these temporary assignments did not lose their bargaining unit status and had continuing rights flowing from that status. In addition, the Union continued to owe them a duty of fair representation.

As a result, it argued, the Union dues payment obligation should continue to apply to them. The Employer countered that the dues obligation was expressly limited to each employee in the bargaining unit, emphasizing both terms. The Employer further argued that the express collective agreement right for such employees to return to the bargaining unit with accrued seniority would be unnecessary if they had remained in the unit throughout their temporary assignment.

Arbitrator Abramski relied on the following ruling by Arbitrator Michel Picher:

The approach taken by Canadian arbitrators has long confirmed the view that when an employee leaves the bargaining unit for reassignment elsewhere within an employer's operations, that person is no longer viewed as a member of the bargaining unit and has no further rights under the terms of the collective agreement, save as they may be specifically protected within its terms.

*Re Canadian National Railway Co. and C.A.W. Canada* (1994) 43 L.A.C. (4<sup>th</sup>) 195 (Picher)

Arbitrator Abramski concluded, from this and other cases, at paragraph 23:

24 In this case, the Employer's obligation to remit union dues applies only to "employees in the Bargaining Unit". It does not apply to employees temporarily working in positions outside of the unit. The Employer, however, acknowledges that its practice has been to remit union dues for such employees for the period for which seniority continues to accrue. It has agreed to continue that practice. That obligation, however, is not based in Article 5.01. Under the specific wording of Article 5.01, and for all the reasons set forth in this Award, I conclude that the Employer is not obligated to remit union dues for employees temporarily assigned to positions outside of the bargaining unit.

*British Columbia Ferry (supra)* involved a grievance over an appointment to a position admittedly excluded from the collective agreement. The board ruled that the terms and conditions of excluded employees were not governed by the collective agreement, and the agreement had no provisions that granted any rights to employees seeking such an out of scope position. It said, at para. 13:

The terms and conditions of excluded positions are, by virtue of their status, not governed by the collective agreement.

If bargaining unit employees are to assert any rights to such positions, such rights must be expressly conferred in the collective agreement.

*British Columbia Ferry Corp. and B.C. Ferry and Marine Workers' Union* [1996] 44 CLAS 382 (Bluman)

The Faculty Association's position, moving on from its assertion of a presumption of bargaining unit rights for bargaining unit members alone is that any exception to this must be expressed in clear and specific language. See:

*Pacific Press v. Graphic Communications International Union, Local 25-C* [1995] BCCAAA No. 637 (Bird)

*BC Hydro and Power Authority v. IBEW, Local 258 (Wage Adjustment Grievance)* [2018] BCCAAA No. 83 (McPhillips).

Ambiguous language, it argues, is insufficient to overcome this basic presumption.

*Cheni Gold Mines Inc. and Tunnel & Rock Workers, Loc. 168 and I.U.O.E. Loc. 115, Re*, [1991] BCCAAA No. 505 (Ladner), para. 20)

***Presumptions against changes not obtained during bargaining***

The University argues that a Union should not be able to obtain in arbitration something it sought and failed to gain in collective bargaining. It cites in support of that proposition the following extract:

34 I find that the language of Article 5 does not support the position of the Union. This finding is buttressed by the evidence adduced with respect to the negotiating history of the parties in which the Union, during the last round of negotiations, proposed to amend Article 5.1 (c) to read:

For the purpose of the Agreement, the term theatre shall include all operations of the Employer.

and delete ... the Queen Elizabeth Theatre complex or any other theatre which is the site of the main production of the Employer and any other place of business in respect of which the Union becomes certified under the *Labour Relations Act* during the term hereof.

35 As is evident, the Union did not attain that provision in the Collective Agreement. Therefore, it is not now open for the union to achieve in arbitration what it did not get during collective bargaining negotiations. For the Union's claim to succeed, the Union would need the type of language that it proposed during the 1987 negotiations.

*Vancouver Symphony Orchestra and IATSE Local 118* [1989] 16 C.L.A.S. 16 (Ready)

The principle in *Vancouver Symphony* has little application here, and to the extent it has, it cuts both ways. The proposal the Union sought; to have only bargaining unit members act as Heads in Non-Departmentalized Faculties, and related issues, occurred before the broader agreement was made to exclude Associate Deans but to include Heads.

***Presumed Importance of Committee Rights***

The Faculty Association puts particular emphasis on the fact that the rights involved in Part 4 are important rights to consultation. Such rights, it asserts are substantive rights, must be meaningful, and should be taken very seriously, even if some other party has the final decision.

*B.C. Public School Employees' Association and B.C. Teachers Federation*, unreported decision, Jan. 25, 2019 (Peltz) particularly at paras. 94-98

I fully accept the importance of consultation rights, although I note that several of the cases referred to by Arbitrator Peltz involve Union consultation rights. Here, the question is not the significance of the consultation rights, but just who is to be consulted. The argument that the Faculty Association must only have bargained these rights for its members and not for administrators, themselves going through the same ARPT processes, is simply one more example of its broader arguments.

With these capacities, restrictions, and presumptions in mind, it is now necessary to look specifically at what these parties have agreed upon.

### ***The Committees in Issue – Part 4 of the Agreement***

An academic's career develops through some highly formal steps involving an initial hiring, probationary periods, a grant of tenure, and promotion through the academic ranks. Superimposed on this is a merit increment system that affects salary progression. Committees figure prominently in these processes. The collective agreement covers the committees concerned here in Part 4: Conditions of Appointment for Faculty. Part 4 contains a series of articles including:

Article 1 – Interpretation

Article 2 – Types of Appointments

Article 3 – Titles and Ranks

Article 4 – Criteria for Appointment, Reappointment, Tenure and Promotion

Article 5 – Procedure for Appointment, Reappointment, Tenure and Promotion

Article 13 – Appeal of Decisions on Reappointment, Tenure and Promotion

Article 4, dealing with the criteria to be applied by the committees and by the ultimate decision makers, is important because it defines, in a broad sense, the nature of the role a committee member is expected to adopt.

Article 5 is the most important for these issues. Articles 6 – 12 are of little assistance. The key elements of Article 5 are as follows, set out in some detail. Article 5.01 sets out generally the decisions to be dealt with by the processes.

5.01 General Provisions



- a) Appointments, reappointments, tenure decisions and promotions are made by the Board of Governors upon the recommendation of the President.
- b) The procedures in this section govern initial appointments at the ranks of Instructor, Senior Instructor, Professor of Teaching, Acting Assistant Professor, Assistant Professor, Associate Professor, and Professor; renewal or non-renewal of pre-tenure appointments; recommendations for or against the award of tenure; and promotions.

The Committee functions are basically advisory, but the recommendations that are put forward and the processes by which they are crafted are highly influential in the final result.

Article 5.02 does not involve a committee, but it is important in understanding the role of the Head. Pre-tenure faculty members are to meet with the Head each year for what is essentially a documented coaching session involving what the person has done and what they need to do to achieve tenure.

After a person's initial appointment, reappointment, promotion, and tenure decisions are based in large part on a file described in Article 5.03 that documents the person's academic progress.

Article 5.04 provides:

#### 5.04 Departmental Consultation: Committees

- a) The Department Head shall consult formally at meetings convened for that purpose with eligible members of the Department in order to ascertain their views and to obtain their recommendation concerning appointment, reappointment, tenure and promotion.
- b) Faculty members eligible to be consulted are:
  - i) In the case of initial appointments, all tenured and tenure-track members of the department.
  - ii) In the case of reappointments and promotions, those higher in rank than the candidate, except that in the case of reappointment of a Professor those holding the rank of Professor are eligible to be consulted.
  - iii) In the tenure cases, those who are tenured and of equal or higher rank.

For the duration of this Collective Agreement, Articles 5.04(b)(ii) and 5.04(b)(iii) do not apply, replaced by Letter of Understanding 1 on pages 86 and 87. Basically it provides a more particular description of the ranks to be consulted in each case.

- c) Consultation shall be achieved through standing committees. These committees shall be composed of all the eligible members of the Department, or of eligible members elected by the eligible members of the Department. Members of faculty from outside the Department may be added to the standing committee when the number of eligible members (not including the Head) is

less than three (3). These additional members shall be chosen by the eligible members of the Department and approved by the Dean.

The University's position is as follows.

The purpose of the DSC, Article 5.04 of Part 4 of the Collective Agreement, is to ensure that each "faculty member" in the applicable department at the same or higher rank than the applicant has the opportunity to have their voice heard and have a vote as to whether they think an applicant should be appointed, promoted or tenured. In essence it provides for the assessment of colleagues by colleagues and is a manifestation of the collegial governance tenant that faculty members who have been admitted to the rank are best suited to evaluate applicants to that rank.

Participation in a DSC is limited by Article 5.04(b) based on a faculty member's (i) rank; and (ii) Department. A "faculty member" must be of the same or higher rank as the applicant and must be in the particular department. This ensures that those with the appropriate experience and expertise (rank and Department) have the opportunity to have their voice heard as to whether they think an individual should be appointed, promoted or tenured to their ranks. Associate Deans hold a particular rank, and remain members of their particular Home Department throughout their appointment.

This argument however would seem to apply equally to Deans in respect to their home department, who continue to hold their academic rank. By taking an administrative (and thus excluded) position it is arguable that the person's academic influence and expertise, so important to peer review, is not eliminated, but subsumed in their administrative role as part of "The Dean's Office", where the influence is, or theoretically can be, exercised at the next level. If Dean's are excluded, does the same hold true for Associate Deans as members of the "Dean's office"? The parties obviously differ on this point which requires an interpretation of the words "Faculty Members eligible to be consulted" and "eligible members of the Department". The Faculty Association equates eligibility here to being a member of the bargaining unit while the University argues from the *University Act* definition.

Article 5.05 concerns the process for requisitioning or submitting letters of reference to be used in the review. Article 5.06 sets out the committee process:

5.06 Departmental Committee: Meetings

a) Consultation shall be conducted according to procedures agreed upon between the Head and the eligible members of the Department and approved by the Dean. The Head shall ensure that each faculty member in the Department is informed of the agreed procedures. The Dean shall collect and maintain an open file of all such procedures.

...

c) Members of the departmental standing committee who cannot participate in the consultations may submit opinions in writing to the committee.

d) The Head shall chair the departmental standing committee but shall not vote.

...

f) When serious concerns about the candidacy arise in the departmental standing committee, the Head shall inform the candidate of that fact and the reasons therefore with sufficient particularity to enable the candidate to have a meaningful opportunity to respond either orally or in writing at the option of the committee and to introduce further relevant evidence. The candidate shall be provided with a summary of the referees' opinions, the summary to be prepared by a member of the departmental committee selected by the committee. The summary shall be prepared in such a way that the identities of the referees are not disclosed.

g) The recommendation of the departmental standing committee shall be that of a majority.

Article 5.07 describes the Committee's end product, indicating to a degree, the importance of committee membership.

#### 5.07 Head and the Department Recommendations

a) When a Department has considered a reappointment, a tenure decision, or a promotion resulting from a review under Article 9 below, the Head shall forward the following to the Dean:

- i) the Head's recommendation with the basis for it;
- ii) the recommendation, a record of the vote and the full report of the departmental committee;
- iii) letters of appraisal from external referees;
- iv) unsolicited information from faculty members or students that qualifies for consideration under Article 5.06(e); and
- v) information submitted by the candidate pursuant to Article 5.02(b)(i) or 5.03.

b) The Head shall prepare the report of the departmental committee. The report shall contain a full statement of the reasons of the committee including a full statement of the majority and any minority opinions. Before sending the report to the Dean the Head shall circulate a draft to the committee and shall invite comments on the draft.

Article 5.06 and 5.07 ascribes certain defined roles to the Dean and the Head, perhaps the most significant of which is Article 5.06(d) "The Head shall chair the departmental standing committee but shall not vote". What this means in terms of the Article 5.09 obligation for non-departmental faculties is discussed in a separate section below. It is one of the conditions that must influence whether procedures in such circumstances are "consistent with those for Departments and Faculties".

The candidates receives notification of the committee's recommendation that is to be forwarded to the Dean. Article 5.08 (b)-(d) provide:

#### 5.08 Notification of Departmental Recommendations to Candidate

- a) In all cases other than an initial appointment, the Head shall, at the time the recommendations are forwarded to the Dean, inform the candidate in writing of the recommendations being forwarded.
- b) If the recommendation of either the Head or the standing committee is negative, the Head shall provide detailed and specific reasons in writing for any negative recommendation including respects in which the candidate is deemed to have failed to satisfy the applicable criteria. Where the Head's recommendation is negative but that of the standing committee is positive the Head shall also provide detailed and specific reasons for the positive recommendation.
- c) The Head may provide detailed and specific reasons by giving to the candidate a copy of the recommendation being forwarded to the Dean but if that is done the recommendations shall be modified to the extent necessary to protect the confidentiality required under Article 5.01(d) and to protect the identity of referees.
- d) The candidate shall be invited to make a timely response, which shall be added to the file pursuant to Article 5.03.

Article 5.10 introduces a second committee; the Dean's Advisory Committee.

#### 5.10 Review by the Dean

- a) The Dean shall review the recommendations received from the Head to ensure that proper procedures have been followed, that all relevant material has been considered, and that recommendations made are consistent with the evidence presented.
- b) In the case of recommendations concerning tenure, promotion, or reappointment (when the Dean is considering not recommending in favour of reappointment) the Dean shall consult with an advisory committee. In the case of other recommendations the Dean may consult with an advisory committee.
- c) The Dean's advisory committee (DAC) shall normally be composed of at least 6 (but not fewer than 4) tenured full professors and professors of teaching, one-half of whom shall be elected by secret ballot by the faculty, and one-half of whom shall be selected by the Dean. Heads who are tenured full professors or professors of teaching shall be eligible for selection by the Dean. In selecting members of the committee the Dean, having regard to the members who have been elected, shall take into account the need for representation of disciplines within the Faculty, including emerging disciplines and multi-disciplinary activities, and the need to maintain gender balance. Members of DAC shall serve for specified and staggered terms.
- d) When serious concerns about the candidacy arise in the advisory committee, the Dean shall inform the candidate of that fact and the reasons therefore with sufficient particularity to enable the candidate to have a meaningful opportunity to respond and to introduce further relevant evidence. If the candidate has not already been provided with a summary of the referees' opinions, they shall be provided by the Dean. The summary shall be prepared in such a way that the identities of the referees are not disclosed.
- e) The Dean, after considering the advice of the advisory committee, (i) may refer the case back to the Head and the departmental standing committee for reconsideration; or (ii)

make a recommendation to the President pursuant to 5.11. (*emphasis added*)

The next step sees the Dean's recommendation being forwarded to the President for review, with provisions for notification. The President's review includes a further review by a Senior Appointments Committee described in Article 5.14.

#### 5.14 Review by President

a) All recommendations to the President concerning initial appointments at or promotions to the rank of Senior Instructor, Associate Professor, Professor, or Professor of Teaching, or concerning tenure decisions, shall be reviewed by the Senior Appointments Committee which is a standing advisory committee established by and making recommendations to the President. At least ten percent of the Senior Appointments Committee appointed by the President will hold appointments at UBC Okanagan. The Faculty Association shall nominate a member of the Committee. A Dean whose recommendations are being considered by the committee may participate in the deliberations of the committee but shall not vote on the recommendations.

Article 5.14(e) provide criteria for all those involved in these processes:

e) 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:

- i) the provisions of this agreement;
- ii) concepts of procedural fairness in the university context;
- iii) consideration of appropriate standards of excellence across and within faculties and discipline.

In addition to considering the merits of the candidate's teaching, scholarly activity and service, the President will also consider all relevant contextual factors.

Before finally interpreting these provisions so as to answer the question in issue, I review the extrinsic evidence put forward by the parties. Some of this touches concepts already addressed, some the implication of the decision to be made.

#### ***Extrinsic Evidence over 2010 Bargaining***

The parties provided detailed notes of their bargaining for the 2010 agreement, and of the meetings that followed concerning these topics. Each party prepared their own notes, but they are generally to the same effect. The turning point for this case specifically occurred in November 2010. This was when, after much discussion of roles, exclusions, and the labour laws reviewed above, the parties agreed on the changes to Appendix A.

I accept the University's point that the exclusion of Associate Deans was not specifically in either party's initial proposal; that really only surfaced in the last three weeks of bargaining. However, the role of administrators was a live issue throughout, and arises indirectly at least from the Faculty Association's initial proposals.

Bargaining took place on February 1, 2010, March 1, and 2, 2010, March 8, 2010, April 26, 2010, May 27, June 24, November 9 and 10 and November 18 and 19. The final agreement was ratified by early January. After that, the parties met for some implementation meetings and discussed relevant issues during their Joint Consultation Committee meetings, notably on January 11, 2011 and, at the end of that year, on November 21, 2011.

The Faculty Association sent a summary of the new agreement to its members before ratification. The University provided a summary in February. Later, on June 29, 2011, the parties agreed on the Supplemental Memorandum reproduced above.

The University argues that the bargaining notes show no discussion let alone agreement that the exclusion of Associate Deans from the unit as managerial would disqualify them from sitting on the ARPT processes in their home departments. Rather, it asserts, the Faculty Association's expressed reason for excluding Associate Deans was related to their assessment and eligibility for merit and PSA pay. Under Article 2.04 and 2.05 of Part 2 of the agreement only "continuing members of the bargaining unit" can share in the pool of funds for distribution under those sections. I note that there is now a specific provision for Heads on this topic.

#### 2.06 Award of Merit and PSA for Heads

Merit and PSA for Heads will be allocated by the Dean after consulting with a reasonable number of colleagues within the unit.

I do not accept that eligibility for PSA and merit was the only motivation for the changes. At the outset the University proposed (February 1, 2010):

#### 4. Appendix A – Excluded Positions (p. 26)

Update and confirm excluded positions including Senior Advisor to the President, Vice Dean (Faculty of Medicine) and Principal of the College of Interdisciplinary Studies, and equivalent positions.

The March 1, 2010 discussion on Appendix A – Excluded Positions, as recorded in the notes prepared by both parties, is more detailed and reveals the basic points of difference between the parties now. The Faculty Association’s position was that the collective agreement specifically included people with Board of Governor’s appointments with certain titles. In general

... we are not opposed to exclusion of specific positions that would otherwise be covered by the definition of the Bargaining Unit in 2.01 if such exclusions make sense, however we do want to ensure that such members are protected whilst out of the bargaining unit.

...

Particularly, we want to ensure right to re-enter bargaining unit, protection of CAP increases [what are their current mechanisms for this], and ability to defend member if disciplined *qua* faculty member (i.e., position in bargaining unit). If they have not violated agreement , ...

This illustrates a Faculty Association interest in protecting members who move out of the unit to an administrative position with the prospect of returning at a later date to a non-administrative faculty role. The reference to “defending member if disciplined *qua* faculty member” illustrates a recognition of the dual-status nature of employment, and that one can lose their administrative appointment without losing their underlying academic role.

In this discussion, Mr. Mark Leffler, the University’s Chief spokesperson, asserted that the Labour Board only certified employees, implying that non-employees under the Labour Code were not included within the Association’s bargaining rights. Mr. Jim Johnson, the Chief Spokesperson for the Faculty Association said he was not prepared to discuss that at the bargaining table. Later in the same discussion, Ms. Fran Watters, for the University, argued that the former language was agreed upon before the Faculty Association became a trade union. She continued:

But the code does not allow managers with confidential relationships into the bargaining. This has caused us [sic] problems for us. Under the L.R. code can’t put a dean into the bargaining unit. Is room to disagree on who is manager – and then parties try to resolve, or it goes to board. Doesn’t go to arbitrator, because it’s a matter of statute. Fran hasn’t seen a contract where exclusions are set out in contract.

The argument went backwards and forwards as to whether exclusions could be decided unilaterally or required negotiation. Ms. Watters then reasserted implicitly that treating people as *prima facie* included in the unit would be a breach of the definition in the Labour Code. The day’s discussion ended with the parties considering whether they needed a process on disputed exclusions or not. The University’s notes reinforce the parties’ then positions. The Faculty Association’s position was that all positions were in their collective agreement (under its certificate and scope clause) and that the University could not unilaterally exclude any position

without either its agreement or a Labour Relations Board decision. In my view this is incorrect. The Faculty Association made it clear that its view was tied to its concern over protection for persons when they return to the bargaining unit. It is probably significant that two disputes were heading to arbitration at the time over two persons unilaterally excluded.

The process issues for new positions was later resolved by Letter of Understanding #1 set out above. It provides for discussions followed by a unilateral University decision followed by the rather ambiguous phrase "... and the parties are at liberty to seek resolution using the appropriate legal channels."

March 2, 2010, the parties discussed specifically the situation of Associate and Assistant Deans, Heads, and Directors. A member of the University team asserted that "every department head is in management, whether or not formally recognized in the collective agreement". This was challenged and spokesperson Leffler asserted that "heads are members of a bargaining unit – they have a dual role". The Faculty Association replied to this by saying:

JJ: we recognize that heads have dual role. Certain tension there. Not our intention to change fundamental way universities have been governed for centuries. Recognize dual relationship. Concern that if you don't have heads from department you lose half of that relationship. 102(d) want to make clear they have admin duties but also a spokesman for their department.

This discussion was primarily focussed on whether Heads should be drawn from the academic unit's staff and what their conditions of work should involve. These discussions were also held in the context of Faculty Association proposed language on the role of, and limitations on the role of, Heads, in particular in respect to discipline. The ensuing communication is recorded as follows (ML = University, JJ = Faculty Association).

ML: the heads are certainly part of the management. The simplest thing would be to exclude them.

JJ: make a proposal and we will see. On the issue of discipline we're a little confused.

FW: as outlined in the CA, oral warning, written warning, etc.

JJ: Why your interest that they can discipline?

FW: you need an additional level of management – those are the heads and directors.

JJ: to sign the letters?

FW: to make the decision. Some cases they are recommending to suspend or terminate.

JJ: you want heads to have the ability to write letters?



FW: with the support of Deans etc.

JJ: I hear you but we're not convinced that it is that important. For employees to go around and discipline each other – not sure the university wants that.

FW: If you feel that way, they should be out of the bargaining unit. The FA knows how uncomfortable that is for the heads. There have been a number of vigorous discussions with Heads and FA – it is a very difficult position.

JJ: there is a tension there. Every single university in Canada has dealt with this issue. Heads are in the BU, they have management like functions. Possible to do that without actual authority.

FW: 16 excluded deans, etc for 3000 faculty – impossible to do without heads.

JJ: you have dean like principals and not dean like principals.

I note here that Ms. Waters' figures do not include the 40 or so Assistant Deans. Bargaining resumed on April 13, 2010. The Faculty Association notes, which broadly match those of the University, read:

Mark discusses "Heads"

Mark: the other thing I wanted to touch on today is wrt to your proposal #7 on heads. Wanted to clarify a couple of things about this. The heads are in bargaining unit as faculty members, but headships are out of the bargaining unit. Even if we're wrong on that, we're not prepared to bargain their position. The other thing I need to tell you, when Policy 21 was amended (it dealt with reappointment), the references to appointment of heads was inadvertently dropped. There's currently in place a process to Amend Policy 22 to affect heads appointment. This will be introduced to BOG at May meeting and considered by the Board in Sept., following comments from the university community. Again, we've taken the position that the issue of the headship of the heads is not something we're prepared to bargain. We think this is a policy issue. (*emphasis added*)

Jim: to clarify your clarification, is it your view that the head's work is not bargaining unit work?

Mark: that part of the head's work that is managerial, that forms the head's duties, is not bargaining unit

Jim: so the salaries and benefits that they get is not for that work?

Mark: for the totality of their work, yes. They get paid for both bargaining unit work and work that falls outside.

Jim: so you're saying that some of the work they're getting paid for is for non-bargaining unit work?

Mark: I'm saying it's for the totality of their work

Jim: is there any other work that our bargaining unit members do that is not bargaining unit work?

Mark: don't know that I can answer that. The term bargaining unit work is something I've heard many times, but it's not a term that I'm very comfortable with. You have work, you have people in bargaining unit doing work, some not in bargaining unit doing work, some doing work that falls both inside and outside. The term bargaining unit work is not something I comfortably embrace.  
(*emphasis added*)

The introduction of the technically inaccurate term "bargaining unit work" and the vague concept of "doing work that falls both inside and outside" added no clarity to the discussion, as reviewed above. Bargaining unit members can be assigned some work that might otherwise be indicative of managerial status. Excluded managers, unless restricted by agreement, do what some see as bargaining unit work, such as teaching.

A further bargaining session was held on April 26<sup>th</sup>. The discussion that day centered on the Faculty Association's concern that "Heads" should be for, and respect the position of, the academic members in advancing matters to the Dean. As such, in its view, it would never be appropriate for a Dean to sit as a Head, although in some structures without a Head a non-Dean acted as equivalent to the Head. The parties discussed the various ways this issue did, or might, work in non-departmentalized faculties and at the Okanagan campus. There was concern raised that some Heads felt their Dean was telling them what to do, causing some conflict. The University expressed the view that Heads have a "dual role" and under the Faculty Association's approach and proposals the Head, from the bargaining unit would not "do the other piece".

The parties returned to bargaining on these points on May 27, 2010. The discussion began with references to the pending grievances over the then meaning of Appendix A. The Association's position was that they were not going to bargain away their position on the grievance (i.e. that all positions were included in the scope clause until bargained out) unless and until they arrived at a settlement on a new Appendix A. As the Association notes record:

Jim: my understanding that every person who has a BOG appointment except those on the CA list are in our bargaining unit. You are requesting further exclusions, and have taken people out who are not on this list. We want to get this sorted out. Have been trying to get some handle on who's in and who's out.

The discussion on May 27<sup>th</sup> and June 24, 2010 reflect the differences due to the University's ongoing concern over its ability to have Heads perform the administrative, and in its view, "managerial" functions it considered essential to the role of Head. This is the topic they declined to discuss, or agree to language for, at the beginning of bargaining and again on April 13<sup>th</sup>. On May 27, 2010 the University's notes record:

AK: We've had a functioning system where heads consider themselves both: Faculty and making meaningful contribution to mgmt of the university. It has worked well. What are you trying to remedy w/ this proposal?

JJ: That's exactly what we're trying to say in our agreement: they have dual role – supervisory role and representing faculty. In their head duties they don't have academic freedom, but to say mgmt duties outside of CA – don't see how you get there. Heads would be surprised to hear they don't have protection of collective agreement.

On June 24<sup>th</sup> the parties discussed in depth the question of how Heads and Associate Deans should be evaluated for merit and PSA increases. Articles 2.04 and 2.05 in Part 2 say the pool of funds for merit and PSA are limited to those with bargaining unit membership. The Faculty Association notes record the beginning of the dialog on the topics:

#### Administrative Appointments

Things we want addressed:

- Clarify role of Associate Deans (anomalous and have no representational role) – they're taken out of the department, and there are merit/psa issues.
- Ensure representational Role of Heads (crucial part of collegial relations) – we heard you say that heads are line management and don't enjoy protection of the association.
- Clarify that Heads are Faculty Members, not line management. Positions are in or out, not duties. If you want heads not to be faculty members then you can request they be moved into Appendix A. Otherwise we're going to insist that they are doing faculty member work and have a dual role. (emphasis added)

...

Jim: On administrative appointments, this is a case of where discussion caused problems for us. Associate Deans in bargaining unit, this is anomalous. We want to make it clear that they are management, and we want to make it clear that they have appts outside of dept and yet they get merit and psa through their appointments. We want clarified the relationship between associate deans and heads. This is not an area that we have a fundamental lack of opinion.

Anna: is associate dean unique to UBC

Jim: they are management, they take on management functions, they are out of the bargaining unit. Here we've kept them in, dues are nice, since we have them anomalously in, since the intent is to be faculty, we want to be clear about their role. Associate deans are out of the dept so they've been given a service role outside of department.

Anna: they still teach. Seems to be you're defining their role as to how they fit into the department. Associate deans contribute to department as are heads.

Jim: It's not that complicated. Positions are either in the bargaining unit or not. We want to make clear how merit and psa apply to people who are seconded into management roles. Not sure there is any disagreement how they should be treated. With heads, we see them as heads and chairs at other universities (Queens, Western, etc.) Our issue there is two-fold, and we may have

disagreement there. We see heads as having dual roles-they have administrative duties (service), but part of their job is as faculty members.

Murray I: same for associate deans

Jim: the fundamental problem with associate deans is that they have been taken out of the dept.

Murray I: I see the issue in terms of merit, is that how you're defining this?

Jim: yes that is our issue. The department can't be determining merit for associate deans. Need to have separation between evaluating academic vs dean responsibilities ...

This dialog makes it clear that the inclusion/exclusion issue clearly lurked behind the evaluation and merit increment issues and that therefore the more formal proposal to exclude Associate Deans from Appendix A was not a sudden or undebated issue when it arose and was resolved in November.

A discussion of the exclusion issue is set out in the November 9<sup>th</sup> University notes:

#### 4. Appendix A Exclusions from the Bargaining Unit

ML: My understanding was that agreement was reached away from table, so that would be as agreed. In addition, on item 4, you referenced Heads and we've had all kinds of discussion on Heads and directors and associate Deans. We have discussed different perspectives. We'd ask you to consider if in the context of a revised proposal, is there any appetite to exclude those members from the collective agreement? We could discuss any conditions, but we need to know if there's any appetite?

JJ: We have new language; you asked if we were disposed to take Directors and Heads out of the bargaining unit. We will not exclude them. We are willing to put Associate Deans in Appendix A; that should solve the biggest single problem, Merit issue. In terms of Heads and/or Directors, we're significantly reduced this proposal. Deena should walk us through the changes. With respect to acting Heads, draft Policy 22 which you passed us, we'd like to leave that there, in Policy. We'd like to leave the appointment of Heads in Policy 22.

In the end, Associate Deans were then added to Appendix A, but in exchange the Faculty Association sought the assurances about re-entry into the unit as now incorporated into Appendix A.

Perhaps the most revealing exchange, given the issues still in dispute, occurred during the last November meeting:

#### ***Agreement Conditions on Appointment for Faculty***

##### **Heads of Department Art. 1.1**

ML: Next in the agreement is in the section on conditions of appointment for Faculty. This is another change we're putting forward: Art. 1.1 Heads of Departments, language on Heads. We heard you say you could live with the ambiguity. This is an issue where we are not moving away from the view that Heads do provide mgt functions, but we are prepared to live with some ambiguity. We're prepared to make a change in Policy 22.

[Draft Policy 22, November 2010, tabled by the University at 11:10 AM]

MM: Has it been amended from what was originally proposed, after the consultation?

FW: Yes.

ML: We're going to change it and remove the "m" word (management). It was say "Provide leadership". We need to recognize that changes to the Policy will go before the Board for approval.

Gives this mutual willingness to "live with ambiguity" it is not surprising that, after reviewing all the extrinsic evidence, I find very little evidence of any meeting of the minds or common intentions in respect to the matters in issue. They agreed that Associate Deans were out and Heads in, but very little about what that entailed.

On December 5, 2010 the Faculty Association sent its members a summary of the changes achieved with its recommendation for acceptance. It included:

#### 8. Academic Administrators

The Faculty Association has agreed to a proposal by the University to remove Associate Deans from the bargaining unit. Those positions are now considered management positions and not covered by the Collective Agreement. However, when a person's term ends as Associate Dean and he or she returns to their faculty member position, they will re-enter the bargaining unit.

The University has agreed to language on terms and conditions of appointment for Heads that acknowledge Heads' dual role both as administrators and as faculty members and academic leaders. In addition we have guaranteed recognition for Head's service in the form of stipends and administrative leaves. Previously stipends and administrative leave existed only in management policy, and were not guaranteed.

After ratification, the parties held a series of meetings "to identify any confusing or unclear issues" within the agreement. In the first meeting they discussed the effective date for the exclusion of Associate Deans. Ms. Waters for UBC is noted as saying in relation to CPI increments, in the first meeting:

Fran: CPI refers to years as a "faculty member" (her term, and refers to those who are not in administration) – if member goes out, to be AVP, accrual stops, then starts up when re-enters.

On January 17, 2011 a question was raised about Part-Time Associate Deans. The University notes say:

- What about PT Associate Deans? Should we discuss their exclusion on case by case basis? FA – no answer yet, but they can't be ½ in and ½ out
- How many Assistant Deans are there? FA (??) thought Assistant Deans are faculty, rather they are staff

On June 27 Ms. Waters advised that she had not yet got to the Part-time Associate Dean's issue. The Faculty Association's notes say:

Fran: haven't gotten to that yet. Inclination is case-by-case basis. Because they are part time are not doing the full-range of management duties.

Deena: how would we do that practically?

Fran: we'd have to sit down and talk

Deena: would trigger the exclusion, the letter, the talk. It might be better to have a category of excluded

Fran: we'll get back to you on this one.

The University's notes simply say "No agreement – FR to get back to FA". The question of the exclusion of Assistant Deans was dealt with in the June 29, 2011 supplemental agreement, but it contains no reference to Part-Time Associate Deans.

On February 18, 2011 the University issued its own summary of the changes in the newly ratified collective agreement. It included:

***Exclusions from the Faculty Bargaining Unit – Appendix A***

Effective January 16, 2011, Associate Deans, Associate Principals and equivalent positions are excluded from the faculty bargaining unit. It is the University's position that they continue to fall within the definition of faculty member.

This change reflects the management responsibilities of these positions. Associate Deans and Principals will be eligible for the 2010 Progress through the Ranks increments.

Academic administrators will enter or re-enter the bargaining unit at the end of their administrative term, with no loss of previously accrued rights and privileges.

On November 21, 2011 the parties held a Joint Consultation Committee meeting the minutes of which describe a discussion about appointments to committees. It reads:

## (c) Search and Hiring Committees

NL: Re Article 5 in the CA. Who can serve on departmental committees? Very clearly does not allow for people outside department on committees. Those committees can be enter group of people in department or a set of elected people.

FW: This is being raised because of the Incident in History. We have talked and this has been rectified.

There are two types of committees. (1) Departmental standing committees; this is covered in the CA. The CA does not say that others cannot sit. For example, graduate students participate. Typically they do not vote but their input is sought. Often departmental standing committees not used for search. (2) Departmental search or selection committees: membership can include undergraduate students, graduate students, elders from the First Nations community, etc. We do not have language in CA on search committees.

NL: I can imagine these scenarios. That is different from the Dean imposing someone on departmental committee. Yes, nothing in the language of the CA prohibits the department from inviting someone to participate. However, nothing in the language suggests that the Dean's office can impose someone on to a departmental standing committee.

FW: Has a Dean imposed someone with voting rights on a departmental committee?

NL: History

FW: Yes, that was a mistake. That was not what the Dean had suggested.

SP: Are you saying that an Associate Dean is not allowed to participate as a member of a search committee?

NL: If the Associate Dean is a member of the department, we have no problem with that.

MM: "Faculty Member" defined in Collective Agreement. When Article 5 written, "faculty member" used as per Agreement.

AK: Two issues. Some individuals as defined can be excluded as members. I am excluded from the bargaining unit. I am a faculty member.

DR: At this point we have agreed on an without prejudice basis that Associate Deans can participate as individuals in their departments.

AK: There is no distinction. Whether or not I am in the bargaining unit, that does not extend to my role as a faculty member at UBC.

NL: There is a distinction. "Faculty" as defined by the CA.

SP: This agreement defines faculty on committees.

AK: Does not say they are excluded from the definition of faculty.

DR: The CA defines participation. There is a distinction.

SP: This is not a typical worker/management relationship.

DR: We are talking about the provisions of the agreement.

FW: The University position: Your analysis discounts language in the CA. To take away that status would require clear language – that is our position. This is a workplace that is imbedded in hundreds of years of practice and history. There is a collegial practice of self-government. It is unique. You are disenfranchising faculty members. Is the issue putting members of the committee on to departmental search committees or is it the issue of the Associate Dean being parachuted in by the Dean?

NL: If departments want to invite graduate students and/or invite members of the community, that is ok. I take issue in parachuting persons in by the Dean's office. Associate Deans in their particular departments can participate, on an without prejudice basis.

DR: Our members should have that opportunity to participate.

NL: If the department thinks it would be a good idea and the department wants other people from other departments, that is ok. But not by a directive from the Dean's office.

FW: This memo in History is outstanding. The notification that the Dean will add someone to the departmental search committee and that person comes with authority and issues of the Dean – that will be taken off.

### ***Decision***

The task now is to interpret just what, on these questions, the parties have agreed upon, particularly in respect to Part 4.

**(a) Does Part 4, by reason of its definition, apply to all Faculty Members, in the *University Act* sense, or is it restricted to those Faculty Members who are not excluded from the bargaining unit?**

Based on the discussions above I conclude that Associate Deans cannot be “half in-half out” of the bargaining unit. However, I have also concluded that the Faculty Association can, in general, and clearly with specific language, negotiate provisions over the ARPT processes that apply to all “Faculty Members” not just members of the bargaining unit.

The parties' intentions can be drawn from the plain words they have used. In Part 4 the parties have adopted a specific definition for the purpose of Part 4:

“Faculty Member” means all persons appointed by the Board of Governors of the University of British Columbia on a full or part time basis as Instructor, Senior Instructor, Professor of Teaching, Lecturer, Acting Assistant Professor, Assistant Professor, Associate Professor, Professor or equivalent position.

This specific definition overrides the general definition of “Faculty Member” in Part 1:



*Boma Manufacturing Ltd. v. CIBC* [1996] 3 S.C.R. 727 at para. 65

The Part 4 definition is basically the *University Act's* definition and is the Part 1 definition of Faculty Member but with reference to sessional instructors removed. This makes sense because sessional instructors are in the bargaining unit but do not hold Board of Governor's appointments or qualify for tenure. This definition in Part 4 is decidedly different from the definition of "Member" under Article 1.01.

I find no basis on which to find the mere fact of certification implicitly whittles down the definition of "Faculty Member" in Part 4 to "member of the bargaining unit". I find it can and does refer to all the listed Board of Governors' appointees. It is not expressly or implicitly to be read down by the effect of certification or any presumption that the collective agreement only extends benefits to bargaining unit members. If express words are needed, the Part 4 definition suffices for that purpose, subject to what follows.

I accept the historical fact that gradually, over many years, Faculty Associations have negotiated the various processes for academics through ARPT procedural protections. That history does not suggest to me that they are for that reason confined to bargaining unit members. All members of a faculty have a long-term interest in the quality of those who are in, or likely to return to, their home department. Tenure and rank based on peer review is the visible expression of that communal and long-term interest.

The parties in bargaining specifically referred to the provisions in Part 2, Article 2.04(b): "Each continuing member of the bargaining unit shall be considered for a merit award. The same is true in Article 2.05. The parties could have, but did not, modify the Part 4 definition as they might have done, to reflect a similar exclusion.

The University refers to one case, from an arbitrator with much experience in academia, that questions whether committee participation is a collective agreement benefit at all, in the sense of an entitlement arising only from membership in the bargaining unit. Arbitrator Etherington ruled:

**51** In the university context the prevalence of collegial decision-making and peer assessment complicates matters somewhat. However, the basic principles remain the same. The procedures for tenure consideration set out in the agreement are part of the terms and conditions of employment between the employer and faculty members. To the extent that they include requirements for members of the bargaining unit to participate in peer assessment and collegial decision making affecting the substantive rights of co-workers, and I note here that the agreement makes it mandatory for faculty to carry out those duties if elected, they are part of the academic service duties of the employees and they are performing those duties in the course of their

employment and acting on behalf of the employer/university. To the extent that they violate the provisions of the collective agreement by carrying out their collegial assessment function improperly, the employer can be held accountable for their actions and is required to do what it can to bring them into compliance with collective agreement requirements. Due to the wording of the relevant legislation (s. 48(1)) and cases like *Weber* and *McGavin*, employees whose substantive rights under the agreement are violated by management or co-workers are restricted to seeking enforcement through the grievance and arbitration process and are barred from seeking enforcement in the courts. In carrying out obligations under the collective agreement to participate in collegial governance and peer assessment the members of the TPC are not acting on behalf of other members of the bargaining unit, but are carrying out employment duties that are part of their terms and conditions of employment, agreed to by the employer and union as workplace duties owed to the university/employer under the collective agreement. (*emphasis added*)

*Algoma University Faculty Assn. v. Algoma University (De Luca Grievance)*, [2015] OLAA No. 285

I find that based on its definition, Part 4 applies to all “Faculty Members” in the *University Act* sense, and that it was open to the parties, without any restraint from certification, to so provide. However, the definition of Faculty Member does not provide the full answer to the issues before me.

**(b) Rights, roles or privileges of Faculty Members under Part 4**

Associate Deans almost invariably have home departments. They are Board of Governors appointees and thus fall within the definition of “Faculty Member”. They are also agreed to be excluded from the bargaining unit. They each hold an academic rank.

The parties have agreed, in Item 6 of the June 29, 2011 Supplemental Memorandum of Agreement’s revision to Appendix A, that:

6. Associate Deans continue to be eligible for tenure and promotion reviews, as are other excluded positions. As excluded faculty members, Associate Deans do not have the right of representation by the Faculty Association. In the case of a tenure or promotion which is denied, the Associate Dean shall be responsible for obtaining his or her own legal representation if he or she wishes to dispute the decision on a contractual basis or otherwise. (*emphasis added*)

The parties have specifically agreed that some special process is needed for administrative appointments for persons from elsewhere than UBC; that is those who are not already “Faculty Members”. Article 5.14(d) provides:

d) Notwithstanding the procedures set out in Article 5 of Part 4: *Conditions of Appointment for Faculty*, the President may make an initial appointment of Associate Professor with tenure, Professor with tenure, Senior Instructor with tenure or Professor of Teaching with tenure where (1) the Departmental Committee, including the Head, a representative of the Faculty Committee and a

representative of the Senior Appointments Committee, and (2) the Dean have recommended in favour of the appointment.

The University's revised (April 21/2011) summary of changes describes the anticipated purpose of this clause.

*Streamlined Appointment Process for Senior Appointments – Art. 5.14(d)*

A senior tenured appointment (for example, the appointment of a Dean) may be made by the President where (1) the Departmental committee including the Head, a representative of the Faculty Committee and a representative of SAC, and (2) the Dean have recommend in favour of the appointment. This process is intended for Senior Administrative appointments. The streamlined process is not mandatory; one may still use the alternate process of appointment for Senior Administrators.

The processes in respect to the tenure and promotion of all Faculty Members is to be that provided in Part 4, without regard to whether the persons are within or excluded from the bargaining unit.

That fact does not of itself imply that all excluded Faculty Members are, as a result, entitled to sit on or participate in the committees involved in these processes.

The University concedes at paragraph 107 of its brief that some administrators who meet the *University Act* definition of "Faculty Member" are excluded from the ARPT consultation committees. Some are excluded it says because:

- They have a specifically outlined role in the ARPT process and therefore do not participate in DSCs as "faculty members" (Dean, President, and post-exclusion Deputy Vice Chancellor, Provost);

I find this a particularly important point.

The central question for Departmental Consultation Committees boils down to an interpretation of Article 5.04(a) and (b). The Department Head shall consult formally at meetings convened for that purpose with eligible members of the Department. Clearly, under 5.04(b) "eligible" refers at least in part to the academic rank of the department member as now more particularly agreed to. Is there some additional aspect to eligibility?

The University, despite collegiality, is still hierarchical. For the purposes of this case and leaving aside for now the NDF's, there are three significant levels in this hierarchy; the President, the

Dean or Principal, and the Department which includes the Head, on the Head's own behalf, and as the person reporting on the views of the eligible faculty members. The provision in Part 4 reflect this three level hierarchy of recommendations all leading to a Board of Governor's decision.

- Article 5.01 General Provisions
  - a) Appointments, reappointments, tenure decisions and promotions are made by the Board of Governors upon the recommendation of the President;
- Article 5.10 describes the Dean's basic role. It is both to review the process followed by those consulted in sending the Dean a recommendation, and a further process to follow if the Dean's decision is something other than the recommendations forwarded to the Dean.
- Several Articles describe the Head's role including Part 4 Articles 1.02, 2.02(d), 5.02, and particularly 5.04 and 5.05, 5.07 and 5.08.

I find that the consultation processes must be interpreted based on this hierarchy of decision making. There is a division between those to be consulted and those higher up who are to take those consultations into account in making the decisions and recommendations they are designated to make. Basically I find that a role, and as a result influence, at the higher level precludes eligibility to be consulted at the initial level.

While recognizing the appropriate exclusion of the President and the Deans, the University continues to argue that other senior appointees remain entitled to participate, within their home department. Paragraph 132-3 of the University's brief says:

*f) Associate Vice President, Senior Advisor to the President*

[132] The University's position is that Associate Vice Presidents and Senior Advisors to the President can participate in the ARPT procedures of their Home Departments in the same way as other eligible faculty members under 5.02(b). If these individual choose not do so, which is often the case, it is because of a lack of time and/or a disconnection from their Home Department because their administrative duties, which are focused on service to the University as a whole rather than to their Faculty, take them outside their Home Department or Faculty. To the University's knowledge, Academic administrators share this view.

[133] These positions are generally unlike Associate Deans whose service is to their Faculty and who retain a strong connection to their Home Department during their appointment.

Article 5.06(d) quite specifically limits the Head's role in consultation meetings: "The Head shall chair the departmental standing committee but shall not vote". Instead, under 5.07(a)(i) the Head

gets to make their own recommendation, with the implication, in 5.07(a)(ii) and 5.07(b), that the Head has an independent duty, despite the Head's personal views (which may differ), to communicate up through this hierarchy the views of the eligible department members or the departmental committee involved. The Head is, as the Faculty Association argues, the representative of the eligible department members in passing on their collegial recommendation to the next level in the hierarchy.

As noted above, the University concedes that the Deans, President, Deputy Vice-Chancellor and Provost do not, which I take and interpret to mean are not eligible to participate, in ARPT processes due to their roles at the next levels of the process. What that leaves is the eligibility of excluded persons associated or affiliated with the Dean's office, or the President's office. Does the requirement for "eligibility" exclude them automatically in the same way as the nominal decision makers (e.g. Dean) or is "within the Dean's office" or "within the President's office" insufficient of itself, unless there is some more direct involvement.

There are three points to be made on this. First, the University argues that there is considerable diversity on the roles assigned to Associate Deans, depending on the size and structure of the Faculty concerned. I accept that to be so; some Associate Deans may be heavily and directly involved in the Dean's assessment of individual's following an ARPT process, others may be assigned duties elsewhere, in no way personally related to such processes. However, Dean's office's may have such regular meetings or consultations that all Associate Deans end up having some participatory role in almost all of the Dean's responsibilities. I am not persuaded that all Associate Deans are excluded from being eligible members of their department, but those who have, or will have any substantive involvement in the Dean's decisions are excluded in the same way and for the same reasons as the Dean with whom they work. I appreciate this requires a judgment in each case, but that judgment needs to be made based on individual circumstances, not presumed from titles alone.

The third point relates to what consultation is about. If administrative faculty members are to be included in the consultation under Part 4 at the departmental level, this is the one situation where their role is confined to their status as Faculty Members, as a colleague in the academic not administrative sense. I find the purpose of and procedures for consultation leave no room for an administrative Faculty Member to be instructed, or to presume themselves obliged, to bring forward concerns other than those upon which all other Faculty Members are entitled to opine. They do not, in other words, participate at the committee level wearing their "management hat" only their "Faculty Member" (in the *University Act* sense) hat". They have the same responsibility as all eligible participants under s. 5.14(e) and, in cases that come to that, the duty not to induce

procedural error should the matter ever get to arbitration or some similar review. I must add however that the consultation this agreement calls for; essentially an academic assessment, applies to the eligible faculty members as well. Put crudely, it is not intended to be a “fight me fight my gang” partisan labour versus management assessment or dispute.

**(c) Non-Departmentalized Faculties**

Article 5.09 (see above) says that:

... that recommendations for appointments, reappointments, tenure decisions, and promotions are arrived at by procedures and arrangements consistent with those for Departments and Faculties.

What are the essential elements of the procedures and arrangements in Departments and Faculties that need to be met in order to meet the requirement that recommendations must be arrived at through consistent procedures and arrangements?

First and foremost is a requirement for consultation with the individual’s eligible academic peers, who are within the academic unit. Eligibility is as described above.

Second, it should recognize the basic three level aspect of the academic hierarchy;

- (1) consultation with peers with a recommendation to the senior officer responsible for the academic unit located in the hierarchy between the faculty members and the President, arising from that peer consultation;
- (2) review by the Dean or other equivalent leader of the academic unit, and
- (3) a recommendation to the President for review under Article 15.14 (particularly (e)) with a recommendation to go for decision to the Board of Governors.

Third, as with consultation at the department level those involved in the second and third levels should not participate in the processes at the lower level. This I find, should preclude a Dean or similar second level official being involved in the first level consultation. I recognize that in non-departmentalized faculties there is no provision for a Head. I find it would be a sufficiently comparable process to proceed with an academic unit member who is not the Dean, chairing the consultation committee and preparing the report of what the individual’s eligible peers recommend. This would not involve the creation of a nominal or straw Head, and the Article 5.07(a)(i) a Head’s independent recommendation need not be provided.

As was discussed during bargaining, the committee or the eligible faculty members may wish to voluntarily add others. It would not offend Article 5.09 to ask a non-departmental member to take on what would otherwise be the Head's role in chairing the meeting, but not with a voting role.

I have considered the structure in the various Non-Departmentalized Faculties. The parties have successfully, over the last 12 years, agreed upon, sometimes fully, and sometimes without prejudice, specific exceptions to the negotiated rules for committee membership. This has and continue to accommodate situations where there is no obvious equivalent to or substitute for the Head, or where there are insufficient eligible departmental Faculty Members to carry out the task due to unit size or issues of rank.

Earlier in this award I suggested that the December 2012 decision to set the "managerial exclusion" line based on the Associate Dean versus Heads category was perhaps less sensitive to the size and role of those positions given the variety in academic units. However, while I have described the parties' ability to agree on a more granular approach, that is not and cannot be a rights arbitrator's role. I offer a similar view on what I have described as the appropriate conditions for "consistent" procedures in the NDF's. It is open to the parties to assess each situation based on the practicalities involved, and free of some of the assumptions that have made this difficult in the past. They can craft their own agreed upon solutions. Beyond the guiding principles I have distilled from their collective agreement terms, I can offer no more precise assistance that can apply to NDF's universally.

I have considered whether Article 17, which notably uses both defined terms "Faculty Member" and "Member of the bargaining unit" provides an independent right from past practice, to excluded Faculty Members.

Article 17. Preservation of Past Rights and Practices

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

In my view it does not. The basis of the interpretation above lies in the agreement's own terms, not on Labour Code or collective bargaining presumptions. It is unrelated to certification or managerial status. Restrictions on eligible membership before would be similar to those now, so nothing substantive from past rights have changed.

I have sought to answer the questions put to me, as well as some of the underlying premises to those questions.

I answer the University's specific questions as follows:

A. Does the Collective Agreement prohibit or limit Associate Deans from serving as faculty members in:

i. their Home Departments on DSCS convened pursuant to Article 5.04 of Part 4 of the Agreement; or

Answer: No, not in a general sense because they are managerial and excluded from the unit, but Yes if they have a role in the process in one of the next levels in the hierarchy.

ii. the ARPT processes developed pursuant to Article 5.09 of Part 4 in Non-Departmentalized Faculties ("NDFs")?

Answer: The same as for A(i).

B. In respect of processes developed pursuant to Article 5.09 of Part 4, does the Collective Agreement prohibit or limit Associate Deans in NDFs from performing the duties that a Head normally performs in Departmentalized Faculties?

Answer: The same as for A(i) and (ii), but, absent consent, this would still be limited to their home academic unit.

I answer the Faculty Association's question as follows:

202. The question to be dealt with in this arbitration is:

Can Associate Deans, whom the parties have agreed are excluded from the bargaining unit, access bargaining unit rights or participate in bargaining unit processes under the Collective Agreement, beyond where roles have been expressly negotiated for excluded academic administrators, related to appointment, reappointment, promotion and tenure set out under Part 4, Article 5 of the Collective Agreement?

Answer: This question is loaded with underlying assumptions. The question is not answered by their status as Faculty Members excluded by agreement from the bargaining unit. By the party's own agreement, Part 4 does not create exclusively "bargaining unit rights or processes". It does, however, in my interpretation, preclude Faculty Members with a role in the person's ARPT process at the Dean or Presidential level from participation in the departmental consultation.



205. The Faculty Association's position is simply that as excluded members, Associate Deans, like Deans or other excluded positions, cannot access bargaining unit rights and benefits such as the consultation rights outlined in Part 4, Article 5 unless explicitly provided for in the Collective Agreement. Since Part 4, Article 5 is completely silent as to the role of Associate Deans in ARPT processes under the Collective Agreement, the answer to all of the above questions is no: they cannot participate in and be voting members in DSCs in departmentalized faculties, they cannot be substantive voting members in any consultation committees in NDFs, and they cannot act as Heads or equivalent in NDFs.

Answer: Again the question is loaded with the same underlying major premise. I find the collective agreement is not silent on Associate Deans in their home department, except to the extent they have a role (beyond their mere title), at the higher levels, and except that their position is as an academic colleague not as an administrator or for some "managerial purposes". Such influences are only appropriate at the next two levels of the hierarchy.

As directed in the letter of July 19, 2019, I have not addressed, and my comments have no relevance to, the appointment of Associate Deans to Dean's Advisory Committees.

I thank the parties for their extensive submissions.

DATED at Edmonton, Alberta this 7<sup>th</sup> day of October, 2021.



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ANDREW C.L. SIMS, Q.C.