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November 18, 2021

Labour Relations Board
600 – 1066 West Hastings Street
Vancouver, BC V6E 3X1

VIA EMAIL

Attention: J. Najeeb Hassan, Vice-Chair and Registrar

Dear Mr. Hassan:

Re: University of British Columbia (the "University") -and- Faculty Association of the University of British Columbia (the "Faculty Association") (Challenge to the Appointment of Associate Deans to Various University Committees) (Section 99 Application)

We are legal counsel for the Faculty Association in respect of the above matter and hereby file this application on their behalf to request that pursuant to Section 99 of the *Labour Relations Code* (the "*Code*"), the Board set aside University of British Columbia and Faculty Association of the University of British Columbia (October 7, 2021) (the "Award").

We thank the Board for extending the time to file this application to today's date and thank counsel to the University agreeing to said extension. We have included a statutory declaration of Kimberly Johansson dated November 16, 2021 that sets out the submissions made to the Arbitrator ("Kimberly Johansson Statutory Declaration #1), including the Faculty Association's submissions of November 25, 2019 ("Faculty Association Submissions"), the University's response submissions of December 20, 2019 ("University Response"), the Faculty Association's reply of January 27, 2020 ("Faculty Association Reply"), excerpts of documents contained in the Faculty Association's Book of Documents ("FABD") and submitted as exhibits, and the Award.

BACKGROUND FACTS

We rely upon the relevant background facts as set out in the Faculty Association Submissions, Faculty Association Reply and Kimberly Johansson Statutory Declaration #1 ("Johansson SD #1"). For ease of reference, we highlight the following facts:

1. At the time submissions were made, the University and the Faculty Association were parties to a collective agreement with a term of July 1, 2016-June 30, 2019 (the "Collective Agreement"). (By the time the Award was issued, the Parties had ratified a new Collective Agreement with a term of July 1, 2019 – June 30, 2022. There were no differences material to the dispute at hand).

2. The Faculty Association has been voluntarily recognized as a "trade union" under the *Code* since January 20, 2000 and is the exclusive bargaining agent for employees appointed as Faculty Members, Librarians. Program Directors in Extended Learning, or equivalent positions at the University, except for those excluded by agreement pursuant to Article 2, Appendix A and Letter of Understanding 1 of Part 1 (Framework for Collective Bargaining) of the Collective Agreement.

3. In the 2010 round of bargaining, the Parties agreed to exclude Associate Deans from the bargaining unit. There is no dispute that they were excluded on the basis of their management status.

4. Following the exclusion, Associate Deans were issued letters of appointment that set out their terms and conditions and expressly foreclosed the application of the Collective Agreement. They were

excluded from Collective Agreement rights and benefits like other excluded persons, even where the Collective Agreement referenced the rights and benefits of "faculty members" or "members of faculty".

5. The dispute at hand began in 2011, when the University permitted excluded Associate Deans to exercise consultation rights under Article 5.04, Part 4 of the Collective Agreement.

6. Under Article 5.04, the Head of the Department must consult with the Departmental Standing Committee ("DSC"), with respect to appointment, reappointment, promotion and tenure ("ARPT") decisions. Non-departmentalized faculties ("NDF") processes for ARPT must be consistent with those in departments pursuant to Article 5.09.

7. The Faculty Association objected to the Associate Dean's accessing such rights given their excluded status and filed two grievances (June 28, 2012, July 24, 2013). Although the parties were able to settle some of the issues raised in the grievances, the remaining dispute was scheduled to be heard before Arbitrator Sims on October 7-9, 2019. The Faculty Association called one witness on direct examination. However, prior to the University completing cross-examination, the Parties agreed to complete the hearing by way of written submissions. The Parties provided their written submissions to the Arbitrator by January 27, 2020.

8. On October 7, 2021, the Arbitrator released the Award. The Arbitrator found that the parties mutually intended to negotiate and apply rights and benefits in Part 4 of the Collective Agreement to excluded members of the bargaining unit by using the term "Faculty Member". The Award is lengthy, however the reasons given for the determination rendered are brief. That portion of the Award is found at pp. 71-81.

APPLICATION

The Award Fails to Correctly Interpret and Apply Provisions and Principles of the Labour Relations Code

9. The Faculty Association submits that the Arbitrator failed to interpret and apply the fundamental labour relations presumption that recognizes 1) an exclusive bargaining agent does not bargain on behalf of excluded personnel; and 2) collective agreement terms and conditions do not apply to management and/or persons excluded from a bargaining unit (the "Presumption"). In brief, the Presumption calls for an arbitrator to presume that parties did not intend to negotiate rights and benefits in a collective agreement for individuals outside of a trade union's exclusive bargaining agency. Because this is a fundamental principle of labour relations, only clear and explicit contractual language can support a finding to the contrary.

10. This endemic failure in the Award is fundamentally at odds with the *Code*, which contemplates:

    a) identification of an appropriate bargaining unit (section 22);
    b) the vesting of authority in a bargaining agent to negotiate terms and conditions of employment *for members of that unit* (section 27);
    c) strikes and lockouts by and upon employees *in the unit affected* in order to secure rights for members of the unit (sections 60(1) and (3); and 61(3));
    d) ratification votes *by members of that unit* (Sections 40 and 78), and
    e) the operation of a collective agreement that is binding *upon the employees on behalf of whom it was negotiated* (Section 48).

11. It is also at odds with the labour relations principles which have guided the considerations engaged under section 139(d), (e), (f) and (l) of the *Code*.

The Presumption is a Statutory Construct

12. Although the Presumption has been applied in countless arbitrations, it directly arises from matters of the statute. A failure to interpret and apply it thus attracts the correctness standard of review.

13. The law of the statute covers arbitral concepts and collective agreement provisions that directly bear upon labour concepts and principles arising from the *Code* (***Health Employers Association of BC v. Hospital Employees' Union***, [2002] BCLRBD No. 112, para. 52). Even interpretations of a collective agreement will be considered matters of the law and policy of the *Code* where they concern certification and bargaining unit inclusions/exclusions issues, particularly where an arbitrator has interpreted bargaining unit descriptions too literally without applying relevant labour assumptions and/or presumptions (***Enterprise Rent-a-Car Canada***, [2015] BCLRBD No. 211 ("***Enterprise***"), paras. 65, 69). Statutory matters are not just disputes concerning *Code* provisions but can include doctrinal approaches used by arbitrators that relate to *Code* provisions and/or principles.

14. It is particularly significant that the Board has recognized a matter of the statute arises where there are questions that fall under Section 139 of the *Code* like employment status or who is covered by a collective agreement (***Fording Coal Ltd.***, 2005 CarswellBC 3686, paras. 23-25). The Board has held that Section 139 conveys clear legislative intention for the Board to have exclusive jurisdiction over these labour matters even if an arbitrator makes findings touching on these matters in the course of arbitration proceedings (***British Columbia Hydro & Power Authority v. IBEW, Local 213,*** [1984] 7 CLRBR (N.S.), paras. 16-17). The exclusive jurisdiction is reflected in the Board's authority to review such findings on a standard of correctness.

15. The established body of jurisprudence addressing the Presumption, leaves little question that it directly engages fundamental questions of labour relations. From as far back as 1960, then Arbitrator Laskin in ***Federal Wire & Cable Co. Ltd.*** (1960), 3 Steelworkers Arbitration Cases 276 recognized that once the right of collective bargaining is achieved, "employees are entitled <u>as of right</u> to benefits of the Collective Agreement". While before recognition of collective bargaining, rights were in effect simply privileges. Once that right is achieved, those previous privileges become benefits of the Collective Agreement (para. 8). See similar comments have been made in ***Re Participating Hospitals and Ontario Nurses' Association*** (1984), 16 LAC (3d) 348 ("***Participating Hospitals***") paras. 8-9.

16. More recently, Arbitrator Germaine held in ***Fraser River Terminal Inc/Coast 2000 Terminals Ltd. v. Teamsters, Local Union 31 (Burry Grievance),*** [2010] BCCAAA No. 183 ("***Fraser River Terminal***") that it was an "illogical contradiction" that a collective agreement right could be "earned by employees who are not party to that collective agreement" (para. 56). Arbitrator Germaine relied in part on the union recognition clause that granted the union exclusive bargaining authority for all within the bargaining unit, a clause that is a direct consequence of the statutory recognition of trade union status (para. 57). He noted that the "inescapable implication" <u>of the "recognition and bargaining authority [of a] Union</u>" is that a "<u>Union bargains on behalf of employees in the bargaining unit, not employees outside of the bargaining unit</u>" (para. 58). Arbitrator Germaine referred to this as being the "<u>basic dynamic of the collective bargaining relationship</u>" and that it would turn the Presumption upside down to take a literal construction of words to imply parties intended to extend benefits to those outside the unit (para. 58; emphasis added). He concluded, "the fundamental limitations imposed by the union's bargaining authority cannot be finessed so easily" (para. 59).

17. Arbitrator Germaine then went on to outline even more explicitly the direct relationship between the Presumption and statutory principles:

> 61 Article 2.03, the Union Security clause, reinforces the analysis. Access to the workplace depends on Union membership. Put another way, without Union membership it is not possible to be included in the bargaining unit. **With membership, the employee becomes bound by the collective agreement and entitled to benefits under the collective agreement.** The collective agreement therefore speaks to the rights and benefits of employees, such as the specific seniority related benefits in Articles 5.01 and 5.02. **The point is that the entire scheme of the collective agreement, including the seniority system, does not apply to persons who are not party to the collective agreement.**

> […]
>
> 66 […] I am persuaded that, unless there is an explicit provision to the contrary, **it is fundamental that the parties to a collective agreement do not intend to confer rights or benefits on employees who are not party to the agreement.** Generally, then, seniority cannot be earned or accumulated by an employee who is outside of the bargaining unit. For the reasons given in *Participating Hospitals,* I am persuaded the Union's position is consistent with the intended effect of the collective agreement.
>
> (emphasis added)

18. This notion that the Presumption is a fundamental principle arising from the recognition of a trade union's exclusive bargaining agency, the "basic dynamic" of the collective bargaining relationship, and the "entire scheme" of a collective agreement and to whom it binds or is a party, is further articulated in a case cited in ***Fraser River Terminal, supra***, ***Re Hotel Dieu of St. Joseph's Hospital and Service Employees' Union, Loc. 210*** (1990), 11 L.A.C. (4th) 151 (Rose), paras. 15-16:

> > "It would appear to be **fundamental that only employees in the bargaining unit can be regarded as obtaining rights and obligations under the collective agreement**. Accordingly, whenever the term 'employee' or 'employees' is used in the collective agreement it must refer to those employees who are in the bargaining unit."
>
> Put another way, it would seem that when an employer enters into contractual relations with respect to an identified group of the former's employees, the rights and obligations so created only being enforceable by arbitration by the two parties to that contract (the collective agreement), **it would seem incongruous that third parties (here part-time employees) be dealt with according to the terms of the collective agreement.** If the hospital's argument were correct, **it would result in a situation where some employees (those covered by the collective agreement) could enforce rights in relation to the competition for the job, while others (those outside the bargaining unit) would be left defenceless against errors made by the employer in this process. Such a result cannot be countenanced.**
>
> To conclude that employees outside the bargaining unit, be they union employees in another bargaining unit or non-union employees, have been given equivalent job rights to the employees in the bargaining unit covered by the instant collective agreement would require the clearest expression of such an intent. In the absence of an express provision, we are unable to agree this is implicit to art. 17.03. […]
>
> (emphasis added)

19. The Presumption also flows from Board recognition that persons cannot be inside and outside of a bargaining unit simultaneously and that inherent conflicts of interest between employees and managers can only be addressed by excluding the latter from collective bargaining rights (***A.S. King Ltd.***, 1979 BCLRB 14; and other cases cited in the **Award, pp. 33-35**).

20. Accordingly, since the issue to be addressed in this application concerns the Arbitrator's failure to interpret and apply the Presumption, which is a fundamental recognition of the effect of trade union status under the *Code* and the basic dynamic and scheme of collective bargaining, the applicable standard is that of correctness. This statutory matter falls squarely within the exclusive jurisdiction of the Board to interpret and apply *Code* provisions and principles.

The Arbitrator Failed to Interpret and Apply the Presumption

21. The Arbitrator failed in two respects in relation to the Presumption: 1) he outright refused to recognize or apply the Presumption at all, and 2) the basis for this refusal was a completely unreasonable interpretation of the Presumption.

22. First, the Arbitrator refused to apply the Presumption, despite its clearly fundamental nature. He dismissed the notion that a collective agreement does not "or is presumed not" to extend to persons outside the bargaining unit:

> This flexibility in the subject matter of bargaining is important because <u>the parties</u> in their discussions and briefs have <u>put forward the notion that the collective agreement</u> cannot, or <u>is presumed not, to provide for issues beyond "employees"</u>. <u>That is not so</u>. It is still a matter of whether they have negotiated such matters in fact; but undistracted by arguments that they cannot do so. (**Award, p. 43**; emphasis added)

23. He effectively concluded that there was no express or implicit presumption that a collective agreement only extended benefits to bargaining unit members:

> I find <u>no basis</u> 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. <u>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</u>. If express words are needed, the Part 4 definition suffices for that purpose, subject to what follows. (**Award, p. 72**; emphasis added)

24. The Arbitrator effectively disregards the case law on the Presumption and proceeds to decide the matter on the basis of a literal reading of "Faculty Member". Since the literal reading of "Faculty Member" includes all "persons" with a Board of Governors appointment under the *University Act*, he determines that the Collective Agreement extends to all bargaining unit and non-bargaining unit members (even non-employees). He then effectively reverses the Presumption by holding that by not using clear and explicit language that the rights and benefits in that Part applied to "members of the bargaining unit", the parties were presumed to have intended those rights and benefits to extend to those outside the bargaining unit **(Award, pp. 74-75).**

25. Yet this is exactly what the cases reviewing the Presumption say is contrary to fundamental labour relations principles. In ***Hotel Dieu, supra***, the Arbitrator cited authority holding that wherever the term "employee" was used it must refer to "employees who are in the bargaining unit" as operation of the fundamental premise that rights and obligations under a collective agreement only apply to employees in the bargaining unit (paras. 15-16). In ***Fraser River Terminal, supra***, the Arbitrator cautioned that a literal construction of words to imply parties intended to extend benefits to those outside the unit would turn the Presumption on its head and such would be an "illogical contradiction" (paras. 56 and 58).

26. The Arbitrator effectively agreed with the University's submissions that given the alleged "unique nature of the university", the Presumption just did not apply **[Johansson SD #1, Ex. F, para. 12].** This is essentially a finding that labour relations principles such as the Presumption and the effect that trade union status and collective bargaining are implied to have on a collective agreement do not apply depending on the workplace or sector. There is simply no authority for that finding and permitting it to stand would set a dangerous precedent. Consider for example, the impact on other workplaces across the province that could potentially be construed as unique on one basis or another.

27. In brief, the Arbitrator's conclusion is that consultation rights regarding ARPT processes were established prior to unionization, and that the advent of unionization does not deprive excluded personnel from participation. By contrast, the Faculty Association maintains that the ARPT <u>consultation rights</u> *in the Collective Agreement* apply to *bargaining unit members only*. Should the University see fit to obtain the input of Associate Deans, it may do so by negotiating such into the process, as it has done with respect to soliciting input from other excluded personnel. But the input of bargaining unit members cannot be co-opted or diluted by the inclusion of excluded personnel at the Departmental level. Consultation at the Departmental, Decanal, or at the level of the Senior Appointments Committee, is a Collective Agreement right belonging to bargaining unit members.

28. The second issue concerning the Presumption was that the Arbitrator improperly distinguished cases citing the Presumption. The Arbitrator appeared to refuse to apply the Presumption by distinguishing cases applying it on the basis that the ARPT consultation rights under Article 5.04 were presumed not to be rights <u>created through</u> collective bargaining. Although the Arbitrator accepts that the Faculty Association, prior to recognition as a trade union under the Code, negotiated ARPT procedural protections (**Award, p. 72**), since ARPT consultation rights existed <u>prior to</u> collective bargaining, he appears to find the Presumption does not apply. In quoting Arbitrator Weiler in ***ICN Strong Cobb Arner Ltd. and International Association of Machinists, Lodge 877***, [1973] OLAA No. 157 ("***Strong Cobb***"), the Arbitrator underlines parts of the passage quoted that refers to bargaining unit members enjoying <u>the rights created through collective bargaining</u> (**Award, p. 50**; emphasis). The Arbitrator appears to literally interpret this to mean that if a right existed prior to collective bargaining under the *Code*, then those rights (even though they are now enshrined in the Collective Agreement and continue to be the subject of collective bargaining) are not rights of the Collective Agreement and so the Presumption does not apply.

29. That finding defies logic. One of the cases the Arbitrator cites, ***Federal Wire & Cable Co. Ltd.*** (1960), 3 Steelworkers Arbitration Cases 276, holds that those rights that existed prior to collective bargaining existed simply as "privilege". When a trade union is recognized to enter collective bargaining, those previous rights are not extinguished or extended to all persons but recognized to be for bargaining unit employees who now have access to those prior privileges as "benefits of the Collective Agreement" (para. 8).

30. The Arbitrator also distinguished another case relying on the presumption, ***British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Positions Grievance)***, [2015] BCCAAA No. 89 (Kinzie) ("***BCPSEA***"). The Arbitrator found it distinguishable on the basis that in that case the *School Act* excluded administrators from the bargaining unit but in this case the *University Act* does not exclude Associate Deans from the bargaining unit or the definition of Faculty Members (**Award, p. 52**). However, as we argued before the Arbitrator, that the difference (which was also argued by the University) is irrelevant because the parties in this case did what the *School Act* did in ***BCPSEA, supra* -** remove administrators from the bargaining unit (Faculty Association Reply, para. 137). It does not matter that the *University Act* did not do that because the parties did that themselves.

31. Thus, the basis upon which the Arbitrator appears to have refused to apply the Presumption, apart from the mere fact that the case arose in a University setting, was by distinguishing the applicable jurisprudence on the basis of irrelevant factors.

By Refusing to Apply the Presumption, the Arbitrator Created a Dual Status Member and Ignored the Operation of Inherent Managerial Conflicts

32. The Award effectively creates a dual-status employee, a person both inside and outside of the bargaining unit. However, the Board has long ruled as a matter of the statute one cannot be inside and outside of the unit, confirming such a situation is unworkable "in a labour relations sense" (***A.S. King Ltd.***, 1979 BCLRB 14, quoted in the **Award p. 33**). That case confirmed that this flows from the "foundation of a union's bargaining agency" that is the right to bargain on behalf of employees in the bargaining unit. We argued this before the Arbitrator and the Arbitrator accepted our submissions on this point (Faculty Association Submissions, para. 229; **Award, p. 33**: "I agree with the Faculty Association proposition that people do not step in or out of a unit depending on the task or time of day").

33. In accepting this basic proposition, the Arbitrator cited cases that recognized a trade union represents employees in the bargaining unit, not the work they perform (**Award, pp. 33-34**). Since the issue of inclusion and exclusion from a bargaining unit typically arises in cases where a person is simultaneously claiming to be an employee and a manager, an important principle underlying this proposition is the avoidance of an inherent labour relations conflict of interest (**Award, pp. 34-35**). As

stated by the Canada Labour Relations Board in ***Bank of Nova Scotia***, 77 CLLC 16,090, quoted in the Award, "The basis for 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 […] It is for this reason that certain persons are denied collective bargaining rights granted to other employees". (**Award, pp. 34-35**)

34. The University argued that there was no concern of conflict of interest given persons can recuse themselves if a conflict arises pursuant to a University conflict of interest policy. However, the Arbitrator rejected that recusal "where conflicts exist" was sufficient since the conflicts 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" (**Award, p. 35**). The inherent labour relations conflict of interests that arises between employees and managers cannot be addressed through simple recusal.

35. Despite this acceptance of the Faculty Association's submissions on these basic labour relations principles, they are not applied or reflected at all in the determination rendered. There was no dispute that Associate Deans were excluded from the bargaining unit and that that was a result of their managerial status. They were part and parcel of the Dean's Office, recognized as part of the Executive, and members of the *University*'s bargaining team. However, by refusing to apply the Presumption, the Arbitrator determines these excluded managers have access to consultation rights reserved for the bargaining unit. He then finds that if one of these excluded managers, the Associate Deans, has a "role and as a result influence at the higher level", it would only be at that point they would be excluded from consultation (**Award, p. 75**). While involved in the consultation, they would participate with their "faculty member hat" and not their "management hat" (**Award, pp. 76-77**, thereby literally switching affiliation depending on task and time of day; the very thing which the Arbitrator agreed they could not be permitted to do.

36. The effect of this Award would have Associate Deans in the unit and accessing consultation rights while performing non-managerial duties (i.e. "faculty member hat") and out of the unit and excluded from consultation when they are performing managerial duties (i.e. "management hat") and/or pose a <u>real</u> conflict of interest (i.e., by being directly involved in the ARPT process higher up).

37. Under this regime, Associate Deans would be operating both inside and outside of the bargaining unit depending on what duties they were performing at any given time. The inherent labour relations conflict of interest would be addressed by individual instances of recusal where there is an actual conflict of interest. Notably, this would be a worse approach than the University's policy on conflict of interest (which the Arbitrator rejected could address inherent labour relations conflicts) given the policy includes "perceived" conflicts and the Award's findings appear to be limited to "actual" conflicts (i.e. actual involvement higher up in the ARPT process). Not only is the effect of the Award contrary to longstanding Board authority that effectively recognizes excluded management cannot take off their "management hat" (hence they cannot be in a bargaining unit with employees, nor can they simultaneously be in and out of a unit depending on their duties), but it is internally inconsistent with the Arbitrator's own earlier findings.

38. One additional troubling consideration concerning the Arbitrator's decision on how to address conflicts was that it ignored the evidence before him which was that the parties had agreed that Associate Deans would not take a substantive role in ARPT at higher levels such as the Dean's Advisory Committee ("DAC") and that that was thus not an issue before the Arbitrator. Despite that evidence, the Arbitrator stated he accepted that "some Associate Deans may be heavily and directly involved in the Dean's assessment of individual's following an ARPT process" and that the "Dean's offices may have such regular meetings or consultations that all Associate Deans end up having some participatory role" (**Award, p. 76**). The Arbitrator appeared to sanction and/or permit the involvement of Associate Deans

in higher levels of the ARPT process (both formally and informally at "regular meetings") so long as they were not also involved at the lower DSC level. However, this directly contradicted facts of which he was fully aware and addressed issues for which he had no jurisdiction to decide.

39. The Faculty Association submitted into evidence the parties' agreement that Associate Deans could only provide advice and support on technical or procedural matters and not include the substantive, academic decision in the DAC, thus the issue of Associate Deans' role in higher levels of ARPT **[Johansson SD #1, Ex. C, Tab 9].** That issue was agreed not to be part of the arbitration, although the issue of Associate Dean involvement in the lower level of DSC was. The Arbitrator even acknowledged in the end of the Award he had no jurisdiction to address the appointment of Associate Deans to the DAC (i.e. the higher level of ARPT after the DSC), stating he had not addressed and his comments were not relevant to that matter (**Award, p. 80**). Yet the Arbitrator, as outlined above, did implicitly address and rely on the incorrect notion that Associate Deans could be or were involved in higher levels of ARPT. This fundamental factual and jurisdictional error further supports the Faculty Association's submission that the Award be overturned.

The Award Fails to Make a Genuine Effort to Interpret the Collective Agreement

40. The Arbitrator failed to make a genuine effort to interpret the Collective Agreement. A failure to provide a genuine effort is evident in a failure to provide a "reasoned analysis" of the issues in dispute (***Vancouver Coastal Health Authority***, BCLRB No. B223/2007, paras. 27-28). A genuine effort "reveals the reasoning process", must be "evident on the face of the reasons" and does not include an "intentional disregard of relevant provisions, an analysis conducted in bad faith or a decision which was inconsistent with the principles of the *Code*" (***Nanaimo Times Ltd.***, BCLRB No. B151/96, para. 36; ***Western Pulp Incorporated Limited***, BCLRB No. B380/2004, para. 25; ***Terasen Gas Inc. v. Office & Professional Employees' Union, Local 378***, 2005 BCSC 123, para. 34).

41. The most glaring and concerning of the Arbitrator's errors, and one central to the final disposition, is the interpretation of "Faculty Member" in Article 5.04 in light of the Presumption, the Collective Agreement provisions and the parties' submissions.

42. The failure to have proper regard to the Presumption as the Arbitrator has done in this case is not only a failure to act in accordance with *Code* principles but also a failure to give effect to the meaning the parties intended for the language. Such a failure to act in accordance with existing labour jurisprudence (which creates a presumptive framework and climate of expectation that parties bargain within) has been recognized by the Board as a reviewable error (*Consumers Glass Company Ltd*., BCLRB No. 49/76; *Nanaimo Regional General Hospital*, BCLRB No. 67/78).

43. Despite the 81-page award, the Arbitrator's decision effectively came down to the following paragraphs:

> 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.
>
> […]
>
> 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 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 […]
>
> (**Award, pp. 71-73**)

44. The Arbitrator finds the parties' intentions clear in the plain meaning of "Faculty Member" in Part 4 that he says imputes the *University Act* definition and refers to "all the listed Board of Governors' appointees". He finds nothing limits that language (apart from an actual conflict of interest, as he describes below as a basis for finding a faculty member not qualified). Accordingly, wherever the term "Faculty Member" is read in Part 4, all those related rights and benefits apply to Board of Governors' appointees (whether employees or not, whether in the bargaining unit or not), including consultation rights in Article 5.04.

45. There are numerous problems with this interpretation. First, the Arbitrator at various places in the Award notes that the use of the term "faculty member" is "not always clear" (**Award, p. 1**). In the introductory paragraph he refers to "faculty members (more or less precisely defined) can be represented by a bargaining agent and bargain collectively" and that with the introduction of collective bargaining to the academic world there could be a "collective agreement binding on the University, the Faculty Association and faculty members (again more or less loosely defined)" (**Award, p.1**). He recognizes the "superimposition of a collective bargaining regime on the traditional University structure…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 […] exclusive bargaining authority" (**Award, p. 1**). The Arbitrator then says:

> 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. (**Award, p. 1**)

46. Elsewhere the Arbitrator refers to the term "faculty member" as "ambiguous" (**Award, p. 9**). In sum, the Arbitrator appears to recognize the phrase "faculty member" does not have one inherent meaning and does not clearly signal whether or not it includes persons outside of the bargaining unit. Indeed, his introductory paragraphs imply a view of "faculty member" that is limited to employees whom labour statutes permit collective bargaining for. He states explicitly it is not clear whether the term has the more traditional meaning or a meaning with labour relations connotations.

47. There was a very long delay (almost two years) between the conclusion of the submission schedule and the decision being rendered. Issuance of the decision was prompted by correspondence from the parties beginning in August wherein they parties asked that the decision be issued **[Johansson SD #1, Ex. I-M].** The Award reads very much as though the lengthier overview was written in early 2020, and the

comparatively brief decision portion of the decision was written on a rushed basis many months later as there is a deep and irreconcilable disconnect between these two parts of the Award.

48. By the time the Arbitrator gets to his conclusion, he fails to reflect on his earlier findings on the ambiguity of the term. Instead, he finds the phrase "Faculty Member" in Part 4 is clear, that it is the *University Act* definition, and this "plain" language shows the mutual intent of the parties to extend rights and benefits in that part to those beyond the scope of the bargaining unit. This is so despite the Arbitrator's own reference earlier to ***Fraser River, supra*** where Arbitrator Germaine noted that a "literal construction of the words of date of hire" turns the "basic dynamic of the collective bargaining relationship established by Article 2.02 [recognition clause] […] upside down" (para. 58; cited in the **Award, pp. 50-51**). As noted above, this finding also flies in the face of ***Hotel Dieu, supra*** that held a reading of "employees" to include "employees outside the bargaining unit" (without "the clearest expression of intent") is neither reasonable nor makes industrial relations sense (paras. 15 and 16).

49. The Arbitrator's decision to base his decision solely on the alleged "plain" meaning of a term, which he earlier found was not clear and which is directly contradicted by cases he cited, is an obvious failure to genuinely interpret a collective agreement.

50. Second, the Arbitrator fails to grapple with the real language at issue. The language at issue was the wording of Article 5.04 in Part 4 which addressed the consultation rights in dispute. Distracted by the definitions section of Part 4, the Arbitrator did not engage in any meaningful consideration of the wording of Article 5.04.

51. The Arbitrator focuses on the phrase "Faculty Member" in Article 1.01 of Part 4, finding it is effectively a full answer to whether Associate Deans or other excluded management persons can have access to consultation rights in Part 4 (apart from where a real conflict of interest arises). However, what the Arbitrator should have focused on was the specific language of Article 5.04. The Faculty Association identified that the specific language in Article 5.04 refers to "members" not "Faculty Members" (as used in Article 1.01)**,** and that that (as noted by the Arbitrator) is a term defined under Part 1, Article 1.01 as "member of the Faculty Association bargaining unit" **[Johansson SD #1, Ex. B, para. 256].** The Arbitrator also ignored the fact that the term "Faculty member" that is used in later portions of Article 5.04 is not the capitalized "Faculty Member" used in the definitions section of Part 4 (para. 256). The Arbitrator appears to presume that "member" and later "Faculty member" means "Faculty Member" as defined in Article 1.01 of Part 4 but fails to make a genuine effort to grapple with the <u>different</u> language used in Article 5.04.

52. Third, the Arbitrator does not consider the use of "Faculty Member" or "member" in other places of the Collective Agreement, or indeed in Part 4 itself, as argued by the Faculty Association. Arbitrators have recognized that it is not only the words of a phrase, but the context, section and collective agreement as a whole that must be considered (*Catalyst Paper Corp. v. Communication, Energy and Paperworkers' Union*, [2010] BCCAAA No. 49, para. 31). That is, in determining the meaning of Article 5.04, the Arbitrator should have also considered how the parties used that and other language in other parts of the Collective Agreement. The Faculty Association submitted that if those other uses were considered, it would demonstrate that the reference to "Faculty Member" in Part 4 could not extend to excluded members and/or was limited to bargaining unit members.

53. The Faculty Association first referred to the Preface that distinguished between "members of the Faculty Association and administrators" and confirmed the "Collective Agreement defines rights of members" **[Johansson SD #1, Ex. B, paras. 238-39].** The Faculty Association also referred to Article 6.02 (b) in Part 4 that clearly distinguished between "faculty" (meaning bargaining unit members), on one hand, and "administrators," on the other. The Faculty Association then referred to the various references to "faculty members", "members" and "members of the bargaining unit" to show the terms had been used elsewhere in the Collective Agreement interchangeably and that "faculty member" had

been used to refer to rights only available to bargaining unit members (paras. 50-52, 57). However, an analysis of the terms used throughout the Collective Agreement is completely absent from the Award, despite the Arbitrator deciding the issue on the basis of the meaning of "Faculty Member". This shows a clear disregard not only for key submissions made, but for relevant Collective Agreement provisions that are critical to determining the parties' mutual intent.

54. When considering the actual use of "Faculty Member" throughout the Collective Agreement, the Arbitrator's ruling that the term in Part 4 was clearly meant to extend rights and benefits in Part 4 to excluded persons becomes patently untenable. The parties used the same or similar terms in Article 15 in Part 1 (discretionary funds for wages); Articles 1-7 in Part 3 (various types of leaves); and Articles 7, 10, 12, and 13 in Part 4 (notice of non-renewal; discipline; financial exigency and redundancy; and certain parts of the appeal process for promotion decisions, respectively) **[Johansson SD #1, Ex. B, paras. 249-251].** Yet, longstanding practice submitted confirmed excluded members never accessed such rights and the parties conducted themselves as if these other parts and sections did not apply (as discussed further below). For example, the parties negotiated explicit rights for excluded persons to return to the bargaining unit in Appendix A in Part 1, which would have been unnecessary if the parties mutually intended the term to include excluded persons and thus extend general leaves of absence rights (i.e., as argued in ***BCPSEA, supra,*** the excluded members could have simply taken a leave from their bargaining unit position). Another example is the reference to the term in Article 13.03, which is part of the Faculty Association's appeal process and specifies time limits for the Faculty Association to submit disputes for its members. The reading of "Faculty Member" in Part 4 to permit access to Article 5.04 rights conflicts with a reading of the same term in Article 13.03 in the same part. Had these uses of the term at issue been given even a fleeting glance by the Arbitrator, he would have seen how incongruent it would be to expand Article 5.04 rights in Part 4 to excluded persons.

55. Does the Arbitrator's decision require that these rights have also been extended to Associate Deans and anyone else with a Board of Governors Appointment, whether they are employees or not? And by correlation, is the Faculty Association now saddled with representing such individuals on these issues? Or is there some other method or forum by which the Arbitrator imagines, but does not identify by which excluded personnel can seek to enforce the Collective Agreement? Associate Deans have sat on the University side of the bargaining table when bargaining has occurred on these provisions, should they now switch back and forth, donning and doffing "hats" in bargaining as well?

56. The implications of this decision underscore how recklessly it was made, and reveal the superficiality of the analysis engaged in. This fundamental upheaval cannot be what the parties intended and certainly if the Arbitrator had put his mind to the actual wording of the Collective Agreement, he would have agreed.

57. The Arbitrator also seemingly without question accepts that Associate Deans and other excluded members cannot use the Collective Agreement grievance process or be represented by the Faculty Association **[Johansson SD #1, Ex. M, p. 9].** In reaching that conclusion, he does not consider, as outlined above, Article 13.03 in Part 4, for example. If he had, he would have discovered support for the Faculty Association's submission that the use of the term does not on its face extend rights to excluded members. It would be illogical and contradictory to apply time limits for the Faculty Association to dispute a decision regarding excluded members whom the Arbitrator acknowledges cannot use the grievance process or be represented by the Faculty Association. This contradiction also raises a question of where exactly excluded personnel can seek to enforce the rights now conferred on them under the Collective Agreement? Certainly, this is precisely why a literal interpretation of "employees" to extend to those beyond the bargaining unit has been rejected by arbitrators: "it would result in a situation where some employees […] could enforce rights […] while others (those outside the bargaining unit) would be left defenceless against errors made by the employer in this process. Such

a result cannot be countenanced" (***Hotel Dieu, supra*,** para. 15). This also begets a second question regarding what rights or role the Faculty Association would have in such litigation?

58. The Arbitrator cannot have it both ways – either Associate Deans and other excluded members can access all rights and benefits where the literal words "Faculty Members" are used, or he must read in labour relations principles to logically limit its potentially infinite scope.

59. Finally, the Arbitrator ignored key submitted extrinsic evidence and submissions of the Faculty Association and thus fails to make a genuine effort on the language by ignoring relevant evidence that aids contract interpretation. We provide more detail on this assertion under the breach of procedural fairness.

The Arbitrator Denied the Faculty Association a Fair Hearing

60. The final ground of error in the Award is that the Arbitrator breached procedural fairness by admitting disputed historical data and collegial governance evidence and ignoring key extrinsic evidence and submissions provided by the Faculty Association.

Admitting Disputed Historical Data / Collegial Governance

61. The Award rests on certain assumptions made about the historical origins of the University. The Arbitrator also appears to rely on the University's submission of what collegial governance is. However, the parties were at odds throughout the process about the admissibility of the historical data as well as evidence on collegial governance sought to be adduced by the University. See, for example exchanged particulars **[Johansson SD #1, Ex. C, Tabs 10-20].**

62. In the hearing, the University expressly agreed not to rely on historical data. This agreement was reflected in the Faculty Association's November 25, 2019 letter to the Arbitrator, copied to the University, that confirmed the University's Book of Documents were to be admitted "excluding the historical documents" **[Johansson SD #1, Ex. A].** Only a small portion of the historical documents were actually in dispute as to whether they would be admitted, and the Faculty Association clearly stated that if the University relied on them there would be an issue of admissibility.

63. The University also relied on the concept and meaning of collegial governance **[Johansson SD #1, Ex. E, paras. 46, 273-275, 238].** The Faculty Association submitted that evidence of collegial governance had to be entered into evidence by an expert and so was inadmissible or alternatively should be given no weight **[Johansson SD #1, Ex. F, paras. 28-31, 156, 182].**

64. Despite the disputed nature of the evidence and the parties' submissions, the Award refers and relies at various points to historical data and implicitly appears to rely on the University's contention of the tenants of collegial governance. This is done without providing any further opportunity for the Faculty Association to speak to these matters, nor providing any reasons or decision on why the evidence was being admitted. The Arbitrator finds ARPT processes pre-existed unionization on the basis of "arbitral notice" and quotes textbook authors who were not speaking about the University of British Columbia, who were not qualified as experts, and who the Faculty Association had no opportunity to cross-examine (pp. 2 and 13). The parties also agreed that historical origins were not relevant (as it precedes even the existence of Associate Deans and the 2020 exclusion) and yet the Arbitrator relied upon assumptions made about such origins. Accordingly, there has been a breach of procedural fairness.

65. This is no small error. Prior to the parties' agreement to exclude historical documents, the parties widely diverged on what the historical documents even meant. Admitting and relying on alleged historical "facts" without a clear opportunity for the Faculty Association to make submissions, cross-examine witnesses or even obtain their own historical expert, is a critical fairness breach. To be clear, the Faculty Association categorically disagreed that ARPT processes existed prior to the negotiation of a Collective Agreement or the existence of a Faculty Association (as argued by the University). The University was

founded in 1915 and the Faculty Association was established in 1920 (voluntarily recognized in 2000). The Faculty Association submitted it was facile to suggest that there was no bargaining and no bargaining unit prior to that. There were interest arbitrations that dated back to the 1980s and the University's own documents directly reflected that the Board of Governors was negotiating with the Faculty Association collectively on these terms as early as 1962, although we strongly suspect it dated well before that. The 1962 and 1971 versions of the collective agreement opened with recognitions that the document was approved by the Faculty Association and reflected a statement of principles and procedures agreed to by both the Board of Governors and the Executive of the Faculty Association **[Johansson SD #1, Ex. C, Tabs 78-79].**

66. The claim that these documents made clear the eligibility to vote in ARPT had nothing to do with bargaining membership in the bargaining unit (as argued by the University) was just not made out in the documents. Yet this is precisely what the Arbitrator appears to find: that the "history" did not suggest the Faculty Association negotiations with respect to ARPT processes were confined to those in the bargaining unit (p. 72). In fact, before recognition under the *Code*, the Faculty Association was bargaining with the University and doing so exclusively for its membership.

67. The Arbitrator's liberal use of "arbitral notice" also conflicts with the courts' recognition of the limited nature of such notice and basic principles of procedural fairness. As long recognized in ***Pfizer Company Limited v. D.M.N.R.***, [1977] 1 SCR 456 (which has been applied in various recent decisions such as ***SKF Canada Ltd v. Canada,*** [1983 FCJ No. 202, cited in ***A&H Steel Ltd. v. International Assn. of Bridge, Structural, Ornamental and Reinforcing Ironworks, Local 720,*** [2007] ABQB 109, para. 59), an administrative tribunal breaches natural justice by relying on expert textbooks and/or dictionaries to make a finding of fact contrary to disputed evidence before them. The concept of "judicial notice" simply cannot be stretched that far. It cannot apply to questions of fact that are to be decided on evidence by qualified experts at a hearing. In this case, these underlying historical assumptions seem to be one of the most material facts the Arbitrator relies upon in the Award and yet they were hotly contested. The Arbitrator acted recklessly when he side-stepped addressing the objections and, instead, based on a fundamental misunderstanding of judicial notice, simply relied upon textbook experts to dictate key findings of fact.

The Arbitrator Ignored and/or Found Irrelevant Key Extrinsic Evidence and Submissions

68. The Arbitrator denied the Faculty Association a fair opportunity to be heard when they effectively ignored and/or found irrelevant key extrinsic evidence and submissions going to the parties' mutual intent not to extend consultation rights in Article 5.04 (or rights and benefits generally) to excluded bargaining unit members.

<u>Associate Dean Contract Clearly Ousts the Application of the Collective Agreement</u>

69. The failure to consider relevant interpretative aids was most squarely evident in the Arbitrator's failure to consider the terms and conditions of the Associate Dean's appointment – essentially, their contract of employment **[Johansson SD #1, Ex C, Tab 1].** The Faculty Association heavily relied on the terms of this letter to establish the mutual understanding that <u>the rights found in the Collective Agreement are in fact, and by mutual understanding, not conferred upon Associate Deans</u> **[Johansson SD #1, Ex. B, paras. 156-160].**

70. The Award reveals no substantive consideration of the Faculty Association's argument nor any examination whatsoever of the relevant terms of the employment contract. The appointment letters issued by the University to Associate Deans explicitly provide that they cannot access the rights found in the Collective Agreement **[Johansson SD #1, Ex. B, para. 157**]; that Associate Deans would only "return" to their "faculty" position once their administrative position was over (with the clear presumption they were not currently in such a "faculty" position) (paras. 159-160); and that the appointment letter constituted the full agreement, superseded all other commitments, and all other

agreements had no effect (para. 158). While the University that argued the letter was not exhaustive in that other University policies applied, there was no dispute that the letter constituted the terms and conditions of the Associate Dean appointment since exclusion and superseded all other terms and conditions **[Johansson SD #1, Ex F, para. 4(v)].**

71. The failure to consider the actual terms and conditions of Associate Deans post-exclusion when considering whether terms and conditions in the Collective Agreement applied to Associate Deans post-exclusion was not just an oversight but a fundamental breach of natural justice.

<u>Partner Appointments, Clinical Appointments, Visiting Appointments and Adjunct Appointments Do Not Have Access to Rights and Benefits</u>

72. Another significant failure arises from the Arbitrator's finding that the existence of partner appointments, clinical appointments, visiting appointments, adjunct appointments and all term appointments "makes no difference to the issues at hand" (p. 20). The Arbitrator accepted it is "well understood [they are] to be outside the bargaining unit" just like Associate Deans (p. 20) and that the issues included determining whether the parties intended to extend certain rights and benefits to excluded persons (p. 2). However, he concludes their existence is irrelevant because "most" of these positions do not fall under the *University Act* definition. However, that is completely incorrect.

73. As the Faculty Association argued, and contrary to the Arbitrator's findings, a literal interpretation of "faculty member" under the *University Act* includes all the above-referenced appointments as they are "persons" with BOG appointments **[Johansson SD #1, Ex. B, para. 43].** Accordingly, based on the Arbitrator's interpretation, all rights in the Collective Agreement that reference "Faculty Member" and not "bargaining unit member" extend to all "persons" outside the unit. Their existence then does make a difference. All the more so because there are so many of these appointments that their numbers would dwarf the number of bargaining unit members by comparison. Globally, these appointments outnumber bargaining unit members 3:1, and in some Departments, it is more than 10:1, meaning that their inclusion in Departmental consultation processes would render the rights of bargaining unit members meaningless, as their votes and voices would barely register. The Arbitrator seems to register that, but entirely fails to deal with it because of his misapprehension of the facts.

74. The Arbitrator's finding on this point flies in the face of and is directly contradicted by undisputed facts that confirm these "Faculty Members" in the *University Act* sense do not have access to consultation rights under Article 5.04 <u>nor any other part of the Collective Agreement</u> **[Johansson SD #1, Ex. B, paras. 43-46].** The Faculty Association specifically relied on evidence that the parties mutually acknowledged these positions did not access Collective agreement rights <u>because they were outside the bargaining unit</u>, which was the very issue in dispute before this Arbitrator **[Johansson SD #1, Ex. C, Tab 2; Ex. D, exhibits 6 and 10; Ex. B, para. 244].** Specifically, the University's own documents revealed that Partner Appointments, for example, were not permitted to be voting members in the ARPT process and not covered by the Collective Agreement because they were not employees and not part of bargaining unit, and the "appointment relationship" with Clinical Appointments was "governed by an Appointment/Offer letter" not the Collective Agreement **[Johansson SD #1, Ex. D, exhibit 10, p. 3-5].**

75. Clearly the Arbitrator does not grapple with this issue because he ignores it on a completely incorrect basis (i.e., that the appointments are not "Faculty Members" in the *University Act* sense). Had it been properly considered; it would have a direct bearing on the interpretation of "Faculty Member" as it shows the parties did not intend for all such appointments to have access to Part 4 rights and benefits. However, taking the Arbitrator's findings to their logical conclusion, rights and benefits in the Collective Agreement would be now extended to thousands of non-bargaining persons (who do not even need to be University employees under the Arbitrator's interpretation). This would include not only Part 4 rights, but Part 1 and Part 3 rights given that the phrase "Faculty Member" is also used in

those parts of the Collective Agreement as well. This stretches the interpretation of the language beyond its logical bounds.

Excluded Members Did Not Access Collective Agreement Tenure and Promotion Process

76. The Arbitrator also assumed that excluded personnel have access to the Collective Agreement tenure and promotion process. In doing so, he entirely ignored substantive submissions made and evidence to the contrary.

77. The Arbitrator held, "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 (p. 73). The Arbitrator interpreted the reference to tenure and promotion reviews in the Supplemental Memorandum of Agreement ("**Supplemental MOA**") as Collective Agreement processes: "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" (p. 73). That is, the Arbitrator found that the parties had bargained ARPT processes for excluded members and that that was provided for in the Collective Agreement.

78. However, the evidence presented to the Arbitrator confirmed that excluded personnel in fact <u>do not have access to</u> the Collective Agreement tenure and promotion process. Rather, there was no dispute, that the University had a parallel process outside the Collective Agreement and the University was not bound to follow the Collective Agreement process. The evidence showed, contrary to the notion that excluded "faculty" have access to Collective Agreement rights and benefits as the Arbitrator assumed, the parties did not mutually intend for them to have such access and acknowledged excluded personnel go through a separate process, albeit a mirrored one.

79. The key piece of evidence that showed the above was the April 4, 2011 bargaining reconciliation meeting minutes **[Johansson SD #1, Ex. D, exhibit 9].** In that meeting, as the notes reveal, representatives from the University and Faculty Association explicitly discussed the tenure and promotion process for Associate Deans given they were now excluded from the bargaining unit. The University stated explicitly that for administrative faculty, "maybe" it paralleled the Collective Agreement but it "<u>doesn't really work under the CA</u> [Collective Agreement]" (emphasis added). The University then said that they were "using an equivalent tenure and promotion process" for excluded personnel and since the Associate Deans were now excluded as well, "probably the same with the AD they're excluded but university may use the equivalent promotion process".

80. If those above-referenced comments were not sufficiently clear (i.e., that excluded personnel including the newly excluded Associate Deans do not access the Collective Agreement tenure and promotion process), but instead a parallel process, then the next comments by the University were: "If they don't have the promotion, <u>it's a matter of contract law, not CA</u>" [**Johansson SD #1, Ex. B, para. 149**; emphasis added). That is, the tenure and promotion process for excluded personnel were part of their independent contract and <u>not arising from the Collective Agreement</u>. That is why the University states that it maintains the ability to "<u>choose</u> to parallel the existing procedures but the FA couldn't grieve it" and that they are "using the university's procedure (which to date has paralleled CA)" [**Johansson SD #1, Ex. B**, para. 150]. Significantly, the discussions on April 4, 2011 were not disputed by the University **[Johansson SD #1, Ex. F, para. 4 (i)].**

81. Accordingly, when the Supplemental MOA referenced eligibility for tenure and promotion for the newly excluded Associate Deans, the reference was to follow the same process "as other excluded positions". This was not the Collective Agreement process as the Arbitrator appears to have incorrectly assumed it was, but a separate external process. There was also no evidence that the Faculty Association bargained for it or received it as a right. In fact, the University emphasized its <u>unilateral right to choose the process</u>. The Arbitrator's failure to consider this undisputed evidence as submitted by the Faculty

Association and his incorrect understanding of the Supplemental MOA that flowed from that reveal a serious breach of procedural fairness and failure to grapple with critical extrinsic evidence.

Excluded Members Without an Explicit Role in ARPT Did Not Access Rights and Benefits

82. The Arbitrator also places considerable importance on the fact that other excluded administrators have explicit roles higher up in the ARPT process and do not take part at the DSC level. He finds this is "a particularly important point" (**Award, p. 74**) and appears to extrapolate that all other excluded administrators (who do not have a role at higher levels of the ARPT process) must then be able to take part at the DSC level and/or access consultation rights under Article 5.04 (**Award, pp. 75-76**), so long as the University's Board has issued an appointment to them.

83. Yet what the Arbitrator did not consider was extrinsic evidence demonstrating that excluded administrators who fall within the *University Act* definition of "Faculty Member" and do not have an explicit role to play in higher levels of ARPT, did not access, and were not permitted to access, consultation rights at the DSC level nor any other rights and benefits under the Collective Agreement. Nowhere in the Award is there consideration of this past practice and common understanding of the role administrators played in the ARPT process.

84. Specifically, the Faculty Association raised the fact that previously the Deputy Vice-Chancellor and Provosts did not have a role in any echelon of the ARPT process. At that time, they did not take part in the ARPT process or access any other rights or benefits in the Collective Agreement [**Johansson SD #1, Ex. B, para. 277**]. The University did not largely dispute this **[Johansson SD #1, Ex. F, para. 4(ii)].** Furthermore, and notably, when there was an instance of the Provost attempting to be involved in the ARPT process, the Faculty Association grieved the matter and the parties negotiated an explicit role in the Collective Agreement for these two positions. The disregard of this relevant evidence demonstrates a clear procedural breach.

Past Practice Evidence Revealed Associate Deans Are Excluded From Other Rights and Benefits

85. The Faculty Association also relied on past practice of the Associate Deans post-exclusion, which was clearly relevant to determining the parties' mutual intent of the meaning and effects of their exclusion. The evidence was undisputed that the practice changed for Associate Deans post-exclusion **[Johansson SD #1, Ex. F, para. 4 (iv)]**. They no longer accessed other rights and benefits in the Collective Agreement, including where the language referred to "faculty members" or "members of faculty", not "bargaining unit member" [**Johansson SD #1, Ex. B, paras. 161-163**]. The Faculty Association also highlighted that as soon as Associate Deans were excluded, the University for the first time added Associate Deans to the University bargaining team **[Johansson SD #1, Ex. B, para. 166]** and began describing them as part of the Executive **[Johansson SD #1, Ex. B, para. 167].** These facts are totally absent from the Award and yet they strongly support the Faculty Association's submissions that past practice directly supported its interpretation and/or, at the very least, raised an ambiguity as to the language used.

Faculty Association Submissions on Past Practice Effectively Ignored

86. This disregard of past practice evidence is tied to the Arbitrator's fundamental misconception of the Faculty Association's position. While the Arbitrator indicated that the University's position was reliant on past practice of Associate Dean's participating in ARPT processes prior to their exclusion from the bargaining unit, the Arbitrator describes the Faculty Association's position as solely about the Presumption: "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" (p. 6). This is, however, a completely incorrect characterization. The Faculty Association's Submissions were replete with reliance on largely undisputed past practice. See, for example, Faculty Association Submissions **[Johansson SD #1, Ex. B]:**

- paras. 52-64, entitled "Past Practice for Excluded Persons";
- paras. 153-167 entitled, "Associate Deans Post-Exclusion";
- paras. 247-253 argument that a literal interpretation of "faculty members" would ignore longstanding and undisputed past practice to the contrary;
- paras. 277-280 entitled "Past Practice Demonstrates All Excluded Personnel Excluded from Collective Agreement Rights and Roles"; and
- paras. 281-288 entitled "Practice and Communications Since Exclusion").

87. The Faculty Association submitted that if a literal interpretation was taken, longstanding past practice with respect to members being excluded from Collective Agreement rights would be ignored **[Johansson SD #1, Ex. B, paras. 247-250].** The Faculty Association also submitted that such excluded groups did not access any Part 3 or Part 4 Collective Agreement rights (apart from the impugned ARPT consultation rights in Article 5) despite the use of "faculty member" language rather than "bargaining unit member" in those parts [**Johansson SD #1, Ex. B,** paras. 250-252]. The Faculty Association emphasized evidence that the University itself had acknowledged these groups were not eligible because they were not members of the bargaining unit, and that the very University representative who drafted that acknowledgement (Tammy Brimner, former Executive Director, Faculty Relations, Faculty of Medicine and Senior Manager, Faculty Relations) had represented the University in the 2010 round of bargaining that excluded Associate Deans [**Johansson SD #1, Ex. B,** paras. 59-61 and 278-288]. All of this critical evidence was either swept away as irrelevant or completely ignored.

88. These failures reflect a deeply flawed reasoning process and a denial of the Faculty Association's right to be heard. As a result, the Award simply cannot stand.

Award Findings on Non-Departmentalized Faculties ("NDFs")

89. The Award not only dealt with the issue of excluded Associate Deans accessing Article 5.04 consultation rights, but what role they could play in NDFs pursuant to Article 5.09 in Part 4 of the Collective Agreement, including accessing consultation rights in ARPT and acting as "Heads" in NDFs. Article 5.09 requires ARPT procedures to be "consistent" with departmentalized faculties.

90. Most of the Arbitrator's reasons for permitting Associate Dean involvement in NDFs was based on the same findings made in relation to Article 5.04 (p. 78). Accordingly, our above submissions equally apply to those reasons.

91. However, in the course of addressing this issue, the Arbitrator effectively found there was no need for Heads in NDFs processes. He stated, an "academic unit member who is not the Dean" can chair the consultation committee and prepare a report but "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" (p. 78). The Arbitrator effectively conceived of the Head role as limited to chairing a consultation committee and providing a report, and that, in fact, that layer was not needed. This completely ignores submissions on the importance of the Head role in leading the Department, guiding and regularly meeting with faculty under Article 5.02, creating procedures for the Department under Article 5.06, communicating with candidates under Article 5.08 and sitting on the DAC, and that such critical roles are performed by equivalent positions in NDFs **[Johansson SD #1, Ex. B, paras. 17-23]**. Those who occupy headships conduct Article 5.02 meetings for years with members, convene DSC meetings at which referees are chosen (which is often the hardest part of the process), consult with candidates in the construction of a dossier and communicates serious concerns to such candidates. The Head does not just write a recommendation that is a summary of discussion. Rather the Head is responsible for curating the Departmental process over a period of years; as well as providing the perspective of a disciplinary expert for the non-expert level at DAC and SAC. The Arbitrator dispensed with the Head on the Departmental Committee, but entirely failed to address any of the other issues regarding how the ARPT processes in NDFs should function consistently with the Collective Agreement.

92. There is no explanation for how these other significant components of the entire scope of the ARPT process (some of it starting years before Article 5.04 applies, such as the process in Article 5.02) can occur if there is no Head or equivalent or how it is "consistent" with departmentalized faculties if these codified procedures are abandoned or offloaded to the next level in the hierarchy in NDFs. Despite substantive argument on this issue **[Johansson SD #1, Ex. B, paras. 260-274]**, the Arbitrator's brief decision on this issue reveals another error on the face of the Award that cannot stand.

No Referral Back

93. The Faculty Association submits in this unique situation it would be appropriate for the Board to make findings on the merits of the dispute if the Award is overturned or alternatively send it back to an alternate panel. The prime considerations for referral back to the same arbitration panel of having a fair, efficient and timely resolution of the dispute are not met in this case.

94. First, the nature of the errors and the ability for the Arbitrator to revisit them in this case strongly support referral to a different decision-maker. As outlined above, there are significant procedural fairness issues that indicate it would not be reasonable to assume the original Arbitrator would be able to fairly revisit the matter. As noted by the Board, "the usual remedy where a party has been denied a fair hearing is to remit the matter to a new arbitration board" (***Interfor v. IWA-Canada, Local 1-3567***, 2002 CarswellBC 3757, para. 33). Furthermore, apart from the procedural fairness matters, the Arbitrator did not simply fail to apply a correct legal test but appeared to completely reverse fundamental labour relations principles. The matter has achieved "[…] a complexion where it is not reasonable to assume that the original tribunal cannot fairly revisit the matter and do justice between the parties". Given the 81-page decision and almost two-year consideration of the dispute, it is simply an untenable to believe the Arbitrator can assess the dispute completely objectively at this stage.

95. There is a particular risk that the matter could not be reheard fairly given the Arbitrator's refusal to consider crucial evidence (***Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières, (sub nom. Université du Québec à Trois-Rivières v. Larocque)*** [1993] 1 S.C.R. 471; ***BCNU v. British Columbia (Labour Relations Board),*** [1995] BCJ No. 2383, paras. 17-20). There is a recognized reasonable apprehension that an arbitrator will not be able to fully consider evidence ruled irrelevant in a renewed hearing and so referral to a different adjudicator is more appropriate. In this case, the Award was replete with failures to consider key and relevant evidence to the main issue in dispute. It is not reasonable to anticipate he could come to an opposite conclusion now.

96. Moreover, guidance can be gleaned from ***Enterprise Rent-a-Car Canada Co. and COPE, Local 378, Re*** [2016] BCLRBD No. 10 ("***Enterprise (Reconsideration Panel)***"), where the reconsideration panel of the Board upheld the original panel's decision not to refer the matter to the original arbitrator. The panel found that it was not reasonable to assume the original arbitrator could fairly revisit the matters given the scant analysis of the issue and a fundamentally incorrect approach to determining to whom a collective agreement applied (paras. 15-18). The Board noted although there was extensive recitation of the parties' arguments and passages from various decisions (as the case was here), there was very little actual analysis. For similar reasons, and given similar clear and fundamental errors, we say the matter should not be referred back to the Arbitrator.

97. Second, where a significant portion of evidence has been entered through written submissions, the Board has accepted such submissions can easily be put before a new adjudicator and the considerations of time and cost do not militate against referring the matter elsewhere (***Enterprise, supra***, para. 18). In this case, there is more of a risk of further delay if the matter is referred back given the almost two years it has taken for the existing Arbitrator to address the dispute.

98. Finally, we submit that it would be appropriate for the Board to render a decision in this case and that this would be consistent with Section 2 duties. In the interest of expediency for the parties who have

already waited years for the current Award and given the matter was for the most part, submitted through written submissions, it would be most efficient for the Board (not another arbitration panel) to rule on the merits. As the central issue is one that the legislature has bestowed upon the Board exclusive jurisdiction under Section 139 (i.e., determining the scope of a collective agreement and to whom it applies) and it is inextricably linked with *Code* law and policy, this is exactly the type of matter the Board should take jurisdiction over and rule on.

Conclusion

In rendering its decision, we respectfully ask that the Board reflect on some of the questions the Faculty Association, and to some extent, the Labour Relations community in this province is left with as a result of this Award:

1. How can the Award be consistent with labour relations principles when it not only disregards the Presumption, but inverts it, approaching the Collective Agreement under the premise that the rights therein are to be enjoyed by persons outside of the bargaining unit, unless the parties have expressly stated otherwise?
2. Are labour relations principles only applicable to certain workplaces? If so, which ones? What value are the guiding principles established under the Code if they have no application or should be inverted due to the nature of the work or workforce?
3. How could the analysis in the Award be construed as a "genuine effort" to interpret the Collective Agreement when,
    a. The Arbitrator determines that the meaning of the term faculty member is both, not clear (pp.1-2), and at the same time, so clear that it rebuts the Presumption;
    b. The Arbitrator determines the meaning of the term faculty member, without <u>any</u> analysis of the collective agreement as a whole or how that term and substantially similar terminology is used elsewhere in the Collective Agreement, or in contrast to the term "administrator(s)";
    c. Collective Agreement rights are by inference extended to non-members, without any consideration of how, where or by whom they might be enforced; and
    d. The decision rendered provides that there is no need for a Head or Head-like-proxy in an NDF without in any way addressing who, in that case, attends the Article 5.02 meeting, creates procedures under Article 5.06, communicates with candidates under Article 5.08, or secures referees, etc.
4. How could the Faculty association be deemed to have enjoyed a fair hearing when:
    a. The Arbitrator placed central reliance on evidence the parties had agreed was not to be admitted (in no small part due to its unreliability)?
    b. In the absence of evidence, the Arbitrator took "judicial notice" on a contested point of fact which became the central underpinning to his conclusions?
    c. The Arbitrator upheld the University's claim that Collective Agreement rights extended to Associate Deans without any consideration of the diametrically opposed terms the University issued to Associate Deans in their offer letters?
    d. Contrary to the evidence before him, the Arbitrator based his interpretation of the term faculty member on the mistaken premise that thousands of other University employees (partner appointments, clinical appointments, visiting appointments, adjunct appointments and all term appointments), do not have Board of Governor appointments, and therefore would not fall within the extraordinary meaning he conferred on that term;
    e. Contrary to the evidence before him, the Arbitrator based his interpretation on a mistaken belief that Associate Deans accessed promotion and tenure rights provided in the Collective Agreement,

f. Contrary to the evidence before him, the Arbitrator based his interpretation on the incorrect assumption that excluded administrators had non-negotiated roles in ARPT processes; and,
g. The arbitrator entirely failed to engage with the past practice evidence which ran contrary to his conclusions?

Yours truly,

BLACK GROPPER
Per:

Jessica L. Burke

Stephanie T. Mayor

JB/STM/kj

cc: Roper Greyell LLP, Attention: Jennifer S. Russell *(via email),*
UBC Faculty Association, Attention: Deena Rubuliak *(via email)*